Arbitrating Corporate Disputes - CEE countries perspective

(analysis based on German, Polish and Russian solutions comparison)
Introductory remarks (2)

For the purpose of the presentation the *analysis is limited to* following issues:

1. arbitrability of corporate disputes
2. mandatory scope of arbitration clause and its incorporation in AoA
3. procedural rules dedicated to this specific disputes

in each relevant jurisdiction: **Germany, Poland and Russia**
Introductory remarks (1)

Corporate disputes (for the purpose of this presentation) refer to internal disputes in corporations between:

- minority shareholders versus the company and/or majority shareholders

E.g., disputes on

(1) the invalidation of company resolutions,
(2) dissolution of the company, and
(3) expulsion of shareholders
The **arbitrability** of corporate disputes
- **Germany**

**In theory:**
- an ambiguity in the law *(firstly, the problem with settleability, and later on, with the so called *erga omnes* effect of the invalidating decision)*
- an ambiguity in the doctrine *(since 1989 Karsten Schmidt publication until 2009 “Arbitrability II ” Supreme Court decision)*

**In practice:**
- **recognized** *(finally) in case-law by so called:
  * “Arbitrability I” *(1996),*
  * “Arbitrability II” *(2009), and*
  * “Arbitrability III” *(2017)*

decisions of the German Supreme Court
The **arbitrability** of corporate disputes – *Poland*

**In theory:**
- no ambiguity in the law („An arbitration clause incorporated into the articles of association/incorporation deed is binding for the company and its shareholders/stock-holders“)
- an ambiguity in the doctrine (starting from the non-arbitrability of all corporate disputes, ending with the arbitrability of all corporate disputes)

**In practice:**
- so far, **not recognized** in the case-law:
  - lack of arbitrability due to the lack of settleability (2009, Katowice Court of Appeal),
  - lack of arbitrability due to the *erga omnes* effect of the court verdict (2009, Warsaw Court of Appeal),
  - conditional arbitrability, to be assessed *in concreto* (2012, award of one of the permanent Arbitration Courts in Warsaw)

nevertheless, no decision rendered by the Polish Supreme Court
The *arbitrability* of corporate disputes – Russia

**In theory:**
- no ambiguity in the law (since 2017 (1) all disputes arbitrable with exemptions listed by law e.g. disputes on calling a general meeting of shareholders, disputes regarding strategic companies, disputes relating to the expulsion of shareholders, (2) *arbitrability is conditional*: (a) only permanent arbitral institutions that obtained a license from the Russian Government may consider these disputes; (b) these arbitral institutions have to elaborate and use the rules of arbitration of corporate disputes; (c) a company and its shareholders have to agree on an arbitration clause, and (d) arbitration should take place in Russia.)

- no ambiguity in the doctrine

**In practice:**
- so far, no case-law questioning the lack of arbitrability of corporate disputes; so far no decision has been rendered by the Russian Supreme Court
An arbitration clause for corporate disputes - Germany

**In theory:**
- no ambiguity in the law (there is a legal definition of arbitration clause/agreement, and its essential parts)
- an ambiguity in the doctrine (some scholars set for higher requirements of the arbitration clause incorporated in the AoA/deed of formation, than stipulated by law)

**In practice:**
- case-law requires the arbitration clause for corporate disputes to meet specific conditions ((1) incorporation by unanimous decision 2) all shareholders are informed about starting the proceedings and are able to join the proceedings, (3) all shareholders enjoy equal rights in composition of the arbitral tribunal, (4) all proceedings regarding the invalidation of the same resolution are consolidated),
- otherwise the clause is null and void, according to "Arbitrability II" (2009), and, "Arbitrability III" (2017) decisions of the German Supreme Court
An arbitration clause for corporate disputes - Poland

In theory:
- no ambiguity in the law (there is a legal definition of arbitration clause/agreement, and its essential parts)
- an ambiguity in the doctrine (some scholars set for (1) higher requirements of the arbitration clause incorporated in the articles of associations/deed of formation, than stipulated by law, some do not, (2) incorporation of the clause, by unanimous or majority decision - still uncertain)

In practice:
- so far very limited case-law on requirements concerning the necessary content of the arbitration clause for corporate disputes:
  • 2012, an award of one of permanent Arbitration Court in Warsaw, the same requirements as set forth by the German Supreme Court

nevertheless, so far no decision has been rendered by the Polish public courts
An arbitration clause for corporate disputes - Russia

In theory:
- no ambiguity in the law ((1) there is a legal definition of arbitration clause/agreement, and its essential parts, there (2) the incorporation of the arbitration clause requires a unanimous decision of all shareholders and the company)
- no ambiguity in the doctrine

In practice:
- no case-law on additional requirements for the arbitration clause incorporated in AoA, other than those stipulated by law
Procedural rules for corporate disputes - Germany

In theory:
- an ambiguity in the law (there is a lack of explicit regulations on procedural rules)
- no ambiguity in the doctrine ((1) all shareholders must be informed about starting the proceedings and their progress and must be able to join the proceedings at every stage, (2) all shareholders enjoy equal rights in the composition of the arbitral tribunal, (3) all proceedings regarding the invalidation of the same resolution are consolidated)), according to “Arbitrability II” decision (2009)

In practice:
- DIS procedural rules (implemented in 2009) follow the procedural requirements set forth when arbitrating corporate disputes by the “Arbitrability II” (2009) decision of the German Supreme Court
Procedural rules for corporate disputes - Poland

In theory:
- an ambiguity in the law (there is a lack of explicit regulation on procedural rules)
- no ambiguity in the doctrine ((1) all shareholders must be informed about starting the proceedings and their progress and must be able to join the proceedings at every stage, (2) all shareholders enjoy equal rights in the composition of the arbitral tribunal, (3) no need to consolidate all proceedings regarding the invalidation of the same resolution)

In practice:
- no procedural rules issued by any permanent arbitration court, so far (but the “change we need” is on the way ... the Lewiatan Court of Arbitration is going to implement supplementary rules for corporate arbitration, similar to DIS rules)
Procedural rules for corporate disputes - Russia

In theory:

- **no ambiguity in law** (there’s a mandatory regulation on procedural rules, similar to DIS rules)
- **no ambiguity in doctrine** (1) all shareholders must be informed about the of starting the proceedings and must be able to join the proceedings at every stage, (2) “passive” shareholders are **not informed about the progress** of the arbitral proceedings (3) no need to consolidate all the proceedings regarding the invalidation of the same resolution)

In practice:

- **ICAC/MKAS Court** (in Moscow) **procedural rules** (implemented in February 2017) follow the procedural requirements set forth by the legislator (in July 2015)
- some additional rules (e.g., rules on the *res judicata* effect of an award for all shareholders, rules on the appointment of a tribunal and consolidation of proceedings).
Conclusions

Well, in CCE countries, when arbitrating corporate disputes,

in theory,
there is no essential difference between theory and practice.

But, in practice, there is...
Rafał Kos, LL. M.
rafal.kos@kkg.pl