Nacionalna ograničanje u međunarodnoj trgovačkoj arbitraži s državama i državnim objektima

Zelenković, Lucija

University of Zagreb

Faculty of Law

Chair of Private International Law

Lucija Zelenković

NATIONAL RESTRICTIONS IN INTERNATIONAL COMMERCIAL ARBITRATION INVOLVING STATES AND STATE ENTITIES

Master's Thesis

Mentor: Assistant Professor dr.sc. Tena Hoško

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Summary

States and state entities participate in international trade by concluding international business contracts with private parties from all across the world. These contracts often contain an arbitration clause, referring potential disputes to arbitration. Some national laws include special requirements, such as prior state approval, that the state party needs to meet for the purpose of a valid conclusion of an arbitration agreement. The issue arises when the state party fails to do that, and then relies on its internal law subsequent to the conclusion of the arbitration agreement in the attempt to invalidate it and deny the jurisdiction of the arbitral tribunal. Arbitral practice as well as commentators agree that such practice is prohibited, but the approaches taken vary. Such jurisdictional objections are denied as being contrary to the general principle of good faith and international public policy, a practice so widely accepted that it led to the development of a substantive rule of international arbitration which tribunals should apply regardless of the otherwise applicable law. This paper will focus on the analysis of these national restrictions and the different approaches taken in arbitral practice denying the state parties the right to invoke them in international commercial arbitration.

Key words: international commercial arbitration; jurisdiction; state parties; substantive rule of international arbitration; international public policy; good faith.

Sažetak

Države i državna tijela, uključujući i trgovačka društva u vlasništvu države, važni su sudionici međunarodne trgovine, sklapajući ugovore s privatnim pravnim osobama iz cijelog svijeta. Ti ugovori često uključuju i arbitražnu klauzulu, podvrgavajući sporove iz i u vezi s ugovorom na arbitražu. Neka nacionalna zakonodavstva postavljaju dodatne zahtjeve ili ograničenja za valjanost arbitražnog ugovora koji sklapa država, državno tijelo ili trgovačko društvo u vlasništvu države, kao što je, primjerice, prethodno odobrenje određenog državnog tijela. Problem nastaje kada taj zahtjev ne bude ispunjen, te se država pozove na nacionalno ograničenje prilikom prigovora nadležnosti arbitražnoga tribunala. Teorija i praksa danas su složni da je takva praksa protivna međunarodnom javnom poretku kao i temeljnom načelu dobre vjere te tribunali redovito odbijaju takve prigovore nadležnosti. Takva ustaljena praksa dovela je do razvoja materijalnog pravila međunarodnog arbitražnog prava, koje tribunali trebaju primijeniti neovisno o mjerodavnom pravu. Ovaj rad usmjeren je na analizu nacionalnih ograničenja te prakse arbitražnih tribunala kada se suoče s takvim prigovorom nadležnosti u međunarodnoj trgovačkoj arbitraži.

Ključne riječi: međunarodna trgovačka arbitraža; nadležnost; državni subjekti; materijalno pravilo međunarodnog arbitražnog prava; međunarodni javni poredak; dobra vjera.

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1. INTRODUCTION

"In contemporary legal systems, international commercial arbitration is a means by which international business disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral adjudicative procedures that provide the parties an opportunity to be heard."[1] It is an increasingly popular mechanism for dispute resolution as opposed to litigation, because it allows the parties to avoid the issues such as inconvenience, local bias, language barriers and other circumstances which may make a certain forum more favourable for one party than the other. Moreover, resolving disputes by litigation can result in long and complex proceedings, often including more than one related proceeding, resulting in increased costs and complications. [2] Because of these reasons, parties to international commercial transactions often include dispute resolution clauses in their contractual documents, in the form of arbitration agreements."[3] One of the participants in these international commercial transactions are often states and their entities, which also refer their commercial disputes to arbitration. For instance, commercial disputes involving states and their entities constitute more than 25% of disputes submitted before tribunals of the International Chamber of Commerce (hereinafter: "ICC tribunals"). [4] Namely, states conclude contracts for the purchase or the supply of goods and services, just like any other private entity would do.[5] To do so, they can either contract directly through a ministry or an agency of the state, or they can rely on special purpose companies which they own or control.[6] These state parties also prefer having their disputes resolved before an arbitral tribunal because often the state party is not willing to submit to the jurisdiction of a foreign court, while the private party is unwilling to submit to the jurisdiction of domestic courts of the respective state party, in fear that it would not get a fair trial.[7] While the private party is generally free to submit to arbitration, this is not always the case for the state party. Namely,

[1] Born Gary B., International Commercial Arbitration, Third Edition, The Hague, Netherlands, Kluwer Law International 2021, p. 67
[2] *Ibid.*, p. 68
[3] *Ibid.*, p. 70
[4] Böckstiegel Karl-Heinz: Public policy and Arbitrability, in Sanders Pieter: ICCA Congress Series No. 3 (New York 1986): Comparative Arbitration Practice and Public Policy in Arbitration, The Hague, Netherlands, Kluwer Law International, 1987, p. 182
[5] Lew D.M. Julian, Mistelis A. Loukas, Kröll Stefan Michael, Comparative International Commercial Arbitration, The Hague, Netherlands, Kluwer Law International, 2003, p. 733
[6] *Ibid.*
[7] Langkeit Jochen: Staatenimmunität und Schiedsgerichtsbarkeit: verzichtet ein Staat durch Unterzeichnung einer Schiedsgerichtsvereinbarung auf seine Immunität?, Germany, Verlag Recht und Wirtschaft, 1989, p. 25 *et. seq.*

national constitutions and laws sometimes contain restrictions on the conclusion of arbitration agreements by the state or its entity.[8] For instance, the Constitution of Iran requires parliamentary approval for the submission to arbitration in disputes involving state property if the other party is a foreign entity.[9] It is not rare that the state party disregards such restrictions and concludes the arbitration agreement, only to subsequently try to evade the obligation undertaken by objecting to the jurisdiction of the arbitral tribunal and relying on its internal restrictions.[10] Therefore, tribunals have in many cases had to decide on the treatment of such jurisdictional objections. This paper will focus on these national restrictions on state parties' right to submit to arbitration and their treatment by arbitral tribunals and courts as well as different approaches as to their characterisation. First, it will present a brief introduction to international commercial arbitration. Second, the analysis will focus on the characterisation of national restrictions as restrictions on subjective arbitrability or general contractual capacity in theory as well as in case law. Lastly, the analysis will focus on the enforcement of arbitral awards.

2. INTERNATIONAL COMMERCIAL ARBITRATION

2.1. Advantages of international commercial arbitration

"International arbitration is a legal process in which parties to a dispute agree to refer that dispute to a tribunal of one or more independent and impartial arbitrators chosen by or on behalf of the parties to the exclusion of the domestic courts".[11] The tribunal is faced with a task to consider both parties' claims and their support, in order to resolve their dispute in the form of an arbitral award. [12] International commercial arbitration is a process in which the parties resolve their disputes arising out of a cross-frontier (or transnational) business relationship.[13] The reason why arbitration is an increasingly popular way of resolution of international

[8] Gaillard Emmanuel, Savage John, Fouchard Gaillard Goldman on International Commercial Arbitration, in Emmanuel Gaillard and John Savage (eds), The Hague, Netherlands, Kluwer Law International, 1999, p. 314
[9] Article 139 of the Constitution of Iran from 1979, as cited in: Gaillard, Savage *op.cit.* (bilj. 8), pp. 314-315; for a more detailed analysis on this issue, see *infra,* chapter 3.
[10] *Ibid.*, p. 315
[11] Blackaby Nigel, Partasides Constantine: Redfern and Hunter on International Arbitration, Seventh edition, Oxford, United Kingdom, Oxford University Press, 2022, para 1-04
[12] *Ibid.*
[13] *Ibid.*, para 1-03

business disputes, as opposed to litigation, is the fact that that it is based on the parties' choice. Namely, the parties determine the structure, form, system, rules and other details of the arbitration.[14] Also, the parties to international business contracts often come from the variety of countries with different legal, political and cultural systems, and by choosing arbitration before in a neutral forum, all of these differences and interests are protected and respected.[15] These are only some of the reasons why parties choose arbitration. Also, it enables the parties to resolve their commercial disputes in a neutral place of arbitration, by an independent, impartial and experienced tribunal which is selected by the parties of on their behalf. Moreover, arbitral proceedings are private and confidential. Lastly, the parties' dispute is finally resolved in the form of an internationally enforceable arbitral award. [16]

2.2. Key elements of international commercial arbitration – international arbitration agreement

Before continuing to national restrictions in international commercial arbitration, it is necessary to touch upon some of the fundamental elements common for every arbitration. These are: (i) the agreement to arbitrate; (ii) the place of arbitration; (iii) the commencement of an arbitration; (iv) the appointment of the arbitral tribunal; (v) arbitral proceedings; (vi) the award of the tribunal; (vii) and the enforcement of the award. [17] Although all of them are equally as important, the cornerstone of every arbitration is the arbitration agreement. [18]

The arbitration agreement manifests the parties' consent to submit to arbitration.[19] Namely, while national courts derive their jurisdiction from national laws or an agreement on jurisdiction, arbitration is solely based on the consent between two or more parties to submit their future or existing disputes to arbitration.[20]

[14] Lew, Mistelis, Kröll, *op.cit.*, (bilj. 5), p. 2
[15] *Ibid.*, para 1-19, p. 2
[16] Blackaby, Partasides, *op.cit.*, (bilj. 11), para 1.122-1.126
[17] *Ibid.*, para 1.19
[18] *Ibid.*, para 2.01
[19] *Ibid.*, para 2.01; See also: Lew, Mistelis, Kröll, *op.cit.* (bilj. 5), p. 2
[20] *Ibid.*, p. 100

The parties can agree on arbitration in the form of an arbitration agreement, concluded as a separate contract from the main contract, or it can take a form of an arbitration clause inserted into the main contract.[21] The latter is the most common form of arbitration agreements.[22]

Regardless of the form, if the arbitration agreement provides for international arbitration, it must comply with international requirements as to their validity, which are set out in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: "New York Convention"). These requirements are provided in Article II(1) of the New York Convention: (i) the agreement has to be in written form; (ii) it concerns existing or future disputes; (iii) these disputes arise from a defined, contractual or non-contractual, legal relationship; (iv) they concern the subject matter capable of being resolved by arbitration. [23] If the arbitration agreement does not meet these international requirements, the arbitration agreement itself and any award made under it, may not qualify for international recognition and enforcement.[24]

Article V(1)(a) of the New York Convention provides additional two requirements, which constitute the ground for denial of recognition and enforcement of an arbitral award if they are not met: (i) the parties to the arbitration agreement had the capacity to conclude it; and (ii) the arbitration agreement is valid under the law the parties have subjected it or, failing any indication thereon, the law of the state where the award is made.[25]

The first of the two requirements from Article V(1)(a), the capacity to conclude an arbitration agreement in some cases presents a particular concern when concluding an arbitration agreement with a state or a state entity. Namely, states or their entities are sometimes prohibited from submitting to arbitration, or they have to obtain some kind of approval or authorisation before concluding an arbitration agreement.[26] These kinds of restrictions concerning the capacity of state parties to conclude arbitration agreements concern the subjective arbitrability or arbitrability "*ratione personae*".[27] Although such restrictions are not common for most legal systems, they are still present in some countries.[28] It is not uncommon that states try to evade

[21] Lew, Mistelis, Kröll, *op.cit.* (bilj. 5), pp. 100-101
[22] *Ibid.*, p. 101, para 6-7; See also: Blackaby, Partasides, *op.cit.*, (bilj. 11), para 2.02
[23] Article II(I) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ("New York Convention")
[24] Blackaby, Partasides, *op.cit.*, (bilj. 11), para 2.12
[25] Article V of the New York Convention
[26] Blackaby, Partasides, *op.cit.*, (bilj. 11), para 2.40
[27] *Ibid.*, para 2.42
[28] *Ibid.*, para 2.41

their obligations after the conclusion of arbitration agreements by invoking lack of subjective arbitrability.[29] Arbitral tribunals tend to deny such objections, and different approaches by which they achieve it will be demonstrated in detail in the following chapters.

3. OVERVIEW OF NATIONAL RESTRICTIONS ON ARBITRATION

3.1. Types and the purpose of national restrictions

It is a general consensus that "any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement".[30] However, this is not always true for states and their entities, as there are some legal systems which impose certain requirements for the submission to arbitration of the state and its entities. The basic idea behind these national restrictions is often based on the old understanding that it is against sovereign dignity to submit to any type of dispute resolution system not controlled by the state itself. [31] These restrictions are the expression of distrust of arbitration in countries which historically considered arbitration to be a dispute settlement mechanism favouring parties from industrialised countries.[32] Nowadays, they can only be found in a few legal systems. There are two basic types of national restrictions on arbitration involving states and their entities.

The first type of such restrictions is limited to domestic disputes only. For instance, Article 2060 of the Civil Code of France provides that "disputes concerning public collectives and public establishments, and all matters involving public policy, may not be referred to domestic arbitration. However, some types of public bodies can be authorised to do so by way of a State decree".[33] In 1994, the Paris Court of Appeal held that this provision is limited to domestic contracts only and that "in order to validate the arbitration agreement contained in a contract, it is sufficient to find that there exists an international contract entered into for the purpose and

[29] Lew, Mistelis, Kröll, *op.cit.*, (bilj. 5), pp. 735-737
[30] Ragno, Francesca: Chapter 8: The Incapacity Defense under Article V(1)(a) of the New York Convention, in: Ferrari Franco, Rosenfeld Friedrich: Autonomous Versus Domestic Concepts under the New York Convention, The Hague, Netherlands, Kluwer Law International, 2021, p. 178
[31] Böckstiegel, *op.cit.*, (bilj. 4), p. 202
[32] Sornarajah, Muthucumaraswamy: The Settlement of Foreign Investment Disputes, The Hague, Netherlands, Kluwer Law International, 2000, p. 110. See also: Lew, Mistelis, Kröll, *op.cit.*, (bilj. 5), p. 735
[33] Blackaby, Partasides, *op.cit.*, (bilj. 11), para 2.40

on terms consistent with the customs of international trade."[34] The focus of this paper is international commercial arbitration, therefore this type of restrictions will not be covered by it.

The second type of restrictions relates not only to national, but international contracts, *i.e.*, contracts concluded with a foreign entity.

An example of such national restriction is conditioning the validity of an arbitration agreement with prior state approval.[35] For example, Article 139 of the Constitution of Iran from 1979 provides that

"The resolution of disputes concerning state property, or the submission of such disputes to arbitration, shall in each case be subject to approval by the Council of Ministers and must be notified to Parliament. Cases in which one party to the dispute is foreign, as well as important domestic disputes, must also be approved by Parliament." [36]

Furthermore, Syrian Legislative Decree No. 55/1959, repealed and replaced by Law 32/2019, required prior advice from the competent Committee:

"No ministry or state organization may conclude, accept or authorize a contract, a compromise or an arbitration or execute an arbitral award of more than Syrian £ 45,000 without the prior advice of the competent Committee."[37]

It can be seen from these provisions that restrictions on submission to arbitration of state parties are imposed in disputes concerning state property and public interest. Commentators have different understanding on the purpose of such legislation. Some consider that one of the purposes behind such legislation is to protect the country from corruption in international trade, by imposing an additional mechanism of control of such transactions.[38] The others claim that such restrictions are a manifestation of hostility towards arbitration based on public policy

[34] Kirry Antoine: Arbitrability: Current Trends in Europe, Arbitration International, Volume 12, Issue 4, 1996, pp. 381-382; See also: Ministère tunisien de l'Equipement v. Société Bec Frères and Société Grands Travaux d'Afrique, Paris Cour of Appeal, decision from 24 February 1994
[35] Gaillard, Savage *op.cit*. (bilj. 8), pp. 314-315
[36] *Ibid.*
[37] Syrian Legislative Decree No 55/1959, as cited in: Fougerollem S.A. v. Ministry of Defence of the Syrian Arab Republic, Administrative Tribunal of Damascus, Syria, 31 March 1988, available in: Van den Berg, Albert Jan: Yearbook Commercial Arbitration, Volume XV, 1990, pp.515-517
[38] *E.g.*, Gharavi, Hamid G.: Update, Thoughts and Perspectives on Iran's International Arbitration Regime, ASA Bulletin, Volume 19 Issue 4, 2001, p. 729; See also: Sornarajah, *op.cit.* (bilj. 32), pp. 103-104

considerations.[39] Some authors even go so far to claim that "these sorts of national law restrictions singling out arbitration agreements for specific legislative disfavor are text-book illustrations of discriminatory national laws whose application to international arbitration agreements is prohibited by Article II(3) of the New York Convention".[40]

3.2. Issues concerning the characterisation of national restrictions on arbitration

A common discussion amongst commentators of international commercial arbitration involving state parties is the characterisation of national restrictions on arbitration. This is significant because depending on the characterisation, different laws can be applied to allow or deny the state the right to rely on these restrictions. The prevailing view amongst courts and commentators is that domestic restrictions on arbitration concern the concept of arbitrability.[41] Namely, in order for a dispute to be arbitrable, two requirements need to be met.[42] First, it must be related to a matter capable of being resolved by arbitration. This is "objective arbitrability" or arbitrability "*rationae materiae*".[43] Second, the parties must be able to conclude an arbitration agreement. This is "subjective arbitrability" or arbitrability "*rationae personae*".[44] Therefore, national restrictions concerning the entitlement of states and their entities to submit their disputes to arbitration, rather than the kinds of disputes that can be submitted to arbitration, concern the question of subjective arbitrability.[45]

There are some authors that claim that national restrictions on arbitration should be characterised as issues of general contractual capacity.[46] However, these restrictions do not fulfil the traditional role of restrictions on capacity. Capacity covers matters which relate to the personal status of a party, *inter alia*, whether a party is capable of entering into binding contracts.[47] "The rationale behind the law on capacity is the need to protect those unable to

[39] *E.g.*, Gaillard, Savage, *op.cit.* (bilj. 8), p. 317; see also: Raeschke-Kessler Hilmar: Some Developments on Arbitrability and Related Issues; in: Van den berg, Albert Jan: International Arbitration and National Courts: The Never Ending Story, The Hague, Netherlands, Kluwer Law International, 2001, p. 44
[40] Born, *op.cit.*, (bilj. 1), p. 776
[41] Lew, Mistelis, Kröll *op. cit.*, (bilj. 5), pp. 737-738
[42] Hanotiau, Bernard; The Law Applicable to Arbitrability, SAcLJ, 26 (Special Issue), 2014, p. 875
[43] *Ibid.*
[44] *Ibid.*
[45] Cheng, Tai-Heng, Entchev, Ivo (2014): State Incapacity and Sovereign Immunity in International Arbitration, SAcLJ, 26 (Special Issue), 2014, p. 946
[46] Marzolini Paolo: The Involvement of States and State-Owned Entities in International Arbitration - The International Conventions and Swiss Perspectives, 6 ROM. ARB. J. 27, 2012, p. 29
[47] Born, *op. cit.*, (bilj. 1), p. 766; See also: Marzolini, *op. cit.*, (bilj. 46), p. 29

defend their own interests, such as minors. It cannot be said that states or state-owned entities require this sort of protection".[48] When state parties cannot conclude an arbitration agreement without, *e.g.*, prior parliamentary approval, "parties do not suffer from a general negotiating incapacity, but are prevented *ex lege* from entering into a specific and *sui generis* contract because of their subjective status or function".[49] Taking into consideration the rationale behind these restrictions, which is usually to protect the country from corruption, especially in international relations, one can see the difference between these restrictions, which are based on public interest considerations, as opposed to the need to protect those who are unable to defend their own interests.[50] Regardless of the characterisation, it is a general trend that tribunals do not allow the state to rely on its own law in order to deny the jurisdiction of the tribunal.[51] The following chapter will demonstrate how tribunals assessed this issue by applying the substantive rule of international arbitration, or in other cases, the principle of good faith and international public policy.

4. DIFFERENT APPROACHES TO NATIONAL RESTRICTIONS IN INTERNATIONAL COMMERCIAL ARBITRATION

As it was already stated, arbitral tribunals generally deny jurisdictional objections based on lack of capacity or subjective arbitrability of state parties. In doing so, they have undertaken different approaches, which were brought out in the landmark award *Benteler v. Belgium* from 1983.[52] This case involved a tripartite contract concluded between German and Belgian companies and the Belgian state regarding the restructuring of the Belgian company. The contract included an arbitration clause. After the dispute arose, Belgium objected to the jurisdiction of the arbitral tribunal and relied on Article 1676(2) of the Judicial Code, according to which it could not validly submit to arbitration except by virtue of a special empowerment in a treaty.[53] The arbitral tribunal denied this objection by applying Article II(2) of the European Convention on International Commercial Arbitration (hereinafter: "European Convention"), according to which legal persons of public law have the capacity to submit to arbitration regardless of the

[48] Raeschke-Kessler, *op.cit.* (bilj. 39), p. 44
[49] Ragno, *op.cit.*, (bilj. 30), p. 178
[50] *Ibid.*, see also; Gharavi, *op.cit.*, (bilj. 38), p. 729
[51] Blackaby, Partasides, *op.cit.*, (bilj. 11), para 2.43
[52] Ad Hoc-Award of November 18, 1983 Benteler v. Belgium, J.Int'l Arb. 1984, at 184 et seq.
[53] Article 1676(2) of the Belgian Judicial Code has since been abandoned.

provisions of their internal law. The tribunal considered that this provision constitutes a general principle of international arbitration which can in practice be achieved in various ways:

1) Limiting the prohibition or restriction on arbitration to national, *i.e.*, domestic cases only;
2) Submitting the capacity of the state to conclude an arbitration agreement to the law of the contract instead of the law of the state party;
3) Holding that the state relying on its internal law to avoid the arbitration agreement is violating international public policy;
4) Applying *nemo venire contra factum proprium* - Allowing an arbitrator to disregard that type of restriction as the state would be acting against its earlier behaviour;
5) Characterising the issue as one of subjective arbitrability and applying the substantive rule of international arbitration instead of the law of the state party. This rule requires state parties to honour the arbitration agreement precluding them from relying on national restrictions to avoid the effects of arbitration agreements it has concluded.[54]

4.1. Substantive rule of international arbitration

States and their entities are prohibited to invoke their internal law subsequent to the conclusion of arbitration agreements in order to try to invalidate them, consequently leading to the denial of tribunals' jurisdiction. In fact, as stated by Gary B. Born, "tribunals have virtually never allowed sovereign states to rely on their own laws to disown their international arbitration agreements".[55] Such arbitral practice has led to the development of a substantive rule of international arbitration governing subjective arbitrability, which the tribunals must apply regardless of the otherwise applicable law.[56] This rule prohibits state parties to rely on the national restrictions in order to invalidate an arbitration agreement they had entered into freely.[57] The substantive rule is derived from international conventions and national laws as well as the extensive arbitral practice. Specifically, in the *Benteler v. Belgium* case, the arbitral tribunal applied Article II(2) of the European Convention which expressly provides for the

[54] Benteler v. Belgium
[55] Born, *op.cit.* (bilj. 1), p. 774
[56] Lew, Mistelis, Kröll *op. cit.*, (bilj. 5), p. 737; See also: Raeschke-Kessler, *op.cit*., (bilj. 39), p. 44; Kirry, *op.cit.*, (bilj. 34), p. 381
[57] Lew, Mistelis, Kröll, *op.cit.*, (bilj. 5), p. 737; See also: Cheng, Entchev, *op.cit.*, (bilj. 45), p. 955; Gaillard, Savage, *op.cit.*, (bilj. 8), p. 318

subjective arbitrability of disputes involving legal persons of public law.[58] However, it went on to state in its *obiter dicta* that "Article II of the European Convention (…) is not exceptional. On the contrary, it is a generally accepted principle in international arbitration law…"[59]. States are allowed to declare a reservation[60] on this provision, and up until this moment only Belgium has done so. This means that in all cases falling under the European Convention, Article II (2) supersedes all national restrictions.[61] Moreover, Article 177(2) of the Federal Act on Private International Law of the Swiss Confederation (hereinafter: "Swiss PILA") provides that "[a] state, or an enterprise held by or an organisation controlled by a state, that is party to an arbitration agreement, may not invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement."[62]

Similar provisions can be found in the arbitration laws of Tunisia[63], Spain[64] and Peru[65]. On the contrary, the UNCITRAL Model Law on International Commercial Arbitration from 1985 with amendments as adopted in 2006 (hereinafter: "Model Law") does not contain a similar provision.[66]

Also, the 1989 Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises of the Institute for International Law suggests the existence of an international consensus that invoking internal restrictions by the state parties should have no effect on the validity of an arbitration agreement. It provides in Article 5 that "[a] State, a state enterprise, or a state entity cannot invoke incapacity to arbitrate in order to resist arbitration to which it has agreed."[67]

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[58] Article II (2) of the European Convention on International Commercial Arbitration
[59] Benteler v. Belgium
[60] Hascher Dominique: European Convention on International Commercial Arbitration (European Convention,1961) – Commentary; in: Van den Berg, Albert Jan: ICCA Yearbook Commercial Arbitration, Volume XX, The Hague, Netherlands, Kluwer Law International, 1995, p. 1017: "The content of Art. II met strong opposition from Civil Law countries where public entities are, generally, prohibited from resorting to arbitration. To accommodate these States, which otherwise would have not ratified the Convention, a second paragraph providing for the possibility of a reservation was added to Art. II".
[61] *Ibid.*, p. 1016.
[62] Article 177(2) of the Swiss PILA, in force from 1 January 1989, English translation available at: https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en; accessed on 18 April 2023
[63] Loi no 93-42 du 26 avril 1993 portant promulgation du code de l'arbitrage, Journal officiel, no. 33, 1993
[64] Ley 60/2003 de 23 de diciembre, de Arbitraje, Boletín Oficial del Estado, no. 309, 2003
[65] DL. no. 1071 Decreto Legislativo que norma el arbitraje, available at: https://www.gob.pe/institucion/osce/normas-legales/308659-1071; accessed on 4 May 2023
[66] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
[67] Resolution on Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises, Institute for International Law, Session of Santiago de Compostela - 1989

This consensus is rather often addressed by arbitral tribunals. The ICC tribunal in a case from 1992 denied the state parties' jurisdictional objection based on lack of subjective arbitrability by applying Article 177(2) of the Swiss PILA. It went on to state that "general principles of arbitration law and of international practice would in any case lead to the same result".[68]

Finally, the majority of authors agree that "…it can therefore be concluded that there exists a general principle of international arbitration which operates as a substantive rule, under which a state cannot avail itself of its own law in order to challenge the validity of an arbitration agreement which it has entered into."[69]

This substantive rule is based on the fundamental principles of good faith and *pacta sunt servanda*. States and their entities are participants in international trade, they negotiate and conclude a variety of contracts with private parties worldwide. This includes arbitration agreements as well. For the proper functioning of international trade relations, a certain level of trust and security is necessary. Therefore, to allow state parties to build up that trust while contracting with a foreign private party, only to subsequently unilaterally withdraw from its obligation, would undermine that certainty and trust.[70] Such efforts are considered to be fundamentally contrary to the principle of good faith, and therefore cannot affect the validity of an arbitration agreement otherwise freely entered into by the state.[71] It is said that is "by the nature of his function, the international arbitrator has to protect a certain basic "contractual morality" and the superior interests of international trade".[72] Therefore, it is no wonder that tribunals worldwide agree on this idea.

However, not all authors agree that the application of this substantive rule should be absolute. Namely, some of them consider that the principle of good faith cannot in all cases lead to the denial of jurisdictional objections based on internal restrictions. Specifically, in situations where the foreign private party was aware of the national restrictions. For a more detailed analysis, see *infra*, chapter 4.3.

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[68] Supplier v. Republic of X, Partial Award on Jurisdiction and Admissibility, ICC Case No. 6474, 1992, published in ICCA Yearbook Commercial Arbitration, Volume XXV, 2000, pp. 280-311; See also: Gatoil International Inc. v National Iranian Oil Co., High Court of Justice, Queen's Bench Division, 21 December 1988, Yearbook Commercial Arbitration, Volume XVII, 1988, p. 587

[69] Kirry, *op.cit*., (bilj. 34), p. 382; See also: Blackaby Nigel, Partasides Constantine: Redfern and Hunter on International Arbitration, Sixth edition, Oxford, United Kingdom, Oxford University Press, 2015, p. 84; see also Ragno, *op.cit.*, (bilj. 30), p. 178

[70] Lalive Pierre: Transnational (or Truly International) Public Policy and International Arbitration, Revista Brasileira de Arbitragem, Volume XI, Issue 41, 2014, p. 211

[71] Born, *op.cit*., (bilj. 1), p. 777

[72] Lalive, *op.cit.* (bilj. 70), p. 211

4.2. International public policy

Constitutional and legislative restrictions for the submission to arbitration are sometimes characterized as an issue of capacity.[73] General contractual capacity of legal persons is governed by the law of their seat.[74] Therefore, this approach would lead to the application of the law of the state party and consequently, the acknowledgement of national restrictions.[75] However, even in such cases, jurisdictional objections based on lack of capacity are denied by tribunals as being contrary to international public policy and the principle of good faith.[76]

International public policy is the ground for the denial of recognition and enforcement of an arbitral award pursuant to Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: "New York Convention").[77] "It enables the judge (…) to refuse the recognition of foreign acts whenever such application of foreign law or such recognition acts would be incompatible with fundamental principles of the forum."[78] Furthermore, it constitutes a ground for setting aside an arbitral award pursuant to Article 34(2)(b)(ii) of the Model Law.[79] Finally, it serves as a defence against the enforcement of the very cornerstone of every arbitration, which is the arbitration agreement.[80]

It is important to note that the restriction itself is not a violation of international public policy, but "[w]hat is recognized by international arbitral practice as a violation of international public policy is the fact for a State or legal entity of public law to conclude an arbitration agreement without revealing its incapacity or lack of authority and then later to invoke such lack of authority in order not to respect the agreement".[81]

There are numerous cases in which arbitral tribunals relied on international public policy to deny recalcitrant state parties top invoke their internal law to avoid their obligations. In the ICC case from 1986, the tribunal had to decide on its jurisdiction in a dispute involving a French

[73] Lew, Mistelis, Kröll, *op.cit.*, (bilj. 5), p. 735; See also: Berger Klaus Peter, International Economic Arbitration, Boston, Deventer, Kluwer Law and Taxation Publishers, 1993, p. 177; See also: Razumov K.L.: The Law Governing the Capacity to Arbitrate, in: Van den Berg Albert Jan: Planning Efficient Proceedings, The Law Applicable in International Arbitration X, Vienna, Austria, Kluwer Law International, 1994, pp. 260-261.
[74] *Ibid.*
[75] *Ibid.*
[76] Born, *op.cit.*, (bilj. 1), p. 777
[77] Article V(2)(b) of the New York Convention
[78] Lalive, *op.cit.*, (bilj. 70), p. 176
[79] Article 34(2)(b)(ii) of the Model Law
[80] Böckstiegel, *op.cit.*, (bilj. 4), p. 178
[81] ICC Case No. 6474; see also: Böckstiegel, *op.cit.*, (bilj. 4), p. 203; Lew, Mistelis, Kröll, *op.cit.*, (bilj. 5), p. 736; Raeschke-Kessler, *op.cit.*, (bilj. 39), p. 45; Ragno, *op.cit.*, (bilj. 30), p. 179

private party as claimant and an Iranian state-owned entity (hereinafter: "SOE") as respondent. Iranian Constitution required prior state approval for the conclusion of the arbitration agreement, which the SOE did not obtain. Consequently, it contested the tribunal's jurisdiction, arguing that the failure to obtain parliamentary approval rendered the arbitration agreement invalid. The tribunal rejected that claim, and stated the following:

"International public policy would be strongly opposed to the idea that a public entity, when dealing with foreign parties, could openly, knowingly, and willingly, enter into an arbitration agreement, on which its co-contractor would rely, only to claim subsequently, whether during the arbitral proceedings or on enforcement of the award, that its own undertaking was void."[82]

Similar understanding was taken other cases where tribunals relied on the principle of good faith, as the fundamental principle of international public policy.[83] This principle requires that a party does not contradict an action or statement which it has previously undertaken in order to benefit from such behaviour.[84]

For instance, in the often-cited Company Z case, the tribunal relied on the principle of good faith and stated:

"It results that the [respondent] cannot rely on its own errors, irregularities, acts or omissions to free itself of an arbitration clause on which the foreign co-contractor was entitled to base itself in good faith, as an essential protection…".[85]

The tribunal also stated that even if the arbitration agreement was in fact invalid *ab initio*, that it was "ratified" by the state parties' conduct, which was the omission to and failure to notify the other party of irregularities potentially causing invalidity of the arbitration clause.[86]

Therefore, as it has been shown, in arbitral practice, it is of no importance how the tribunal in a particular case decides to characterize the national restrictions. The result is the same whether the tribunal decides to apply the substantive rule governing the subjective arbitrability of the

[82] ICC Award No. 4381,1986, available at: Collection of ICC Arbitral Awards 1986 – 1990, Kluwer Law and Taxation Publishers, 1994, pp. 264-271
[83] ICC Case No. 6474
[84] Mohtashami, Reza: Protecting the Legitimacy of the Arbitral Process: Jurisdictional and Procedural Challenges in Public-Private Disputes in Kalicki Jean, Raouf Mohamed Abdel: Evolution and Adaptation: The Future of International Arbitration, The Hague, Netherlands, Kluwer Law International, 2019, p. 631.
[85] Company Z and Others v. State Orhanization ABC, Award, April 1982, published in: ICCA Yearbook Commercial Arbitration Volume VIII, 1983, pp. 94-117
[86] *Ibid.*

dispute, or principles of international public policy which prohibit invoking of the otherwise applicable law on capacity.

4.3. Cases where the state could rely on its internal law

4.3.1. Lack of good faith of the foreign private party

Chapters 3.1. and 3.2. analyse a spectrum of different situations which confirms that arbitral practice is determined in the prohibition for state parties to rely on their internal law in order to invalidate arbitration agreements they concluded. However, there are some commentators that claim that this prohibition should not apply in all cases. Precisely, that the behaviour of the foreign private party should be considered as well.[87] For instance, it is argued that the principle of good faith in negotiations would require the state party to disclose the existence of any law or regulation which prohibited or restricted its right to conclude the arbitration agreement. If the state failed to do so, only the private party which was unaware of the fact that the state was acting in bad faith could resist the jurisdictional objection. On the contrary, if the state disclosed the requirements and the private party disregarded them and went on with the conclusion of the arbitration agreement with the knowledge that they were not met, it could not rely on the principle of good faith and thus had waived its right to resist the jurisdictional objection.[88] In the described situation "it is difficult to conceive how the good faith of either party is at stake where they were both aware of the defect capable of affecting the validity of the arbitration agreement at the moment of its conclusion."[89]

The reasoning behind this is the fact that there is a general duty on the side of the foreign private party contracting with a foreign state or its entity, to inquire about the existence of any restrictions which could possibly affect the validity of the arbitration agreement.[90] Professor Sornarajah stated that "[a] foreign corporation was under a duty 'in accordance with normal practice and in good faith' to ascertain, by available means, the capacity or the lack of capacity

[87] Mohtashami, *op.cit.*, (bilj. 84), p. 631; Poudret Jean-Francoise, Besson Sebastien, Comparative law of international arbitration, London, United Kingdom, Sweet & Maxwell, 2007, pp. 193-194
[88] Mohtashami, *op.cit*, (bilj. 84), pp. 631-633 Sornarajah, *op.cit*., (bilj. 32), p. 107
[89] Poudret, Besson, *op.cit.* (bilj. 87), pp. 193-194
[90] Sornarajah, *op.cit*., (bilj. 32), pp. 109-110.

of the state entity with which it concludes a contract".[91] According to this approach, a manifest incapacity on the state party is always relevant.[92]

A specific situation which supports such an approach is the event of proven corruption or the likelihood thereof. For instance, the private party negotiates the conclusion of a commercial contract with a state party from a state with a high corruption index.[93] The contract includes an arbitration agreement referring all disputes arising out of or in relation to it to arbitration. The law applicable to the state parties' capacity, designed to prevent corruption, requires prior state approval for the submission to arbitration, and despite that, the parties fail to obtain it. It is stated that in such cases, if the foreign party ignores this protective mechanism and disregards the requirements for the valid conclusion of the arbitration agreement, it behaves against the expectations of the international community by trying to benefit from the venture it knows, or should know, is illegal.[94] The followers of this approach consider that in such cases, "ratification by conduct", as applied in the Company Z case[95], is not justified, because it completely disregards the legislation developed to protect the economic sector of the country, in favour of the profits arising for the foreign company.[96]

Contrary to this theoretical approach which denies the private foreign party the right to resist the state parties' jurisdictional objection if the former was aware of the restriction on its capacity to submit to arbitration, arbitral practice suggests that even in such cases of the private parties' awareness of the requirements, its right to resist the state parties' objection is not precluded. In the ICC case from 1992, the state party, being the respondent, objected to the tribunal's jurisdiction by claiming lack of subjective arbitrability due to missing Cabinet approval and authorisation. It relied on the fact that its co-contractor, the foreign private party, was aware of these requirements. However, the tribunal had again denied this argumentation and objection. It stated that even if it may be assumed that the foreign party knew about the requirements, the respondent provided no proof as to the knowledge of the other party that these requirements were not met. The tribunal went on to state that it is difficult to expect that the foreign private party should know that these requirements have been met, if even the state party in that case was unable to do so. And lastly, it explained that even if some regulations were not followed, the state party had a much greater duty [than the private party] to prevent these irregularities,

[91] *Ibid.*, p. 110.
[92] *Ibid.*
[93] *E.g.*, according to Corruption Index of Transparency International
[94] Sornarajah, *op.cit.*, (bilj. 32), pp.103-104, Gharavi, *op.cit.*, (bilj. 38), p. 729
[95] See: *supra*, p. 13
[96] Sornarajah, *op.cit.*, (bilj. 32), pp. 105-106

and to remedy the situation.[97] This shows that the prohibition to rely on internal restrictions in international commercial arbitration is widely accepted and applied in various circumstances.

Despite this arbitral practice which will, in general, protect the foreign private party and deny such attempts of state parties to avoid arbitration, the decision will at last depend on arbitral tribunal's decision in the specific case. Therefore, to avoid any doubts about the capacity of the state party for the conclusion of an arbitration agreement, it is always advisable that the private party inquire about the existence and the fulfilment of any requirements that could possibly bring into question the validity of the arbitration agreement it had concluded with a state party. The preferable solution is to insert an express clause in the contract containing the arbitration agreement, indicating that all of the necessary formalities and requirements have been fulfilled.[98] This will reduce the possibility of jurisdictional objections based on the omission to meet such requirements.

4.3.2. Other cases where the state was allowed to rely in its internal restrictions

Contrary to this general trend of prohibiting the state parties to rely on their internal restrictions to avoid the obligations they had undertaken, there are a few cases in which the state was successful in doing so before national courts.

The first case was decided by the Administrative Tribunal of Damascus, and involved a contract concluded between the private company Fougerolle S.A. and the Ministry of Defense of the Syrian Arab Republic. A dispute arose between the parties and the former initiated arbitration pursuant to the agreement between the parties. The tribunal rendered two awards in favour of the claimant, who went on to seek enforcement of the awards in Syria. The Administrative Tribunal of Damascus refused to enforce the awards, claiming that they were "non-existent" because they were rendered without the preliminary advice of the Syrian Council of the State, required by Article 44 of the Legislative Decree no. 55/1959. The Tribunal considered this provision to be a party of Syrian public policy and has thus denied enforcement on the basis of Article V(2)(b) of the New York Convention.[99] Even in this case, which presents a rare

[97] ICC Case No. 6474
[98] Blackaby, Partasides, *op.cit.*, (bilj. 11), para 2.41.
[99] Administrative Tribunal of Damascus, decision No. 74 M of 31 March 1988, Fougerolle SA v. Ministry of Defense of the Syrian Arab Republic, Yearbook Commercial Arbitration, Kluwer Law Interntional, Volume XV, 1990, 515-517.

exception, the Administrative Tribunal did not rely on Article V(1)(a), *i.e.*, lack of capacity, to deny enforcement, further confirming that such a defense cannot be invoked by state parties.

Another example of state successfully relying on its internal law to avoid arbitration is the case of B.V. Bureau Wijsmuller v. United States of America, decided by the U.S. trial court. B.V. Bureau Wijsmuller was a marine salvage company, and it concluded the contract including the arbitration agreement with the captain of the U.S. warship Julius A. Furrer. The Court held that the contract was null and void pursuant to Article II (3) of the New York Convention[100]. Namely, under U.S. legislation, the United States of America are not bound by an arbitration agreement in the absence of any waiver of sovereign immunity of the State. Consequently, claimant's request to direct the United States to proceed to arbitration in London was denied.[101]

These examples prove that in certain cases, the state was successful to rely on its internal law to avoid arbitration, but they certainly do not constitute the prevailing practice. Also, both of the decisions were rendered by national courts, and not international arbitral tribunals. Therefore, these decisions are more to be considered exceptions to the general rule.

5. ENFORCEMENT OF THE ARBITRAL AWARD

It is clear that international arbitral tribunals are determined in following the trend of not allowing state parties to invoke their internal restrictions in international arbitration. But what happens when the party tries to seek enforcement of the award in the state which imposed such restrictions?

5.1. The New York Convention

When it comes to the recognition and enforcement of foreign arbitral awards, one must first consider the New York Convention. The New York Convention provides uniform international

[100] Article II (3) of the New York Convention provides 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 within the meaning of this article, 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."

[101] B.V Bureau Wjsmuller v. United States of-America, 1976 A.M.C. 2514 (S.D.N.Y. 1976), also in Born, Gary B., International Arbitration: Cases and Materials, Third Edition, The Hague, Netherlands, Wolters Kluwer, 2011, 409-411

standards mandating the presumptive validity of foreign and non-domestic arbitral awards and limits the grounds denying their recognition.[102] Having 172 state parties, the New York Convention is the most important treaty regulating the recognition and enforcement of foreign arbitral awards.[103]

Article III of the New York Convention unambiguously provides that "each contracting state shall recognise arbitration awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on." It also prohibits the state from imposing more onerous fees and expenses for the recognition and enforcement of foreign arbitral awards, as opposed to domestic arbitral awards.[104]

The "pro-enforcement" character of the New York Convention can be derived from the fact that it provides in Article V an exhaustive list of grounds on which recognition and enforcement can be denied, and national law cannot be the ground for any other defense.[105] Thus, the New York Convention "[s]ignificantly simplified the enforcement of foreign awards and harmonised the national rules for the enforcement of foreign awards."[106]

For the purpose of this paper, Article V(1)(a) must be considered. Namely, it provides that the recognition and enforcement of a foreign arbitral award can be denied if the parties to the arbitration agreement were, under the law applicable to them, under some incapacity.[107] Another ground on which national courts could deny recognition and enforcement of foreign

[102] Article III of the New York Convention; Born, *op.cit*., (bilj. 1), p. 3719
[103] The New York Arbitration Convention: https://www.newyorkconvention.org/list+of+contracting+states, accessed on 21 May 2023
[104] Article III of the New York Convention
[105] Kronke Herbert et. al.: Recognition and Enforcement of Foreign Arbitral Awards: A global commentary on the New York Convention, The Hague, Netherlands, Kluwer Law International, 2010, p. 209; Article V of the New York Convention provides the following reasons for denying the recognition or enforcement of foreign arbitral awards: (i) the parties to the arbitration agreement were under some incapacity under the law applicable to them, or the arbitration agreement is not valid under the law the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; (ii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case; (iii) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; (iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Recognition and enforcement may also be refused if the competent authority in the country where recognition and enforcement is sought finds that (i) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (ii) The recognition or enforcement of the award would be contrary to the public policy of that country.
[106] Lew, Mistelis, Kröll, op.cit., (bilj. 5), pp. 693-694
[107] Article V(1)(a) of the New York Convention

arbitral awards is provided in Article V(2)(b) of the New York Convention, which provides that the court may refuse the recognition or enforcement of the award if recognition and enforcement would be contrary to the public policy of that country.[108]

5.2. Lack of subjective arbitrability as ground for denial of enforcement of an award

Article V(1)(a) of the New York Convention provides that recognition and enforcement of an arbitral award can be denied if the parties to the arbitration agreement were, under the law applicable to them, "under some incapacity".[109] It is important to note the court in the country where the enforcement is sought will not consider this ground *ex officio*, but only on the initiative of the party resisting enforcement.[110] The question raised is whether the "incapacity defense" can be raised due to lack of subjective arbitrability and therefore lead to denial of recognition and enforcement of an arbitral award on that ground.

Going back to the problem of characterisation of national restrictions on submission to arbitration, it has been demonstrated in detail that according to the prevailing view, these restrictions are to be differentiated from the general contractual capacity.[111] Issues of general contractual capacity are covered by the domain of personal law as suggested under Article V(1)(a). On the contrary, subjective arbitrability, *i.e.*, special requirements to conclude the arbitration agreement, do not fall under the scope of this provision and are therefore not covered by the "incapacity defense".[112] However, it is suggested that if the lack of subjective arbitrability can be covered by other grounds for refusal of recognition and enforcement of an arbitral award from Article V of the New York Convention, the competent authority could deny recognition and enforcement pursuant to that provision.[113] For instance, if subjective arbitrability affects the validity of the arbitration agreement under the law applicable to it.[114]

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[108] Article V(2)(b) of the New York Convention; see *supra*, p. 16
[109] Article V(1)(a) of the New York Convention
[110] Werkhoven Max, Duggal Kabir A.N: Incapacity Under the New York Convention Article V(1)(a), available at: https://jusmundi.com/en/document/publication/en-incapacity-under-the-new-york-convention-article-v-1-a, visited on 2 May 2023.
[111] See: *supra*, p. 7
[112] Ragno, *op.cit.*, (bilj. 30), p. 172
[113] *Ibid.*
[114] *Ibid.*

In practice, apart from a few exceptions[115], national courts share the same understanding as arbitral tribunals towards relying on internal law to invalidate arbitration agreements by states and their entities. They have denied to recognize state parties' objections to enforcement of arbitral awards based on the lack of subjective arbitrability, on the ground of principle of good faith or the general principle of *pacta sunt servanda*. Some scholars argue that "the inability to rely upon the lack of subjective arbitrability results from the combination of international arbitration practice, customary international law, and principles of transnational law, which supersede national law".[116] Thus, the existence of general principles prohibiting objections to enforcement based on lack of subjective arbitrability is recognized on the basis of same standards referred to by arbitral tribunals. However, enforcement of an arbitral award will always depend on the applicable treaties, laws and regulations, and will consequently depend on the decision of the court in the country where the enforcement is sought.

6. CONCLUSION

International arbitration is an alternative mechanism for dispute resolution. International commercial arbitration enables parties to international business transactions to refer their disputes to international arbitral tribunals, constituted of one or more independent arbitrators, who are experts in the field the dispute arises from. There are two types of parties in international commercial arbitration. These are private parties, and state parties, *i.e.*, states and their entities.[117] While the private parties are in most cases free to decide to refer their disputes to arbitration, this is not always the case with state parties. Namely, they can be prohibited or restricted to do so under their national legislation. Such kind of restrictions is uncommon for most countries in the world, but there still remain some legal systems which consider arbitration to be a "too private" way of resolving disputes involving states and their entities and therefore wish to retain control over the submission to arbitration regarding these disputes, especially if the other party is a foreign entity. The restrictions themselves, other than being an additional step in the conclusion of arbitration agreements, do not constitute a problem. However, the problem arises if the state party concludes the arbitration agreement, only to subsequently

[115] See: *supra*, p. 16
[116] Berger, *op.cit.*, (bilj. 73), p. 184
[117] Böckstiegel Karl-Heinz: „States in the international arbitral process" in Lew, Julian D. M.: "Contemporary Problems in International Arbitration", Dortrecht, Netherlands, Springer Science + Business Media Dordrecht, 1987, p. 40

invoke its internal law and try to deny the jurisdiction of an international arbitral tribunal, claiming it did not have the capacity to conclude the arbitration agreement. Arbitral tribunals are almost unanimous in denying jurisdictional objections based on the state parties' internal law. The approaches taken vary. The prevailing view is that national restrictions on submission to arbitration are treated under the heading of subjective arbitrability, *i.e.*, capacity of parties to the arbitration agreement for its conclusion. Subjective arbitrability is governed by the substantive rule of international arbitration, which prohibits state parties to invoke their internal law in order to evade their obligations undertaken by concluding the arbitration agreement. Some authors consider that these restrictions are considered under the heading of general contractual capacity, which in case of legal persons is governed by their personal law, *i.e.*, the law of their seat. However, even in such cases state parties are prohibiting from invoking national restrictions due to principles of international public policy and the principle of good faith. In the existing practice, the behaviour and the knowledge of the private party of these restrictions did not affect the tribunals' denial of jurisdictional objections, even though some commentators consider that this prohibition for state parties should not be applied if the other party was aware of these restrictions. Finally, once the dispute is resolved in the form of an arbitral award, the question arises whether the state party could resist to the recognition and enforcement of the arbitral award due to lack of subjective arbitrability. The general answer is no, except for the cases where the subjective arbitrability affects the validity of the arbitration agreement. It can be stated that theory and practice agree on this topic in the majority and that state parties cannot seek an escape from the arbitration agreements they concluded by relying on their internal law. However, to avoid any doubts, the private party should inquire about the capacity of the state party it tends to conclude an agreement with, and potentially include a clause in the contract, stating that all requirements for its conclusion have been met.

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