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ARBITRATION OF CORPORATE DISPUTES

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THE ARBITRABILITY OF CORPORATE DISPUTES

CHALLENGES

- There is no agreed approach in the arbitrability of these disputes;
- In some countries it is subject to some conditions due to the concern on *due process* and *res judicata* effect including **different public policy** approaches;
- The term “corporate disputes” is **very broad**;
- The term “corporate disputes” **limits only to internal disputes** in the company and does not extend to external disputes i.e. a dispute between one company and other company (intra-corporate disputes);
- **Different meaning** with the term “shareholder disputes”;

THE ARBITRABILITY OF CORPORATE DISPUTES

DIFFERENT PERSPECTIVES ON THIS ISSUE:

- countries widely open for the use of arbitration in corporate disputes (**Brazil, Switzerland, United States**);
- countries that allow the use of arbitration under some consideration (**England, Germany**);
- countries where arbitrability of corporate disputes is questionable (**Belarus**).

THE DEFINITION OF CORPORATE DISPUTES

BELARUS

Procedural law of the Republic of Belarus does not give a definition of the “corporate dispute”.

- The following categories of cases are **under the exclusive competence of courts**:

“...Disputes arising out of the foundation, registration or liquidation of the legal entities on the territory of the Republic of Belarus or the termination of an individual entrepreneur’s activity, as well as the rehearing of the decisions of the bodies of these legal entities ...”¹

¹para. 5 Art. 236 of the Commercial Procedural Code

THE DEFINITION OF CORPORATE DISPUTES

BELARUS

- The **court** considering economic disputes considers the following cases:

“...disputes arising from the registration, reorganization and liquidation of legal entities and organizations which do not have the status of a legal entity, and termination of activities of individual entrepreneurs;

...disputes arising from the refusal of state registration, on evasion of state registration of legal entities, organizations, which do not have the status of a legal entity, and individual entrepreneurs;

...disputes arising from the application of the conditions of the foundation of a legal entity or organization, which do not have the status of a legal entity, and (or) participation...”¹

¹paras. 3-5 Art. 47 of the Commercial Procedural Code

THE DEFINITION OF CORPORATE DISPUTES

BELARUS

- The following categories of cases are also **under the special competence of the economic court:**

“- disputes between the joint-stock company and its shareholders...;
- disputes between a LLC and the Additional Liability Company and their participants...;
- disputes between corporations and its participants...;
- disputes between business partnerships and its participants...
- other disputes between business partnerships and its participants except employment disputes”¹

Art. 236 establishes the exclusive competence of the economic **courts** of the Republic of Belarus over corporate disputes, but **does not limit the Parties to refer disputes to arbitration in the territory of Belarus.**



de jure all corporate disputes are arbitrable
de facto no

¹ paras. 2-6 Art. 3 of the Resolution No. 20 of the Plenum of the Supreme Economic Court of the Republic of Belarus 31 October 2011

THE ARBITRABILITY OF CORPORATE DISPUTES

BELARUS PERSPECTIVE

- *“Disputes arising out of the Articles of Association relating to the foundation and enterprise activity of the joint-venture company in presence of the respond arbitration clause are the subject to the International Arbitration Court at the BelCCI proceedings”¹*
- *“the International Arbitration Court at the BelCCI consideres disputes arising out of the participation in the business entity in case the International Arbitration Court at the BelCCI is mentioned in the Foundation Agreement as the body for dispute resolution”²*



- **The arbitration clause in the present cases was included in the Articles of Association;**
- **Disputes arising out of the Articles of Association can be the subject to the International Arbitration Court at the BelCCI proceedings.**

¹case No. 117/43-97 the International Arbitration Court at the BelCCI;

²case No. 333/28-02 the International Arbitration Court at the BelCCI.

THE COMMONWEALTH OF INDEPENDENT STATES' PERSPECTIVE

*"Disputes arising out of the **corporate relations among members of a public-private partnership, agreements between members of a public-private partnership** may be resolved by a state court, **nonstate arbitration**, with the application of other means of an alternative dispute resolution as modified by the state legislation"¹.*

¹para.7 Art. 29 of the Resolution No.41-9 of the Interparliamentary Assemble of the Member Nations of the Commonwealth of Independent States "On the Model Law "On public-private partnership"

CONSIDERATION ON THE USE OF ARBITRATION IN CORPORATE DISPUTES

The court may refuse to recognise and enforce on its own motion if it finds that «the recognition or enforcement of the award would be contrary to the **public policy** of that country»¹

THE PUBLIC POLICY BASIS (BELARUS PERSPECTIVE)

- Public policy is *“the fundamental principles of the legal system of the Republic of Belarus”*²
- *“the fundamental principles of international law, the norms of the Constitution of the Republic of Belarus, the provisions of international treaties of the Republic of Belarus, the basic principles of the fundamental branches of law”*³

¹Art. V (2)(b) NY Convention 1958;

²para. 11 Art. 1 of the International Arbitration Court Act;

³para. 98 of the Resolution No. 25 of the Higher Economic Court of the Republic of Belarus 26 June 2013.

SUMMARY

- Procedural law of the Republic of Belarus does not give the definition of the “corporate dispute”.
- Corporate disputes in the Republic of Belarus fall within the scope of the subject matter of arbitration courts only in the territory of Belarus.
- The essential condition for the Arbitral Tribunal to consider a corporate dispute is an arbitration agreement (in the form of the arbitration clause or Submission Agreement) in written form signed by the all members of the business entity/authorized signatory.
- Attention should be paid to the public policy given that according to the Art. V(2)(b) of the New York Convention 1958 the court may refuse to recognize and enforce on its own motion if it finds that «the recognition or enforcement of the award would be contrary to the public policy of that country”.
- The issue on corporate disputes is need to be formalized in legislation of the Republic of Belarus with intent to reduce the load on state courts and to extend the alternative dispute resolution.

Thank you for your attention!



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