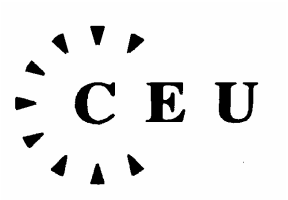

SCRUTINY OF ARBITRAL AWARDS BY CONSTITUTIONAL COURT

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ABSTRACT

This master thesis is dealing with the problem of reviewing arbitral awards by Constitutional Court, concentrating on countries where this has recently occurred – Republic of Croatia and some countries of Latin America. Different approaches related to different understanding of legal personality of arbitration and respectively the awards rendered by arbitral tribunals, were given.

Against arbitral awards, the only possible remedy that dissatisfied party has, and that are usually provided by laws of different countries and International Conventions, is filling an action for setting aside the award in the country where the awards is rendered, or opposing to the recognition and enforcement of the award in the country where this is sought.

In practice of these countries mentioned, constitutional complaints for protection of human rights and freedoms guaranteed by the Constitution were files with Constitutional Court against arbitral awards. This possibility as a venue against arbitral awards has made a confusing situation among judges and other legal scientists in this field, who were having different opinions on whether arbitral awards may or may not be subject to the control of the Constitutional Court. The opinions have changed during the years, thus not giving the final conclusion of what should be the proper understanding of a concept of arbitration and the exact possibilities available for the party, against non satisfying arbitral awards, especially in terms of constitutional complaint.

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INTRODUCTION

In this master thesis I would like to explain different approaches of a review of arbitral awards by Constitutional Court, especially related to my country Croatia and some countries of Latin America where this problem has occurred as well. An important issue to be elaborated is the issue of legal personality of arbitral tribunal, whether it is a judicial organ, i.e. a part of judicial system, or maybe a body with public authority, and why, with respect to that it is possible, in some countries, to scrutinize arbitral awards, under what circumstances and what the consequences are.

The main purpose of this master thesis is to give a closer approach towards existent practice and its difference from the legal standpoint specified in the laws of certain countries, regarding the possibility of reviewing arbitral awards by Constitutional Court (or the other highest Court having the same rights and duties as Constitutional Court). Case law of those countries shows that there has been an evident difficulty in defining the nature of arbitration as an alternative dispute resolution method, and arbitral decisions as decisions with specific effects that bring them close to the concept of judicial decisions. My aim is to evaluate the concept of arbitration and all possibilities for challenge of arbitral awards, as well as to exactly define rights and duties of Constitutional Court regarding the constitutional complaint as the most important instrument for protection of human rights and freedoms guaranteed by the Constitution. It is interesting to see how the approach of the Court and of legal experts acting in this field has changed within couple of years and only by a small amount of cases brought before them.

As it is hard to predict the future, and since traditionally there has been some differences in

legal opinions when it comes to the concept of arbitration and possibilities of controlling arbitral awards, this thesis will have a goal to discuss the debates that have already taken part about this issue and offer ways of possible future outcomes related to arbitral awards and their control.

The method I will be using in my thesis to elaborate this problem is analysis of primary and secondary sources of countries that my thesis is dealing with (Republic of Croatia and certain countries of Latin America). By examining relevant books, articles, studies and rapports, I will try to approach the subject of my thesis from all points of view, with aim to explain all existent findings in details. The most relevant sources that will help me to fulfill my task are national legislations of country of Croatia and countries of Latin America, as well as the most important conventions when it comes to the concept of arbitration, such as New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958., UNCITRAL Model Law on International Commercial Arbitration of 1985. and other relevant international treaties.

Regarding the sources used, this master thesis will be divided in three parts. The first part is concerned with possibilities of challenging arbitral awards. The second part is explaining the situation in Republic of Croatia, especially regarding the role of the Constitutional Court and its past and present reasoning about the control of arbitral awards, and the third part is concerned with countries of Latin America where the same problem with concept of arbitration occurred in practice, and which needs to be resolved for the future.

Arbitration is a very important method of settling disputes, especially in the field of international commerce. Parties have a right to choose arbitration as an alternative to litigation

or to other methods of resolving disputes. With an arbitration agreement or arbitration clause, they decide to submit all or just certain disputes arising from a certain relationship before an arbitral tribunal, and have the opportunity to choose arbitrators, place of arbitration, applicable law etc. Considering all of the characteristics that denote arbitration, it is a private method of resolving disputes, usually more effective and faster than normal proceedings before courts, with more flexibility of procedures, confidentiality, finality and international enforceability of the award.[1]

One of the advantages of arbitration is also the award made by the arbitrators. These awards are deemed to be enforceable in a foreign country much easier than any judgment of the court, which is one of the main reasons that make arbitration more attractive than any other mean of dispute resolution, especially in the field of international commercial trade.

Although awards are usually directed towards payment of a certain sum of money from one party to another, there is a wide range of remedies that can form part of the award. Among these are punitive damages and other penalties, making a declaration as to any matter to be determinate in the proceeding, creation of new relations and, ordering a specific performance.

An arbitral tribunal, when making the award, should pay attention on form and content of the award, as issues that might be raised regard the validity and enforceability of the award. In general, requirements of the form and content are dictated by the arbitration agreement where particular formalities may be mentioned, or by the law governing the arbitration (lex arbitri) where national system may determine under what conditions and how the award should be made.[2]

In an arbitration agreement, it is usually stated that the award shall be final and binding upon parties. Finality can be regarded as the point when arbitral tribunal disposes of all issues that

[1]Alan Redfern and Martin Hunter, *Law and practice of International Commercial Arbitration*, Third edition, (1999) at 24

[2] *Id.* at 386

have been raised before the tribunal, if they have not been already dealt by a partial or interim award. Decision to submit the dispute before the tribunal, demonstrates the will of the parties to be bound by the decision arbitrators make, thus it is considered that parties shall undertake to carry out the award without delay.[3] It is important that the award is made in an unambiguous and dispositive way, with effective determination of the issues in dispute, so parties are later not confused and they do know in which direction the dispute is solved and what are their rights and duties after the award is rendered.

Under UNCITRAL Model law on International Commercial Arbitration,[4] the award shall be made in writing and shall be signed by the arbitrator or arbitrators. It shall state the reasons upon which it is based, unless parties have agreed differently. The award shall state its date and the place of arbitration, and it will be deemed that the award has been made at that place. [5] This provision sets the requirements of the form and content of the award, most of which are mandatory. These requirements help the award to gain the quality on which parties can lean on. Signature of the arbitrators gives parties knowledge on who decided upon their request, because in contrast, not knowing the names of the arbitrators and their role in resolving the dispute could be one of the reasons for refusing recognition and enforcement of the award under the New York Convention. This provision also mandates a statement of reasons in the award, but with the exception that parties may agree otherwise, which means that the reasons may be stated in another form or that the award may even be without them stated inside. The advantage of stating the reasons is a kind of control on arbitrators not to act too arbitrarily, thus their task is then to explain how and regarding what facts they came to conclusions on

[3] UNCITRAL Arbitration rules of 1976, article 32(2)

[4] A set of rules designed to assist States in reforming and modernizing their laws on arbitral procedure in terms of taking into account the particular features and needs of international commercial arbitration. It covers all stages of arbitral process from arbitration agreement through to the recognition and enforcement of arbitral awards. UNCITRAL adopted Model law in 1985, and was amended in 2006. (hereinafter UNCITRAL Model Law)

[5] Article 31 of UNCITRAL Model law on International Commercial Arbitration of 1985 (based on the article 32 of UNCITRAL Arbitration rules of 1976)

the dispute which was brought before them. From the other point of view, not stating the reasons has the effect on greater speed of rendering the award and making it harder to challenge.

On the place of arbitration parties may agree in the arbitration agreement, but if they fail to do so, place may be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.[6] The place of arbitration is important primarily because of the recognition and enforcement of the award, while date of the award has connection with termination of the proceedings, possible correction of errors made in the award as well as seeking an interpretation from the part of arbitral tribunal[7].

The presumption that the award is deemed to have been made at the place stated in the award is set only to avoid invoking the invalidity of the award, in case the conclusion on the dispute was reached in some other place, not the place meant to be the place of arbitration. Sometimes it is easier and more convenient for arbitrators to meet at some other place and discuss the issues of the dispute there, than at the one stated in the agreement as the place of arbitration. Nevertheless, the place decided upon in the agreement or determined by the arbitrators shall be the one stated in the award, since, as I already have mentioned, that is important regarding the recognition and enforcement, as well as the challenge of the award.

1. VENUES OF CHALLENGING ARBITRAL AWARD

Parties, when deciding to submit their dispute to arbitration, have in their mind only wining, and unless they terminate the commenced proceeding by settlement, requested by the parties themselves and not objected by the tribunal, one of the parties always comes out with an unfavorable result. This is why a very important part of the arbitration is the challenge of the awards, as a further instance in reaching a positive result. A party, in favor of whom the arbitration has finished, looks at the arbitration as the final process and wants no possible recourse against it, but the other party is aiming to get the close judicial scrutiny of the award not made in his favor.

Under UNCITRAL Arbitration Rules "The award shall be final and binding on the parties. The parties undertake to carry out the award without delay"[8]. One of the already mentioned advantages of arbitration is exactly that the result of arbitration should be final, meaning that if parties wanted any kind of compromise solution or, on the other hand fighting before court, they should have opted for some other type of resolving dispute solution (mediation or litigation). Thus, when deciding on arbitration, parties choose a method which results with a decision that is final and binding, without further possibilities to challenge it. But, despite this very important characteristic of arbitration, most of the rules of arbitration or the rules of the seat of the arbitration may provide certain ways of challenging the award. [9] Thus, the challenge is considered like a bonus or additional advantage to a losing party.

Reasons for challenging the award can be different, but usually they are to have the award modified because of some flaws made in the logic or in the process of reaching it, or

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[6] Article 20(1) of the UNCITRAL Model Law
[7] Articles 32 and 33 of UNCITRAL Model Law
[8] Article 32(2) of UNCITRAL Arbitration Rules of 1976
[9] Alan Redfern and Martin Hunter, *Law and practice of International Commercial Arbitration*, Third edition (1999) at 415

declaring the award to be "set aside" in whole or in part. Every country has a different approach on the possibilities to challenge the award, from internal appeal procedure to setting the award aside by national courts, or even by Constitutional court.

1.1. Appeal to a second arbitral instance

One of the options the dissatisfied party has, is to appeal to a second arbitral instance. This possibility is not very usual, though. It is considered as the opposite of the result that parties want to reach by choosing arbitration, which is expedite and final procedure.

Most of the arbitration rules do not provide this method as a possibility for the party, but those which do provide it, e.g. ICSID[10] or certain commodity arbitrations, establish particular features that make the appeal possible. Thus, the awards in commodity arbitrations might be brought to appeal as to their merits, while appeal against an ICSID award may only be possible for procedural reasons.[11]

Good example can be found in rules of Grain and Feed Trade Association (GAFTA), where two-stage arbitration system is provided. Appeal against the award rendered by one or three arbitrators is submitted to a Board of Appeal, which counts three or in the other case five members. There is a special time limit prescribed for the notice of the appeal, as well as other conditions which must be followed, in order to enable a Board of appeal to confirm, amend or set aside the award.[12]

[10] International Center for Settlement of Investment Disputes – Autonomous international institution established under the Convention on the settlement of investment disputes between States and Nationals of other states (Washington Convention)

[11] Mark Huleatt – James and Nicholas Gould, *International Commercial Arbitration, A Handbook***,** at 115-116

[12] See more in : Alan Redfern and Martin Hunter, *Law and practice of International Commercial Arbitration,* Third edition, (1999) at 418-419

Nowadays, most arbitration rules provide that an appeal is possible but only if the parties have expressly agreed on it. It is regarded as a compromise between two different approaches, pro and counter appeal against the arbitral award, which gives opportunity for the parties to choose the best option for the conduct of their proceedings.

The effect of the award rendered is the same as the effect of the final judgment (res judicata), unless the parties have expressly agreed that the award may be contested by an arbitral tribunal of the higher instance.[13]

Appeal to a Court against the merits of an arbitral award, which may be understood as a second instance in respect to the arbitral proceedings, is not admissible. The only possible application before the court would be an application for setting aside the award, and no other legal remedies are available.[14]

1.2. Setting aside of the arbitral award (Action for annulment)

Judicial control over arbitration award can be viewed in only two directions. First the attack on the award may be made by the claim for setting aside the award (action for annulment), while the other option is opposition to recognition and enforcement of the award. Difference between these two options depends on the understanding whether particular award is domestic or foreign. Setting aside of the award can be performed only in the country in which the award was made or country where the award is considered to be domestic. The interpretation of "domestic" award is given in two very important treaties that set grounds for challenge of the awards in these above mentioned proceedings. The New York Convention of

[13] Article 31 of Croatian Law on Arbitration, 2001 (Official Gazette 88/01)

[14] For example, In Croatian Arbitration Law, the Law on Arbitration expressly provides that only application for setting aside the award is possible and this is a strict rule. Thus, the parties' agreement to submit their award to

1958.[15], that in article 5 sets grounds for refusal of recognition and enforcement of the awards, and the UNCITRAL Model Law 1985., that in article 34 sets grounds for setting aside the award, which are basically the same as for refusing the recognition and enforcement. But what is important is that those treaties give different understanding of "domesticity" that distinguishes the awards and gives the parties an opportunity to resort to one of the proceedings in question.

In New York Convention, it is indirectly stated what should be deemed as domestic, and even though this understanding is of great importance, it still does not create a real rule, that national courts should be following in setting aside procedure. Article V(1)e alleges that the

> "recognition and enforcement of the award may be refused, at request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof that…. 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."[16]

From this provision it follows that the award will be domestic in the country in which the award was rendered or under the law of which the award was rendered, which leads to conclusion that setting aside of the award will be possible only in those countries. In contrast, if setting aside of the award is made somewhere else, on the basis of some other criteria, this action of setting aside would not be recognized by other countries, members of the New York Convention, and there the award would still be valid and enforceable.[17]

As authors of "International Commercial Arbitration", professor Tibor Varady, professor John J. Barcelo and professor Arthur T. von Mehren indicate, there is another problem with the

appellate proceedings before a Croatian court would be null and void. International Handbook on Commercial Arbitration, proof Alan Uzelac

[15] Widely recognized Convention brought by United Nations, deemed as the foundation for international arbitration in terms of giving effect to the arbitration agreement and of recognizing and enforcing the awards,

[16] Article 5(1) of New York Convention

[17] Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration, A transnational Perspective, Third edition*, (2006) at 707

qualification of this provision, since it is not particularly clear. Whether the country in which the award is made is the one where arbitration really took place, or the one where the award is signed or formulated, and whether the law under which the award is made is substantial or procedural law of particular country, gives this provision not as big a dimension as on the first sight one could consider.[18]

UNCITRAL Model Law describes the procedure of stetting aside of the award in article 34, where what is deemed to be domestic is not mentioned, but article 1, where the scope of application of the Convention is defined, clearly states that "the provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of the State"[19]. It follows that this provision is based on territoriality as well, but makes the award domestic in the country where the arbitration took place. Thus, setting aside of the award, in terms of having effect towards other countries, can only be made in the country where the arbitration had its place.[20] The place can be agreed upon by the parties in their arbitration agreement or arbitration clause. Since its determination is a very important part of a process because it settles which procedural law will be applied to arbitration, in case parties did not agree on the place, it is a duty of arbitrators to decide. For example in UNCITRAL Model law, if parties fail to agree on the place of arbitration, arbitral tribunal shall determine it "having regard to the circumstances of the case, including the convenience of the parties".[21] Looking at the above mentioned provisions of both treaties, they rest on the notion of territoriality but, the "place of arbitration" on one hand and the "country where the award is

[18] Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration: A transnational Perspective, Third edition,* (2006) at 707
[19] Article 1 of UNCITRAL Model Law
[20] Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration, A transnational Perspective, Third edition,* (2006) at 707-708
[21] Article 20(1) of UNCITRAL Model Law

made or under the law of which it is made" on the other, do not have to be the same, which means that the criterion for defining the domestic award in these treaties is different. [22] Eventually, these differences should be worked out and one common understanding should be given, with purpose of making future situations to be handled much easier.

1.2.1. The reasons and result of setting aside

It is important to emphasize that no award can be rendered in one country without possibility of being reviewed on that territory, or at least without attempt of the parties to address the court to review it in case of some great irregularities.[23] The review of the award by the national courts is restricted usually on procedural matters, specifically listed in most of the countries. The time limits for taking the action to set aside are usually very short, and parties should do it without delay. Countries that adopted the Model law, comply with the article 34 where the grounds for setting aside are indicated. Those are almost the same as the grounds enumerated in New York Convention, article 5, with a difference of the article 5(1)e ground that is provided in the New York Convention, but not in the Model Law. All grounds will be specified in the next subchapter, regarding the recognition and enforcement of the awards.

The court may set aside the award if the party, or the court itself ex officio, finds certain grounds to be true, but is not obliged to. It is up to his own discretion, whether he will, if he finds those grounds to be proved, set aside the award.

Considering the types of the awards available, Model Law does not specify whether the award in question, that can be challenged, should be final, dealing with all issues raised before

[22] Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitratio: A transnational Perspective, Third edition*, (2006) at 737

arbitral tribunal, or partial, interim or some other award. Knowing the practice of the courts, the obvious solution would be the award with which the arbitral process has been completed, but since there is no rule, the possibility to challenge other types is still open.[24] Result of setting aside the award is that the award has no effects in the country where setting aside is sought. If that country is one where the award is deemed to be domestic, it may also serve as a ground for refusing recognition and enforcement of the award in other countries, members of the New York Convention.

1.3. Opposition to recognition and enforcement of the award

When the award is rendered the losing party has couple of choices. The most favorable choice for the winning party is a voluntary performance of the award from the other side. It cannot be said with certainty how big the percent of the voluntarily performed arbitration awards is, for the first reason, arbitration being a private process, and for the second, after finalization of arbitration, there is no obligation whatsoever for the tribunal to participate in enforcement of the awards.[25]

Second choice possible for the losing party is to try to negotiate a settlement, because surprisingly, wining party can sometimes agree on less than awarded in arbitration, just to be secure that something still will be carried out.

Third possibility of the losing party is to challenge the award or just to oppose its recognition and enforcement, in any jurisdiction, where the winning party tries to carry it out.

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[23] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model law jurisdictions,* (2005)

[24] Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration: A transnational Perspective,* Third edition, (2006) at 708

[25] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Third edition, (1999) at 444

In case the losing party does not perform the award voluntarily, the other side might still try to convince it to do so, using different means of pressure,[26] or on the other hand, using a power of the state through national courts for reaching a desirable result. Usually this is done by enforcing the award before national courts. It may be done in couple of ways and it is on the particular country to decide how and by which methods that is to be done. Some countries require deposition and registration of the award; other will enforce them directly or maybe after the act of recognition is made. [27]

The notion of recognition and enforcement is directed towards giving the effect to the award, opposite of the procedure to set aside, which purpose is to take away any effect award might have. Recognition consists of giving the award a res judicata effect in the country different from the one where it was rendered and where that effect already exists. It is kind of defense, where party satisfied with the result of proceeding, seeks that the issue already decided, would not be discussed again. Enforcement on the other hand means, not only recognizing legal effect of the award in question, but also using all means available to ensure that it will be carried out.[28] "Purpose of enforcement is to act as a sword. Enforcement of the award means applying legal sanctions to compel the party against whom the award was made to carry it out."[29]

From above mentioned, it follows that the possibility party has regarding challenging the award before national courts, is to oppose the recognition and enforcement of the award in the country where procedure for that is commenced. That is possible if certain rules are followed,

[26] E.g. A commercial pressure: if parties are, after the award, still involved in the business, for continuing their business relationship, losing party shall be forced to perform its part of the award, or otherwise it's business position might suffer

[27] Alan Redfern, martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and practice of International Commercial Arbitration*, 4th edition, (2004) at 412

[28] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Third edition, (1999) at 448-449

[29] Alan Redfern, martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and practice of International Commercial Arbitration*, 4th edition, (2004)

and depending on the particular country, those may be provisions of some bilateral treaties and other Conventions, or for us the most important provisions of the New York Convention. The New York Convention is based on enforcing foreign arbitration agreements and foreign arbitration awards. Article 1 indicates what should "foreign" mean, determining that the Convention shall apply to "awards made in the territory of the State other than the State where the recognition and enforcement is sought…and awards not considered as domestic awards in the State where their recognition and enforcement is sought."[30]

There are some other particularities of the Convention that must be stated. Firstly, the Convention does not allow review of the merits of the award; only procedural issues may be challenged. Secondly, to succeed with attempt of refusing recognition and enforcement of the award, certain grounds, prescribed in the Convention should be proven. It is stated that only if the party furnishes the proof of existence of either one of those grounds enumerated in article 5 of the Convention, or on the other hand, if Court itself finds some grounds to be proven, it may refuse the recognition and enforcement of that award.[31] The word "may" in this sentence should be emphasized, meaning that judge is not under any obligation to refuse recognition and enforcement, it is his own discretion whether he will do it or not.[32] It is also interesting that party who has a duty to provide a proof is the one that is against recognition and enforcement. Further, those grounds enumerated are the only grounds on which the attempt to refuse recognition and enforcement may be sought. Countries may only be more permissive than the Convention to the extent that they provide fewer grounds for refusal of recognition and enforcement than Convention indicates. This is approved by article 7 of the Convention, where it is stated that if one country has adopted other bilateral or multilateral agreements or

[30] Article 1 of the New York Convention
[31] Article 5 of the New York Convention
[32] See in the Case: China Nanhai Oil Joint service Corporation v. Gee Tai Holdings, available in: Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration: A transnational Perspective*, Third edition (2006)at 842-845

has it's laws designed in a manner that give more right to the interested party to avail herself of the award, those agreements and rules should have priority.[33] To give an example, France is a country that has one less ground than prescribed in the article 5 of the Convention (5(1) e).

1.3.1. Grounds for refusing the recognition and enforcement

The grounds enumerated in article 5 may be divided in two groups. The first group, where a party who seeks refusal of recognition and enforcement is obliged to furnish a proof of existence of one of the following grounds, is divided in 5 subparagraphs. Under first subparagraph, the first ground is related to the arbitration agreement and its invalidity if "a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of this State"[34]

Second ground is based on the due process. The court may refuse recognition and enforcement if a party against whom the award is invoked, furnishes to prove that there was no proper notice given to her regarding the appointment of the arbitrators or of the proceeding itself, or there was no opportunity for her to present her case before tribunal.[35] This is one of the most important grounds that may be invoked. The whole arbitral procedure is based, among the rest, on the notion of fairness of conduct between parties and the tribunal. For this purpose, as one of the advantages of the arbitration, it is very important that the procedure is properly conducted and that parties are properly noticed of certain issues. The court here must determine whether the proper hearing of the both parties was carried out, and in case of a

[33] Article 7(1) of the New York Convention (1958)
[34] Article 5(1)a of the New York Convention (1958)

flaw, it is the duty of court to state that denial of justice is present. The case which illustrates application of this ground, and where the decision before national court is brought in favor of party who sought refusal of recognition and enforcement, is "Danish Buyer v. German Seller" case.[36] In it, Court of Appeal found that conditions from New York Convention article 2 for enforcement of the award were not followed. It has also found, since there was no proper notice of appointment of the arbitrators, that party was deprived of knowledge whether arbitrators challenged by him were or were not involved in rendering the award. That is what made this award subject to challenge. [37]

Third subparagraph is concerned with jurisdiction of the tribunal. Whether the tribunal had a right to decide the dispute in question, based on the agreement of the parties, determines whether the ground for refusal will exist. If a party proves that "the award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration or the award contains decision on matters beyond the scope of the submission to arbitration"[38], the court may refuse its recognition and enforcement. The logic here is contained in the fact that the tribunal is exceeding its authority. To decide upon issues that were not submitted to arbitration by the parties' agreement, should be a valid ground for the refusal. There is also the other part of this provision, indicating that if one part of the award is in the limits of matters which were submitted to the arbitration and could be separated from the other part in which tribunal exceeded its powers, the part which does not exceed the authority given by the parties, may be recognized and enforced. The example of showing the valid ground for refusal of enforcement is described in the case before US court of Appeals, where refusal was granted, based on the facts that tribunal decided to award to the winning

[35] Article 5(1)b of the New York Convention (1958)
[36] See in: Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration: A transnational Perspective*, Third edition, (2006) at 832
[37] Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration: A transnational Perspective*, Third edition, (2006) at 832

party a certain sum of damages for consequential loss, what was exactly the part of the clause that parties in their agreement excluded from gaining.[39]

The fourth ground is concerned with the procedure. Arbitration should be conducted in accordance with the agreement of the parties, and only if such agreement fails, it should be conducted in accordance with the law of the country where arbitration takes place. This provision encompasses the procedure itself but the composition of the tribunal as well. The case that is somehow pro and contra relying on this ground was conducted before Supreme Court of Hong Kong.[40] On one hand, court agreed with the losing party in terms of the ground that was proven and that was the wrong composition of the tribunal, i.e. that arbitrators participating in rendering the award, did not really have jurisdiction. While on the other hand it granted a leave to enforce the award made by that tribunal, relying on the facts that composition of that tribunal was not completely wrong, and that parties did get what they agreed upon in their agreement.[41]

The last in this first group of grounds, that only party seeking refusal of recognition and enforcement may point out and try to prove, is particular for New York Convention, and does not take part of Model Law grounds for setting aside the award. It states that the party may seek refusal if she proves that "the award has not yet become binding on the parties, or has been set aside or suspended by competent authority of the country in which or under the law of which, that award was made"[42]. This rule is accompanied by some controversies, not settled by this or any other convention. Particularly, the rule by itself does not have any flaws,

[38] Article 5(1) c of the New York Convention (1958)
[39] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Third edition, 1999. at 465, see footnote 95: from *VII Yearbok Commercial Arbitration* at 382 - Libyan American Oil Company (LIAMCO) v. Socialist Peoples Libyan Arab Yamahirya (1982)
[40] Case China Nanhai Oil Joint service Corporation v. Gee Tai Holdings, available at: Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration: A transnational Perspective,* Third edition at 842
[41] See more in: Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration: A transnational Perspective,* Third edition at 842
[42] Article 5(1)e of the New York Convention (1958)

it seems quite reasonable that the refusal may be granted if the award is set aside or suspended in the country in which or under the law of which it was rendered. But, the problem is that some countries do not respect that the award has been set aside in certain country. Thus, the situation that possibly might come out of this, is that, although in one country the award is set aside and cannot be enforced, in some other country it still may have binding effect, and may become enforceable. The issue here is that there are no rules contained in the New York Convention which would set valid grounds for setting aside the award that would bind all countries, members of the New York Convention. It all depends on the law of each particular country.[43] The case, supporting this view is a Chromalloy case, where award was rendered in favor of Chromalloy but was also soon set aside by Court of Appeal of Cairo on the ground that the law applied was not the one that should have been applied. Despite the annulment of the award by Cairo Court, the US District Court, for the District of Columbia, decided to enforce the award.[44]

Second group of grounds are those that may be invoked by courts ex officio, thus in this case there is no obligation on the party to prove anything. Moreover, the party does not even have to raise a defense; everything is based on the motion of the court.

The grounds belonging to this group are concerned with the arbitrability of the subject matter that is brought before arbitral tribunal. It depends from country to country, which disputes should and which will be designated as those that may be resolved only before national courts. The other ground that court looks upon ex officio is if the recognition and enforcement

[43] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Third edition, (1999) at 469-470

[44] Case Chromalloy Aeroservices v. the Arab Republic of Egypt, available at: Tibor Varady, John J. Barcelo III, Arthur T von Mehren, *International Commercial Arbitration: A transnational Perspective*, Third edition, (2006) at 862

of the award would be contrary to the public policy of the country where recognition and enforcement is sought.

This overview of remedies available for challenging of disputable awards gave us a closer look on what are the possibilities of a party which are designated by laws. These are in general, procedures that should be followed with conditions to be fulfilled. Certain exceptions and unusual situations related to this issue of challenging awards, with special emphasis on Croatia and countries of Latin America shall be discussed in details now.

2. THE ROLE OF THE CONSTITUTIONAL COURT IN CROATIA

Today in most contemporary legal systems, main role in the field of standardization of legislative, executive and judicial authority and protection of norms of certain legal system has an institution called Constitutional Court. Constitutional Court in Croatia draws its powers from the Constitution, the principal act of the country that defines fundamental political principles, establishes the powers and duties, structure and procedure of the government, as well as fundamental rights and responsibilities of citizens. Constitutional Court symbolizes the highest protection of citizens against any wrongful act from the side of state bodies which is done against their fundamental rights designated in the Constitution. Proceedings which are held before Constitutional Court represent the most important instrument of protection of civil and democratic freedoms in the contemporary legal systems and at the same time the continuity of development of legal protection. This refers to the protection of a society and social principles attached to it, as well as the protection of an individual in case of damages made towards his fundamental rights and freedoms guaranteed by the Constitution.

As defined in the Constitution, and according to the Montesquie's separation of powers among executive, legislature and judicial, Constitutional Court is deemed to be an autonomous body, not belonging to any group of authority specified by Montesquie, but designed to be a superior body, independent from any other authority, with principal task to monitor work of other authorities.

According to the Croatian Constitution and Constitutional Act on the Constitutional Court of

the Republic of Croatia[45], the main two acts regulating the structure, procedure and other important issues related to the existence and work of Constitutional Court, its scope of application is strictly defined. Principal duties of the Court are: to decide on the conformity of laws and other legal regulations with Constitution (and laws), to decide on Constitutional complaints against the individual decisions of governmental bodies, bodies of local and regional self government and legal entities with public authority when those decisions violate human rights and fundamental freedoms, as well as the local and regional self government guaranteed by the Constitution of Croatia, to decide on jurisdictional disputes between the legislative, judicial and executive branches, and perform other duties specified by the Constitution.[46] To summarize, Constitutional Court rules upon constitutionality of laws, regulations, government acts and elections and it hears appeals from any court, if related to the constitutional issues.

Monitoring the conformity of laws and other legal regulations with the Constitution and other laws, is deemed to be the most important task of Constitutional Court, maybe because of its highly pronounced presence and importance in every day's life. Furthermore, not less important task is the protection of constitutional freedoms and rights in the procedure which is commenced before Constitutional Court on the basis of Constitutional complaint.
In few following subchapters I will overall discuss specific task of the Constitutional Court in Croatia regarding its possibility to control the acts enacted by the courts and other bodies with public authority. Special emphasis will be made to the above mentioned Complaint for protection of person's rights and freedoms designated by the Constitution.

[45] This Constitutional Act regulates conditions and procedure for the election of judges of Constitutional Court, terms and conditions for instituting proceedings for the review of constitutionality and legality, procedure and legal effects of its decisions, and other issues of importance for the performance of duties and functions of the Constitutional Court. (Hereinafter Constitutional Act)

2.1. Constitutional Court control upon the acts of courts and other bodies with public authority

As already stated, for the protection of an individual, Constitutional Court has a duty to monitor decisions of certain bodies that deal with individual's rights and freedoms if those are guaranteed by the Constitution.

Constitution provides in the part dedicated to the protection of fundamental human rights that "the right to appeal against the first instance decisions made by courts or other authorities shall be guaranteed"[47] This may be excluded only in case something different is specified by law, i.e. in case some other remedies are provided. It also indicates that "individual decisions of administrative agencies and other bodies vested with public authority shall be grounded on law. Judicial review of decisions made by administrative agencies and other bodies vested with public authority shall be guaranteed"[48]. As it may be seen, Constitution does not regulate situations of judicial review upon the individual acts made by judicial or executive authority. In the Constitutional Act, by formulation of the provision that provides possibility to file the complaint with Constitutional Court in case when person's human rights and freedoms are violated by the individual act of a state body, body of local or regional self government or a legal person with public authority, this omission was corrected.[49] Individual acts rendered by all three branches of law, as divided by the Constitution, were covered this

[46] Article 128 in the Constitution of the Republic of Croatia (The consolidated text published in Official Gazette No 41/01 of May 7, 2001 with its corrections published in the official Gazette No 55 of June 2001)
[47] Article 18(1) of the Constitution of the Republic of Croatia
[48] Article 19 of the Constitution of the Republic of Croatia
[49] Article 62 (ex 59) of The Constitutional Act on the Constitutional Court of the Republic of Croatia (Consolidated text published in the Official Gazette No 49/02 of May 3 2002); hereinafter 'Constitutional Act'

way. By the act of filing this specific constitutional complaint, better protection to a person, against unlawful acts of certain bodies, is guaranteed and made more easily accessible.[50]

The problem that my thesis is dealing with is concerned with the issue of what is included in the term of 'judicial authority', whether it encompasses arbitration as a part of it or not. In case that arbitration cannot be deemed as a part of judicial authority, the further question is whether there is a possibility to include and consider arbitral tribunal as a body with public authority or maybe even something else. Other than that, bodies that belong to specific branch of law are not disputable from this point of view, and their acts, if violating constitutional rights and obligations, always give opportunity to the individual for filing the complaint.

2.1.1. Setting aside courts' and other authorized bodies' final acts (Constitutional complaint)

Constitutional complaint should not be deemed as an ordinary or extraordinary legal remedy. It is a special kind of remedy designated to protect human rights and freedoms guaranteed by the Constitution. Function of the complaint is protection of human's subjective constitutional rights as well as objective nature of constitutional legal system. Characteristics that may be derived from this feature is that the procedure which is held upon the complaint is not of contradictory nature, i.e. before the Constitutional Court do not appear two opposite sides, but only one party who challenges acts of certain bodies. Secondly, since the procedure is carried on in public interest, decisions brought by the Court have effect towards everyone, i.e. erga omnes, and finally, according to the protection of objective nature of legal system

[50] Miljenko Giunio, *Possibilities of challenging the arbitral decision*, Collected papers of Zagreb Law Faculty, Vol. 56 No 2-3, (20.04.2006.) at 783

and to the public interest, Constitutional Court has a right to decide which complaints will be discussed and which will be rejected.[51]

When complaint is submitted, Court has to decide first on its permissibility, the grounds for which are strictly designated by the law. Moreover, article 62(2) of the Constitutional Act indicates that complaint can be lodged only if other legal remedies, if provided, have already been exhausted. There is an exception to this rule, where Constitutional Court shall initiate the proceedings even before all legal remedies have been exhausted "in cases where the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated"[52]. This situation is called "silence of administration" (or jurisdiction) and was implemented in the Constitutional Act following the model of European Convention for the protection of human rights and fundamental freedoms that was ratified by the Republic of Croatia in 1997. and accordingly became a part of Croatian legal system.

Everyone has a right to submit the complaint, Croatian citizens or foreigners, natural or legal person, during the period of 30 days from the day when challengeable decision was received.[53]

As a very important instrument for protection of human rights and freedoms, complaint can be lodged against acts of courts as well as against other bodies with public authority. In their decisions, when deciding on different issues, they may directly or indirectly affect some of

[51] Branko Smerdel and Smiljko Sokol, *Ustavno pravo [Constitutional Law]*, (Zagreb Law Faculty, 2006)

[52] Article 63 of The Constitutional Act (Consolidated text published in the Official Gazette No 49/02 of May 3 2002)

[53] Exception can be made in case of a person who failed to lodge the complaint in time because of justified reasons. Restitution shall be permitted into the previous state if during the term of 15 days after the cessation of the reasons which has caused this failure he submits the proposal for the restitution as well as constitutional complaint. (Article 66 of The Constitutional Act)

individual's rights and freedoms, and if the result of those decisions is violation or denial of rights and freedoms that naturally pertain to the individual, he has a right to fight for it.

2.1.2. Dilemma on whether the arbitral tribunal is a body of public authority

Dilemma that has occupied thoughts of many Croatian legal scientists has begun when first two complaints before Constitutional Court were submitted and decisions brought only after couple of years, and has continued during the years, not giving clear direction of how and what should finally be deemed as correct understanding of the problem.

The principal problem that has emerged in theory and in practice, after the Constitutional Act was enacted in 1991., was whether arbitral awards can be subject to the constitutional control, i.e. whether Constitutional Court has jurisdiction to decide upon possible complaints when individuals think that their rights and freedoms guaranteed by the Constitution are violated by arbitral award rendered by arbitral tribunal.[54]

Some legal scientists, e.g. Hrvoje Momčinović, after analyzing in details the legal nature of arbitration as a legal institute and Constitutional Act as an act giving certain rights and duties to a Constitutional Court, gave his opinion towards this issue, in which he suggested following.[55] According to certain provisions of Constitutional Act, he came to a conclusion of several points, explaining them in a way of giving the arbitral award character of the award that may be subject to a constitutional control. He stated that everyone may lodge a constitutional complaint if his rights and freedoms are violated by the individual act of domestic arbitration, that complaint may be lodged only if other remedies provided are completely exhausted, and it may be lodged in the period of 30 days after receiving a

[54] Miljenko Giunio, *Possibilities of challenging the arbitral decision*, Collected papers of Zagreb Law Faculty, Vol. 56 No 2-3, (20.04.2006.)

disputable award. Furthermore, Constitutional Court can decide on the merit of the dispute with adopting or rejecting the constitutional complaint that results with annulment of arbitral award and remanding the dispute again to the arbitral tribunal, or in case of invalid or non existing arbitral agreement, to a state court.[56] This interpretation of the Constitutional Act and understanding of arbitral award as final and executive judgment which forced execution may be requested from the state courts, led him to conclude that arbitration is a part of judicial body and in this manner, its decisions may be subject to a constitutional control. He also argues that remedies that are provided for certain situation by law, do not have to be exhausted before filing a constitutional complaint, here thinking exactly of a remedy for setting aside the award as the only possible remedy against arbitral awards. He equates this remedy with the institution of renewal of proceedings, thus making the filing of that remedy non obligatory before potential constitutional complaint.

On the other hand, lots of legal experts do not agree with his way of thinking, stressing out that arbitration cannot be deemed as a part of judicial authority. According to their understanding, power of arbitral tribunal comes from the parties' agreement, thus arbitration is understood as an institution of private legal nature, main characteristic being no state control. Parties when deciding upon venues of solving disputes that arise between them, have a choice to submit all or some of their disputes to arbitration, or leave them to be handled and solved by the state courts. Looking at all possibilities, and advantages and disadvantages that both institutions guarantee, one of the main points why parties choose arbitration is exactly running away from state courts, their slow procedure and formality and running towards arbitration as a final procedure, very confidential and informal that gives them an opportunity to agree on most of the segments concerning the proceedings. That is why arbitration is

[55] See dissenting opinion in Decision of the Constitutional Court of Republic of Croatia U-III-410/1995, brought on 17.11.1999 and published in Official Gazette No 130/99

[56] *Id.* at 785

deemed to emerge from their agreement, thus not having a feature of state authority, which leads to conclusion that it is not a part of judicial, legislative or executive branch and moreover, not a body vested with public authority.

Although the law provides for arbitral award to have a power of final judgment, that is not enough to be considered as a decision made by a body mentioned above, against which party would have a possibility to file a constitutional complaint. It is not enough to change its significance and origin. In addition, different approach is given also in respect of remedies provided by the law in case of unsatisfying arbitral award. As Miljenko Giunio indicates[57], since the only possible remedy against the award is action for setting aside the award, it would be possible to file the complaint only after this remedy has been exhausted. One of the reasons for setting aside the award is contradiction of the award to the Constitution, i.e. constitutional rights and freedoms, which brings us to a conclusion that control of the award could be done before state courts and Constitutional Court for the same reasons. And not only that, but the likelihood of situation that state courts and Constitutional Court might deal with same complaints at the same time, cannot be excluded and forgotten as a possibility. This could give opportunity to unsatisfied party to move again to the Constitutional Court if state court decision does not satisfy her needs, thus a demand for control over the same issue would be brought before the Constitutional Court at the same time. That is why, the necessity of filing the envisaged action with state courts should be accomplished before constitutional protection is being used before Constitutional Court.[58]

There is another important point that needs to be stressed out, that refers to the activity of the Constitutional Court which is defined by law[59] and the necessity of exhausting all legal

[57] In his work *Possibilities of challenging the arbitral decision*, Collected papers of Zagreb Law Faculty, Vol. 56 No 2-3, (20.04.2006.)

[58] Miljenko Giunio, *Possibilities of challenging the arbitral decision*, Collected papers of Zagreb Law Faculty, Vol. 56 No 2-3, (20.04.2006.)

[59] See supra at 20, line 4-10

remedies provided for challenging of arbitral awards. When dealing with complaints the Court has certain powers that include: or adoption of the complaint in which case it remands the dispute to a new trial, or rejection of the complaint as not permissible if complaint does not satisfy prescribed requirements. Situation when Court is deciding upon the complaint is not a "dispute of full jurisdiction" because his task does not encompass dealing with substance of the dispute but only with adopting or rejecting the complaint. The fact that arbitral award could be challenged before Constitutional Court would mean that the competence of the Court would then be exceeded. It would e.g. adopt the complaint and annul the arbitral award which then would mean dealing with the substance of the dispute. According to the law and Court's designated activities, as well as considering that arbitral award does not have significance of the award that may be challenged directly before Constitutional Court, that would not be possible. The possibility that the Court has is to deal with the court's decision brought on the basis of the action of setting aside arbitral award. This decision completes and satisfies all requirements for the award that may be controlled by the Constitutional court. It is an act of a body vested with public authority. Indirectly, Constitutional Court would be able to correct mistakes of the arbitral tribunal rendered in the proceeding held before it, but only in terms of what is decided by the state court when dealing with the action for setting aside the disputable award.[60]

As it has been said, arbitration is from one point of view considered to be a part of judiciary and as such having characteristics like any other proceeding before state court, with all accompanying consequences and possibilities envisaged by the law.

[60] Miljenko Giunio, *Possibilities of challenging the arbitral decision*, Collected papers of Zagreb Law Faculty, Vol. 56 No 2-3, (20.04.2006.) at 786-787

From the other point of view, other legal stream thinks that it cannot be deemed for arbitration to be a part of a judiciary only on basis of giving the arbitral award power of res judicata. Arbitration is a specific institution that differs from state institutions in most of features denoting her. Arbitration exists only on basis of parties' agreement, and as such it is a contract of private nature which gives arbitral tribunal powers designated in that contract that should represent the true will of the parties. If understood in this way, than this approach is correct; arbitral body is nor a judicial body nor any other body with public authority, it draws its powers from parties' agreement and only connection with state and public is that it has the same effect as res judicata.

Dilemma is still present, and decisions that have been rendered by Constitutional Court in practice, present the sequence of thoughts made by Croatian legal experts towards this issue, but making it not quite understandable and clear.

3. DECISIONS OF THE CONSTITUTIONAL COURT UPON CONSTITUTIONAL COMPLAINTS

Croatian Law on Arbitration[61] explicitly states in article 36 paragraph 1, that the only possible remedy against the arbitral award, for the moving party is to file the claim for setting aside the award. In practice, different situation has happened. Although contrary to the mentioned provision of the Law on Arbitration, constitutional complaint was brought already twice against the arbitral award, and once against the arbitral tribunal's decision on jurisdiction. This opened whole variety of questions regarding the real nature of the arbitration and the relationship between national and arbitral tribunals.

The starting point for justification of using the constitutional complaint against arbitral awards is based on article 62(1) of the Constitutional Act on the Constitutional court of the Republic of Croatia which states that:

> "Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution"[62].

Since this provision precisely designates the bodies against whose acts the complaint may be filed, one of the crucial problems arising out of it, is the question whether arbitration (in this case domestic) and arbitral tribunal itself has a role of the public body against whose decisions is possible to file a complaint. To show the precise development and change in thinking of Constitutional Court in this field, the 3 aforementioned cases will be discussed in details. In first two cases, the complaint against the arbitral award was rejected as not permissible, but the interesting remark to be made here is that the reasoning of the rejection

[61] Enacted in 2001 (Official gazette 88/2001)
[62] Article 62(1) of the Constitutional Act (Consolidated text published in the Official Gazette No 49/02 of May 3 2002)

made by Constitutional Court was totally different in those cases, although they were brought on the same day.

3.1. Dismissal of the complaint upon fact that arbitral tribunal is not a judicial body

The complainant has filed a complaint with the Constitutional Court, regarding the award of the arbitral tribunal brought upon the dispute concerning the parties' contract that was allegedly terminated even before the dispute has arisen. Complainant did not file the claim for setting aside the award as it was foreseen by the Law on Civil Procedure[63] but moved directly to the Constitutional Court. He claimed that the tribunal did not have a right to decide the dispute at all, basing his claim on the fact that "there was no agreement on the arbitration between the parties or the agreement was not valid"[64]. Constitutional Court brought the decision by which the complaint was rejected as a not permissible complaint.[65] Court based its reasoning on the notion that arbitral award is not a decision of the body against which is possible to file the complaint. The possibility for that exists only in cases of judicial or some other public authority's decisions, which here is not the case according to the understanding of the Court. To explain this understanding couple of facts should be mentioned. First of all, Court has established, that arbitral tribunal has its legal foundation in the statute, the same as any other national tribunal, which is the main characteristic that gives it a right to be deemed as a judicial body. On the other hand, according to the decision in question, there are lots of differences between arbitral tribunal and regular tribunal, which

[63] The Law of Civil Procedure at that point regulated the procedure before the arbitral tribunal. It was before the first Croatian Law on Arbitration was brought in 2001.
[64] Article 485(1) of Croatian Law on Civil Procedure, (Official Gazette No 53/91, 91/92, 112/99, 88/01 and 117/03)

push away the thought of arbitration being a part of judicial authority. The most important is the fact that arbitration is based on the agreement of the parties and it can be conducted in the way they consider it the best, e.g. by the customs or by equity. Another thing is that composition of the tribunal, organization and rules of conduct are regulated by special Rules of arbitral tribunal, and not by the law.[66] Because of the characteristics just mentioned, Court decided not to consider arbitral tribunal as a part of judicial authority, thus not giving the possibility for the parties to challenge the awards before the Constitutional Court.

What matters here is the qualification of the complaint as not permissible. Only, this qualification has no connection whatsoever with the reasoning given by the Court. The law exactly prescribes under what terms complaint must be rejected: when the court is not competent, when the complaint is not timely submitted, when is incomplete or when it is not permissible. To specify the meaning of the term "not permissible" law defines it as a situation where provided legal remedies are not exhausted, respective if the applicant has omitted to use the provided legal remedy in the previous procedure, where the complaint has been submitted by the person not entitled to submit it, or was submitted by the legal person who cannot be entitled to the constitutional rights.[67]

Constitutional Court in this case qualified the complaint as not permissible but without giving proper explanation that would satisfy any of the designated reasons in the Constitutional Act. The only possible reason would be that the party did not follow the legal path that should have been exhausted before submitting the complaint to the Constitutional Court, meaning that the claim for setting aside the award as prescribed by the law was not filed. Reasoning of the Court is quite different. It rejected the complaint based on the understanding that it is not

[65] Decision of the Constitutional Court of Republic of Croatia U-III-410/1995, brought on 17.11.1999 and published in Official Gazette No 130/99

[66] Miljenko Giunio, *Possibilities of challenging the arbitral decision*, Collected papers of Zagreb Law Faculty, Vol. 56 No 2-3, (20.04.2006.)

[67] Article 72 of the Constitutional Act

competent to decide upon it, respective to the fact that the arbitral tribunal is not a body whose decision can be challenged before the Constitutional Court.

One of the judges[68] whose standing is opposite to the final decision of the Court, considers arbitral tribunal as a body with a legal status of judicial body established by law, and the precondition for submitting the constitutional complaint, i.e. exhaustion of all available legal remedies, as not obliging for the party.

Since the reasoning of the decision in question was not substantiate by satisfying reasons and overall opinion was not explained in a proper way, this decision of the Court appears to be very confusing.

3.2. Dismissal of the complaint upon the fact that permitted legal procedure is not exhausted

The second constitutional complaint filed[69], resulted in the same way as the first one; the Court rejected it, stating that it was not permissible. What is worth mentioning here is the fact that both decisions were brought on the same day; both of them were designed to reject the complaint but had the different reasoning behind it.

In this case, the complaint was brought before the Constitutional Court against the arbitral award under the same conditions as above explained one. The permitted legal procedure was not exhausted again, i.e. complainant did not even try to challenge it in the way that was foreseen by the law. Interestingly, Court in its reasoning decided to substantiate its decision

[68] Judge Hrvoje Momcinovic; see more in the Decision of the Constitutional Court U-III-410/95 (published in Official Gazette 130/99)

[69] Decision of the Constitutional Court of Republic of Croatia U-III-488/1996, brought on 17.11.1999, but never published in the Official Gazette

by the failure of the party to use all the permissible means to achieve for her a satisfying result. From this reasoning there are two points that have to be emphasized.

Firstly, the constitutional complaint against the arbitral award is obviously possible, thus the Constitutional Court has jurisdiction to decide upon the complaint against it. The only requirement that has to be satisfied, according to the opinion of the Court is that all legal means for challenging the award provided by the law have to be exhausted. It can be concluded that this complaint would not be rejected if the complainant has tried to challenge the award by filing the claim for setting aside the award before the regular tribunal, and if the tribunal had brought the decision by which it rejects or repudiates the claim. Of course, there has to be taken into account a possibility that parties could have foreseen some other remedies against the award, e.g. appeal to the second arbitral instance, which means that not only the claim for setting aside the award would have to be filed to satisfy the conditions for constitutional complaint, but also all other remedies available at that moment.[70]

Secondly, from the decision it may be concluded that the Court, in case the complaint is permissible and there are visible violations of fundamental rights guaranteed by the Constitution, would be competent to annul the decision of the court against which constitutional complaint was brought, and indirectly it would have a competence to annul the arbitral award challenged before the regular national court.[71] What follows from here is the fact that Constitutional Court would have the competence to decide on the merit of the dispute.

As Miljenko Giunio in his work "Possibilities of challenging the arbitral decision" explains, this would not be permissible for two reasons; first of all, because the Court is not competent to scrutinize arbitral decisions, respective to the fact that arbitral tribunal is not a part of

[70] Ivana Knezovic, *Pobijanje arbitraznog pravorijeka*, [*Challenge of arbitral awards,* translated in English by the author of this thesis], (Zagreb Faculty of Law, May 2005) at 21

judicial authority and not a legal person with public authority. Secondly, because the Court is not competent to decide upon the merits of the dispute brought before the national tribunal, meaning that by doing this the Court would exceed his authorities. It appears that the reasoning of this decision as well is not the clear one, it does not give us the right path which could be followed in the future and does not explain and give proper explanation of whether arbitration is deemed as a part of a judiciary, or not.

As it can be seen, two decisions of the Constitutional Court, apparently the same and even brought on the same day, but with different legal reasoning, did not give proper solution to the issue of availability of the constitutional complaint against the arbitral award and the procedure that has to be followed upon it. Even greater confusion to this issue was brought by the third decision of the Constitutional Court that will be explained next.

3.3. Adoption of the complaint upon fact that arbitral tribunal is a judicial body

The decision, against which the complaint with Constitutional Court was filed, was based on the fact that arbitral tribunal has no jurisdiction to settle the dispute that arose between the parties. Constitutional Court ruled that the rights of the parties were violated; it adopted the complaint, reversed and remanded the decision of the tribunal.

The facts of this case will help us understand on what basis Court decided this way, although it will not make clearer the confusing situation already made by above explained decisions and the one we are dealing with right now.

The contract between Croatian and Italian company contained an arbitration clause stating that all disputes that could arise between the parties, if not possible to be settled in a friendly

[71] Miljenko Giunio, *Ugovor o Arbitrazi u praksi Ustavnog Suda RH [Arbitration Agreement in the practice of*

way, must be submitted to the arbitral tribunal, with place of arbitration in Zagreb, Croatia. The tribunal should consist of three arbitrators, appointed by the International Chamber of commerce, and the Croatian material law should conduct the procedure.[72]

After the dispute has arisen, Croatian company filed a complaint with a Commercial Court in Zagreb, which upon the objection by the respondent, declared itself as non competent to settle the dispute between the parties. The same company then filed the complaint with the Permanent Arbitration Court established with the Croatian chamber of commerce, but the respondent objected the jurisdiction again, only this time it was a jurisdiction of arbitral tribunal, basing the objection on the fact that arbitrators should have been appointed according to the rules of International chamber of commerce, and not according to rules of Permanent Arbitration Court of Croatia. Once again, the objection was adopted; the arbitral tribunal declared that has no jurisdiction to decide the case. This action motivated plaintiff to move to the Constitutional Court with claim of being refused with his constitutional rights to be heard before the Court; to a fair trial before a competent court specified by law to discuss his rights and obligations, or his suspicion or accusation of a penal offense.[73] He also based his claim on the fact that the Constitution in article 19 provides right to judicial review of the legality of individual acts of administrative authorities and bodies vested with public powers.

The Constitutional Court accepted plaintiff's claim basing the decision on several points, by which earlier attitude of the Court where it was deemed that arbitral decision is not a decision against which Constitutional complaint could be filed, was changed. First of all, the Court stated that law was changed in this period between the last decisions of the Court (U-III-10/1995 and U-III-488/1996) and this complaint. Pursuant to its apprehension, Croatian

the Constitutional Court of the Republic of Croatia], (Pravo u Gospodarstvu 2/2005)

[72] Davor Babic, *Ustavna tuzba protiv odluke arbitraznog suda o nenadleznosti*, [*Constitutional complaint against negative arbitral decision on jurisdiction],(* Pravo i Porezi No 7 (1331-2235), 2005), at 23

[73] Article 29 in the Constitution of the Republic of Croatia (The consolidated text published in Official Gazette No 41/01 of may 7 2001 with its corrections published in the official Gazette NO 55 of June 2001)

Parliament by modifying the Constitution and Constitutional Act of the Constitutional Court of the Republic of Croatia made a change that affects the right of a person to file a complaint, stating in article 29 of the Constitution that not only in case of a penal offence but in all other cases where person's rights and obligations should be discussed, one has a right to a fair trial. The article 59 (now 62(1)) of the Constitutional Act was changed in the manner that now it precisely specifies the acts against which the constitutional complaint can be filed, mentioning here the individual acts of a state body, a body of local and regional self government or a legal person with public authority[74].

The third point asserted by the Constitutional Court is the fact that for the first time the Croatian Law on Arbitration (Official Gazette 88/01) was enacted, and that it gives opportunity to the plaintiff, if the arbitral tribunal decides in his favor, to seek the enforcement of the award by the state court.[75]

The reasons stated above were the main points upon which Constitutional Court determined that arbitral award or arbitral decision in fact is an individual act in terms of article 62(1) of the Constitutional Act against which constitutional complaint may be filed. After that, Court turned its attention on deciding whether the grounds of the complaint were satisfying to adopt the complaint. The Court determined that plaintiffs were brought in the situation where no body on the territory of Republic of Croatia was authorized to decide upon their complaint, nor that they had any possibility to challenge that arbitral decision that rejected the competence of the tribunal to settle the dispute. This resulted with emphasizing the issue of the protection of parties' fundamental rights in the court proceedings. Court realized that since parties were deprived from their fundamental rights in court proceedings, the statement of grounds

[74] Earlier, the Act mentioned acts of judicial, administrative and other bodies with public authority.

[75] Davor Babic, *Ustavna tuzba protiv odluke arbitraznog suda o nenadleznosti*, [*Constitutional complaint against negative arbitral decision on jurisdiction],(* Pravo i Porezi No 7 (1331-2235), 2005), at 24

was incomplete[76], that it does not give the whole image of what was meant from the side of the arbitral tribunal, and with failure to apply certain provisions of the law that give tribunal the opportunity to take into account what was the real purpose of the parties' agreement.[77]

This conclusion of the Constitutional Court gives different directions regarding the legal nature of the arbitration as an institution and awards made by arbitral tribunals then those already given by the same Court in earlier cases. It makes more difficult to understand, according to the article 62(1) invoked by the Court, whether arbitral tribunal is a part of state body, a body of local and regional self government or a legal person with public authority, as well as whether the decision declining the jurisdiction of the tribunal satisfies the requirements of a decision regulating one's rights or freedoms.

As certain Croatian legal scientists perceive[78], arbitral tribunal is a non governmental body, which powers arise from the parties' agreement and which gives tribunal no elements of public authority. According to this understanding no power in this direction should be given to arbitral tribunal nor should tribunal be deemed as a body vested with public authority as designated in the article 62(1) of the Constitutional Act.

The other issue is concerned with whether the decision by which the competence to settle the dispute was rejected by the arbitral tribunal, is a decision deciding about individual's rights.

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[76] In this decision, reasons mentioned are only those justifying that there was no parties' intention to contract jurisdiction of the arbitral tribunal in Zagreb, but all other important points regarding parties' intention for the seat to be in Zagreb, for use of Croatian material law, for rules on nominating arbitrators according to rules of Croatian Chamber of Commerce or International Chamber of commerce, were transmitted. There were also not mentioned reasons by which arbitrators could not have been nominated directly by the International Chamber of Commerce like it was envisaged by the parties (Davor Babic, *Ustavna tuzba protiv odluke arbitraznog suda o nenadleznosti*, [*Constitutional complaint against negative arbitral decision on jurisdiction],(* Pravo i Porezi No 7 (1331-2235), 2005), at 24-25

[77] Davor Babic, *Ustavna tuzba protiv odluke arbitraznog suda o nenadleznosti*, [*Constitutional complaint against negative arbitral decision on jurisdiction],(* Pravo i Porezi No 7 (1331-2235), 2005), at 25

[78] Some of them are: Miljenko Giunio in his work *Possiblities of challenging the arbitral decision,(* Collected Papers of Zagreb Law Faculty, Vol. 56 No 2-3 (2006)) *and Arbitration agreement in the practice of the Constitutional Court of the Republic of Croatia* (in Croatian: *Ugovor o arbitrazi u praksi ustavnog suda RH*), Pravo u Gospodarstvu 2/2005; Sinisa Triva, *Ustavna tuzba radi ukidanja arbitraznog pravorijeka [Constitutional Complaint for challenge of arbitral award* ;translated by the author of this thesis from Croatian], (Pravo u Gospodarstvu, a journal for business law theory and practice (2000) pg 205-240); Kresimir Musa,

According to the Constitutional Act, constitutional complaint may be filed only against individual act which dealing with person's rights and freedoms[79]. In this case, even if we conclude that the decision is an act of a body with public authority, it still cannot be deemed that decisions on jurisdiction of the court or of arbitral tribunal are those deciding about person's rights and freedoms. Those decisions are concerned with procedural issues. They do not settle the main issues of the dispute between the parties, thus they cannot be deemed as individual acts of bodies of public authority.[80]

It appears that Constitutional Court with this decision made a totally different approach towards understanding what a legal nature of arbitration is, and did not make it clearer what in the present and in future should be deemed as right understanding. Three decisions discussed here differ one from another in main points and none of them gives a complete explanation in the manner to be understandable to everyone or at least to those involved in discussing and exploring this issue.

Tuzba radi ponistaja presude izbranog suda [Complaint for the challenge of arbitral award; translated from Croatian by the author of this thesis], (Collected papers of Zagreb Law Faculty vol. 56, No 2-3, 2006)

[79] Article 62(1) of The Constitutional Act (Consolidated text published in the Official Gazette No 49/02 of May 3 2002)

[80] Davor Babic, *Ustavna tuzba protiv odluke arbitraznog suda o nenadleznosti*, [*Constitutional complaint against negative arbitral decision on jurisdiction*], (Pravo i Porezi No 7 (1331-2235), 2005)

4. CONSTITUTIONAL COURT CONTROL OF ARBITRAL AWARDS IN LATIN AMERICA

Countries of Latin America were for a long time showing hostility towards arbitration. Events such as "Venezuelan/British Guiana arbitration"[81] and so called "colonialism and gunboat diplomacy"[82] contributed to the development of "Calvo doctrine". This doctrine lays on the basis that jurisdiction in international investment disputes should rest with the country where investment is located, which means that no diplomatic protection before local resources is to be exhausted.[83] Since Latin America is a territory in which lots of foreign investors are interested, especially because of oil, gas and other natural resources and because it's educated workforce and relative political stability, the aim of its countries was not to give foreign investors opportunity to exploit her. This resulted in precluding the use of arbitration to resolve international commercial disputes, considering arbitration as an institution giving greater rights to foreign investors in comparison with local ones.[84]

Within recent years, Latin American countries started to realize the importance of investments, they started to adopt treaties and to pass new laws, as to encourage foreigners to continue and increase doing business there. With adoption of New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, the two stage arbitration

[81] The dispute that arose between Venezuela and Great Britain over a control of the mineral-rich territory called Essequibo. It was submitted to the arbitration in Paris in 1899, and the tribunal issued a ruling without rationale. The result was that Great Britain received major part of the disputed territory, and it is was believed even after 100 years that this decision had rested on international politics and not on the legitmiacy of countries' claims.It was one of the events that contributed to Latin America's hostility towards arbitration (Kirkpatrick & Lockhart Nicholson Graham LLP, *Overview of arbitration in Latin America*, Topical Issues in International Arbitration, March 2006, available at www.klgates.com, at 3-4)

[82] Gunboat diplomacy is considered to be an agressive diplomatic activitycarried out with the implicit or explicit use of military power. E.g. in 19th century France used military actions to enforce private claims of french citizens against Mexican government (Kirkpatrick & Lockhart Nicholson Graham LLP, *Overview of arbitration in Latin America*, Topical Issues in International Arbitration, March 2006, available at www.klgates.com, at 7)

[83] The doctrine arose from Calvo's ideas expressed in his *Derecho internacional teórico y práctico de Europa y América*, justifying it as a necessary to prevent the abuse of jurisdiction of weak nations by more powerful nations. (wikipedia)

process envisaged by most of the countries of Latin America was supposed to be ousted from their laws.[85] Moreover, with adoption of Panama Convention of 1975, the Inter-American Convention on Commercial Arbitration, the "Calvo Doctrine" was in major part rejected and the path for development of international arbitration was opened, as an alternative method of dispute resolution.[86] This has made foreign investors feel more comfortable knowing that any arbitration clause included in their contracts will be valid and that any arbitral award rendered on basis of such clause will be fully recognized and enforced in most of the countries of Latin America.[87]

Further step towards accepting arbitration as an important way of dispute resolution in countries of Latin America is the adoption of now modern laws regulating it. UNCITRAL published in 1985. the 'Model Law' designated to facilitate international arbitration, the procedure before the tribunals as well as the role of state courts in those proceedings. Here very important point for the investors is to be secure about the procedure and other signifacant elements when deciding on the seat of the arbitration. Countries that have adopted in full or in part Model law became soon very interesting for investors as possible seats of arbitration, in contrast to those insisting on developing their own rules regulating arbitration.[88] Foreign

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[84] Kirkpatrick & Lockhart Nicholson Graham LLP, *Overview of arbitration in Latin America*, Topical Issues in International Arbitration, March 2006, available at www.klgates.com

[85] The two stage proceedings included the existence of arbitration clause (Clausula Compromisoria) by which parties decided to submit future disputes to arbitration, and the "compromiso", the contract where parties agree exactly on the names of the arbitrators, the matters submitted to arbitration, conduct etc; from Kluwer Law International: Horacio A. Grigera Naon, *Arbitration in Latin America – Overcoming Traditional Hostility*; Source: Arbitration International, Vol 5 No. 2 (1989) pp. 137-172, available on: www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=10022/

[86] Nigel Blackaby and Sylvia Noury, Freshfields Bruckhaus Deringer, *International Arbitration in Latin America*, LatinLawyer review available at www.Latinlawyer.com, at 1

[87] Nigel Blackaby and Sylvia Noury, Freshfields Bruckhaus Deringer, *International Arbitration in Latin America*, LatinLawyer review available at www.Latinlawyer.com, at 2

[88] One of those solutions is the Mercousr Agreement on International commercial arbitration (MAICA) applicable in several countries such as Brazil, Argentina, Paraguay and Uruguay that established their own rules. It is based on the notion that arbitration shall be "conducted in accordance with the same modern regime, irrespective of the arbitral seat selected" (Nigel Blackaby and Sylvia Noury, Freshfields Bruckhaus Deringer, *International Arbitration in Latin America*, LatinLawyer review available at www.Latinlawyer.com, at 2)

investors usually try to avoid uncertain rules and elements provided by different countries. It is always more favorable for them to play on the safe ground, and Model law offered that.

4.1. Mexico

Mexico was one of the first countries that adopted New York and Panama Convention and that organized its arbitration laws according to UNCITRAL Model law. Like all Latin countries, Mexico was also one of those respecting two-stage arbitration system, first stage with clausula compromisoria (arbitration clause) and second stage with compromiso, additional contract used to compel disputes to arbitration. Eventually with adopting above mentioned Conventions, this has disappeared and the only necessary condition is existence of valid arbitration clause.

Judicial system in Mexico is divided in two - federal and state system. Federal courts include 3 levels of courts[89] all of them under the supervision of the Supreme Court, the highest court that has both, original and appellate jurisdiction in four branches: administrative, labor, penal and civil. One of the duties of federal courts and respectively of the Supreme Court is also to deal with the constitutional complaints that obviously exist in Mexican law, as it will be discussed next.

Mexican commercial code in part which is envisaged for regulating the arbitration, adopted certain principles of Model Law, thus using particular institutions prescribed there such as: exceptional judicial intervention, restrictive causes for setting aside and enforcement of the awards etc. One of those principles that have to be respected, regarding the proceedings for vacating or enforcing arbitral award, is the challenge of the awards before courts. Challenge

can be made only with the action for setting aside of the award before competent local or federal court of the place of issuance of the award (in case of setting aside) or domicile of the defendant (in case of recognition and enforcement). Judgment must be entered by the court in certain period of time prescribed by the law and the only possible remedy against it, is a special extraordinary remedy know as "Amparo suit". It is constitutional action filing of which before federal courts has its basis on the alleged violation of fundamental rights that are provided by the Mexican Constitution for every individual. It is considered to be the most original and highly utilized cause of action for protection of individuals from laws or public authorities' acts that violate constitutional rights. Same as in Croatian law, i.e. what is designated in the laws, constitutional action can be filed only against judgment dealing with disputable arbitral awards. It is obviously not considered for the tribunal to be a part of judiciary or a body with public authority against whose decisions constitutional action could be brought. Since there are no cases in the praxis of Mexican judiciary that would compel legal experts to take into account a possible situation for reviewing arbitral awards from the side of highest court, it cannot be said with certainty what is the real standpoint of Mexican legal authority upon this issue. Different situation exists in other countries of Latin America whose highest courts have had the opportunity to deal with such situations, what will be discussed next.

One more point to be stressed out about this special constitutional action is existence of its two variations. There is a difference between direct (a one stage procedure) and indirect Amparo action (two stage procedure) which filing depends on whether the action for setting aside or recognition and enforcement of arbitral awards is understood as an ancillary or a summary and independent procedure. Since Mexican legislation (Commercial Code and Federal Code of Civil proceedings) considers those actions as ancillary, normally related to

[89] Collegiate Circuit Courts, Unitary circuit courts and district courts (http://www.country-data.com/cgi-

the procedural issues and not used to review the merits of the dispute which have been brought before arbitral tribunal, indirect amparo should be relevant. This means that the complaint should be submitted not only to collegiate circuit court that finally reviews the constitutionality of awards but also to federal district court. Problem with that is that this two - stage procedure actually makes challenge of the award or its recognition and enforcement slower and more time consuming, thus contravening with the initial motive on deciding for the arbitration instead of for normal judicial proceeding before state courts.[90]

4.2. Venezuela

Venezuela is one of the countries that has followed the example of Mexico and adopted both Panama and New York Convention, as well as enacted the laws allowing arbitration as an alternative method for solving disputes that have arisen between foreign investors and state entities. In 1998., Venezuela enacted the Commercial Arbitration Law based on UNCITRAL Model Law, but still retaining some specifics from already established system, e.g. that certain issues cannot be arbitrated under the Venezuelan arbitration law "including matters that are against public policy, criminal matters, matters directly related to the state, public, or governmental entities' scope of authority, and matters that have been resolved by a final court judgment."[91]

Judicial system in Venezuela has the same postulate as judicial system in Mexico. The highest tribunal is Supreme Court of Justice which is also the court of final appeal. This court hears

bin/query/r-8766.html)

[90] Omar Guerrero Rodriguez, Cesar Martinez Aleman, *The Arbitration Review of the Americas 2008, Section 2: Country Overviews: Mexico Global Arbitration Review*, available at www.globalarbitrationreview.com/hanbooks/4/sections/8/chapters/52/mexico, at 1-2

[91] Kirkpatrick & Lockhart Nicholson Graham LLP, *Overview of arbitration in Latin America*, Topical Issues in International Arbitration, March 2006, available at www.klgates.com, at 15

complaints related to the violation of individual's rights and freedoms guaranteed by the Constitution of Venezuela. Amparo suit is the most important instrument for protection of violated rights as well, and it is used against court's judgments or other acts made by bodies with public authority.

The case brought before Constitutional Chamber of Supreme Court of Justice in 2006.,[92] will show us the standpoint of Venezuelan legal system towards constitutional action related to arbitral awards, more particular, whether they have same or similar opinion on this issue as experts and judges of Constitutional Court in Croatia, or rather not.

The amparo constitutional action was filed with the Constitutional Chamber of the Supreme Court of Justice against the arbitral award rendered in Miami, USA. The Chamber affirmed previous case law according to which it had power to review the constitutionality of the award. Still, the action was rejected by the Supreme Court stating that it should fall within the competence of the lower court. Dissenting opinion was given by the President of the Chamber where he pointed out the fact that this motion was used improperly to set aside the disputable award. The only possible remedy against the award would be the action for setting aside but only in place where the decision was rendered, and since Venezuela is not a place of arbitration, i.e. where award was rendered, even its courts lacked jurisdiction for this action. The president further stressed out that filing of the amparo constitutional action for protection of human rights, with the Supreme Court against arbitral award, is totally against all what Venezuelan law on arbitration, New York and Panama Conventions provide, as well as that this consequently encourages the use of inappropriate means of recourse against arbitral awards. Finally, the Superior Court of Caracas, to which the constitutional action had been remitted, followed the opinion given by the president, thus dismissing the complaint as a non

[92] Corporacion Todosabor, C.A. v. Haagen-Dzas International Shoppe Company, available at Kluwer Law International, Kluwer Arbitration, ITA Monthly report, edited by prof Roger Alford, August 2006, Vol IV, Issue XIV, http://www.kluwerarbitration.com/arbitration/Newsletter.aspx?month=august2006

proper action to be used against arbitral awards. This leads us to the conclusion that arbitral award does not have a significance of the award rendered by the judicial body or some other body vested with public authority. It means that arbitration, like in Croatia, is obviously deemed to be the alternative solution for dispute resolution with some similar effects as those produced by state court procedures but still outside of that field. [93] There are no other cases in Venezuelan practice which would offer different opinion or understanding of this issue. Still, this gives enough material to conclude the current standpoint of the legal system of Venezuela in this particular field.

4.3. Colombia

Colombia is a country that has no single law on arbitration, but rather different instruments gathered altogether in one unit, giving arbitral tribunals extensive powers in dispute resolution proceedings. The judicial system of Colombia comprises Constitutional Court, Supreme Court of Justice, the Higher Judiciary Council, Council of state and superior and municipal courts.[94]

It is one of the countries also familiar with a special kind of remedy for protection of individual's rights, called Accion de Tutela that can be brought before Constitutional Court anytime person finds that his rights and freedoms are violated by the act of judicial body or a body with public authorities. This also refers to situations where arbitral awards, which supposedly have the effect of violation of someone's constitutional rights, are rendered. Practice of Constitutional Court shows the standpoint of the country towards the principle

[93] Kluwer Law International, Kluwer Arbitration, ITA Monthly report, edited by prof Roger Alford, August 2006, Vol IV, Issue XIV, http://www.kluwerarbitration.com/arbitration/Newsletter.aspx?month=august2006
[94] http://www.nationsencyclopedia.com/Americas/Colombia-JUDICIAL-SYSTEM.html

issue which this thesis is occupied with. At first, different from the position, of e.g. Venezuelan Constitutional Chamber of Supreme Court of Justice, Constitutional Court in Colombia, in case that was brought before it, holds the position that it has complete right to review arbitral awards without prior obtaining the judgment of a state court regarding the action to set aside the award. This opinion has changed during the years, and some cases conducted before Constitutional Court will show us the legal train of thoughts.

In the case AFA Consultores y Constructores S.A. E.S.P. v. Empresa Electrificadora de la costa Atlatnica, Colombian Constitutional Court in September 2004 rendered the decision, declaring itself competent to review the merits of the arbitral award. The facts of the case are that dispute between two domestic companies has arisen and ended up with arbitral award against which one of the parties filed the "tutela", the constitutional action for protection of fundamental rights. The main arguments for bringing this action were errors made by arbitral tribunal in decision-making process and process of interpretation of parties' contract. The claimant sought a protection of his due process rights. Although the law has prescribed as only possibility to challenge the award, the annulment of the award before state courts, Constitutional Court in this case has established the position that, if non of the grounds for annulment before state courts could apply, the Court has a right to review the merits of the award in question, only if arbitral tribunal has acted arbitrarily or in violation of due process. The Court further stressed out that the test for deciding whether due process has been violated was one of reasonableness, thus if procedure conducted by arbitral tribunal was held in such manner that it significantly differs from something that is considered to be reasonable conduct, action of tutela could be filed.[95] It is worth mentioning that this was a case of domestic arbitration, but when deciding upon it, no distinction was made between local or international arbitration. This means that under the same conditions the review of arbitral

awards rendered in relation to international arbitration would be possible to perform. Moreover, that the question of challenging arbitral awards directly before Constitutional Court brings uncertainty to the legal nature of arbitration and its decisions, which does not contribute as the advantage to this institution, both domestic or international.[96]

There is another, recent case, good to be elaborated for the purpose of ascertaining the difference in the understanding of the Constitutional Court, made during couple of years, towards question of legal nature of arbitration and the possibility to challenge the arbitral awards, with or without exhausting remedies explicitly defined by the law.

The Colombian Constitutional Court, dealing with arbitrability of the disputes involving a state entity, ruled twice in the case Departamento del Valle (Valle del Cauca) v. Concesiones de Infrastructura S.A. (CISA), in two different ways, changing the first opinion given on particular issue. In this case, the public entity Departamneto del Valle has terminated the contract unilaterally, and the other party to the contract, CISA, although knowing that termination of the contract was falling into the prerogatives of Valle as a state entity, started the arbitration procedure, while relying on the fact that some claims were still arbitrable, those which were not directly connected with the action of termination. Arbitral award was rendered in favor of CISA, the state entity challenged it before Council of State. Not satisfied with the decision of the Council, Valle del Cauca filed a Constitutional complaint (accion de tutela) alleging the violation of due process. Firstly, in the may 2006., the Constitutional Court ruled upon the complaint, in the way that it annulled both – decision of Council and the arbitral award. It took position that it has a right to review both decisions if violation of fundamental rights of a person was present. In 2007., the Court changed the position, and overruled its own decision, declaring that "a constitutional protection claim could not be used

[95] The Court after considering all evidences realized that there was no violation of due process on the side of arbitral tribunal (http://www.kluwerarbitration.com/arbitration/Newsletter.aspx?month=june2005)

to challenge the validity of arbitral awards and annulment proceedings"[97], furthermore finding that, in fact, there was no violation of constitutional rights done by the arbitral tribunal. The Court reasoned that arbitration is used as an alternative method constitutionally guaranteed and protected, that awards rendered are final and binding, and that they only defer from the judicial decisions in fact that they are not subject to appeal. Only remedy available is the action for setting aside and it is only applicable in country of place of arbitration, i.e. where the award was rendered. Constitutional complaint is not possible as a mean for annulment of arbitral awards. Awards do not belong to a group of acts which can be reviewed by any state court and especially not Constitutional Court. Once again, the diversity of opinions that were changing throughout the years is shown by praxis of Constitutional Court in Colombia, confirming the present standpoint of most of the countries, regarding this issue, that offer individuals the option for filing the constitutional complaint in case of violation of constitutional rights.

[96] Kluwer Law International, Kluwer Arbitration, ITA Monthly reprt, edited by prof Roger Alford, June 2005, Vol III, Issue 12, http://www.kluwerarbitration.com/arbitration/Newsletter.aspx?month=june2005

[97] White and Case LLP – Publications – Colombia: Constitutional Court Rulings on the Applicability of International Arbitration to State Contracts, International Disputes Quarterly, Fall 2007, available at http://www.whitecase.com/idq/fall_2007/

CONCLUSION

The elaboration of the issue, that this thesis was concerned with, did not finally offer clear guideline as to the future understanding of the concept of reviewing arbitral awards by Constitutional Court in practice. From the legal point of view, laws of the countries discussed here, clearly offer the solution for challenging of the arbitral awards. The only possible remedy that unsatisfied party has, is the action for setting aside the award in the place where the award was rendered, or on the other hand, the action for opposition to recognition and enforcement of the award in the place where this is sought. The practice of countries mentioned in this thesis provided us with different standing from that one designated in their laws, regarding this issue. Possibility of challenging the awards before Constitutional Court by using the constitutional complaint has suddenly arisen, making it difficult to understand what is the actual legal nature of arbitration and whether this possibility should exist or not. Constitutional action is the instrument designed for protection of individual's rights and freedoms guaranteed by the Constitution, and used only against acts of the judicial bodies or bodies vested with public authorities. Practice in Croatian and Latin American systems has developed approach in two directions when Constitutional Court (or highest federal court in certain countries of Latin America) was confronted with cases of filing the complaint against arbitral award because of violation of certain constitutional rights made by arbitral tribunal. First approach is that arbitral decisions may be reviewed if alleged violation is really existent, thus giving the arbitral tribunal and its decisions power of institutions that arbitral tribunals should not normally have. In first cases of Croatian, Venezuelan and Colombian systems, the result of complaints brought, was exactly this – arbitral awards, although not decisions of

institutions specified by law, against whose acts the complaint could be filed, were reviewed. During the following years the legal standpoint has changed. Constitutional Court and legal experts in this field, after realizing and analyzing in details the legal nature of this instrument, developed new opinion, stating that arbitral tribunal has no authority of a public body and is not a judicial body. They based this notion on the fact that it is a specific institution different in its characteristics from both institutions and as such, decisions made by arbitral tribunal can be challenged only in a way designated in laws of the countries, and no constitutional complaint can be brought against it.

Although this second reasoning is the latest legal reasoning given, still it is not clearly stated what should be deemed as correct answer to this problem. Not plenty cases concerned with this issue exist in practice of these countries, and because of this, and respectively the fact that this issue is not elaborated enough, it is hard to say what the real standpoint on this issue is.

In my opinion, arbitration as an institution should stay out of concept of being one of the state institutions with features of public authority. Its powers arise from parties' contract of private nature, it is used precisely to avoid state interference in disputes that have arisen between them, and the only common feature between arbitration and judiciary is related to the effect that decisions made by arbitral tribunals have – effect of final court judgment.

The constitutional complaint for protection of rights and freedoms guaranteed by Constitution of each country should stay available only for those acts of bodies explicitly designated in the laws of those countries, with no possibility for direct challenge of arbitral awards, against which the only available remedy, and only under certain circumstances, is and should continue to be, the action for setting aside and opposition to recognition and enforcement of the awards. Arbitration is usually chosen exactly for the purpose of reaching the final, not challengeable award, and with respect to that, arbitration should be conducted in such manner

and having its final consequences in such manner.

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8. Croatian Law on Civil Procedure (Official Gazette No 53/91, 91/92, 112/99, 88/01 and 117/03)

4. TABLE OF CASES AND AWARDS

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