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TRAINING MANUAL:
Arbitration

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Training Manual:

Arbitration

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INTRODUCTION

I. About the Course

This short course is designed to provide a framework for understanding the main concepts of arbitration as one of the most widely used methods of resolving commercial disputes. It includes a comparison of Arbitration with other main Alternative Dispute Resolution (ADR) processes and it presents the perceived advantages and potential disadvantages of arbitration over litigation.

This course is specifically designed for legal professionals to provide them with explanations of the main principles of arbitration and interpretive tools for the rules related to this form of dispute settlement. It is especially useful for judges and attorneys who deal with commercial disputes arising from contracts that can be resolved through arbitration.

During this intensive and practical course, participants will engage in simulated arbitration, examine considerations that apply to drafting arbitration agreements and/or clauses, apply and interpret the rules that apply to issues such as witnesses and evidence and practice their advocacy skills while delivering presentations before an arbitral panel.

Finally, the course also provides the necessary basis for participants to be able to render arbitral awards and to apply the rules to for the recognition and enforcement of these awards. During the course, you will use this book as a resource guide. It contains definition of terms, concepts, exercises, instructions for assignments, discussion, questions and examples.

II. Learning Objectives

Upon completion of this course, participants will be able to:

- Explain and apply main concepts and principles of Arbitration
- Interpret and review the purpose and scope of Kosovo's Law on Arbitration
- Judge the limits of a court's jurisdiction over cases in which the parties choose arbitration as the dispute settlement form
- Draft arbitration agreements and/or clauses
- Compare and contrast valid and invalid arbitration agreements and/or clauses
- List the steps for the constitution of the arbitral tribunal
- Explain the sequence of arbitral proceedings and complete the steps for the pre-hearing process
- Complete the steps of oral hearings
- Render an arbitral award
- Apply the rules of recognition and enforcement of the arbitral award

III. Learning Methodology

The role of the instructor is to facilitate your learning. The course methodology includes instructor presentations, which will mainly build on a case-based approach, using existing and hypothetical cases as examples. It utilizes exercises, discussions, arbitration simulations, and activities designed to apply the concepts of arbitration in practical situations. The course materials that will be distributed include narratives/presentations on the main principles and rules of arbitration as well as exercises to illustrate the application of these rules.

IV. Participation Requirements

The participants in the course come with a variety of valuable experiences. Your contribution to group discussions will be helpful to other participants. Likewise, the experiences of other participants serve as a valuable resource to you. During the course, you will be asked to participate in several ways: group discussions, completing individual assignments, and working in teams with other participants to analyze problems and make recommendations. Please take the opportunity to share your knowledge and experiences, ask questions and challenge concepts.

The information that you received in this introduction should ensure that the rest of the course is meaningful to you.

MODULE 1:
INTRODUCTION TO ARBITRATION

1.1. Overview

This module provides an introductory presentation of arbitration as a dispute settlement form. It presents the evolution of arbitration and its advantages as opposed to other types of dispute resolution processes.

1.2. Learning Objectives

Upon completion of this module, you will be able to:

- Explain the historical background of arbitration as a widely used method for resolving disputes
- Apply and understand approaches for resolving commercial disputes
- List the differences between arbitration and litigation
- Compare arbitration to other ADR methods
- Outline the perceived advantages and potential disadvantages of arbitration over litigation and other methods of dispute settlement
- Describe how arbitration can be tailored to suit specific circumstances and needs
- List the elements that need to be taken into account when choosing between institutional and ad-hoc arbitration.

1.3. Historical Background of Arbitration

When faced with a dispute arising from a contract or other type of a commercial relationship, courts are the first method that one might think of to settle the dispute. Even though courts remain the most popular mechanism for adjudicating disputes, arbitration and other types of alternative dispute resolution have evolved and grown over the centuries together with the growth of commerce and trade. Ancient records in fact show that arbitration predates the courts as a method for adjudicating disputes between traders.

A historical analysis of dispute resolution reveals that the roots of all forms for resolving disputes are negotiation, mediation and arbitration, which in modern legal terminology are known as Alternative Dispute Resolution (ADR). Before any court-type institution was ever established to adjudicate a matter, people settled their disputes by simply talking to one another about the problem and reaching a solution that both could accept. If this was not possible, they would turn to the tribal chief or a respectable "leader" of the group, village or society, and the decision of that person would be binding on the contending parties. A similar approach was embraced with a later system where the "council of elders" of the village would decide on a problem between two parties and their decision could not be appealed and had to be abided by and implemented immediately. Since almost all contractual relationships involved a potential dispute, the resolution of these issues involved a neutral determination and an agreement to abide by the decision made by that neutral entity.

Although it is not known exactly when the use of arbitration formally began, there are records which prove that it was in fact widely used in ancient Egypt, as well as by the Romans, Greeks, the popes, and European kings. Of course the procedures at that time were based on ancient forms, quite different from the contemporary arbitration proceedings. The first rules of arbitration were

adopted sometime between the 15th and 16th century in England and the United States of America, respectively. Nevertheless, the growth of arbitration and its promotion mainly took place in the beginning of the 20th century, when many countries (mainly in Western Europe and the U.S.) passed laws sanctioning arbitration as an alternative to courts.

In the past, arbitration was always an *ad hoc* process, but the growth of arbitration was accompanied by the development of institutional or sponsored arbitration where private organizations were established to administer arbitration proceedings. For example, the American Arbitration Association was established in 1926, following enactment of the U.S. Federal Arbitration Act. With the growth of international trade, arbitration has continued to develop and most countries around the world now have arbitration laws and institutions of arbitration. Today, arbitration is used for resolving a variety of disputes. It is most popular as a process for commercial disputes, especially those of an international character. In that regard, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration in 1985 and Model Rules for International Commercial Arbitration in 2006. The Law and Rules have established international standards that are relevant for both international and domestic arbitration.

1.4. Approaches to Resolving Commercial Disputes

In today's modern world of business and technology, businesses are more inclined than ever to choose the most appropriate way to resolve commercial disputes outside of the classic type of court adjudication. Special attention is being focused on pre-dispute agreements, in which parties agree on the type of dispute resolution mechanism they are going to use should a dispute arise among them. These pre-dispute agreements, in most cases, explicitly exclude the jurisdiction of courts. Nevertheless, there are still many cases where businesses do not include choice of forum and choice of law clauses in their contracts and, as a result, end up in courts, as the default form of dispute settlement.

When it comes to dispute resolution, the options that are available to parties, apart from the **courts** as the traditional forum, include **negotiation, mediation and arbitration**. Businesses are becoming more aware of the importance of resolving their disputes informally, and are undertaking all the necessary steps to avoid resorting to a court process. They acknowledge that resolving their conflicts out of court is cheaper, speedier, more confidential and private, less formal, and much more predictable. As a result, businesses have started to analyze and identify the appropriate dispute resolution options for commercial relationships. Most of them understand that they can save time and money in resolving their disagreements by addressing conflict management as a part of contract planning and negotiation.

Since business needs and objectives vary with the type of transaction, it is important to consider which type of dispute resolution will be compatible with the transaction in question. This dictates the need for different ADR provisions in company 'sample' contracts. In many cases, companies choose one type of ADR and draft clauses in the contract which govern all disputes that may arise between the parties. However, there are instances, such as complex contracts with a lot of money at stake, where a multi-tier dispute resolution process is adopted. For example, the dispute resolution clause may make reference to mediation and arbitration, or it may start with a reference

to amicable negotiations between the parties, continue with mediation as a second resort, and end up with arbitration as the last resort.

1.5. Arbitration in the ADR Landscape

In this manual, the term Alternative Dispute Resolution (ADR) refers to all out of court methods of dispute resolution, including negotiation, mediation and arbitration. However, some authorities writing on this issue do not consider arbitration to be a form of ADR because arbitration, like court litigation, is an adjudicative process where a third party will hear and decide the dispute. This draws the distinction between adjudicative mechanisms (arbitration and litigation) and non-adjudicative mechanisms (negotiation or mediation). Nonetheless, the essential features of each one of the ADR forms are presented in the table below:

	What are the costs of the process?	**(In)formality**	**Who controls the ultimate resolution of disputes?**	**Where/What is the focus?**
Negotiation	Not costly	The parties decide the level of formality	The parties themselves	The interests of the parties and their future relationship
Mediation	Mediator fees	The parties decide the level of formality together with the mediator	The mediator simply facilitates the negotiations between the parties. It is up to them to decide whether they accept the proposed agreement	The interests of the parties and their future relationship
Arbitration	Arbitrator fees	Formal but flexible, set out by arbitration rules	The arbitral panel or the sole arbitrator	Past events and circumstances that are used to determine issues of fact or law
	Are solutions limited?	**Who appoints the authorities and what is their function?**	**What's the relation between the appointed authorities and the parties?**	**Who plays the central role in the process?**

Negotiation	The variety and number of solutions depend on the willingness of the parties.	No authorities appointed since the parties negotiate the dispute themselves directly	No appointed authorities	The parties
Mediation	The variety and number of solutions depend on the willingness of the parties.	The mediator is appointed with the agreement of both parties in order to facilitate negotiations of issues.	The mediator works directly with the parties in order to find a solution suitable to both.	The parties play a central role by actively participating in the process
Arbitration	Solutions are limited by the original agreement of the parties and usually consist of monetary costs, injunctions, or equitable relief.	Parties appoint one sole arbitrator , or A panel of three arbitrator, is appointed as follows: each party appoints one arbitrator and the two arbitrators appoint the presiding arbitrator.	Arbitrators assess the information they get from the parties in a written form or during a hearing, but are required to avoid *ex parte* discussions.	Presentations of positions are made through counsel. Parties themselves play a secondary role.

1.6. Arbitration vs. Litigation

There are numerous advantages of arbitration as a dispute resolution mechanism. On the other hand, there are also a number of perceived concerns related to the use of arbitration by businesses. Efficiency in costs and time, preservation of confidentiality, neutrality and finality of the award are some of the perceived advantages of arbitration. A large number of businesses, however, regard the flexibility – the opportunity to tailor arbitration to particular needs and circumstances – as the most significant advantage of arbitration. The potential benefits and concerns of arbitration vary by company, by transaction and by dispute. Moreover, while some factors might be seen as benefits by some businesses (e.g. finality of the award and no possibility to appeal), others regard them as drawbacks. The specific factors that a party needs to consider in making the decision between arbitration and litigation include, but are not limited to, the following:

Jurisdiction: While a forum selection clause in the contract that gives a power to a court is usually seen as the solution to remove all jurisdictional challenges, jurisdiction may still be challenged on the basis of forum non-convenience or inappropriateness. In addition, issues of sovereign immunity may arise if the court is selected as the forum. It is, of course, possible for the parties to agree on a forum in a third state, but this is not allowed by the laws of all countries. For this reason, the claim is

always brought before a court in the country where one of the parties has its place of business. With arbitration, on the other hand, all (or nearly all) problems of jurisdiction would be avoided. Even if arbitration is to be held in the country of one of the parties, the agreement to arbitrate is seen as an agreement for a neutral forum that is not linked with the judicial or political structure of either party. Furthermore, an agreement to arbitrate future disputes with a state entity removes problems of sovereign immunity since virtually all countries have held that an arbitration agreement is a waiver of the right to invoke sovereign immunity.

Enforcement of judgments/awards: It is quite clear that simply getting a piece of paper from a court or arbitral tribunal that shows a decision in one's favor does not put money back into the pocket of the winning party. This can only happen after the decision is enforced. So far, however, (at least until The Hague Convention on the Enforcement of Foreign Judgments comes into force), the biggest problems have arisen in connection with the enforcement of court judgments. With arbitration, on the other hand, the issue of enforcement and recognition of arbitral awards has been solved with the 1958 New York Convention on the enforcement and recognition of foreign arbitral awards (the New York Convention). According to this Convention, arbitral awards rendered in Convention states are enforceable in all other Convention states on the same basis as domestic awards.

Cost and Time efficiency: One of the main reasons companies choose arbitration over litigation is cost and time efficiency. Although arbitrator fees might seem expensive at a first glance, if we compare these costs to those that might arise from a case that is appealable and moves from a court of first instance to another, arbitration costs are much cheaper than litigation. In addition, arbitral proceedings are much faster than court proceedings. Most arbitral tribunals hear and decide the case during the day, while procedures in courts, for the same type of case (especially due to the high number of cases) can last for several days.

Confidentiality and Privacy: Many companies choose arbitration for both international and domestic contracts because the arbitration process is confidential. The level of confidentiality is regulated, in principle, by means of the arbitration rules chosen by the parties. However, in many cases the level of confidentiality is set forth by the parties and regulated in the arbitration agreement. As opposed to court sessions, which are open to public, arbitral proceedings are private and confidential. Neither the arbitrator nor the administrative staff is allowed to discuss or publish any of the issues related to the case outside the arbitration hearing.

Predictability: The issue of predictability is a very important matter, especially when the case has an international character. With arbitration, the dispute will be resolved in one place and at once (without the possibility of appealing the award), and not by a race of judgments of different courts in different countries.

Expertise: Arbitrators have expertise in a wide variety of fields, as opposed to judges who are all lawyers. This is an important factor that makes parties choose arbitration over litigation. Since the parties themselves choose the arbitrators that are going to hear the dispute, they are not confined to a list of lawyers. If, for example, the dispute involves a contract of specific complex goods, they can choose arbitrators who are experts of that specific field.

Flexibility: In arbitration, as opposed to litigation, the procedure is often shaped by the parties themselves. Apart from the procedural rules chosen, the parties can derogate from any specific rule and agree otherwise. Arbitration is deemed as a dispute resolution form that can be tailored to any specific circumstances of a certain case. The parties, together with the arbitrators, do have a role in determining the procedure and there is more flexibility on this matter, compared to the courts where the rules of procedures established by law are dictated to the parties. (example: in Kosovo the Law on contested procedures is applied) .

Finality: The arbitral award is final and binding. There is no possibility for appeal, unless the parties ask for a judicial review of the award, which can be requested only in specific cases when there are essential violations of procedural provisions (example: parties were not invited accordingly in the procedure, inexistence of arbitration clause or arbitration agreement, etc). The court judgment, on the other hand, is appealable and can go to a court of a higher instance.

1.7. Choosing the Right Type of Arbitration

One of the most significant advantages of arbitration is that it can be tailored to suit specific objectives and needs. The parties enjoy quite a lot of flexibility on deciding on the procedure and level of formality. As previously discussed, the best practice is to make these decisions before the dispute arises, and specify them in the arbitration clause or agreement.

1.7.1. Institutional and Ad Hoc Arbitration

Once the parties choose arbitration as their method of dispute resolution, they must decide whether to arbitrate under the rules of an arbitral institution or to use an *ad hoc* arbitration. While institutional arbitration is administered by an organization or institution in accordance with its own rules of procedure, *ad hoc* arbitration means that there is no formal administration by a specific organization. Institutional arbitration is widespread with numerous international, regional and national organizations. These include the International Court of Arbitration at the International Chamber of Commerce, the International Center for Dispute Resolution, the London Court of International Arbitration, the American Arbitration Association, the Vienna International Arbitration Center, the Permanent Arbitration Tribunal at the Croatian Chamber of Economy and many others. In 2011, two new arbitration institutions were established in Kosovo—the Permanent Arbitration Tribunal at the Kosovo Chamber of Commerce and the Alternative Dispute Resolution Center at the American Chamber of Commerce in Kosovo.

In order to make a smart choice, one needs to take into account the advantages and disadvantages of both.

Institutional Arbitration: This type of arbitration has a number of advantages, the first of which is that the institution will help administer the arbitration procedure from beginning to end. Second, arbitration institutions have their own rules of procedure, which the parties can incorporate in their arbitration agreement. Therefore, instead of starting from scratch, determining rules by themselves, and reinventing the wheel, the parties can take comfort in the arbitration rules of a certain institution that are drafted by professionals. This solution also offers predictability because parties will have the chance to read and analyze the rules and even their commentary to see what kind of

solutions they offer for certain issues. Moreover, the rules of most institutions allow the parties to modify the rules to suit their needs. Another advantage is the model arbitration clause which the arbitral institution offers. In many instances, the parties will look at the model clause provided by the institutions, and simply incorporate it in the contract. This solution avoids later possible challenges to the validity of the clause, which may arise if the clause has not been drafted correctly by the parties.

The selection of arbitrators is unquestionably one of the most significant advantages that institutional arbitration offers. Instead of facing possible disagreements between the parties on arbitrator selection, it is easier to get this service from the administering institution. Arbitral institutions excel in this area and have lists of arbitrators that are usually the best that can be appointed. In addition, through institutional arbitration, the parties do not have to negotiate the fees with the arbitrators. They simply let the institution set the fees and spare themselves from this burden.

In addition to assisting in the appointment process, an arbitral institution will handle administrative and logistical matters, thereby relieving the arbitral tribunal and parties of those duties, which may result in a prompter process.

Another important advantage of this type of arbitration is the judicial respect towards the integrity of arbitral awards made by an arbitral institution. It is more likely that a court would set aside an arbitral award made by an *ad hoc* arbitration than an award rendered by an arbitral institution. Some arbitration institutions, including the ICC, scrutinize draft arbitral awards to ensure that they are in the proper form and to draw the arbitral tribunal's attention to issues related to the merits that might result in setting aside and award. (See ICC Arbitration Rules, Art. 33, and Kosovo Arbitration Rules, Art. 44).

Ad hoc Arbitration: The main advantage offered by *ad hoc* arbitration is its flexibility**.** The parties have all the space necessary to make any decisions on procedure and to shape the proceedings to meet their wishes and objectives. While this may be a benefit for sophisticated parties that are familiar with arbitration, it may be a detriment to less experienced parties. However, parties may choose to follow well established rules for *ad hoc* arbitration, such as the UNCITRAL Model Rules for Arbitration, which are a complete set of rules that any party may use if they opt for *ad hoc* arbitration. This means that they do not have to draft their own rules and there are no fees for using the UNCITRAL rules.

Other often cited advantages of *ad hoc* arbitration are costs and speed. *Ad hoc* arbitration may be less expensive than institutional arbitration, since the parties will not have to pay institutional fees but simply negotiate arbitrators' fees. *Ad hoc* arbitration may also be speedier than institutional arbitration, because it does not have to go through all the procedures that usually take time. However, it the parties and arbitrators are not sophisticated, these apparent advantages may be lost. Further, in order for all the above mentioned advantages to have any meaning, it is essential that there is complete cooperation between the parties. Without this accord between the parties and their counsel, the advantages of *ad hoc* arbitration can prove to be illusory.

1.7.2 Fast Track Arbitration

Fast-track arbitration was first introduced by the International Chamber of Commerce (ICC) International Court of Arbitration in the beginning of the 1990's due to criticism that the duration of

arbitration proceedings in international disputes was too long. Although, the ICC does not have standard fast track procedures, the ICC Rules of Arbitration provide the flexibility to expedite the process. However, several arbitral institutions have included provisions on fast-track arbitration in their procedural rules. For example, the American Arbitration Association has specific rules for expedited procedures. The Kosovo Arbitration Rules 2011also provide for expedited procedures. Typically, expedited procedures are conducted by a single arbitrator and are based on documents alone or a single hearing. It is very important for the parties, before agreeing to use the fast track arbitration procedure, to check on whether the applicable law of the place of arbitration, the contract law and the law of the place where arbitration award is sought to be enforced, allows the use of the fast track arbitration procedures.

1.8. Exercise: Arbitration vs. Litigation

Instructions: The following is a group exercise for discussion and debate with all participants.

Fact Pattern	**Arbitration/Litigation – why?**
Adnan Losha is the CEO of a major corporation. He is being sued, along with his corporation, by a small shop for breaching a contract. The damages claimed by the small shop are EUR 5,700,00. Adnan Losha believes that his company did not breach the contract and is willing to make available unlimited funds to defend this suit to the end, so that the small shop is unable to afford the expenses related to the lawsuit. The small shop offers to take this lawsuit to arbitration if Adnan Losha agrees. What should Adnan Losha do under these circumstances?	Arbitration / Litigation
Tribenex, Sh.P.K is a company specializing in nanotechnology. It has come to the attention of Tribenex that another company, Android, JSC is using some of the technology developed by Tribenex to build small robots that are used in heart disease diagnostics. Tribenex has sent a threatening letter to Android, but Android insists that the technology it uses is different from that developed by Tribenex. Tribenex wants to resolve this dispute and also wants to preserve the technological secrets that may be disclosed through the resolution of the dispute. Should Tribenex litigate or arbitrate?	Arbitration / Litigation
Holeger International, LLC has a $500,000,000.00 deal on the line that will expire in 60 days. Before the deal can be concluded, Holeger International must resolve two IP disputes it has with another company, Jones Private Fund, J.S.C. The deal will fall through if Holeger International has any disputes which are unresolved when the deadline expires. What is the best option for Holeger International?	Arbitration / Litigation

Hans Bold, Ltd. is located in Frankfurt and Drones, S.E. is located in Brussels. Hans Bold has a dispute with Drones regarding some commercial contracts the parties signed years ago. Both companies need the dispute resolved in a timely manner, but cannot agree where to resolve their dispute, in Frankfurt or Brussels. Because they have a longstanding business relationship, they do not want these disputes to drag on or to create bad blood between the two companies. The cost for the resolution of the dispute is not a major concern, but new tax regulations have removed litigation costs from the list of tax write-offs. What should the parties do?	Arbitration / Litigation
Luma, Sh.A. has a commercial dispute with Ants, Sh.P.K. regarding a joint venture in Kosovo. Luma is registered in Kosovo, has limited assets, and its management and legal counsel are not that sophisticated. Ants are a large multinational corporation. The contract in dispute has no dispute resolution clauses but states that Kosovo law should be applied. Ants have offered to resolve the dispute through the International Centre for Dispute Resolution ("ICDR") in New York. Should Luma resolve the dispute in Kosovo or take its chances with ICDR in New York?	Arbitration / Litigation

1.9. Multi-step Dispute Resolution

There are many cases in which parties would benefit from including a mutli-step resolution dispute resolution clause in their contract as they may be able to resolve their dispute through a less formal, non-adjudicatory process, such as mediation.

Example multi-tier dispute resolution clause:

> *"The parties shall resolve any dispute arising out of or related to the contract by good faith through negotiation between them.*
>
> *If the dispute has not been resolved through negotiation within [30] days, the parties shall try in good faith to resolve the dispute by mediation under the [Mediation Procedural Rules] before resorting to arbitration.*
>
> *If mediation is not successful either, the parties shall submit their dispute to binding arbitration in accordance with the [Arbitration Procedural Rules]. The place of arbitration shall be [_____] and the language of arbitration shall be [_____]."*

In practice, it has been noted in some cases that parties who included a multi- step ADR clause in their contracts did not try initially to reach an amicable settlement of the dispute through negotiation and mediation, but instead jumped to the last step and filed a request for arbitration. This has raised questions about whether the initial steps are mandatory and enforceable conditions to be performed before commencing arbitration and who has authority to decide on whether the pre-arbitration requirements have been met. The practice in various countries indicates that in cases

where there is a valid arbitration agreement, the issue of whether the pre-arbitration requirements are met is decided by the arbitrator or arbitrary tribunal in accordance with the principle of *kompetenz-kompetenze* (see Module 3).

1.10. Summary

In this module you have examined the role of arbitration in the dispute resolution landscape, by analyzing the advantages it offers as well as potential concerns that may arise if it is used as a mechanism to resolve disputes. Arbitration was compared to litigation as well as other types of ADR and the reasons why arbitration remains one of the preferable mechanisms for resolving conflicts arising from commercial contracts were emphasized.

In this module, you learned to:

- Explain the historical background of arbitration as a widely used method for resolving disputes
- Apply and understand approaches for resolving commercial disputes
- List the differences between arbitration and litigation
- Compare arbitration to other ADR methods
- Outline the perceived advantages and potential disadvantages of arbitration over litigation and other methods of dispute settlement
- Describe how arbitration can be tailored to suit specific circumstances and needs
- List the elements that need to be taken into account when choosing between institutional and ad-hoc arbitration

MODULE 2:
LAW ON ARBITRATION

2.1. Overview

This module explains the purpose and scope of Kosovo's Law on Arbitration. It reviews issues related to the applicability of this law to both domestic and international disputes and it also discusses the necessity for arbitration in Kosovo.

2.2. Learning Objectives

Upon completion of this module, you will be able to:

- Review the purpose of the law and understand the importance of establishing rules that govern arbitration
- Interpret the scope of application of the Kosovo Law on Arbitration
- Apply the rules related to the application of the Law on Arbitration to domestic disputes
- Apply the rules related to the application of the Law on Arbitration to international disputes
- Discuss the need for arbitration in Kosovo

2.3. Brief History on the Application of Arbitration in Kosovo

While arbitration might seem as a totally new concept to lawyers working under the current legal system in Kosovo, the application of this type of conflict resolution dates back to the early seventies. In Former Yugoslavia, arbitration and its procedure were important subjects taught in Faculties of law in all federal units, whereas arbitration institutions, although in a very small numbers, rendered decisions that even today are looked at as precedents by many arbitral tribunals around the world.

The aftermath of the war did not bring a lot of interest in the area of commercial law or commercial arbitration in Kosovo. Because of other immediate needs in the legal framework, these areas were left behind as something that could be developed only after some time. As a result, there were no attempts to establish an arbitral institution or to draft and implement laws that cover dispute resolution forms as an alternative to courts.

Despite these circumstances and the lack of institutional interest in arbitration, the business entities went ahead and along with establishing their Chamber of Commerce and other types of associations, they established a dispute resolution mechanism within the Kosovo Chamber of Commerce. This mechanism, known as the Court of Arbitration, was similar to mediation.

In 2007, the Assembly of Kosovo approved Law (No. 02/L-75) on Arbitration. The drafting of this piece of legislation was supported by a number of international experts, and after being discussed within parliamentary commissions, the Law was approved in the parliamentary session of 26 January 2007 and was promulgated by the UNMIK's SRSG on 15 June 2008. The Law accommodates institutional and ad hoc arbitration. Kosovo Chamber of Commerce and the American Chamber of Commerce in Kosovo offer institutional arbitration and mediation.

With support of the USAID Systems for Enforcing Agreements and Decisions in Kosovo Program (SEAD), two institutions, the Kosovo Chamber of Commerce (KCC) and the American Chamber of Commerce in Kosovo (AmCham), established ADR programs.

Permanent Arbitration Tribunal at the KCC (PAT) and the AmCham Alternative Dispute Resolution (ADR) Center adopted their own versions of the Kosovo Arbitration Rules. In this manual, the Kosovo Arbitration Rules are attached as Annex I. The Arbitration Rules of the KCC/PAT and AmCham ADR Center are available at www.kosovo-arbitration.com and www.adr-ks.org, respectively.

2.4. Scope of Application of the Law on Arbitration

The scope of application of the Law on Arbitration is defined in Article 1 of the Law as covering *"the rules that apply to arbitration agreements, arbitration proceedings and the recognition and enforcement of arbitral awards made inside and outside of Kosovo."* Thus, Article 1 simply clarifies that the Law contains rules that cover the three main topics in arbitration, namely, the rules for drafting a valid and enforceable arbitration agreement, rules for the commencement and course of arbitral proceedings up to the point when an award is rendered by the arbitral tribunal, and finally, the rules related to the enforcement and recognition of that award.

The rules that apply to **arbitration agreements** mainly set forth principles related to formal requirements of an arbitration agreement. Article 5 of the Law covers arbitrability and provides that only civil and economic disputes can be settled by arbitration and then only if the parties have concluded an agreement in writing and the agreement specifies that the parties accept the dispute to be settled by arbitration. Article 6 of the Law covers the writing requirement.

The rules that apply to **arbitration proceedings** start with a chapter dealing with the pre-hearing process, namely the composition and constitution of the arbitral tribunal, and it continues with rules related to the hearing which include issues of jurisdiction of the arbitral tribunal, presentation of the statements of claim and defense, witnesses and evidence and other related matters.

The rules that apply to the **recognition and enforcement of arbitral awards** explain the decision-making procedure for rendering an arbitral award, its form and effect, as well as requests to declare the award enforceable inside or outside of Kosovo. These rules also set forth the very limited instances in which a party can request a court to set aside an arbitral award.

Each of these three main topics will be examined in detail in subsequent modules of the course. As a preliminary first step, however, it is critical to determine when the Kosovo Law on Arbitration shall apply. As discussed in the following sections (2.5 and 2.6), the Law can be applied to both domestic and international disputes, depending on the elements contained in the arbitration clause drafted by the parties.

It should also be noted that in line with international standards and the fact that arbitration is based on the agreement of the parties, there are only a few mandatory provisions in the Law on Arbitration. The Law gives the parties and the arbitral tribunal the opportunity to shape the arbitration procedure to suit the dispute. If parties elect to follow a specific set of procedural rules (e.g. the UNCITRAL Model Rules, the ICC Rules or the Kosovo Arbitration Rules), those rules will replace any optional provisions or fill in any gaps in the Law. Further, any matters specifically covered in the parties' arbitration agreement take the place of provisions in the Rules. This

framework is referred to as the Hierarchy of Rules and is set forth in Article 1of the Kosovo Rules of Arbitration.

2.5. Application of the Law to Domestic Disputes

For purposes of this manual, the term "domestic disputes" refers to any controversy or claim arising out of a contractual relationship between two parties/companies operating inside Kosovo.

Generally, in domestic disputes, this law can apply in the following situations:

1. All cases where parties have chosen Kosovo's Law on Arbitration as the procedural arbitration law applicable to their dispute.
2. All cases where parties have chosen arbitration as a means for resolving any dispute or controversy arising among them and they have not designated a specific set of arbitration rules.
3. All cases where parties have chosen arbitration as a means for resolving any dispute or controversy arising among them and have designated the place of arbitration as Kosovo.
4. All cases where the parties have chosen a specific set of arbitration rules (other than Kosovo's Law on Arbitration) and Kosovo as the seat of arbitration, and there are:
    a. gaps within the rules chosen by the parties that need to be filled in by lex arbitri or lex fori, (which means the law of the seat where arbitration is taking place and in this case would be Kosovo's Law on Arbitration), or;
    b. conflicts between the provisions in the rules chosen by the parties and lex arbitri, and the Arbitral Tribunal needs to decide which rule shall prevail.

In situation 1, an arbitration clause that would lead to the application of Kosovo's Law on Arbitration would look like this:

> *"Any controversy or claim arising out of or relating to the present contract shall be finally determined in accordance with Kosovo's Law on Arbitration, by a panel of three arbitrators. The place of arbitration shall be Prishtina, Kosovo, and the language of arbitration shall be Albanian."*

As we can see, in this case, the parties have made a clear designation of the law that would apply in case of disagreements related to their contractual relationship, and the Arbitral Tribunal does not need to look at other laws or to conduct a conflict of laws analysis in order to determine what is the applicable procedural law to the arbitral proceedings.

In situation 2, we would have a case where both of the parties or companies operate in Kosovo, and they have simply chosen arbitration as the form for resolving disputes among them, without designating a specific set of arbitration rules. The text of the arbitration clause would look as the following:

> *"The parties hereby agree that any controversy or claim arising out of or in relation to their contract will finally be settled through arbitration."*

In the present case the parties have only chosen the form of dispute settlement, whereas there is no specific law on arbitration or a set of arbitration rules mentioned in the arbitration clause. Since the parties did not make an express choice of procedural law to govern their arbitration, it is up to the Arbitral Tribunal to decide which procedural law to apply for its proceedings. Given that this is a domestic dispute, i.e. both parties operate in Kosovo, the conclusion would be that the procedural law is Kosovo's Law on Arbitration.

In situation 3, which is very similar to the second example above, the parties would have simply chosen arbitration as a means for resolving their disputes, and the place or arbitration as Prishtina, Kosovo (or some other city within Kosovo where an arbitral Tribunal may be seated). The arbitration clause could look like this:

> *"Any controversy or claim arising out of or in relating to the contract between the buyer and the seller shall be finally settled through arbitration. The place of arbitration shall be Prishtina, Kosovo."*

This case is somewhat easier for the Arbitral Tribunal since the parties, by agreeing to Kosovo as the place of arbitration, have waived their right to contest the jurisdiction of a Tribunal constituted under the arbitration rules applicable in Kosovo. Since arbitration was chosen as a dispute resolving mechanism and the place of arbitration is Kosovo, the procedural law that will be applied by the tribunal will be Kosovo's Law on Arbitration.

In situation 4, there are two different ways in which Kosovo's Law on Arbitration could apply, at least partially.

Point "a" is where the Tribunal would apply this Law as a gap-filling instrument. This can happen where the parties have chosen a set of arbitration rules that would apply to their dispute, e.g. Swiss Arbitration Rules. If there are circumstances or elements that are not foreseen and settled by the Swiss Rules, the Arbitral Tribunal can fill in those gaps by applying Kosovo's Law on Arbitration.

Point "b" covers situations where the parties have chosen the arbitration rules applicable to their dispute, e.g. the German Arbitration Act. Article 1032 of this Act allows the parties, even in cases where they have agreed to arbitration, to submit claims before a court prior to the constitution of the Arbitral Tribunal. On the other hand, Kosovo's Law on Arbitration, in its Article 7, provides that a court shall reject any action brought before it, if it concerns a matter that is the subject of arbitration. In this situation, there is a conflict between a provision in the rules chosen by the parties and those contained in lex fori or lex arbitri, which in this case is Kosovo's Law on Arbitration. The arbitral tribunal will have to decide the provision of which law shall prevail.

There are many other circumstances where the law could apply, even when we are dealing with a case of an international character. These situations are presented in section 2.6 below.

2.6. Application of the Law to International Disputes

A case usually gains its international character where one or both of the parties to the dispute operate outside the country where the arbitration institute is seated. Since one of the perceived

advantages of arbitration is the neutrality it offers, it is very common for parties from different countries to choose the arbitration rules and an arbitration institution of a third neutral country. As the circumstances of a case may change because of its international character, some countries have separate laws (or separate provisions within the same law) for international and domestic arbitrations. Similarly some arbitration institutions have separate rules that cover international disputes. Another group of institutions at least have separate provisions or sections for international arbitration within the same law or rules.

However, many countries that have based their arbitration laws on the UNCITRAL Model Law on International Commercial Arbitration do not have separate provisions for international arbitration. Kosovo has followed this approach. There are no separate rules or provisions within the Kosovo Law on Arbitration that would apply to cases of an international character. More importantly, however, there is nothing in Kosovo's Law on Arbitration that would prohibit its application in cases of international disputes. It is therefore clear that even in cases of an international character, Kosovo's Law on Arbitration could apply in two situations, namely:

1. Where the parties have agreed on its application, or
2. Where the rules of private international law lead to its application

In situation 1, companies that are operating outside of Kosovo may decide to include an arbitration clause in the contract which designates Kosovo's Law on Arbitration as the applicable procedural law to their dispute. As stated above, it is very common in arbitration for parties to want the law or rules of a third neutral country to apply. They can, therefore, choose Kosovo's Law on Arbitration and an arbitral institution in Kosovo to settle their disputes. If there are any gaps within the Kosovo Law on Arbitration, then the arbitral tribunal would have to conduct a conflict of laws analysis to determine what law it should apply to fill in those gaps. In commercial contracts, and in particular in sales contracts, the prevailing rule is that any gap should be filled in with the Law of the country that is most closely connected to the contract. While the past the governing rule was that the law of the seller should apply, this is changing especially in light of the fact that in international contractual relationships there are times when the seller's country has no connection whatsoever with the contract and its performance.

In situation 2, the parties would not have agreed on the application of Kosovo's Law on Arbitration but international private law (conflict of laws) rules would lead to its application. Such a situation may arise in cases when one of the parties to the contract operates in Kosovo, and after a conflict of laws analysis, the tribunal decides that Kosovo's Law should apply. Another situation would be in cases where neither party operates in Kosovo, but the contract and its performance are somewhat related to Kosovo and the tribunal decides to apply Kosovo's Law based on the "most closely connected" principle. As far as gap-filling is concerned, there may be international cases where the parties have chosen the application of e.g. UNCITRAL rules, but the arbitration will take place in Kosovo. The application of Kosovo's Law on Arbitration is only allowed to the extent that it fills in any gap that might exist in the arbitration rules chosen by the parties.

2.7. Need for Arbitration in Kosovo

Despite initial hesitations that might have existed on the inclusion of arbitration in Kosovo's legal system, there is no dilemma that this type of mechanism for resolving disputes is not only necessary but even indispensable for a country that is striving to follow the steps of the contemporary legal systems of western democracies. There is also, however, no doubt that significant time and effort will be needed for Kosovo to reach the point when arbitration will be seen as one of the easiest and most suitable forms of resolving disputes. The business and legal community will need to be familiar with arbitration and its benefits and arbitrators will need to gain experience. Nevertheless, arbitration has a bright future in Kosovo, and its expansion - although it might be slow in earlier stages - will grow with the growth of business and trade interactions. This new and more effective way of resolving disputes is most certainly a worthwhile pursuit from both a social and economic point of view. There are specific reasons that make Kosovo a case with a strong need for using arbitration, some of which are outlined below.

- **Arbitration will lessen the burden on the courts**

One of the main difficulties that the judiciary in Kosovo is facing is the large number of cases before courts as opposed to the very small number of judges who could work on those cases. The presentation and enhancement of arbitration as an option other than litigation will limit the role of national courts and will pave the way towards a system where cases are resolved in time and in accordance with the principles of fairness and due process. In addition, this will provide the parties with an alternative, which (as discussed in Module 1) offers many advantages as opposed to litigation.

- **Arbitration will offer a possibility to resolve disputes in a fashion more acceptable to the business community**

With the establishment of the KCC's PAT and the AmCham's ADR Center, the business community in Kosovo has already shown its arbitration-friendly attitude. This action proves that companies are interested to keep their disputes out of court, and if possible, even resolve them in a timely fashion and with less cost. With these benefits being offered by arbitration, businesses will have the opportunity to choose it as a mechanism for resolving their disputes, which in turn, will also provide for more predictability as far as the outcome is concerned.

- **Arbitration will encourage international trade and investment**

With the inclusion of arbitration in its legal system, Kosovo will follow the footsteps of its neighboring countries as well as developed countries that it is looking at as examples. The continued growth and health of arbitration has encouraged most business around the world, including economic giants, to have arbitration clauses included in their standard contract forms. This term of the contract, which in many cases is non-negotiable, will play an important role when foreign

companies intend to conclude contracts with businesses in Kosovo or even invest in Kosovo. The fact that Kosovo will provide these companies with a legal framework and legal guarantees on the application of arbitration, and most importantly, the recognition and enforcement of arbitral awards, is by all means an important drive for all those thinking of doing business in Kosovo.

- **Arbitration will give the parties the freedom to determine how their disputes should be resolved**

The principle of "party autonomy" is one of the most important principles in contract law. Thus far, companies in Kosovo had no choice. Any dispute that arose between them had to go to the court, if they could not solve it amicably. With arbitration in place, parties will have the freedom to determine themselves what will be the form for resolving any eventual controversy. Moreover, arbitration is known as a process that tends to preserve the parties' relationship, if not always, then certainly more successfully than a court process.

2.8. Exercise

Discuss the general provisions of the Law on Arbitration and complete the two short hypothetical cases involving articles 1 and 2 of the Law.

Instructions: Read the following clauses and answer the questions below.

Clause XX

"Any dispute arising out of or in relation to this contractual relationship shall be finally resolved by arbitration. The arbitral panel shall be composed of a panel of three arbitrators who shall be appointed pursuant to Kosovo's Law on Arbitration."

Questions:

1. Considering Article 1 of Kosovo's Law on Arbitration, do you think that the prerequisites for the application of Kosovo's Law have been met?
2. Does the fact that the parties have only referred to Kosovo's Law for the appointment of arbitrators and not for the resolution of the entire dispute have any impact on your answer?
3. What would your answer be if both parties to the dispute are from Kosovo? What if they come from different countries outside of Kosovo?

Clause XX

"Any dispute arising out of or in relation to this contract shall be finally resolved through arbitration, by a panel of three arbitrators. The language of arbitration shall be English. The place of arbitration shall be determined by the parties if a dispute arises, taking into account the circumstances of the case and the place that is most closely connected to the contract and its performance."

Questions:

1. Assume that the parties had concluded a contract for the sale of 20,000 boxes of "Mars" chocolate. The seller comes from England and the buyer from Greece. However, at the time of the conclusion of the contract, the goods were produced and located in one of seller's branches in Kosovo and were going to be shipped to Greece directly from there. The seller from England presented a claim before an arbitral institution in England. The buyer does not accept the jurisdiction of that arbitral tribunal arguing that Kosovo is the country most closely connected to the contract, and the arbitration should take place there.

    a. What Law should apply in the present situation?
    b. Where should arbitration take place?
    c. What arguments would you present in favor of applying Kosovo's Law and having arbitration take place in Kosovo?
    d. What are the arguments against applying Kosovo's Law and considering it as a forum for arbitration?
    e. Can Kosovo's Law apply even though this is a contract that involves two parties that are not from Kosovo?

2.9. Summary

In this module you have examined and interpreted the purpose and scope of Kosovo's Law on Arbitration. The application of the law to domestic and international disputes was analyzed. The module also presented a short historical background of arbitration in Kosovo and discussed arbitration's prospective application in Kosovo.

In this module, you learned to:

- Review the purpose of the law and understand the importance of establishing rules that govern arbitration
- Interpret the scope of application of the Law on Arbitration
- Apply the rules related to the application of the Law on Arbitration to domestic disputes
- Apply the rules related to the application of the Law on Arbitration to international disputes
- Discuss the need for arbitration in Kosovo.

MODULE 3:
JURISDICTION OF COURTS

3.1. Overview

This module presents an analysis of the jurisdiction of courts in cases when arbitration has been chosen by the parties as the means for resolving their disputes. Issues related to parallel proceedings as well as specific cases where the courts may have full or limited powers will also be reviewed. Participants will apply legal principles used by the courts to decide whether they have competences when arbitration is involved.

3.2. Learning Objectives

Upon completion of this module, you will be able to:

- Assess the balance between the right to sue and the duty to arbitrate
- Judge whether a court has jurisdiction to hear a claim when the parties choose arbitration as the mechanism for settling their disputes
- Review the competence of courts to issue preliminary orders
- List and discuss the solutions in cases when there are parallel proceedings (before both, courts and arbitral tribunals)
- Review the competence of courts to rule on the validity and/or existence of an arbitration agreement
- Analyze and judge the competence of courts to review an arbitral tribunal's decision on its own jurisdiction
- Analyze and judge the competence of courts to review arbitral awards

3.3. Setting a Balance between the Right to Sue and the Duty to Arbitrate

The possibility to go to court is considered to be a fundamental right and there are only a limited number of circumstances when this right can be waived or limited. One of these situations is when parties, in writing sign away their right to sue by choosing mandatory arbitration to resolve any dispute that may arise out of a specific contractual relationship. In the past, the courts in many countries did not have a friendly attitude towards arbitration clauses and they accepted claims before them despite the existence of these clauses. This situation is changing and courts throughout the world today are much more supportive of arbitration.

When drafting an arbitration clause or during the early stages of dispute, parties should take into consideration that: by choosing arbitration they waive their right to go to court
This is the position taken by the courts of most countries, although there are certain specific circumstances under which courts might find that they still have jurisdiction, which will be elaborated in the following sections of this module.

It is generally recognized that, in order to be fully effective, arbitration must be free of judicial interference. But it is also well-established in arbitration practice that the prerequisite for excluding

the jurisdiction of courts is to have an express and clear agreement between the parties to arbitrate their disputes. Without this "agreement" or "consent", no arbitration can take place.

Thus, courts are sometimes given the competence to resolve these threshold questions on the **existence or validity of this agreement** (although in the past few years, the view that this duty belongs to an arbitral tribunal is prevailing). Another situation where the courts are allowed to intervene is related to their competence in issuing **preliminary orders.** In addition, a number of decisions have held that courts also have the right to review an **arbitral tribunal's decision on its own jurisdiction**. And finally, the competence of courts for **judicial review**, i.e. the right to review the arbitral award rendered by an arbitral tribunal, is recognized by all arbitration rules and laws.

Kosovo's Law on Arbitration contains a number of provisions that cover issues related to a courts' jurisdiction in cases when parties have agreed to arbitrate their disputes. As laws of most other countries, Kosovo's Law gives precedence to arbitration over courts, whenever the parties have agreed to it. Articles 3 and 7 of this Law provide that a court is prohibited from intervening in arbitral proceedings and it should reject any claim before it if the parties have agreed to present the same subject matter to arbitration. It is, therefore, important for courts to know how to deal with cases before it if one of the parties contests arbitration whereas the other wants to compel it. Further explanations on situations that may arise in these cases are provided in the following sections of this module.

3.4. Limits to the Jurisdiction of Courts When the Parties Choose Arbitration as the Mechanism for Settling Their Disputes

Article 3 of Kosovo's Law on Arbitration provides that "*no court in Kosovo may intervene in arbitration proceedings, unless otherwise provided for in this Law.*" This provision limits the jurisdiction of courts once arbitral proceedings have started and prohibits the parties from presenting any claim once the proceedings before an arbitral tribunal have commenced. If a party brings an action before a court based on a contract that contains an arbitration clause, the court should reject the action as inadmissible, as provided for in article 7 of the Law. Nevertheless, according to the Law, this limitation does not apply in a number of situations, which are outlined below and elaborated in more detail in sections 3.5 – 3.10:

- The Court may issue preliminary orders upon the request of either party if it is proved that irreparable injury, loss or damage will result to the party if no preliminary order is granted
- The Court may, at the request of a party, order the enforcement of a preliminary order issued by the arbitral tribunal
- The Court may, upon the request of either party, review arbitral tribunal's decision on its own jurisdiction
- The Court may give assistance upon the request of an arbitral tribunal for the purpose of collecting evidence or performing other judicial acts which the arbitral tribunal is not authorized to carry out
- The Court may, in certain circumstances, make an evaluation as to whether an arbitration agreement is null and void, or that the disputed subject matter is not covered by the arbitration agreement
- The Court may, upon the request of a party, review an award rendered by an arbitral tribunal.

It is important to emphasize that the limitation on a courts' jurisdiction when arbitration is chosen by the parties is taken very seriously by courts of most states that are parties to the New York Convention. *As an example, most European countries have taken the view that an arbitration clause is an explicit exclusion of the jurisdiction of courts.*

In particular, Switzerland, which is known as one of the countries that favors arbitration, has taken the view that no intervention whatsoever is allowed by the courts, once arbitral proceedings have started. Germany is the only European country which, in its law of arbitration, allows a party to present a claim before a national court prior to the constitution of the arbitral tribunal. The reasoning behind the inclusion of this provision has been given in the commentary to the German Law as something that was necessary for matters of public policy and due process.

Like other states that are parties to the New York Convention, during the past few decades, courts in the United States have been rejecting matters that are referred to arbitration and are compelling parties to go to arbitration each time a valid arbitration agreement has been concluded among them.

As far as Asian countries are concerned, in its efforts to become an international arbitration center and an arbitration-friendly forum, Japan has been striving to limit the powers of courts and went so far as to change its Law on Arbitration in order to favor arbitration whenever issues of jurisdiction are involved.

As we can see, despite some exceptions provided for in the laws of some countries, such as Germany, courts are usually not allowed to intervene and are obliged to refer parties to arbitration whenever a valid arbitration agreement exists. Therefore, in order for arbitration to develop and expand in Kosovo, it is essential that the courts understand their role correctly and refrain from scrutinizing cases where parties actually intended to arbitrate their disputes.

3.5. Competence of Courts to Enforce Preliminary Orders Issued by an Arbitral Tribunal and to Issue Preliminary Orders

A party to an arbitration process may request an arbitral tribunal to issue a preliminary order against the other party. This may be, for example, an order towards one party not to divulge information that is deliberated during arbitral proceedings, on the basis of the principle of confidentially; or a preliminary injunction ordering one party to pay security for costs, if there is grounded evidence that this party has or may become bankrupt; or a preliminary decision on the existence of an arbitration clause. Usually, an arbitral tribunal is allowed to issue preliminary orders on any issue it deems necessary.

Article 8 of the Kosovo's Law on Arbitration allows a court to issue an interim measure upon the request of a party. This usually happens in cases when one of the parties does not accept the jurisdiction of the arbitral tribunal and send a claim before the court to issue a preliminary order. Such a situation may arise when a party believes there was no arbitration agreement at all, and requests the court to issue an interim measure to suspend the arbitral proceedings.

An interim measure can be issued for many reasons, on condition that the party requesting it proves that in the absence of such a measure this party will suffer irreparable losses and damages. Such a situation may arise when a party believes there was no arbitration agreement at all, and requests the court to issue an interim measure for arbitral proceedings to continue.

A preliminary order issued by a court may cover many other areas, as long as a party gives credible evidence that immediate or irreparable damage or loss will result to it if no preliminary order is granted. Article 8 confirms that irrespective of the existence of an arbitration agreement or the commencement of arbitration proceedings, a court of competent jurisdiction may issue preliminary orders if this is requested. Article 8 confirms that irrespective of the existence of an arbitration agreement or the commencement of arbitration proceedings, a court of competent jurisdiction may issue an interim measure if this is requested.

Additionally, Article 15(1) of the Arbitration Law provides that an arbitral tribunal may issue interim measures if requested by a party, if that party has provided evidence that in the absence of that order it will suffer irreparable damages. Article 15(2) provides that either party may request a competent court to enforce such order. If, however, the preliminary order issued by the tribunal proves to be unjustified, then the party in whose favor the order was issued is obliged to pay the damages incurred to the other party as a result of the enforcement of the order (Article 15(3)).

Although the Law offers little guidance or limitation as to areas in which interim measures are allowed, more detailed provisions for interim measures issued by the arbitral tribunal are provided under the section on Interim Measures in the Kosovo Arbitration Rules, Article 27.

3.6. Competence of Courts to Review an Arbitral Tribunal's Decision on its Own Jurisdiction

An arbitral tribunal has the competence to decide on its own jurisdiction. This power, also known as the "competence-competence" principle (originally: *kompetenz-kompetenz*) is recognized by all arbitration laws or rules throughout the world, and it gives the tribunal the right to decide by itself whether it can hear the case, whenever one of the parties raises an objection as to the jurisdiction. The procedure for challenging the jurisdiction of an arbitral tribunal is outlined under Chapter IV of the Law on Arbitration and will be discussed in more detail in module 7 of this course.

For purposes of this module, we will assume that after an unsuccessful challenge to its jurisdiction, the arbitral tribunal decides that it does have jurisdiction to continue hearing the merits of the case. Such a decision may be reviewed by a competent court, at the request of a party. Article 14.5 of Kosovo's Law on Arbitration allows the parties to resort to the courts in such cases by providing that "*any party may request the Court to review the decision of the arbitral tribunal that it has or has not jurisdiction over the dispute.*" This request, however, does not prohibit the arbitral tribunal from continuing with arbitral proceedings and from rendering an award.

In case the arbitral tribunal decides to continue with its proceedings despite the fact that a court is reviewing its decision on jurisdiction, there will be parallel proceedings taking place at the same time. Since parallel proceedings always mean double costs and less time-efficiency, some arbitral tribunals decide to stay their proceedings until the court has reviewed the tribunal's decision on

jurisdiction. This decision is always up to the arbitral tribunal, since the law gives it this discretion, however issues of cost and time-efficiency need to be addressed by an arbitral tribunal whenever it decides whether to continue or not with its proceedings.

3.7. Competence of Courts to Assist in Evidentiary Matters

Court assistance in evidentiary matters is provided for in Article 28 of Kosovo's Law on Arbitration. According to this article, *the tribunal may request a competent court for assistance in collecting the necessary evidence for the case or assistance for the purpose of performing judicial acts which the arbitral tribunal is not authorized to perform.* This request may also be made by either party, however, they will need to have the prior approval from the arbitral tribunal in order to present this request before a competent court.

Issues of evidence are quite complicated, and arbitral tribunals, as compared to the courts, sometimes do not have all the necessary mechanisms to collect evidence. Even though the informalities provided by arbitration are one of its perceived advantages, the procedural rules of the courts sometime seem to give the parties the comfort they need. In this regard, there are a number of judicial acts that an arbitral tribunal cannot perform, and therefore, it can ask for a court's assistance. Such may be the case when an arbitral tribunal has issued an order against a party ordering it to pay security for arbitration costs because there is sufficient evidence that shows this party will be bankrupt soon. In that case, since the arbitral tribunal cannot enforce this decision and compel the payment of security for costs, it must ask a court's assistance. This request for assistance and cooperation between an arbitral tribunal and a court is not deemed to be an interference or intervention of courts in arbitral proceedings.

3.8. Competence of Courts to Rule on the Validity and/or Existence of an Arbitration Agreement

The existence and validity of an arbitration agreement are issues that have caused quite a lot of debate, with considerable focus on who shall be the authority deciding on these issues: the arbitrators or the court. As stated in section 3.6, the arbitrators may decide on their own competence, but on the other hand, the decision of the arbitrators on this issue may be reviewed by the courts. Dilemmas persist as to whether a court can rule on cases before it when the issue is the existence and the validity of an arbitration agreement. Since the cornerstone of arbitration is "consent", some may argue that if the existence of this "consent" or "agreement" is the issue involved, it should not be up to an arbitral tribunal to decide on it but this issue should rather be resolved by a court. On the other hand, there are also many arguments in favor of leaving this job to the arbitral tribunals, especially since one of key reasons why parties choose arbitration is to keep their disputes away from courts.

The New York Convention, the UNCITRAL Model Law and most modern arbitration rules provide for a mechanism for compelling arbitration where a valid arbitration agreement has been concluded. A key provision of the New York Convention and the UNICTRAL Model Law states that a court shall refer the parties to arbitration unless it finds that the arbitration clause is null and void, inoperative or incapable of being performed. Although the New York Convention is silent on the

matter as to who should decide whether an arbitration agreement is in fact valid or existent, the UNCITRAL Model Law sets out the principle that an arbitral tribunal may decide on its own jurisdiction. Most legal systems are favoring the view that the arbitral tribunal should decide these cases even when issues of validity or existence are involved. However there are two particular systems that have had different approaches on this dilemma. One is American, and the other is the French system.

3.8.1. U.S. System

The U.S. legal system has reached a compromise on this issue which focuses on whether a party attacks the whole contract as invalid, or only the arbitration clause. If the challenging party alleges that the whole contract is invalid, and that the arbitration clause is therefore derivatively invalid, the U.S. courts will send this question back to the arbitrators. However, if the party alleges that the invalidity or defect is specific to the arbitration agreement (for example if the arbitration clause was included in the contract through fraudulent misrepresentation), then the court would retain the competence to decide the matter. In addition, if a party alleges that the contract never came into existence, as opposed to just alleging subsequent invalidity, the U.S. courts have taken the view that the courts should decide such "existence" questions themselves, before referring the parties to arbitration.

3.8.2. French System

The French legal system takes a deferential attitude towards arbitration and is based on two main considerations. First, if an arbitral tribunal has already started proceedings on a subject matter, then the courts will refuse any jurisdiction and refer all matters to arbitration, including issues of validity and existence of the arbitration clause. Second, if an arbitral tribunal has not been constituted yet and it has not started the proceedings, the court undertakes a limited scrutiny of the validity and existence of the arbitration clause. If the court finds that the arbitration clause is null and void, it will retain jurisdiction. And if, to the contrary, it finds that the answer to validity and existence questions is not manifestly negative, it will compel the parties to arbitration.

3.8.3. Kosovo's Law on Arbitration

The Law on Arbitration takes a position which is a mixture of both, the American and the French legal system. Article 7 of Kosovo's Law on Arbitration provides that *"a court before which an action is brought concerning a matter that is the subject of an arbitration shall reject the action as inadmissible if the defendant in his statement of defense invokes the arbitration agreement, unless the court finds that the arbitration agreement is null and void or that the disputed subject matter is not covered by the arbitration agreement.*" Article 14.1, on the other hand, provides that it is up to the arbitral tribunal to "*determine whether it has jurisdiction over the dispute presented to it and whether the arbitration agreement is valid.*" It is clear from these two provisions that issues pertaining to existence (whether an agreement is null and void) is under a court's jurisdiction (Article 7), whereas issues pertaining to the validity of an arbitration clause shall be decided by the arbitral tribunal itself (Article 14).

Issues related to validity and the existence of an arbitration agreement, are also important because parallel proceedings may take place before both an arbitral tribunal and a court. This situation may

arise if one party commences proceedings before an arbitral tribunal based on an arbitration clause contained in the contract, whereas the other party brings an action before a court and asks for a stay of arbitral proceedings. The question is now which institution should stay its proceedings allowing the other to continue. This is a very complicated situation that no jurisdiction has been able to give a clear answer to, yet. Nevertheless, a court deciding such issues under Kosovo's Law on Arbitration shall always first decide whether the issue in front of it is one of "validity" or "existence" of an arbitration clause.
After this determination, the Law is quite clear and asks a court to reject any action as inadmissible if there is a valid arbitration agreement. However, if the court finds that the agreement is null and void, it is under no obligation to refer the case to arbitration.

Because arbitration has now established itself as a viable and trustworthy method of dispute settlement, it is understandable that the number of cases that favor the retention of the jurisdiction of courts on issues of validity and existence of an arbitration agreement is decreasing. Yet, since the differences between litigation and arbitration remain significant, it is important for a competent authority to know what elements it should take into account when deciding this threshold issue of whether a case should remain before it. Again, the "consent" of the parties to arbitration is the key issue for all of these decisions. It is important to facilitate arbitration when the parties really want it and there was a clear and express agreement on arbitration; and to disallow arbitration whenever both or one of the parties never wanted it in the first place or when the express intention of the parties did not reach a concurrence. Both the arbitral tribunals and courts should therefore have the element of "consent" as a starting point. This does not mean that they will not be faced with a number of other issues related to the validity and existence of an arbitration agreement. These issues will be elaborated in more detail in module 5 of this course.

3.9. Competence of Courts to Review Arbitral Awards

Compared to the situations referred in the previous sections of this Module, where the competence of courts is quite vague and there are different systems for resolving issues of jurisdiction, **one clear and undeniable competence of the courts is the power of judicial review of arbitral awards**. Upon rendering of an arbitral award, each party may seek judicial review of that award. This recourse is only allowed under certain circumstances that are very much linked to the issue of recognition and enforcement of arbitral awards, because as it has been already established, arbitral awards are generally not appealable.

Judicial review of an award can be requested before a competent court which may be:

- the court in Claimant's country
- the court in Respondent's country
- the court at the place of arbitration

Usually, judicial review is requested before the courts of the country of Claimant or Respondent whenever the recognition and enforcement of an arbitration award is requested in one of those countries. In such a case, the party in whose favor the award was rendered may ask for enforcement

in a specific court (e.g. the court of the other party's country), but the other party may seek a judicial review of the award and reject enforcement before the same court.

The judicial review at the place of arbitration is in fact most common and many legal systems have adopted the approach according to which the court of the forum (where arbitration takes place) shall have the power of judicial review of an award rendered by an arbitral tribunal seated in the same country.

As stated above, the judicial review is very much connected to issues of enforcement and recognition of arbitral awards. Usually, no judicial review is granted if there are no grounds for challenging the recognition and enforcement of an arbitral award. These grounds for enforcement will be further discussed under module 10 of this course.

3.10. Exercise: Arbitration vs. Litigation

Claimant ABC and Respondent XYZ met at a business fair of construction companies in July 2007. Claimant was interested to hire a construction & design company in order to prepare the design and carry out the construction work for a five-floor shopping center. For that reason it asked Respondent and a few other companies to send their offers. Respondent sent its offer on 1 August 2007 and Claimant informed it that it would send its acceptance within one week. On 7 August 2007, Claimant prepared its acceptance letter and mailed it to Respondent early in the morning. However, Respondent claims that it had revoked its offer before Claimant dispatched its acceptance, and has offered a copy of a sent e-mail on August 6 as proof. Apparently, because of a server breakdown in Claimant's business place, it could not read the e-mail until the afternoon of 7 August. Respondent claims that since there was never a contract (as it revoked its offer), it does not have to carry out the design and construction work for Claimant. Claimant, on the other hand, has initiated arbitral proceedings against Respondent for breach of contract.
The offer that was sent by Respondent included an arbitration clause, which stipulated the following:

> *"Any dispute, controversy or claim arising out of or relating to this contract, including the interpretation, breach or termination thereof, will be referred to and finally determined by arbitration in accordance with the Kosovo's Law on Arbitration. The tribunal will consist of three arbitrators. The place of arbitration will be Prishtina, Kosovo. The language to be used in the arbitral proceedings will be Albanian."*

Instructions:

Participants will be divided into two groups. Group 1 will present arguments in favor of having the case decided by the court, whereas the Group 2 will present arguments in favor of having the case decided by the arbitral tribunal.

Questions:

1. Assuming that the issue that needs to be resolved deals with the validity of the arbitration agreement, does the arbitral tribunal have jurisdiction to decide on its own competence? What about the competence to decide on the validity of the arbitration agreement?

2. Would your answer change if we assume that the issue that needs to be resolved has to do with the "existence" of the arbitration agreement?

3.11. Summary

This module has provided the participants with an in-depth analysis of issues related to the limited competences of courts when parties have opted for arbitration. It examined the specific situations under which a court may intervene during the course of arbitration and it presented principles and rules under which such situations may be resolved.

In this module, you learned to:

- Assess the balance between the right to sue and the duty to arbitrate
- Judge whether a court has jurisdiction to hear a claim when the parties choose arbitration as the mechanism for settling their disputes
- Review the competence of courts to issue preliminary orders
- List and discuss the solutions in cases when there are parallel proceedings (before both, courts and arbitral tribunals)
- Review the competence of courts to rule on the validity and/or existence of an arbitration agreement
- Analyze and judge the competence of courts to review an arbitral tribunal's decision on its own jurisdiction
- Analyze and judge the competence of courts to review arbitral awards

MODULE 4:
ARBITRATION AGREEMENT

4.1. Overview

This module presents the rules and principles that need to be taken into account when parties draft arbitration agreements. It analyzes issues to consider during the drafting process, such as: the applicable law, place and language of arbitration, confidentiality, and evidence, and shows the effect of the inclusion or non-inclusion of these elements in the arbitration clause and/or agreement.

4.2. Learning Objectives

Upon completion of this module, you will be able to:

- Summarize the importance of including "choice of law" and "choice of forum" clauses in the contract
- List issues that need to be taken into account while drafting an arbitration clause
- Analyze the importance of designating the place of arbitration (forum) and the language of arbitration in the clause
- Discuss the need to designate the arbitral institution and the applicable arbitration rules in the event of a dispute;
- Explain the importance of the issue of confidentiality in the arbitration agreement
- Draft arbitration agreements and/or clauses based on elements presented in this module

4.3. "Choice of Law" and "Choice of Forum" Clauses in the Contract

Modern contracts contain numerous clauses which specify all sorts of conditions and define many essential terms based on which a contractual relationship is built. In the past few decades, the importance of two clauses has arisen, especially in relation to international contracts. These are the "choice of law clauses (COL)" and "choice of forum clauses (COF)". The inclusion of these two clauses in a contract is particularly important if the parties choose arbitration as a dispute settlement form in order for the arbitral tribunal to have a clear understanding of what substantive and procedural laws apply to the dispute.

4.3.1. Choice of Law Clauses

"Choice of law clauses" are those in which the parties to the contract specify what law will apply to the substance of any dispute arising out of that contractual relationship. The law that is designated in these clauses is usually the substantive law of the country of one of the parties, the law of a third country, or an international convention. If all the parties are geographically located in the same country, it is obvious that the applicable law to substantive matters is the law of that country, even if the contract does not contain a choice of law clause. The applicable law to procedural matters in this case is the law of the local forum.

The situation becomes more complicated in cases of international contracts, where the parties come from countries with different laws or completely different legal systems and the application of one or

the other law may affect the outcome significantly. In these cases, it is highly important that the parties include a choice of law clause in the contract in order to avoid any complications or confusion and end up with the application of a law they do not want to apply or with which they are not familiar. A choice of law clause could avoid these problems and the parties are free to choose basically whichever law they want to apply to the substance of their dispute.

The parties can even choose the law of a third country that has no connection whatsoever to the contract, unless it is proved that the parties simply made this choice

1. in order to avoid the application of a mandatory provision of their relevant legal system, or
2. the clause was included in the contract by means of fraud or duress, or
3. the choice was made as a result of some other bad faith element.

In that instance, the deciding authority does not have to honor the choice of law clause and will choose the most appropriate law to apply to the contract by using the "most closely connected" principle, according to which the law of the country which is most closely connected to the contract and its performance should apply.

Examples of Choice of Law Clauses

Example 1

> *"Any dispute arising out of or in connection to this contract shall be finally be settled in accordance with Kosovo's Law on Obligations"*

Example 2

> *"The Law governing any dispute arising between the parties to the present contract shall be the United Nations Convention on Contracts for the International Sale of Goods"*

Example 3

> *"The applicable law to the substantive matters of any dispute arising between the parties shall be the domestic law of Germany, whereas procedural matters shall be governed by the law of the forum."*

4.3.2. Choice of Forum Clauses

"A choice of forum" clause is one in which the parties agree on the forum or authority that will decide or resolve any dispute that may arise between them. This clause allows the parties to designate a particular court or a specific kind of dispute resolution, such as arbitration. Usually, parties will insist on having disputes resolved before their own domestic forum, as this is more convenient for them. A domestic forum is usually more sympathetic to the claims of its own citizens or companies rather than those of others. In addition, a party bringing an action before its own forum would not have to travel abroad, hire foreign lawyers, and present its claim before a forum that it is not familiar with. Because both parties usually insist on having their own forum in the "choice of forum clause", a compromise is often necessary. It has therefore become very common

in international contractual relationships to have the forum of a third neutral country designated in the contract.

There are generally three types of "choice of forum clauses" that are frequently used in commercial contracts:

1. The first type is a clause where the parties refer to litigation, i.e. the court of a specific country and of a specific instance (e.g. the Commercial Court of Prishtina, Kosovo or the Municipal Court of Zurich, Switzerland). Such a clause would look like this:

   "Any dispute, controversy, or claim arising out of the present contract shall be finally resolved by the Commercial Court of Kosovo in accordance with its rules of procedure."

2. The second type is a clause where the parties refer to arbitration as a dispute settlement form, and they designate a specific arbitration institution before which the case will be heard and specific arbitration rules that will apply. The clause would be similar to the one below:

   "Any dispute, controversy or claim arising out of the present contract shall be finally resolved by arbitration before the German Arbitration Association in accordance with its arbitration rules."

3. The third type is a multi-step dispute resolution clause which refers to negotiations as the initial process and then to mediation, arbitration or litigation as the final resort. The clause could look like this:

   "Any dispute arising out of this contractual relationship shall be resolved by means of good faith negotiations between the parties. If the dispute has not been resolved by negotiations within 30 days, the parties shall refer their dispute to a panel of three arbitrators at the Swiss Arbitration Center."

The three types of clauses above are just some of the models that the parties could use in their contracts. Because alternative dispute resolution types, especially arbitration, can be suited to the specific circumstances of each case and tailored to the parties' needs, it is up to the drafters of the contracts to decide what to put in a forum selection clause. The choice of forum clause, however, must be crystal clear and recognizable so that there is no room for different interpretations and no possibility for a party to end up before an inappropriate and undesired forum.

To provide for institutional arbitration in Kosovo (either as a single step or multi-step dispute resolution mechanism), the contract should include one of the model clauses of either the Permanent Arbitration Tribunal at the Kosovo Chamber of Commerce (www.kosovo-arbitration.com) or the Alternative Dispute Resolution Center at the American Chamber of Commerce in Kosovo(www.adr-ks.org).

4.3.3 Arbitration in a Choice of Forum Clause

As established in the previous modules, arbitration may only take place if the parties have expressly agreed on it. Without specifying arbitration as the chosen forum for resolving disputes, this process cannot take place. Parties can agree to submit future disputes to arbitration or they can agree to arbitration after a dispute arises. The first option is preferable because it is normally easier to agree

on a method of dispute resolution while the parties are in good relations—it is harder to get such agreement after a dispute arises.

Parties can agree on arbitration in one of the following ways:

- **By including an arbitration clause in their contract**. The most common way of designating arbitration as a form for resolving disputes between the parties is by simply referring to it in the choice of forum clause. This clause would usually also designate the arbitration institution before which the process will take place as well as the procedural rules applicable to the hearings. Some clauses are more detailed, determining the way that the arbitrators are selected and setting the degree of confidentiality that will apply to that specific matter.

- **By signing an arbitration agreement separate from the main contract**. This agreement is usually much more detailed than a simple arbitration clause and it refers to the subject matter (or the contractual relationships) that it covers. Arbitration agreements separate from the main contract are favored by companies that regularly use arbitration as a dispute settlement form and want to tailor it to their specific needs. For this reason, they draft much more detailed agreements as opposed to just including a short arbitration clause in the contract.

- **By signing a submission agreement after a dispute arises.** The parties may agree on an arbitration clause after a dispute has arisen because they might have common interests in choosing a dispute resolution mechanism which is more time and cost efficient and confidential as well as less adversarial. This could be in a short form, similar to an arbitration clause, or more detailed like a separate arbitration agreement.

The term "arbitration agreement" is used to refer to all of the abovementioned forms. It is extremely important for the parties to decide on the extent of detail that they wish to include in this clause or agreement. Some drafting considerations are presented below.

4.4. Essence of an Arbitration Agreement

An arbitration clause or agreement must clearly state the following: 1) that the parties agree to submit disputes to arbitration; 2) which disputes are covered and 3) that the decision is final and binding.

- ***Adoption of Arbitration as the Method to Resolve Disputes.*** The most important reference in the clause/agreement is that of arbitration. Without a clear designation of this dispute settlement mechanism, no arbitration can take place. Sometimes parties simply refer to an institution that administers arbitration proceedings. However, such institutions may administer other types of proceedings, such as mediation, conciliation, expert determination, etc, (e.g. the ICC) and the simple inclusion of the name of that institution does not mean that the parties have resorted to arbitration. Further the clause should make clear that arbitration is mandatory by using language such as "shall submit to arbitration".

- ***Scope of Arbitration*** The clause should emphasize whether it only covers disputes arising out of the contract or also disputes related to the contract. The language has to be very clear,

because different courts have taken different positions on interpreting ambiguous language that refers to the scope of arbitration. See e.g. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967); *Ethiopian Oilseeds & Pulses Export Corp. v. Rio Del Mar Foods, Inc.*, [1990] 1 Q.B. 86, 97; *Ashville Investments, Ltd. v. Elmer Contractors, Ltd.*, [1989] Q.B. 488, 508).)

- ***Final and Binding.*** Although most arbitration laws and rules provide that the arbitral award is final and binding, that should also be confirmed in the arbitration clause to avoid the possibility to appeal or use other forms of dispute settlement afterwards. U.S. courts, for example, interpret the "final and binding" words as meaning that the issues resolved by an arbitral tribunal may not be tried again in any court. (*M&C Corp. v. Erwin Behr, GmbH & Co.*, 87 F.3d 844 (6 Cir. 2005); Iran Aircraft Industries v. Avco Corp., 980 F.2d 141, 145 (2d Cir. 1992).) The Kosovo Arbitration Law (Art. 31.1) and the Kosovo Arbitration Rules (Art. 35.2) provide that an arbitral award is always final and binding. (*See also*, ICC Rules art. 28(6); LCIA Rules art. 26.9, ICDR Arbitration Rules art. 27(1)).

4.5. Issues to be Taken into Account While Drafting an Arbitration Clause

The drafting of the arbitration clause is one of the most important phases of the arbitration process since the details of a carefully drafted arbitration agreement may significantly affect the outcome of the arbitral proceedings. Issues such as the place of arbitration, language of arbitration, level of confidentiality, and evidentiary issues are of utmost importance to the parties and each may have their own preference on these matters. Even though many companies have sample arbitration agreements that they use for all their contracts, and other companies use model clauses provided to them by arbitration institutions, it is extremely important to take certain factors into consideration each time an arbitration clause is drafted. These factors include, but are not limited to, the ones presented in the following sections of this module.

4.5.1. General Considerations

The following are some general considerations that each company needs to take into account before drafting the arbitration clause:

- ***Institutional or ad-hoc arbitration*** (decide whether you would like to follow the institutional or ad-hoc arbitration process by reviewing the advantages and disadvantages that each solution may offer, including case management, selection of arbitrators and costs)

- ***Institutional Arbitration Rules*** (review the arbitration rules provided by the institutions that might interest you because they might provide different rules and solutions on important matters for your company, e.g. confidentiality, evidence)

- ***Institutional Model Clauses*** (review model clauses provided by arbitration institutions and consider including optional provisions unless you want to draft the arbitration clause from scratch; as a general rule a simpler clause that will avoid internal inconsistencies or difficulties in drafting is better)

- ***Ad-hoc arbitration rules*** (if ad hoc arbitration has been chosen, be sure to draft the arbitration rules that will apply to your case, or refer to some model arbitration rules that you deem most appropriate for your case, such as the UNCITRAL Model Rules)

- ***Derogation from Rules*** (after reviewing and choosing the institutional rules, decide whether there is any specific provision or part of those rules that you would like to derogate from, so that they do not apply to your case)

- ***Arbitration costs*** (One of the most important factors that make a party choose or not choose a specific arbitration institution or arbitrator is the arbitrators' fees and other costs associated with organizing arbitral proceedings).

- ***On-Line Arbitration*** (review the possibility of having online arbitration, especially if the case is of an international character; several institutions offer on-line arbitration).

4.5.2. Key Elements

After considering the general factors mentioned above, the parties must agree on the following essential elements in the arbitration clause:

- ***Number of Arbitrators.*** The parties should agree whether they want their dispute to be decided by a single arbitrator or a panel composed of three or more arbitrators. Most arbitration rules provide for the number of arbitrators if the parties do not specify the number.(See e.g. UNCITRAL Arbitration Rules, art. 5; German Institution of Arbitration rules, section 3; WIPO Arbitration Rules, art.14). However, it is generally desirable that the parties express their preference. Kosovo's Law on Arbitration sets forth the rules on the number of arbitrators in article 9(1) and (2) and provides that disputes may be heard by either a single arbitrator or a panel with an odd number of arbitrators. It also leaves this decision in the discretion of the parties. Article 5 of the Kosovo Arbitration Rules follows this approach, but further provides that the institution will determine whether there should be one or three arbitrators, taking into account all relevant circumstances.

- ***Place of arbitration.*** The forum where arbitration will take place is an element of utmost importance and must be included in the arbitration clause. If the parties have simply designated the arbitration institution, different arbitration rules provide for different solutions. The Kosovo Arbitration Rules (Article 18) provide that in the absence of the parties' agreement on the place of arbitration, or if the designation of place of arbitration is unclear or incomplete, the place of arbitration will be determined by the arbitration institution based on the circumstances of the case.***(*** *See also* ICDR ***Ar***bitration Rules art. 13 (administrator may initially determine the place of arbitration, subject to the final determination by the tribunal); UNCITRAL Rules art. 18 (arbitrator tribunal determines); ICC Rules art. 14 (ICC International Court of Arbitration shall fix the place of arbitration if not agreed by the parties); LCIA Rules art. 16.1 (seat shall be London unless and until the LCIA Court determines that another seat is more appropriate).

- ***Language of arbitration*** It is important to set the language of arbitration, especially in international contracts where the parties do not come from the same countries. If the parties have not agreed on this matter, most international arbitration rules leave this to the discretion of the arbitrators, who usually take into account the language of the contract and the language of

the forum where arbitration is taking place (See e.g. UNCITRAL Rules art. 17; ICDR Rules art. 14; ICC Rules art. 16; LCIA Rules art. 17.1.). The Kosovo Arbitration Rules (Article 19) take the same approach.

- ***Arbitration Institution and Rules*** Should the parties resort to institutional arbitration, they need to unequivocally designate the name of the institution and the arbitration rules according to which the proceedings will be organized, otherwise, they risk jurisdictional challenges. Most arbitration rules provide that they can only apply if the parties agree to their application (e.g. Kosovo Arbitration Rules, art. 1; UNCITRAL Arbitration Rules, art.1; WIPO Arbitration Rules, art.1; DIS Arbitration Rules, art.1, SIAC Arbitration Rules, art.1).

The Model Arbitration Clauses of the KCC/PAT and AmCham ADR Center cover all the key variables described above.

4.5.3. Other Helpful Elements

In addition to the most important elements listed above, certain helpful elements may be included in the arbitration clause or agreement, some of which are included by reference to specific procedural rules. Nonetheless, as a key principle of arbitration is the parties' right to tailor the proceedings to their needs, companies should review the applicable arbitration law and rules to determine if they want to specify certain modifications in their arbitration agreement.

- ***Method of Selecting Arbitrators.*** Various procedures for appointing arbitrators are discussed in Module 6.3. As discussed in that module, the parties may include the method for selecting arbitrators in their arbitration agreement. For example, if there are three arbitrators, they can determine whether they want each party to select one arbitrator and then the two arbitrators to appoint the presiding arbitrator, or they want to jointly select all three arbitrators. Arbitration rules of some institutions provide for their own methods of selecting arbitrators (See e.g. ICC Rules art 8(2) & 8(4), ICDR Rules art. 6(3); LCIA Rules art. 7.2; UNCITRAL Rules arts. 8-10). Kosovo's Law on Arbitration (Article 9. 3 and 4) provides that in the absence of the parties' agreement on the method of selection, the arbitral panel shall be composed of three arbitrators, where each party shall designate one arbitrator and the presiding arbitrator will be appointed by the two arbitrators chosen by the parties. This is a standard procedure, which is also included in the Kosovo Arbitration Rules.

- ***Qualifications and Conduct of the Arbitrators.*** The parties may also determine the qualifications of the arbitrators. Depending on the specificities of the case, the parties may want the arbitrators to have an expertise in the area of the dispute, and not necessarily to be a lawyer. See Module 6.5 Moreover, most international arbitration rules require the arbitrators to be impartial and independent (ICDR Rules art. 7.1; LCIA Rules art. 5.2; UNCITRAL Rules art. 10(1), but see e.g. ICC Rules, which only require independence (ICC Rules art. 7(1), or the English Arbitration Act which require only impartiality (Chapters 1(a) and 24(1) (a) of the English Arb. Act of 1996). In light of differing arbitration rules and laws, it is important for the parties to determine the qualifications and conduct of arbitrators beforehand.

- ***Confidentiality.*** This is one of the main reasons that parties choose arbitration, as they can have the proceedings away from the eyes of the public. The level of confidentiality is sometimes set out in the rules of arbitration chosen by the parties (See, e.g., ICDR Rules art. 34; WIPO Arbitration Rules art. 76; Kosovo Arbitration Rules art. 41), however, it is recommended that the parties address this issue in the arbitration agreement. With the exception of England, whose courts have imposed an implied obligation of confidentiality, (See, e.g., *Insurance Co. & Lloyd's Syndicate*, (Commercial Court), 1994; Dolling-Baker v. Merrott (U.K. Court of Appeal (Civil Div.) March 21, 1990).), most countries' laws impose no confidentiality requirements upon the parties to an arbitration (e.g. Australia (*Esso Australia Resources Ltd. v. Plowman*, FMC. No. 95/014 (High Ct. Austr. 1995); The United States (*U.S. v. Panhandle Eastern Corp.*, 118 F.R.D. 346, 349-50 (D. Del. 1988); Therefore, it is highly advisable that the parties deal with this matter when drafting an arbitration clause.

- ***Discovery.*** The parties may determine in their arbitration agreement how much discovery will be allowed, for what period of time and in what form (e.g. depositions, interrogatories, requests to produce documents, requests to admit). This issue is sometimes dealt with by the arbitration rules, some of which allow the arbitrators to direct discovery at the request of any party or at the discretion of the arbitrators (ICDR Rules, Art. 16), whereas some other international arbitration rules provide for very limited discovery (ICC rules, for example, in Article 20(1), simply gives the arbitrator the authority to "establish the facts of the case by all appropriate means." This means that the ICC arbitrator has the discretion, but not the obligation, to order parties to engage in discovery prior to an arbitration hearing. Article 17.2 of the Kosovo Arbitration Rules provides that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality….. In exercising its jurisdiction, the arbitral tribunal shall conduct the proceedings to avoid unnecessary delay and expense……"

- ***Interim Measures*** The parties may decide at the outset whether parties will be allowed to seek interim measures, while arbitration is pending, and what sort of interim measures the arbitral tribunal may issue. Even though this issue is usually dealt with in the arbitration rules, the parties may limit or widen the power of an arbitral tribunal to issue interim measures. Some arbitral rules and some countries' laws expressly allow the arbitrators to issue interim measures (ICC Rules art. 23; AAA International Rules art. 21; LCIA Rules art. 25; UNCITRAL Rules art. 26; UNCITRAL Model Law on International Commercial Arbitration art. 17) , whereas other countries' laws do not give this power to the arbitrators (1996 English Arbitration Act § 39(4)). Kosovo's Law on Arbitration allows the courts to issue interim measures at the request of a party who presents evidence that not issuing interim measures would cause irreparable harm. Similar rules apply for interim measures issued by the arbitral tribunal. (See articles 8 and 15 of the Law).) *See also* Kosovo Arbitration Rules, art.27.

- ***Arbitrability*** Since the issue of whether the courts or an arbitral tribunal should decide on the arbitrability of a case has produced a lot of debate with different solutions, the parties may decide to empower the arbitrators to make this decision, without any court intervention on this matter. The U.S. Supreme Court held that the question of whether a particular dispute is arbitrable is to be decided by the courts unless the parties agreed that the arbitrators will decide the arbitrability question (*First Options of Chicago, Inc, v. Kaplan* 514 U.S. 938, 115 S.Ct. 1920, 1923-24 (1995). The French, English and German models, however, have taken a different

approach, by authorizing arbitral tribunals to decide on matters of arbitrability without any court intervention. Article 14 of the Kosovo Law on Arbitration and Article 24 of the Kosovo Arbitration Rules follow this approach.

- ***Consent to Appeal*** Even though arbitral awards are usually final and binding, the parties may agree in their arbitration clause to broaden the courts' jurisdiction to review an arbitral award or other matters usually pertaining to an arbitral tribunal. These clauses broadening the role of the courts have been upheld by U.S. courts (See e.g. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997); *Gateway Technologies, Inc. v. MCI Telecommunications, Inc.*, 64 F.3d 993 (5th Cir. 1995)). However, a different view is supported by French courts which have refused to enforce such clauses (*Societe de Diseno v. Societe Mendes*, Cour d'appel de Paris -1994). Therefore, depending on where the parties to the dispute come from, these clauses may either be enforced or rejected.

- ***Multi-step ADR Procedures*** Considering that it is highly important for businesses to preserve their good relationships with the other party to the dispute, sometimes they prefer to attempt resolving the dispute through negotiations or meditation before resorting to arbitration. Such multi-step ADR provisions need to be drafted with specific consideration by setting up the time limit during which the parties shall attempt to resolve disputes through other ADR procedures before the arbitral proceedings may start.

- ***Waiver of Sovereign Immunity*** Issues of sovereign immunity may arise in cases when one or both parties are governmental agencies and they may invoke this principle in order not to appear before an arbitral tribunal. In order to make sure that this party appears in the hearing, a waiver of sovereign immunity in the arbitration clause is the best solution. This principle is especially important if one of the parties to the contract comes from the U.S., even though U.S. courts have interpreted a clause waving sovereign immunity very narrowly (*Shapiro v. Republic of Bolivia,* 930 F.2d 1013, 1016 (2d Cir. 1991)).

- ***Type of Damages*** The laws of different countries contain different rules on the type of damages that may be awarded by an arbitral tribunal. For example, the U.S. Supreme Court has held that arbitral tribunals in the U.S. may award punitive damages unless they are forbidden to do so by the parties' agreement. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)). Therefore, it is always advisable for the parties to agree beforehand on the powers of an arbitral tribunal in this regard.

- ***Arbitration Costs & Attorneys' Fees*** It is very useful if the parties agree through the arbitration clause on how the arbitration costs and attorneys' fees will be apportioned, since many laws and institutions have different rules on this matter. The arbitration rules of the most famous institutions authorize arbitrators to award costs against one of the parties or to allocate the costs between the parties (ICC Rules art. 31(3); LCIA Rules art. 28.2; ICDR Rules art. 31). *See also* Kosovo Arbitration Rules, Art. 45. In addition, it is also advisable that the parties agree on interest rates as well as the currency of the arbitral award.

All of the abovementioned elements need to be considered to some extent by the parties when drafting an arbitration clause. Some of the elements presented are more important than others and the parties should pay particular attention to them when making decisions. More specifically, issues

such as the place of arbitration (forum), the language of arbitration, the arbitral institution and the applicable arbitration rules, and confidentiality, may have a significant impact on the resolution of the dispute. These elements will be elaborated in more detail in sections 4.6 – 4.8 below.

4.6. Place of Arbitration (Forum)

The choice of the place (seat) of arbitration by the parties is extremely important. This is because of a number of reasons, the most important of which is because the forum or place of arbitration determines what procedural law will apply. The applicable procedural law regulates, in particular, the relationship between the arbitration proceedings and the extent to which the courts of the place of arbitration may /or will entertain actions in relation to the arbitration.

The parties may agree to have their arbitration proceedings take place at basically any country or city in the world and courts will rarely overturn the parties' choice of arbitral forum when the arbitration agreement specifies one. A refusal of the parties' agreement to arbitrate at a particular situs would usually happen only in cases where such an agreement has been reached by means of fraudulent actions or duress.

There are cases, however, where the parties have not designated the place of arbitration, but simply refer to a particular arbitration institution or to a set of arbitration rules. In such cases, a number of arbitration institutions provide that it is up to arbitrators to decide the venue of proceedings, and this decision needs to be made taking into account a number of factors, which include the circumstances of the parties and the case. For example, article 13 of the ICDR Arbitration Rules provides that the "*administrator may initially determine the place of arbitration, subject to final determination by the tribunal*". Another example is provided in the UNCITRAL Arbitration Rules, article 18, which states that absent the parties' agreement, the place of arbitration "*shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration*." A number of other arbitration rules authorize the institution itself to decide what will be the place of arbitration if the parties have not made that determination. Such examples are provided by ICC Rules, article 14 of which provides that the ICC International Court of Arbitration shall fix the place of arbitration if not agreed by the parties. In addition, LCIA Rules, art. 16.1, set forth a similar rule by stating that "*the seat shall be London unless and until the LCIA Court determines that another seat is more appropriate*."

Kosovo's Law on Arbitration (Article 17.1) has adopted a similar approach by providing that absent the parties' agreement, the arbitral tribunal shall decide on the place of arbitration taking into account all circumstances of the case and the appropriateness of the forum for the parties and the tribunal. Article 18 of the Kosovo Arbitration Rules provides that "if the parties have not agreed on the place of arbitration, it shall be Kosovo unless the arbitration institution determines….. that another seat is more appropriate."

When making the choice, the parties need to take into account a number of factors, related to the appropriateness and the legal environment of the arbitration place or forum. Some of these factors are presented below:

- Review particularities of that legal system, especially the independence, impartiality and fairness issues

- Review whether that forum is arbitration-friendly, or if its legal system has little or no experience in conducting or implementing proceedings of this dispute settlement type
- Review whether in that forum, arbitral awards will be enforceable in other countries, as provided under the New York Convention
- Review the level of interference of courts in arbitral proceedings that is allowed by that country's legal system as well as the scope of review of awards by the courts
- Review whether the host country allows non-nationals to appear as counsel in international arbitration proceedings, otherwise a company may end up being represented by lawyers that reside in the forum state, and not by their own lawyers

The factors that need to be reviewed depend on circumstances of each case. Nevertheless, what is important is that the parties should designate the place of arbitration themselves, and not leave this decision up to an institution or an arbitral panel. The most famous venues for international arbitration include London, Paris, Geneva, New York, Stockholm, Singapore, Hong Kong and New York.

Regardless of the place (seat) of the arbitration, the arbitral tribunal can meet at any location it determines appropriate. See Article 17.2 of the Kosovo Arbitration Law and Article 18.2 of the Kosovo Arbitration Rules.

4.7. Language of Arbitration

The language of arbitration is another significant element, especially in international contracts. When the parties come from different countries and speak different languages, they should definitely agree on what will be the language of arbitral proceedings. Not all arbitration institutions provide for proceedings under any possible language. Most of them can organize proceedings in their own language plus in English or French or some other more frequently used language. In this regard, the ICC Court of Arbitration is well known for providing the parties with rules translated in many languages, apart from the common English and French versions, and they also provide for proceedings in a number of languages.

In case the parties do not agree or cannot agree on the language of arbitration, most arbitral rules allow the arbitrators to make that decision by looking at all relevant circumstances, in particular the language in which the contract was drafted. For example, ICC Rules art. 15 specifies that "*the arbitrator shall determine the language or languages of the arbitration, due regard being paid to all the relevant circumstances and in particular to the language of the contract*." The WIPO rules provide that "unless otherwise agreed by the parties, the language of the arbitration shall be the language of the Arbitration Agreement, subject to the power of the Tribunal to determine otherwise, having regard to any observations of the parties and the circumstances of the arbitration." Similar rules are contained in the UNCITRAL Arbitration Rules, art. 17, UNCITRAL Model Law, art.22, ICDR Arbitration Rules, art. 14 and LCIA Rules, art. 8.

Kosovo's Law on Arbitration provides that unless the parties have agreed otherwise, the arbitral tribunal determines the language of arbitral proceedings, which shall apply to all the written and oral submissions. The Tribunal may order for prompt translation of all relevant documents into the

languages for which the parties have agreed. (See article 19 of the Law). Similar provisions are included in Article 19 of the Kosovo Arbitration Rules.

It is highly recommended that the parties determine what will be the language of arbitration in order to avoid difficulties that may arise in proceedings in a foreign language, such as inaccurate interpretation, delay in proceedings, extra translation and interpretation costs.

4.8. Arbitral Institution and the Applicable Arbitration Rules

Provided that the parties opt for institutional rather than ad hoc arbitration, they need to agree on the arbitration institution that will organize and conduct the arbitral proceedings under its own rules. Not always, however, do the parties agree to use the rules of the institutions they choose. Sometimes they may choose an institution in, for example, Hong Kong, but decide to have their proceedings conducted under the UNCITRAL Arbitration Rules. This solution is not allowed by all arbitral institutions, though. Nevertheless, a number of them would accept the application of UNCITRAL Arbitration Rules, if the parties agree to their application (e.g. ICC Court of Arbitration, the American Arbitration Association, the London Court of International Arbitration). Article 1 of the Kosovo Arbitration Rules provide for arbitration pursuant to the rules adopted by the arbitration institution subject to any modifications agreed to by the parties.

Companies need to be particularly careful when choosing a certain arbitration institution. It is highly advisable that they scrutinize all the available information of that institution, including its arbitration rules, prior to making the decision. Some of the facts they need to take into account are:

- Costs of arbitration
- List of arbitrators provided by the institution
- Rules related to challenges of jurisdiction and challenges to the arbitrators
- Rules related to confidentiality and privacy
- Rules related to interim measures
- Rules related to intervention and role of courts
- Rules related to enforceability of awards.

This is not an exhaustive list of factors that the parties should examine before making their choice, since this varies depending on the circumstances of the parties and the case. Among the better known international arbitration institutions are the International Chamber of Commerce, the American Arbitration Association, the International Center for Dispute Resolution, the Stockholm Chamber of Commerce, the German Arbitration Institution, the London Court of International Arbitration, the International Centre for the Settlement of Investment Disputes (ICSID), and the World Intellectual Property Organization (for arbitration of IP related matters).

4.9. Confidentiality in the Arbitration Agreement

If the parties wish that the arbitral proceedings, documents related to the proceedings and the arbitral award itself be maintained as confidential, they should provide for this in their arbitration

clause. The issue of confidentiality is touched upon by some arbitration rules, however some of the well-known arbitration institutions do not require the parties to maintain the proceedings as confidential. (See e.g. LCIA Rules art. 30.1; WIPO Rules arts. 73-75; Center for Public Resources (CPR) Non-Administered Arbitration Rules, Rule 16.). Therefore, it is important for the parties to agree on this matter in the arbitration agreement, and to even decide what will be the level of confidentiality.

The information that parties may wish to maintain as confidential would usually cover three certain areas:

- the existence of the arbitral proceeding
- the documents produced or exchanged by the parties and directed to the tribunal
- the arbitral award

It should be kept in mind, however, that if the parties do not want to absolutely limit the role of courts, but leave some chance to resort to litigation, they should specify this in their arbitration clause. Specifically the parties should state the exception to the limitation on court involvement, such as the need to compel arbitration or to enforce the arbitral award. In addition, it is helpful if the parties stipulate in their arbitration agreement which specific documents should be maintained confidential and which ones can be open to public.

Despite the agreement of the parties on issues pertaining to confidentiality and privacy, courts and arbitral tribunals need to also take into account issues of public policy and public interest when making the decision of whether to publish certain arbitration-related matters. In this regard, the best approach seems to be that of English Courts which always undertake a test to balance the public interest in the transparent administration of justice on the one hand with the protection of private confidential and sensitive information on the other. (*See e.g. Dolling-Baker v. Merrett,* [1990] 1 W.L.R. 1205, [1991] 2 All ER 890 (U.K. Court of Appeal (Civil Div.) March 21, 1990)*; Department of Economic Policy and Development of the City of Moscow and another v. Bankers Trust Co and another,* Court of Appeal [2004] All ER (D) 476). This approach has proved quite successful in protecting the particular interest of the parties and publishing arbitration awards when possible.

Kosovo's Law on Arbitration, does not provide any Article pertaining to confidentiality. However, the Kosovo Arbitration Rules (Article 41)provide that, except if parties expressively agree in writing to the contrary, parties, arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the Chambers, undertake as a general principle to keep confidential all awards (including orders), as well as all materials submitted in the arbitration process, save and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a court.

4.10. Exercise

Instructions:

Each participant shall draft an arbitration agreement that covers a dispute arising from a commercial contract. When drafting the clause, keep in mind the general considerations, essential elements and other helpful elements discussed in 4.4 of this module.

4.11. Summary

This module has presented guidelines for drafting arbitration agreements by setting forth elements that need to be considered by drafters in order to come up with an enforceable arbitration agreement that suits the parties' needs and interests.
In this module, you learned to:

- Summarize the importance of including "choice of law" and "choice of forum" clauses in the contract
- List issues that need to be taken into account while drafting an arbitration clause
- Analyze the importance of designating the place of arbitration (forum) and the language of arbitration in the clause
- Discuss the need to designate the arbitral institution and the applicable arbitration rules in the event of a dispute
- Explain the importance of the issue of confidentiality in the arbitration agreement
- Draft arbitration agreements and/or clauses based on elements presented on this module

MODULE 5:
VALIDITY OF AN ARBITRATION AGREEMENT

5.1. Overview

This module provides the participants with information on the existence and the validity of an arbitration agreement. Situations under which an arbitration clause may be deemed invalid or inexistent are examined, and recommendations on avoiding the breach of an arbitration agreement are presented.

5.2. Learning Objectives

Upon completion of this module, you will be able to:

- Apply key concepts related to the validity and existence of an arbitration agreement
- Differentiate between voidable and void ab initio arbitration agreements
- Interpret the principle of separability in relation to arbitration agreements
- Analyze the "writing" requirement and the consequences that might follow from non-compliance with this requirement
- Explain the concept of "arbitrability" and describe areas where arbitrability is excluded
- List problems that might arise from the erroneous designation of an arbitral institution or arbitration rules as well as the possible solutions
- Apply the principles of in favorem validatis, contra preferentum and other principles of contract law when interpreting an arbitration clause
- Present preventive remedies that can be used to avoid the breach of an arbitration clause
- Outline consequences that might follow as a result of the breach of an arbitration agreement.

5.3. Key Concepts Related to the Validity and Existence of an Arbitration Agreement

If the parties want to be certain that their arbitration clause will be enforced, they need to make sure that the arbitration clause addresses the essential elements mentioned in Module 4, in particular the intention to arbitrate, the institution of arbitration (if they opt for institutional arbitration), the arbitration rules, the number of arbitrators, the place of arbitration and the language of arbitration.

Because there are many cases when the contracts are drafted by businessmen or inexperienced lawyers, some of the abovementioned essential elements are disregarded. Moreover, there are other situations when an arbitration clause has been drafted under duress or fraud. In the first type of situations, we would have to deal with the issue of **"validity"** of an arbitration clause, whereas in the second type of situations the issue is the **"existence"** of the arbitration clause. These two concepts are very much similar to invalidity concepts under Kosovo's Law on Obligations, where the issue of "validity" of an arbitration clause would parallel that of "relative invalidity" under Kosovo's Law on Obligations, and the issue of "existence" is the parallel of "absolute invalidity" under Kosovo's Law on Obligations.

5.3.1. Validity of an Arbitration Clause

The jurisdiction of an arbitral tribunal stems from an arbitration clause. Therefore, any dilemma as to the validity of that clause may trigger jurisdictional challenges. The invalidity of a clause may come as a result of one of the following omissions:

1. non-designation or erroneous designation of an arbitral institution
2. non-designation or erroneous designation of the arbitration rules
3. disregard of the "writing" requirement
4. non-arbitrability of the subject matter
5. absence of the parties' intention to arbitrate *(*also regarded by some courts as a ground for rendering the arbitration clause inexistent*)*

An arbitral tribunal usually does not start scrutinizing the arbitration agreement in order to see whether it meets all the validity requirements, unless one of the parties challenges the tribunal's jurisdiction on bases of an invalid arbitration clause. For that reason, this concept is very similar to that of "relative invalidity" provided in Kosovo's Law on Obligations, where this issue can only come up at the request of one of the parties. Should the tribunal get a jurisdictional challenge on grounds of invalidity of the clause, it is the obligation of the tribunal to decide whether it has jurisdiction or not, pursuant to the "competence-competence" principle. (See e.g. UNCITRAL Model Law, art.8(2); *SNE v Joc Oil Ltd, 1990,USSR; Fung Sang Trading v. Kai Sun Sea Products & Food (Hong Kong); ICC Award no.6268)*. A tribunal makes this decision based on the validity requirements that are set forth in the applicable substantive and procedural law that applies to the case.

Kosovo's Law on Arbitration (article 14) is clear in giving the arbitral tribunal the power to decide on issues related to the validity of a clause. It states that "*the arbitral tribunal shall determine whether it has jurisdiction over the dispute presented to it and whether the arbitration agreement is valid*". This is also true of the Kosovo Arbitration Rules.

5.3.2. Existence of an Arbitration Clause

A tribunal's jurisdiction may also be attacked because of the non-existence of an arbitration clause. A party contesting the existence of the clause needs to present reasonable grounds that the clause has been agreed upon as a result of circumstances, which if they had not existed, the agreement would not have been entered into in the first place. A party may argue the inexistence of an arbitration clause if one of the following situations has taken place:

- the clause is a result of fraud
- the clause is a result of duress
- the clause is a result of unconscionability
- the clause is a result of mistake
- the intention of the parties to arbitrate does not exist (sometimes seen as ground for invalidity and not inexistence)

These situations are very similar to the grounds for "absolute invalidity" set forth in Kosovo's Law on Obligations, which provides that an agreement that is made as a result of fraud, duress, mistake or unconscionability, is deemed to have never existed.

Given that the existence of an arbitration clause is necessary to vest upon a tribunal its jurisdictional authority, sometimes the parties go to courts to determine whether an arbitration clause exists or not. There are cases, however, that the determination on the existence of an arbitration clause is an issue for the tribunal to decide. This usually happens when the arbitration rules chosen by the parties provide that the arbitral tribunal has the authority to decide on both the existence and the validity of an arbitration clause (see e.g. Kosovo Arbitration Rules, Art. 24; ICDR Arbitration Rules, art. 15.1, UNCITRAL Arbitration Rules, art. 23.1). Another instance where the tribunal would have the authority to decide on the existence of an arbitration clause is when the arbitration clause itself gives it this authority. Such a clause would look similar to the one below:

> *"Any controversy or claim arising out of or in relation to this contract and its formation, including its validity and existence, shall be finally settled through arbitration, by an arbitral panel formed under the rules of German Arbitration Association. The place of arbitration shall be Munich, Germany, and the language of arbitration shall be English."*

If the arbitration clause or the arbitration rules are very clear as to whether the arbitral tribunal shall have the power to decide issues of existence of an arbitration clause, then a party should not submit a claim on this issue to the courts.

Nevertheless, Kosovo's Law on Arbitration provides that a court shall reject a matter that is subject to arbitration, "*unless it finds that the arbitration agreement is null and void or that the disputed subject matter is not covered by the arbitration agreement*" (Article 7). This means that a party has the right to submit a claim before a court in Kosova whenever it contends that the agreement is null and void (see section 5.4) or non-arbitrable (see section 5.7).

5.3.3. Absence of Intention to Arbitrate as a Ground for Invalidity and/or Inexistence of an Arbitration Clause

The intention or agreement of the parties to arbitrate, namely the existence of an offer to arbitrate and the unequivocal acceptance of that offer, is the essential element for the existence and validity of an arbitration clause. There are cases when a party may attack either the existence or the validity of the clause based on the fact that the clause does not meet formal requirements, i.e. the "agreement" element does not exist. This can happen if an offer to arbitrate is made, and then revoked in the meantime, whereas the other party accepts the offer without accepting the revocation. In this instance, one party would argue that the agreement never came into effect because the offer was revoked before the acceptance took place, whereas the other party would argue that the agreement is valid because it made the acceptance in time. Such cases happen very often in practice, and the arbitral tribunal or the court (depending on where the claim is submitted) would have to decide if the agreement was made and whether it is valid. Sometimes, the lack of intention to arbitrate is considered as a ground for invalidity, but there are cases where a tribunal or a court would decide that this makes the clause inexistent, because if the parties never intended to arbitrate their disputes, it means that an agreement actually never came into force.

5.4. Voidable and Void ab initio Arbitration Agreements

Courts and commentators have distinguished between agreements that are "voidable" (e.g. the contract exists but is subject to rescission) and contracts that are void ab initio, (e.g. a contract that never came into existence). (*see Pollux Marine Agencies, Inc. v. Louis Dreyfus Corp*. 742 F.2d 386 (7 Cir. 1984*); Pottawatomi Indians v. Kean-Argovitz Resorts, Michigan*). Voidable arbitration agreements are basically those that can be attacked as invalid, whereas void ab initio agreements are those that never came into effect because the parties never actually finalized the agreement. Some authors and cases refer to void ab initio agreements as "clauses with birth defects" *(see e.g. Sté Navimpex v. Sté Wiking Traler, 06.12.1988, (Fr))*. Courts have held that contracts which are void ab initio are "challenges to the very existence of the contract" as opposed to "attempts to avoid or to rescind a contract" which are otherwise subject to arbitration. (*Camaro Trading Co. v. Nissei Sangyo America* 577 So.2d 1274 (Ala. 1991*); Alabama Catalog Sales v. Harris)*. If an entire contract is void ab initio, the inexistence of the contract extends to the arbitration agreement. (*Harbour Assurance Co. Ltd. v. Kansas General International Insurance Co. Ltd.* [1993] Q.B. 701*; Elf Aquitaine Iran (France) v. National Iranian Oil Co.* 388 YCA 1986*)*.

These concepts have provided a foundation for UNCITRAL Model Law, Article 8(1), which provides that if a case that is the subject of an arbitration agreement is brought to the court and a party requests the court to refer the case to arbitration, the court shall refer the case to arbitration unless it finds that the arbitration agreement is:

- null and void,
- inoperative, or
- incapable of being performed.

The same provision is included in Article II.3 of the New York Convention.

An arbitration agreement is considered to be **null and void** when the agreement was actually never made or in the event that it was made it was void *ab initio*. Arbitration agreements that are revoked or terminated are deemed to be null and void. Arbitration agreements have been held to be null and void when they are defective at the formation, typically as a result of fraud, duress, illegality, mistake, and lack of capacity. In other cases, courts have held that arbitration clauses are null and void when the arbitrator was also a party to the contract. (*See Charbonneau v. Industries A.C. Davie Inc*; [1989] RJQ 1255 ; *Desbois v. Industries*).

A contract is considered **inoperative** if an external supervening event destroys contractual relations, bringing the contract to an end and destroying the arbitration clause. *(See e.g. Hirji Mulji v. Cheong Yue Steamship Co.* [1926] AC 497, 95 LJPC 121*; Harper v. Kvaerner Fjellstrand Shipping A.S.*)

Courts have found that an agreement is **incapable of being performed** where the parties have agreed upon a specific procedure that cannot be realized or where the terms of an arbitration agreement are so vague, indefinite, or internally contradictory that the tribunal cannot ascertain the parties intent (*Wilson v. Lignotock (USA); Fowler v.Merril Lynch (UK)*). For example, if an arbitration agreement specifies a particular arbitrator must hear the matter but he or she is not available, or designates an arbitral institution that does not exist, the arbitration clause will be considered to be

"incapable" of being performed. (*City of Prince George v. A.L. Sims & Sons Ltd. And McElhanny Engineering Services; Burlington Northern Railroad Co. v. Canadian National Railway Co.).*

5.5. Principles of Separability or Severability

Arbitration clauses may be attacked as voidable or void ab initio based on claims that the commercial contract (where the arbitration clause forms a part) is not valid or existent. It would seem logical to determine that if there was no contract and no agreement to any of the terms of the contract (including the arbitration clause), the arbitration clause should be deemed invalid, too. However, it is important to keep in mind that the reason why parties include an arbitration clause in the first place is because they want their disputes to be resolved through arbitration. Therefore, in order to deal with these situations, arbitral panels and courts promulgated **the separability doctrine**. This doctrine basically means that the arbitration clause is an independent agreement, separate from the remainder of the contract in which it is contained.

This principle is incorporated into the UNCITRAL Model Law (Art. 16(1) and Art. II(3) of the New York Convention. The separability or severability principle is set forth in article 14 of Kosova's Law on Arbitration, which provides that an arbitral tribunal should decide on the validity of an arbitration agreement and that "for that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the terms of the contract".

The separability doctrine has been recognized widely and many courts have held that the arbitration agreement constitutes a contract separate from the commercial contract. *(See e.g. Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 402 (1967*); Fung Sang Trading, Ltd. V. Ka Sun Sea Products and Food Co. , Ltd. (Hong Kong)).* Moreover, most institutional arbitration rules have incorporated this principle in their rules, by recognizing that the arbitral agreement survives any defect of the principle agreement. *(*See e.g. UNCITRAL Model Rules (Article 16(2)); ICDR Arbitration Rules (Art. 15.2) and Kosovo Arbitration Rules (Art. 24.1)).

Many courts have held that even when the contract is void, induced by misrepresentation, or non-disclosure, whether negligent, fraudulent, affirmed or innocent or when the contract has been repudiated or frustrated, the arbitration clause survives the main contract. (*Globe Union Industrial Corp. v. G.A.P Marketing Corp.* 2 Western Weekly Reports 696 [1995] Canada*; ODC Exhibit Systems Ltd. v. Lee* (CLOUT case 65)*, Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd*. (1992) England; *ABN Ambro Bank Canada v. Krupp Mak Maschinenbau* [1996] 91 OIAC 229 (Ont. Canada)*; Euro-Mec Import, Inc. v. Pantrem & C., S.p.A. (*U.S.*); Tennessee Imports, Inc. v. Pier Paulo Filippi and Prix Italia* (U.S.*)).*

5.6. "Writing" Requirement

The requirement that an arbitration agreement must be in writing to be valid is actually envisaged in the arbitration rules of most institutions dealing with this dispute settlement form. Kosovo's Law on Arbitration sets forth this requirement by stating that "the arbitration agreement shall be concluded in writing" and specifying that this requirement is deemed to have been met "even if the conclusion of the arbitration agreement is recorded by means of exchange of letters, telefaxes, telegrams, or

other means of telecommunication or electronic communication, by means of a bill of lading if the latter contains an express reference to the arbitration clause, or in the event of an exchange of statements of claim and defense, in which the existence of an agreement is alleged by one party and not denied by the other". *(*See article 6 of the Law).

The importance of having the arbitration clause as an integral part of the contract and in writing has been confirmed by a number of cases *(see e.g. Case Law on UNCITRAL Texts (CLOUT) at: http://www.uncitral.org/uncitral/en/case_law.html) - CLOUT Case 78; CLOUT Case 40; CLOUT Case 64; CLOUT Case 32; CLOUT Case 44; CLOUT Case 62; CLOUT Case 43; CLOUT Case 78; CLOUT Case 388*).

According to Art. II(2) of the NY Convention, it is sufficient that the arbitration agreement is contained in an exchange of letters or telegrams. In addition, the number of communications exchanged between the parties may be an adequate record of a written arbitration agreement.

5.7. Concept of "Arbitrability"

Arbitrability is defined in the NY Convention in art.II(1), dealing with validity, and art.V(2)(a), dealing with the recognition and the enforcement of the awards. Both articles require that the subject matter of the arbitration be capable of settlement by arbitration in connection with the formation of a valid arbitration agreement. The concept of "arbitrability" basically means that an arbitral tribunal or a court need to assess whether under the applicable law a particular type of controversy may properly be arbitrated, or whether it must be litigated by the competent courts.

Kosovo's Law on Arbitration defines "arbitrability" in article 5 by providing that "*one dispute can be settled by arbitration only if it exists in the parties' agreement, whereby they accept the dispute to be settled by arbitration*". More importantly, it goes further on by saying that "*disputes related to civil-judicial and economic-judicial requests may be subject of an arbitration agreement, unless prohibited by law*".
The Law does not specify any limits as to certain types of disputes that would not be arbitrable or prohibited. It is clear though, that disputes not falling under the two categories mentioned in article 5(2), namely "civil-judicial" and "economic-judicial", would be rejected by an arbitral tribunal as non-arbitrable (for example claims based on criminal law).

In the past, claims related to antitrust or competition law, intellectual property disputes, and employment issues were considered not proper subjects for arbitration. *(American Safety Equip. Corp. v. J.P. Maguire Co.,* 391 F.2d 821, 828 (2nd Cir. 1968); *Wilko v. Swan,* 346 U.S. 427, 438 (1953)*)*. However, that view has been changing and during the past 25 years, both antitrust and competition law issues have been held to be arbitrable.*(Mitsubishi Motors Corp. v. Soler Chrysler,* 473 U.S. 614, 628-29 (1985*); Attorney General of New Zealand v. Mobil Oil New Zealand, Ltd.,* [1989] 2 NZLR 64d.*; Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 515 (1974).

Because of differing rules in various legal systems, it is highly advisable for the parties to research the applicable law to determine whether any likely disputes that may arise between them are considered arbitrable under that law and to avoid any subsequent problems that might arise on this issue.

5.8. Erroneous Designation of an Arbitral Institution or Arbitration Rules

The erroneous designation of an arbitral institution or arbitration rules is sometimes seen as grounds to invalidate the arbitration agreement. This usually happens when the parties do not refer to the correct name of an institution or rules, or they do not make any reference at all.

Authors and case law make a distinction between **"erroneously designated institutions or rules"** and **"inexistent institutions or rules".** The decisions of many courts on these issues have been different, however, the view that is mostly supported is that whenever an institution or rules are simply "erroneously designated" a tribunal or court should try to give effect to the clause, if possible by trying to interpret the intent of the parties. However, in cases when the parties referred to inexistent institutions or rules, most courts and tribunals would render those clauses invalid, as in that instance it would not be possible to determine what the intent of the parties was.

Arbitration agreements in which the chosen arbitration institution or rules are named wrongly or that are ambiguous in any other way appear quite often in arbitral proceedings. (See e.g. *ICC Court of Arbitration, 6709/1991 (Fr); Republic Nicaragua v. Standard Fruit Co. (*U.S.*); Lucky-Goldstar Intern., Ltd. V. Ng Moo Kee Engineering, Ltd (*Hongkong*); Star Shipping A.S. v. China Nat. Foreign Trade Transp. Corp. (*GB*); Bulgaria Court of Arbitration case No. 151/1984 (*Bulgaria*); German Coffee Association, 28 September 1992 (*Germany)). Nevertheless, many arbitral tribunals and courts have held that these clauses should be given effect in all cases where the intention of the parties to choose a particular institution or rules was clear and when, for example, if no other arbitration institution or arbitration rules could have been alternatively meant (ICC Court of Arbitration, 2626/1977 (Fr*); Laboratorios Grossman, S.A. v. Forest Laboratories, Inc. (*U.S.*)). However, it must be noted, that a defective clause can only be salvaged if a significant degree of certainty regarding the real intention of the parties is achieved via interpretation. For example, if the parties refer to the "German Arbitration Association" instead of "German Arbitration Institution (the correct name)", and that is the only institution in Germany dealing with arbitration disputes, it would be very easy to determine the intent of the parties. But if the parties simply make a reference to "New York, Arbitration", without any specific designation of an institution or rules, it would be hard, if not impossible to determine where the parties wanted to arbitrate their disputes, given that there are more than one arbitration institutions in New York.

5.9. Principles of Contract Law Used to Interpret Arbitration Clauses

There are a number of principles or doctrines, generally applied in contract and arbitration law, which are also very widely used to interpret arbitration agreements. Some of the most famous principles are "in favorem validatis", "contra preferentum" and "effet utile".

5.9.1. Principle of "in favorem validatis"

This principle, if translated from Latin, means "in favour of validity". It basically connotes that whenever an arbitral tribunal or a court is faced with the issue of 'validity' of an arbitration clause, it should try decide in favour of validity, by taking into account all relevant circumstances of the case,

including the intention of the parties. Courts have often used this principle in their reasoning whenever deciding upon the validity of arbitration clauses. (ICC Court of Arbitration, 5103/1988 (Fr)).

5.9.2. Principle of "contra preferentum"

This principle means that a clause or term of the contract, if ambiguous, shall be interpreted against the drafter. Basically, if the seller has drafted the contract and afterwards it turns out that the arbitration clause in that contract is ambiguous and the parties do not agree on its meaning, the arbitral tribunal or the court shall interpret the clause against the party who drafted it, which in this case was the seller. As a rule of strict construction, "contra preferentum," requires that the contract be construed against the person preparing terms thereof. *(*UNIDROIT Principle 4.6, ICC Court of Arbitration, 1434/1975 (Fr)).

5.9.3. Doctrine of "effet utile"

According to this doctrine, arbitration clauses which are not exactly clear have to be interpreted in a way that gives reasonable sense to them, rather than rendering those clauses ineffective (ICC Court of Arbitration*, 3380/1980 (Fr); 4145/1984 (Fr); 5103/1988 (Fr); Star Shipping A.S. v.China Nat. Foreign Trade Transp. Corp. (*GB*)*).

5.10. Preventive Remedies That Can Be Used to Avoid the Breach of an Arbitration Clause

A party may sometimes go to court, despite the inclusion of an arbitration clause in the contract, contending that the arbitration agreement never actually came into effect or was subsequently invalidated because of certain circumstances. On the other hand, the party who contends that the arbitration agreement exists and is valid, may start arbitration proceedings and claim that the opposing party who went to court has actually breached the arbitration agreement.

In order for this not to happen, the parties may undertake a number of preventive measures, at the time of the drafting of an arbitration agreement. These include:

- an irrevocable submission to the jurisdiction of the arbitral tribunal
- an irrevocable waiver of any objection to any action brought in accordance with the arbitration clause for reasons of inconvenience or inappropriateness of forum
- an irrevocable waiver of any objection to any action brought in accordance with the arbitration clause based on contract formation issues
- an irrevocable waiver of any objection to arbitral proceedings in default of appearance
- an indemnity for all reasonable costs of enforcing the agreement and any award
- an irrevocable waiver of any objection to any action brought in accordance with the arbitration clause based on the "sovereign immunity" defense

The abovementioned preventive remedies can help parties enforce their arbitration agreements despite of objections that may come up after a dispute has arisen. Therefore, it is advisable that the

drafters of an arbitration agreement consider these factors if the enforcement of the arbitration clause is of a significant importance to them.

5.11. Consequences That Might Follow as a Result of the Breach of an Arbitration Agreement

If, despite the existence of an arbitration agreement, a party initiates litigation proceedings, it may result in a decision by an arbitral tribunal against that party, which provides that it has breached the arbitration agreement. In addition, the party contending that the arbitration agreement existed has a number of other options:

- **First,** the non-breaching party may request the arbitral tribunal to issue an anti-suit injunction; *(*the arbitral tribunal may issue an anti-suit injunction by ordering the breaching party to stay the court proceedings).

- **Second**, the non-breaching party may request the arbitral tribunal to issue a declaration of non-liability; *(*This request is usually made in cases where the opposing party may request the court to enforce the judgment. Thus, the party before an arbitral tribunal should act fast to get the award of an arbitral tribunal first, so that it establishes *res judicata* over the case. This can be achieved through a declaration of non-liability, which should assist the non-breaching party in resisting any attempt to enforce a court judgment).

- **Third**, the non-breaching party may request compensation of damages for breach of an arbitration agreement. *(*Some courts have held that damages are available for breach of an arbitration clause. This would include the costs of any anti-suit injunction, costs incurred in court proceedings challenging the jurisdiction of the court, and any increase in cost for additional arbitral proceedings required as a result of parallel proceedings before both the court and the arbitral tribunal.)

These after-breach remedies are not available under all legal systems. Therefore, it is highly recommended that the parties undertake as measures any or all of the preventive remedies referred to in section 5.10 of this module.

5.12. Exercise

Instructions:

Read the facts of two landmark cases presented below, and choose the correct answer from options (a), (b) and (c) provided under the text of each case.

1. Case of PEPSICO v. OFICINA CENTRAL

(*U.S. District court, NY, 1996, 945 F.Supp.69)*

In **Pepsico v. Oficina Central,** Claimant (Pepsico from the U.S.) had a contract with its bottling company (Oficina Central from Venezuela), which provided that "any party prematurely terminating

the contract must pay specified liquidated damages to the other party. The contract also included an arbitration clause which stipulated that any controversy arising out of the contract, including breach thereof, shall be finally settled by arbitration in accordance with the ICC Rules of Arbitration, and arbitration shall take place in New York, USA. An authorized representative of Oficina Central terminated the contract, explaining that the bottling companies were defecting to Coca Cola. Pepsico respondent by asking Oficina to pay the amount of liquidated damages of $118,400,000 within 60 days. Before the 60 days expired, Oficina filed a suit in a civil court in Venezuela, contending that the amount of liquidated damages was a much smaller sum. The bottling company was alleging, *inter alia*, that the arbitration clause was "inoperative" because of its "obscurity and ambiguity" and because it was not "applicable to the present case as the dispute on liquidated damages was non-arbitrable."

Which of the following do you think should be the decision of the Venezuelan Court?

a) The arbitration clause is ambiguous because it refers to the International Chamber of Commerce (which is located in Paris) and to arbitration in New York. Because the clause refers to two geographical locations, it is not clear where should arbitration take place and this makes the clause null and void. For that reason, the court has jurisdiction to decide on the sum of liquidated damages.

b) Because of the reasons stated under option (a), the arbitration clause is ambiguous and tends to be invalid. However any issues pertaining to invalidity should be resolved by arbitration before the ICC, and therefore, the Court does not have jurisdiction to deal with this matter and shall compel the parties to arbitration.

c) The court shall look at the substantive law applicable to the case. If that law (be it Venezuelan or U.S. law) deems the calculation of liquidated damages as non-arbitrable, the court should render a decision on arbitrability and make the assessment of liquidated damages itself, without compelling the parties to arbitration.

2. Case of TEXACO OVERSEAS v. THE GOVERNMENT OF LIBYA (53 Int'l L. Rep. 389-409 (1979))

In Texaco v. Libya the parties had entered into a Deed of Concession, which, among others, included the following clause:

" If at any time during or after the currency of this Concession any difference or dispute shall arise between the Government and the Company concerning the interpretation or performance or anything related to the contract, or the rights and liabilities of the parties hereunder and if such parties should fail to settle such difference or dispute by agreement, the same shall be referred to two Arbitrators, one of whom shall be appointed by each such party, and a Presiding Arbitrator who shall be appointed by the arbitrators immediately after they are themselves appointed. In the event the arbitrators fail to agree on the Presiding arbitrator within 60 days from their appointment, either party may request the President of the International Court of Justice to appoint the Presiding Arbitrator."

After a dispute arose, Texaco informed the Government of Libya of its appointment of an arbitrator. Libya, however, did not appoint its arbitrator within the time limit provided by the contract, and declared that it rejected the demand for arbitration. The Government of Libya contended that the Deeds (contract) of concession is in fact is invalid because the measures of nationalization that were

undertaken afterwards, had the effect of voiding the Deeds of Concession, including all its clauses. Despite this, the International Court of Justice appointed a sole arbitrator to hear the dispute. The tribunal composed of this sole arbitrator was challenged the jurisdiction by the Government of Libya.

Which of the following do you think should be the decision of the Tribunal?

a) The Tribunal should decide that it has competence to decide on its own jurisdiction based on the "kompetenz-kompetenz" principle. It should, moreover, apply the "separability" doctrine, according to which the arbitration clause survives any defect in the contract, including its subsequent invalidity because of nationalization measures. Further, because this is a question of "validity" rather than "existence" of the arbitration clause, it should decide that it is in the exclusive jurisdiction of the arbitral tribunal to decide such a matter, and therefore, can carry on with its proceedings and decide on the merits of the case.

b) The Tribunal should decide that it has no jurisdiction since from the moment the Deeds of Concession were void because of the nationalization measures the arbitration clause also became automatically null and void. Since the powers of the arbitral tribunal stem from the arbitration clause, the tribunal has no jurisdiction to hear the merits of the case.

c) The Tribunal should decide that it has jurisdiction to hear the case based on the "kompetenz-kompetenz" principle, but it should decide that the arbitration clause is not valid since it does not state the applicable arbitration rules or what arbitration institution shall resolve the dispute."

5.13. Summary

Through this module, the participants have learned to apply key principles related to the validity and the existence of an arbitration clause, including issues of arbitrability, voidability, separability or severability and breach of an arbitration clause.

In this module, you learned to:

- Apply key concepts related to the validity and existence of an arbitration agreement
- Differentiate between voidable and void ab initio arbitration agreements
- Interpret the principle of separability in relation to arbitration agreements
- Analyze the "writing" requirement and the consequences that might follow from non-compliance with this requirement
- Explain the concept of "arbitrability" and describe areas where arbitrability is excluded
- List problems that might arise from the erroneous designation of an arbitral institution or arbitration rules as well as the possible solutions
- Apply the principles of in favorem validatis, contra preferentum and other principles of contract law when interpreting an arbitration clause
- Present preventive remedies that can be used to avoid the breach of an arbitration clause
- Outline consequences that might follow as a result of the breach of an arbitration agreement

MODULE 6:
COMPOSITION OF THE ARBITRAL TRIBUNAL

6.1. Overview

This module explains the procedure for selecting and appointing arbitrators. It defines key attributes that a good arbitrator should have and it outlines the procedure for challenging and removing arbitrators who do not meet the desired criteria.

6.2. Learning Objectives

Upon completion of this module, you will be able to:

- Explain and apply key concepts and principles on the appointment of arbitrators and the appointing authorities
- Compare when a three-arbitrator panel is preferable to a single arbitrator
- Define key attributes of an effective arbitrator
- Recall and discuss legal and ethical standards that govern the actions of arbitrators
- Present and analyze grounds for challenging an arbitrator
- Outline the procedure for challenging an arbitrator
- List consequences of an arbitrator's failure to act
- Describe the procedure for removing and replacing an arbitrator and the duty to repeat a hearing if an arbitrator is replaced
- Exercise ways to screen and select arbitrators.

6.3. Appointment of Arbitrators and Appointing Authorities

The appointment of arbitrators is one of the most important processes in arbitral proceedings. The arbitrator is the key to the whole process and the selection of a good or bad arbitrator may greatly affect the outcome of the case. Because of the importance of this process, most arbitration institutions have adopted rules which give the parties the freedom to determine the procedure for appointing arbitrators. These rules also provide for alternative methods for the selection of arbitrators, if the parties have not determined that through their agreement. (See e.g. Kosovo Arbitration Rules 2011, articles 6-8; UNCITRAL Arbitration Rules, articles 6-1; ICC Rules, articles -12-13;; ICDR Arbitration Rules, articles 5-6).

Chapter III of Kosovo's Law on Arbitration covers the procedure related to the appointment and challenge of arbitrators. Article 9 allows the parties themselves to determine the procedure for appointing arbitrators and provides default rules if the parties fail to do so. Although most arbitration laws and rules of procedure give parties the power to determine their own procedure, this is not very often used by parties to arbitration proceedings. This is usually because parties feel more comfortable with the procedures foreseen in the law or institutional arbitration rules chosen by them, or sometimes it is hard for them to reach an agreement on this procedure and they see the solution provided by the applicable law or rules as a compromise.

In the event the parties choose to use this discretional power, they can agree on any procedure possible, and it would not be in contradiction to the Law. They can provide for any method of

selecting arbitrators, such as naming the particular persons by name or office, calling on an institution to select the arbitrators, or simply referring to the rules that govern their dispute. For example, through their arbitration clause, they could agree on the following selection and appointment procedures.

Example 1

"The parties hereby agree that the dispute shall be heard and decided by a single arbitrator, who shall be chosen by the President of the ICC International Court of Arbitration."

Example 2

"The parties hereby agree that any dispute or controversy arising from the present contract shall be finally determined by a panel of three arbitrators. Each party shall have the right to select an arbitrator, whereas the presiding arbitrator shall be appointed by the two arbitrators appointed by the parties."

Example 3

"The parties hereby agree that any dispute or controversy arising from the present contract shall be finally determined by a panel of three arbitrators, all of whom shall be selected by the Arbitration Institute of the Stockholm Chamber of Commerce, from its list of arbitrators for international disputes."

In cases when the parties have not established an agreement as to the procedure for appointing the arbitrators (including through the rules of procedure), as well as their number, article 9 of Kosovo's Law on Arbitration provides for a procedure that needs to be followed. It states that, "*if the parties do not agree on the number of arbitrators or on the procedure for the appointment of the arbitrator or arbitrators within fifteen days after the receipt by the Respondent of the notice of arbitration, the arbitral tribunal shall consist of a panel of three arbitrators.*" The provision in the Kosovo Arbitration Rules is slightly different. Article 5 provides that "*if the parties have not previously agreed, the appointing authority shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances.*" The Article further provides for "*a sole arbitrator unless the complexity of the subject-matter and/or the amount in dispute justify a three-member tribunal*."

Both the Kosovo Arbitration Law (Article 9.4) and the Kosovo Arbitration Rules (Article 8) have the same provisions on appointment of the panel. "*Each party shall appoint one arbitrator. The two arbitrators thus appointed shall appoint the third arbitrator who shall act as the chairman of the arbitral tribunal.*"

According to the Law, a party is obliged to appoint the arbitrator within thirty days of the receipt of a request to do so. If a party fails to do so, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the relevant appointment is to be made by the Court upon the request of a party. After a party makes its appointment, it is bound by it from the moment the other party receives notice of the arbitrator appointment. (See article 9(5) of the Law). The Kosovo Rules also provide for a 30 day period and if the appointments are not made in that time, the appointing authority will make the appointment using a list procedure. Under the list procedure, the institution provides the name of three potential arbitrators to the parties express

their preferences and the institutions makes the appointment according to the parties' preferences (See Articles 7-8).

As we can see from the examples above, the appointing authorities are not always the parties themselves. Depending on what they have agreed on, the appointing authority may be a third party, e.g. a neutral lawyer or institution, the arbitration institution under the auspices of which the proceedings are taking place, or even a judicial authority.

Despite the fact that the parties may choose different versions of arbitrator panels, the most popular choices are the single arbitrator and three-arbitrator panels. In each instance, a screening and selection process need to be undertaken by taking into consideration key attributes that an arbitrator should have. These issues are discussed in sections 6.4- 6.7 below.

6.4. Three-arbitrator Panels as Opposed to a Single Arbitrator

Article 9(1) of Kosovo's Law on Arbitration provides that "*the arbitral tribunal shall be composed of either a single arbitrator or a panel of arbitrators, provided that the panel is composed of an odd number of arbitrators.*" This basically means that the parties can choose between a single and more arbitrators, depending on the specificities of their case. There are a number of factors they need to take into account when making this decision, as outlined below.

- **Amount of money involved**
  It is generally advisable that the parties choose a single arbitrator in cases when lower amounts of money are involved, and on the other hand, to choose a three-arbitrator panel in cases when very high amounts of money are at stake. It is also believed that when parties come from different states and different legal and commercial systems, a panel of three arbitrators would be the best solution.

- **Expertise of arbitrators**
  In complex cases that involve a lot of expertise, such as construction or intellectual property cases, it is usually better to have a panel that includes arbitrators with experience in that specific area. In these cases, it is advisable to have a panel of three arbitrators as opposed to a single arbitrator, because a multi-member tribunal may afford the parties a mix of professional expertise.

- **Scheduling concerns**
  Scheduling concerns in fact militate against the use of panels, because it is much harder for a panel of three or more arbitrators to agree on dates when the hearing and other proceedings will take place. This especially happens if arbitrators come from different countries and the parties will end up trying to fit the arbitral proceedings into their own as well as the arbitrators' calendars. However, arbitrators can use methods such as video conferencing to overcome these obstacles.

- **Arbitrator fees**
  The fees that the parties would have to pay are much lower in cases of a single arbitrator. Nevertheless, in major cases, the added cost of two additional arbitrators is not a high price to

pay for the advantage of having a panel that is able to offer its expertise and analyze the issues jointly.

6.5. Key Attributes of an Effective Arbitrator

It is quite hard to define attributes of an ideal arbitrator having in mind that different circumstances of each case demand different requirements. Despite this, there are a number of necessary characteristics (as provided below) that an arbitrator should have, if the parties are interested in a fair and impartial outcome.

- **Impartiality**
  Impartiality is the single most important attribute that a party will ask for in an arbitrator. Sometimes it may not be clear from the very beginning whether an arbitrator is entirely impartial since any bias or partiality on his part is only likely to come to light during the course of proceedings. Impartiality is one of the standards required for an arbitrator in Kosovo's Law on Arbitration (see article 9(6)).

- **Independence**
  As opposed to impartiality, independence is an objective notion and may be established at very early stages, starting from the appointment process. Lack of independence sometimes arises because of an arbitrator's previous commercial, financial or other relationship with a party. Independence of an arbitrator is also required by Kosovo's Law on Arbitration (article 9(6)).

- **Efficiency**
  Efficiency of an arbitrator is highly valued, especially in light of the fact that arbitration is known as a quick mechanism for resolving disputes and the parties choose it exactly because of time efficiency. Therefore, it is important to select arbitrators that are able to find the truth of the matter in an efficient manner.

- **Professional experience**
  An arbitrator' professional qualifications are an important drive for the parties during the selection process as it is important to have arbitrators who have received pertinent training and education, who have the desired experience in an arbitrator's role and in their profession in general. Qualifications that are required by the parties in the arbitration agreement need to be found in the arbitrators, and this is also foreseen in Kosovo's Law on Arbitration (article 9(6)).

6.6. Legal and Ethical Standards That Govern the Actions of Arbitrators

The arbitrators need to carry out their function in accordance with legal and ethical standards. The legal standards are usually contained in the applicable arbitration law or arbitration rules, whereas ethical standards are in some cases contained in ethical codes that are approved by countries or institutions.

- **Legal standards**
  As mentioned above, Kosovo's Law on Arbitration provides for independence and impartiality of arbitrators. The Law also requires that if a Court is serving as the appointing authority, "the Court shall have due regard to the qualifications an arbitrator is required to have pursuant to the arbitration agreement and it shall make sure that the appointed arbitrator is independent, impartial and does not have a conflict of interest." (Article 9(6)). These are threshold characteristics that an arbitrator must have, in accordance with the law, and any deviation from them may lead to their challenge and removal. Impartiality and independence are foreseen as legal standards by almost all well-known arbitration rules and institutions such as UNCITRAL, ICDR, LCIA, WIPO and DIS. The Kosovo Arbitration Rules also require arbitrator independence and impartiality.

- **Ethical standards**
  Ethical standards mainly govern an arbitrator's disclosure of any possible interest or relationship with either party to the dispute. The disclosure obligation is one that continues through the entire arbitration process. Some arbitral institutions have drafted codes of ethics to govern the actions of arbitrators. One of the most famous is the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, which provides that "arbitrators should disclose the existence of any interest or relationship which is likely to affect their impartiality..." (See Part II(A)(1) of the Code). The Code clarifies that the relationships that need to be disclosed may be any past financial, business, professional, family or social relationships, including personal relationships with any party or its lawyer, or prospective witness, and including family members or current employers, partners or business associates. (Part II(A)(2)). Even though the disclosure obligation is deemed to be an ethical standard, most arbitration laws are now sanctioning this by including a provision that mandates the arbitrators to disclose any circumstances that give rise to justifiable grounds as to his impartiality or independence (see e.g. article 10(1) of the Kosovo Arbitration Law).

6.7. Grounds for Challenging an Arbitrator

Article 9 of Kosovo's Law on Arbitration sets forth the key prerequisites that an arbitrator should have in order to be appointed, his independence and impartiality being the most important factors. Article 10 clarifies that when a prospective arbitrator is approached by a party or a Court, he shall disclose circumstances that give rise to justifiable grounds as to his impartiality or independence. Even after his appointment, an arbitrator is obliged to disclose such circumstances, unless the parties have already been informed by him.

Non-disclosure of the abovementioned circumstances may give rise to the challenge of the arbitrator by the parties. According to Article 10(2), either party may challenge an arbitrator if there are justifiable doubts as to his:

- independence
- impartiality, or
- if the arbitrator does not have the qualifications agreed to by the parties.

The following examples illustrate circumstances that may give rise to justifiable doubts as to the impartiality or independence of an arbitrator:

Example 1:
Arbitrator XYZ was appointed by Claimant in a dispute over a sales contract with Respondent. After he is appointed, Respondent finds out that Arbitrator XYZ had previously represented as a lawyer a company which is planning to merge with Claimant's company in the days to come. Respondent immediately objects to the appointment of Arbitrator XYZ arguing that there are justifiable grounds to believe that Arbitrator XYZ would not be impartial since he has previously had a commercial relationship with a company that is merging with Claimant and would therefore be biased and act on Claimant's favour.

Example 2:
Arbitrator XYZ is appointed by Respondent and immediately after his appointment he discloses that he had been married (and afterwards divorced) to a woman who possesses shares in the Respondent's company. Claimant immediately initiates a challenge procedure against Arbitrator XYZ arguing that previous personal relationship with anyone in the Respondent's company is sufficient ground to give rise to doubts as to his impartiality and independence.

Example 3:
Arbitrator XYZ is appointed by Claimant and as soon as Respondent finds out who is Claimant's appointee, objects on the ground that the owner of Respondent's company has had a conflict with Arbitrator XYZ three years ago over the ownership of a property. Respondent argues that there is still animosity between Arbitrator XYZ and Respondent, and therefore it does not believe that Arbitrator XYZ would be impartial and independent during these proceedings.

A party may challenge an arbitrator based on the abovementioned reasons only if it became aware of their existence after it appointed the arbitrator and it must do so immediately after it became aware of such circumstances.

Article 10 of the Kosovo Arbitration Rules contains similar grounds for challenging arbitrators (see also UNCITRAL Arbitration Rules, articles 11-12). Further, to avoid challenges, Article 11 of the Kosovo Arbitration Rules provides for the arbitral institution to confirm proposed arbitrators. Similar provisions are also contained in the ICC Rules of Arbitration (article 13).

6.8. Procedure for Challenging an Arbitrator

Article 11 of Kosovo's Law on Arbitration allows the parties to agree on a procedure for challenging an arbitrator and in the alternative, it provides for a procedure to be followed in cases when the parties have not agreed on this issue. Paragraph 2 of the same article provides that "*the party which intends to challenge an arbitrator shall within fifteen days after the appointment of an arbitrator, or after circumstances listed in article 10, par.2, became known to that party, send notice of its challenge to the other party and the other members of the tribunal.*"

As we can see, a party must make its challenge promptly after it becomes aware of circumstances as to an arbitrator's impartiality or independence and inform the other party as well as the arbitral

tribunal. Unless after this challenge, the arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal has the right to decide on the challenge (see article 11(3) of the Law). If the challenge is not successful, the challenging party may request for a Court intervention, by asking it to decide on the challenge, which decision shall not be subject to appeal. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award (see article 11(4) of the Law).

The right of a party to challenge an arbitrator before a court during the arbitral proceedings is recognized by most arbitration laws. However, there are both advantages and disadvantages related to this right.

Advantages are mostly related to the fact that a question about an arbitrator's independence or impartiality can be decided forthwith, and a party's remedies would not be exhausted with the arbitral tribunal's rejection of the challenge. This is a very important right in light of the fact that neutrality and fairness are two significant advantages of arbitration and the parties always want to make sure that they get a fair outcome, which would not be possible with a biased arbitrator.

Disadvantages of this system, on the other hand, mostly relate to a party's use of this right as a delaying tactic, since an average challenge procedure before a court can take up to six months, even though this depends on a country's judicial system and its functionality. This is especially true in cases when the Law allows the parties to initiate a challenge procedure before a court while arbitration proceedings are still ongoing. (Such approach is embraced by article 11(4) of the Kosovo Law). The arbitration laws of some countries, on the other hand, have found a better solution and they only allow a challenge procedure before a court after the arbitral tribunal has rendered its award. This approach, which for example prevails in Sweden, minimizes delays in arbitration proceedings.

The procedure for challenging arbitrators is included in the Kosovo Arbitration Rules (Arts. 12-13). Under the Kosovo Arbitration Rules, the arbitration institution, rather than a Court, would make a decision on the challenge (Article 13.5). The same provision is included in other arbitration rules (e.g. ICDR, Art. 9; UNCITRAL Rules, Art. 13.4). Having an institution, rather than a court, make the decision is another example of how institutional arbitration avoids the possibility of delays associated with court intervention.

6.9. Arbitrator's Failure to Act

An arbitrator's mandate is not always terminated because of a successful challenge based on his impartiality or independence. Kosovo's Law on Arbitration also lists "an arbitrator's failure to act" as a ground for the termination of his mandate. Article 12 provides that "*if an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate shall terminate if he resigns or if the parties agree on the termination of his mandate*."

The term "failure to act" is a very vague term. It is, nevertheless, introduced in arbitration laws in order to ensure sufficient flexibility to cover the different situations in which an arbitrator's non-performance affects the normal flow of arbitral proceedings. In judging an arbitrator's failure to act, a court or an arbitral tribunal should always take into account the circumstances of the case, and evaluate what action was expected of him, whether the delay or non-performance is reasonable,

whether his conduct is well below the expected standards and whether he fulfills the normal qualifications that an average competent arbitrator has.

Just like the case with the challenge to arbitrators, the Law allows the Court to make the final decision whenever the arbitrator does not resign or if the parties do not agree on the termination. The Court can make that decision upon the request of any party or member of the tribunal. No appeal is allowed against a Court's decision on this matter.

6.10. Procedure for Removing and Replacing an Arbitrator

Article 13 of Kosovo's Law on Arbitration states that "*in the event the mandate of an arbitrator is terminated in accordance with articles 11 or 12 or because of the arbitrator's resignation from office, a replacement arbitrator shall be appointed in compliance with the provisions applicable to the appointment of an arbitrator, unless the parties agree on another procedure.*"

The procedure for removal has been presented in sections 6.8 and 6.9 and it is clear that the final say on removing an arbitrator belongs to the court (or the arbitration institution) , if a party requests so. If a party does not make a request before a court, an arbitral tribunal's decision is binding. Once the court or the arbitral tribunal has made the decision, and if that decision accepts the challenge to the arbitrator, he must be removed from the panel immediately and replaced with another arbitrator.

Article 13 clarifies that a substitute arbitrator needs to be appointed in accordance with the rules that are applicable to the appointment of the arbitrator being replaced. This means that if the departing arbitrator was appointed by the Claimant then the Claimant shall appoint the substitute. If he was appointed by Respondent or was selected by an institution, the Respondent or the institution shall select the substitute.

Kosovo's Law does not discuss whether the arbitral tribunal needs to repeat a part or all of the hearings in the event a substitute arbitrator is appointed. This issue, which is regulated by many arbitration rules and laws, has a significant importance because while the parties may request a repetition of proceedings, the arbitral tribunal needs to make sure to complete the case in a timely fashion. With respect to this, UNCITRAL Model Law presents a balanced approach by providing that if the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated, whereas if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal. (See Article 14 of UNCITRAL Model Law). Other rules simply provide that it is up to the arbitral tribunal to decide whether it should repeat any previously held hearings once the substitute arbitrator is appointed. (See e.g. UNCITRAL Model Rules, Art. 15; Kosovo Arbitration Rules, Art. 15 ICDR Arbitration Rules, Art. 11.2).

6.11. Exercise: Selection of an Arbitrator

Instructions:

The participants should work in groups of two. Participant 1 shall prepare a list of questions for the screening and selection process, while participant 2 shall play the role of the potential arbitrator and answer questions. Based on the answers, participant 1 shall decide whether to appoint participant 2 as the arbitrator and present the reasoning for his or her decision.

When preparing the questionnaire, participant 1 should have in mind the following:

- **Impartiality and Independence** (Arbitrator's financial, business, professional or personal relationships with the appointing party or that party's counsel; Arbitrator's interest in the matters in dispute or the underlying transaction).
- **Arbitrator's experience in arbitration** (prior experience in arbitration, nature of disputes arbitrated, relative complexity of disputes arbitrated, etc)
- **Arbitrator's professional, commercial or technical expertise** (depending on the nature of the dispute)
- **Arbitrator fees** (daily or hourly fees)
- **Arbitrator's schedule and his availability** (for scheduling conference calls as well as hearings)

6.12. Summary

This module examined the procedure for appointing arbitrators and the factors that need to be considered by the parties during the arbitrator screening and selection process. It discussed legal and ethical standards related to arbitrators as well as the procedure for challenging, removing and replacing an arbitrator.

In this module, you learned to:

- Explain and apply key concepts and principles on the appointment of arbitrators and the appointing authorities
- Compare when a three-arbitrator panel preferable to a single arbitrator
- Define key attributes of an effective arbitrator
- Recall and discuss legal and ethical standards that govern the actions of arbitrators
- Present and analyze grounds for challenging an arbitrator
- Outline the procedure for challenging an arbitrator
- List consequences of an arbitrator's failure to act
- Describe the procedure for removing and replacing an arbitrator and the duty to repeat a hearing if an arbitrator is replaced
- Exercise ways to screen and select arbitrators

MODULE 7:
ARBITRAL PROCEEDINGS

7.1. Overview

This module sets forth the steps that are undertaken during arbitral proceedings. It describes ways to avoid delays and to resolve issues related to jurisdictional challenges. It also outlines key elements of Claimant's and Respondent's written submissions as well as the procedure for their amendment.

7.2. Learning Objectives

Upon completion of this module, you will be able to:

- Complete the steps for the commencement of arbitral proceedings
- Describe how to expedite and avoid delays in arbitral proceedings
- List grounds for challenging the jurisdiction of the arbitral tribunal and resolve issues related to such challenges
- Outline the procedure of issuing preliminary orders
- Draft key elements of Claimant's and Respondent's written submissions before the commencement of oral hearing
- Describe when it is permissible and how to amend a written submission

7.3. Steps for Commencing Arbitral Proceedings

A case can be referred to arbitration in two situations: first, when there is a pre-dispute arbitration agreement which clearly designates arbitration as the dispute settlement form, and second, when the parties agree on arbitration after a dispute has arisen.

In both these cases, it is always the Claimant who initiates the case by presenting its Statement of Claim before the arbitral tribunal is chosen by the parties. The following are the steps undertaken during the arbitral proceedings:

- Request for Arbitration – submitted by Claimant
- Statement of Claim – submitted by Claimant
- Statement of Defense – submitted by Respondent
- Appointment of Arbitrator or Arbitrators
- Constitution of the Arbitral Tribunal
- Commencement of Oral Hearings
- Oral Arguments by Claimant and Respondent
- Presentation of Evidence (Witnesses, Experts, etc)
- Deliberations of the Arbitral Tribunal
- Rendering of the Award

With respect to the first step, different laws have different rules concerning the time when the arbitral proceedings are considered to have commenced. The most common approach though, is the one also envisaged in Kosovo's Law on Arbitration, article 18, providing that "unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for the dispute to be referred to arbitration is received by the Respondent."

Even though the Law allows the parties to agree on a different procedure, it sets forth that in case this agreement does not exist, the proceedings will commence at the time the Respondent receives a copy of the Request for Arbitration that Claimant has sent to the arbitral tribunal. A Respondent is generally deemed to receive a copy of the Request for Arbitration on the day that it is delivered physically or by registered mail to him or to his mailing address, habitual residence, or place of business. (Article 4).

The Request for Arbitration is usually followed by Claimant's Statement of Claim, which presents the position of Claimant related to the case. Once the Request for Arbitration and the Statement of Claim are received by Respondent, he will have to prepare its Statement of Defense. The elements of the Statement of Claim and Defense are discussed in section 7.8 of this Module.

The Kosovo Arbitration Rules take a different approach and provides that the statement of claim shall include the notice of arbitration unless the parties come to a different agreement (Article 20.2). The reason for this is to discourage parties from filing frivolous notices (requests).

The Kosovo Law also sets forth some general principles that apply during the arbitral proceedings, such as the equal treatment of the parties (article 16.1), the freedom of parties to choose their own representatives (article 16.2) and to agree on the arbitration procedure (article 16.3), and the right of the arbitral tribunal to determine the procedure and the rules applicable to the case if the parties failed to agree on these matters (article 16.4). Similar provisions are included in the Kosovo Arbitration Rules.

As mentioned above, except for the limited number of mandatory provisions in arbitration laws, parties have the autonomy to develop their own procedure, which can be accomplished by agreeing to use particular arbitration rules such as the UNCITRAL Model Rules or the Kosovo Arbitration Rules. With respect to commencing the arbitration, the rules for institutional arbitration often provide for the Claimant to submit the Statement of Claim to the institution at the same time as its is submitted to the Respondent or for the institution to deliver the Statement of Claim to the Respondent. These Rules provide that the arbitration is commenced on the date the institution received the statement of claim (e.g. ICDR Arbitration Rules, art. 2.2; Kosovo Arbitration Rules, Article 20.1)

7.4. Avoiding Delays in Arbitral Proceedings

Arbitration is chosen for its advantages, one of which is its time efficiency in comparison to court proceedings. For that reason, the arbitrators need to make sure that this expectation of the parties is met. There are a number of circumstances that should be taken into account, in order to make sure that unnecessary delays do not occur during arbitral proceedings.

- **First**, the arbitral tribunal needs to make sure that deadlines are respected by the parties. The arbitration rules in most cases set forth deadlines for written submissions, their amendments, and any objection that the parties might have during the proceedings. The arbitrators need to make sure that the parties are reminded on those deadlines, and in case the arbitration rules do

not foresee any deadline, then the arbitrators must make this decision and inform the parties promptly.

- **Second,** the arbitral tribunal should swiftly reject ungrounded claims presented by either party related to challenges to the jurisdiction of the tribunal or challenges to arbitrators, since these claims are in many cases made simply as a delaying tactic.

- **Third,** the arbitrators should conduct the proceedings with a view to expediting the resolution of the dispute by directing the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

- **Fourth,** the arbitrators should make sure not to accept challenges on the discovery procedure when they are used as dilatory tactics. An experienced arbitrator knows the best discovery procedure for expediting the proceedings, and it should avoid challenges in this regard by ordering the production of documents or other evidence within a period of time it deems reasonable.

The parties' lawyers may use different kinds of dilatory tactics, whenever it is in the interest of their client. In all these cases, the arbitral tribunal needs to make sure that it clearly understands the circumstances of the case so that it distinguishes cases when a party is making a challenge simply to delay the process, on one hand, and when it is making this challenge based on justifiable grounds, on the other. Typically, it suffices for an arbitrator to warn the parties of the consequences of dilatory tactics. The arbitral tribunal has the discretion to decide what the consequences would be and they may range from preliminary injunctions or orders to monetary damages against a party that is using the dilatory tactic.

7.5. Grounds for Challenging the Jurisdiction of the Arbitral Tribunal

Challenges to the jurisdiction of an arbitral tribunal are becoming very frequent in arbitration. One reason is because parties are using this as a delaying tactic. Other reasons include the alleged invalidity of the arbitration clause or the non-arbitrability of the subject matter (See Module 5). An arbitral tribunal needs to be prepared for such challenges and it shall make the decision on its jurisdiction based on the competence-competence principle, which is provided in article 14(1) of Kosovo's Law on Arbitration as well as Article 24 of the Kosovo Arbitration Rules.

As far as the timing of a request for challenge is concerned, Kosovo's Law on Arbitration clarifies that an objection to the jurisdiction of the tribunal shall be submitted not later that the submission of the statement of defense by Respondent. In other words, the challenge to the jurisdiction needs to be one of the legal arguments and legal conclusions that Respondent makes in its statement of defense. The fact that a party challenging jurisdiction has participated in the arbitrator-appointment process, does not deprive it from its right to challenge the jurisdiction of the tribunal, as long as the request has been received in time. (Article 14.2). A late challenge to the jurisdiction may be accepted by the tribunal only if it considers that the party making the challenge has a reasonable justification for the delay. (Article 14.4). An example of a reasonable justification may be cases when a party became aware of facts that lead to the challenge after it had submitted its statement of defense.

In general, an arbitral tribunal rules on a challenge concerning its jurisdiction as a preliminary question, however, this decision is in the discretion of the arbitral tribunal and it may even proceed with the arbitration and rule on the challenge as a part of the final award. The decision of the arbitral tribunal on jurisdiction is subject to a court's review. According to the Law, any party may request the court to review the decision of the arbitral tribunal on jurisdiction.

However, such request does not prevent the arbitral tribunal from continuing with the arbitral proceedings and from making an award, whenever it deems it appropriate. (see article 14.5 of the Law). Similar provisions on the challenge to jurisdiction of the arbitral tribunal are found in the Kosovo Arbitration Rules, Article 24.

The following are two examples that show cases when the jurisdiction of an arbitral tribunal may be challenged by a party:

Example 1
Claimant (ABC) and Respondent (XYZ) have entered into a sales contract which contains an arbitration clause designating the Stockholm Arbitration Center as the competent authority to settle their disputes. As soon as the dispute arises over the quality of goods, Claimant submits its request for arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce. As soon as Respondent receives notice of the claim before this Institute, it prepares its Statement of Defense, where it also challenges the jurisdiction of the Tribunal, arguing that the parties had never agreed on the Arbitration Institute of the Stockholm Chamber of Commerce, but rather on the Stockholm Arbitration Center, which in fact does not exist. Respondent argues that mentioning an inexistent arbitration institution makes the arbitration clause invalid, and therefore an arbitral tribunal constituted under that clause and before an institution which was not chosen by the parties does not have jurisdiction.

Example 2
Claimant (ABC) and Respondent (XYZ) have agreed to settle through arbitration any dispute that may arise out of their employment contract. Both Claimant and Respondent come from Switzerland, the laws of which foresee that employment disputes are non-arbitrable but should definitely by settled in courts. Once Claimant submits its request for arbitration and its statement of claim, Respondent challenges the jurisdiction of the arbitral tribunal arguing in order for the dispute to be settled through arbitration, the principle of 'arbitrability' must be met. Respondent argues that since the dispute is non-arbitrable, the arbitral tribunal has no jurisdiction.

7.6. Procedure for Issuing Preliminary Orders

An arbitral tribunal has the right to issue preliminary orders at the request of either party. In order to do that, the tribunal needs to receive credible evidence that in the event such preliminary order is not issued, the party requesting it will suffer immediate or irreparable injury, loss or damage. (See article 15.1 of the Law).

Preliminary orders are usually requested by parties that are afraid of the other party's non-performance. An example is set out below:

Claimant (Company ABC) has submitted its claim before an arbitral tribunal against Respondent (Company XYZ). Immediately after the arbitration panel is constituted, Claimant finds out that Respondent's company is about to bankrupt. For that reason, it requests the arbitral tribunal to issue a preliminary order by which it orders Respondent to pay security for costs. Claimant argues that since it has grounds to believe that it will win the case, Respondent would not be able to pay them the costs of damages as well as arbitration costs, and therefore, the arbitral tribunal should request Respondent to pay security for costs.

This case shows an example of what would be deemed a justifiable request by many arbitral tribunals. Similar to the example above, Kosovo's Law on Arbitration recognizes the arbitral tribunal's right to require any party to provide appropriate security in connection with such preliminary orders. (Article 15.1). If a party believes that it cannot enforce the preliminary order through the arbitral tribunal, it may request a competent court to order this enforcement. (See Module 3). If the court finds that preliminary order issued by the tribunal was in fact not justified, the party against which the order was issued will be compensated damages by the party in whose favour the order was issued. This will happen only in cases when damages were incurred to a party as a result of this order. The arbitral tribunal also has the power to decide on the justification of the preliminary order and matters related to the compensation of damages referred to above. (see article 15.3 of the Law).

The Kosovo Arbitration Rules, Article 27, have more detailed provisions on interim measures (preliminary measures). The Arbitration Rules empower the arbitral tribunal, at the request of the party, to grant interim measures if it deems necessary or to request the court to grant such measures.

7.7. Claimant's and Respondent's Written Submissions

The Statement of Claim and the Statement of Defense are the two most important documents in an arbitral proceeding. For that reason, quite a lot of energy and expertise needs to be exhausted in drafting them, even though the parties will have the chance to argue their positions orally, during the oral hearing process.

The Request for Arbitration (which is the first document submitted by Claimant) is usually followed by Claimant's Statement of Claim, which presents the position of Claimant related to the case and it mainly contains these elements:

- Statement of facts of the case
- Legal arguments in support of Claimant's position
- Legal conclusions

Attached to the Statement of Claim are all the relevant documents that prove Claimant's position on all the arguments presented in that Statement. Such documents are listed as "Claimant's exhibits", and may contain documents such as the contract, communications between the parties, and other documents they deem relevant. If Claimant does not submit its statement of claim and does not show sufficient cause for such failure, the arbitral tribunal shall terminate its proceedings (see article 26 of the Law).

Similarly, the Statement of Defense which is prepared by the Respondent includes the following elements:

- Statement of facts
- Legal arguments in support of Respondent's position (including any challenge to the jurisdiction of the arbitral tribunal)
- Legal conclusions

A Respondent needs to make sure that its Statement of Defense is an answer to the Statement of Claim, which means that it has to respond to all issues raised in the Statement of Claim. It should also include any counterclaims. If the Respondent has failed to communicate his Statement of Defense the arbitral tribunal continues with its proceedings, but this is not considered as an admission of the Claimant's allegations, since the tribunal will continue with its assessment of the claim, without Respondent's statement. (See article 26 of the Law).

Both, the Statement of Claim and the Statement of Defense need to be submitted within the period of time agreed to by the parties, or in the absence of such agreement, within the period determined by the arbitral tribunal. (See article 20.1 of the Law).

Some arbitral tribunals request the parties to prepare briefs (memoranda), which present their positions in a very lengthy way. These memoranda are sent to the tribunal before the oral hearing starts. Kosovo's Law on Arbitration does not foresee the submission of such documents. Nevertheless, memoranda are usually requested in cases when an arbitral tribunal wants a detailed description of the legal position of the parties before the oral hearings, in order to keep the hearing as short as possible. Memoranda also help the tribunal to decide the relevance of documents, evidence, witnesses as well as determine the order of proof and the order of issues to be heard from the parties and determined by the tribunal.

The Kosovo Arbitration Rules, Article 20, specifies that Statements of Claim to include the notice on arbitration, unless parties come to a different agreement. The reason behind it is to discourage parties from filing non-serious notices. Moreover, the Kosovo Arbitration Rules specify that Statement of Claim should include the following information: names and contact information of parties, identification of arbitration agreement in which parties rely on, a brief description of dispute, facts and legal basis in support to the claim, amount of dispute at the time of the claim. If parties did not agree before on the number of arbitrator, place or language of arbitration, these can be proposed on Statement of Claim. A copy of contract agreement or arbitration and other documents need for the support of the claim shall be attached to the Statement of Claim.

7.8. Amendments to Written Submissions and Counter-claims

Parties are generally asked to present written submissions including all their requests, so that an amendment to those submissions is not necessary at a later stage. However, almost all arbitration rules and laws allow parties to amend or supplement its claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment due to delay in making the amendment. (See e.g. article 20.2 of the Law). Clearly, if the tribunal

considers that such amendments would cause lengthy delays, which would be contrary to one of the main principles of arbitration – time efficiency, then it usually would not allow such amendments.

The tribunal would apply the same rules and standards when it comes to counter-claims. (Article 20.3). of the Law provides that "in the statement of defense, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the Respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

Apart from cases when the Law would disallow the amendment of a written submission, the only criteria that the tribunal would look at to decide whether such a request is admissible is its appropriateness related to delays that it may cause.

Article 22 of the Kosovo Arbitration Rules contains similar provisions to those in the Law. The Rules also make clear that the amendments/supplements to the statement of claim or defense are not allowed if they are outside the arbitral tribunal's jurisdiction.

7.9. Exercise

Instructions:

Participants should work in groups of two. Assume that you are the attorney representing a company that is about to initiate an arbitration proceeding. Explain to the client how the procedure differs from initiating a court case. Then switch roles and the second participant should explain the procedure for responding to the claim.

7.10. Summary

In this module you have examined the steps for commencing arbitral proceedings and the undertakings of both Claimant and Respondent, as far as their written submissions are concerned. Issues related to the challenge of the jurisdiction of an arbitral tribunal were also discussed.

In this module, you learned to:

- Complete the steps for the commencement of arbitral proceedings
- Describe how to expedite and avoid delays in arbitral proceedings
- List grounds for challenging the jurisdiction of the arbitral tribunal and resolve issues related to such challenges
- Outline the procedure of issuing preliminary orders
- Draft key elements of Claimant's and Respondent's written submissions before the commencement of oral hearing
- Describe when it is permissible and how to amend a written submission

MODULE 8:
ORAL HEARINGS

8.1. Overview

This module sets forth the steps that are undertaken during the oral hearings in an arbitral proceeding. It lists the key issues related to the performance and actions of arbitrators as well as the parties' counsel. It also discusses issues of evidence, default of a party, and the waiver of the right to object.

8.2. Learning Objectives

Upon completion of this module, you will be able to:

- Assess the role of arbitrators as the key to the arbitration process
- List key issues a good advocate will focus on during the oral arguments
- Exercise the role of Claimant and Respondent in oral submissions (pleadings)
- Organize presentations and present arguments on the procedure and merits of a case using the best techniques of advocacy
- Explain and apply issues of evidence, witnesses, and expert opinion during oral hearings
- Assess and judge issues related to default of a party and the waiver of the right to object.

8.3. Arbitrator's Role during Oral Hearings

The arbitrators are the key to the whole arbitration process. The flow of arbitral proceedings depends to some extent on the arbitration rules applicable to the case, but to a large extent is influenced by the arbitrators' case management. Chapter 5 of the Kosovo Law on Arbitration gives only the general parameters for the conduct of arbitral proceedings, which leaves considerable discretion for the arbitrators to manage the hearing. In order to achieve the objectives of a speedy, economic, and fair resolution of disputes, arbitrators need to take into account the following factors.

8.3.1. Controlling the Hearing

Even though informality is one of the advantages of arbitration, this does not mean that the arbitrators should exercise no control over the hearing process. The arbitrators should enforce the agreed schedule and make sure that the starting time, the length of breaks and adjournments are respected and insisted upon. The Kosovo Arbitration Rules provide that witnesses are heard and examined under the conditions set by the arbitral tribunal (See Art. 29).

8.3.2. Acting with Authority and Professionalism

Given the degree of discretion that the arbitrators enjoy in the arbitral process, it can be said that they enjoy a greater deal of authority than judges. Arbitrators should not be passive during the proceedings, but should rather manage the case with authority and a firm hand. However, even though the arbitrators are allowed to undertake all the measures they deem necessary for a time and cost effective process, they need to be careful not to turn the process into an arbitrary or autocratic one. The parties' satisfaction is to a great extent what can make a hearing successful or non-successful.

8.3.3. Ensuring Effective Case-Management

Arbitrators need to make sure that the proceedings are conducted as expeditiously and economically as possible, and for these reasons, especially in big cases, good case management needs to start even before the actual hearing. The arbitrators should prepare conference calls, timetables, schedule the presentation of evidence, establish the order of presentations for parties' counsel, suggest presentation formats, know the availability of witnesses well in advance, and follow other guidelines for the efficient flow of proceedings. Institutional arbitration can be very helpful in this regard as the institution will keep track of the proceedings and provide administrative support as necessary. Institutional arbitration can be very useful in this regards as this institution keeps track of proceedings and ensures administrative support if needed.

8.3.4. Maintaining the Focus

Lawyers sometimes tend to take the arbitrators off track, in order to delay the proceedings in favour of their client. In those cases, the arbitrators should clarify and prioritize the issues and focus the participants on the issues. He/she must direct the parties' behavior and make sure they are only heard with respect to real issues relevant to the case.

8.3.5. Other Relevant Techniques

The arbitrators should, apart from having in mind the elements presented above, make sure there is continuous cooperation when it comes to the exchange of documents between the parties themselves as well as with the tribunal. (See article 21 of the Law). In addition, they should insist on having long uninterrupted hearings over a certain period. They should ask the parties to provide each other, as well as the tribunal, with a list of witnesses they plan to call. It is also helpful for arbitrators to make sure they restrict the arguments of parties to a certain time period.

8.4. Key Issues a Good Advocate Will Focus on During Oral Arguments

The attributes of an effective advocate (counsel) are in fact dependent on a very subjective assessment. Different arbitrators like different elements when it comes to presentations by advocates at an arbitration hearing. Nevertheless, there are some effective and ineffective techniques on which most arbitrators agree. These techniques are presented in the table below.

Effective Techniques for Advocates	Ineffective Techniques for Advocates
Make short and clear presentations	Do not make irrelevant and long statements
Make logical and easy-to-follow presentations	Do not be repetitious
Make your strongest points first	Do not look disorganized and unprepared
Treat the arbitrators with a lot of respect	Do not interrupt an arbitrator
Demonstrate an excellent knowledge of facts	Do not be argumentative
Organize your documents and papers	Do not be loud or offensive

Focus on key issues	Do not ignore the facts of the case or hesitate to admit fault
Maintain a good eye contact with all the arbitrators	Do not ignore important trade and commercial practices
Be calm, persuasive and professional	Do not make theatrical presentations
Admit correct facts in an honest way, even if they are not in your favour	Do not introduce arguments based on inexistent facts
Make visual presentations, through photos or other techniques	Do not look too hostile toward your opposing counsel
Distribute exhibits	Do not avoid questions from the arbitrators
Be ready to answer any question and receive the questions well	Do not make rhetorical questions to the arbitrators

8.5. Sequence of Presentations

An arbitral tribunal does not always hold oral hearings. There are cases when this is deemed to be unnecessary or the parties agree that no hearings shall be held (See article 21.1. of the Law). In most cases, however, an arbitral tribunal decides to hold hearings at an appropriate stage in the proceedings. If this is the case, the parties need to be notified in advance so that they have sufficient time to prepare the evidence it plans to present during the hearing. (See Article 21.2 of the Law and Article 29 of the Kosovo Arbitration Rules). The order of proof (presentations of parties) is usually determined by procedural rules of the institution which administers the arbitral proceedings, unless the parties have agreed otherwise. The usual order, which is envisaged in most rules, is the following:

1. The Claimant presents its **claim** - which includes an opening statement, the detailed arguments, periodic summations (in case of long proceedings), and a closing statement.
2. The Respondent presents its **defense** - which should be responsive to the arguments raised by Claimant, and also includes an opening statement, the detailed arguments, periodic summations (in case of long proceedings), and a closing statement.
3. The Claimant presents its **rebuttal** to Respondent's defense
4. Respondent presents its **rebuttal** to Claimant's rebuttal. (*Not always allowed*).

Before the hearing, and during the entire course of proceedings, each party is obliged to supply the other party with all documents or other information presented to the arbitral tribunal. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decisions shall be communicated to all parties. (See article 21.3 of the Law).

The statements of the parties should be framed in ways that fulfill the requirements of good advocacy techniques, presented in section 8.4. Most arbitrators find it helpful if the counsel use **opening statements,** even if the parties have already submitted their positions in writing. This helps the arbitrators know what the counsel will focus on and what key points and legal arguments they will make. This is also considered as a road map for the arbitrators, because most of them do not like lengthy statements that do not outline any key issues. Apart from opening statements, whenever the proceeding is likely to last for more than a day, the arbitrators find it helpful if the

counsel make **periodic summations**. It usually helps if the counsel summarizes the testimony of a witness or any other evidence which might take time to be presented. The evidence sometimes tends to go beyond that which is relevant, and for that reason, the counsel can sum up the relevant proof and refocus the attention on important issues. After presenting all arguments, the counsel should make sure to do their **closing statements**. Since the arbitrators will be hearing a lot of evidence, witnesses, and statements during the course of proceedings, the counsel should emphasize at the end what is important for the arbitrator to hear and finish up the roadmap it had started with its opening statement.

After the presentation of the claims by both parties, the arbitral tribunal declares the hearings closed. The arbitral tribunal may, if it considers it necessary due to exceptional circumstances, decide on its own initiative or upon an application of a party, to reopen the hearings at any time before the award is made. (See article 22 of the Law and Article 32 of the Kosovo Arbitration Rules).

8.6. Issues of Evidence, Witnesses and Expert Opinion During Oral Hearings

Kosovo's Law on Arbitration provides that each party shall have the burden of proving the facts relied on to support its claim or defense and it is up to the arbitral tribunal to determine the admissibility, relevance, materiality and weight of the evidence offered. The tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine. (Article 23) See also Kosovo Arbitration Rules, Art. 28.

Different from the courts, in arbitration the focus is not on the formality of presentation of **evidence**, but rather on obtaining relevant evidence that helps the arbitrators reach an understanding of the dispute. As we can see from the provisions of Kosovo's Law on Arbitration, the arbitrators have the discretion to decide what evidence is relevant and admissible, and to exclude evidence deemed by them to be irrelevant. These wide powers in handling evidence, however, carry with them the responsibility to evaluate the evidence carefully. In addition, to make the proceedings move faster, the arbitrators may come up with methods of presentation and order or proof that are not typical to courtroom trials. For example, the arbitrators may ask from the counsel to provide biographical information for the witnesses that will testify in the proceedings, so that they do not have to devote time to asking questions about the witness's identity, work experience, relations to the case or his education.

When it comes to **witnesses,** Kosovo's Law on Arbitration provides that if the parties decide to call witnesses to be heard, they shall communicate the details of each witness (name, address, etc) to the other party, at least 15 days before the hearing. Similar to all other rules of arbitration, Kosovo's Law allows the evidence of witnesses to also be presented in the form of written statements signed by the witness, provided that the witness is made available to the parties, if one of the parties requests the examination of the witness. (See article 24 of the Law). It is important to emphasize that even though a written statement or deposition may be used as a substitute to direct examinations of the witness in a hearing, it does not have the same value if the witness is not available for cross-examination. With new technological developments, some arbitral tribunals are now allowing videotaped statements or even direct video recordings, where even if the witness is

not present in the room where the hearing takes place, the arbitrators and the counsel may pose questions to the witness.

Apart from evidence presented by the parties, as well as witness testimonies, the arbitral tribunal may appoint one or more **experts** to report to it in writing on specific issues to be determined by the arbitral tribunal. If the arbitral tribunal decides to do this, it may ask the parties to provide to the expert all documents he might need in order to prepare his expert opinion. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express in writing their opinion on the report. After the delivery of the written report, the parties may ask the expert to be heard directly at a hearing and cross-examine him. (See article 25 of Kosovo's Law on Arbitration). If the parties have proposed the experts themselves, it is their job to establish the expert's qualifications before an arbitral tribunal. Since contending parties often appoint different experts who come up with opinions that are diametrically opposed, it is generally more efficient and fair if the arbitral tribunal appoints a neutral expert, who would be available for examination by both parties equally.

The Kosovo Arbitration Rules (Articles 28-30) contain similar provisions to the Kosovo Law on Arbitration.

8.7. Default of a Party and Waiver of the Right to Object

The parties are obliged to comply with the arbitration rules applicable to their case, and one of the requirements is for them to provide the arbitral tribunal with statements of claim and defense within the time agreed to by the parties or set by the tribunal as well as to appear at the hearing scheduled for their case. (Article20). There are many cases, however, where a party does not supply these documents in due time or does not appear in a hearing. For these situations, Kosovo's Law on Arbitration provides that if it is the Claimant who fails to communicate its claim, without showing sufficient cause for such failure, the arbitral tribunal will terminate the proceedings. This is because if the Claimant steps down, it means that it has given up on its claims and does not want to pursue them anymore against Respondent, which was the only reason why the arbitral proceedings would have started in the first place. (See article 26.1 of the Law). If, on the other hand, the Respondent fails to communicate its statement of defense, the arbitral tribunal will continue with its proceedings and this failure will not be deemed as an admission of Claimant's allegations. (See article 26.2 of the Law). If either party fails to appear at a hearing, the arbitral tribunal continues nevertheless, and makes an award based on the evidence that is presented before it. (Article 26.3). Therefore, like the procedure in many other arbitration rules, the arbitrators will go forward with the case and render the award based on the record that is set forth before them.

Kosovo's Law also provides that whenever a party knows that the other party has not complied with a provision of the law or the arbitration agreement, he should state his objection. If it does not, then it is deemed that it has waived its right to object on the same matter. (See article 27 of the Law). For example, one party may be informed that the other has breached the arbitration agreement by submitting a case before a court. If the non-breaching party does not raise any objections as soon as it becomes aware of this fact, it will be deemed to have waived its right to object.

The Kosovo Arbitration Rules (Articles 31 and 33) contain the same provisions regarding default of a party and waiver of the right to object.

8.8. Exercise:

Simulate the opening of an oral hearing and play the role of the arbitral panel and counsel in the opening session.

Instructions:

Three participants shall play the role of the arbitral tribunal. One of them shall be the presiding arbitrator. One participant will be counsel for Claimant and the other will be counsel for Respondent.

All participants are required to read the facts of the hypothetical case presented below. The participants playing the role of the counsel of the contending party will have to prepare the arguments on behalf of their client, and present them before the arbitral tribunal. The arbitrators are allowed to pose questions at any time during the proceedings. After the presentations of the parties, as well as their rebuttals, the tribunal will read its decision and give its reasoning for such decision/award.

MEDITERRANEO WINE COOPERATIVE (CLAIMANT)

V.

EQUATORIANA SUPER MARKETS (RESPONDENT)1

I. Parties

1. **Mediterraneo Wine Cooperative** is organized under the laws of the country of Mediterraneo. Mediterraneo Wine Cooperative (hereafter "**Wine Cooperative**") has a legal personality and can bring legal actions in its own name. It has its principal office at 140 Vineyard Park, Blue Hills, Mediterraneo. Wine Cooperative produces and markets wine from grapes grown by its members. It sells wine both domestically and for export.

2. **Equatoriana Super Markets S.A**. is a corporation organized under the laws of Equatoriana. It has its principal office at 415 Central Business Centre, Oceanside, Equatoriana. Equatoriana Super Markets S.A. (hereafter "**Super Markets**") is the largest operator of super markets in the country of Equatoriana with about 2,000 outlets. With the wide selection of wines that it sells in its stores, it is the largest retailer of wine in the country.

II. Facts

From 7 to 10 May 2006 Wine Cooperative participated in a trade fair for the wine industry held in Durhan, Oceania. Super Markets sent a buying team to the fair as they had plans to hold a major wine promotion during the month of October 2006. At the fair they showed particular interest in a red wine shown by Wine Cooperative that goes by the name "Blue Hills 2005". It is a blended wine of several different grape varieties grown in the Blue Hills region, Mediterraneo. Subsequent to the fair there was an exchange of letters Wine Cooperative and Super Markets, in which there was a discussion as to the amount that might be ordered and the price.

On 10 June 2006 Super Market sent an order for 20,000 cases of Blue Hills 2005 at a price of US$68.00 per case, for a total contract price of US$1,360,000. The wine was to be delivered in four shipments. In the letter accompanying the order Super Markets wrote that it would need an acceptance of the order by 21 June 2006, since it was important for them to be able to plan for the wine promotion. It further stated that, if there had been no acceptance of the order by then, they would turn to another wine distributor for the wine promotion.

On the morning of 19 June 2006, Wine Cooperative signed the contract, and sent it to Super Markets by the ABC courier service. The ABC tracking service on the internet shows that it was received by Super Markets on 21 June 2006. In the afternoon of 19 June 2006, the representative of Wine Cooperative received an e-mail message from Super Markets purporting to withdraw the

[1] Note: Parts of the facts of this hypothetical case are taken from the 2008 VIS competition problem (see http://www.cisg.law.pace.edu/vis.html)

offer. The message seems to have been received by the server at Wine Cooperative on 18 June 2006, but the internal network at Wine Cooperative had a service failure on 18 June that was not corrected until the afternoon of 19 June. Wine Cooperative stated in his message that the reason for the purported withdrawal of the offer was that the newspapers in Equatoriana had reported that anti-freeze had been used to sweeten wine produced in the Blue Hills region of Mediterraneo.

Wine Cooperative immediately answered the same day that the newspaper articles were incorrect. No anti-freeze fluid had been used to sweeten any wine produced in Mediterraneo. Subsequently, Wine Cooperative sent to Super Markets a report by an internationally recognized expert in regard to the vinification processes. The report showed that diethylene glycol had been used as a sweetening agent in the 2005 vintage. The report showed that ethylene glycol, not diethylene glycol, is the common anti-freeze ingredient. The report acknowledged that diethylene glycol is a toxic substance when ingested in substantial quantities. However, the report showed that diethylene glycol, when used in the very tiny quantities present in the 2005 vintage, is not a dangerous substance. In fact, when used in such almost unrecognizable quantities it is less toxic than is the alcohol in the wine. Nevertheless, even after receiving this report, Super Markets repeated the purported withdrawal of the offer and added that would not consider purchasing any wine from Mediterraneo.

III. Arbitration clause, applicable law

The parties to arbitration had agreed that the applicable substantive law to the contract shall be Kosova's Law on Arbitration.

The arbitration clause is found in paragraph 13 of the contract. It provides as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration in accordance with the Kosova's Law on Arbitration. The tribunal will consist of three arbitrators. The place of arbitration will be Vindobona, Danubia. The language to be used in the arbitral proceedings will be English."

8.9. Summary

In this module you have learned of main principles related to the role of arbitrators as well as key elements that need to be taken into account by counsel representing the parties. An analysis of issues related to the presentation of evidence and other matters coming up during the oral hearing process, was also presented.

In this module, you learned to:

- Assess the role of arbitrators as the key to the arbitration process
- List key issues a good advocate will focus on during the oral arguments
- Exercise the role of Claimant and Respondent in oral submissions (pleadings)

- Organize presentations and present arguments on the procedure and merits of a case using the best techniques of advocacy
- Explain and apply issues of evidence, witnesses, and expert opinion during oral hearings
- Assess and judge issues related to the default of a party and the waiver of the right to object

MODULE 9:
ARBITRAL AWARD

9.1. Overview

This module presents the procedure for rendering an arbitral award. It explains issues related to this process, such as the decision-making procedure, the effect and form of the award, as well as interventions after the award is written.

9.2. Learning Objectives

Upon completion of this module, you will be able to:

- Apply the legal rules related to the rendering of an arbitral award
- Understand key issues on the decision-making procedure when making an award
- Describe the form of the award as well as its effect
- Explain and apply concepts of "finality" and "reviewability" of an arbitral award
- Identify cases that may require intervention after the award is written, in particular with the correction and interpretation of the award
- Explain partial awards and their effect
- Analyze the arbitral tribunal's decision on arbitration costs
- Discuss issues of deposit, authentication and certification of the arbitral award
- Describe the procedure for requesting the judicial review and the grounds for setting aside such award

9.3. Procedure for Rendering an Arbitral Award

The "Arbitral Award" is the final decision of the arbitral tribunal on the subject matter and it is the equivalent of a judgment issued by a court. The rules for rendering this award are quite detailed in all arbitration laws and institutions. Kosovo's Law on Arbitration, likewise, first clarifies what law a tribunal should apply when rendering the award. In this regard, Article 29 of the Kosovo Law provides that the arbitral tribunal may look at three different sources of law, namely:

1. The law designated by the parties as applicable to the substance of the dispute
2. Failing designation by the parties, the law determined based on rules of private international law, and
3. In all other cases, Kosovo's legislation.

The first two situations are clear, the first being when the parties choose the law in the contract, and the second being the situations when no law has been designated. In the first instance the law chosen by the parties will apply, and in the second instance the tribunal has to look at International Private Law rules. The solution in situation number three, however, is confusing because it does not clarify what "other cases" would require the application of Kosovo's legislation. One interpretation might be that after looking at International Private Law rules, the tribunal comes to the conclusion to apply the law of

the forum, i.e. Kosovo's legislation, as the law most closely connected to the contract, or for reasons of appropriateness and fairness.

The UNCITRAL Model Law (Article 28) provides that "failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable". The Kosovo Arbitration Rules (Article 36) have the same provision.

Any decision of the tribunal as far as the award is concerned needs to be made in accordance with the terms of the contract and take into account the usages of trade applicable to the transaction. (See article 29.3 of the Law). However, if the parties expressly authorize it, the tribunal may also decide ex aequo et bono or as amiable compositeur. (Article 29.2). Similar provisions are found in the Kosovo Arbitration Rules (Article 36).

"Ex aequo et bono", refers to the power of the arbitrators to dispense with consideration of the law and consider solely what they consider to be fair and equitable in the case at hand. Similarly, "**Amiables compositeurs"** clauses in arbitration agreements allow the arbitrators to decide the dispute according to the legal principles they believe to be just, without being limited to any particular national law. These two types of agreements can come into question only if the parties explicitly refer to them in the arbitration clause. Otherwise, the arbitral tribunal should always make its decisions in accordance with the law and the terms of the contract.

The following is an example clause which allows the arbitrators to act "ex aequo et bono" and "amiables compositeurs".

> *"All disputes arising under or related to this contract, including its existence, shall be finally resolved by an arbitral tribunal in accordance with the Swiss arbitration rules. The arbitral tribunal shall be composed of three arbitrators who will act as "amiables compositeurs"- ex aequo et bono -. The award of the arbitral tribunal shall be final and binding."*

Having in mind the applicable law, the arbitrators should start the procedure for rendering the award. This procedure, of course depends on the number of arbitrators. If there is a single arbitrator, he will not need to deliberate with anyone else in order to reach a decision. On the other hand, if there is a panel of three arbitrators, they need to discuss all the evidence presented before them and make the decision with a majority of votes. (See article 30.1 of Kosovo's Law). While any question related to the substance of the award must be determined with a majority of votes, questions of procedure may be decided by the chairman on his own, if he is authorized by the parties or all members of the arbitral tribunal (article 30.2 of the Law). Similar provisions are found in the Kosovo Arbitration Rules (Article 37).

The arbitrators may encourage the parties to reach a settlement of the dispute before it renders an award. If such settlement is reached at any stage during its proceedings, it shall immediately terminate the proceedings. (See article 32.1 of the Law). If requested by the parties, the tribunal shall record the settlement in the form of an arbitral award on the agreed terms, unless the contents of such settlement

violate public policy. Such award will have the same effect as any other award on the case. (Article 32.2.).

Example 1

Claimant and Respondent have concluded a contract for the sale of goods, where Claimant agreed to sell 2,000 cases of wine and Respondent agreed to buy the wine for 100€ per case. After the conclusion of the contract (which included an arbitration clause), Respondent refused to accept the shipment of wine. Assume that Claimant has presented its claim and Respondent has presented its defense before an arbitral tribunal constituted pursuant to the Kosovo Law on Arbitration. As soon as the tribunal is appointed, Claimant withdraws its claim for damages and simply insists that Respondent accept the wine it produced for them. In such situations, the arbitral tribunal should not sit cross handed and continue resolving the claims the parties have presented. Instead, since there is a chance for settlement, it should try to convince the Respondent to accept the goods, and if he is dissatisfied with the quality of goods, to either send substitute goods or reduce the price. Any settlement reached may be written as a final award by the arbitrators and will have a final and binding effect upon the parties.

Once the arbitral tribunal has issued an award, the proceedings are thereby terminated. Article 33.2 also envisages that proceedings shall be terminated in the following instances:

- If the Claimant
    a) fails to communicate his claim (as explained in Module 8)
    b) withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute
- If the parties agree on the termination of the proceedings
- If the parties fail to pursue the arbitral proceedings despite a request by the arbitral tribunal to pursue proceedings or if the continuation of the proceedings has for any other reason become impossible or unnecessary

There are cases when the Claimant decides to withdraw its claim, because it has reached a settlement with Respondent, or it understands that its claims are without merit and unlikely to be successful. Furthermore, sometimes both parties fail to appear in the proceedings, thus making the continuation of proceedings impossible or unnecessary (this is foreseen in the Kosovo Arbitration Rules (Art. 37.2). This may also happen if the parties agreed that a particular arbitrator will conduct the proceedings and that arbitrator is unavailable. In all of these cases, the termination of proceedings by the tribunal is unavoidable.

9.4. Form of the Award and Its Effect

Kosovo's Law on Arbitration establishes minimum **formal requirements** for an award issued by an arbitral tribunal. The requirements are the following:

- **It must be in writing.** (Just like the arbitration agreement, the award must be in writing in order to have effect)
- **It must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given.** (The reasoning of the arbitration award is an essential part of it, as is the case with any court decision. However, this requirement may be waived by the parties if they do not want any reasoning to be stated in the award.).
- **It shall be signed by the arbitrators** (In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall be sufficient, provided that the award states the reasons for the absence of signature. This can happen in cases when an arbitrator dies, becomes incapacitated, or refuses to sign the award.)
- **It shall contain the date and place on which the award was made and it can be made public only if the parties agree on that** (because of confidentiality requirements in arbitration, the tribunal may publish the award only with the consent of the parties).

One issue that the Law does not address is whether the arbitral tribunal will also issue the dissenting opinions of the arbitrators who did not agree with the decision of the majority.

As a general rule, the arbitral award is **final and binding** on the parties (see article 31.1 of the Kosovo Law). The award shall have the same effect between the parties as a final and binding court decision. This is precisely one of the reasons why businesses choose arbitration for settling a dispute. There are, of course, exceptions for certain circumstances, when the review of an arbitral award is allowed before a competent court. These exceptions as well as the principles of finality and reviewability of an award will be further discussed in section 9.5.

Similar provisions on the form and effect of the award are included in the UNCITAL Model Law (Art. 31) and the Kosovo Arbitration Rules (Article 35).

9.5. "Finality" and "Reviewability" of an Arbitral Award

Apart from its value as a speedy and efficient tool for settling disputes, arbitration is also favored for another reason: the finality of the arbitral award. A final award is one which finally settles all claims between the parties submitted by them before the arbitral tribunal, without leaving any further work for that arbitration panel.

As discussed previously, the arbitrators enjoy broad discretion in structuring the award and this is strongly supported by the limitations on the scope of judicial review of the arbitral awards. Very often, the issue of whether judicial review is required depends on the way how the arbitrators draft their award. For this reason, if this is not foreseen in the law chosen by the parties, they should draft an arbitration agreement which requires the arbitrators to give a statement of reasons in the arbitration award. However, a number of arbitration experts and authors have actually stated that a published award with a statement of reasons may in fact make a request for review even more likely. This is

because the reasoning in the award often gives the parties additional reasons to challenge the award in an appeal before a court.

The parties may, on the other hand, agree in their contract that the arbitration award is not final and binding and consent to appeal to a court. This way they can agree for an expanded judicial review or for private review of the award. Even though this solution gives the parties the chance to pursue their case further, especially if there is an unreasonable arbitral award rendered by an arbitral tribunal, this benefit must be weighed against the additional costs and other burdens the parties will incur.

One important element to remember is that the courts cannot overturn the award rendered by an arbitral tribunal for any grounds. Most legal systems only allow the judicial review to the extent that a court simply analyses whether the arbitrators exceeded their powers, whether the award was made based on a valid arbitration agreement, or whether the award was procured by corruption, fraud or misconduct of arbitrators. Therefore, the court cannot overturn the award for misapplication of the law or for errors of fact. The powers of a Kosovo court to set aside an award as well as the procedure for doing so are presented in section 9.10 of this Module.

9.6. Interventions after the Award Is Written: Correction and Interpretation of the Award

After the award is written, Article 35 of the Kosovo Arbitration Law provides that either party may request the arbitral tribunal to undertake one of the following actions:

- Give an interpretation of the award
- Correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature
- Make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

Such request must be made within 30 days of receipt of the award.

A tribunal established under the Kosovo Law will accept a request for an additional award if it considers it to be justified, and considers that the omission can be rectified without any further hearings or evidence. (See article 35.3 of the Law). Even when the parties have not made a request, the arbitral tribunal may make the correction on its own initiative (Article 35.2).

The right to request an interpretation of the award is also recognized in some international arbitration rules, such as the UNCITRAL Model Rules (Arts. 37-39); ICDR Arbitration Rules (Article 30). Similarly, the correction of the award is only allowed in cases of technical errors that have nothing to do with the substance of the decision. The same rules provide for the right to request an additional award, if anything claimed or counterclaimed is found to have been omitted in the arbitral award. In such cases, if the arbitral tribunal finds the request for an additional award justified because something has been

actually omitted, it makes an additional award which then forms a part of the original arbitral award. Similar provisions are included in the Kosovo Arbitration Rules (Arts. 38-40).

Some international arbitration rules have introduced rules that allow some sort of institutional review of the award, before it is submitted to the parties and made final and binding. The review is limited to the form of the award, not the merits. For example, the ICC rules of arbitration provide that "*before signing the award, the arbitral tribunal shall submit the award to the International Court of Arbitration. The Court may lay down modifications as to the form of the award and…draw the arbitral tribunal's attention to points of substance.*" (See article 27 of ICC Arbitration Rules). The Kosovo Arbitration Rules also provide for institutional review and approval of the award (Art. 44). The purpose of the review is to identify any inaccuracies or inconsistencies before the final award is made in order to decrease the possibility that a party will seek judicial review of the award.

Example 1

Suppose that an award that is made under Kosovo's Law on Arbitration does not state the date on which it was made. In addition, the award simply established that Respondent should pay the amount of 20,000€ to Claimant. The award does not, however, discuss the issue of interest, and the Claimant claims that 5,000€ of interest has accrued for a certain period. Apart from this, the award states in many parts that the parties shall pay arbitration costs without specifying whether it has decided to apportion the costs or to apply the "loser pays" rules. In this case, either party may request a correction of the award (because of the date omitted), an additional award (because of the omitted decision on interest) and for an interpretation of the award (as to the allocation of the arbitration costs)

9.7. Partial Awards and Their Effect

As opposed to final awards which put an end to all the claims submitted by the parties to an arbitral tribunal, a partial award is one where the arbitrators have made a final settlement only for some of the claims submitted to arbitration. This happens when, for example, Claimant submits separate claims on the merits and damages, and the tribunal simply makes a partial award on the merits of the case, without finally settling the issue of damages. Basically, in a partial award, only part of the claims or cross claims which are brought are settled, and the parties are left to either resolve or to continue to arbitrate (or litigate) the remaining disputes.

The issue of partial award is not dealt with by Kosovo's Law on Arbitration. This issue, however, is very important for two reasons, the first being the effect of partial awards, and the second, their enforceability.

If an arbitral tribunal decides to issue a partial award, it has to explicitly state whether that award is final or not. It has to be clear for the parties whether they can pursue their rights under the matter covered by the partial award further in courts. If the partial award is not final, it can have effect only after the complete final award is issued by the tribunal. If, on the other hand the partial award clearly states that it is final and binding for the issues that it covers, then the parties may not appeal that award.

The Kosovo Arbitration Rules do not explicitly make reference to interim or partial awards rendered by the arbitrator or arbitral tribunal. However, Article 35 of the Rules provides that "the arbitral tribunal may make separate awards on different issues at different times which shall be made in writing and be final and binding on the parties." The same provision is included in Article 34 of the 2010 UNCITRAL Rules of Arbitration and replaced the provision in the 1976 UNCITRAL Rules of Arbitration which provided that: "In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards."

It is worth mentioning that national laws and rules of different arbitration institutions have similar provisions to the Kosovo and 2010 UNCITRAL Arbitration Rules. The aim behind this, according to many authors, is to provide a broad autonomy to the arbitral tribunal to handle disputes in efficient way on various circumstances without limiting the ability in rendering awards on part of the claim.

Example 1

Claimant and Respondent entered into an installment contract, where each month Respondent was required to send 100 cases of wine to Claimant. Claimant had to pay for the goods 1 week after receiving each installment (the costs of one installment were 1000€). Claimant entered into this contract so that it could promote the wine in fairs organized in his country for 6 consecutive months. Claimant accepts the first two installments and finds that the goods are non-conforming. It refuses all the other installments, and it presents its claims before an arbitral tribunal requesting damages for the amount of money paid for the first two installments (2000€), as well as for lost profit in the amount of (10000€) for losing all of its customers during the fair.

The tribunal made a partial award, awarding Claimant the amount of 2000€, since the goods were nonconforming and could not be resold, but refrained from issuing a complete final award on the issue of lost profits, since it determined that a thorough analysis of the circumstances is necessary, and that it would take months to determine whether the sole reason that Claimant lost its customers was because it lost its contract with Respondent. The tribunal's partial award stated that it was final and binding on the issue of damages for the first two installments that Claimant paid for.

9.8. Arbitral Tribunal's Decision on Arbitration Costs

An arbitration award also addresses the issue of costs. The parties, however, may waive this requirement and agree between themselves how to handle this issue. If, however, they do not agree, the tribunal shall fix the costs of the arbitration in its award, which will include the following:

- Fees of the arbitral tribunal
- Arbitrator's costs
- Cost of expert advice and other assistance required by the arbitral tribunal and agreed to by the parties

- Travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal
- Cost of legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such cost to be reasonable
- Any fees and expenses of the court when acting as the appointing authority of arbitrators. (See article 34.1 of the Law)

The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case. In the event of a dispute as to the extent or amount of the fees to be paid to the arbitral tribunal, the Court shall have jurisdiction to settle such dispute. (See article 34.2 of the Law).

The Kosovo Law on Arbitration has embraced the "loser pays" rules, according to which the party who loses the case, shall bear the costs of arbitration. Article 34.3 of this Law provides that "unless otherwise agreed by the parties, the cost of arbitration shall be borne by the unsuccessful party." However, the Law also states that the tribunal may apportion each of the costs between the parties if it determines that apportionment is reasonable under the circumstances of the case. The Kosovo Arbitration Rules, Article 45, contain a similar provision.

9.9. Deposit, Authentication and Certification of the Arbitral Award

The Kosovo Law on Arbitration does not set forth any requirements for the parties to deposit, authenticate or certify an arbitration award in order to make it final and binding. According to article 31.1, the award is final and binding upon its issuance by the arbitral tribunal. However, in order to request the recognition and enforcement of an award the interested party must present before a court "the authenticated original award or a duly certified copy thereof." (See article 39(3)(a) of the Law). The Law, though, does not specify the authority before which such award needs to be authenticated.

In some instances, the applicable law or rules may have requirements on deposit, authentication or certification, which may delay the binding effect of the award. Such law or rules may require the parties to deposit the award before a national court, notarize it, or certify it before another institution. Countries that have such requirements include Belgium, France, Switzerland, Egypt, and Spain. On the other hand, countries such as the U.S. do not have this requirement. The latter approach is also supported by UNCITRAL Model Law, which contains no requirement on deposit. Article IV of the New York Convention provides that in order for an award to be enforced and recognized "the applicant has to supply a duly authenticated original award, or a duly authorized copy thereof." Even though this is not the same as requiring a deposit before a court or some other institution, since different countries have different rules on this matter, it is always helpful if this authentication takes place before a court, in order to meet the enforcement requirements under the laws of that jurisdiction.

9.10. Procedure for Requesting Judicial Review and Grounds for Setting Aside an Arbitral Award

Even though an arbitral award is final and binding on the parties to the dispute, courts have competences to review these awards under a limited number of circumstances. If the requirements listed below are met, a Court may "set aside" an arbitral award.

- If the applicant proves that:

    a) a party to the arbitration agreement did not have the capacity to act
    b) the arbitration agreement is not value under the law determined as applicable by the parties or the arbitral tribunal or, in the absence of such determination, under the law applicable in Kosovo
    c) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case
    d) the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on maters submitted to arbitration may be recognized and enforced
    e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the provisions of this Law or a valid arbitration agreement, under the condition that such defect had an impact on the arbitral award

- If the court finds that:
    a) Arbitration is prohibited by law
    b) The enforcement of the award leads to a result which is in conflict with public policy. (See article 36.2 of the Law)

Example 1

Assume that a contract is concluded between Claimant and Respondent, two companies operating in Prishtina. The contract was signed on behalf of Claimant by the personal assistant to the Managing Director of Claimant's company who, according to his contract, did not have the power to sign any contracts. Despite this, Respondent takes the contract as valid. In addition, the arbitration agreement simply refers to "arbitration" with no designation whatsoever of the arbitral institutions, the arbitral rules, or the number of arbitrators. After the case is submitted before an arbitral tribunal, Respondent appoints an arbitrator and does not inform Claimant of this appointment. Finally, the arbitral tribunal has 4 members, which is not allowed by Kosovo's Law on Arbitration, according to which the tribunal needs to have an odd number of arbitrators.

Clearly, in this example, the Court may set aside the award because: (1) a party signing the arbitration agreement did not have the capacity to act, (2) the arbitration agreement was not valid, (3) Claimant was not informed of the appointment of an arbitrator by Respondent, and (4) the composition of the arbitral tribunal was not made in accordance with the applicable law.

The parties can stipulate in their Arbitration Agreement the timeframe for requesting a Court to set aside an arbitral award. If they have not agreed on this issue, a request to set aside an arbitral award shall be submitted to the Court not later than ninety days after the award was received by the parties. When such request is submitted, the Court may, where appropriate, set aside the award and resubmit the case to the arbitral tribunal to resume arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside. (See article 36.4 of the Law).

The decisions of the Court shall have the form of a court order. Prior to the issuance of a court order, the Court shall hear the respondent. If an appeal is submitted for setting aside an arbitral award, the Court shall hear all parties. (See article 37 of the Law).

9.11. Exercise

Instructions:

Answer the following multiple-answer questions. Only one out of the three options is correct.

1. An arbitrator needs to make its decision and render an award based on:

a. The terms and language of the contract, the applicable law as well as trade usages applicable to the transaction in questions;
b. *Ex aequo et bono* or as *amiable compositeur;*
c. The negotiations that took place between the parties

2. If the parties agree that the arbitrators in their dispute will act ex aequo et bono:

a. The tribunal should disregard such clause and render an award only based on the applicable law and the terms of the contract;
b. The tribunal should only act *ex aequo et bono* in cases when there are gaps in the law related to a certain question;
c. The tribunal should give effect to such clause.

3. When making the award:

a. All questions, including those related to procedure shall be decided by consensus;
b. Any question related to the substance of the award must be determined with a majority of votes, while questions of procedure may be decided by the chairman on his own, if he is authorized by the parties or all members of the arbitral tribunal
c. All questions, including those related to procedure shall be decided by a majority of votes.

4. An award which settles all claims between the parties submitted by them before the arbitral tribunal, without leaving any further work for that arbitration panel is known as:

a. A final award
b. A partial award
c. Interim measures
d. An award on arbitration costs

9.12. Summary

In this module you have learned of the concepts, principles and procedures related to the rendering of an arbitral award. The rules on finality and reviewability of the arbitral award were also presented and issues of deposit, authentication, certification and judicial review of the award were also discussed.

In this module, you learned to:

- Apply the legal rules related to the rendering of an arbitral award
- Understand key issues on the decision-making procedure when making an award
- Describe the form of the award as well as its effect
- Explain and apply concepts of "finality" and "reviewability" of an arbitral award
- Identify cases that may require intervention after the award is written, in particular with the correction and interpretation of the award
- Explain partial awards and their effect
- Analyze the arbitral tribunal's decision on arbitration costs, as a part of the award
- Discuss issues of deposit, authentication and certification of the arbitral award
- Describe the procedure for requesting the judicial review of an arbitral award and the grounds for setting aside such award

MODULE 10:
RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

10.1. Overview

This module deals with principles and rules related to the recognition and enforcement of arbitral awards. It discusses the grounds for refusing recognition and enforceability of an award as well as the requirements that stem from the New York Convention on recognition and enforcement of foreign arbitral awards.

10.2. Learning Objectives

Upon completion of this module, you will be able to:

- Explain the issue of enforceability and recognition of domestic and international arbitral awards
- List and discuss the grounds for refusing the enforceability and recognition of an award
- Outline the procedure for requesting recognition and enforcement of an award
- Formulate issues that may arise from the international character of the case which are related to the recognition and enforcement of the award
- Explain the application and requirements of the NY Convention on recognition and enforcement of foreign arbitral awards

10.3. Enforceability and Recognition of Domestic and International Arbitral Awards

The enforceability of an award is the most important issue in arbitration. Without it, a party wining the case would simply end up with a piece of paper in its hand. An arbitral award that is not recognized or enforced by a national court does not have any practical value. Precisely for these reasons, the Kosovo Law on Arbitration sets forth the legal requirements for the enforcement and recognition of both domestic and international arbitral awards.

As far as domestic awards are concerned, the Law provides that "an arbitral award made by an arbitral tribunal in Kosovo shall be enforced when declared enforceable by the Court." (Article 38.1). Further, the Law confirms that Kosovo courts shall recognize arbitral awards made outside of Kosovo as effective and enforce them if such awards are recognized and are published as enforced. (Article 39.1).

As we can see from these two Articles, the Kosovo Law treats awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, and promotes their enforcement in Kosovo. These provisions dealing with recognition and enforcement are based on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. By modeling its rules on the relevant provisions of the New York Convention, the Law embraces a regime of recognition and enforcement that has been successful for 50 years. (See section 10.6 of this Module for more on the NY Convention).
In order to have an arbitral award enforced, the interested party must do the following:

- it must prepare its request for enforcement and recognition
- it must attach an authenticated copy of the award to that request
- it must translate the award in the official language of the court (if it is in a foreign language)
- it must attach a copy of the arbitration agreement which was concluded in writing
- it must make sure that none of the grounds for refusing enforcement by a court exist. (see section 10.4 of this Module)

Once these requirements are met, a party may seek recognition and enforcement in court. A party may request the enforcement in its national courts or the court of the other party (in international contracts). The two examples below explain a party's choice related to this issue.

Example 1 – Domestic Disputes

Claimant and Respondent are both residents of Kosovo. An arbitral tribunal constituted under Kosovo's Law on Arbitration rendered an award in Claimant's favor, according to which Respondent had to pay to Claimant 200,000€. All of Respondent's assets are located in Kosovo, and therefore, Claimant requests the recognition and enforcement of the award in Kosovo's courts because it is the only forum that has the power to force Respondent to pay the damages and thus, enforce the arbitral award.

Example 2 – International Disputes

Claimant is a resident of New York (USA) and Respondent is a resident of Munich (Germany). A tribunal in Munich decided in Claimant's favor, ruling that Respondent had to pay Claimant 2 million dollars. All of Respondent's assets are located in Paris (France). All three countries (USA, Germany and France) are parties to the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Claimant can seek enforcement in any of the three countries, but it would be most advantageous for it to make the request in the national courts of France, since it would be easiest for that court to force Respondent to pay the damages as all of its assets are located in France.

10.4. Grounds for Refusing the Enforceability and Recognition of an Award

A request to declare an arbitral award enforceable is always submitted to a competent court. Once the court receives such a request, it has to decide whether such request should be accepted or rejected. The Law sets forth an exhaustive list of circumstances under which the recognition and enforcement of an arbitral award may be refused. In general, a request to declare an arbitral award enforceable shall be rejected if the Court determines that one or more grounds for setting aside an award discussed in the previous module are satisfied (see article 38.2 of the Kosovo Law). The circumstances for refusing the recognition and enforcement of an arbitral award are essentially the same for domestic and international awards and can be divided into two categories:

The first category, includes circumstances that must be proved by one party and are summarized as follows:

- Lack of capacity of the parties to conclude an arbitration agreement
- Invalidity of the arbitration agreement under the applicable law
- Lack of a fair opportunity to be heard during arbitral proceedings
- The award deals with matters not covered by the submission to arbitration
- The composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the agreement of the parties or, failing such agreement the applicable law
- The final award has not yet become binding on the parties, or has been set aside or suspended by a competent authority

The second category includes grounds that a court may consider of its own initiative, and they are as follows:

- The subject matter is not capable of a settlement by arbitration under the applicable law in Kosovo
- The recognition or enforcement of the award would be contrary to the public policy (*ordre public*) of Kosovo

The two grounds in the second category are usually interpreted and construed very narrowly by the courts. For example, in *Parsons v. Rakta,* 508 F.2d 969 (1974), the United States Court of Appeals concluded that when it comes to the first ground, non-arbitrability, the mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim, this does not make the dispute non-arbitrable. It further stated that there is no special national interest in judicial, rather than arbitral, resolution of the breach of contract claim underlying the award in this case. In addition, as far as the second ground, namely public policy, the court held that the public policy defense should be construed narrowly and that enforcement of arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.

10.5. Procedure for Requesting Recognition and Enforcement of an Award

Kosovo's Law does not state which court a party should submit its request for recognition and enforcement of a domestic award to. It does however give an answer to this question when it comes to foreign awards by providing that "the request for recognition and enforcement of an arbitral award made outside of Kosovo shall be submitted to the Economic Court."(See article 39.2 of the Law).

The request for recognition and enforcement that is sent to a court should be accompanied by the following documents:

- The authenticated original award or a duly certified copy thereof
- The original arbitration agreement or a duly certified copy thereof

- A duly certified translation of the arbitration agreement and the arbitral award into an official language of Kosovo if the award or agreement is not made in an official language of Kosovo

Many laws are currently seeking to simplify the procedure for seeking enforcement of an award. As an example, the UNCITRAL Model Law does not set forth procedural details of recognition and enforcement, and instead leaves this to national procedural laws and practices. It sets forth only limited conditions for obtaining enforcement and was amended in 2006 to liberalize the formal requirements for the enforcement of arbitral awards as well as the form of the arbitration agreement (e.g. a copy of the arbitration agreement is no longer required under Article 35(2) of the UNCITRAL Model Law.).

10.6. Application and Requirements of the 1958 NY Convention on Recognition and Enforcement of Foreign Arbitral Awards

Kosovo is not yet a party to the 1958 New York Convention, but it will probably follow the steps of most democratic countries and ratify this Convention as part of its first group of treaties that promote foreign investment and economic growth. Even though Kosovo is not a party to the Convention, its Law on Arbitration nevertheless embraces the principle of recognizing and enforcing foreign arbitral awards, which is the main objective of the NY Convention.

The NY Convention applies to awards made within the territory of a state other than the state in which recognition and enforcement is sought. It also applies to arbitral awards not considered as domestic awards in the state where recognition and enforcement is sought (See Article I.1 of the Convention). The Convention provides that each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. When it comes to documents that a party needs to supply for requesting recognition and enforcement, the NY Convention provides the same requirements as Kosovo's Law on Arbitration. Basically, pursuant to Article IV of this Convention, to obtain the recognition and enforcement a party shall supply:

- The duly authenticated original award or a duly certified copy thereof;
- The original agreement or a duly certified copy thereof.

Article V of the Convention sets forth a limited list of grounds upon which a country may refuse recognition and enforcement to an award. These include situations where a party presents proof that:

- The parties to the agreement were, under the law applicable to them, under some incapacity, or the agreement was not valid under the law to which the parties have designated or, failing any indication thereon, under the law of the country where the award was made; or
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case; or
- The award deals with a matter not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not

so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- 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.

Enforcement of the award can also be refused on the basis that the subject matter of the dispute was not arbitrable under the law of the country in which enforcement is sought, or on the grounds that the public policy of that forum would be violated. (See Article V.2)

The importance of the applicability of the NY Convention in Kosovo is immense, because foreign investors will be interested in entering into contracts with arbitration clauses only if they are assured that arbitral awards will be enforced. The enforceability is guaranteed by the NY Convention and this has been proved to be correct in the contracting states. For this reason, the existence of the Convention, which enables the enforceability of foreign arbitral awards, is deemed to be one of the most significant advantages of arbitration and one of the main reasons why parties choose arbitration to settle their disputes. The explosive growth of arbitration in all types of commercial disputes will undoubtedly make the ratification of the NY Convention by Kosovo an essential step in order to ensure its proper development pursuant to the principles of our global economy.

10.7. Exercise:

1. In order to have an arbitral award enforced, the interested party must do 5 out of the 6 requirements presented below. Which one of the requirements is wrongly included?

1. it must prepare its request for enforcement and recognition;
2. it must attach a copy of the entire contract concluded between the parties;
3. it must attach an authenticated copy of the award to that request;
4. it must translate the award in the official language of the court;
5. it must attach a copy of the arbitration agreement;
6. it must make sure that none of the grounds for refusing enforcement by a court exist.

2. The requirements for enforcing and recognizing an award include circumstances that must be proved by one party (first category) and those that may be considered by the court on its own initiative (second category). The first category includes 7 out of the 8 circumstances listed below. Which one does not belong to this category?

1. Lack of capacity of the parties to conclude an arbitration agreement;
2. Invalidity of the arbitration agreement under the applicable law;
3. Lack of a fair opportunity to be heard during arbitral proceedings;
4. The award deals with matters not covered by the submission to arbitration;

5. The composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the agreement of the parties or, failing such agreement the applicable law;
6. The composition of the arbitration tribunal or the arbitration procedures violates the parties' arbitration agreement or the law of the country where the award was made;
7. The final award has not yet become binding on the parties, or has been set aside or suspended by a competent authority.
8. The final award was not prepared in English.

3. Pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to obtain the recognition and enforcement a party shall supply 2 out of the 3 documents presented below. Which of these three documents is not required?

1. The duly authenticated original award or a duly certified copy thereof;
2. The original copy of the contract;
3. The original agreement or a duly certified copy thereof.

10.8. Summary

In this module you have learned about the concepts, principles and procedures related to the recognition and enforcement of an arbitral award. The rules related to the refusal of recognition and enforcement as well as issues that may arise from the international character of the case were also discussed.

In this module, you learned to:

- Explain the issue of enforceability and recognition of domestic and international arbitral awards
- List and discuss the grounds for refusing the enforceability and recognition of an award
- Outline the procedure for requesting recognition and enforcement of an award
- Formulate issues that may arise from the international character of the case which are related to recognition and enforcement of the award
- Explain the application and requirements of the NY Convention on recognition and enforcement of foreign arbitral awards

ANNEX I

Kosovo Arbitration Rules 2011

Section I. Introductory rules

Scope of application

Article 1

1. These Rules shall govern domestic and international arbitration of disputes in respect of a defined legal relationship, whether contractual or not, where an agreement refers to arbitration pursuant to these Rules under the auspices of [insert the name of arbitration institution endorsing the Kosovo Arbitration Rules 2011]. In the following text, such institution administering the arbitration proceedings under these Rules shall be referred to as an 'arbitration institution'.

2. These Rules shall apply subject to such modification as the parties may agree.

3. Unless the parties have agreed otherwise these Rules shall apply to all arbitral proceedings in which the statement of claim is submitted on or after the date of entry into force of these Rules.

4. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Notice and calculation of periods of time

Article 2

1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

3. In the absence of such designation or authorization, a notice is:

    (a) Received if it is physically delivered to the addressee; or
    (b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

The Representation and assistance

Article 3

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

Designating appointing authorities

Article 4

Unless the parties have already agreed on the choice of an appointing authority, the appointing authority shall be the body designated as such under the organizational rules of the arbitration institution.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 5

1. If the parties have not previously agreed on the number of arbitrators, the appointing authority shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances.

2. As a rule, the appointing authority shall refer the case to a sole arbitrator, unless the complexity of the subject-matter and/or the amount in dispute justify that the case be referred to a three-member arbitral tribunal.

3. For purposes of these Rules, the expression "arbitral tribunal" includes a sole arbitrator or a three-member arbitral tribunal.

Appointment of arbitrators (articles 6 to 9)

Article 6

1. The parties may appoint the arbitrators who are on the list of the respective arbitration institutions.

2. The parties may also appoint persons to be arbitrators who are not on such lists of arbitrators, provided that any such person provides a brief statement of his past and current professional experience. Such statement must also be provided if an arbitrator is appointed by an appointing authority other than the appointing authority designated by the arbitration institution.

3. The appointment of an arbitrator shall become effective when it has been confirmed by the arbitration institution in accordance with Article 12 of these Rules. Accordingly, any reference to appointment under these Rules shall be deemed to be a nomination until confirmed by the arbitration institution.

Article 7

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree

that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 8

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under Article 7.

Article 9

1. For the purposes of Article 8, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.
2. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Acceptance of Mandate of Arbitrator and Disclosures

Article 10

1. Every arbitrator must be and remain independent of the parties involved in the arbitration.

2. Each person who is approached in connection with his or her possible appointment as an arbitrator shall, without undue delay, notify the arbitration institution of his or her acceptance of the appointment as arbitrator and declare whether he or she fills the conditions agreed upon by the parties. He or she shall also disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The arbitration institution shall inform the parties accordingly.

3. If circumstances are apparent from an arbitrator's declaration, which are likely to give rise to doubts as to his impartiality or independence or his fulfillment of agreed qualifications, the arbitration institution grants the parties an opportunity to comment within an appropriate time-limit.

4. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Confirmation of Arbitrator

Article 11

1. The arbitration institution may confirm the proposed arbitrator as soon as the arbitration institution receives the arbitrator's declaration of acceptance, and no circumstances likely to give rise to doubts regarding the impartiality or independence of an arbitrator or his fulfillment of agreed qualifications are apparent from the declaration, or if within the time-limit set by Article 13.1 no party objects to the confirmation of that arbitrator.

2. In the event of a challenge pursuant to Article 13.1 , which a party elects to pursue as provided in Article 13.4, a decision by the arbitration institution to reject the challenge of the proposed arbitrator shall be considered a confirmation of such arbitrator.

3. Upon confirmation of all arbitrators, the arbitral tribunal is constituted. The arbitration institution informs the parties of the constitution of the arbitral tribunal.

Challenge of arbitrators (articles 12 to 14)

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.
3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in Article 13 shall apply.

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in Articles 11 and 12 became known to that party.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged, to the other arbitrators and to the arbitration institution. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it and seek a decision on the challenge by the arbitration institution. In that case, within 15 days of notice by the party making the challenge to pursue the challenge, the other party and the challenged arbitrator shall submit a response to the challenge.

5. The arbitration institution shall make a decision on the challenge without undue delay. Such decision shall be final.

Replacement of an arbitrator

Article 14

1. Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 7 to11 that was applicable to the appointment or choice of the arbitrator

being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Repetition of hearings in the event of the replacement of an arbitrator

Article 15

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Exclusion of liability

Article 16

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority, the arbitration institution and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

Section III. Arbitral proceedings

General provisions

Article 17

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration, which shall be provided to the parties and, for information, to the arbitration institution. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties. The arbitral tribunal shall provide the revised timetable to the arbitration institution.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties and the arbitration institution. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Place of arbitration

Article 18

1. If the parties have not previously agreed on the place of arbitration, or if such designation is unclear or incomplete, the place of arbitration shall be Kosovo unless the arbitration institution determines, having regard to the circumstances of the case and after giving the paties the opportunity to make written comments, that another seat is more appropriate. The award shall be deemed to have been made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings. In any case, the arbitral tribunal should notify the arbitration institution about such locations and, if parties are expected to be present at them, to give them sufficient notice.

Language

Article 19

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defense, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defense, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

3. Until the language of the proceedings had been determined, a claim, a defense and other documents can be submitted in the language of the main contract, of the arbitration agreement or in any language in the official use at the seat of the arbitral institution.

4. If neither parties nor arbitrators can reach an agreement on the language of arbitration, the language of arbitration shall be determined by the arbitration institution.

Statement of claim

Article 20

1. The claimant shall communicate its statement of claim in writing to the arbitration institution. The proceedings shall be deemed to commence on receipt of the statement of claim by the arbitration institution. The arbitration institution shall deliver the statement of claim to the respondent without undue delay.

2. Unless the parties come to a different agreement, the statement of claim includes the notice of arbitration.

3. The claimant shall submit one copy of the statement of claim together with enclosures for each respondent, each arbitrator and the arbitration institution.

4. The statement of claim shall include the following particulars:
    (a) The names and contact details of the parties;
    (b) Identification of the arbitration agreement that is invoked;
    (c) A brief description of the dispute;
    (d) A statement of the facts supporting the claim;
    (e) The points at issue;
    (f) The relief or remedy sought;

(g) The legal grounds or arguments supporting the claim;
(h) The amount in dispute at the time of submission of the statement of claims, unless the claims are not related exclusively to a specific sum of money;
(i) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon;
(j) If a decision by three arbitrators is requested, the nomination of an arbitrator and contact details of that person;
(k) If a sole arbitrator is to be appointed, the proposal regarding the arbitrator to be appointed and contact details of that person.

5. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.

6. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Statement of defense

Article 21

1. The respondent shall communicate its statement of defense in writing to the arbitration institution within a period of time to be determined by the arbitration institution.

2. The statement of defense shall reply to the particulars (b) to (k) of the statement of claim (Article 20, paragraph 4). The statement of defense should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In its statement of defense, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of Article 20, paragraphs 3 to 6, shall apply to a counterclaim, and a claim relied on for the purpose of a set-off.

Amendments to the claim or defense

Article 22

During the course of the arbitral proceedings, a party may amend or supplement its claim or defense, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or

prejudice to other parties or any other circumstances. However, a claim or defense, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defense falls outside the jurisdiction of the arbitral tribunal.

Transmitting of the file to the arbitral tribunal

Article 23

The arbitration institution shall transmit the statements of claim and defense and other documents to the members of the arbitral tribunal as soon as a statement of claim or counterclaim have been received in due form, the arbitrators have confirmed acceptance of their mandate and their objectivity, and the deposit for costs has been paid.

Pleas as to the jurisdiction of the arbitral tribunal

Article 24

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defense or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Further written statements

Article 25

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defense, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Periods of time

Article 26

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defense) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Interim measures

Article 27

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
    (a) Maintain or restore the status quo pending determination of the dispute;
    (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
    (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
    (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
    (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
    (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Evidence

Article 28

1. Each party shall have the burden of proving the facts relied on to support its claim or defense.

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Hearings

Article 29

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

3. Hearings shall not be public unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.

4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

Experts appointed by the arbitral tribunal

Article 30

1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of Article 28 shall be applicable to such proceedings.

Default

Article 31

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause the respondent has failed to communicate its statement of defense, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defense to a counterclaim or to a claim for the purpose of a set-off.
2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of proceedings

Article 32

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none or if the arbitral tribunal is satisfied that the record is complete, it shall declare the proceedings closed.

2. When the arbitral tribunal has declared the hearings closed, it shall indicate to the arbitration institution an approximate date by which the draft award will be submitted to the arbitration institution for approval pursuant to Article 44. Any postponement of that date shall be communicated to the arbitration institution by the arbitral tribunal.

3. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of right to object

Article 33

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Section IV. The award

Decisions

Article 34

1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Form and effect of the award

Article 35

1. The arbitral tribunal may make separate awards on different issues at different times.

2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature. The arbitration institution shall certify that the award has been approved under the internal rules of the arbitration institution.

5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

6. Copies of the duly certified award signed by the arbitrators shall be communicated to the parties by the arbitration institution.

Applicable law, amiable compositeur

Article 36

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

Settlement or other grounds for termination

Article 37

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated to the parties. Where an arbitral award on agreed terms is made, the provisions of Article 35, paragraphs 2, 4 and 5, shall apply.

Interpretation of the award

Article 38

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within 30 days after the receipt of the request. The interpretation shall form part of the award and the provisions of Article 35, paragraphs 2 to 6, shall apply.

Correction of the award

Article 39

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 30 days of receipt of the request.

2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

3. Such corrections shall be in writing and shall form part of the award. The provisions of Article 35, paragraphs 2 to 6, shall apply.

Additional award

Article 40

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.

2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 30 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.

3. When such an award or additional award is made, the provisions of Article 35, paragraphs 2 to 6, shall apply.

Section V. Confidentiality

Article 41

1. Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to maintian the confidentiality of the arbitral proceedings and to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not otherwise in the public domain, save and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, experts, witnesses, persons acting on behalf of any person involved in the arbitral proceedings, the secretary of the arbitral tribunal and any person at the arbitration institution involved in the administration of the arbitral proceedings.

2. The deliberations of the arbitral tribunal are confidential.

3. An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:
    (a) A request for publication is addressed to an arbitration institution;
    (b) All references to the parties' names are deleted; and
    (c) No party objects to such publication within the time–limit fixed for that purpose by the arbitration institution.

Section V. Expedited Procedure

Article 42

1. The provisions on Expedited Procedure, set forth in paragraph 2 of this article, shall apply:
    (a) to all cases in which the amount in dispute representing the aggregate of the claim and the counterclaim (or any set-off defense) does not exceed EUR 100,000, unless the arbitration institution decides otherwise taking into account all relevant circumstances:
    (b) to all cases, irrespective of their value, if the parties agree to apply the provisions on Expedited Procedure.

2. In the Expedited Procedure, the foregoing provisions of these Rules apply subject to the following modifications:
    (a) The arbitration institution may shorten the time-limits, including time-limits for the appointment of arbitrators;
    (b) The case shall be referred to a sole arbitrator, unless the arbitration agreement provides for a three-member arbitral tribunal. If the arbitration agreement provides for a three-member arbitral tribunal, the arbitration institution shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree to refer the case to a sole arbitrator, the fees

of the three arbitrators shall be calculated in accordance with Article 8 of the Regulation on Costs in Arbitration Proceedings.

(c) Unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the arbitral tribunal shall hold no more than one hearing for the examination of the witnesses and expert witnesses as well as for oral argument. Upon request by the arbitral tribunal, the arbitration institution may exceptionally allow holding of another hearing.

(d) The award shall be made within six months from the date when the arbitration institution transmitted the file to the arbitral tribunal. In exceptional circumstances, the arbitration institution may extend this time-limit.

Section VII. Powers of the arbitration institution

Powers in the course of the proceedings

Article 43

1. The arbitration institution, subject to its internal rules, may authorize one of its members to attend the hearings.

2. The arbitration institution shall secure adequate legal assistance in all hearings where the sole arbitrator or at least one member of the arbitral tribunal is not a lawyer.

3. The arbitration institution may, whilst respecting the right of decision-making of the arbitral tribunal on the merits of the dispute, draw the arbitrators' attention to legal issues of importance for decision-making and especially issues relating to the content and form of the procedural actions which are being undertaken.

Approval of the award

Article 44

1. Before signing the award, the arbitral tribunal is obliged to present to the arbitration institution the draft of the award for approval.

2. The arbitration institution may order alterations to the form of the draft presented. The arbitration institution, whilst respecting the right of decision-making of the arbitral tribunal on the merits of the dispute, is authorized to draw the attention of the arbitral tribunal to issues related to the merits of the dispute.

Costs of proceedings

Article 45

1. The [rules on the] costs of arbitration proceedings (including the [rules on] arbitrators' fees, registration and administrative fees, advance payments of costs, presentation of evidence and other costs) shall be determined by the Institution in accordance with the Regulation on Costs of Arbitration Proceedingsof the arbitration institution in force at the time the arbitration proceeding is commenced.

2. The arbitral tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.

Entry into force

Article 46

These Rules shall come into effect on _____.

ANNEX II

Model arbitration clause for contracts

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration under the auspices of [name of arbitration institution] in accordance with the KOSOVA Arbitration Rules 2011.

Note. Parties should consider adding:

a. The appointing authority shall be ... [name of institution or person
b. The number of arbitrators shall be ... [one or three];
c. The place of arbitration shall be ... [town and country];
d. The language to be used in the arbitral proceedings shall be ... .
e. The applicable substantive law is.....

Model statements of independence pursuant to Article 11 of the Rules

No circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to Article 10 of the KOSOVA Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement.] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Note. Any party may consider requesting from the arbitrator the following addition to the statement of independence:

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits.