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Arbitration in Administrative Matters

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The settlement of certain administrative matters in Croatia by arbitration is an incentive to review the limits of objective arbitrability of administrative matters in a broad comparative sense. Namely, since legal provisions explicitly stipulate the possibility of settling concession disputes and disputes arising in the context of public-private partnership agreements by arbitration, it is necessary, first of all, to reconsider whether other administrative matters in Croatia could be settled in this manner. The well-established practice of some governing bodies and different, more or less successful comparative experiences of national legal systems might help us answer these questions. However, this preliminary set framework for conducting a more detailed research into the pursuit of public interests in a primarily private-law procedure may also be the first step in uncovering the field that has not been researched enough yet. Therefore, the paper firstly outlines the specifics of arbitration in administrative matters in France and the role played by administrative courts in these proceedings. Secondly, it deals with the experience of settling tax matters and disputes relating to public procurement by arbitration in Portugal. Arbitration in administrative matters is available in Romania, as well, although there are serious doctrinal doubts about this. Finally, we will complete the presentation of various comparative models in the resolution of administrative matters by arbitration by presenting Croatian solutions – not only those that have explicitly been prescribed by law, but also those that have emerged from practice.

Keywords: arbitration in administrative matters, public procurement, concession, administrative contracts, public interest

I. Introduction

The indisputable importance of arbitration in commercial matters has repeatedly been an incentive to expand the boundaries of arbitrability into new domains. The reasons for this are, besides unstoppable development of law and paradigm shifts in particular areas of law, the growing dissatisfaction of citizens with the slow and ineffective judiciary, as well as the search for new methods of dispute resolution. Despite the fact that arbitration is not a complete *novum* when it comes to settling certain administrative matters, there are hardly any systematic comparative analyses thereof. The neglecting of the issue that has fallen behind due to rigid doctrinal approaches of strict division into the private and public interests, and due to the question if arbitration is a method suitable for referring only to private interest,

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precludes that there is a typical interplay of public and private interests and that a paradigm on the task of administration being primarily a service to citizens has changed. The commercialization of public administration and legal effects deriving therefrom may also require new methods of resolving potential disputes. However, in an effort to safeguard the public interest, which is subject to greater restrictions than the private one, the administration may interfere with the conduct of the arbitration in various ways – by influence of administrative courts on the arbitration award and the enforcement of the award or by retaining certain control powers by operation of law. Since in a comparative sense the approaches differ, the paper presents some of them, in order to compare some of their basic features with *de lege ferenda* proposals for the application of arbitration in administrative matters in Croatia.

II. The role of administrative courts in arbitration in France

a) The case of INSERM v. Letten

In 1998, the French *Institut National de la Santé Et de la Recherche Médicale* (INSERM) and the Norwegian *Letten F. Saugstatt* Foundation concluded an agreement to establish a research institution in the field of neurobiology in which they agreed to arbitration in the event of dispute. Although *Letten* immediately paid 2 million French francs (FRF), out of a total of FRF 25 million in total project value, the project failed at the outset. *INSERM* filed an action against *Letten* before the High Court in Paris[1] for payment of other amounts. The court upheld the action, although the defendant objected that the parties had agreed to arbitration. On appeal, the Court of Appeal in Paris declared itself incompetent and directed the parties to resolve the dispute in arbitration. In the arbitration proceedings, *INSERM* was ordered to pay *Letten* the amount of FRF 2 million and to pay damages.

In 2007, the Paris Land Court ordered the enforcement of the arbitration award. However, *INSERM* filed two remedies. First, it once addressed the Marseille High Administrative Court to set aside the arbitral award and order the *Letten* Foundation to pay the remaining sums. At the same time, an appeal was filed against the exequatur decision and its abolition was required before the Court of Appeal in Paris, which rejected it. The Higher Administrative Court in Marseille referred the matter to the Council of State[2], and this referred the matter to the *Tribunal des Conflits* (TC).[3]

[1] The French *Tribunal de Grande Instance Paris.*

[2] The French *Conseil d 'État* in France is the highest administrative court, but also a special advisory body to the Government in legal matters, https://de.wikipedia.org/wiki/Conseil_d%E2%80%99%C3%89tat_(Frankreich), 30 October 2019.

[3] The French *Tribunal des Conflits* is a court presided over by the Minister of Justice, and it is composed of five representatives of the Court of Cassation (the highest civil court) and five representatives of the Council of State. One of its tasks is to resolve conflicts of jurisdiction between civil and administrative courts. https://de.wikipedia.org/wiki/Tribunal_des_conflits, 30 October 2019, hereinafter TC.

The TC decided that the remedy against the arbitral award in the dispute over the breach of contract concluded between a legal person of French administrative law and a foreign legal person, which was to be carried out in the territory of France and related to the interests of international trade under then Art. 1505 (now Article 1519) of the French Code of Civil Procedure,[4] should be brought before the Court of Appeal in the place where the award was rendered. This rule also applies to a contract, which, under French law, is an administrative contract. Accordingly, under French law the court competent for the remedy against an arbitral award in *INSERM* v. *Letten* is a court of general jurisdiction, and not an administrative court. However, in part of the said decision, this rule was limited by the view that administrative courts, rather than courts of general jurisdiction, will have jurisdiction when the remedy concerns the conformity of an arbitral award with the mandatory rules of French public law. The notion of mandatory rules of French public law covers public property law, public procurement, partnership contracts and contracts entrusting public activities.[5]

Following the decision in *Letten v. INSERM,* the problem of the division of jurisdiction between civil and administrative courts in the field of arbitration was considered to have been resolved. However, the opposite happened, because disputes that may arise from an administrative contracts, which are concluded by France in international contexts, are of exceptional economic interest because of their particular significance for the state. Thus, exceptions to the rule that the civil courts are generally competent to rule on a remedy against an arbitral award have become a new source of constant battle between the two branches of French jurisdiction and have become *Waterloo* for legal protection claimants.[6] Therefore, we will present some decisions of French courts indicating that the conclusion of an arbitration contract in administrative matters is very risky, since it is unclear who will control the arbitral award regarding the remedy and how far-reaching are the limits of arbitral awards review in administrative matters.

[4] Code de Procedure Civile, https://www.jus.uio.no/lm/france.arbitration.code.of.civil.procedure.1981/doc.html, 30 October 2019, hereinafter: CPC.

[5] Niggemann, Friedrich; de Ligne, Frédéric Jonglez, Schiedsgerichtsbarkeit und Verwaltungsrecht in Frankreich: Die INSERM Entscheidung des französischen Tribunal des Conflits, Zeitschrift für Schiedsverfahren – SchiedsVZ, 2/2011, pp. 80-81.

[6] Niggemann, Friedrich, Schiedsgerichtsbarkeit und Verwaltungsrecht in Frankreich – Ein Offener Konflikt zwischen den französischen Gerichten, SchiedsVZ, 4/2017, p. 177.

b) The case of SMAC v. Ryanair

The regional entity managing development of airports *SMAC*, as a public-law entity, has entered into two contracts with *Ryanair* for a scheduled air service to Angoulême in western France. Both contracts contained an arbitration clause establishing the jurisdiction of the London Court of International Arbitration. *Ryanair* terminated both contracts for unfulfillment. *SMAC* invoked the termination of the arbitration clause and addressed the local administrative court, and *Ryanair* filed an action before the London Arbitration Court, which confirmed its jurisdiction and the legal validity of the termination, sentencing *SMAC* to payment of the court proceedings to *Ryanair.* The local administrative court dismissed SMAC's claim due to the existence of an arbitration contract.

Ryanair sought enforcement of an arbitral award in France, as determined by the High Court in Paris. *SMAC* appealed against that decision and at the same time called on the Council of State, the highest administrative court in France to set aside the arbitration award, and to sentence *Ryanair* to compensation for damages that *SMAC* believed to have suffered as a result of the unauthorized contract termination. The decision of the Council of State[7] established that the administrative courts had jurisdiction to rule on a remedy against an arbitral award rendered in France, in the case of public-law claims, in which the conformity of that award with the mandatory rules of French administrative law should be reviewed. However, it was decided that in the specific case involving a foreign arbitral award, the French administrative courts had no jurisdiction, for which reason the Council of State declared itself incompetent. However, the Council of State established that the administrative courts were competent to issue a certificate of enforceability and would not order enforcement if the decision were contrary to public policy. Referring to the decision, the Court of Appeal in Paris declared itself incompetent. *Ryanair* recoursed against that decision before the Court of Cassation, which ruled that civil courts had jurisdiction over the exequatur. Invoking the New York Convention[8], it pointed out that it is not possible to review the decision in all elements (facts and application of substantive law) within the framework of issuing a certificate of enforceability - *révision au fond.* The Court of Cassation set aside the decision of the Court of Appeal in Paris and remitted the case for retrial, and the latter addressed the *Tribunal des Conflits.* Finally, the TC, referring to the decision in *INSERM* matter, referred the matter to the administrative court, since the

[7] CE 19. 4. 2013., No. 352750, Syndicat mixte des aéroports de Charente (SMAC) c. société Ryanair, Rev. arb. 2013, 761 Anm. *Laazoui*; D. 2013, 1445 Anm. *Cassia.*

[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

administrative courts have jurisdiction to determine the enforcement of arbitral awards in the area of public procurement.[9]

c) The FOSMAX case

In the *FOSMAX* case, the question of dispute was that *Gaz de France* was a state-owned entity at the time of the conclusion of the contract for the construction of a liquefied gas terminal with a Franco-Italian consortium. In 2005, the *Gaz de France* was made private, so that its subsidiary *FOSMAX* replaced it with retroactive effect at the time the contract was entered into. *FOSMAX* is a simplified joint stock company without any administrative functions and prerogatives. In 2011, the French members withdrew from the consortium and the contract was amended by an ICC[10] arbitration clause providing for jurisdiction of the French arbitral tribunal in France. In ruling on the dispute between *FOSMAX* and the consortium, the arbitral tribunal found that it was a private contract. The consortium was eventually sentenced to payment of EUR 68 million to *FOSMAX* and *FOSMAX* was ordered to payment of EUR 128 million to the consortium. Subsequently, *FOSMAX* requested the Council of State to cancel the arbitral award, upon which the Council of State referred the matter to the *Tribunal des Conflits.*

In its decision[11], the *Tribunal des Conflits* relied on the *INSERM* decision with one significant difference - it found that the case was an administrative contract because the legal nature of a contract was considered with respect to the time of its conclusion, irrespective of subsequent changes, which undeniably took place in this dispute. Since the contract concluded with the consortium serves the public interest, the contract falls into the administrative domain, which is why the administrative courts are competent to decide on the remedy against it. Given that the administrative courts are competent to review the arbitral award in the remedy proceedings and in the proceedings for determining the enforcement of the award, the question arises how far the limits of the powers of the administrative courts in reviewing the arbitral awards reach.[12]

There followed a decision of the Council of State[13], which found that, in the request for cancellation of the arbitral award, the Council of State first reviews the validity of the concluded arbitration contract, i.e. the application of the rule that the

[9] Niggemann, op. cit. (note 6), p. 178.

[10] Eng. *International Chamber of Commerce*, Arbitration Court of the International Chamber of Commerce in Paris".

[11] TC 11. 4. 2016, No. 4043, Rev. arb. 2016, 1140 Anm. *Billemont; Laazouzi/Lemaire* Cahiers arb. 2016, 977; Searglini JCP Chronicque 2016, 900.

[12] Niggemann, op. cit. (note 6), p. 179.

[13] CE 9.11.2016., No. 388806; Jurisdata Nr. 2016-023504; Rev. arb. 2017.

French administration cannot conclude an arbitration contract without an expressly established permission by law (Art. 2060 of the Civil Code). Thus, the control of the Council of State extends to the conformity review of the arbitral award with public policy. In this context, it was necessary to review whether the arbitral tribunal had rightly invoked its jurisdiction, whether it was properly constituted of independent and impartial arbitrators, whether it had complied with the parties' requests, whether the principle of hearing the parties had been adhered to in the proceedings and whether the award was reasoned. The public policy conformity review comprises also the question of admissibility of the contract content and the preconditions for entering into the contract, as well as whether the arbitral award has taken into account the rules which the administration cannot derogate from. These are the rules on ban of waivers from charges, ban of the public spaces and land sale, rules on ban of waivers of privileges conferred on management by the public interest and, finally, mandatory rules of European law. If such a review resulted in the cancellation of the award due to the fact that in aforementioned cases, the administration could not enter into the arbitration contract, the Council of State could refer the matter to the competent administrative court or decide on it itself. It could only decide the case on its own if the parties to the contract consented thereto in the procedure before the Council of State.[14]

In the aforementioned case, the arbitral tribunal took a different stand as to the legal nature of the contract due to which the dispute between the parties was brought about. However, the Council of State held that although the arbitral tribunal established it was a private contract, it did not necessarily mean that there was a reason to reverse the award. On the other hand, during the review of the conformity of the arbitration agreement with public policy, including mandatory rules of French administrative law, and even certain privileges of the administration (*droits exorbitants*), the arbitral tribunal found that the claim for compensation to the subsidiary was contrary to the contract since the provisions of the contract explicitly allowed for it only if the agreement had been previously (partially) terminated. However, the French courts estimated that these agreement provisions were contrary to the principles of French administrative law, and that administration can, in public interest, with the purpose of accelerating the goal achievement, upon a reprimand and notice, claim compensation even without prior termination of the contract. The application of this principle is necessary. Since arbitral tribunal gave priority to provisions of the agreement, instead of allowing the administration to exercise its rights, it violated the mandatory rules of administrative law. Therefore, this part of the award of the arbitral tribunal was set aside.[15]

[14] Niggemann, op. cit. (note 6), p. 179.

[15] Ibid.

d) Broadband Pacific case

The decision of the Council of State in this case[16] is interesting for the fact that it is a dispute arising from the telephone and internet concession contract in the French Pacific. The concession contract contained an arbitration clause, and after the dispute arose, an arbitration proceeding was conducted in which the administrative body was sentenced. In reference to the recourse, the Council of State decided that the arbitration contract was not based on law and that the award be therefore set aside. In procedural sense, it was crucial that the administrative body participated in arbitration proceedings although it did not object to the validity of the arbitration contract, which resulted in violation of the principle of *estoppel* or *venire contra factum proprium*, i.e. the legal principle that precludes the parties from acting contrary to their previous conduct.

e) In conclusion

It follows from the presentation of the decisions that it has been disputable in French theory and practice which courts or other bodies have power to rule on the remedies against arbitral awards in administrative matters. The analysis of the *INSERM* decision shows that civil courts have jurisdiction to rule on a recourse against an arbitral award, unless it is a recoursel challenging the conformity of the arbitral award with the mandatory rules of French public law, in which case the administrative courts have jurisdiction. However, in the case of award enforcement proceedings, the remedies are - according to the view of the *Tribunal des Conflits* in *SMAC v. Ryanair* - to be decided by administrative courts, when it comes to a public procurement case. The *FOSMAX* case shows that the limits of the review of the arbitral award were set too far, so that in the course of the review of the conformity of the award with mandatory provisions of French law they reached even to the privileges of the administration, whose non-fulfillment resulted in setting aside of the award. Finally, in the *Broadband Pacific* case, in which a public-law party, contrary to its earlier conduct, did not challenge the validity of the arbitration contract, the Council of State completely disregarded the public-law party's conduct, terminated the arbitration contract as it was not based on the law, and therefore set aside the arbitral award, thus having taken a biased and legally unfounded approach.

It should therefore be concluded that the analysis of the decisions presented and the procedure of the administrative courts in France indicate dangerous legal uncertainty in the settlement of administrative matters by arbitration. This is supported

[16] CE 23.12.2015, *Bizard/de Kersauson* Cahiers arb. 2016, 429.

by the complex system of jurisdiction of the courts empowered to decide on remedies against arbitral awards, or empowered to rule on their enforcement.

In all the above cases, regardless of whether the seat of arbitration is France or abroad, regardless of whether the request for review of the decision is aimed at its cancellation or enforcement, irrespective of whether it is a domestic or foreign award - the arbitral award has been examined in its full scope. Although the presented case-law shows that the purpose of the review of the award in administrative matters was to ensure the legality of the administration's work, the control should not be such as to infringe the rights of the other party to the contract, since the claimants will be lost in the jurisdiction disputes affecting the exercise of their rights.[17]

III. Tax and Public Procurement Disputes Settlement in Portugal

a) Arbitration in tax matters

The Portuguese Parliament provides by Law no. 15/2002 the arbitration as an alternative form of dispute resolution in administrative matters. Article 180 of the Law stipulates that arbitration as a dispute settlement mechanism is admissible in contracts entered into by a private (natural and legal) person and a body of the Portuguese Government, in cases of the non-contractual liability of public authorities, the validity of administrative decisions and public service employment contracts. The Portuguese public authorities were not obliged to accept arbitration as a way of resolving a dispute, but pursuant to Art. 187 para. 2 they were entitled to determine the type and value of the dispute to accept arbitration. In 2009, the Portuguese Ministry of Justice encouraged the establishing of the Centre for Administrative Arbitration in Portugal (CAAD)[18], an arbitral tribunal for administrative matters. Following the possibility of flexible determination of the value of the dispute to be decided by arbitration, the Ministry of Culture accepted arbitration in disputes of up to € 15 million, and the Coimbra Polytechnic Institute set a maximum value of € 20,000 in intellectual property disputes and € 5,000 in other types of disputes.[19]

At the time of the creation of CAAD there were more than 45,000 unresolved administrative and tax disputes in Portugal, and the system was often criticized for being slow and ineffective.[20] In 2011, the new tax law gave parties the opportunity

[17] Niggemann, op. cit. (note 6), p. 182.

[18] *Centro de Arbitragem Administrativa.*

[19] Müller, Werner; Henriques, Duarte, G., Tax Arbitration in Portugal, SchiedsVZ 6/2016, pp. 318-319.

[20] Mimoso, Maria Joã; Anjos, Maria de Rosário, Administrative arbitration in public procurement: a look at Portuguese law, Juridical Tribune, Vol. 9, Issue 1, March 2019, p. 201.

to choose arbitration as a form of tax disputes settlement. However, arbitral tribunal in tax matters is not structured as commercial arbitration, since its existence is not based solely on the will of the parties. In contrast, arbitration in tax matters in Portugal is based on the Portuguese Government's continuous offer to each taxpayer to accept it as a form of settlement. By accepting arbitration as a way of resolving a dispute, the taxpayer loses the right to address the tax court. The advantages of arbitration in tax matters are the promptness of decision making and the experience of arbitrators – a reasonable degree of practice and experience. As a rule, only lawyers with more than ten years of tax law experience are listed on the CAAD arbitrator list. The arbitral tribunal may be composed of one or three arbitrators. Single arbitrator conducts arbitration in disputes the value of which does not exceed EUR 60,000, or if the taxpayer has not selected an arbitrator. The arbitrator shall be selected from a list of approximately 220 arbitrators and appointed by the CAAD Ethics Council. If the value of the tax subject matter exceeds € 60,000, the arbitral tribunal is to be composed of three arbitrators. Each party elects an arbitrator, who in turn elects the presiding arbitrator of the panel. If the arbitrators cannot agree on the nomination of the president of the panel, he will be elected by the CAAD Ethics Council.[21]

The specific features of this type of arbitration are that the fee paid by a party is higher if the arbitrator in the proceedings has been chosen by the party, and that in addition to being independent and impartial, the arbitrators in tax matters and officials in the tax office are bound by the obligation of professional confidentiality. In addition, the arbitral tribunal in tax matters is not entitled to render decisions based on equity, but on law. Finally, despite the fact that an arbitral tribunal does not generally qualify as a court or a tribunal of a Member State in the sense of Art. 267 of the Treaty on the Functioning of the European Union[22] of 2014, the Court of Justice of the European Union in case *Ascendi* decided that in tax matters, an arbitral tribunal established under the CAAD rules is a court or a tribunal in the sense of this provision of the Treaty on the Functioning of the European Union. [23] [24]

[21] Müller/Henriques, op. cit. (note 19), p. 320.

[22] Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ C 202/1, 7 June 2016).

[23] The Court of Justice of the European Union rendered this decision based on the criteria of permanence, obligation and application of the law. The court thus concluded that, unlike other arbitral tribunals, the Portuguese arbitral tribunal was permanent, given that the taxpayer submits his dispute to the tax arbitral tribunal, it has a binding jurisdiction and renders decisions based on law, while rendering decisions based on equity is forbidden.

[24] For more information see: Zunić Kovačević, Nataša, Zunić Kovačević, Nataša, Upravnosudska kontrola u poreznim stvarima [Administrative Judicial Control in Tax Matters], Proceedings of the Faculty of Law in Split, Vol. 53, 1/2016, pp. 290-293.

The CAAD has recorded a relatively high number of cases in tax matters (600-700 cases per year) for the last ten years, and the introduction of arbitration in this area has been a great success, with a steady annual increase in the number of the cases.[25]

b) Arbitration in public procurement disputes

The amendments to the Public Contracts Code[26] in Portugal, which came into force on January 1, 2018, have brought about changes in the method of resolving disputes arising from public procurement. Thus, Art. 476 no. 2 referring to Alternative Forms of Dispute Resolution stipulates that arbitration and other means of alternative dispute resolution are admissible under the conditions laid down by the law for settling disputes that arise from proceedings or contracts to which this law applies. (1)

(2) When the parties choose arbitration as a way of resolving the dispute, it means:

a) that all interested parties, candidates and competitors accept the jurisdiction of an institutional arbitration centre competent to settle a dispute arising from a contract in accordance with the rules of Annex XII to this Code, on which they are founded, forming an integral part, and which comprises the course of procedure;

b) the need for the contracting party to accept the jurisdiction of the institutional arbitration centre for resolving all disputes arising from a contract, in accordance with the rules of Annex XII, which shall be an integral part of the contract documents and contract;

c) the manner in which the court is constituted and the rules of procedure to be applied by reference to the rules of the relevant institutional arbitration centre in accordance with the model of rules contained in Annex XII.

(3) Dispute settlement by arbitration in which the arbitral tribunal does not include an institutional arbitration centre may be determined only in the following cases:

a) if, for the sake of resolving very complex legal or technical problems, including the high economic value of the dispute subject-matter or due to the lack of an institutional arbitration centre competent in such a case, it would

[25] Mimoso/Anjos, op. cit. (note 20), p. 202.

[26] Revision of the Public Contracts Code, approved by Decree-Law No.111-B72017, of 31 August 2017, entered into force on 1 January 2018.

be advisable to accept arbitration by an arbitral tribunal not integrated with the institutional arbitration centre;

b) if the arbitration procedure to be conducted in accordance with the rules of the institutional arbitration centre does not correspond to the urgent regime prescribed by the rules of the Administrative Court Procedure Code for a contract governed by that law,

c) should the use of an institutional arbitration centre result in a longer settlement of the dispute;

d) should the use of an institutional arbitration centre result in higher costs for the contracting authority or the public contractor.

(4) If it is decided to settle the dispute by an arbitral tribunal, which is not part of an institutional arbitration centre, the contracting authority shall prepare a cost impact assessment that this option includes, in particular concerning arbitrators, attorneys' fees, charges and other costs and expenses.

(5) In disputes of a value exceeding EUR 500,000, the arbitral award may be challenged before the competent administrative court, in accordance with the law, with a devolutive effect. This form of arbitration is considered to be voluntary only for the contracting authority and not for tenderers participating in the procurement procedure. The practice of contracting arbitration in public contracts is not a novelty in Portugal, and the main reason for resolving administrative matters by arbitration is the extreme delay of administrative courts, as well as the need for the parties to employ arbitrators specialized in these matters, given recent legal changes - in the area of public procurement.[27]

It is emphasized that the introduction of arbitration in the field of public procurement involves new challenges to an administrative act adapted to the needs of the procurement process, issues related to the contracting authority's civil liability and challenges to the administrative rules contained in the procedural document. These standards, naturally, did not go beyond criticism. There is a problem of absence of voluntariness in the selection of arbitration by all participants in the public procurement process, except the contracting authority that actually, by having accepted this type of dispute resolution, made the selection for all tenderers, who, if they wish to participate in the public procurement procedure and subsequently enter into a contract, must agree that disputes arising from that contract will be settled by arbitration. In addition to this problem, the provisions of Art. 476 para. 5 CCP, according to which the arbitral award may be challenged before the competent

[27] Mimoso/Anjos, op. cit. (note 20), p. 201.

administrative court in disputes exceeding EUR 500,000, in accordance with the law, with only a devolutive effect have been exposed to critic.

However, according to some authors, the majority in the doctrine seeks to interpret the new rule of law in such a way that, with the already existing possibility of challenging the arbitral award pursuant to Art. 185-A of the Administrative Courts Procedure Code of 2015, explicitly repeals the former Art. 186 para. 2, which provides that decisions rendered by an arbitral tribunal may be challenged before the Central Administrative Court, according to the rules of voluntary arbitration determining that a remedy before an appellate court exists when the court acted unfairly.[28] Other authors believe that both solutions are possible. However, if the variant is accepted according to which a remedy is possible only under the conditions stipulated in Art. 476 para. 5 CCP, the constitutional legality of the latter ruling is called into question. However, due to a new legal solution, a new arbitration centre has been set up under the auspices of the Portuguese Public Markets Association (APMEP), especially established for public procurement arbitration, which, together with CAAD, as the administrative arbitration centre, represent two largest centres with enormous influence in these subject matters.[29]

IV. Resolution of disputes arising from administrative contracts by arbitration in Romania

Pursuant to Art. 542 para. 2 of the Romanian Code of Civil Procedure, the state and public authorities may enter into an arbitration convention if they are authorized to do so by law or by an international agreement (convention), which Romania is a contracting party to. On the other hand, Art. 542, para. 3 of the same law stipulates that legal entities of public law, whose activity is focused on the pursuit of economic activities, are entitled to conclude an arbitration agreement, unless otherwise provided by the articles of incorporation or organizational provisions. Thus, with respect to the distinction made under Romanian law as regards the conclusion of an arbitration convention or arbitration contract, there is a distinction between the state and public authorities, on the one hand, and public law entities, on the other. And another difference is that the former need a special legal or convention related authorization to conclude an arbitration convention, whereas the latter must be involved in an activity aimed at pursuing economic interests, which means that a special authorization to conclude an arbitration agreement is not needed. As an exception, the rule of principle on the general possibility of concluding an arbitration

[28] Medeiros, R. (2018) article about: Regime de recurso das decisões arbitrais CCP revisto – una reflexão constitucional in Cadernos Sérvulo de Contencioso Administrativo e Arbitragem, #01.2018. In: Cf. ibid., p. 203.

[29] Cf. ibid., pp. 203-204.

contract for legal persons of public law shall not apply if the articles of incorporation or other organizational provisions preclude it.

In the area of resolving administrative matters by arbitration, arbitration is possible in case of public procurement contracts[30] and works and service concession contracts.[31] This rule is explicitly stipulated by Art. 57 of the Law no. 101/2016 on Remedies and Review Procedures in the Field of the Award of Public Procurement Contracts, Utilities Contracts and Works and Services Concession Contracts, as well as for the Organisation and Functioning of the National Council for Solving Complaints. The provision directly specifies that the parties may settle a dispute relating to the interpretation, conclusion, implementation, amendment and termination of the contract by arbitration. Thus, in the public assets concession agreement the parties can agree on arbitration. In addition, to resolve any dispute, the parties may insert an arbitration clause to the public assets concession agreement under Art. 12, para. 2 of Annex no. 6 of the Government Decision[32] accepting the application of Methodological Norms for the Application of the Government Emergency Ordinance no. 54/2006 on the Regime of Concession Contracts for Public Assets. However, it should be noted that the analysis of this Ordinance, as amended, does not comprise the possibility of recourse to arbitration, but instead determines the jurisdiction of the administrative courts in this type of disputes. Therefore, Government Decision no. 168/2007 which incorporates the methodological rules for the application of Government Emergency Ordinance No. 54/2006 added to the law is unconstitutional with respect to the provision of Art. 108 para. 2 of the Constitution, which stipulates that the decision serves the implementation of laws, where the term "law" is used in a broad sense, encompassing not only the law but also other legal sources other than legal acts (including Government Emergency Ordinance). It is considered that the unlawfulness of this particular Government Decision could be remedied in an administrative dispute.[33]

It is often emphasized in the doctrine of administrative law that the use of arbitration in administrative contracts is banned because it is considered to be a way of circumventing the jurisdiction of an administrative court, and that arbitration is a specific institution intended for commercial law in which the parties are in a position of legal equality. It has also been argued that the use of arbitration in administrative contracts provides commercial parties a commercial feature, avoiding the

[30] Law no. 98/2016 and Law no. 99/2016.

[31] Law no. 100/2016.

[32] Decision of the Government no. 168/2007.

[33] Săraru, Cătălin-Silviu, Arbitration settlement of disputes concerning administrative contracts in Romania, Juridical Tribune, Vol. 8. Special Issue, October 2018, pp. 224-225.

need to protect the public interest in implementing the procedure that takes into account the specifics of public services and assets. Given that an arbitration clause can also be created by a foreign arbitral tribunal, it may not be accepted because national arbitration interests have been evaded. However, it cannot be denied that it has for a long time been possible to apply arbitration in administrative contracts. Where arbitration is agreed in disputes concerning a public procurement contract, the freedom of entering into a contract by the parties is subordinated to the principle of public interest priority, and the appointed arbitrators should be experts in the field of administrative law, so that institutional arbitration is a body of arbitrators specialized in public contracts.[34]

V. Arbitration in administrative matters in Croatia - *de lege lata* and *de lege ferenda*

a) Arbitrability in Croatia

Objective arbitrability in Croatia is determined by Art. 3 para.1 of the Arbitration Law[35], according to which the parties may contract domestic arbitration to settle disputes that they are free to dispose. In addition, in disputes with an international element, the parties may also contract arbitration whose place is outside the territory of the Republic of Croatia, unless it is stipulated by a special law that such a dispute can only be settled by a court in the Republic of Croatia (Art.3, para. 2 ZA).

Thus, these should be disputes about the rights that the parties can freely dispose of - within the limits set by the mandatory regulations,[36] which can be considered as regulations of the Croatian public policy. The possibility of disposing of the right should be viewed in the context of a proceeding - a judicial or administrative, in which the party could recognize the claim, waive it or agree on a settlement.[37] Therefore, arbitrable are the legal matters in which an administrative contract could be entered into, but also legal matters in which the parties could settle an administrative dispute before an administrative body or before a court, because the possibility of concluding a settlement would indicate the disponible nature of the legal matter. The broad limits of the admissibility of arbitration set out in ZA point to such a conclusion.[38] In support of the arbitrability of administrative matters in

[34] Cf. ibid., p. 226.

[35] Zakon o arbitraži [Law on Arbitration] (Official Gazette, no. 88/01), hereinafter: ZA.

[36] Compare: Dika, Mihajlo, Disponibilnost predmeta spora kao kao pretpostavka arbitrabilnosti u hrvatskom pravu, Pravo u gospodarstvu, 2/2005, pp. 113f.

[37] Triva, Siniša; Uzelac, Alan, Hrvatsko arbitražno pravo [Croatian arbitration law], Narodne novine, Zagreb, 2007, p. 29.

[38] In this sense Dika, op. cit. (note 36), pp. 119-122.

Croatia, the law also explicitly determines the arbitrability of concession disputes and disputes arising from public-private partnership contracts.

b) Concession disputes

Art. 3, paragraph 1 of the Law on Concessions[39] defines concession as a right acquired by a contract, and a concession contract as an administrative contract in written form and for a fixed term entered into between the concession grantor and the concessionaire on mutual rights and obligations related to the given concession on the basis of the decision on granting a concession (Art. 5, item 7 ZK). Therefore, the essential features of this contract are its administrative legal nature, the entities and their specific legal status, the subject of the concession, the concession fee, the conditions regarding time limits of the concession and the general possibility of withdrawal.[40]

The concession grantor can only be a public authority or legal person authorized to grant a concession, the subject of the concession is limited and determined by law (Art. 8 ZK), the contract is aimed at economic use of a common or other assets, works and, as a rule, (public) services. The concession agreement is a pecuniary[41] and time-limited act, which is entered into for a fixed term.[42] The conclusion of the concession agreement is preceded by a decision-making procedure on the concession award, with the ZK specified content (Art. 50). It is therefore an administrative contract subject to multiple restrictions in a subjective and objective sense. However, although the conclusion of the concession contract is only approached after the expiry of the setback period, which is 15 days from the date of the service of the concession decision to all tenderers or applicants who are directly awarded the concession (Art. 39 ZK), and in the event of initiating the review procedure, after the enforcement of the concession award decision (Art. 54, paras. 1 and 2 ZK), the parties concluding such a contract are entitled (with certain restrictions) to dispose of the rights that are the subject of that contract. Thus, in the event of a dispute arising out of or likely to arise from a concession agreement, it would be a dispute over the rights to which the parties are free to dispose. In support of this, the possibility of contracting arbitration was explicitly provided as laid down by the Law on Concession (Art. 97, para. 2).

[39] Zakon o koncesijama [Law on Concessions] (Official Gazette, no. 69/17), hereinafter: ZK.

[40] Đerđa, Dario, *Koncesije* [Concessions], Hrvatska pravna revija, 2/2015, p. 57.

[41] Concession fee is the fee paid by the concessionaire on the basis of the concession contract (Art. 5, item 8 ZK).

[42] The term for which the concession is granted is determined within the range determined by the provisions of a separate law (Article 17, paragraph 3 ZK). Thus, for example, according to Zakon o lovstvu [Law on Hunting] (Official Gazette, no. 99/18), hereinafter referred to as ZL, the hunting concession contract may be concluded for up to thirty hunting years (Art. 35, para. 1 ZL).

Different doctrinal concepts of the legal nature of concession agreement[43] are not relevant to its arbitrability. In this context, it is irrelevant whether it is defined as a contract of civil or administrative law; it is essential that the parties have the power to exercise the rights arising from that contract. The legislator has already accepted, under previous legal solutions,[44] that disputes that arise or could arise from this contract are arbitrable.

The parties to the concession agreement may settle disputes that arise or are likely to arise from the concession agreement by arbitration, if not otherwise provided by a special law (Art. 97 para. 2 ZK). The place of such arbitration shall be in the territory of the Republic of Croatia, the arbitral proceedings shall be governed solely by the law of the Republic of Croatia, and the language of the arbitration shall be Croatian. If the concession agreement is formed both in Croatian and in a foreign language, the Croatian version shall apply (Art. 97 para. 3 ZK). The concession agreement that allows for arbitration must state the obligation to address the other party in advance with a request for a peaceful settlement of the dispute, which may not be less than three months from the date of the request for mediation (Art. 97, para. 4 ZK). The rules of the concession arbitration procedure shall be determined in accordance with the law governing arbitration (Art. 97, para. 5 ZK).

It follows from the aforementioned provisions of the ZK that parties to a concession contract for the settlement of disputes arising from or likely to arise from a concession contract are authorized to conclude an arbitration agreement in the form of an arbitration clause in a contract or in the form of a separate contract (Art. 6A). Arrangements for the arbitration of concession disputes are subject to a number of restrictions, which should ensure a certain level of public interest protection - with respect to the place of arbitration, the applicable law, the language, the rules governing arbitration and the mandatory prior implementation of peaceful settlement of the dispute within the time limits set by the law.

The reasoning of the Final Proposal of the Law on Concessions of 2017[45] lacked the explanation why the arbitration settlement of disputes under the concession

[43] For more details see Crnković, Mateja, Upravni ugovori u posebnom zakonodavstvu Republike Hrvatske [Administrative Contracts in Special Legislation of the Republic of Croatia], Hrvatska komparativna javna uprava [Croatian and Comparative Public Administration], Vol. 14 (2014), No. 4, pp. 1035-1056.

[44] Thus, Art. 39, para.1 of Zakon o koncesijama [Law on Concessions] (Official Gazette, no. 125/08), hereinafter referred to as ZK 08, stipulates that in disputes arising from the concession contract the parties may agree on arbitration.

[45] Konačni prijedlog Zakona o koncesijama od svibnja 2017, [Final Proposal of the Law on Concessions of May, 2017] P.Z.E. 75, http://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/081149/PZE_75.pdf., Accessed November 2, 2019.

contract must be preceded by the procedure of peaceful settlement of the dispute, which may not be shorter than three months from the date of the request for mediation (Art. 97, para. 4 ZK). We consider that in this way the arbitral proceedings are unnecessarily conditioned by the prior implementation of another method of dispute resolution, the result of which may be missing. Namely, mediation in Croatia has not given significant results. However, particular uncertainty has been caused by unclear notion whether this provision should be linked to the terminology used in the Law on Civil Procedure[46] in Art. 186, which refers to a "peaceful solution to the dispute." It is conducted before the competent State attorney's office and it is a procedural precondition for bringing an action against the Republic of Croatia. We do not assume that this might have been the idea, since at the same time, in the provision of Art. 97, para. 4 ZK the term mediation is used.

Legal uncertainty arising from the use of misleading and imprecise terms in ZK is an obvious sign that the legislator did not take into account the length of concession disputes, the mandatory prescribing of a peaceful settlement of disputes and mediation, and the ambiguity regarding the body or institution having authority to conduct it.[47]

One of the concession contracts available on the website regulates the provision of services to passengers with the use and maintenance of port substructure and superstructure facilities in the port area open to public traffic of particular (international) economic interest to the Republic of Croatia - Gaženica Port, Zadar.[48] The contract was concluded between the Port of Zadar Authority and the concessionaire, with details of the modalities in dispute resolution by arbitration. Thus, Art. 115 of the aforementioned contract stipulates that the arbitration shall be entrusted to the Permanent Court of Arbitration at the Croatian Chamber of Commerce. It is conducted by an arbitration panel comprising a president and two members. Each contracting party shall appoint one member of the panel, and the members of the panel shall unanimously appoint the president of the panel. The contracting parties may appoint the president of the panel directly and unanimously. If the members of the panel or the contracting parties fail to reach an agreement on the appointment of the president of the panel within thirty days from filing the complaint, the President of the Permanent Court of Arbitration at the Croatian Chamber of Commerce shall appoint him/her. The language of the arbitral proceedings is Croatian. Croatian

[46] Zakon o parničnom postupku [Law on Civil Procedure] (Official Gazette, nos. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14), hereinafter: ZPP.

[47] The Conciliation Centre at the Croatian Chamber of Commerce or the Conciliation Centre at the Croatian Mediation Association should be taken into consideration.

[48] http://www.portauthorityzadar.hr/download/Ugovor_o_koncesiji%20prijedlog%20uz%20DZN%20FINAL.pdf Accessed November 2, 2019.

procedural and substantive law apply in the proceedings. Contract disputes are urgent, and the decision must be rendered within an instructional period of three months from the receipt of the claim. For other issues in the conduct of arbitration that are not governed by the contract, the parties agree to apply the Zagreb Rules.[49]

c) Disputes arising from public-private partnership contracts

The Law on Public-Private Partnership[50] defines a public partnership (hereinafter: JPP) as a long-term contractual relationship between a public and a private partner, the subject of which is the construction and/or reconstruction and maintenance of a public building, for the purpose of providing public services within the competence of a public partner (Art. 2, para. 1). In order to implement the JPP project, the public and private partners enter into a JPP contract governing their rights and obligations (Art. 2, para. 6 ZJPP). A public-private partnership contract (hereinafter referred to as JPP contract) is a contract between a public and a private partner, governing rights and obligations of the contracting parties for the purpose of implementing the JPP project (Art. 3, item 3 ZJPP).

The JPP contract is concluded in writing and for a fixed period, which may not be shorter than three years, and not longer than forty years, unless otherwise stipulated by a special law (Art. 4, para. 1 ZJPP). The JPP contract must comprise, besides other provisions also the provisions governing the procedure for settling disputes between the contracting parties (Art. 4, para. 4 ZJPP). If a concession is granted for the implementation of a JPP project, the provisions of the regulations governing the area of concessions (Art.4, para. 7 ZJPP) shall also apply to the content of the JPP contract.

In disputes between the parties arising from a JPP contract, the parties may agree on arbitration or mediation (Art. 31, para. 1 ZJPP). The law of the Republic of Croatia (Art. 31, para. 2 ZJPP) shall apply in the procedure of settlement of disputes by arbitration. If the parties have not agreed to arbitration or mediation, the Commercial Court in whose territory the JPP immovable property is located has exclusive jurisdiction (Art. 31, para. 3 ZJPP).[51] If we compare the legal solutions for the application of arbitration in concession disputes with those in disputes arising from public-private partnerships, it is obvious that the ZJPP is much more flexible.

[49] Ibid.

[50] Zakon o javno-privatnom partnerstvu [Law on Public-Private Partnership] (Official Gazette, nos. 78/12, 152/14, 114/18), hereinafter: ZJPP.

[51] The possibility to resolve the disputes arising from JPP contracts by arbitration has already existed in the Law on Public-Private Partnership of 2008 (Official Gazette, no. 129/08). However, unlike current regulations, in arbitration disputes between the public and private partners, the law decided by the parties was relevant.

This primarily refers to the power of the parties to decide whether to resolve their disputes through arbitration or mediation. Therefore, the parties do not have to conduct a mediation procedure, limited by the deadline before which the arbitration procedure could not be initiated as prescribed for concession disputes (Art. 97, para. 4 ZK). However, a problem may arise when a JPP project implementation is granted concession, since in this case the provisions of the regulations governing the area of concessions shall apply to the content of the JPP contract (Art. 4, para. 7 ZJPP).

In this context, two interpretations of this provision are possible. According to the first interpretation in cases where the JPP relationship has its concessional dimension the provisions of arbitration in concession disputes apply in arbitration of disputes of concessional nature. According to the second interpretation as regards the case of a concession granted for the implementation of JPP project, the provisions of ZK apply to the content of the JPP contract, and disputes would be resolved by applying the provisions of ZJPP. In procedural terms, these are considerable differences, since arbitration under ZK includes more limitations than ZJPP. It should be noted that according to ZK, a concession agreement that allows for arbitration must specify the obligation to approach the other contracting party in advance with a request for a peaceful settlement of the dispute, which may not be shorter than three months from the date of filing the mediation request (Art. 97 para. 4. ZK). Other restrictions refer to the place of arbitration, applicable law, language and the rules governing the arbitration. According to ZJPP, the parties to the arbitration proceedings are restricted only in the selection of applicable law, i.e. the law of the Republic of Croatia (Art. 31, para. 2). In our view, however, the selected option should be the one in which the provisions of ZK apply to the content of the JPP contract, in case that concession is granted for the implementation of the JPP project, and disputes would be resolved by application of ZJPP provisions. This is also in accordance with explicit provisions of Art. 4, para. 7 of ZJPP.

d) Public procurement disputes

Although the Law on Public Procurement[52] does not encompass any provision on dispute resolution by arbitration, or disputes that could arise from the implementation of the public procurement procedure, in practice there are arbitration clauses in contracts that result from previously conducted public procurement procedure and that govern the relationship between the concession grantor and the tenderer. Since arbitration clauses may be contained in a framework agreement or a procurement contract, they should be defined. Namely, a framework agreement is an

[52] Zakon o javnoj nabavi [Law on Public Procurement] (Official Gazette, no. 120/16), hereinafter: ZJN.

agreement between one or more contracting authorities and one or more economic operators, with the purpose to determine the conditions under which contracts are awarded during a given period, particularly a price and the quantities provided (Art.3, para.16 ZJN), whereas the public procurement contract is a pecuniary contract, concluded in writing between one or more economic operators and one or more contracting entities, whose subject is the performance of works, delivery of goods or provision of services (Art. 3, item 32 ZJN). The framework agreement is, as a rule, the basis for the conclusion of a public procurement contract.

In public procurement procedure, an appeal is a regular remedy under the provisions of ZJN and the Law on General Administrative Procedure (Art. 399, para.1 ZJN). The authority competent to decide on an appeal is the State Commission for the Control of Public Procurement Procedures[53] (Art. 398, para. 1 ZJN). In the appeal proceedings it is decided on the legality of procedures, actions, omissions and decisions rendered in public procurement procedures, and on the legality of public procurement contracts and framework agreements entered into without the implementation of public procurement procedures (Art. 399, para.3 ZJN). Pursuant to Art. 434, para. 1 ZJN a remedy is granted against the decision of the State Commission in an administrative dispute before the High Administrative Court of the Republic of Croatia. Since the decisions of the State Commission are served by public announcement on the website (Art. 432, para. 5 ZJN), the deadline for filing a claim begins to run by expiry of eight days from the day of public announcement. The decision on the administrative dispute should be rendered within 30 days from the day of filing a duly claim (Art. 434, para. 2 ZJN). If the High Administrative Court of the Republic of Croatia annuls the decision of the State Commission, it will also decide on the appeal in the public procurement procedure, and the decision in the administrative dispute shall be announced on its web site without anonymization (Art. 434, paras. 3 and 4 ZJN). Claims for damages arising from violation of the provisions of ZJN before the competent court may be realized in the civil procedure of legal protection under the general regulations on compensation (Art. 435).

There is no consensus as to the true nature of the procurement contract. Unlike authors who believe that a public procurement contract is a contract that combines public and civil law, emphasizing primarily its civil law aspects,[54] others consider it to be a public (administrative) contract.[55] A public procurement contract concluded

[53] Hereinafter: State Commission.

[54] See: Drmić, Anica, The Legal Nature of Public Procurement Contracts, Croatian and Comparative Public Administration, Vol. 14, 2/2014, pp. 493-504.

[55] See: Turudić, Marko, The Legal Nature of Public Procurement Contracts in Croatian Legal Order, Public Law Notebooks, 34 (2018), pp. 10-189.

between the contracting authority and, as a rule, a public body and an economic operator is, by its legal nature, an administrative contract. The determination of the legal nature of a particular contract may also be conditioned by the mode of legal protection afforded to it.[56] However, there are some other administrative contracts, which, despite being administrative, contain arbitration clauses, and disputes arising from them are settled by arbitration. Accordingly, the legal nature of a contract is not decisive for the application of arbitration to disputes that may arise from the contract. Therefore, if the framework agreement and the subsequent public procurement contract contain an arbitration clause and if it is an arbitrable matter, a genuine arbitration in administrative matters, the arbitration should be conducted regardless of that it is not expressly prescribed by law, as in the case of ZK and ZJPP.

An example from practice is the Documentation for the Procurement of Construction-Handicraft and Installation Works for the Reconstruction of Entry 1 – Rastovača by the Contractor Procurement Placer "the Plitvice Lakes National Park" public institution as of August 2017 that reads as follows: *a Public Procurement Agreement between the Contracting Authority and the selected Bidder (contractor), in addition to the conditions laid down in this procurement documentation and accepted by the bid of the selected Bidder, shall contain, but will not be limited to, the following general provisions:..."The contracting parties shall settle the dispute by arbitration in accordance with the valid Rules of Arbitration at the Permanent Court of Arbitration of the Croatian Chamber of Economy (the Zagreb Rules)."*[57] An identical arbitration clause is also contained in the Documentation of the Public Procurement Procedure for Insurance Services of the Clinical Hospital Centre Rijeka of December 2016.[58]

We believe that this way of resolving certain administrative matters disburdens the administrative courts, and in the public procurement procedure - the High Administrative Court of the Republic of Croatia. However, one of the questions that arises in this regard is which court could exercise control over the arbitral award rendered in administrative matters, or whether courts of general, specialized (commercial) or administrative jurisdiction should decide on the action for annulment. In com-

[56] On the issue of the legal nature of concession contracts and public procurement contracts as administrative contracts and forms of legal protection provided in connection with these contracts, see: Staničić, Frane, Control over Concluding Administrative Contracts, Proceedings of the Faculty of Law in Split, Vol. 53, 1/2016, pp. 232-252.

[57] https://np-plitvicka-jezera.hr/wp-content/uploads/2017/10/Dokumentacija-o-nabavi-MV-64-17_2.pdf?x92898. Accessed November 4, 2019.

[58] http://kbc-rijeka.hr/wp-content/uploads/2016/05/263-16_dokumentacija.pdf. Accessed November 4, 2019.

parative experience, it seems that the task of such review should nevertheless fall to the jurisdiction of a court specialized in a particular legal field. Specifically, it could certainly better control the rulings passed in administrative matters. This idea is not far from the existing legal system in Croatia, according to which jurisdiction to decide on an action for annulment of an arbitral award is determined according to the type of case under review (*arg ex* Art. 43, para.1 ZA).

VI. Conclusion

By comparing individual national models for resolving administrative matters by arbitration, we have established that arbitration has (to a greater or lesser extent) succeeded in securing its breakthrough into an administrative area that, for the public interest it serves, has long been considered a field on which arbitration cannot be applied. Apart from the emphasized or even over-emphasized role played by administrative courts in controlling the arbitral award, which we were able to follow through the various arbitral awards where French public authorities were parties, it is obvious that arbitration in administrative matters is no longer a *specificum* related to only a few comparative systems. In this regard, two tendencies stand out; one has already overcome doctrinal doubts about arbitration, noting the potential to resolve a large number of disputes that have otherwise burdened national courts, but which, despite positive experience, fears the greater influence of arbitration in resolving disputes arising from administrative contracts and doubts about the possibility of reviewing the arbitral award (Portugal). The second tendency is present in systems that still emphasize doctrinal views on the strict separation of public and private, as well as of administrative and commercial, the constitutionality or unconstitutionality of certain decisions that explicitly do or do not determine the application of arbitration in administrative matters by law or by other acts – thus general and special preconditions for the admissibility of arbitration in administrative matters (Romania). A lack of confidence in arbitration as an overly commercialized medium that can harm public or even national interests is common to all of these systems.

Without claiming to provide an overview of many questions that are just opening the door to arbitration in administrative matters, it seems that many more topics and many more material remain to be explored for some deeper conclusions. It is crucial that Croatia is not at the end of the column in this respect, that there is already some legal framework made as a breakthrough into the world of arbitration. However, it is most gratifying that the parties have recognized arbitration in public procurement procedures as extremely useful, regardless of the fact that it is not explicitly regulated by law. In this regard, arbitration competes with burdensome courts and lengthy court proceedings, as a method that could provide substantial benefits in resolving particular administrative matters.

Arbitration, Corruption and Money Laundering

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Professional paper

This paper analyses corruption and money laundering and their impact on arbitration. In introduction, it gives an overview of legislative activities undertaken at international level to prevent them. After demonstrating the basic attributes of money laundering, legislative text important for its suppression stands out the 2005 Model legislation on money laundering and financing of terrorism of the United Nations Office on Drugs and Crime which sets out the definition of money laundering in its Art. 5.2.1. In the central part of the paper, the author finds that when it comes to arbitral proceedings, it is very difficult to recognize if arbitral proceedings or its subject-matter are related to corruption or money laundering. In conclusion, it is pointed out that arbitral institutions and arbitrators realize the need of protection when it comes to corruption much more then to money laundering. Negative effects of money laundering are less recognized. However, with regard to corruption and money laundering, arbitral tribunals should exercise its protective role with greater seriousness.

Key words: arbitration, corruption, money laundering, OECD Anti-Bribery Convention, UN's Convention against Corruption, UN Global Compact

Undoubtedly, corruption and money laundering remain two of the hottest topics in international arbitration. One may rightfully wonder why? In fact, we have seen the greatest change in compliance legislation in the past few years. Businesses are nowadays subject to a myriad of regulations when it comes to establishing compliance mechanisms with regard to corruption, bribery, human trafficking and money laundering. The legislators' activities can be explained by a shift in public perception as to how businesses are supposed to do their business. Nowadays, companies are expected to be green, diverse and "clean". The impact public perception has even on the biggest companies is illustrated e.g. by H&M's downfall due to a mistake in marketing. But it also seems that public prosecutors are much more on the offence and eager to prosecute when it comes to allegations of corruption, see e.g. the case Eni and Shell now face in Milan.[1]

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[1] Besides Shell and Eni, the prosecution charged the companies' managers involved in the dealings, see *Public Prosecution Office*, Notification of completion of preliminary investigations, 22 December 2016, Case No. 54772/13. Since then, the proceedings have been directed to trial by an order of the preliminary judge, see *Order of the Milan Court*, 20 December 2017, Case No. 54772/13.

The same is true for *Odebrecht*, the biggest Brazilian construction company, which is involved in one of the biggest corruption scandals of the South-American continent. For example, *Ode-*