THE INTERNATIONAL ARBITRATION

Prof. Dr. Ivan ČUKALOVIĆ[1]

SUMMARY

International arbitration is one of the oldest ways for resolving problems between states. International arbitration is between diplomatic and juridical measures for resolving problem. From diplomatic measures arbitration took elasticity and from juridical took obligation of judgment.

Arbitration we can divide on trade and state arbitration. In this article we took attention on arbitration between states. In my opinion, arbitration is the best way for resolving problem between states in trust areas. In complicated cases between states where is mixed political and juridical interests, the best way is arbitration. If states agree about nominated arbiter and legal source its big guarantee that they will respect and implement judgment. Only to remind that problem about district Brčko was resolved by international arbitration, and more than two hundred contracts concluded between EU states foreseen arbitration as way of resolving disputes. As we seen, arbitration is one of the most elastic ways for reaching solution in international relations which contain elements of diplomatic and juridical ways.

Key words: Arbitration, states, resolving, problems, international relations, cases

ÖZET

Uluslararası tahkim, devletler arasındaki sorunların çözümündeki en eski yöntemlerden birisidir. Uluslararası tahkim, problem çözmede diplomatik ve hukuki kanunlar arasında yer almaktadır. Tahkim, uluslararası kanunlardan esneklik, hukuki kanunlardan da yargı yükümlülüğü almıştır.

Tahkimi, ticari tahkim ve devlet tahkimi şeklinde ayırabiliriz. Bu makalede, devletler arasındaki tahkime dikkat çekmekteyiz. Benim düşünceme göre tahkim, güven alanlarındaki sorunların giderilmesinde en iyi yoldur. Karma politika ve farklı hukuki çıkarları olan devletler arasındaki komplike durumlarda en iyi yol tahkimdir. Devletler yargıç ataması ve yasal kaynak konusunda mutabık kalırlarsa, yargıya saygı duyup onu yürütmeleri garanti altında demektir. Brčko bölgesindeki sorunu anımsatmak gerekirse, bu sorun uluslararası tahkim yoluyla çözümlenmiş, tahkimi anlaşmazlıkların çözüm yolu olarak gören AB devletleri arasında iki yüzden fazla sözleşme imzalanmıştır.

[1] Full-time professor of International Public Law/ Judge of Constitutional Court of Kosovo

Gördüğümüz gibi tahkim, uluslararası ilişkilerde çözüme ulaşmak için diplomatik ve hukuki durumlardan öğeler içeren en esnek yollardan birisidir.

Anahtar kelimeler: tahkim, devletler, çözme, sorunlar, uluslararası ilişkiler, davalar

***

INTRODUCING

In today's world full of unresolved problems, ridden with the global economic crisis, local wars and the armament race, the basic question that arises is how to overcome the problems in relations between the states. Apart from the diplomatic means, the International Court of Justice and Arbitration is available to states. As the arbitration is a flexible way of resolving disputes, it is certain that in such a sensitive area such as the Balkans, it is the most appropriate means. Let us just recall the words of Cicero "confront the arbitrators hoping that all will not be lost, but be prepared for not gaining all." Therefore, in such traditional areas such as ours, enough attention should be paid to arbitration and try to create a Balkan regional arbitration. In this paper we shall discuss the concept and types of resolving disputes this way.

TYPES OF ARBITRAGE

Arbitration is a comprehensive concept for a peaceful, electoral trial. However, it should be noted that a classification of arbitration on certain criteria can be done, all of which speaks in favor of the fact that this is a flexible means, adaptable to the nature of each dispute.

a) From the territorial point of view, arbitration can be divided into universal and regional, that is the one that obligates most of the countries of the world, or only certain regions of the country.

b) From the point of view of permanence of the arbitration forum, arbitration can be classified as institutional and ad hoc.

c) From the point of view of subjectivity in the arbitration proceedings, a division can be made into interstate, where states appear as subjects, and trade where business enterprises have the function of the disputed parties.

We will briefly consider the main characteristics of each category, in order to make a distinction. Because of the importance, as well as the fact that it is very close to interstate arbitration, the term of trade arbitration will be dealt with in particular. Undisputably, the main emphasis will be

placed on the problem of interstate election trials, and special attention will be paid to the arbitration proceedings.

1. UNIVERSAL AND REGIONAL ARBITRATION

An attempt to institutionalize a universal arbitration was done already at The Hague Peace Conference 1899 and 1907, and was moving in the direction of aspiration for all the states for the resolution of all types of disputes, must turn to arbitral forum for help.

This form of dispute resolution at the universal level can be envisaged in an international convention signed by a number of countries. It was underlined in the UN Charter in the Article 33 that:

"The parties to the dispute, the continuance of which threatens the maintenance of international security, should seek solutions primarily through negotiation, investigative commissions, mediation, settlement, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choosing."

It was also emphasized in the UN Security Council resolution of 25 August 1947 that The Council stands ready to assist in resolving any dispute through Commission of the Council which would consist of 3 members, of which each party would elect one, while the third would be determined by the two parties selected this way.[2]

A number of international conventions of world significance provide the possibility of using arbitration to resolve disputes. For example, the Protocol of the facultative signing which is related to compulsory settlement of disputes from the Geneva convention on maritime law from year 1958 in the Article[3] and the Protocol from the Vienna Convention on consular relations in Article 2 provide the opportunity to resolve the dispute either in the International Court of Justice or in some arbitral court.[4]

Even the Helsinki executive Act of the Conference on Security and Cooperation in Europe from 1 August 1975 deals with the problem of arbitration and proposes it as a convenient means for resolving all disputes, particularly those of trade, 3 and also the Convention on the Prevention

2 SCOR, 2 Year, Resolutions and Decisions of the Security Council 1947.
3 Official Gazette of SFRJ, 1965/4
4 Conference on security and Cooperation in Europe – Final act Helsinki, Avgust 1, 1975. – Arbitration

and Punishment of Crimes against Internationally Protected Persons from 1973 envisages arbitral resolution for the eventual disputes.[5]

Arbitration is represented on a regional basis too, perhaps even far more frequently and more effectively than on the universal. Regional organizations are conceived as one of the supporting mechanisms of the UN. It began with the assumption that the countries of one region are associated with the same interests, the same practices and problems, and will certainly decide among themselves how to solve a problem, and far more efficiently and conveniently, than if the solution came from an international forum of the world.

The Program of the Organization of African Unity in its Protocol of mediation, conciliation and arbitration from 1964, The Charter of the Organization of American States from 1967, The Treaty on establishing the African Development Fund, the European agreement on international road transport of dangerous goods from 1972, and a number of other regional agreements, have in their provisions parts that discuss the arbitral settlement of disputes.

OAU protocol on mediation, conciliation and arbitration from 1964, envisages the combined institution of reconciliation, arbitration and mediation. This Protocol authorizes a panel of 21 members, elected by the Assembly of Heads of States and Governments of 50 Member States, to discuss the professional disputes to be brought before it. Two members of the Commission can not be selected if are of the same nationality, and membership is entrusted to persons of acknowledged qualifications. [6]

When the parties to the dispute decide to form arbitration, the Protocol legislates in Article 28, that such an agreement must be respected as a mission of good will, and ruled by the arbitration tribunal. In the event that two arbitrators, within one month do not agree about the choice of the Chairman, he shall be designated by the Bureau. "Two additional members of the tribunal, which need not be members of the Commission, with the consent of the parties, shall be designated by the president,".[7]

5 Official Gazette of SFRJ, 54/1976

6 Muhamed Fofana: ``A peaceful solutions of disuptes based on the Charter of OAU``Phd Dissertation, Belgrade, 1983, p.88

7 Ibid, p.88.

According to the provision of the article 29 of the Protocol, it is necessary that the parties to the dispute before they bring it to the commission reach a compromise which should include:

a) The commitment of parties to go to arbitration.

b) The subject and description of the dispute.

c) The seat of the arbitration court.

Compromise can determine the sources by which the dispute will be ruled and time during which the judgment should be made. Article 30 determines that the sources are: the contract between the states, statute of OAU, the UN Charter, and if the parties agree on the principle of ex aequo et bono. Protocol specifies in the Article 31 that unless arbitration decides otherwise, all hearings before an arbitration forum should be considered confidential.

The Charter of the Organization of American States from 1967 in Chapter V Article 24 provides that the peaceful methods are: direct negotiation, good services, mediation, investigation and settlement procedures, court and arbitration proceedings, and any method of which the parties to the dispute concur by special agreement.[8]

The Agreement on the Establishment of the African Development Fund in Chapter X Article 53 provides that if a disagreements arises between the fund and the state which has ceased to be a member, or between the Fund and any member after final cessation of operations of the fund, such a dispute is presented before the Arbitration Council, which consists of three selected arbitrators. For decision the majority of votes are sufficient, and the decision is final and binding on the parties to the dispute.[9]

The European agreement on international road transport of dangerous goods (ADR) in Article 11 Paragraph 2 provides that:

"Any dispute not settled by negotiation, should be presented to the arbitration if requested by one party to the dispute, and accordingly will be presented before one or more arbitrators, which are jointly selected by the parties to the dispute. If within three months from the date of application for settlement of dispute by arbitration, the parties do not agree on the selection of an arbitrator, an appeal shall be made to the UN Secretary

8 Official Gazette of SFRJ, 1973 /36
9 Official Gazette of SFRJ, 1972/59

General to appoint a single arbitrator ".As it has been seen, a number of regional agreements provide for the possibility of the arbitral solution of the problem, precisely because of the fact that there is a higher level of understanding between the countries of the region, so the assumption that the arbitral decision made at the regional level will be more common and safer and efficient from resorting to other forums is correct.

2. INSTITUTIONAL AND AD HOC ARBITRATION

The criterion for this division is the nature of the arbitral forum. If it is an established arbitration institute, with a defined list of arbitrators and permanent seat, then it is about institutional arbitration, and if it is about cases where parties to the dispute concur by mutual agreement to resolve a specific dispute by arbitration, it is about its ad hoc form. As an example of the institutional arbitration we can take the Permanent Court of Arbitration established at The Hague Peace Conference, but throughout history, and the modern period we have a number of cases of ad hoc arbitration.

a) The Permanent Court of Arbitration

Country parties started organizing the Permanent Court of Arbitration in The Hague in 1900, in accordance with Articles 20-29 of the First Hague Convention in 1899. The organization was comprised of three separate bodies - the Court Administrative Council, International Bureau, and Arbitration Court itself. Articles 20-29 were replaced by Articles 41-50 of relevant convention, made on the Second Hague conference in 1907.[10]

According to the provision of Article 49 The Permanent Council consists of the diplomatic representatives of the Contracting Parties accredited in the Netherlands, and the Dutch Minister of Foreign Affairs, acting as the President of the Council. The duty of the Council is to supervise the International Bureau of the Court and resolve all administrative questions related to the performance of jobs.

The International Bureau acts as a registry of the court (Article 43) and an intermediary for communications relating to the meetings. The Contract Parties are obliged to provide the Bureau with certified copies of every provision in their mutual agreements relating to the arbitration.

[10] The Hague Regulations of the electoral court in 1907

The composition of the Court of Arbitration is defined by Article 44. According to these provisions, the arbitration court consists of a large number of personalities of "acknowledged authority in matters of international law, and highest moral reputation, elected and appointed by the contracting countries.

Each country can nominate four members but the same person may be appointed from different countries. The mandate of appointed lasts for six years, and the place which remains vacant by resignation or death, is filled by interested countries.

In this case the appointment is given for a new period of six years. The names of members elected this way are entered on the list, which is announced to contracting countries. The arbitrators who are chosen this way continue to perform their professional duties in their country, and only if necessary come to adjudge the dispute.

As it can be concluded, this court is a broad list of possible arbitrators who are elected for the solution of each individual case. According to Article 45, that court is established for each specific case by direct agreement between the disputed parties. Each party chooses two arbitrators from the list, of which only one may be its national. The four arbitrators thus chosen shall elect the fifth, who acts as a president.

If the votes are halved, the fifth member is elected by a third country and if they can not agree about the choice of third, each of the disputed parties elects one country, while the fifth member is elected by the joint action of members designated this way. If within a period of two months these two countries can not agree on the election, each of them suggests two candidates from the list of members of the Permanent Court, with the exception of members that are chosen by the disputed, or who are nationals of any of them. Who among the candidates thus selected will be designated as the fifth member shall be decided by lot. The court has a permanent headquarters in The Hague, and that place can be changed only with the consent of the disputed parties. Court costs are paid by the disputed parties alike. The highest authority of the court is Governing Body, composed of diplomatic representatives of contracting Parties accredited in The Hague, whose function is to appoint officers, control the financing of the court and decide on all matters relating to its operation. Decisions on all matters are made by majority of votes.

Apart from, the majority of members of the Hague electoral court has never participated in the trials. For a period of 25 years, and in 18 different cases, 35 different personalities were appointed as judges of whom 23 adjudicated only one time, and 12 of them on several occasions. Most often, famous Parisian professor of International Law Louis Renault was appointed as the judge - a total of seven times.

b) The Organization and Character of the Court

The first lawsuit the court was given to adjudicate in 1902, and it was a dispute between the U.S. and Mexico regarding use of income of California Endowment, and then had three disputes up to 1905. From 1905 to 1909 g. the court had no work and one of a sudden a rapid addressing to the court began, so that in the period from 1909. up to the World War I, it adjudicated a total of 11 cases.

It should be noted that the activity of the Hague Court of Arbitration, almost ceased after the World War I.[11] It should be noted that the Permanent Court of Arbitration rendered the following verdicts (the Second World War: United States - Mexico - 1902g., Germany - England and Italy - Venezuela 1904.g., Germany - France, England - Japan 1905g. And France - England 1905; Norway - Sweden 1909, United States - English 1910, United States - Venezuela 1910. and France - England 1911g.; Italy - Peru 1912g.; Russia - Turkey 1911g.; France - Italy 1913g., Netherlands - Portugal 1914g.; England - France 1920g.; Spain - Portugal 1920; France - Peru 1921, Norway - U.S. 1922; U.S. - Netherlands 1928 and France - England 1931; USA - Sweden 1932).

This could have been expected, since the creation of the League of Nations and the Permanent Court of International Justice, a mechanism that enjoyed more trust was created, but still in the period between the two wars several cases of great political importance were ruled. The number of member states was gradually expanded and now includes 65 countries. The last dispute was resolved on 27th of July 1956 (the case of France and Greece). There are many reasons for decreased interest in Hague electoral court: the ideological differences between countries, it was about old school, but certainly the most important reason is the establishment of the International Court of Justice, institutional forum with great prominence, developed mechanisms, beyond whose decisions

[11] Wilson - The Hague Arbitration Cases (1915) and Martens NRG / 2,3. ser).

stands the Security Council, whose decisions this forum gives a dimension of security that no verdict of the Hague Court of Arbitration has.

On the other hand it should be noted that this is not a crisis of the arbitration trial, which provides a number of examples of speech or ad hoc arbitration in the regional framework. Therefore it was necessary to point to some form of ad hoc arbitration, which proved to be a very effective means of resolving disputes.

3. AD HOC ARBITRAL TRIBUNAL

Address by the ad hoc arbitration is very popular way of resolving disputes, and the essence of it consists in the fact that the specific dispute subject to arbitration agreement, the disputed pages that only applies to the case.

Ad hoc arbitration was applied before the Hague Peace Conference and has maintained to this day. Furthermore, the contracts in which disputes are the subject of this particular method of resolving disputes are different from each other, because their main feature is to adapt to the circumstances of the specific case. However, it should be noted that the essence of the arbitral trial retains with ad hoc form too, while the differences are present only in selection of arbitrators, the restrictions in terms of deadlines and the like. Thus, for example, even during the English - American War in 1814, the incident in Falaj dock was resolved through the electoral court. [11]

Disputed parties the United States and Portugal have agreed to submit the dispute to the president of France, Napoleon III, for solving, who ruled in 1852 that Portugal is not responsible, and therefore is not obliged to pay the required fee. It was similar in dispute between England and France over fishing in Newfoundland. French fishermen, with number of contracts with the English gained the right for fishing in these areas, but after a while the English began obstructing.[11] During the mentioned war two ships encountered in Falaj port (Portugal), one American, the other English. Due to the conflict of sailors the English tried to seize American ship, whose captain was forced to destroy it because of the risk of it falling into enemy's hands. Americans sued Portugal that it did not protect a ship referred to as a neutral country in the conflict. Napoleon III ruled in favor of Portugal, on the grounds that Americans were the cause of conflict and that the Portuguese authorities did not have enough force for protection.

Especially since the English gave Newfoundland a broad self-government. In 1891, a compromise was reached between the disputed parties, and the judges were appointed: Professor Martens, Rivie and Gram. Although the arbitration forum was composed of outstanding experts verdict was not rendered, because the Newfoundland refused trial referring to its autonomy.

There are a lot of these examples of ad hoc arbitration in history. Let us mention just a few: 1891. Spanish queen delivered the verdict on the border dispute between Colombia and Venezuela, and the President of the United States is 1878 resolved the dispute between Argentina and Paraguay. The English king resolved the dispute in 1902 between Argentina and Chile, the king of Italy the dispute between Brazil and British Guiana, and the Spanish king the dispute between Honduras and Nicaragua in 1906. For all these cases of ad hoc arbitration, it is characteristic that the arbitration courts were created for the specific concrete case and that all the agreed rules on the selection of arbitrators and the procedure were applicable until reaching the verdict.

It is hard to say whether the ad hoc or institutional form of arbitration is better. If an institutional has the advantage because there is already a common practice around the selection of the arbitrator and procedure, which gains on its speed, the advantage of ad hoc arbitration is no doubt that it aims to adapt to the particular case in order to chose the kind of action that suits the parties to the dispute, which is essential for final success. However, it must be noted that ad hoc arbitration has disadvantages, one of which is the slowliness due to the lack of pre-specified form, and lack of qualified arbitrators and the like.

As we have seen, arbitration is a very appropriate means of resolving disputes, so one should think about the idea that one way of institutional arbitration is provided for the resolution of disputes in area of the Balkan states.

RESULT

As we so international arbitration is one of must elastic ways for resolving problem between states. In sensitive area of Balcan, international arbitration can be used in cases of this region. Conclusion of this article is that we need to reconsider to establish one permanent institution arbitration in Balcan.