Українська Арбітражна Асоціація

ЛІГА СТУДЕНТІВ
АСОЦІАЦІЇ ПРАВНИКІВ УКРАЇНИ
2005

Роботи фіналістів та призерів Конкурсу

І Всеукраїнський конкурс письмових робіт з міжнародного комерційного арбітражу

Тема: "Арбітрабільність спорів: значення та вплив на розвиток міжнародного арбітражу"

15 січня 2014 - 6 квітня 2014

І Всеукраїнський конкурс письмових робіт з міжнародного комерційного арбітражу, який спільно організовується Лігою студентів ВГО «Асоціація правників України» та ГО «Українська Арбітражна Асоціація»

Тема: «Арбітрабільність спорів: значення та вплив на розвиток міжнародного арбітражу»

Строки Конкурсу: з 15 січня по 6 квітня 2014 року

Нагороди переможців:

І місце – можливість пройти оплачуване стажування протягом одного місяця в юридичній фірмі «СаенкоХаренко» за напрямком «Вирішення спорів», грошова премія у розмірі 2,000 грн. та право стати кандидатом у члени ГО «Українська Арбітражна Асоціація» без сплати вступного та щорічного внесків.

ІІ місце - можливість пройти безоплатне стажування протягом одного місяця в юридичній фірмі «Астерс» за напрямком «Вирішення спорів», грошова премія у розмірі 1,000 грн. та право стати кандидатом у члени ГО «Українська Арбітражна Асоціація» без сплати вступного та щорічного внесків.

ІІІ місце - література з міжнародного комерційного арбітражу та право стати кандидатом у члени ГО «Українська Арбітражна Асоціація» без сплати вступного та щорічного внесків

Стипендіальна комісія Конкурсу

Тетяна Сліпачук, партнер, керівник практики міжнародного арбітражу юридичної фірми Sayenko Kharenko, Chartered Arbitrator, дійсний член англійського Королівського інституту арбітрів (FCIArb), член Європейської арбітражної групи при Міжнародній торговій палаті, Віце-президент Арбітражної комісії Міжнародної асоціації юристів (IBA). Президент Української Арбітражної Асоціації.

Маркіян Мальский, партнер юридичної фірми Arzinger, керівник практики альтернативного врегулювання спорів, керівник Західноукраїнської філії, к.ю.н, адвокат. Член правління Української Арбітражної Асоціації

Олена Перепелинська, радник юридичної фірми Sayenko Kharenko, член англійського Королівського інституту арбітрів (MCIArb). Член Правління Української Арбітражної Асоціації

Ярослав Петров, старший юрист ЮФ «Астерс», Генеральний секретар Української Арбітражної Асоціації, засновник, Голова 2005-2006 р. Ліги студентів АПУ.

Учасники Конкурсу

25 студентів-правників із наступних ВНЗ України:

	ВНЗ	Кількість робіт
1.	НЮУ ім. Ярослава Мудрого	6
2.	КНУ ім. Тараса Шевченка	5
3.	Академія митної служби України	3
4.	ЛНУ ім. Івана Франка	2
5.	Національна академія внутрішніх справ	2
6.	НУ «Одеська юридична академія»	1
7.	Київський університет права НАН України	1
8.	КНЕУ ім. Вадима Гетьмана	1
9.	Національний університет державної податкової служби України	1
10.	ОНУ ім. І. Мечникова	1
11.	Київський міжнародний університет	1
12.	Хмельницький університет управління та права	1

Фіналісти та призери Конкурсу

	ПІБ	**ВНЗ**
I	Оксана Матіяш	КНУ ім. Т.Шевченка, Інститут міжнародних відносин
II	Андрій Онисько	КНУ ім. Т.Шевченка, Інститут міжнародних відносин
III	Вікторія Мартинкова	КНУ ім. Т.Шевченка, Інститут міжнародних відносин
	Анастасія Нгуєн	ОНУ ім. І. І. Мечникова
	Андрій Шостацький	НЮУ ім. Ярослава Мудрого
Фіналісти	Лариса Данченко	АМСУ
	Аліна Маковська	ЛНУ ім. Фвана Франка
	Софія Ковач	ЛНУ ім. Фвана Франка
	В'ячеслав Корицький	НЮУ ім. Ярослава Мудрого
	Дмитро Стецков	ХУУП
	Олександр Тимчій	НЮУ ім. Ярослава Мудрого

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Міжнародний комерційний арбітраж (далі-МКА) визнають одним із найефективніших механізмів розв'язання спорів. На противагу національним судам він має певні переваги при розгляді спорів. Там немає національних прапорів або інших символів державної влади. Для "людини з вулиці" це буде виглядати так, як конференція чи ділова зустріч. МКА не схожий на судовий розгляд взагалі.

Перша перевага МКА полягає в неупередженості. Добре відомо, що міжнародні арбітражні інституції, як правило, організовуються незалежними організаціями. Наприклад, Міжнародна торгова палата (ICC), яка була заснована в 1923 році і має штаб-квартиру в Парижі, Стокгольмська торгова палата (SCC), Міжнародний арбітражний центр Гонконгу (HKIAC) і так далі. Вони не входять до судової системи жодної держави і не обмежуються їх судовою практикою. Арбітражний суд, як правило, вирішує спір згідно з набором правил (наприклад, Арбітражний Регламент ICC), що сторони обумовлюють і зазначають в "arbitration clause"(арбітражному застереженні).

По-друге, міжнародні арбітражні рішення можуть бути забезпечені майже в кожній країні в світі. Арбітражні рішення хоч і є обов'язковими, але не мають прямої дії і тому повинні бути приведені у виконання судом країни, на території якої знаходиться сторона, щодо якої винесено рішення. Це правило запроваджується Нью-Йоркською конвенцією про визнання і приведення у виконання іноземних арбітражних рішень (1958), яку ратифікувало 133 країни, в тому числі й Україна.

Також до переваг МКА можна віднести швидкість і ефективність витрат. Але вони не є автоматичними перевагами, а напряму залежать від самої суті спору, сторін (одна зі сторін може перешкоджати розгляду справи). Але арбітражний розгляд до сих пір є досить дорогим. Прямі витрати на арбітраж в основному включають в себе: (1) плату арбітру; (2) витрати на проїзд для арбітра та оренду приміщення для вирішення спору; (3) вартість проведення інспекцій на місцях чи при залученні

експертів, які допомагають арбітру; (4) плату за юридичні послуги.

Нарешті, сторони можуть вибрати арбітрів , що володіють спеціальними знаннями з певного питання або галузі. Це може бути дуже вигідним для суперечок в вузькоспеціалізованих галузях [3; 124].

Однак, варто зауважити, що не кожен спір за зовнішньоекономічним договором може розглядатись в порядку МКА. Важливим і системоутворюючим елементом, який визначає межі компетенції МКА, є арбітрабільність спорів. Термін «арбітрабільність» безпосередньо не вживається ні в законодавстві, ні в судовій практиці України. Як зазначають Лукас А. Містеліс і Ставрос Л. Брекоулакіс - арбітрабільність виходить за межі арбітражної угоди, це є невід'ємне право держави на визначення кола спорів, які можливо вирішити шляхом арбітражу, і незалежне від волі сторін [2; 273 -292].

Дане визначення цілком відповідає дійсності, бо поняття арбітрабільності є неуніфікованим і в міжнародних правових актах. Так, наприклад, Модельний закон про міжнародний комерційний арбітраж, що був прийнятий Комісією ООН з права міжнародної торгівлі в 1985р., не згадує поняття арбітрабельності, і вирішення цього питання залишається на розсуд кожної держави. Така позиція узгоджується з абз.2п.2 Європейської конвенції про зовнішньоторговельний арбітраж (Женева, 1961): «Суд, в якому порушено справу, може не визнати арбітражну угоду, якщо за законом його країни спір не може бути предметом арбітражного розгляду".

Варто зазначити, що були здійснені деякі спроби, спрямовані на уніфікацію концепції арбітрабільності. У 1999 році Комісія Організації Об'єднаних Націй з права міжнародної торгівлі (далі-Комісія) визначила дане питання в якості однієї з тем для майбутнього опрацювання (доповідь Комісії про роботу 32 -й сесії , з 17 травня по 4 червня 1999р., пункти 351-353). Але проблемі уніфікації було надано низький пріоритет, що було зумовлено її постійним розвитком в рамках національних юрисдикцій держав і тим, що деякі з цих держав вважають, що це є небажаним втручанням у внутрішнє регулювання. Незважаючи на це, Комісія згодом знову виразила зацікавленість в обговоренні єдиної концепції арбітрабільності, зокрема в сфері корпоративних спорів, нерухомості, банкрутства та недобросовісної конкуренції [5; 63-65].

В доктрині міжнародного приватного права виділяють такі загальноприйняті критерії арбітрабільності: об'єктивні і суб'єктивні. Дані критерії були запозичені з німецького права. Так, наприклад, за німецьким законодавством об'єктивним критерієм є характер спору, що передається на розгляд арбітражу. Суб'єктивний критерії передбачає наявність у сторін правосуб'єктності щодо укладення арбітражної угоди, тобто здатність бути суб'єктом арбітражної угоди. У свою чергу, в австрійському законодавстві об'єктивний критерій розуміється, як можливість укладати арбітражну угоду щодо предмету спору, суб'єктивний критерій - фактично розглядається як дієздатність, тобто можливість сторін укладати арбітражну угоду [11].

В Україні такими суб'єктами, згідно з Закону України "Про міжнародний комерційний арбітраж", можуть виступати комерційні підприємства, що є стороною спору і знаходяться за кордоном, підприємства з іноземними інвестиціями і міжнародні об'єднання та організації, створені на території України (їх спори між собою, спори між їх учасниками, а так само їх спори з іншими суб'єктами права України).

Отже, можна зазначити, що в праві зарубіжних країн під суб'єктивною арбітрабільністю розуміється загальна правосуб'єктність сторін, яка в свою чергу передбачає договірну правосуб'єктність (тобто можливість і здатність укладати цивільно-правові угоди), також деліктоздатність сторін та процесуальну правосуб'єктність. Суб'єктивна арбітрабільність включає в себе як матеріальну, так і процесуальну правосуб'єктність сторін. Крім цього, суб'єктивна арбітрабельність передбачає добровільне волевиявлення сторін про передачу спору на вирішення до МКА. Тобто концепція арбітрабільності тісно взаємопов'язана з іншою концепцією МКА, а саме - принципом "Kompetenz-Kompetenz", який дозволяє арбітражному суду вирішувати питання власної компетенції навіть при оскарженні дійсності арбітражної угоди. Арбітражний суд самостійно, без звернення до національного суду може винести постанову про свою юрисдикції, в тому числі при наявності будь-яких заперечень щодо дійсності арбітражної угоди. Даний принцип закріплений в арбітражних регламентах і передбачений в Типовому законі ЮНСІТРАЛ, а також у Європейській конвенції 1961 р. Відповідно до п.3 ст.V Конвенції, арбітражний суд, проти якого заявлено відвід через

непідсудність, не повинен відмовлятися від розгляду справи і має право сам винести рішення з питання про свою компетенцію, однак таке рішення арбітражного суду може бути згодом оскаржене в державному суді відповідно до національного законодавства сторін [8].

Об'єктивна арбітрабільність визначається виходячи з категорій спорів, що можуть бути предметом арбітражного розгляду. Так як ні Нью-Йоркська конвенція, ні типовий закон ЮНІСТРАЛ не містить обмежень щодо предмета арбітражного розгляду, він визначається національним законодавством. Так, наприклад, Швейцарія використовує широке поняття арбітрабільності. До спорів, що можуть розглядатись в МКА, входять і питання пов'язані з нерухомістю. Швейцарський Закон про арбітраж 1999 року допускає розгляд арбітражним судом спорів з відносин пов'язаних з адміністративним регулюванням. За швейцарським законодавством питання про валютне регулювання і контроль, законодавство про охорону навколишнього середовища і регулювання фінансових ринків, є арбітрабільними за умови, що арбітри не виходять за межі двосторонніх угод (тобто не зачіпають питання публічно-правового характеру). Крім того, арбітрам дозволяється розглядати справи з елементами кримінального права, якщо фактичні обставини справи впливають на взаємовідносини сторін, наприклад, у разі недійсності контракту внаслідок злочинної поведінки сторони. За законом арбітри не мають повноважень застосовувати кримінальні або адміністративні санкції [4;13-14]. А в законодавстві Бельгії, Франції, Італії, Словаччини застосовується підхід, який передбачає, що сторони можуть на власний розсуд розпоряджатись своїми правами щодо можливості вирішення спору і досягнення компромісу, але прямо виключається арбітрабільність певних спорів. Прикладом такого підходу є стаття 1676 (1) Бельгійського Судового кодексу яка передбачає, що " будь-який спір, що виник зі специфічних правових відносин і щодо якого можливо укласти мирову угоду, є предметом арбітражної угоди'' [1].

Можна виділити спори, щодо яких існує проблема визначення їх арбітрабільності, а саме в сферах:

- антимонопольного і конкурентного права;
- угоди щодо цінних паперів;
- банкрутства;

- інтелектуальна власність;
- хабарництво і корупція;
- інвестиції в природні ресурси.

В міжнародній практиці існує думка, що антимонопольні спори є неарбітрабільними, виключення становить США, де був прецедент арбітрабільності такого спору (справа Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.(1985)). Панує думка, що держава та її суди мають обов'язок сприяти захисту національних інтересів і забезпечувати умови конкурентної економіки, шляхом застосування антимонопольного законодавства. І тому МКА з його конфіденційним і приватним характером не підходить для вирішення антимонопольних питань. Було висловлено побоювання, що державні інтереси можуть бути проігноровано "за зачиненими дверима МКА". Верховний суд США відхилив ці міркування, і спір було розглянуто в арбітражному порядку.

Спори щодо банкрутства є арбітрабільними в Німеччині. Такі справи розглядаються, бо присутній економічний характер. Однак, існують певні обмеження. Згідно зі статтею 160 (2) № 3 Кодексу банкрутства (InsO), арбітражний керуючий може передавати спір про значну суму до МКА лише за згодою комітету кредиторів [4; 3,11].

На законодавчому рівні в Україні міститься велика кількість обмежень щодо арбітрабільності певних категорій спорів. Зокрема, у ст. 77 Закону України "Про міжнародне приватне право" зазначається, які спори підсудні виключно судам України: щодо нерухомого майна, що знаходиться на території України; спори, пов'язані з оформленням права інтелектуальної власності; спори, пов'язані з ліквідацією або реєстрацією іноземних юридичних осіб, або фізичних осіб підприємців; певні адміністративні спори (предмет таких спорів виходить за межі приватної сфери); щодо банкрутства; цінних паперів, що були оформлені в Україні та трудові спори [6]. Також неарбітрабільними є спори із споживачами. Споживачем, відповідно до українського законодавства, є винятково фізична особа, що виключає можливість юридичних осіб бути споживачами. То, очевидно, що спори зі споживачами не можуть розглядатись як «комерційні», тобто господарські, а відтак не можуть розглядатися в міжнародних арбітражах.

Досить проблемним питанням в Україні є неарбітрабільність корпоративних спорів за національним законодавством. До

2008 р. в законодавстві не було встановлено обмежень, щодо передачі корпоративних спорів на розгляд до МКА. З 2008 почався зворотній процес, а саме - була прийнята Постанова Пленуму ВГСУ "Про практику розгляду судами корпоративних спорів " від 15.10.2008року №13 у п.9, у якій зазначається: "Учасники господарських товариств незалежно від суб'єктного складу акціонерів не вправі також підпорядковувати розгляд корпоративних спорів, пов'язаних із діяльністю господарських товариств, зареєстрованих в Україні, зокрема таких, що випливають із корпоративного управління, міжнародним комерційним арбітражним судам"[10]. Але ж Постанови Пленуму ВГСУ не мають юридичної сили нормативно-правового акту, хоча суди нижчих інстанцій керуються ними при розгляді спорів. Законодавче закріплення неарбітрабільності корпоративних спорів відбулось з прийняттям Закону України "Про внесення змін до деяких законодавчих актів України щодо діяльності третейських судів та виконання рішень третейських судів" від 05.03.2009 р. згідно п.10 ч.2 спори, що виникають з корпоративних відносин, виключаються з компетенції МКА. Корпоративними, згідно українського законодавства, є спори між господарським товариством та його учасником (учасником, що вибув) та спори між учасниками господарських товариств, що пов'язані із створенням, діяльністю, управлінням та припиненням діяльності цього товариства, крім трудових спорів [7].

Цікавою є практика Верховного Суду України, котрий, розглядаючи спір, що виник між фізичними особами з приводу укладеного договору купівлі-продажу корпоративних прав, в ухвалі від 26 грудня 2007 р. зазначив: "Спір виник не між учасниками господарського товариства щодо корпоративних прав, а між фізичними особами щодо поновлення порушеного права власності… тобто спір не з корпоративних відносин…, а цивільно-правовий спір, який підлягає розгляду в порядку цивільного судочинства". Отже, можна констатувати, що спори щодо обігу корпоративних прав не є корпоративними спорами і можуть передаватись до МКА[9].

Отже, можна зробити висновок, що арбітрабільність розуміється, як прерогатива держави на визначення і закріплення того кола спорів, що можуть передаватись на вирішення до МКА. Дехто ототожнює "арбітрабільність" і "підсудність", та, на мою думку, це є некоректно. Підсудність

закріплюється в законі лише у відношенні до національної системи судів. "Поняття "арбітрабільності" є неформальним і законодавчо не закріпленим в жодному міжнародному чи національному акті, хоча саме воно виступає основою арбітражного розгляду, визначає межі компетенції арбітражної інституції. Саме відсутність єдиної концепції арбітрабільності призводить до виникнення додаткових проблем, бо практика винесення тих чи інших спорів на МКА в різних країнах по різному регулюється: в одній країні спір є арбітрабільним, в іншій ні. І тому існує небезпека при передачі до національного суду сторони, щодо якої винесено рішення МКА, що воно може не виконатись в силу того, що спір є неарбітрабільним згідно законодавства тієї країни. На мою думку, було б доцільно розробити критерії віднесення спорів, що можуть передаватись на розгляд до МКА на міжнародному рівні. Так як арбітражні інституції не відносяться до певної національної системи судів, вони мають визначати арбітрабільність на основі певної уніфікованої концепції.

Для визначення арбітрабільності МКА можна виділити 2 шляхи:

Перший - це встановлення і закріплення вичерпного переліку спорів, які підлягають розгляду в МКА. Але цей спосіб є неефективним, що зумовлюється постійним розвитком права і можливістю виникнення спорів, що раніше не виникали. Закріплення закритого переліку спорів матиме обмежений характер.

Другий шлях - це вироблення і пошук загальних критеріїв віднесення спорів на розгляд МКА. Так, наприклад, можна запропонувати такі критерії:

1) спори мають виникати з "торгівельних (комерційних)" відносин - такі відносини мають досить широкий характер і не можуть бути закріплені в певному вичерпному переліку в силу постійного розвитку (зокрема, до таких відносин можна віднести: співробітництво з іноземними компаніями, партнерство, інвестування, укладання торгівельних угод та зовнішньоекономічних контрактів і т.д.);

2) спір має приватний характер (тобто зачіпає сферу цивільного права та відносин, що виникають в його межах), але це не виключає участі в якості сторони в арбітражному розгляді державних органів, якщо така можливість прямо не заборонена національним законодавством;

3) арбітражна угода і арбітражне застереження щодо передачі спору на розгляд МКА мають укладатись на основі добровільного волевиявлення сторін;
4) арбітражна угода може укладатись в будь-якій формі у тому випадку, коли закон держави або волевиявлення однієї з сторін угоди не вимагає обов'язкової письмової форми. Але, в будь-якому випадку, доцільніше використовувати письмову форму.
Щодо України, то найбільш дискусійним і проблемним моментом, що потребує вирішення ще з 2008 року, є арбітрабільність корпоративних спорів. Українське законодавство відстає від провідних зарубіжних країн, де не встановлено обмежень для МКА у розгляді корпоративних спорів. Обмежені можливості арбітражу не є привабливими для іноземних інвесторів. Іноземні інвестори, у своїй більшості, не бажають вирішувати спори і взагалі мати справи з українською системою судів. Навіть якщо МКА розгляне спір, який є неарбітрабільним в Україні, а згідно законодавства однієї іншої сторони є арбітрабільним, то рішення по таких спорах виправдовують себе лише тоді, якщо його виконання можливе поза межами держави-відповідача. Рішення щодо спору, що є неарбітрабільним, не буде виконуватись національним судом. Отже, на мою думку, в українському законодавстві було б доцільно повернутись до положень, що не встановлювали обмежень щодо вирішення корпоративних спорів в МКА, тобто до стану, що фактично існував до 2008 року. Це б посприяло зацікавленню іноземних інвесторів і партнерів до співпраці з українськими фірмами, а також спряло б подальшому розвитку і вдосконаленню економіки України.

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If the jurisdiction of the arbitrators can only go as far as the parties by agreement have authorized them, one must add immediately that this jurisdiction can also go only as far as the parties CAN authorize them. Limits of party autonomy thereby become limits for the jurisdiction of the arbitrators. The lack of arbitrability is such a limit.
Prof. K.H. Bockstiegel

I. Non-Arbitrability Doctrine and Its Basis

Given that the judiciary has always been a concern of a state, it is quite fair that under states' mandatory rules and *ordre public* provisions there are some disputes which parties are not free to contract out of in advance and which fairly clearly require resolution in state courts. This kind of disputes is unofficially called "*non-arbitrable*", i.e., "not capable of settlement by arbitration" in the wording of Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereinafter – New York Convention).

The non-arbitrability doctrine was frequently invoked during the 20th century, when national courts, particularly those of common law countries, concluded that a variety of claims were non-arbitrable, applying expansive, sometimes ill-defined, conceptions of public policy. [2; 82] Similarly, legislation in most states started to treat some categories of claims as incapable of resolution by arbitration. Other than New York Convention, the basis for this was Article 1(5) of UNCITRAL Model Law on International Commercial Arbitration (hereinafter – Model Law), providing that this Law *(Model Law)* shall not affect any other law of this State *(State that has adopted Model Law)* by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law. Thus, Model Law confirmed that specified types of disputes may be treated by the states as not capable of settlement by arbitration (or "non-arbitrable").

Virtually, all states have provided, by legislation or judicial decisions, that certain categories of disputes are non-arbitrable: even if the parties have concluded a valid arbitration agreement, which extends to a dispute, the agreement will not be enforceable as applied to these "non-arbitrable" matters. [2; 82]

Arbitrability is typically divided into "subjective arbitrability" and "objective arbitrability". [4; 154]. On legislative level, this division is fixed, for instance, in Private International Law Act of Switzerland (hereinafter – Swiss PILA). Ukrainian Law on International Commercial Arbitration (hereinafter – Ukrainian Law on ICA) does not stipulate such a division however the concept of it is present in this law, as well. Whether under an applicable law, a particular entity – typically a State or other public body may be a party to an arbitration agreement and thus whether a dispute to which such entity is a party may be submitted to arbitration is referred by commentators as "subjective arbitrability" (arbitrability *ratione personae*) [4;354]. While many national laws contain limitations on the ability of the State or public entities to settle the disputes they are a party to by the means of arbitration, generally such limitations do not apply in international arbitration. Moreover, Article 177(2) of Swiss PILA bars a state from using its legislative power to prevent arbitration in disputes with an individual. It provides that a state cannot invoke its own law in order to challenge either the arbitrability of the dispute or its own capacity to enter into an arbitration agreement or to be a party to the arbitration. This also applies to companies and organisations that are owned or controlled (legally or de facto) by a state. Nowadays, it is a widely accepted approach within subjective arbitrability.

Whether, under an applicable law, a particular subject-matter of the dispute is capable of resolution by arbitration, in the light of relevant public policy considerations, is referred to by commentators as 'objective arbitrabiliy' (arbitrability *ratione materiae*). It is objective arbitrability that Article II(1) of New York Convention addresses, stating that "a Contracting State shall recognize an arbitration agreement ….concerning a subject-matter capable of settlement by arbitration". Although as declares New York Convention, the freedom of parties to choose arbitration as the means of resolving disputes extends broadly to 'any disputes … in respect of a defined legal relationship, whether contractual or not', that freedom is nevertheless limited to differences engaging

subject-matters "capable of settlement by arbitration". The areas where traditionally issues of arbitrability arise are disputes on antitrust and competition, securities transactions, insolvency, intellectual property rights, illegality and fraud, bribery, corruption, investments in natural resources etc. Arbitration Acts of the countries (if they have adopted them) often define which disputes are non-arbitrable. If there are no such acts, the decision on whether the dispute is arbitrable or not can be made based on the decisions of higher judicial institutions and case law, especially this concerns common law countries, or on other acts of legislation such as civil codes, procedural codes, or acts on international private law.

II. Consequences of Non-Arbitrability of the Dispute

Non-arbitrability of the disputes may result in very serious consequences for the parties as it is closely connected with the possibility of arbitration agreements' recognition and the enforcement of arbitral awards.

As to arbitration agreements Mr. Martin Hunter has wittily noted, that the agreement to arbitrate is the foundation stone of international commercial arbitration. The title of "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" is something of a misnomer. The Convention's starting point is the recognition and enforcement of arbitration agreements. Having provided for recognition of the validity and enforceability of arbitration agreements, it also provides for the international enforcement of awards that comply with the specified criteria. [7; 89] I think that this is a very good point, especially in the light of Article II(1), V(1)(a), and V(2)(a) of New York Convention.

Article II of New York Convention stipulates that each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not, concerning a subject-matter capable of settlement by arbitration. Therefore, under New York Convention, Mr. Hunter states, "capability of settlement by arbitration" is one of the concepts of arbitration agreement's "validity". I think, this is very important as further New York Convention operates this concept of "validity" to define the possibilities of arbitration award enforcement. Thus, under these provisions, recognition and enforcement of the award may

be refused at the request of the party against whom it is invoked, if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
1. the agreement referred to in Article II is not valid under the law to which the parties have subjected it V(1)(a);
2. or, failing any indication thereon, under the law of the country where award was made V(1)(a);
3. recognition and enforcement of an arbitral award may also be refused if the competent authority where the recognition and enforcement is sought finds that the subject-matter of the difference is not capable of settlement by arbitration under the law of that country V(2)(a)
Thus, it is possible that the enforcement of the award because of its non-arbitrability may be refused not only based on the fact that the subject-matter of the difference is not capable of settlement by arbitration under the law of country where the enforcement is sought, but also if the enforcement authority decides that dispute was non-arbitrable under the law to which the parties have subjected it or under the law of the country where award was made.
Other than at the stage of recognition and enforceability, the issue of arbitrability may also arise when:
- ✓ the issue of arbitrability is raised in setting aside proceedings before the State court, usually at the place where Arbitral Tribunal has its seat;
- ✓ the issue of arbitrability is invoked by a party at the beginning of the arbitration, before the Arbitral Tribunal, which has to decide whether it has jurisdiction or not;
- ✓ the issue of arbitrability is referred by a party to a State court, which is requested to determine whether the arbitration agreement relates to a subject-matter which is arbitrable.

Regarding the situation where the issue of arbitrability is referred by a party to a State court, it was Geneva Protocol of 1923 where it was first stipulated that, if a party commenced litigation, the courts would refer the parties to arbitration. Today this guarantee is also stipulated in Model Law and New York Convention providing that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement, shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Therefore, if

the court finds that the subject-matter is non-arbitrable, it will refer the dispute to litigation. [5; 274]

III. Law Applicable

Whether the issue of arbitrability arises as a threshold issue at the beginning of the proceedings or in a challenge to an award and its enforcement, at the end of arbitration, the arbitral tribunal or court before which the issue is invoked must decide how to determine this issue. In particular, it must first determine the law applicable to the inquiry.

Thus, Mr. Goldman holds that when examining the objective arbitrability of an international dispute, a court must apply its conception of international public policy. As they are not the organs of a particular legal order, arbitrators dealing with the same issue will generally apply the requirements of genuinely international public policy, subject to considerations regarding the enforceability of their award. [4; 559]

L.Yves Fortier states that this approach is quite simple and that is why it is widely accepted by the practitioners. Mr. Fortier also states that in one of his arbitrations, where he served as an arbitrator, he received a submission on arbitrability emphasizing that 'the question of arbitrability is ultimately one of international public policy'.[5;277]

I cannot say that I agree with this approach though. I think that arbitrability is the issue every state decides for itself, at least nowadays, when we do not have any unified act on arbitrability of disputes. That is why, in my opinion, if the issue of arbitrability arises it is necessary to have regard to the relevant laws of different states that are or may be concerned. These are likely to include:

- ✓ national law of both parties concerned;
- ✓ the law governing the arbitration agreement;
- ✓ the law of the place of arbitration;
- ✓ the law of the place of enforcement of the award. [2;85]

IV. Who is to Decide on the Issue of Arbitrability?

As it has been already stated in part II of this work, the issue of arbitrability can raise at the end of arbitral proceedings, in setting aside proceedings or enforcement proceedings, or at its initial stages or during the arbitral process when the issue is raised before the Arbitral Tribunal or state court whether the dispute is arbitrable or not. It is clearly the relevant State court that will decide the issue in enforceability or setting aside proceedings.

However, where the issue is invoked at the beginning of or during the arbitral process, a question may arise as to which forum – the court or Arbitral tribunal – has the power to determine whether the subject-matter of the dispute is arbitrable.
According to the Kompetenz-Kompetenz principle, which is now recognized by the majority of arbitration conventions, by most modern arbitration statutes and by the majority of institutional arbitration rules, an arbitral tribunal is empowered to determine the existence and scope of its own jurisdiction. Therefore, it has the primary power to rule on the issue of arbitrability. [2; 179]However, as it is stated by commentators Mr. G.Asken and Mr. H.Bockstiegel, the courts will often have the opportunity to review the tribunal's decisions, including those regarding arbitrability issues, by virtue of jurisdictional compromise set in Article 16 of Model Law and thus many national laws that are based on it. [5; 277]
Article 16(3) of the Model Law provides that where an arbitral tribunal rules as preliminary matter that it has jurisdiction (i.e. that the dispute is arbitrable), the decision may be challenged by a party within thirty days before a national court.
It is important to note that the Kompetenz-Kompetenz principle is significantly attenuated in the United States where the Federal Arbitration Act, which predates the Model Law, has generated its own unique jurisprudence. In *First Options v. Kaplan*, the United States Supreme Court held that just as the arbitrability of the merits depends upon whether the parties agreed to arbitrate that dispute, so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about that matter.
I think that this issue is very important but at the same time very sophisticated. As commentator Mr. Sigvard Jarvin stated, 'There is no solution to this dilemma. New avenues must be explored to find the solution to this problem.'[6; 115]
Actually this is one of the reasons I favor the approach of states' law being applicable by the Tribunal when deciding the issue of arbitrability. I believe it is less likely for the court to decide the dispute is non-arbitrable if, before that, Arbitral Tribunal considers not only international public policy, but law that governs the party objecting to the arbitrability of the dispute.

V. Non-Arbitrable What Subject-Matters

In Ukraine the arbitrability of commercial disputes is determined in Law of Ukraine on ICA (Article 1), setting forth that the disputes that may be referred to international commercial arbitration are as follows:

- ✓ disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; as well as,
- ✓ disputes arising between enterprises with foreign investment, international associations and organizations established on the territory of Ukraine; disputes between the participants of such entities; as well as disputes between such entities and other subjects of the law of Ukraine.

Article 12 (2) of Comercial Procedure Code (hereinafter - CPC), in its turn, contains restrictions and prohibits submitting to arbitration (both domestic and international) following disputes falling within the jurisdiction of commercial courts of Ukraine:

- ✓ disputes on invalidation of acts,
- ✓ disputes arising out of conclusion, amendment, termination and performance of public procurement contracts,
- ✓ disputes arising out of corporate relations between a company and its participant (founder shareholder), including a former participant, and between the participants (founders, shareholders) related to the establishment, activity, management and termination of the company.

In our country it is probably the arbitrability of corporate disputes that is the most debatable. The thing is that under Ukrainian Law on ICA such disputes are arbitrable, while under CPC they are not. Guidance (Recommendations) of the Presidium of the Superior Commercial Court of 28.12.2007 On Jurisprudence in Disputes arising from Corporate Relations and Resolution of the Plenum of the Supreme Court of 24.10.2008 On Jurisprudence in Corporate Disputes provided that 'members of business companies … are not entitled to subject the corporate disputes related to the activity of business companies, including those arising from corporate management, to international commercial arbitration courts'. However, in 2009 the Recommendations were amended and now they specifically set out that relations on the turnover of shares, except for relations concerning realization of the preemptive right to acquire shares, shall not be deemed as relations concerning the

activity of the company and its corporate management. Thus, such category of disputes arising out of share purchase agreements is still arbitrable. Practitioners do a great job on this issue, trying to find possible solutions, but I think that the risks regarding the arbitrability of corporate disputes in our country are still high. The worst thing about it is that the risk of dealing with Ukrainian litigation in the end of the day may push foreign investors and companies away from Ukraine.

There are very interesting provisions in Swiss PILA concerning arbitrability of the disputes. Under Article 177, any disputes involving an economic interest are arbitrable, i.e. all claims that have an economic value for at least one party, be it an asset or a liability. Commentator to this act says that even where the claim is related to a non-arbitrable right, such as a personal right of a party, the dispute can still be subject to arbitration if the party seeks protection from economic consequences and if the economic aspect is predominant, for example if an athlete is suspended because of doping. Very similar wording can be found in German Code on Civil Procedure.

French Civil Code, for example, provides that "all persons may enter into arbitration agreements relating to the rights that they may freely dispose of". Although Art.2060 further provides that parties may not agree to arbitrate disputes in a series of particular fields (e.g. family law), and "more generally in all matters that have a public interest". This limitation has been construed in a very restrictive way by French courts.

In regard to EU states, it is also important to consider Council Regulation (EC) No 44/2001of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, under Article 22 of which an exhaustive list of disputes that are under exclusive jurisdiction of the courts stipulated in this Article.

VI. The Impact of Arbitrability on the Development of International Arbitration

Finally I got to, probably, the most important part of this work. In my opinion, the impact of arbitrability on the development of international arbitration is underestimated.

Regarding any arbitration, while negotiating an arbitration agreement it is very important and highly advisable to check whether all potential disputes can be submitted to international arbitration so as to minimize the risks related to applicable

legislation and court practice on arbitrability. At first sight very clear institution of arbitrability may result in non recognition of the arbitration agreement or unenforceable award. That is why if I were to conclude arbitration agreement I would make sure to test the national law of each party to a contract, law of the place of arbitration and law of the place of probable enforcement of arbitral award on the question of arbitrability.

Concerning, arbitrability more globally, I think, each state needs to understand that the scope of arbitrable disputes under its laws equals the number of entities willing to contract with the companies governed by its laws and number of entities willing to choose it as a place of arbitration. Thus, arbitrability is not only a key to arbitration promotion in particular countries, but also is a great precondition for the state's businesses to develop through contracting with foreign companies without any risk for the latter of the arbitration agreement being not recognized or arbitral award being not enforced in the end of the day.

While analyzing the legislation and especially case law on this issue I realized that it is quite difficult to find out which disputes are non-arbitrable. Some states have Arbitration acts or other acts of law with an exhaustive list of non-arbitrable disputes. They were the best case. However, some countries do not have such acts or they do, but nevertheless they use very vague wording or the list is just not comprehensive, e.g. Civil Code of France, which provides a list of non-arbitrable disputes, but later stipulates "all other matters that have a public interest" are also non-arbitrable. There are a lot of approaches to the concept of public interest and such a wording can be differently interpreted especially if we deal with international disputes. That is why I believe it would be much more practical for the parties and for arbitrators if there was one unified act on arbitrability, with possible reservations made by the states that consider some cases of exclusive jurisdiction of national courts while others do not. In any event, it is very important for the states to clearly stipulate which disputes are non-arbitrable and make sure that their laws do not conflict with one another like it is in our country.

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The problem of creating an effective, complex, logically ordered system of international arbitration (IA) *is extremely important, especially in the aspect of global economic and political integration of the world and the necessity of creating clear and functionally obligated system of resolving disputes between the participants of international and national economic relations by the legal apparatus. So, IA is one of the effective international systems of resolving disputes as on the international scope as on the national level due to the transparency of procedures and a high level of fulfilling of its resolutions, wide sphere of arbitrability of disputes (AD).*

The Actuality of the theme is explained by the novelty of the legal nature of AD as well as an absence of doctrinal definition of AD and the legal instruments of its realization. Thereby, it is represented by not identical and often the opposite legislative fixation of AD in legislation in the force and other acts. That's why a full and objective understanding of the main features of arbitrability and its matter is unique and a key way for resolving disputes.

The aim of this work *is* to observe the AD as fundamental and unexplored issues in the system of IA. On the one hand, the urgency of this theme is defined by methodological and theoretical problems of understanding AD, on the other hand this question has a great practical meaning.

This article is devoted to: a) *giving a complex systematic definition which can be interpreted as a full conclusion about the nature of AD*; b) *underlining and summarizing the main features of AD in comparative aspect: between the analysis of the ratio of arbitrability and jurisdiction*, *of arbitrability and validity*; c) *exploring the legal methods of fixing of arbitrability, its analyzing in legislation of other states*; d) *detecting of the action of arbitrability in commercial disputes according to Ukrainian legislation*; e) *the arbitrability and bankruptcy*; f) *exploring the role and impact of AD for international arbitration and ADR [12](alternative dispute resolution) system*.

An adjustment of AD is a novel use for international as national legislation. That's why it was explored through the acts which were passed to regulate IA: the Geneva Protocol on Arbitration Clauses (1923), the Geneva Convention on the Enforcement of Foreign Arbitral Awards (1923). The New-York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the European Convention on International Commercial Arbitration (1961), the Moscow Convention on arbitration by resolving civil disputes arising from the relationship between economic and scientific-technical cooperation (1972), the Panama Convention (1975) are the examples of certified acts about the development and functioning of arbitration system on the local or regional level. So, a global act was passed by UNCITRAL – Model Law on International Commercial Arbitration.

At the national level AD is regulated by: international agreements which are certified by Ukraine and are the part of Ukrainian legislation (to New-York Convention on the Recognition and Enforcement of Foreign Arbitral Awards USSR joined in 22.08.1960), LU " On amendments to some legislative acts of Ukraine on the activities of the arbitration courts and enforcement arbitration courts " (Ed. 05.03.2009), the Law of Ukraine (LU) "On International Commercial Arbitration" (Ed. 29.09.2005), LU "On International Private Law" (Ed. 09.06.2013), LU "On amendments and additions to some legislative acts of Ukraine in connection with the adoption of the Law of Ukraine" On the international commercial arbitration " (Ed. 01.09.2005), Commercial Procedural Code of Ukraine (CCP)(Ed. 02.02.2014) and bylaw acts.

The theme of AD was researched by William W. Park, Andrew Tweeddale, Loukas A. Mistelis, Stavros L. Brekoulakis, T. Slipachuk, V. N. Anurov.

The institute of arbitrability is one of the key issues in international commercial arbitration (ICA), because it causes a procedural validity of the arbitration agreement and the possibility of arbitration competence in general. So, the term "arbitrability" outlines a range of disputes within the competence of arbitration courts and may be subject to arbitration. According to *Loukas A. Mistelis and Stavros L. Brekoulakis*, *the arbitrability goes beyond the scope of an arbitration agreement, it is inherent in the power of the States as to what issues are capable of being resolved through arbitration and it is outside the will of the parties*. In this

manner, referring to the definition of the term, which is the most common in legal sources, we should note the absence of a common understanding of the definition and indicated significant differences in its interpretation. That's why, in our opinion is a necessity of studying the ratio of the terms "Arbitrability" and "jurisdiction".

There is an opinion among scientists that *if we use the doctrine of arbitrability it will outline a range of cases under the jurisdiction of arbitration courts*, and it means that a *concept of arbitrability signifies substantive jurisdiction of the disputes to this court*, and the term "jurisdiction" is broader than the term "arbitrability" [9;127]. Indeed, on the one hand, as courts of arbitration, especially international commercial arbitration, are the parts of the jurisdictional system of Ukraine as a body with the aim to protect civil rights, the jurisdiction institute determines and fixes the competition of tribunals as well as state courts. In this sense arbitrability is a narrower concept than jurisdiction, it is legal mechanism, which doesn't compete with its generic institution and is just off one element of the jurisdiction institute, that provides the distribution of cases between different jurisdictional level (it refers, under certain conditions some categories of disputes to the jurisdiction of courts of arbitration).

However, as noted by T. Slipachuk , "with respect to the jurisdiction of courts of arbitration institution is not applicable in its classical form, as one of its main characteristics is becoming such a specific feature as "admissibility" of a contractual transfer of a particular dispute arbitration. Herewith, the competence of international arbitration and domestic arbitration is legislatively divided in Ukraine, and disputes with a foreign element can't be transferred to the domestic arbitration, there is a quite complicated system, and such institutions of classic procedural law as jurisdiction require significant adaptation in their application with respect to this system"[10; 107].

In our opinion, the ratio "Arbitrability - jurisdiction" should not be viewed as the ratio of "total - partial" and it can be understood as how the interaction of related concepts, which, however, are separated from each other, because international commercial arbitration is not a subject to state law and it submits to the state only in certain cases, and ICA doesn't apply to institute of procedural law.

There are discussions on the relationship between the concepts "Arbitrability " and "validity" of the arbitration agreement, in addition to disputes about the relationship between the concepts of "Arbitrability " and "jurisdiction". The major part of the authors are inclined to think, to consider Arbitrability disputes as part of the validity of the arbitration agreement, but, as noted by V.N. Anurov , this approach doesn't meet the legal nature of the relationships that developed between the parties to the arbitration agreement and the arbitrator on the definition of arbitrability of the dispute. According to scientist, the term "validity" is understood as the property of the substantive relations between the parties for compliance with the applicable law. The arbitral tribunal determination of AD doesn't have the nature of the action of the parties, which is performed within the substantive law agreement, that's why AD cannot be regarded as an element of validity of the arbitration agreement between the parties and the arbitration agreement between the parties and the arbitrator. V.N. Anurov also indicates that the dispute doesn't depend on the provision of the said properties from the will of the parties, and especially it doesn't depend from the will of the arbitrator [1]. The arbitrator actions don't finish constructing of relationships that arising from the will of the parties, as it is in the case in determining the scope of the arbitration agreement, and it is a self-assessment of those expressions in terms for compliance with the applicable law. The state court has to consider the decision of the arbitral tribunal concerning AD as a matter of procedural nature, which is resolved on the basis of imperative law without considering the principle of autonomy of the parties. As the author notes , the functions of arbitrator to establish AD have no connection with his authorization by the arbitration agreement and therefore more inclined , although they are not identical to the functions of the court in the administration of justice than to contractual obligations with [1;59].

Turning to international practice and doctrine we can identify the following features of it: in foreign jurisprudence the term "arbitrability" is quite common and it is based on clearly defined doctrine. For example, the doctrine of AD is detailed to the smallest nuances in German law. Arbitrability consists of the objective arbitrability and subjective arbitrability in this law doctrine. According to this distinction, arbitrability could be challenged, in the first case, by reason of the quality of the

parties, and in the second case – by reason of the subject matter of the dispute. Loukas A. Mistelis says that objective arbitrability is understood as a condition of the validity of the arbitration agreement and it is concerned with the question of whether a dispute is capable of settlement by arbitration under the applicable law. So, it is determined which types of disputes may be subject to the arbitration agreement (the nature of the material relations that are passed for resolving to the arbitral tribunal) by objective arbitrability. Subjective arbitrability (ratione personae), by which is meant the ability of the parties to put valid arbitration agreement or to be a subject of an arbitration agreement. Objective Arbitrability is understood as the possibility of a conclusion of an arbitration agreement with respect to the subject of the dispute, according to Austrian law; subjective Arbitrability is understood as the ability of the parties to conclude an arbitration agreement (which is generally regarded as an analogue of the relevant procedural capacity) .

According to Michaela Hinner, not all disputes are objectively arbitrable, and legal systems don't always follow the same method to identify arbitrable disputes. As follows, the methods of fixing rules for arbitrability in legislation of different countries can be divided into positive and negative. Positive method involves instruction in the law about which of the disputes may be subject to arbitration. Such guidelines can be related to the scope of law, which includes legal disputes (for example, civil law) or it calls certain characteristics that make an arbitrable dispute (such as a " foreign element "). However, since such definitions outline too broad the range of disputes it is naturally that to the arbitration can be transferred such disputes that are not arbitrable . The negative method of fixing is realized by describing the relationships, which shall not be endowed with the properties of arbitrability in case of a dispute. Description of relationships is or straight list, or a reference to regulations containing a list of them. The disadvantage of this method is the inability to predict all the causes of exclusion the legal relationships from the category of arbitrability. Thereby, both methods of fixing are imperfect because it doesn't allow to define completely what disputes are arbitrable, and what - no.

For resolving of this problem we have to detect certain basic criteria, which presence or absence would have clearly signaled about the Arbitrability or not an arbitrable character of the

dispute. There is an opinion about a "public order" as a starting point in the legal literature.

We should refer to the Civil Code of Ukraine with the aim to specify the concept of "public order" in the sense of Ukrainian legislator, which uses this combination in the Art. 228 CC of Ukraine. Under Part 1, Art. 228 CC of Ukraine transaction is considered to be in violation of public policy when it was directed to the violation of constitutional rights and freedoms of man and citizen, destruction, damage to the property of an individual or a legal entity, the State, the Autonomous Republic of Crimea, territorial communities, misappropriation of the property.

And, when we compare this definition with a list of disputes that may be characterized as not arbitrable according to national or foreign legislation, we can conclude that the criterion of "disturbance of public order" isn't capable for a functions of single criterion directed to differentiation, because it is obvious that it doesn't cover all possible options. It seems more appropriate to use the criterion proposed by V.N. Anurov, which can be formulated as "the presence of an indefinite range of interests of third parties". This formulation includes both cases where: legal disputes, involving questions of national security or law enforcement principles, and the expression of these interests are the public authorities, and cases where legal disputes are exclusively private, but it is related to unspecified persons because of certain circumstances, as this, for example, it takes place during the procedure of bankruptcy.

In Ukraine the jurisdiction of disputes to international Commercial arbitration established by the Law of Ukraine "On International Commercial arbitration" and it is defined according to two criteria: the presence of "foreign elements" and the matter of dispute.

But the Art. 1 of the Law of Ukraine "On International Commercial Arbitration" contains only the general rule of jurisdiction the disputes to international commercial arbitration in Ukraine, and it doesn't set no exception to this rule in the law, the only warning may be considered Section 4 Article 1 of this Law, which contains a rule that the Act doesn't affect the realization of any other law of Ukraine, by the action of which certain disputes may not be transferred to arbitration or they may be submitted to arbitration only according to other provisions than those that are in this Act.

Direct exceptions of the cases from the scope of arbitration provided by the Commercial Procedural Code of Ukraine (Article 12) and the Law of Ukraine "On arbitration courts" (Article 6). Article 12 of CPC of Ukraine determines the cases under the jurisdiction of commercial courts, and therefore indicates which of the disputes are under the jurisdiction of the commercial courts and can't be referred to arbitration. But if in Part 4 Article 1 of the Law "On arbitration courts" is clearly defined that this Law doesn't apply to international commercial arbitration, the scope of Art. 12 CPC of Ukraine (only domestic arbitration courts or/and international commercial arbitration) remains uncertain, because, despite of the existence of a clear tendency to equate the concepts of "arbitration" and "arbitral " judgment in scientific doctrine, legislative regulation of these terms differs radically, firstly it is possible through the difference of subject composition relations that are the subject of these institutions.

Under Part 2 of Article 12 CPC of Ukraine, disputes concerning arbitration court to invalidate acts and disputes arising from the conclusion, amendment, termination and execution of commercial contracts associated with meeting state needs, and certain disputes between the business entity can't be transferred by parties for resolving.

There is a highly controversial issue that hasn't been sufficiently explored in the literature and it regulates the attribution to the category of not arbitrable the second category of disputes. It remains unclear what the relationships are understood by the legislator under the "relates to the needs of the state", and whether this ex-solusion becomes an insurmountable obstacle to the participation of public authorities in international commercial arbitration at all.

The theme of Arbitrability of corporate disputes heated debates too. Noncompliances in legislative regulations on this issue are the basis for these discussions. The Law of Ukraine "On International Commercial Arbitration" provides for the right of the parties under the agreement to transfer to international commercial arbitration disputes arising between enterprises with foreign investment, international associations and organizations established on the territory of Ukraine, with each other and disputes between their members (Part 2 of Art.1). However, the LU" On amendments to some legislative acts of Ukraine on the activities of the arbitration courts and enforcement

arbitration courts", which came into force on 5 March 2009, amendments were made to the CPC Ukraine, and they resulted from the fact that, Article 12 CPC of Ukraine includes a ban on the transfer to arbitration of disputes arising out of corporate relations in disputes between the business entity and its members (founders, shareholders), including the participant who dropped out, and between the participants (founders, shareholders) of a business partnership which are related to the creation, operation, management and termination of this entity, in addition to labor disputes. By this way was established the problem of the ratio of CPC Ukraine and the provisions of special laws. It rightly concludes in legal literature that this uncertainty of Ukrainian legislation concerning the arbitrability of corporate disputes which shall be referred to the International Commercial Arbitration, carries serious risks. Corporate disputes are quite arbitrable according to Ukrainian legislation in force, but implementation of the adjudicated decisions concerning of such disputes often causes with significant difficulties because the realization of this decision is performed by appealing to the state court of general jurisdiction in Ukraine, and the approach of Ukrainian state courts concerning with arbitrability of corporate disputes is formed not in her favor [10].

The Recommendations of the Supreme Commercial Court *of 28 December 2007 № 04-5/14* (namely published much earlier than changes were made by the legislature to the CCP of Ukraine) states (paragraph 6.2) that members of business companies regardless of the subject composition of shareholders have no rights exercise the review of corporate disputes, which are related to commercial activities of companies that registered in Ukraine, including those arising from corporate governance, to international commercial arbitration courts. Also, by the Supreme Court of Ukraine Decree № 13 of 24 October 2008 "On the practice of the courts of corporate disputes" is explained the courts that shareholders of a company which are registered in Ukraine are not eligible to enter a corporate agreement on dispute resolution in international commercial arbitration, because it violates the public policy cases in Ukraine. After the adoption of the LU " On amendments to some legislative acts of Ukraine on the activities of the arbitration courts and enforcement arbitration courts " Supreme Court of Ukraine № 01-08/194 Information letter dated 2 April 2009 (section 2.1) reported to commercial

courts, that even decisions of tribunals which are adopted before the amendments to the legislation and not made on the date of entry into force of these amendments are not enforceable [4].

Thus, considering on the legal position of the Supreme and the High Commercial Court of Ukraine, as well as the position of the legislator fixed in Art. 12 CCP of Ukraine, the possibility of implementing an arbitration clause that applies to corporate disputes is unlikely.

Another controversial issue concerning the competence of arbitration courts are the questions about Arbitrability of disputes relating to bankruptcy. CCP of Ukraine doesn't contain a direct prohibition on the transfer of the arbitral tribunal resolving a case of bankruptcy. The category of not arbitrability of the disputes expressly provided for in Art. 6 of the Law of Ukraine "On arbitration courts". Exclusive jurisdiction to courts of Ukraine of bankruptcy cases, with a foreign element, if the debtor was established in accordance with the laws of Ukraine, is established in c. 77 LU "On International Private Law".

If the inability of review the bankruptcy cases of the arbitration is no doubt, however, remain unresolved questions about the fortune of the arbitration agreement, the party of which is a debtor against whom is began a case of bankruptcy.

If we want to apply the above single criteria of definition of arbitrability of disputes, it becomes clear that strict regulation by the state of imperative conditions of bankruptcy proceedings by the presence of interest previously undefined group of third parties is a guarantee of their rights. This guarantee is expressed in the establishment of the bankruptcy stages, the appointment of a state court of arbitration managers with their rights and obligations, drawing up the register of creditors' disclosure of information about bankruptcy and more. The effectiveness of arbitration can be detected only in the elimination of discrepancies between the debtor and the creditor and archieving of a compromise between them [2, 122]. Accordingly, there is a huge theme for dispute and scientific research.

In the system of ADR the IA the most effective system on the matter of: a) international recognition and simplicity; b) organization; c) and the main feature-arbitrability of disputes.

That's why we can say that IA plays the main role in the system of ADR.

So, summarizing the analysis of Ukrainian, foreign, international legislation, court and arbitrage practice we can make a conclusion that the Ukrainian legislation doesn't promote of the Outstate regulative system and spreading the rights and authorities of arbitration system of Ukraine. So, the aim of IA and the Ukrainian legislation is the developing, systematization and harmonization of the categories of disputes which can be resolved by ADR in the aspect of arbitrability of disputes as a key instrument for its realization.

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У світовій практиці міжнародний комерційний арбітраж, як один із альтернативних судовому способів вирішення спорів, загальновизнано вважається найбільш ефективним способом врегулювання суперечок, що виникають з комерційних угод та контактів. Втішною є тенденція до зростання популярності міжнародного комерційного арбітражу в Україні, що, безумовно, сприяє інтеграції нашої держави в світову економічну спільноту, розвитку зовнішньоекономічних зв'язків, розширенню міжнародної торгівлі та співробітництва, робить Україну більш привабливою для іноземних партнерів. Проте, наявна неврегульованість та невизначеність національного законодавства, що стосується правового регулювання міжнародного комерційного арбітражу, створює чимало проблем в правозастосуванні.

Одним з найбільш дискусійних та складних питань, що стосуються міжнародного комерційного арбітражу, є питання арбітрабільності спорів. Невизначеність в арбітрабільності певних категорій спорів є небезпечною ситуацією так, як це може призвести до таких ризиків, як:

(1) прийняття третейським судом постанови про відсутність компетенції розглядати конкретний спір (принцип міжнародного арбітражу «компетенція-компетенція», що передбачений ч.1 ст. 16 Закону України «Про міжнародний комерційний арбітраж» від 24.02.1994 р. № 4002-XII [5](далі - Закон Про МКА);

(2) скасування арбітражного рішення (згідно з п. 2 ч. 2 ст. 34 Закону Про МКА)

(3) відмова у визнанні або у виконанні арбітражного рішення (згідно з п. 2 ч. 1 ст. 36 Закону Про МКА)

Думаю, перш ніж перейти до розкриття теми, варто зупинитись на визначенні поняття «арбітрабільності» спорів, яке не вживається і не детермінується українським законодавцем. Визначення даного поняття можна сформулювати з визначення поняття «неарбітрабільності» спорів, як підстави для скасування або відмови у визнанні або виконанні арбітражного

рішення. Так, згідно з п. 1 ч. 2 ст. 36, п. 2 ч. 2 ст. 34 Закону Про МКА, арбітражне рішення може бути скасоване судом або у визнанні або виконанні арбітражного рішення незалежно від того, в якій державі воно було винесено може бути відмовлено, якщо суд визнає, що об'єкт спору не може бути предметом арбітражного розгляду за законодавством України. Відповідно, арбітрабільність спору – це можливість об'єкта спору бути предметом арбітражного розгляду за законодавством України. Проте, таке визначення є не повним, так як загальноприйнятою є позиція щодо розмежування суб'єктивної та предметної арбітрабільності, і подане вище визначення характеризує лише предметну арбітрабільність спору. Так, під суб'єктивною арбітрабільністю розуміється можливість фізичних та юридичних осіб передавати спір на розгляд арбітражу виходячи із їх статусу чи функцій. Підсумовуючи вищевикладене, можна дати таке визначення поняття «арбітрабільність» - це можливість об'єкта спору між фізичними та юридичними особами, які наділені правом передавати спір на розгляд арбітражу, бути предметом арбітражного розгляду за законодавством України.

Сфера спорів, які можуть за угодою сторін передаватись на вирішення міжнародного комерційного арбітражу, визначена п. 2 ст. 1 Закону Про МКА, згідно з якою до міжнародного комерційного арбітражу можуть за угодою сторін передаватися: спори з договірних та інших цивільно-правових відносин, що виникають при здійсненні зовнішньоторговельних та інших видів міжнародних економічних зв'язків, якщо комерційне підприємство хоча б однієї з сторін знаходиться за кордоном, а також спори підприємств з іноземними інвестиціями і міжнародних об'єднань та організацій, створених на території України, між собою, спори між їх учасниками, а так само спори з іншими суб'єктами права України.

Щодо суб'єктивної арбітрабільності, то досить дискусійним є питання можливості держави, державних органів та державних підприємств, установ, організацій, укладати арбітражну угоду і передавати спори, що виникли з їх участі, на вирішення міжнародного комерційного арбітражу. Дискусії щодо цього виникають, перш за все, через існуючий в міжнародному приватному праві принцип імунітету держави, зокрема, судового імунітету та імунітету до примусового виконання рішення, що полягають в непідсудності держави без її згоди

судам іншої держави та неможливості примусового виконання рішення, винесеного проти неї судом іншої держави. Як зазначають Т. Сліпачук, О. Перепелинська, С. Уваров, на сьогодні значна кількість держав (особливо на пострадянському просторі) дотримуються концепції абсолютного імунітету[18]. З іншого боку, мова йде про виконання арбітражного рішення, а не рішення суду іншої держави, тому вбачається нелогічним застосування принципу «рівний над рівним не має влади». На думку Т.С. Кисельової, якщо держава або її орган укладають господарський договір або вчиняють інші комерційні дії, вони втрачають свій імунітет.[14;55]

На мою думку, такі спори можуть передаватись на розгляд міжнародного комерційного арбітражу, так як, виходячи з п. 2 ст. 1 Закону Про МКА, суб'єктний склад учасників спорів, що розглядаються в міжнародному комерційному арбітражі не є вичерпним («а так само спори з іншими суб'єктами права України»). Крім того, згідно ст. II Європейської конвенції про зовнішньоторговельний арбітраж юридичні особи публічного права мають можливість укладати арбітражні угоди, за винятком випадків, коли держава-учасниця при підписанні ратифікації чи приєднанні до Конвенції зробила заяву про обмеження такої можливості.[1] Україна при ратифікації цієї конвенції не зробила жодних застережень щодо обмеження права юридичних осіб публічного на укладення арбітражних угод. Більше того, відповідно до ч. 2 ст. 3 Закону України «Про зовнішньоекономічну діяльність», Україна в особі її органів, місцеві органи влади і управління в особі створених ними зовнішньоекономічних організацій, які беруть участь у господарській діяльності на території України, діють як юридичні особи згідно з частиною четвертою статті 2 цього Закону і законами України (принцип юридичної рівності та недискримінації суб'єктів зовнішньоекономічної діяльності) [9]. Отже, немає ніяких підстав вважати неарбітрабільними спори, в яких стороною є держава, її органи та державні підприємства, установи, організації.

Щодо предметної арбітрабільності, то варто зауважити, що Закон Про МКА передбачає досить широке коло спорів, які є арбітрабільними. Разом з тим кожна держава в своєму законодавстві може визначити коло спорів, які не можуть бути предметом арбітражного розгляду. Відповідно до ч. 4 ст. 1

Закону Про МКА: Цей Закон не зачіпає дії будь-якого іншого закону України, в силу якого певні спори не можуть передаватися до арбітражу або можуть бути передані до арбітражу тільки згідно з положеннями іншими, ніж ті, що є в цьому Законі. В українському законодавстві такі спори передбачені, проте таке «передбачення» щодо певних категорій спорів є надзвичайно неузгодженим і подекуди навіть не логічним, що абсолютно не сприяє ні розвитку міжнародного комерційного арбітражу в Україні, ні українській економіці загалом.

До законів України, які визначають коло неарбітрабільних спорів, на перший погляд, можна віднести ч. 2 ст. 12 ГПК України, ст. 77 Закону України « Про міжнародне приватне право», ст. 6 Закону України «Про третейські суди» та ч. 5 ст. 235 ЦПК України. Проте, на мій погляд, дія останніх трьох не поширюється на міжнародний комерційний арбітраж, а можливість застосування ГПК України при вирішенні питання арбітрабільності спорів є суперечливою.

Щодо Закону України «Про третейські суди», то відповідно до ч. 4 ст. 1 Закону України «Про третейські суди»: «дія цього Закону не поширюється на міжнародний комерційний арбітраж»[7]. Тому помилковим є твердження, що перелік спорів, які непідвідомчі третейським судам в силу ст. 6 Закону України «Про третейські суди», не можуть передаватись на вирішення до міжнародного комерційного арбітражу. Крім того, деякі з категорій, що визначені вище згадуваній статті не можуть бути арбітрабільними, просто виходячи з суті цих відносин. Зокрема, справи, що виникають з сімейних відносин, з трудових відносин, справи про встановлення фактів, що мають юридичне значення, справи у спорах щодо захисту прав споживачів тощо навряд чи можуть бути такими, що виникають при здійсненні зовнішньоторговельних та інших видів міжнародних економічних зв’язків. З цієї ж причини не має ніякого відношення до арбітрабільності спорів і ч. 5 ст. 235 ЦПК України, відповідно до якої «справи окремого провадження не можуть бути передані на розгляд третейського суду і не можуть бути закриті у зв'язку з укладенням мирової угоди».[3]

Не застосовується при вирішенні питання щодо арбітрабільності спорів і Закон України «Про міжнародне приватне право», а саме, ст. 77 цього Закону, якою

встановлений невичерпний перелік справ, що належать до виключної підсудності українських судів.[6]Віднесення певних категорій спорів до виключної підсудності українським судам полягає в забороні розгляду таких спорів судами інших держав. Тому виключна підсудність справ українським судам немає ніякого відношення до вирішення питання арбітрабільності спорів, як можливості передачі останніх на розгляд міжнародного комерційного арбітражу, який за своєю суттю є альтернативним судовому способом вирішення спорів. Як зазначає Я.А. Петров, за загальним правилом виключна підсудність прямо не впливає на підвідомчість спорів арбітражу, підтвердженням чому є досвід різних країн щодо співвідношення виключної підсудності справ національним судам і підвідомчості спорів міжнародному комерційному арбітражу[16;8]. З огляду на різну правову природу понять підвідомчості та підсудності, ст. 77 Закону України «Про міжнародне приватне право», що визначає виключну підсудність справ судам України, може трактуватися не інакше, як така, що визначає національний суд, уповноважений розглядати спір, якщо правовідносини включають іноземний елемент[16;9].

Отже, єдиним законодавчим актом, що визначає коло спорів, які є неарбітрабільними є ГПК України, хоча і щодо застосування цього Закону є цілком обґрунтовані сумніви, про що згодом піде мова. Згідно ч. 2 ст. 12 ГПК України: Підвідомчий господарським судам спір може бути передано сторонами на вирішення третейського суду, крім спорів про визнання недійсними актів, а також спорів, що виникають при укладанні, зміні, розірванні та виконанні господарських договорів, пов'язаних із задоволенням державних потреб, спорів, передбачених пунктом 4 частини першої цієї статті, та інших спорів, передбачених законом.[4]

Окремої уваги заслуговує категорія спорів, що виникають при укладенні, зміні, розірванні та виконанні господарських договорів, пов’язаних із задоволенням державних потреб. Чинним законодавством не передбачене визначення державних потреб, лише ч. 1 ст. 1 Закону України «Про державне замовлення пріоритетних державних потреб» визначено, що пріоритетні державні потреби - це потреби України в товарах, роботах і послугах, необхідних для розв'язання найважливіших соціально-економічних проблем,

підтримання обороноздатності країни та її безпеки, створення і підтримання на належному рівні державних матеріальних резервів, реалізації державних і міждержавних цільових програм, забезпечення функціонування державних органів, що утримуються за рахунок Державного бюджету України[8]. Проте, як слушно зазначають О. Фелів та Х. Федунишин, державні потреби не зводяться лише до пріоритетних, відповідно їх зміст є ширшим[18;31]. Тому, в зв'язку з відсутністю чітких законодавчих критеріїв визначення меж державних потреб, це питання в кожній конкретній справі вирішується судом, що недопустимо, з огляду на те, що неарбітрабільність спору може встановлюватись виключно законом. Щодо того, як широко державні суди трактують поняття «державних потреб» показовою є ухвала Шевченківського районного суду м. Києва від 03 вересня 2013 року у справі 761/20746/13-ц, якою, за клопотанням компанії «VAMED Engineering GmbH & CO KG», було скасоване рішення МКАС при ТТП України від 04 квітня 2013р. Підставою для скасування зазначеного рішення, серед іншого, був висновок суду про те, що *«поставка медичного обладнання за договором поставки між компанією «VAMED Engineering GmbH & CO KG» та ДП «УКРМЕДПОСТАЧ» здійснювалася за кошти, отримані в кредит під державну гарантію України, а тому була пов'язана із задоволенням державних потреб України»*[21]. На мою думку, віднесення до компетенції державних судів вирішення питання щодо арбітрабільності спорів суперечить Закону Про МКА, а тому це питання потребує негайного вирішення шляхом встановлення чітких законодавчих критеріїв визначення меж державних потреб.

Щодо виключної підвідомчості господарським судам спорів у справах, що виникають з корпоративних відносин між суб'єктами, визначеними ч. 4 ст. 12 ГПК України, то це питання є одним з найбільш актуальних в контексті арбітрабільності спорів.

Включенню даної категорії спорів, до переліку спорів, які не можуть бути передані сторонами на вирішення третейського суду передувало прийняття Президією ВГСУ Рекомендацій «Про практику застосування законодавства у розгляді справ, що виникають з корпоративних відносин» від 28.12.2007 року N 04-5/14 (далі - Рекомендації Президії ВГСУ)[13] та Пленумом ВСУ Постанови «Про практику розгляду судами корпоративних

спорів» від 24.10.2008 року N 13 (далі – Постанова Пленуму ВСУ)[12]. В цих роз'ясненнях, серед іншого, міститься висновок про те, що учасники господарських товариств незалежно від суб'єктного складу акціонерів не вправі підпорядковувати розгляд корпоративних спорів, пов'язаних із діяльністю господарських товариств, зареєстрованих в Україні, зокрема таких, що випливають із корпоративного управління, міжнародним комерційним арбітражним судам.

Як зазначає Т.Б. Бондарєв та М.М. Мальський, жодного обґрунтування щодо встановлення обмеження права учасників господарських товариств передавати корпоративні спори на вирішення міжнародного комерційного арбітражу зазначені роз'яснення не містять.[20;84] Крім того, на час прийняття зазначених роз'яснень в законодавстві України не було передбачено обмежень щодо можливості передачі корпоративних спорів на вирішення міжнародного комерційного арбітражу. Без сумніву, обмеження щодо права передачі корпоративних спорів на розгляд міжнародного комерційного арбітражу, не може встановлюватись роз'ясненнями ВГСУ та ВСУ, які, крім того, мають лише рекомендаційний характер.

Законом України «Про внесення змін до деяких законодавчих актів України щодо діяльності третейських судів та виконання рішень третейських судів» від 05.03.2009 року [10] було внесено зміни у ч. 2 ст. 12 ГПК України, згідно з якими забороняється передавати на вирішення третейський судом (арбітражем) спорів, що виникають з корпоративних відносин у спорах між господарським товариством та його учасником (засновником, акціонером), у тому числі учасником, який вибув, а також між учасниками (засновниками, акціонерами) господарських товариств, що пов'язані із створенням, діяльністю, управлінням та припиненням діяльності цього товариства, крім трудових спорів. Також було внесено відповідні зміни до ст. 6 Закону України «Про третейські суди». Проте, жодних змін до Закону Про МКА не вносилось, що може свідчити про те, що метою законодавця було виключення зазначеної категорії спорів з підвідомчості лише внутрішньодержавних третейських судів. Про це говорить також і назва зазначеного вище закону.

Крім того, Законом України «Про внесення змін до Господарського процесуального кодексу України щодо

оскарження рішення третейського суду та видачі виконавчого документа на примусове виконання рішення третейського суду» від 3 лютого 2011 року з ч. 2 ст. 12 ГПК України було вилучено слово «арбітраж»[11]. Також розмежовано компетенцію загальних та господарських судів щодо оспорювання рішень міжнародного комерційного арбітражу, а також про визнання та надання дозволу на виконання рішень міжнародного комерційного арбітражу шляхом внесення змін до ч. 4 ст. 15 ЦПК України та ч. 2 ст. 4 ГПК України, якими ці питання віднесені до компетенції загальних судів. З огляду на всі ці зміни, можна зробити висновок, що ч. 2 ст. 12 ГПК України стосується лише внутрішнього третейського судочинства, і не обмежує права сторін передавати спори зазначенні в п. 4 ч. 1 ст. 12 ГПК України на розгляд міжнародного комерційного арбітражу.

Як зазначає О.С. Перепелинська, застосування зазначених положень ГПК до міжнародного комерційного арбітражу призводить до конкуренції п. 2 ч. 1 ст. 1 Закону Про МКА та ч. 2 ст. 12 ГПК України[16]. Згідно з п. 2 ч. 2 ст. 1 Закону Про МКА спори між учасниками підприємств з іноземними інвестиціями можуть передаватися на розгляд міжнародного комерційного арбітражу. Згідно з ст.79 Господарського кодексу України: Господарськими товариствами визнаються підприємства або інші суб'єкти господарювання, створені юридичними особами та/або громадянами шляхом об'єднання їх майна і участі в підприємницькій діяльності товариства з метою одержання прибутку [2]. Тобто поняття господарських товариств включає в себе також і поняття підприємств з іноземними інвестиціями. Таким чином, ч. 2 ст. 12 ГПК України охоплюються також і спори між учасниками підприємства з іноземними інвестиціями, які виникають з корпоративних відносин, що пов’язані із створенням, діяльністю, управлінням та припиненням діяльності цього товариства. Повністю погоджуюсь з думкою О.С. Перепелинської, що при конкуренції положень ГПК України та Закону Про МКА, перевага повинна надаватись останньому, який до того ж є спеціальним законом щодо правового регулювання відносин, пов’язаних з міжнародним комерційним арбітражем[16].

Крім того, як зазначає М.М. Мальський, обмеження щодо передачі зазначеної категорії спорів на вирішення міжнародного комерційного арбітражу не сприяє розвитку

останнього в Україні, а також поліпшенню інвестиційного клімату нашої країни, бо поза сумнівом, іноземні інвестори з більшою охотою передали б корпоративний спір на розгляд міжнародного комерційного арбітражу, аніж державного суду[15;35].

Окремої уваги заслуговує питання арбітрабільності спорів, пов'язаних з відносинами щодо обігу акцій (часток) акціонерних товариств (товариств з обмеженою відповідальністю). В п. 1.11 Рекомендацій Президії ВГСУ та п. 6, 7 Постанови Пленуму ВСУ міститься висновок, зазначені спори, крім спорів пов'язаних з порушенням переважного права на придбання акцій/часток до корпоративних не належать. А тому такі спори можуть бути передані на вирішення міжнародного комерційного арбітражу. Підтвердженням такої позиції слугує і судова практика, зокрема, резонансна «справа Дубль W», в якій Постановою ВСГУ від 23.08.2012 року у справі № 18/17 було констатовано, що спір у даній справі про визнання недійсним договору реалізації часток ТОВ "Дубль W Київ" та вчинення дій по перереєстрації частки у статутному фонді ТОВ "САССК" не має ознак корпоративного спору, а тому підлягає розгляду в арбітражному порядку, згідно арбітражної угоди, укладеної між сторонами[22].

Отже, за результатами аналізу законодавства, наукової літератури та судової практики, можна дійти до висновку, що питання арбітрабільності спорів є вкрай неврегульованим в національному законодавстві, що, звичайно, справляє негативний вплив на розвиток міжнародного комерційного арбітражу в Україні. А тому нагальним є врегулювання даного питання на законодавчому рівні, зокрема включенням до Закону «Про МКА» чіткого переліку спорів, які не можуть розглядатись в порядку міжнародного комерційного арбітражу.

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International arbitration is a method of settling international commercial disputes. It is an alternative to court proceedings and often used as a binding and highly respected method of resolving such disputes fast and efficiently in various jurisdictions. Since it is a private dispute resolving, the contracting parties should agree on an arbitration agreement which is to be a compromise document. This method gives more flexibility and autonomy to the parties to decide various aspects concerning arbitration proceedings. One of the most important advantages of using arbitration is that the arbitral awards are more easily enforceable. Another advantage is that arbitration allows parties to choose a neutral forum for resolving disputes and agree upon the procedural law and the arbitration institution on confidentiality basis.

We should bear in mind that during the process of the arbitration agreement formation the parties are to decide what kind of disputes may arise between them pursuant to the concluded agreement. It is very important with a view to the necessity of determination the *arbitrability* of such disputes. *Arbitrability can be defined as the condition of validity of the arbitration agreement and consequently an arbitrator's jurisdiction.* [1, 32]

The scope of arbitrability and non-arbitrability is usually defined by national jurisdictions in two different ways:

(i) By rules found in arbitration laws which establish the scope of arbitrability in general terms (e.g. in Art. 177(1) of the Swiss Private International Law Act);

(ii) By rules found in non-arbitration laws which set out the exceptional jurisdiction of the national courts in relation to specific areas or subject matters. [2, 101]

Since national laws of different countries are not the same, it is important to examine the peculiarities of arbitrability of disputes in different countries and thus their impact on development of international arbitration. Thus this article is based on comparison of different approaches to arbitrability in different countries which

may be useful for contracting parties in choosing the jurisdiction to be eligible to the arbitration proceedings, as much as this issue steps outside the arbitration rules of a particular jurisdiction and is covered by the arbitration legislation of a particular state. This study limits its analysis to the arbitrability of five countries, namely, England, Ukraine, the United States, Germany and Switzerland. The reason of choosing these countries is because there is a high level of arbitrability in a number of them and the comparioson of Ukrainian arbitration legislation with such countries will be extremely useful for improving its supportiveness to arbitration, making appropriate reforms and, of course, assistance to international investment to Ukraine in order to give the opportunity to resolve disputes by international commercial arbitration.

International instruments

As far as arbitral awards are only enforceable when it is recognized by the domestic legal system, creation of uniform principles of recognition and enforcement of such awards is very important. In order to establish basic principles of recognition of international arbitration agreements and awards there have been drawn up three major instruments, namely, the New York Convention on the recognition and Enforcement of Foreign Arbitral Awards 1958, the Geneva Convention 1961 and the UNCITRAL Model Law. Notwithstanding their significance and application these instruments do not contain substantive rules on arbitrability and let national legislators and courts to determine what disputes are arbitrable.

The New York Convention

Article II (1): the obligation of each contracting party to recognize and enforce arbitration agreements when "subject matter capable of settlement by arbitration".[3]

Article V (2)(a): "the recognition and enforcement of the award may be refused if the competent authority in the country where recognition or enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of the country". [3]

The Geneva Convention

Article VI (2): "The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration". [4]

The UNCITRAL Model Law

Article 1(5): it is not intended to affect other laws of the state that preclude certain disputes being submitted to arbitration. [5]
Thus, there is no internationally agreement about the definition of arbitrability. It is clear to understand that international litigator intended to give the *national litigator* power to determine which disputes are arbitrable due to the diversity in understanding of this concept by different countries. In this context the question of determination of applicable law by parties to the arbitration agreement becomes more urgent as any dispute may be arbitrable under the law of one country but not in another.

Arbitrability in domestic legislation

The following study of approaches to arbitrability in above mentioned countries in order to facilitate practicality, clearness, accuracy and hereby to make the choice of the jurisdiction applicable in the arbitration agreement easier will be based on the following comparative criteria:

1. Arbitration laws;
2. Relation to the UNCITRAL Model Law;
3. Definition;
4. Arbitrable disputes;
5. Non-arbitrable disputes;
6. Adopted international treaties related to arbitration;
7. Arbitration institutions;
8. Questions to solve, gaps.

	England	**Ukraine**	**USA**	**Germany**	**Switzerland**
1	-The Arbitration Act 1996; -2 parts, 4 schedules, 110 sections [6]; -governs arbitrations seatd in England, Wales ans Notrhen	-The law of Ukraine on International Commercial Arbitration of Fabruary 1994, No.4002-XII (LICA) [11]	-The Federal Arbitration Act 1925; -both federal and state law	-Book 10 "Arbitration proceedings' of the German Code of Civil Procedure (the German ZPO) [15]	-Chapter 12 of the Swiss Private International Law Act ("PILA")[17]

	Ireland				
2	-Did not follow the UNCITRAL Model Law, but is influenced; -has differences: governs domestic and international arbitration; the document containing parties agreement need not to be signed; English court cannot refer a matter to arbitration, no time limit on a parties' opposition to the appointment of an arbitrator etc.[7,2]	-Based on the UNCITRAL Model Law but has some differences: - any dispute resulting from contractual and other civil law relations may be referred to international arbitration; - any dispute involving Ukrainian enterprises with foreign investment and international associations and organizations established in the territory of Ukraine	Based on the UNCITRAL Model Law but influenced by Swiss law	Based on the UNCITRAL Model Law but with only slight modifications	Based on the UNCITRAL Model Law but has some differences: -arbitrators are free to determine without recourse to conflict rules as provided by the Model Law the rules of the applicable law [4]

		[11]			
3	The concept of arbitrability relates to public policy limitations upon arbitration as a method of settling disputes each state may decide which matters may be settled by arbitration and which may not [8]	-The term "arbitrability" is not used nor in the legislation nor in the court practice in Ukraine; -it means the right of the parties to the agreement to submit to an international arbitration [12]	Arbitrability means the preliminary question of whether an arbitral tribunal has the authority to decide, as an initial matter, that a given dispute should be submitted to arbitration for a determination of whether the arbitral tribunal has jurisdiction over the dispute [13]	The condition of validity of the arbitration agreement and consequently an arbitrator's jurisdiction	Any dispute involving financial interests can be the subject matter of arbitration [2,60]
4	The Arbitration Act does not define what	Pursuant to the agreement of the parties to	-The FAA does not define what limits of	-"Any claim under *property law* may	-"Any dispute involving *property* may be

	matters may be brought to arbitration; -it is generally accepted that *most commercial disputes* are capable of being arbitrated if the parties agree on that form of dispute resolution; [9, 300] -any dispute or claim concerning *legal rights* which can be the subject of an enforceable award can be submitted to arbitration [1,75]	the international commercial arbitration may be referred the following types of disputes: -disputes resulting from *contractual and other civil law relations* arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; (Article 2(1), LICA) [11]	arbitrability; -this issue is left for *judicial decisions* and provisions in other legislation; -matters involving federal antitrust claims arising from international transaction; - question of arbitrability must be addressed for the arbitration [1,83]	be the subject of an arbitration agreement. An arbitration agreement regarding non-pecuniary claims has legal effect…" (s. 1030(1), the German ZPO) [15]	subject matter of an arbitration"(Art.177(II)(I), PILA) [16]

5	-Matters based on public policy considerations; -criminal matters or proceedings; -divorce laws; -planning laws [7]	-Disputes regarding the invalidation of normative acts; -disputes arising out of the conclusion, amendment, termination and performance of public procurement contracts; -disputes arising from corporate relations between a commercial company and its participant (founder or shareholder), including a participant that has withdrawn from the company, as well as	-Disputes due to public policy considerations; -claims under the Securities Act 1933, the Securities Exchange Act 1934, the Racketeer influenced and corrupt organizations Act, Magnusson-moss Warranty Act, Uniformed Services Employment and Reemployment Rights Act [1, 83]	-"An arbitration agreement regarding legal disputes arising in the context of a tenancy relationship for residential space in Germany is invalid". (s. 1030(2), the German ZPO) [15]	-Non-economic rights -public nature of the applicable rules (international public policy) [2,60]

		between the participants (founders or shareholders) of commercial companies, in connection with the establishment, operation, management or winding up of the company (Article 12(2) of the Commercial Procedure Code of Ukraine with reforms made by No.1798-III ('CoPC')) [11]			
6	-The New York Convention; -the Geneva convention	-The New York Convention; -the Geneva Convention	-The New York Convention; -the Inter-American	-The New York Convention; -the Geneva Convention	- The New York Convention [14]

	[7,3]	; - CIS treaty on Settling Disputes Related to commercial Activity [ratified conv]	Convention on International Commercial Arbitration (the Panama Convention) [14]	n; [14]	
7	- International Chamber of Commerce (ICC); -London Court of International Arbitration (LCIA); - International Centre for Dispute Resolution (ICDR) (the international section of the American Arbitration Association (AAA)); -The Chartered Institute of	- International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at the UCCI); -Maritime Arbitration commission at the UCCI (MAC)	-American Arbitration Association; - International Institute for Conflict Prevention & Resolution (CPR); - Commercial Arbitration and Mediation Center for the Americas (CAMCA); - International Centre	-The German Institution of Arbitration (DIS); -Frankfurt International Arbitration Centre (FIAC); -German Maritime Arbitration Association (GMAA); - Arbitration Court of the Chamber of Commerce	-Swiss Chambers' Arbitration Institution; -Basel Chamber of Commerce; - Chamber of Commerce of Berne; - Chamber of Commerce of Geneva; - Chamber of Commerce of Lausanne; - Chamber of Commerce of Lugano; - Chamber of Commerce of Neuchatel; - Chamber of Commerce of Zurich

	Arbitrators (CIArb) -London Maritime Arbitrators' Association (LMAA) [10]		for Dispute Resolution [14]		
8	-There is no any rule of arbitrability in the legislation; -court practice defines most matters which are not arbitrable	- Complications related to the arbitrability of corporate disputes -there is no direct restrictions to arbitrability in legislation; - competence between domestic and international arbitration with respect to arbitrability is vague; -on the legislative level there is a great number of	-Tension between application of state law and federal law	-As far as according to the German Arbitration Law any claim involving economic interest is arbitrable, the concept of non-arbitrable disputes is not so clear	- Considerations of public policy rarely affect the arbitrability of a dispute; -foreign laws have only a very limited role when it comes to determining arbitrability

		restrictions to arbitrability of certain types of disputes			

Role and influence to development to international arbitration

England

We can say that the Arbitration Act as a respected modern and flexible document provides a favorable arbitration regime. It is logically constructed and has a sufficiently clear language free from technicalities. That is why the legislator by conspicuously omitting any treatment of the subject of arbitrability tried to facilitate parties to the arbitration agreement in choosing the most favorable conditions and provisions for them. As for the court practice it is important to say that it only limits subject matter of arbitrability to the generally recognized commercial disputes.

That is why the most experienced arbitration bodies that can provide procedural rules (if needed) and qualified specialist arbitrators are situated in England.

Ukraine

It is important to say that Ukrainian legislator managed to provide in the appropriate laws governing international arbitration a great number of disputes which cannot be solved by arbitrations. Such enforcement making the process of defining arbitrability and, thus, certain categories of disputes applicable to international arbitration more complicated is a disadvantage of the Ukrainian legislation. This makes Ukrainian arbitration peculiarities not so attractive for implementing and can be an obstacle to international investment to Ukrainian economy.

Also complications may arise due to the uncertainty to the arbitrability of certain types of disputes under Ukrainian law, especially corporate disputes. At the first sight corporate disputes are completely arbitrable under the Article 1 of the Law of Ukraine on International Commercial Arbitration. But the Article 12 of the Company Procedure Code of Ukraine is a key on the question of arbitrability to corporate disputes. It is worth bearing in mind that on 3 February 2011 there were adopted several laws amending

the legislation in arbitration-related matters, namely, law No. 2979-VI and law No. 2980-VI. These laws have filled many gaps as the court practice on this question was rather controversial and there was lack of procedural law. The new wording of Article 12 of the Commercial procedure Code of Ukraine containing certain categories of disputes which cannot be submitted to arbitration may provoke a lot of discussions because it contains ambiguous interpretation of its provisions as applicable to domestic arbitration or to international arbitration also.

The USA

The key feature to the concept of arbitrability in the USA is that arbitration has the authority to define which disputes can be submitted to arbitration before hearing. This gives American arbitrations power to define the limits of arbitrability and, thus, to make it more flexible. Moreover the federal policy promotes and supports arbitration.

Germany

Since the German ZPO defines that any claim under property law may be subject to the international agreement, it makes arbitration in Germany more flexible, speed and confidential.

Switzerland

The provision of the PILA that "any dispute involving property" leaves all other disputes to the jurisdiction of national courts in order to ensure that any dispute not involving property can be determined exclusively by the national courts of Switzerland. The Swiss arbitration regime that applies to all international arbitration seated in Switzerland provides party autonomy, liberty. What is more, the question of arbitrability is regulated by the *lex arbitri* which intended to eliminate the research of the law applicable to the determination of the arbitrability of the case.

All in all, arbitrability as the condition of validity of the arbitration agreement is an important aspect of qualification the arbitration domain in different jurisdictions. Having examined this issue in various countries we may conclude that arbitration is more attractive in those countries where there is a more attractive option for dispute resolution by increasing party autonomy and reduced the scope for court interference in the arbitral process. Such countries are England, the USA, Germany, Switzerland etc. What concerning Ukraine, it is necessary to say that notwithstanding being based on the Model Law, there are a lot of excessive provisions in legislation concerning arbitration in

Ukraine that are very often contradictable. That is why only with time and upon the establishment of good practice in this regard the applicability of provisions for arbitration will be more frequent.

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ARBITRABILITY OF DISPUTES:
ROLE AND IMPACT ON DEVELOPMENT OF INTERNATIONAL ARBITRATION

This article deals with the scope and definition of arbitrability and its role as a threshold issue of international commercial arbitration. In this context, the author draws attention to situations when the question of arbitrability arises as well as to the issues of who, court or arbitral tribunal, has jurisdiction to decide on this particular problem.

Key words: arbitrability, arbitration agreement, subject matter of the dispute, courts, arbitrators, arbitral award.

Problem statement. The arbitrability question has been attracting not only scientific, but also professional interest of both scholars and practitioners in the sphere of international commercial arbitration. Such attention is being paid to the arbitrability since it raises problems related to the existence, validity and scope of arbitration agreement as well as to the restrictions imposed by national jurisdictions. Another problem as to the arbitrability concerns the absence of its universally adopted concept and different approaches to its definition both by the doctrine and national laws.

Analysis of research works and publications. A huge contribution to the study of the role of arbitrability in international commercial arbitration has been made by such outstanding scholars as well as the practitioners in the sphere of international arbitration as Loukas A. Mistelis, Stavros L. Brekoulakis, Gary Born Michael F.Hoellering, Tibor Varady, John J. Barcelo III, Arthur T. Von Mehren, L. Yves Fortier, Eric Fishman, Per Sundin, Eric Wernberg and others. Among Ukrainian scholars and practitioners who have paid their attention to the issue of arbitrability are T. Slipachuk, O.Perepelynska, Kuptsova M., O.Pheliv etc. Their research studies are of a great scientific interest and serve as a

practical guide for those whose professional interests lie within the field of international arbitration.

Purpose of the article is to research the role and determine the impact of arbitrability on the development of modern international arbitration as well as to stress the current problems related to this issue from the practical point of view.

The main material. It is undoubtedly that one of the fundamental issues in international commercial arbitration is arbitrability of disputes being considered under this particular kind of alternative dispute resolution (ADR). The issue of arbitrability is complex and subject to constant development [15]. One will not find the unified definition of arbitrability in any universally adopted laws concerning issues of arbitration. The 1985 UNCITRAL Model Law on International Commercial Arbitration does not deal with the definition of arbitrability [1], nor does, for example, the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards [2]. However, both the New York Convention and the Model Law refer explicitly to disputes that are "capable of being resolved by arbitration" [17, para 2-10].

It is noteworthy, that there were some efforts of the United Nations Commission on International Trade Law (UNCITRAL) to give the arbitrability a special attention. In the Report of UNCITRAL on the work of its 32nd session the Commission determined the "arbitrability" question as one of the key issues for possible future work in the area of international commercial arbitration [4]. The Report stated that "uncertainty about, and differences among definitions of which disputes are arbitrable may cause considerable difficulties in practice, and one way of approaching the problem may be to attempt to reach a world-wild consensus on a list of non-arbitrable issues" [5, p.10]. Due to the fact that concept of arbitrability was subject to constant development within national jurisdictions the Commission's efforts towards the "arbitrability" question were unsuccessful [15].

In our opinion, the best way of determining arbitrability is by the doctrine. There are a lot of scholarly works as well as separate opinions of the practitioners in the sphere of international arbitration that concern question of arbitrability. Consider, for example, *Redfern*. According to *Redfern*, the concept of arbitrability is basic to the arbitral process. He indicates that "arbitrability involves determining which types of dispute may be

resolved by arbitration and which belong exclusively to the domain of the courts" [17, para 3-12].
Mistelis recognizes arbitrability as one of the issues where the contractual and jurisdictional natures of international commercial arbitration collide head on. In his book *Mistelis* determines that arbitrability involves the simple question of what types of issues can and cannot be submitted and whether specific classes of disputes are exempt from arbitration proceedings [13, p.4]. At the same time, *Varady, Barcelo* and *von Mehren* consider the arbitrability definition by its narrow and wide meaning. Whereas the latter one is much the same as in *Redfern* and *Mistelis*, the narrow one is determined by *Varady, Barcelo* and *von Mehren* as "referring to whether mandatory law in a given jurisdiction disallows arbitration of disputes dealing with a particular subject matter because that subject is infused with high-order public policy concerns" [19, p.99]. Interesting is the approach of *Bermann* who defines arbitrability by encompassing a wide and diverse range of issues, such as: does an agreement to arbitrate exist? Is that agreement valid and enforceable? Are both parties signatories to the agreement or otherwise bound by it? Does the agreement cover the particular dispute at hand? [6, p.10].
From the practical point of view attention should also be paid to the interpretation of arbitrability by the courts under different jurisdictions according to the international character of arbitration. Thus, in *Audi-NSU Union A.G. v. SA Adelin Petit & Cie case the Brussels Court of Appeal* held that the arbitrability of a dispute should be ascertained "according to different criteria depending on whether the question arises when deciding on the validity of the arbitration agreement or when deciding on the recognition and enforcement of the arbitral award" [16, 287].
Whereas the English courts do not have a general theory of the arbitrability of disputes, by contrast, there is an abundant United States court practice on the question of arbitrability. However, this practice is not uniform. In *AT&T Technologies, Inc. v. Communications Workers of America case* it was held that by "arbitrability question" the Court was referring to whether or not the particular dispute fell within the scope of the arbitration agreement". The Court also held that "it is for the courts to decide the threshold question of whether this particular dispute is "subject to the arbitration clause" [18, p.166]. On the contrary, *the Federal Circuit* held in *Qualcomm Inc. v. Nokia Corp.*, where a

court has concluded that the parties to the agreement did "clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator, then the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is wholly groundless" [18, p.172].

Therefore, arbitrability can be determined as whether disputes should be decided by the arbitral tribunals, or due to the limitations imposed by national laws, must be referred to the consideration by state courts. In turn, this definition raises a very important issue of who, arbitrators or courts, has the jurisdiction to decide whether the dispute is arbitrable. The New York Convention and other conventions that are modelled upon it as well as the Model Law leave such important matters as "arbitrability" and "public policy" for determination under the law of the forum state [17, para 10-79].

National laws often restrict or limit the matters, which can be resolved by arbitration [9]. These are usually the areas related to public policy and regulated by the mandatory rules of national law aimed at protecting public interests. *Redfern* suggests that the less developed states should impose very strict limits on arbitrability, especially in respect of disputes involving state entities. The reason for such, in his opinion, is that this is the only way for these states "to retain control over foreign trade and investment, where more economically powerful traders may have an unfair advantage" [17, para 3-14]. At the same time, *Mistelis* writes that in the temporary arbitration-friendly environment not every rule of public policy justifies reserving the disputes involved for determination by state courts [13, p.8]. In particular, *Brekoulakis* points out that:

"It is true that arbitration proceedings have procedural characteristics different from national legislation. However, this does not make arbitration a compromised dispute resolution mechanism in terms of due process, which is unfit to deal with public policy disputes. Otherwise, if that was the case, all disputes – public policy and non public policy ones – should be excluded from arbitration altogether".

Notwithstanding the trend in favour of arbitrability, however, various areas of law are still deemed to be for the exclusive competence of courts of law [10]. *Varady*, *Barcelo* and *von Mehren* say in their book that in both civil-law and common-law courts disputes in the following areas have sometimes been

found nonarbitrable: antitrust, securities law, intellectual property, damage from unilateral termination of exclusive distributorship agreements, political embargoes, bankruptcy and administrative contracts [19, p.233]. On the contrary, *Hoellering* indicates that, except for a limited number of non-arbitrable areas, such as securities laws violations and antitrust allegations, the parties to a contract may agree to arbitrate virtually every kind of disputes that may arise [12].

Courts repeatedly recognize that the issue of who has the jurisdiction to decide the "question of arbitrability" is a threshold issue [18, p.159]. According to *Redfrern*, it is expressly the law of the place of arbitration which decides whether or not the dispute is "capable of settlement by arbitration" or whether it belongs to the domain of disputes that must be decided by a national court [17, para 9-30].

Both arbitrators and courts may decide on the arbitrability of disputes. If the arbitrators have competence to decide upon their own competence (the Kompetenz-Kompetenz principle), dilemmas persists when a court has to consider an issue related to the existence, validity, or scope of an arbitration agreement. The problem arises whether the court should consider this issue or allow it to be decided by the arbitral tribunal. According to *Varady*, *Barcelo* and *von Mehren* this issue shall be decided under the national laws since the New York Convention takes no position on this question [19, p.99].

One may argue that arbitrability "defining the class of disputes that may be removed from the scope of arbitral reference" automatically implies that an arbitration tribunal will be barred from determining whether particular issue can be adjudicated in arbitration [13, p.7]. However, the author wants to indicate that this only means that in some cases state courts have exclusive rights to decide disputes arising out from spheres which are of a strong public interest (*see above*). As a rule, such cases are directly determined by each state in its national laws. Consider, for example, Ukraine. Under Ukrainian legislation only state courts are entitled to decide disputes concerning real estate located in the territory of Ukraine, corporate and labor disputes, and disputes related to the state purchases [20]. Accordingly, such disputes cannot fall within the scope of arbitration between the parties.

In this relation one can refer to *Nankani* who states that there are a lot of legal precedents in the international arbitration where state courts recognized that contrary to the parties' autonomy expressed in arbitration agreement a particular dispute could not be settled by arbitration but by the relevant statutory authority. As example *Nankani* indicates that in a recent order by the Telecom Dispute Settlement Appellate Tribunal (TDSAT) it is stated that there is no scope for arbitration in telecom and broadcasting disputes under the Telecom Regulatory Authority of India Act from 1997 (TRAI Act). Arbitration was barred on matters that were within the exclusive jurisdiction of the TDSAR under the provisions of the TRAI Act [14].

Probably, national law-makers have been left with the possibility to define at their own discretion which disputes can be decided under arbitration and which ones should be considered by courts for the purpose of drawing the line between arbitrable and non-arbitrable disputes.

Normally, the question of arbitrability arises when a party to a particular dispute (1) objects to arbitration on the basis that no valid, enforceable arbitration agreement exists between the parties or (2) argues that such dispute does not fall within the scope of arbitration agreement. In such situation it is necessary to have regard to the relevant laws of the different states that are or may be concerned. *Redfern* indicates that "these are likely to include the law governing the party involved, where the agreement is with a state or state entity; the law governing the arbitration agreement; the law of the seat of arbitration; and the law of the place of enforcement of the award" [17, para 3-13]. There is little agreement among national courts and commentators on the resolution of this issue [7, p.516]. However, the author considers the choice-of-law issue to be very important since each state has adopted its own concept of arbitrable disputes that must be taken into account by the parties while drafting their arbitration agreement.

While considering the arbitrability question one should refer not only to the doctrine, but also to the international legal instruments, such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1961 European Convention on International Commercial Arbitration that have played a key role in making arbitration the

most popular means of dispute resolution in international trade [3, p.85]

According to *Di Pietro,* one of the issues that have given rise to a considerable amount of interest under the New York Convention is the way the Convention deals with arbitrability [3, p.86]. In particular, the arbitrability question is addressed directly or indirectly in its Articles I, II and V. According to *Born,* the New York Convention is best interpreted as subjecting application of the non-arbitrability doctrine by Contracting States to international limitations [7, p.516].

An interesting approach in relation to the arbitrability question under the New York Convention was adopted by *the U.S. District Court for the Eastern District of New York* in *Meadows Indemnity v. Baccala & Shoop Insurance Services*. In deciding whether to enforce the arbitration agreement under Article II of the New York Convention, the Court treated the provision of the Convention as a substantive rule providing for an autonomous concept of arbitrability [3, p.93]. Like the New York Convention, the European Convention makes provision for denying recognition to agreements on non-arbitrability grounds, thereby giving direct recognition to limits on the parties' autonomy to choose the law governing their arbitration agreement [7, p.476].

Conclusion. Summarizing, it should be noted that the question of arbitrability can arise at different stages of the arbitral proceedings, both before the arbitral tribunal and in state courts. Normally, the arbitral tribunal deals with arbitrability at the beginning stage whereas at the end of the arbitral process, in setting-aside or enforcement proceedings, it is clearly the relevant state court that will decide the matter [11]. However, the significance of arbitrability should not be exaggerated. It is important to be aware that it may be an issue, but in broad terms most commercial disputes are arbitrable under the laws of most countries [17, para 3-24]. In any case, the arbitrability should be considered as fundamental issue of modern international commercial arbitration since it defines the sphere of disputes to be referred to arbitration as well as those to be considered exclusively by state courts.

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Introduction

The post–World War II era has shown a considerable increase in international trade and commerce. This process has been catalyzed by the General Agreement on Tariffs and Trade, which led to a substantial reduction in tariff barriers to trade. Speaking about Ukraine as a developing country, there is a continuing, if often sporadic, inflow of foreign investments, for example, capital and joint ventures. In a sizable number of these commercial relations, especially with foreign contractor participating in, the parties choose arbitration as alternative dispute resolution. We have to bare in mind the statement by J. Meason and A. Smith:

Advocates within the business community believe that arbitration is preferable over litigation because arbitration is thought to be informal, faster, less costly, equitable, a way to avoid unfavourable publicity, relatively conciliatory, absorbs less management time. . . . Most importantly, arbitration is seen as providing the best chance to save the underlying business relationship.[6; 27-28]

Notwithstanding that some of arbitration advantages seem to be myths, as it can be difficult and expensive, the priority of arbitration in international commercial relations is widely recognized. Moreover, one of the essential characteristics of arbitration is its consensual nature. It is also true that the attitude of national courts to the arbitral process depends on the nature of arbitration and its relationship with national legal systems. In most cases judicial decisions concerning the scope and limits of the powers of arbitrators could be predicted by reference to the theory of arbitration accepted in the particular jurisdiction. There are different theories of arbitration including the contractual, the jurisdictional, the mixed or hybrid, and the autonomous.

The Ukrainian school of law received the ideas of the Russian theoreticians A.D. Cailin, L.A. Lunts, S. N. Lebedev, I. O. Hvostova, who supported "mixed" (or hybrid, complex) theory. It can be seen from Ukrainian legislature ("On International Commercial Arbitration", "On Execution Procedure", "On International Private Law"), as relations between the arbitral

tribunal and the national court, for example, concerning the arbitrability of the disputes, adoption of interim measures, enforcement of the arbitral award, are settled under the procedural law of Ukraine as the State in whose territory the arbitration takes place, or the State where the enforcement of the award is requested. According to Lebedev arbitration is the delegation of exclusive competency to administer justice to an arbitrator by the State, with the only difference that the delegation of such competency to arbitrators occurs in specific cases, to which the legislator attributes international commercial relations.[16; 22-34] This theory cautions us always to remember that international arbitrations cannot be entirely divorced from the legal systems with which they come into contact. For as J. Robert and T. Carbonneau remind us, "the validity of arbitral adjudication is directly dependent upon the recognition by the legal system that the arbitral process responds to the felt needs of society." [7]

Notion of Arbitrability

The notion "arbitrability" is irrelevant to identify the jurisdiction of the national courts. This concept is formulated in the theory of arbitration proceedings (especially in the doctrine of international commercial arbitration).

Arbitrability is a narrower concept than the jurisdiction. [18; 143] Jurisdiction provides the distribution of cases between different jurisdictional units. Arbitrability indicates the possibility of allocation of certain special categories of cases to private arbitration. So arbitrability as a legal mechanism does not compete with more general institute of jurisdiction. However, the modern interpretation of the term "arbitrability" also reflects the "qualitative" features of the distribution mechanism of cases as it reflects competency of the arbitral tribunal, which relying on the capacity of parties entered into an arbitration agreement, decides the question of its own jurisdiction.

In foreign jurisprudence the notion "arbitrability" is quite common and has a respective formulated doctrine. For example, in German law doctrine of arbitrability is very detailed. Modern foreign jurisprudence divides arbitrability into objective, which defines the disputes that can be the subject of the arbitration agreement, and subjective arbitrability (*ratione personae*), which defines the capacity of the parties to enter into a valid arbitration agreement. Subjective arbitrability can be generally regarded as an analogue

of the procedural capacity ("процессуальная дееспособность") according to national procedural law.
The traditional notion of arbitrability in foreign theory distinguished arbitrability from capacity on the grounds that while the former answered what can be arbitrated, the latter dealt with who can arbitrate. This distinction is now considered impractical and unreal because essentially the result of both inquiries is the same: the answer to the questions can in either case preempt an arbitration. The result in situations where an issue cannot be arbitrated and where a party cannot arbitrate are identical— there can be no valid arbitration.

Objective arbitrability
In the discussion of the advantages of arbitration, we outlined some of the reasons why the business community continues to embrace arbitration as an alternative to litigation. Arbitration has fulfilled the expectations of the business community largely as a result of its flexibility and adaptability. The line between the necessity of ensuring that public interests are protected and party autonomy is not very clear-cut. The doctrine of objective arbitrability is designed to draw the lines. It is the tool by which a State proclaims those interests that it considers so vital and sensitive as to be removed from the scope of private arbitration. Objective arbitrability, then, answers the question: What can be arbitrated? The decision as to what matters should be removed from the ambit of arbitration is evidently subjective to respective national legal systems. What is considered so fundamental as to be non-arbitrable in one country may be viewed as amenable to the process of private arbitration in another country.
It has been suggested that the New York Convention should be amended to include a list of non-arbitrable subject matters for each Contracting State or a list reflecting judicial and legislative practice in all member countries. [5] We consider the suggestion erroneous in implying that it is possible to distill a list of non-arbitrable matters reflective of the law in all Contracting States. Additionally, it is hardly helpful for the convention to list non-arbitrable matters in each Contracting State. Arbitrability encapsulates the present perception of each country as to matters that could be left to arbitration. The scope of arbitrable matters therefore varies according to the changing views of each country as to where the line between public interests and private

adjudication should be drawn. A convention, which is not easily amenable to change, is therefore ill-suited to contain flexible national practice.

So arbitrability is governed by national law. As for Ukraine, Part 2 Art. 12 of the Commercial Code of Ukraine provides 3 categories of non-arbitrable disputes:

1) disputes on invalidation of acts;

2) disputes arising from the conclusion, modification, cancellation and execution of commercial contracts related to the satifaction of public needs;

3) disputes arising out of corporate relations stated in paragraph 1 Part 4 of Article 12 of the CCU. [12]

But in an international contract, there may be more than one national law that connects with the arbitration— for example, the law applicable to the agreement, the law of the place of arbitration, and the law of the place where enforcement of the agreement or award is sought. Where two or more laws are involved, an arbitral tribunal obviously has to select one of them in testing the arbitrability of the issue before it. This choice of law problem equally arises in proceedings before national courts when enforcement of the arbitration agreement is sought or when enforcement of the award is requested. In either case, the judge has to determine the law that governs arbitrability that is not so easy for the Ukrainian courts. Both the New York convention and the Model Law recognize the doctrine of objective arbitrability. Article II of the New York Convention provides that each Contracting State shall recognize an arbitration agreement "concerning a subject matter capable of settlement by arbitration." Article V(2)(A) of the convention equally allows Contracting States to refuse recognition and enforcement of an award where "the subject matter of the difference is not capable of settlement by arbitration under the law of that country." Similarly, by virtue of Article 1(5) of the Model Law, the Model Law does not affect those laws of a Contracting State by virtue of which certain disputes "may be submitted to arbitration only according to provisions other than those of [the Model Law]." Under Article 34(2)(b)(i) of the Model Law, an award may be set aside if the subject matter of the dispute is not capable of settlement by arbitration under the law of the Contracting State involved. Similar provisions relating to arbitrability are contained in other conventions dealing with arbitration. [3] [8]

The critical issue here is to determine the law that governs arbitrability. To sum up, the issue of arbitrability may arise at any of four different stages:

- before the arbitral tribunal
- before a judge from whom enforcement of the arbitration agreement is sought
- before a judge who is requested to enforce the award
- before a judge to whom an application is made to set aside the award.

Question of Arbitrability Arised before the Arbitral Tribunal

When the issue arises before an Arbitral Tribunal the jurisdiction and authority of arbitrators are founded on the arbitration agreement. The law applicable to the arbitration agreement would be a relevant standard in determining arbitrability in cases where it is the law of the country that is most closely connected to the underlying transaction according to the provisions of Law of Ukraine "On International Private Law". Where it is not so connected, one sees no compelling reason why the law applicable to the arbitration agreement should be considered relevant. As we can see, the **separability doctrine**, coupled with the **Kompetenz-Kompetenz rule**, enables the arbitral tribunal to determine its jurisdiction. Thus, an arbitral tribunal is entitled to hear any preliminary objection relating to the arbitrability of the subject matter and to rule on such an objection. It is open to a tribunal to disregard the parties' choice of law applicable to the arbitration agreement if the law applicable to the arbitration agreement is unconnected with the underlying commercial transaction.

There is a problem in this regard and there might be a **regrettable result** if the arbitral tribunal applies the law of the forum. Yet there was a solution adopted in ICC Case No. 6162 of 1990, where in a dispute between a French party and an Egyptian party, the arbitral tribunal used Swiss law— the law of the place of arbitration— in determining the arbitrability of the dispute. It is suggested in cases like these, where the transaction has no connection with the place of arbitration, that the law of the place of arbitration should not be used in determining arbitrability and that the courts of the place of arbitration should refrain from setting aside awards rendered in such cases on the ground that

the subject matter is non-arbitrable in accordance with its national laws. [8; 153-164]

Question of Arbitrability in Case of Enforcement of an Arbitration Agreement

An application may be made to the court to enforce an arbitration agreement either where one of the parties is reluctant to proceed with arbitration or where a party institutes a suit in contravention of an arbitration agreement. The court could refuse to enforce the agreement to arbitrate if it considers that the subject matter of the dispute is not capable of settlement by arbitration. Although Article 8 of the Model Law does not specifically refer to arbitrability as a ground for refusal to enforce an arbitration agreement, the general view is that the reference to an agreement that is "**null and void**" encompasses agreements whose subject matters are non-arbitrable. But neither the Model Law nor the New York Convention provide any guidance as to the law which a judge may apply in determining arbitrability in this kind of situation. The national court has to cope with some **problems** here. It may be that the arbitration agreement and the underlying commercial transaction have entirely no connection with the law of the forum. Furthermore, it could be the case that the rules of arbitrability in the lex fori are more restrictive than the law with which the commercial transaction is most closely connected. In these kinds of situations, it would be unfair to apply the lex fori that has neither a real nor a substantial connection with the commercial transaction.

A court should apply the law of its forum only in cases where the underlying transaction has an overwhelming connection with the forum. An illustration is the celebrated case of Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., where the U.S. Supreme Court utilized U.S. law in determining the arbitrability of antitrust disputes. It should be noted, however, that in Mitsubishi the commercial transaction had a significant link with the United States.

Question of Arbitrability Concerning the Recognition and Enforcement of an Award

Under Article V(2)(a) of the New York Convention and Article 36(1)(b)(i) of the Model Law, recognition and enforcement of an award may be refused if the subject matter of the dispute is non-

arbitrable under the law of the country where recognition or enforcement is sought. The national court before whom recognition and enforcement of an award is sought would therefore apply the lex fori in determining the arbitrability of the subject matter of the award. This approach guarantees the national court the opportunity to ensure that it enforces only awards that are the product of matters considered arbitrable under the national law.

Where the commercial transaction impacts upon another country, it strains the imagination to conceive of any justifiable reason why the law of an enforcement jurisdiction should be capable of declaring the subject matter of the dispute non-arbitrable. The primary reason why the jurisdiction of the enforcement court is invoked in instances like this is because the respondent has **assets** in the country that may be attached to fullfil its obligations under the arbitral award. In this case it seems reasonable to suggest that the lex fori of the enforcement court should not have any impact on the arbitrability of the dispute

Question of Arbitrability Concerning Setting Aside an Award

The final instance where the issue of arbitrability may arise is before a judge to whom an application is made to set aside an award. Article 34(2)(b)(i) of the Model Law provides that an award may be set aside where "the subject matter of the dispute is not capable of settlement by arbitration under the law of the enacting country." The only country whose courts could be asked to set aside an award under this article is the country that is the seat of the arbitration. Courts in other countries cannot set aside awards made outside their jurisdiction; they can only refuse to recognize and enforce such awards.

However, where the seat of arbitration is unconnected to the transaction between the arbitrating parties, it is illogical to use the law of the seat of arbitration in determining subject-matter arbitrability. The place of arbitration may be chosen due to convenience and the ability to attract qualified arbitrators to such a location. What is more, in some cases the seat of arbitration is chosen, not by the parties, but by third parties, such as an arbitral institution or the arbitrators themselves. The parties may therefore not be aware of the seat of arbitration at the time the arbitration agreement is contracted and the underlying

commercial transaction carried out. These factors demonstrate that it is unrealistic to use the law of the seat of arbitration in determining arbitrability in proceedings to set aside an award.
The injustice in testing arbitrability by the law of the seat of arbitration that has no connection with the agreement and the underlying transaction leads to suggestions made by scholars that the law unrelated to an arbitration agreement and its underlying transaction should not govern the arbitrability of a dispute, as their policy interests are not directly implicated.
But now it is the task of the contracting parties to avoid such inconvenient in regard to such far-reaching effect seat of arbitration.

Subjective arbitrability

Arbitration derives from the mutual consent of the parties. Party autonomy and the specific rights of the parties to choose arbitration instead of national courts to settle their commercial disputes are the cornerstones of international arbitration. So the jurisdiction of arbitrators is as much dependent on the scope of the dispute covered by the arbitration agreement as on the capacity of the parties to authorize such arbitration.Capacity is designated as subjective arbitrability because the issue of capacity is subjective to the respective parties; this contrasts with questions regarding what matters can be arbitrated, an inquiry that can be determined only on an objective basis.
It follows that capacity and authority are very crucial considerations in analyzing the jurisdiction of international commercial arbitrators. Absent one of the two factors, a party can dispute its consent to arbitration. The discussion often focuses on the issues of capacity and authority as they relate to State parties because a great majority of the cases where these issues have arisen in arbitral practice involved State parties. Due to the Commercial Code of Ukraine state cannot be involved in the arbitration process and no valid arbitration agreement can be concluded. Nevertheless, Ukraine is the state party to the ICSID Convention. The ICSID Convention entered into force for Ukraine on 7 July 2000 therefore not the State agencies but Ukraine as the Contracting Party can be involved in arbitration.

Conclusion

Arbitrability is of great importance as practical issue. On the one hand, we have the trend toward the recognition of the doctrine of party autonomy and the need for contractual security. On the other hand, objective arbitrability is a means by which countries delimit the scope of issues that can legitimately be the subject of private arbitration. Each State should be able to determine whether arbitration is an available option in resolving disputes that implicate its policy interest in a most direct way. All in all, parties to an arbitration should not be allowed to circumvent the rules on arbitrability in jurisdictions in which their transaction has its closest connection. In order to ensure that parties entered into valid arbitration agreement and will be able to enforce the award in case of arbitration we suggest that objective arbitrability should be determined in accordance with the law of the country whose national interests are most directly implicated by the commercial transactions underlying the parties' agreement.

However, arbitration clauses are not always given their deserved attention in international contract practice. Most commercial parties have little specific knowledge regarding the drafting of a dispute resolution clause. And it may be reduced to a "copy and paste" exercise using model or past contracts. By doing so the parties choose ad hoc or institutional arbitration, the UNCITRAL, ICC, SCC, ICSID or other Arbitration Rules without actually being aware of the differences between them.

The contracting parties should pay due attention in order to avoid negative far-reaching effect. As we mentioned before, it is important to choose the right seat of arbitration and identify the applicable law to govern the arbitrability. Consequently, the parties before submitting the dispute to the Arbitral Tribunal, it is desirable to find out whether the dispute arbitrability under the legislation not only the place of arbitration and a place of execution and the expected award.

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Arbitrability - the Line Between Public and Private Justice

[The phenomenon of arbitrability in international arbitration puts the interest of states and parties to arbitration into direct conflict, posing complex and continuing problem for practicioners. This area of law developed a big interest of scholars few decades ago. It's obvious now, that the broad circle of non-arbitrable disputes neglects the very idea of parties autonomy and out-of-court dispute settlement. This article examines the hottest issues of arbitrability and outlines the role and effect of imposing arbitratility restrictions on the development of international arbitration. Types of arbitrability, law applicable to it, Ukrainian legislation concerning arbitrabiliy and obstacles caused by it are particularly identified within the framework of this paper.]

Onysko Andrii
Foreign investors and companies usually face the question whether the disputes arising out of contracts they are going to conclude may be referred to arbitration, is it possible to enforce relevant arbitral award under certain jurisdiction? The term "arbitrability" in its most basic sense denotes every condition or requirement set forth in the legislation limiting types of issues which may and may not be resolved by arbitration due to the public policy of certain country[1]. It answers the question: "Does the legislation recognize a particular cause of action, authorize its adjudication by an arbitral tribunal, or does the legislation reserve its adjudication to the courts of law". [15;11] The concept of arbitrablity involves several elements that must be satisfied before dispute arising under an arbitration agreement can be referred to arbitration [8;228]. These elements form two types of arbitrability: objective (*ratio materiae*) and subjective (*ratio*

[1] Arbitrability in this context will be mentioned as one of the instruments of public policy.

personae) arbitrability. [2;6] Objective arbitrability defines whether the subject-matter of the dispute submitted to arbitration is one which can be resolved by arbitration. [5;5] Certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they may be dealt only by courts, e.g. antitrust, competition and corporate disputes. [1;5] Article II of the New York Convention concludes, "Each Contracting State shall recognize an agreement … concerning a subject matter capable of settlement by arbitration". With this provision in view it is clear that not all types of subject matters can be effectively arbitrated. Various jurisdictions regulate this matter differently so that there is no uniform treatment of the arbitrability. The lack of uniformity means that it is important to check the laws of each jurisdiction prior to entry into transaction. Otherwise, arbitrability will be revised at the stage of enforcement or annulment proceedings pursuant to article V(2)(a) on the New York Convention. [7; …] Parties usually raise objective non-arbitrability issue when they want to waive arbitration proceedings.

Subjective arbitrability says whether certain individuals or entities are considered unable to submit their disputes to arbitration because of their status or function. [5;5] This part of arbitrability is also called "capacity". It regulates the arbitrability by subjective criteria. It usually concerns the entitlement of states and public entities to submit their disputes to arbitration. In some legal systems public entities remain prohibited or limited from submitting their disputes or at least their domestic disputes to arbitration. [6;314] The arbitration agreement is invalid and the arbitrators lack jurisdiction, if either one of the two aspects of arbitrability is missing. [12;5]

Obviously, public policy expressed through arbitrability is a source of concerns for international lawyers. It usually leads to limitations or lack of arbitrability of disputes. After arbitration agreement is concluded, arbitrability generally arises at two stages in international arbitration proceedings. First, at or shortly after commencement of the arbitration, with one party arguing that the arbitration agreement is invalid or the dispute is not arbitrable. Second, and more commonly, at the stage of enforcement of a foreign award. [14;30] The definition of arbitrability conforms to international rules. Non-arbitrability grounds may be found both in the 1958 New York Convention

(Arts. III(1), V(2)(a)) and in the UNCITRAL Model Law (arts. 34, 36). [15;12]

Mentioned above definition of "arbitrability" yields important advantages. First, it serves to highlight those situations in which the legislature, rather than the parties – either directly or through operation of the law of contract place a claim outside arbitrations bounds. [15;12] Arbitrability should be understood more capaciously. Why is that so? A party resisting arbitration may argue that the contract of which the arbitration clause forms a part itself never came into existence, or is itself invalid and unenforceable. It may argue that its opponent waived its right to arbitrate. The party may even argue that some other barrier to arbitration stands in arbitrations way, whether time limits on the underlying claim, failure to satisfy a condition precedent to arbitration, or the principle of res judicata. [15; 11] All these elements form another part of arbitrability in its broader sense. They signify any feature of a dispute with reference to which the parties to arbitration can potentially keep arbitration from going forward. This entire bundle of issues has traditionally been called "threshold" or "gateway". This term usually encompasses only those issues that a court agrees to resolve, if raised on a timely basis, rather than leave for an arbitral tribunal to decide. [15; 7] Consequently, the dispute is only arbitrable if all threshold issues are resolved in favor of arbitration going forward. The most frequently implemented doctrines in this instance are kompetenz-kompetenz and separability[2].

Kompetenz-kompetenz principle demands that the arbitral tribunal, and not the court, should in the first instance decide the tribunal's competence. [16] The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. (Art.16 UNCITRAL Model Law on International Commercial Arbitration).[17]

The doctrine of separability provides that an arbitration clause is "separable" from the contract containing it and thus may survive a successful challenge to the validity of the contract. [13] While the

[2] These two terms are very often employed in international commercial arbitration and scholary writings. Omitting them from the consideration of arbitrability would make this analysis much narrower. (See Loukas A. Mistelis Arbitrability – International and Comparative Prospectives)

kompetenz-kompetenz empowers the arbitration tribunal to decide on its own jurisdiction, separability affects the outcome of this decition. The function of separability is to enable an arbitral tribunal to declare a contract invalid on the merits without thereby necessarily destroying the basis of its authority to make that very ruling. Otherwise, tribunal would potentially be obliged to deny jurisdiction on the merits since the existence of the arbitration clause might be affected by the invalidity of the underlying contract. [15, 22] Both kompetenz-kompetenz and separability are recognized in Ukraine.

It is also essential in considering non-arbitrability issues to distinguish between matters which are non-arbitrable in a domastic context and those which are non-arbitrable in an international context. In many jurisdictions arbitrability rules are broader in domestic than in international matters. It is important due to the fact that a particular matter is non-arbitrable in a domestic setting does not necessarily mean that in will be non-arbitrable in an international setting. The rationale for this conclusion is that in international cases national conceptions of public policy and mandatory law should be moderated in light of the existence of the competing public policies of other states and the shared international policy. [8,775]

When introducing the issue of arbitrability in international commercial arbitration it is necessary to focus on law applicable to arbitrability, as it has a very important practical meaning,[3] it is usually caused by the conflict of *lex fori* and *lex loci arbitri*. [4] The prominence of *lex fori* as the most relevant law to determine arbitrability remains unquestionable, especially when the issue arises before a national court at the stage of enforcement. Here, the express mandate of the New York Convention (NYC) Art. V(2)(a) leaves very little space for a different view, as well as

[3] I want to note from the outset of this paper that determining the applicable mandatory law which defines arbitrability of dispute is usually one of the obstacles arbitrability causes for international arbitration, that is why I consider it necessary to described in this context.

[4] "lex fori" is used when the issue is examined from the perspective of a national court, referring exactly to the national law of this jurisdiction. Whereas, the term "lex loci arbitri" is used when the issue is examined from the perspective of an arbitral tribunal, referring to the national law of the seat of the tribunal.

national laws: Art.12 of The Commercial Procedure Code of Ukraine, German ZPO s.1030(1), Art.22 EC Regulation 44/2001 in EU. [9, 100]

In international commercial arbitration, the law governing the arbitrability of a dispute may depend on where, and at what stage of the proceedings the question arises. [1, 2] The application of *lex fori* varies at different stages: 1) when the issue of arbitrability arises before national courts at a pre-award (i.e. referral) stage, 2) at the stage of annulment proceedings, 3) at the stage of enforcement proceedings, 4) and finally when the issue of arbitrability arises before a tribunal [9; 102]. In the first case (referral stage) the *lex fori* will be relevant only to the extent that the jurisdiction of the national courts before which the dispute is referred (the national courts of referral) will be relevant for the specific dispute at hand. The national courts should by analogy apply New York Convention (NYC) Art. V(1)(a) (providing for the application of law of the place "where the award *was* made") and thus apply the law of the place where the award *shall* be made. To explain further – national courts assume jurisdiction over a specific dispute on a territorial basis, namely whenever the pending dispute has a territorial link with a particular country of these national courts. [9;103] In the second case, *lex fori* shall be applied as well, but only in case the dispute has no territorial link with the seat. This is mainly because the majority of national provisions on challenge include a provision that mirrors the NYC Art. V(2)(a) or Model Law Art. 34(2)(b)(i), providing that "the subject matter of the dispute is not capable of settlement by arbitration under the law of this State". In the third case, *lex fori* will be the sole point of reference for the enforcement courts, referring to the same provisions mentioned above. [9;109] And finally when the dispute stands before the arbitral tribunal the arbitrators should take the *lex loci arbitri* into account only when the pending dispute has a territorial connection with the seat of the arbitration. The tribunal should answer the following questions: Is there any arbitrability rule of the national law of the seat, granting its national courts exclusive jurisdiction over a *type of dispute*, such as the one pending before the tribunal? If in the affirmative, is this national provision applicable to *the specific dispute pending* before the tribunal? [9; 111]

Pending arbitrability issues exist in Ukrainian context as well, and their specific nature should be outlined here.

The most acceptable alternative found by investors for litigation in Ukrainian courts is international arbitration. However, the provisions of domestic law in this aspect bring a lot of risks for future enforcement of an arbitral awards. Arbitrability is one of those kinds of obstacles.

Ukraine adopted separate laws on domestic and international arbitration. Arbitrability of commercial disputes in international context is largely determined by The Law of Ukraine on International Commercial Arbitration (Arbitration Act), which closely follows the UNCITRAL Model Law of 1985. Ukrainian legislation provides neither the definition of the term "arbitrability" nor the exhaustive list of the disputes which are non-abitrable. However, the abovementioned act (Art.1) defines disputes (on the basis of subjective arbitrability) which may be referred to international commercial arbitration as follows:

- disputes arising from contractual and other civil law relationships in connection with foreign trade and other kinds of transactions, provided that the place of business of at least one of the parties is located abroad;
- disputes arising between enterprises with foreign investment, international associations and organizations established on the territory of Ukraine; disputes between the members of such organizations; as well as disputes between such organizations and other Ukrainian entities.

References to non-arbitrable disputes can be found separately in some international agreements and national laws, Ukrainian legislation doesn't expressly define the following types of disputes as non-arbitrable. [14; 511] Commercial Procedure Code of Ukraine (CCP), in Art.12(2) contains restrictions and prohibits submitting to arbitration:

- disputes on invalidation of acts of state authorities;
- disputes concerning execution, change, termination and fulfillment of state procurement contracts;
- disputes arising out of corporate relations between a company and its participant (founder, shareholder), including a former participant, and between the participants related to the establishment, activity, management and termination of the company. [3; 2-3]

Some additional restrictions include disputes that according to the Civil Procedure Code of Ukraine, are categorized as "non-contentious proceedings" (generally, such disputes relate to the

establishment of legal facts, disclosure of bank secrets, restoration of rights for lost securities, etc.), disputes concerning the bankruptcy of a Ukrainian debtor. [14; 511-512]

One of the arguable issues of arbitrability in Ukraine is Art. 77 of Private International Law Act of Ukraine (PIL Act). This article provides exclusive jurisdiction of the national courts over disputes concerning immovable property, intellectual property and securities disputes. [14; 512] According to Moss the reason for exclusive jurisdiction in these aspects is protection of disputes important for public policy considerations. [10;193] Art.77 was drafted on the basis of Art.22 of EC Council Regulation No 44/2001. According to Art. 1(2)(d) of the latter Art.22 shall not be applied to arbitration, and thus doesn't define arbitrable matters. However, Art.22 is usually applied for that purpose. [4] According to Arfazadeh exclusive jurisdiction may have some hidden intercourse with arbitrability especially in countries which law doesn't provide an exhaustive list of non-arbitrable disputes. [11; 55] One more argument is that PIL Act regulates neither issues connected with jurisdiction nor the arbitrability of disputes. Arbitrability must be defined by Arbitration Law, which is drafted with close proximity to UNCITRAL Model Law. Art 1(4) of the Arbitration Law states that its provisions do not restrict any other law clearly defining some disputes as non-arbitrable. It means that provisions of any other act should expressly and clearly state non-arbitrability of dispute[5]. [4] Moreover, according to the Decition of the Supreme Court of Ukraine dated June 29, 2006 arbitrability of commercial disputes (including international arbitrability) is defined by Art.12 of Commercial Procedure Code of Ukraine. This statement was confirmed by the recent Resolution of Supreme Commercial Court of Ukraine dated November 29, 2007 [6]. [4] However, recent legal practice demonstrates that Art.77 still causes confusion and there is a tendency to apply this provision to avoid arbitrating these types of disputes. [14;512]

When evaluating the risks of referring to arbitration in Ukraine with commercial dispute it should be borne in mind that even if

[5] Exclusive jurisdiction stated in Art. 77 was also argued by the Resolution of Supreme Commercial Court of Ukraine "On issues concerning …"

[6] Case number 32/170

arbitral tribunal finds such disputes arbitrable and renders an award thereon, it will most probably be refused in obtaining an enforcement permit and writ of execution on the grounds of non-arbitrability. [3;2]

The first step to restrict arbitrability of corporate disputes was made on 28 December 2007 by the Recommendation of the Presidium of the Higher Commercial Court of Ukraine "On Practice of Legislation Application in the Disputes arising out of Corporate relation" quite broadly prohibiting the resolution of corporate disputes with regard to Ukrainian company through arbitration. After that the Resolution of the Supreme Court "On Court Practice of the Corporate Dispute Consideration" specified that only corporate disputes related to the activity of a company registered in Ukraine and, in particular, arising out of corporate management, are non-arbitrable regardless of the shareholding structure. After in 2009 Recommendations were amended, they specifically set out that relations on the turnover of shares, except the relations concerning realization of the preemptive right to acquire shares, shall not be deemed as relations concerning the activity of the company and its corporate management. Thus such category of disputes arising out of share purchase agreements were still arbitrable. [3;2] In 2009 Ukrainian parliament adopted changes to the Commercial Procedure Code of Ukraine that prohibited the arbitration (domestic or international) of any disputes arising from corporate relations between a company and its current or former participants, or between the companies's participants themselves, relating to the establishment, activity management or termination of their company. This amendment was passed in order to address corrupt practices of certain local arbitration institutions in considering corporate disputes and to formalize positions expressed in recommendations. As a consequence of these legislative changes, any arbitral award concerning these types of corporate disputes will run counter to the new provisions of the Commercial Procedure Code of Ukraine and, as such, will not be enforceable in Ukraine. [14;517]

The list of non-arbitrable disputes includes the term "commercial contracts related to satisfaction of the state needs". The absence of express definition of the abovementioned term leaves the possibility of its broad and obviously "non-arbitrable" interpretation by Ukrainian courts. The Law on Public Procurement for Satisfaction of the Priority State Needs defines the term

"priority state needs" and sets out that such needs are to be satisfied through public procurement. The peculiarities of such contracts are provided for in the Commercial Code of Ukraine (Articles 13 and 183). However, the legislation doesn't provide an exhaustive list of that kind of customers. For that reason foreign companies should negotiate arbitration agreements with such customers with a very high degree of caution. [3; 2]

Another obstacle caused by arbitrability in Ukraine is applicability of the Arbitration Act only within the territory of Ukraine which affects the disputes between entities with foreign investment or disputes with such entities and other local legal entities. There is a risk that recognition and enforcement of such arbitral awards may be denied if it is rendered abroad. [3; 2-3]

To sum up, arbitrability now is not mere academic discussion. Despite broadening the circle of arbitrable disputes all around the world Ukrainian legislation still has a lot of restrictions which make the arbitral regime not really friendly.

Broadly speaking the tendency of enshrining non-arbitrability considerations in domestic legislation makes national courts and arbitral tribunals each other's opponents. The development of market economy and restraining arbitrability can't go together. Limiting the scope of arbitrable disputes will cause investors and other international agents submit their disputes to foreign institutions.

There is an increasing tendency to refuse the enforcement of arbitral awards both under Ukrainian and other jurisdictions. However such refusals must be exceptional. With a possibility of refusal in view the party which lost arbitral proceedings usually appeals the award to a court of law (or makes the appeal invoked by the court *ex officio*[7]). Such an award deciding matters of objective or subjective arbitrability can be easily set aside or refused recognition and enforcement, due to surprisingly broad interpretation of arbitrability restrictions of legislation. That's why arbitrability can be easily misused. Traditionally judges of common jurisdiction courts have little experience in commercial disputes and very limited knowledge of arbitration, which has resulted in

[7] It is usually mentioned that the corrupt practices of local courts are not addressed yet, in addition to the fact that enforcement authorities can take any action prescribed by courts merely using formal excuses to obstruct the enforcement of foreign arbitral awards.

an increase in the number of appeals concerning arbitration. Implicitly, arbitrability becomes the protection of one party of the proceedings rather than the legal system as a whole.

Arbitrability increasingly becomes a barrier to party autonomy in the choice of the applicable law. The issue of whether arbitrability relates to the validity of an arbitration agreement or to the tribunal's jurisdiction has important practical repercussions. It may, in particular, influence the discussion of which forum should be given priority, or even exclusivity, in determining arbitrability: national courts or arbitral tribunals? While different approaches have been taken on this issue, the prevailing view seems to be that courts and tribunals have concurrent power to review arbitrability at a pre-award stage. [11; 40]

Uncertainty in arbitrability of some disputes is the most controversial issue, it gives rise to the risks of (i) arbitral tribunal's conclusion of its non-competence to decide the dispute, (ii) setting aside or (iii) denial in enforcement of the award by competent court. The category of non-arbitrable disputes is not usually clearly defined by the law, and may cause the problems mentioned above through broad interpretation of certain arbitrability provisions (real estate, corporate disputes).[8] Moreover, practitioners usually face low awareness of the judges with key principles of international commercial arbitration and desire to monopolize consideration of the most controversial types of disputes. For that reason bad reputation of domestic arbitration very often reflects important tendencies of domestic jurisdiction in general. [5;8]

Non-arbitrability tendencies are increasingly harmful for international arbitration. The application of this concept allows a considerable amount of judicial discretion in defining arbitrability of disputes. In order to preserve decision making autonomy within the arbitration system, it is important that domestic jurisdictions avoid extensive and unclear broadening of scope of non-arbitrable disputes. Wide reliance on public policy in considerations embedded into non-arbitrability may jeopardize autonomy and effectiveness of international arbitration together with the prestige of domestic arbitration systems.

[8] Here I mean the problem of Art. 77 of PIL Act of Ukraine and the absence of exhaustive list of non-arbitrable disputes in Ukraine and other countries

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State has long since ceased to be an entity whose legal status is ruled only by regulations of public law (or public international law if we are taking into account the interstate scale of relations). Nowadays State in the person of its bodies, agencies and corporations often acts as a "private person" according to the provisions of private (or private international) law, especially in the field of contractual obligations, State's participation in which is the reality and an important constituent of modern economical, social and legal life. Nevertheless, the State, speaking metaphorically, very unwillingly lefts behind its "public nature" and agrees to conduct as the person of jure gestionis instead of more accustomed role of jure imperii.

That is why it is so important not only to provide the proper legal background for commercial interactions between State and non-State, but to ensure the effectiveness of legal defense of violated rights, when the wrongdoer is a polity. In this case one of the most noticeable in the list of the mechanisms of such defense is, undoubtedly, the international commercial arbitration because of its impartiality, consensual nature and confidentiality, all of which are extremely essential primarily for the enterprise. In that light the issue of arbitrability of disputes with State involvement becomes one of the principal.

But before investigating the features of the aforementioned subject and their impact on international commercial arbitration in general, let us briefly look at the meaning of the "arbitrability" term and its integral components with the purpose to distinguish further the most relevant of them according to the aim of our topic.

Foremost, there is no internationally acknowledged legal definition of arbitrability, though exists almost worldwide accepted understanding of this term. Arbitrability could be considered with the respect of two main elements: objective – the matter of the dispute must be capable of being resolved by arbitration and subjective – the party must be entitled to submit to arbitration [14, p. 312; 15].

So in closely connected complex arbitrability is both the characteristic of the dispute or, more precisely, its legal nature (e.g. is it corporative disputes or certain antitrust and competition matters, when the first one is arbitrable, while the second in most jurisdictions – isn't [10, p. 5]) and the parties right to apply to arbitration, which can be limited for State entities or may require a special authorization [23, p. 270]. In other words the question of arbitrability as some authors emphasize is where arbitration is an accepted method of dispute settlement or not [10, p. 5] and the key to "arbitrability" in international commercial arbitration is the subject matter of the claim [11].

The legal basis of such comprehension of arbitrability are the provisions of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as New York Convention of 1958), namely Article II (1) which states that each contracting State recognize an agreement under which the parties undertake to submit to arbitration concerning a subject matter capable of settlement by arbitration, and Article V (2)(a), which provides that an arbitral award may be refused recognition and enforcement if the competent authority in the country where recognition and enforcement is sought finds that subject matter of the difference is not capable of settlement by arbitration under the law of that country [2].

The last provision as A. Redfern and M. Hunter presume serves as a degree of control which the State is entitled to exercise in return of its assistance to the arbitral process [1, p. 65]. Also it represents the power of the State to "leave the final word to itself" in the matter of arbitrability of a certain dispute and in the aspect of prevention of public policies violations. As stated in famous Mitsubishi v. Soler Chrysler-Plymouth case, "having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed" [12].

Mentioned provisions were also included in the text of UNCITRAL Model Law on International Commercial Arbitration in Article 34 (2)(b)(i) and Article 36 (2)(b)(i) which provide that if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State it could be a reason for setting aside the award or for refusal of recognition or enforcement of an arbitral award in this State [20].

Also it is important to remember that there are several jurisdictions that can play the role of the law applicable to the issue of arbitrability, i.e., law on the basis of which the arbitrator will decide whether settlement by arbitration is admissible or not (if we are considering the pre-award stage). It can be, for example, the law governing the substantive contract or the law of the arbitration agreement [23, p. 275], but, in general, the question of arbitrability is settled upon the provisions of lex arbitri – the national legislation of the country where the arbitral tribunal has its seat [24]. The importance of this matter in the scope of not only arbitrability, but also the possibilities of recognition and enforcement of the arbitral tribunal's award is difficult to overestimate.

When speaking about State participation in commercial arbitration all of the observed components and closely connected matters of arbitrability are highly significant. But in this article for the purpose of proper analysis we will concentrate, by our opinion, on the most relevant issues concerning the outlined sphere showing their impact on the development of international commercial arbitration today.

The first issue which concerns arbitrability of disputes where party is a State can be present even before the direct appeal to arbitral tribunal and usually is hidden until the same moment of it. The matter is that who actually is the party to the contract when the State is claimed to be the party? The government which represents State itself, the state agencies or instrumentalities or almost absolutely autonomous in certain legal systems state corporations and on which behalf they are acting? The outcomes of this, at the first look, quite simple question affects everything – the capability of execution of the agreement both in financial and administrative meanings by such a party, the status of its assets and can they be an object of imposed penalties, the tribunal jurisdiction to settle the dispute, the possibility of enforcement of the arbitral award etc.

So, let us have a more precise view on this point. Under private international law the definition of State depends on the provisions of the applicable law which is usually the national legislation of the proper country and thus may vary quite substantially. While in one jurisdictions State agencies and State instrumentalities (and sometimes even the governments) have separate legal personality and enter into the arbitration by their own name (as well as in

different kinds of commercial relations), in others they are bound with the "core" State and don't have the right to entry the arbitral procedure [22, p. 3], so the subjective criteria of arbitrability does not observe in such case.

It is important to mention the provision of article 2 of European Convention on International Commercial Arbitration of 1961 which provides that "in the cases referred to in Article 1, paragraph 1, of this Convention (international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States and to arbitral procedures and awards based on agreements referred to in paragraph 1(a) above – D.S.), legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements" with the right of the State "on signing, ratifying or acceding to this Convention to declare that it limits the above faculty to such conditions as may be stated in its declaration" [6]. D. Hascher in his commentary to this Convention claims that the expression "legal persons of public law" should be interpreted in a broad way – not only public corporations falls in the scope of it, but also States and any public agencies [3]. Generally this norm is extremely important, though the right of the State to limit its scope to some extent eliminates it, especially in countries of civil law system.

But one of the most serious difficulties in the scope of mentioned earlier is does such party (body, agency or corporation) has the legal authority to bind the State, or does it act only on its own behalf? And furthermore from this point of view can the State "bind itself" and how if it wasn't done in the "normal" way provided by the national or international law?

For example, in Svenska Petroleum Exploration AB v. Lithuania case [17] the contract under which Svenska and Geonafta (former EPG) agreed to establish a joint stock company to exploit the oil reserves within the area of Lithuania didn't include the Government as a party to it, but several of its articles contained not only terms dealing with the rights and obligations of Svenska and EPG but also terms dealing expressly with the rights and obligations of the Government. Also the contract consists of the next rubric: "The Government of the Republic of Lithuania hereby approves the above agreement and acknowledges itself to be legally and contractually bound as if the Government were a

signatory to the Agreement". Governing by this the ICC tribunal found that the government was bound by this contract.
Another case – the Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL) in which the arbitral tribunal stated that on the Kuwait side the agreement was concluded by the Minister of Finance and Oil. And it is a matter entirely of Kuwait law whether that Minister had capacity so to act, while AMINOIL has correctly accepted him as duly authorized, and the Government of Kuwait has always recognized that the Minister legally bound the State. Thus this Agreement was always valid ab origine [19].
The same decision was made by the arbitral tribunal in the dispute between Dallah, a Saudi Arabian company, and the Government of the Pakistan on the basis of the contract between the Claimant and a trust approved by the Pakistani cabinet and established by the Pakistani Ministry of Religious Affairs ("Awami Hajj Trust", which ceased to exist before the initiating of the arbitration process) when the Government refused to participate in the arbitration proceedings or sign the Terms of Reference motivating it as it was not a party to a valid arbitration agreement. The tribunal stated that the Ministry of Religious Affairs, Government of Pakistan, was bound by the arbitration agreement, but unfortunately it's decision was abolished by the High Court which refused the enforcement of the tribunal's award in England for what the Dallah was addressing [7].
Concerning the general ICC practice in resolving such matters the former Deputy Secretary-General of the ICC International Court of Arbitration E. S. Romero concludes that ICC case law establishes that the conduct of an organ of the State will always engage the State's liability and its involvement in the arbitration procedure. So there are even no distinction between the State and its organs for purposes of determining the State's liability [5, p. 33]. However that doesn't apply in the case of state agencies, many of which are designated as separate legal entities with their own assets and more even when talking about state corporations.
In our opinion the solution of the discussed problem lies in the necessity of development of an internationally acclaimed provisions, independent from the national legislation as far as it possible, which would govern the general provisions of defining when the State body or corporation are acting on behalf of the State and when the State has no relation to their obligations. By

no means aiming to narrow the jurisdiction of the State concerning its agencies or instrumentalities and not having a purpose to interrupt into the State's internal policy, this provisions would only regulate what actions by the state, no matter of its national legislation, would definitely indicate its "participation" in the affairs of its bodies concerning the field of commercial relations, regulated by private law. As the result of this – the clear understanding of who is the party of the dispute and is it arbitrable with all the attendant outcomes, such as establishing coherent situation concerning States involvement in international commercial arbitration, while the present order of things leaves a lot of room for different interpretations and applying of the provisions of national and international law.

It would be fair to say that such work is established, but only in the field of public international law, for example the Article 4 (1) of United Nations Draft articles on Responsibility of States for International Wrongful Acts declares that the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. Under the provision of Article 5 of this act the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance [4].

Moving onward, after reviewing the "who is who" issue in disputes involving States and their agencies with its impact on the development of international commercial arbitration, let us investigate the objective component of arbitrability – the subject matter of the dispute with the respect of step-by-step exposition.

According to the provision of Article 1(3) of the New York Convention the Contracting State may declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration [2]. Several significant and highly influential statements on the matters of disputes arbitrability are coming out of this one sentence, as well as the series of issues. What

relationships are generally considered commercial? What is the effect of the exceptional States authority to define them and can the arbitration be commercial when it involves State entities and what is the impact of it on the international commercial arbitration if the answer is "yes"?

Though in international law there is no exhaustive legal definition of the term "commercial", a number of worldwide recognized acts are trying to establish the common understanding of the way how to define it on the level of national legislation. According to the footnote to the Article 1 of UNCITRAL Model Law on International Commercial Arbitration the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not, such as: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road [20].

Under the Article 2 (1) of the United Nations Convention on Jurisdictional Immunities of States and Their Property "commercial transaction" means any commercial contract or transaction for the sale of goods or supply of services; any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons [21]. As concluded I. Guevara-Bernal: "the notion of commercial includes all kinds of economic transactions (excluding family and labor matters), irrespective of the private or public status of the parties involved" [8, p. 9].

So the main standing points of defining commercial relationships are their nature, when the parties are aiming to receive economic benefits from proper fulfillment of the contract between them while such elements as contractual or non-contractual character of relations or the status of the parties are generally irrelevant.

"Generally" because of another important conclusion which arises from cited earlier Article 1(3) of the New York Convention: the right to define what interactions are commercial belongs exclusively to State. Using it the public authorities sometimes

excludes purely commercial relations from the scope of international commercial arbitration, making them non-arbitrable. For example – some aspects of antitrust and competition law, which aren't connected with domineering activities of the State, the whole field of maritime law [13, p. 61] and so on.

Taking into consideration the irrelevance of private or public nature of the contractor in commercial relations on the one hand and the right of the State to create its own definition of the term "commercial" according to its own interests on the other hand can we still claim that the arbitration between such parties will be of commercial nature regardless of the seat of arbitration? The answer is definitely "yes" because: a) the commercial nature of these transactions, which is determined by the presence of a foreign undertaking as one of the contracting parties, and b) arbitration is undoubtedly the result of a contractual clause [14, p. 36].

This output has the great relevance to the whole idea of international commercial arbitration with State participation, because makes it possible on the theoretical level and affects the legal approach to the matter of establishing of the general provisions of arbitrability, arbitral procedure, recognition and enforcement of arbitral awards applicable to the arbitration where State is a party. Though on the modern stage of development the inevitable are exceptions and special provisions on that matter.

And one of them is the doctrine of States immunity from the jurisdiction of any arbitration. Generally it is acknowledged and legally stated that if the State enters any commercial transaction and concludes the arbitration agreement it can't refer to immunity from arbitral tribunal jurisdiction. Article 10 (1) of United Nations Convention on Jurisdictional Immunities of States and Their Property states: "if a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction" [21].

Similar provisions could be found also in national legislation of different countries. For example, article 177 (2) of Swiss Federal Statute on Private International Law provides that a State, or an enterprise held by, or an organization controlled by a State, which

is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement [18]. The article 3 (1) (a) of the United Kingdome's State Immunity Act of 1978 points that A State is not immune as respects proceedings relating to a commercial transaction entered into by the State [16]. Despite that State often tries to "escape" the arbitration and turn to its national courts, where it can be "more equal" than private individuals by using their legislative power or administrative measures [13, p. 62]. The solution of this issue lies not only in the legal field, but in practice of interstate relations.

According to ICC Commission Report on arbitration involving States and State entities under the ICC Rules of Arbitration approximately 10 per cent of ICC cases involve a state or a state entity. ICC arbitration is chosen for resolving a wide variety of disputes involving both large and small amounts in them, in all parts of the world, although there is a concentration of cases from Sub-Saharan Africa, Central and West Asia, and Central and Eastern Europe (between them, cases from these regions account for about 80 per cent of ICC arbitrations involving states or state entities) [9].

This testifies that the matter of State participation in international commercial arbitration ascends into quantitatively and qualitatively new level of development. Though acting like private persons in commercial transactions of an international scale, States generally aren't willing to recognize themselves bound by arbitration clauses and ready to enter the arbitration. And there are still a lot of issues which arise from this point, especially in matters of arbitrability of disputes with State participation, which we were discovering in the present article. Enterprise shall as well always be aware of difficulties which may come from States immunity, public policy or administrative measures, appeal to which States or their entities are trying to escape the arbitration procedure.

In conclusion we want to emphasize that the solution of investigated issues in the way of creating the universal guidelines for enterprises in their disputes with States or State entities, as well as setting the most important provisions on interstate scale by adoption of international conventions will bring more certainty and effectiveness into the field of international commercial arbitration with State participation.

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The formation of the International Arbitration Institute, in most countries, was at the beginning of the twentieth century. [1; 5] Undoubtedly, it was formed due to the development of international private law relations, as an alternative to national legislation that was unfavorable to international trade and investment.

More attention has been drawn to a problem of consideration of certain disputes in international commercial arbitration. It can be explained by a growing role of international commercial arbitration as an institution of alternative dispute resolution between private economic relations parties from different countries.

One of the features of ADR (alternative dispute resolution) is voluntary nature of arbitral awards enforcement. This voluntariness corresponds to the legal nature of this jurisdiction. [14; 1305]

But in practice it is not that perfect. For the enforcement of arbitral award, in the absence of voluntariness, the party often appeals to national courts of the place of enforcing, because this is the procedure stipulated in the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. According to the Convention, recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country. [12] Meaning, that the dispute is recognized not arbitral.

The term "арбитрабильность" was introduced in the Soviet legal doctrine as a transliteration of the English term "arbitrability" by Professor S. Lyebedev in 1979, and in this very transcription, although later some authors began to use the word "арбитрабельность". [11; 141] The term "arbitrability" outlines a range of disputes within the scope of arbitration competence that may be a subject of its trial. [13; 41]

Arbitrability in international arbitration doctrine is traditionally interpreted in both a broad and narrow sense. In a broad sense,

among others, it also covers issues related to the existence and validity of the arbitration agreement. Some scholars see it as a function of arbitration to establish arbitrability of a dispute during its consideration. In a narrow sense, arbitrability refers to a category of disputes that may be submitted to arbitration for a determination. [16; 95]

New York Convention contains no rules on arbitrability of disputes; the issue remains to be considered by the national legislation. [16; 111] Each state independently, guided by its own sovereignty, defines the range of disputes that may be considered in international commercial arbitration, and those that can only be considered in court. [18; 141]

Government policy regarding arbitration is a balance between the internal importance of keeping some issues solely for the court, and the interests of a wide range of people who want to use arbitration in the promotion of trade and commerce. [4, 4] Public policy on arbitrability is affected by a number of factors, in particular:

1) rights of third parties; 2) public interest; 3) inalienable rights, [3; 3] and 4) level of confidence.

Rights of third Parties cross arbitrability in case the resolution of such dispute affects not only the two parties but also other people, or in case there is a reason to believe that the number of people whose rights may be affected by the award has not been fully established. Plainest example of this is bankruptcy disputes when sometimes it's not in the interest of any of the parties to determine all creditors.

Some disputes may be related to sensitive issues and each country wants to protect its borders keeping the matter within the competence of national courts. [1; 4] On the other hand, rejection of the award may be explained by the fact that in order to implement it the country has to disturb public order. In fact, arbitrability and public order are combined phenomena. Arbitrability relates to the legality of the arbitration agreement or process, while public order relates to the laws and standards that may conflict with an agreement or decision. Violation of public policy leads to non-arbitrability of agreement. [5; 2] Courts often appeal to public policy as the main tool. An obvious example is criminal law, where criminal offense is related to a negative impact on social relations, that's why the autonomy of the parties is limited here. In Slovakia, it is also labor law. [4; 2]

Public policy by its very nature is mandatory rules of morality and justice, the violation of which will violate human rights in that country. It is expressed in domestic law, constitutional limitations or the jurisprudence of certain states, and is a principle based on the idea of the public good. Public policy is inherently a dynamic concept that is constantly evolving to meet social needs, including social, cultural, moral and economic aspects. [1; 12]

Determining of dispute arbitrability is also affected by the social impact of the subject matter of the dispute and by the level of confidence of the legislative and judicial branches of the Institute of dispute resolution by arbitration. It is believed that if the subject matter can create social consequences it is determined as not arbitrable. Legislature and society's trust to arbitration is also an important parameter that affects the total allowable amount of arbitrability.

Different national laws on arbitration define differently which law regulates the matter of arbitrability. In common law countries, they directly determine subject matters which can be settled by arbitration. In traditional law countries, this approach is used in the jurisprudence. In continental law countries, the legislative body issues a law concerning disputes that could be considered by arbitration. [4; 3]

Arbitrability of dispute is connected not only with the objects of the dispute, but also with its subjects. [18; 142] So, in the theory of arbitrage, there are two groups of problems on arbitrability. The first group are those interested in arbitration, i.e. subjects of arbitrability (in theory, this group of problems is called "subjective arbitrability" or "ratio personae"). The second group is the nature of the legal relationship that caused the dispute, and it's objective arbitrability. [16; 96] Both groups are limited by national law in consideration of a dispute by international arbitration. So arbitrability is a combination of objective and subjective elements. In the absence of one of them, the proper subject or legal relationship, the determination of which is permitted by domestic law, the dispute is recognized non-arbitrable and cannot be settled in international commercial arbitration.

In general, there is a rule that the arbitral tribunal must refuse to consider a dispute on its own motion if it is not arbitrable based on facts presented by the parties. Although the parties have the right to decide which principle to be applied by arbitration, this principle doesn't apply to evasion of mandatory rules that regulate

the arbitrability issue. The parties cannot exclude the application of the law that is used by arbitration when it comes to determining the dispute arbitrability. [4; 5]
In Austrian law, subjective arbitrability is understood as the ability of the parties to conclude an arbitration agreement. [13; 42] Legislation of Ukraine determines that the dispute can be transmitted to international arbitration in two cases: if at least one of the parties has a commercial enterprise abroad, or if at least one party is an enterprise with foreign investment, international association or organization set up in Ukraine, or is a member of the company, association or organization. [9] It is believed that the state and state agencies can not be a party to the arbitration agreement. [4; 2] But in my opinion, the state can be a party to an arbitration agreement as it is able to engage in private legal relations as an equal member and enjoy legal personality of the legal entity of private law. Thus, the subjective element of arbitrability occurs when the parties enter into a relationship as subjects of private relations. The question "what should these private legal relations be like?" pertains to the objective arbitrability.
In most cases, scientists define arbitrability only from the side of its objective element, that is from the side of the subject matter of a dispute. Objective arbitrability determines the amount of public relations, disputes regarding which can be settled by international arbitration.
For example, Swiss PIL Article 177 stipulates that any dispute of property can be the subject of arbitration consideration. [7] Such an example is a broad definition arbitrability in national legislation. Thus, according to Article 1676 (1) of the Belgian Judicial Code, any monetary claim can be transferred to arbitration. [2] According to section 1 of the Swedish Arbitration Act, disputes concerning the legal relationship on which the parties can reach an agreement are arbitrable. [6; 1]
Detailed analysis of Article 1, part 2 of the Law of Ukraine "On International Commercial Arbitration" sets the "foundation of arbitrability" which is fixed by domestic law. This article defines two independent compositions of arbitrability.
According to the first composition an objective element is a civil relations dispute which arises in international economic relations, and a subjective element is a condition that one of the parties is a

commercial company outside the state. On these conditions, the dispute may be considered in international commercial arbitration.
The second composition requires a subjective element which is an enterprise with foreign investment, international association or organization set up in Ukraine and their members. An objective element of the second composition of arbitrability is not determined, and that gives a reason to believe that the subject matter of a dispute is almost unlimited. Limits are set only by the legal capacity of the subject, his ability to be a member of social relations regarding which a dispute can arise in the future. In other words, if one of the parties of a dispute is one of the above subjects, the international arbitration may consider a dispute of any legal nature that this subject might have. At the beginning of Ukrainian statehood and economy development this approach was called to attract foreign investors, guaranteeing them opportunities for rapid and economic settlement of disputes with their participation.
But not for nothing, it was noted that these rules of law set "foundation of arbitrability." Part 4 of the same Article contains provisions saying that any other law with its standards is able to additionally determine disputes that can not be transferred to international arbitration and disputes which may be transferred to it, but under other provisions than those in this law. [9] For example, Part 2 of Art. 12 of the Economic Procedural Code of Ukraine, before the modification in 2011, [8] contained the following arbitrability restrictions: 1. disputes concerning invalidation of acts; 2. disputes concerning conclusion, amendment, termination and execution of commercial contracts associated with meeting public needs; 3. regarding corporate relations - disputes between a business entity and its members (founders, shareholders), including a dropped out member, and between the members (founders, shareholders) of a business entity related to its creation, activity, management and termination, except for labor disputes. [10]
Although corporate disputes are quite arbitrable according to the current law, the decisions handed down in such disputes often cause significant difficulties created by the prevailing approach of the state judicial system which is not in favor of corporate disputes arbitrability. [13; 43]
Those disputes the subject matter of which is realty should be recognized as arbitrable. In accordance with the Provisions of the

Maritime Arbitration Commission at the Chamber of Commerce of Ukraine, [15] the commission can consider disputes arising from relations on ship chartering, sale and mortgage of seagoing vessels; meanwhile the Civil Code of Ukraine[17] establishes that ships and vessels of inland navigation are considered realty. [18; 147]

Provisions of Article 77 of the Law of Ukraine "On International Private Law", establishes a list of disputes with a foreign element that belong to the exclusive jurisdiction of the Ukrainian national courts. Cases listed in the Article can not be transferred by the mutual consent of the parties for settlement to the foreign courts. Some scientists believe that these disputes can not be considered in international arbitration either. But the analysis of the concepts "amenability", "jurisdiction" and "arbitrability" interrelation leads to the conclusion that the use of "amenability" and "jurisdiction" concepts in relation to international commercial arbitration is not justified as the part of the main distribution mechanism in relation to disputes that are transmitted to arbitration institution is played not by the institution of jurisdiction which is not fixed in the law of international arbitration, but the parties' private procedural agreement on the choice of a particular method of alternative dispute resolution. [16; 101] Thus, attributing this or that category of cases to the exclusive jurisdiction of the Ukrainian courts is not a ban on the consideration of such cases by international arbitration. [18; 146]

Note that the legislation of Ukraine does not impose additional restrictions on arbitrability except those that are established the Law of Ukraine "On International Commercial Arbitration". This uncertainty ultimately can lead to violations of third party rights and public order, which will inevitably entail shattering confidence in the institution of alternative dispute resolution. Traditionally, the domestic legislation of states limits arbitrability in the following fields of law: 1. antitrust and competition law; 2. securities transactions; 3. bankruptcy; 4. intellectual property law; 5. illegality and fraud; 6. bribery and corruption; 7. investment in natural resources. [4; 5] Legislation of Ukraine also needs to set clear boundaries of arbitrability, and determine which disputes can not be transferred to the international arbitration, otherwise such uncertainty will have consequences in the future.

Arbitrability emphasizes separation settlement of a dispute in arbitration from the one in court, the international commercial

arbitration from the national judicial system, private legal resolution from public law resolution. It also emphasizes the independence and autonomy of the mechanism.

Arbitrability has a double meaning. On one hand, it is an institution that is protecting the interests of international commercial relations, creates the possibility of alternative dispute resolution, which saves time and money, creates a favorable investment climate in the country, and is a circumvention of the national judicial system, which these subjects mostly have no desire to deal with. On the other hand, arbitrability means protection for people who are not a party to an arbitration agreement, but their rights and interests are affected at the same time; it also prevents the negative social impact and protects the state's sovereignty in dealing with important issues. Definition of arbitrability for legislators becomes finding a balance between the interests of participants in international commercial relations and interests of the state, between attracting investments and developing international trade with paternalistic policies.

Expanding the scope of arbitrability directly influences the development of the international arbitration. The more subject matters of a dispute can be considered by arbitration the more subjects of international commercial relations will turn to it. A significant stream of cases makes the institution of alternative dispute resolution better, making it a perfect mechanism. However, there is still a problem of a clear definition of arbitrability. The lack of clearly defined objective and subjective elements of arbitrability leads to disputes between scientists regarding legislation that may limit arbitrability of disputes as well as to controversial practice of arbitral awards enforcement by national courts. Without a clear definition of arbitrability members of international commercial relations do not realize all the possibilities of settlement of disputed relationship, or even are afraid to use alternative dispute resolution mechanisms, because of different jurisprudence. This leads to inhibition of the development of international commercial arbitration.

Determining a clear and balanced ambit of arbitrability (based on four criteria listed previously), defining its subjective and objective elements (arbitrability compositions), and taking into account characteristics and traditions of national legal doctrines ensure sustainable development and balanced coexistence of the national

judicial system and such alternative dispute resolution mechanisms as international commercial arbitration.

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Nowadays international arbitration is quite a growing trend, which has been developing side by side with incessantly increasing international trade, investment and globalization of commerce; it is widely recognized that businesses prefer arbitration over litigation for cross border disputes, e.g. over two thirds (69%) of in-house counsel in financial services companies felt international arbitration is suited to resolving their transnational disputes, 35% reported a rise in the number of international disputes following the financial crisis in 2008 [6] etc. This responds to the words of Benjamin Franklin: "When will mankind be convinced and agree to settle their difficulties by arbitration?" Even though arbitration has been established for hundreds years ago,[9] in its initial period there was no international legal framework regarding arbitrability of disputes or even award enforcement and national courts could largely intervene in any arbitration proceedings,[10] making the arbitral award difficult to enforce. But at the beginning of the twentieth century it began to change, especially with the establishment of the International Chamber of Commerce and its arbitration body, the International Court of Arbitration as it is known today, adoption of the Geneva Protocols 1923 and 1927,[11] and finally the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – the NYC). By the 1980th, aiming to boost economy, developing countries began to provide a friendlier environment to foreign investment and international trade; consequently, *with the increase of international transactions and disputes respectively, countries accepted international arbitration and limited judicial authority through making more subject-*

9 For example, in the Anglo-American legal system, there is evidence of recourse to commercial arbitration dating back to at least the fourteenth century [13;175].
10 It was due to the concept that "it is against sovereign dignity to submit ant type of dispute to resolution system not controlled by the state itself " [2;9]
11 Article 1 already envisaged that to obtain recognition or enforcement, it shall be necessary that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon [7]; in fact, many provisions of this Convention were used in the NYC.

matters arbitrable. As a result, the UNCITRAL Model Law on International Commercial Arbitration and based on it in whole or part corresponding national laws on international arbitration were adopted throughout the world[12].

In its narrow sense the term "arbitrability" covers disputes capable of being resolved by arbitration; it is sometimes given a broader meaning covering also the existence and validity of the parties' consent to arbitration (so-called "subjective" arbitrability), as is the case with the terminology used by the U.S. Supreme Court, but it is not widely used in international practice, though. Here it is to do with the narrow sense of the term which is also known as "objective arbitrability" (whether the subject-matter of the dispute submitted to arbitration is not one which can be resolved by arbitration) [4;312-313] and the issue of public policy which all together are overlapping notions (since *arbitrability is purely a matter of policy and it is traditionally defined in terms of public policy*) covering arbitrability of disputes all the way, which role and impact on the development of international arbitration are examined and described in this article. This article is concerned with international commercial arbitration only; arbitrability of disputes in the realm of international investment arbitration and others involving states is not examined[13] here.

Main Content

Primarily, *objective arbitrability establishes the criterion of jurisdiction* of a particular dispute as well as determines the scope of international arbitration as a whole. For instance, in the 1991 *Ganz* case the Paris Court of Appeals held that: "…in international arbitration, arbitrators are entitled to *determine their own jurisdiction with regard to the arbitrability of the dispute in the light of international public policy*…"[4;336-337]. Therefore, the issue of objective arbitrability comes across as essential form the very beginning - when concluding an arbitration agreement[14]

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12 A typical example of this trend can be seen in Latin America, where beginning from the 1980th most countries adopted the NYC, the Panama Convention and national arbitration laws [19;1103].

13 As it is reasonably pointed out by legal scholars that international commercial arbitration should be distinguished from international investment arbitration and public arbitration as the latter ones are treaty based procedures rotted in public international law [7;3], [14;8].

14 However, the question of whether the subject matter can be referred to arbitration is different from what type of dispute falls within the scope of an

and when taking cognizance of the dispute by an arbitral tribunal, if it then comes to the dispute. As opposed to the award enforcement stage, there are no rigidly detailed rules or restrictions at this point. Broadly speaking, in order to be capable of settlement by international arbitration the subject-matter in question should be so according to applicable law:

1. treaties, conventions and other international acts:[15] the NYC provides for recognition of an agreement under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration; however, the subject-matter sometimes should be considered as commercial since this Convention gives right to the signatory state to declare that it will apply the convention only to issues considered as commercial under national law of the state marking such a declaration (so-called "commercial reservation")[2;18]; the Panama Convention is applicable to arbitral decisions regarding any differences that may arise or have arisen between them with respect to a commercial transaction; the European Convention on International Commercial Arbitration is applicable to any disputes arising from international trade between physical or legal persons; the UNCITRAL Model Law is applicable to international commercial arbitration where the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not, etc;

2. applicable law of a particular state.

As we see, there are two levels at which arbitrability of disputes arises. Although it might cause some discrepancies (not just in laws – an arbitrator may treat the arbitrability issue differently than a judge asked to enforce an award), I therefore think that such a generally defined arbitrability approach set out in these international sources provides flexibility for national arbitration laws, emerging relations and disputes, *gives an effective guide direction to the contracting states.*

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arbitration agreement; the letter is the question of arbitration agreement interpretation, which has nothing to do with arbitrability [2;5].

15 In fact, they do not include direct restrictions as to what subject-matters are non-arbitrable.

Nonetheless, this is not the only concern as it becomes more critical when enforcing the award in a particular state with its own legislative attitude towards arbitrability of disputes, though the parties should take it into consideration at the inception – when entering into an arbitration agreement. In principle, the award that has been correctly rendered in the claimant's favor by an international arbitral tribunal does not require enforcement by a national court if it is carried out by the respondent. However, the reality is that the respondent will often evade carrying out the terms of the award or use the award as a bargaining tool with the claimant. When this situation occurs, the claimant is provided a remedy under the NYC - he can seek enforcement of the award either in the national court of the seat of arbitration or the court of the country in which the respondent has its assets. *This leads us to another complicated but significant role of arbitrability of disputes – the criterion of award enforceability (because if a dispute arbitrable in a particular state, accordingly it can be enforced in that state)*, as in particular Article V2 of the NYC envisages that recognition and enforcement of the arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: 1) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country[16]; 2) or the recognition or enforcement of the award would be contrary to the public policy[17] of that country. Interestingly, the arbitrability related provisions in the UNCITRAL Model Law and the Panama Convention are almost identical as those in Article V2 of the NYC. However, inarbitrability in one country does not hamper or prevent from arbitrability of a dispute in another country where it is arbitrable, provided that recognition and enforcement will be in that country; some legal scholars call it "presumption of arbitrability of disputes, if otherwise is prescribed by law"[10].

Thus, public policy and derived from it capability of settlement are overlapped concepts that determine enforceability; however, this is what international arbitration will always stumble

16 Objective arbitrability is mentioned separately from public policy since laws restricting arbitrability may not necessarily be part of public policy. However, these are two interrelated angels of arbitrability of disputes.

17 The New York Convention is intended to challenge only international public policy grounds [2;12].

over because any legal system by far wishes to ensure that certain matters considered to be sensitive should be decided in accordance with the interests of society; public policy [international][18] itself is vague and uncertain and has been interpreted and applied differently from country to country depending on its political, religious, social, cultural, and economic systems. *Moreover, since objective arbitrability emanates from party autonomy, it is opposed to public policy and therefore in international arbitration objective arbitrability can be perceived as both the point of tension and the buffer between party autonomy and public policy.* In order to conform them together there have been developed three methods: *the first* simply consists in excluding from arbitration disputes which are perceived as involving the questions of public policy (e.g. criminal or family law); *the second* entails excluding from arbitration all the disputes where one of the parties has violated a rule of public policy (e.g. a contract containing the arbitration clause contravenes antitrust rules); the view of these two methods that all the disputes "implicating public policy" are non-arbitrable prevailed in 19th and early 20th century; and most importantly, *the third method, manifesting pro-arbitration attitude*, consists in allowing the arbitrators to hear also disputes relating to a matter of public policy, while the courts will be then able to review the public policy issue if an action is subsequently brought to enforce or set aside the resulting award [4;332-336]. For instance, the Paris Court of Appeals in the 1991 *Ganze* case held that: "…in international arbitration, an arbitrator… is entitled to apply the principles and rules of [international] public policy and to grant redress in the event that those principles and rules have been disregarded, subject to review by the courts..."[4;336]. *In some way, such an arbitrability approach removed public control farther to the award enforcement stage, which gave the parties more freedom at the initial stages of international arbitration.*

Furthermore, *the main distinguishing characteristic of objective arbitrability complicating international arbitration is that there is a great deal of domestic legislative differences in the legal*

18 Here in the article we imply international public policy – when an international element gets involved, either from the underlying transaction's nature or from the nationality of the parties; it should be distinguished from domestic and transnational public policies [2;10].

determination of it, which directly exerts influence upon the efficiency of the application of Article V2 (a) of the NYC or any other dealing with the issue of arbitrability. That is why it is so important to have a clear and coherent approach towards this issue, yet it is not that easy in practice.

Generally, there is a number of different criteria to determine arbitrability of disputes: disputes involving an economic interest (in Swiss "any dispute of financial interest may be the subject of an arbitration" (Art. 177) [16]; in Germany "any claim involving an economic interest can be the subject of an arbitration agreement" (Sec. 1030)[17]); depending on a type of legal relationships (in China these are disputes arising from "economic, trade, transport or maritime activities" and contacting a "foreign element"(Art. 257) [15]), (in Japan "unless otherwise is provided by law…subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation" (Art.13)[18]); rights of full dispositions, etc. Yet, the vast majority tends to state that most matters not involving an economic interest are non-arbitrable; besides, as for the criterion of full disposition, there are some uncertainties and peculiarities concerning inalienable rights and those raising other sensitive issues, for the notion of inalienability is somewhat elusive and even though rights which do not involve an economic interest are considered to be in alienable, a number of rights which do involve an economic interest are still deemed to be inalienable [4;340-341]. Typically, such confusions can be seen in intellectual property rights, e.g. validity of a patent in Europe is a matter of the exclusive jurisdiction of the courts at the place of registration of the patent, while the commercial use of the patent may well be the subject matter of arbitral proceedings [13; 181-182]. Evidently, the only use of such criteria is by no means sufficient or suitable; therefore, among with arbitrability provisions usually there are different non-arbitrable ones excluding certain subject-matters of disputes. *Hence, it can be inferred that a well-prepared list of exceptions, so-called "non-arbitrable block", as well as clear definition of arbitrability are essential for international arbitration as it ensures sufficient predictability and certainty.*

For instance, this problem can be vividly seen in the Ukrainian legislation containing some uncertainties related to arbitrability of disputes[19] (one of the problems is that any ambiguous disputes are most likely to be defined in the favor of judicial jurisdiction), because the category of non-arbitrable disputes[20] (related to real estate, corporate, labor and administrative disputes and those related to state procurement or consumers, etc.) is not clearly defined by the legislature (e.g. some of corporate disputes may be arbitrable, while others may not)[1;31-32]. Moreover, a number of disputes, which are non-arbitrable in Ukraine, are arbitrable in many other countries; *thus, it may well hinder or complicate the use of international arbitration in the disputes involving "Ukrainian element."*[21]

Additionally, we should consider the *U.S. perspective on arbitrability of disputes which is somewhat different than in other countries*, *but, I think, more pro-arbitration.* The accession to the NYC and the amendment of the Federal Arbitration Act 1925 had a great impact on the arbitrability doctrine in the U.S., as depicted by the evolution of the U.S. Supreme Court's attitudes towards the arbitrability claims. While the FAA *does not explicitly restrict what type of disputes should be non-arbitrable*, the Supreme Court has concluded an approach to the arbitrability claims by looking at the arbitration clause between the parties; if the arbitration clause is broad enough, such a claim, even it arises from mandatory law or designed for social policies, will be arbitrable; however, if there is clear evidence to the contrary, such as a reduced ability to arbitrate the claim in particular, the dispute might be non-arbitrable[2;42]. As mentioned above, *the U.S. applies the broader meaning of the term of arbitrability of disputes and tends to be reluctant to use public policy*[22] *as grounds for refusing the enforcement of the arbitral award,* for the U.S. Supreme Court has found that it is necessary for the

19 The Law of Ukraine on International Commercial Arbitration provides the following disputes which may be referred to international commercial arbitration: 1) disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relation…[11]

20 Defined by Article 77 of the Law on Private International Law and some other laws

21 For example, in the case Telenor Mobile Communications v. Storm L.L.C., (two companies, Telenor and Storm, jointly owned a Ukrainian company called Kyivstar) the New York court enforced the award even though it violated Ukrainian antimonopoly law [2;34].

22 In the case Telenor Mobile Communications v. Storm L.L.C the U.S. federal court highlighted the narrow view of public policy [2;34].

domestic courts to support the notion of arbitrability [2;43] and indicated that commercial international arbitration is to be treated even more favorably than domestic arbitration[7;4]; and, in my opinion, such a pro-arbitration policy is so by virtue of the prudent development of arbitrability.

It is also pertinent to add that *arbitrability tends to expand, which indicates a growing role of international arbitration.* For example, with withdrawal by France of the NYC commercial reservation, there became arbitrable some disputes of antirust, intellectual property, bankruptcy, labor and corporate law, despite the fact that these subjects are considered to be sensitive from a public policy standpoint [4;341-342].

Conclusion

Premised on all the foregoing arguments, it can be succinctly deduced that arbitrability of disputes has a huge impact upon international arbitration which evolved throughout the world notably because of the proper development of the arbitrability concept both at international and national levels. In fact, in those countries with a wide range of arbitrable subject-matters international commercial arbitration may no longer be regarded as "alternative" means of resolving disputes.

From my viewpoint, the reason why arbitrability of disputes is of capital importance to international arbitration rests upon a matter of fact that *it performs a set of pivotal functions (role of arbitrability of disputes)*: it is the criteria of jurisdiction of a dispute in particular; it outlines the scope of international arbitration in general; it excludes some delicate matters from the scope of arbitration so that protect them; it is the buffer between party autonomy and public policy, which gradually drifts into the favor of party autonomy; it is the criterion and assurance of enforceability; it is a tool and starting point to unify international arbitration, etc. Accordingly, *the impact of arbitrability of disputes manifests itself in the realization of these functions*.

Therefore, clearly developed arbitrability of disputes provides much needed predictability and certainty so that lower the risks of international economic activity. In a nutshell, it is the cornerstone of international arbitration in the sense that it ties up the pole of party autonomy and the pole of public policy.

Finally, international arbitration, arbitrability of disputes in particular and international commerce in general are highly *interrelated, interactive, and intercorrelative,* e.g. while

economical reasons of international commerce prompted countries to make more subject-matters arbitrable, the development of arbitrability and international arbitration also promoted and facilitated international commerce by providing more opportunities to have effective dispute settlement by international arbitration and so further.

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