

ARBITRATION  
LAW AND PRACTICE  
IN CENTRAL AND  
EASTERN EUROPE

*Editors*

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Printed in the United States of America

ISBN 1-929446-95-0

JurisNet, LLC

71 New Street

Huntington, New York 11743

USA

[www.arbitrationlaw.com](http://www.arbitrationlaw.com)

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## CROATIA\*

### 1. GENERAL LEGAL FRAMEWORK

#### 1.1 National law

##### a) Current status

*What is the current status? When was it enacted? Have there already been amendments?*

Until 2001, Croatian arbitration law was contained in the federal law of the former Yugoslav federation, which dealt with arbitration in two acts: the Code of Civil Procedure and the Conflict of Laws Act. After establishment of the independent Croatian state in 1991, both acts were adopted as national legislation<sup>1</sup> and they remained in force throughout the nineties, more or less unchanged.

A major change in arbitration law took place in 2001, when the scattered provisions in various laws were replaced by a single act – the Law on Arbitration, which is based on the UNCITRAL Model Law on International Commercial Arbitration.<sup>2</sup> This new statute was adopted by the national legislature (*Sabor*) on 28 September 2001. It came into force on 19 October 2001.<sup>3</sup>

In addition to new legislation on arbitration, new legislation on alternative dispute resolution methods<sup>4</sup> was introduced by the Law on Conciliation of 2003.<sup>5</sup>

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\* By Alan Uzelac and Tomislav Nagy. Some parts of this and the following chapters were based on the Croatian national report published in ICCA Handbook on Commercial Arbitration (Suppl. 39, X/2003, author: A. Uzelac).

<sup>1</sup> See Narodne Novine 53/1991 (Official Gazette, hereinafter the “Off. Gaz.”).

<sup>2</sup> Hereinafter “UNCITRAL Model Law”.

<sup>3</sup> The Law on Arbitration (hereinafter the “Law on Arbitration”) was published in Off. Gaz. 88/2001 of 11 October 2001.

<sup>4</sup> Hereinafter “ADR”.

<sup>5</sup> Off. Gaz. 163/2003 of 16 October 2003.

The Law on Arbitration applies to not only to commercial disputes (i.e. commercial arbitration), but to all matters concerning rights which the parties may freely dispose of (including civil and other non-commercial disputes). This law regulates both international and domestic arbitration and applies to both institutional and *ad hoc* arbitrations.

The Law on Conciliation defines conciliation as any process, regardless of the expression used to describe it (i.e. including, but not limited to: mediation, early neutral evaluation, mini-trial, etc.), in which parties attempt to reach a settlement of their dispute with the assistance of one or more conciliators who do not have the authority to impose a solution to the dispute upon the parties.

All national laws and regulations are available (only in Croatian) on the website of the Official Gazette (*Narodne novine*) at [www.nn.hr](http://www.nn.hr). Some laws are available at the internet site of the Croatian government ([www.vlada.hr](http://www.vlada.hr)) and parliament ([www.sabor.hr](http://www.sabor.hr)) as well as the website of the Ministry of Justice ([www.pravosudje.hr](http://www.pravosudje.hr)). At the Croatian Supreme Court's website ([www.vsrh.hr](http://www.vsrh.hr)), the decisions of that court and some other courts are available. There are a number of academic and non-governmental websites that also offer access to various legal documents on commercial and non-commercial subjects.

*b) Future development*

*Are amendments intended? If so, please outline the timing and the intended changes.*

These two new acts have completed the planned reform of the arbitration law, so it is not likely that new amendments to such laws will be passed soon.

*c) Special rules for international arbitration*

*Are there special rules for international arbitration; if yes, please describe the areas concerned as well as state the criteria for "international arbitration."*

Under the Law on Arbitration, essentially the same rules apply to both national and international arbitrations. However, there are some important differences, in particular with respect to the ban on “exporting” a purely domestic dispute to a foreign arbitration forum. The definition of “domestic” and “international” disputes follows only objective criteria, i.e. the nationality of the parties to the dispute. Thus, a dispute in which at least one of the parties is a natural person with domicile or habitual residence in Croatia, or a legal person established under the law of the Republic of Croatia, is considered to be a “dispute with an international element”; otherwise it is considered to be a purely domestic dispute (“dispute without an international element”).<sup>6</sup> In disputes without an international element, only domestic arbitration (i.e. arbitration with seat within the Croatian territory) may be agreed upon. Other rules are the same, *mutatis mutandis*, for national and international arbitration, including the possibility to agree on application of foreign substantive law, nationality of the arbitrators, applicable rules of proceedings, *ad hoc* arbitration, etc.

*d) UNCITRAL Model Law*

*Outline the main differences between the arbitration law of Croatia and the UNCITRAL Model Law.*

The Croatian Law on Arbitration is widely recognized as a law that closely follows the approach of the UNCITRAL Model Law. Yet, there are some, mostly minor, discrepancies and departures from the UNCITRAL Model Law text. Some differences follow from the broader scope of the Law on Arbitration: it regulates not only international but also national disputes; it also covers all disputes concerning rights that parties may freely dispose of, not only commercial disputes. Extended application of the UNCITRAL Model Law approach made unnecessary the attempts to stretch the limits of “international disputes”, hence the Law on Arbitration has a strict and objective definition of “international element” that does not correspond to the UNCITRAL Model Law text (see above at 1.1.c.). With respect to the general provisions of the

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<sup>6</sup> Art. 2 para 1 p. 6 and 7 of the Law on Arbitration.

Law, the provision on the form of arbitration agreement<sup>7</sup> has already implemented some of the new work of UNCITRAL in this area, as well as rules on protection of consumers influenced by German law. The Law on Arbitration also contains specific rules on the capacity of parties to conclude an arbitration agreement, as well as rules on the power of attorney for the conclusion of the arbitration agreement.<sup>8</sup> Among the duties of the arbitrators, a duty to conduct arbitration with due expeditiousness is in particular emphasized.<sup>9</sup> Regarding the procedure for challenging the selection of arbitrators, parties may preclude court review of the decision on challenge by specifying another appointing authority.<sup>10</sup> Arbitral proceedings in institutional arbitration are commenced by submitting the statement of claim to the competent arbitral institution, unless parties agree otherwise.<sup>11</sup> In the absence of any designation by the parties of the applicable law, the arbitral tribunal shall apply the law which it considers to be most closely connected with the dispute.<sup>12</sup> The Law on Arbitration also has slightly different rules with respect to the enforcement of domestic awards or recognition and enforcement of foreign awards.<sup>13</sup>

## 1.2 International Treaties

### 1.2.1 New York Convention

*Provide a brief summary of each court decision on the New York Convention.*

See below at 1.2.3. No Croatian court decisions on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards could be found (“New York Convention”).

<sup>7</sup> Art. 6 of the Law on Arbitration.

<sup>8</sup> Art. 7 and 8 of the Law on Arbitration.

<sup>9</sup> Art. 11/2 of the Law on Arbitration.

<sup>10</sup> Art. 12/7 of the Law on Arbitration.

<sup>11</sup> Art. 20/1.1 of the Law on Arbitration.

<sup>12</sup> Art. 27/2 of the Law on Arbitration.

<sup>13</sup> Art. 39 and 40 of the Law on Arbitration.

### **1.2.2 European Convention**

*Provide a brief summary of each court decision on the European Convention.*

See below at 1.2.3. No Croatian court decisions on the 1961 European Convention on International Commercial Arbitration could be found.

### **1.2.3 Other multilateral treaties**

*Indicate title and entry into force as well as any other information you deem useful.*

Croatia is a party to all major conventions, among others, European Convention on International Commercial Arbitration, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Washington Convention for the Settlement of Investment Disputes between States and Nationals of Other States. Croatia has also signed a number of bilateral treaties.

By succession effective on 8 October 1991, Croatia became party to the following Conventions:

- the 1923 Geneva Protocol on Arbitration Clauses;
- the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards;
- the 1961 European Convention on International Commercial Arbitration;
- the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and
- the 1965 Washington Convention for the Settlement of Investment Disputes between States and Nationals of Other States.

### **1.2.4 Bilateral Agreements**

*Indicate title and entry into force as well as any other useful*

*information, and provide a copy of the treaty. Of interest in particular are:*

- *Treaties more favourable to arbitration than the New York Convention*
- *Treaties with parties who are not members of the New York Convention*
- *Treaties with provisions on areas not covered by the New York Convention*
- *Bilateral Investment Treaties (BIT)*

Croatia has signed forty-nine Bilateral Investment Treaties,<sup>14</sup> twenty-five of which are currently in force. The full status of the Treaties is available at the Croatian Ministry of Foreign Affairs (see [www.mvp.hr](http://www.mvp.hr)). The BITs signed (“S”), ratified (“R”) and effective (“E”) by Croatia are as follows:

- Albania (10 May 1993 (S), 10 February 1994 (R), 16 April 1994 (E));
- Argentina (2 December 1994 (S), 27 March 1996 (R), 1 June 1996 (E));
- Austria (19 February 1997 (S), 30 October 1997 (R), 1 November 1999 (E));
- Belgian and Luxembourg Economic Union (31 June 2001 (S));
- Bosnia and Herzegovina (26 February 1996 (S), 12 May 1997 (R), 4 August 1997 (E), 23 July 2002 (Amended));
- Belarus (26 June 2001 (S));
- Bulgaria (25 June 1996 (S), 5 December 1996 (R), 20 February 1998 (E));
- Cambodia (18 July 2001 (S), 15 June 2002 (E));
- Canada (3 February 1997 (S), 11 July 1997 (R), 30 January 2001 (E));
- Chile (28 November 1994 (S), 5 April 1996 (R), 15 June 1996 (E));
- China (7 June 1993 (S), 10 February 1994 (R));

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<sup>14</sup> Hereinafter “BITs”.

- Czech Republic (5 March 1996 (S), 21 April 1997 (R));
- Cuba (16 February 2001 (S));
- Denmark (5 July 2000 (S), 16 November 2000 (R));
- Finland (1 June 1999 (S), 1 July 2001 (R), 1 November 2001 (E));
- France (3 June 1996 (S), 15 January 1997 (R), 5 March 1998 (E));
- Germany (21 March 1998 (S), 3 September 1998 (R), 28 September 2000 (E));
- Greece (18 October 1996 (S), 10 April 1997 (R), 21 October 1998 (E));
- Hungary (15 June 1996 (S), 15 January 1997 (R), 1 March 2002 (E));
- India (4 May 2001 (S), 22 November 2001 (R), 19 January 2002 (E));
- Indonesia (10 September 2002 (S));
- Iran (17 May 2000 (S), 23 November 2000 (R));
- Italy (5 November 1996 (S), 6 March 1997 (R), 12 June 1998 (E));
- Israel (1 August 2000 (S));
- Jordan (10 October 1999 (S), 17 February 2000 (R), 27 April 2000 (E));
- Kuwait (8 March 1997 (S), 26 June 1997 (R), 2 July 1998 (E));
- Macedonia (6 July 1994 (S), 31 August 1995 (R));
- Malaysia (16 December 1994 (S), 18 June 1996 (R));
- Malta (11 February 2002 (S), 7 March 2002 (Publ.), 10 July 2002 (E));
- Moldova (5 December 2001 (S));
- Netherlands (28 April 1998 (S), 9 July 1998 (Publ.), 1 June 1999 (E));
- Poland (21 February 1998 (S), 4 October 1999 (E));
- Portugal (10 May 1995 (S), 24 July 1997 (R), 24 October 1997 (E));

- Qatar (12 November 2002 (S));
- Romania (8 June 1994 (S), 11 May 1995 (R), 30 April 1998 (R));
- Russia (20 May 1996 (S), 13 December 1996 (R));
- Serbia and Montenegro/Yugoslavia (18 August 1998(S), 21 January 2002(R), 31 January 2002 (E));
- Slovakia (12 February 1996 (S), 6 February 1997(E));
- Slovenia (12 December 1997 (S));
- Spain (21 July 1997 (S), 24 July 1998 (R), 17 September 1998 (E));
- Sweden (10 January 2001 (S), 28 June 2001 (R), 1 August 2001 (E));
- Switzerland (30 October 1996 (S), 21 April 1997 (R));
- Thailand (18 February 2000 (S), 11 May 2000(R));
- Turkey (12 February 1996 (S), 18 September 1997 (R), 21 April 1998 (E));
- Ukraine (15 December 1997 (S));
- United Kingdom (11 March 1997 (S), 7 August 1997 (Publ.), 16 April 1998 (E));
- USA-OPIC (15 January 1993 (S), 3 February 1994 (R));
- USA (13 July 1993 (S), 21 April 1994 (R));
- Zimbabwe (18 February 2000(S), 11 May 2000 (R)).

Further references can be found in a number of trade agreements.<sup>15</sup>

The provisions of the multilateral and bilateral treaties are superior to national laws and therefore their provisions prevail to the extent there is a conflict.

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<sup>15</sup> E.g., Austria (15 July 1992 (S), 18 December 1992 (R), 1 March 1993 (E)); Japan (28 February 1959 (S), 28 April 1959 (R), 13 December 1996 (E)); Switzerland (12 March 1999 (S), 12 March 1999 (R), 17 February 2000 (E)).

### 1.3 Arbitral institutions

*Name any arbitral institutions in Croatia with their contact details and any specialisation.*

The tradition of arbitration in Croatia is long, although the practice was at certain stages in history suppressed or reduced. In 1852, the Croatian Chamber of Commerce established an arbitration court that ruled primarily in smaller commercial and merchant disputes. Following the early difficult years of the Russian-type socialist regime, a mild economic liberalization introduced by the doctrine of Yugoslav self-management made arbitration with a "foreign element" possible, but also allowed arbitration among domestic economic players (relatively autonomous "socially-owned" state enterprises). As Yugoslavia pursued the policy of the non-aligned countries, it never joined the Moscow Convention. At certain times there were a significant number of arbitration cases involving Croatian parties - not only at the national institution of international arbitration, but also under the auspices of foreign arbitral institutions, particularly the ICC International Court of Arbitration.<sup>16</sup>

Today, the practice of arbitration is gradually evolving. Despite the war of independence in the early 1990s, a substantial number of cases originated even in that time period.<sup>17</sup> Since declaring independence from the Socialist Federative Republic of Yugoslavia ("SFRY"), the practice of both domestic and international arbitration continued at the Permanent Arbitration Court at the Croatian Chamber of Commerce ("PAC-CCC") that, prior to 1991, only handled domestic cases. From the start of the war, arbitration clauses providing for arbitration at Belgrade's Foreign Trade Arbitration Court ("FTAC") were considered null and void in

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<sup>16</sup> See Verbist, "The Arbitration of the ICC in Former Yugoslavia and the New Republics that Emerged from It", 1 *Croatian Arbitration Yearbook* (1994) p. 137, stating, *inter alia* that in 1991 (at the beginning of the dissolution of the FRG) there were twenty-three cases filed which involved parties from the former Yugoslavia.

<sup>17</sup> See, e.g., the statistical data of the PAC-CCC presented *infra*, Table 1.

Croatia.<sup>18</sup> Thus, the PAC-CCC became the most important local arbitration venue in Croatia. This was assisted by the fact that, until the enactment of the Law on Arbitration in 2001, the PAC-CCC also had a legal monopoly on domestic arbitration. Therefore, other arbitration institutions in Croatia did not exist, although the opportunity to establish arbitral institutions as entities of private law that was provided by the Law on Arbitration brought about increased interest in establishing new dispute resolution facilities. Also, the first cases of *ad hoc* arbitration<sup>19</sup> started to appear.

The contact information for the PAC-CCC is:

Permanent Arbitration Court  
Croatian Chamber of Commerce  
(*Stalno izbrano sudište pri Hrvatskoj gospodarskoj komori*)  
Rooseveltov trg 2  
HR-10 000 Zagreb  
Tel.: +385 1 4606 777  
Fax.: +385 1 4606 752  
E-mail: [sudiste@hgk.hr](mailto:sudiste@hgk.hr)  
Web-site: <http://www.hgk.hr/komora/sud>

The latest revision of the arbitration rules of the PAC-CCC came into force on 25 December 2002. This version of the rules, also known as the Zagreb Rules, replaced previous conflicting standards by enacting a single set of rules for both domestic and international arbitration. Generally, the Zagreb Rules would have to be available in Croatian, English, German, Italian and French (currently, only older sets are available, new translations are pending).

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<sup>18</sup> Regarding the status of arbitral clauses indicating ex-Yugoslav arbitral institutions on "hostile territory" in Croatia and abroad, see Bajons, "Der Einfluß der geänderten Staatsverhältnisse auf völkerrechtliche Übereinkommen und private Schiedsvereinbarungen" 1 *Croatian Arbitration Yearbook* (1994) pp. 145-155 and Uzelac, "Succession of Arbitral Institutions", 3 *Croatian Arbitration Yearbook* (1996) pp.71-89. Also the judgment of the High Commercial Court in Zagreb no. Pž-957/92 of April 29, 1992, *Croat. Arbit. Yearb.* 2/1995, pp.209-211 (arbitration clauses with FTAC clause have no legal effect as from 8 October 1991).

<sup>19</sup> *Ad hoc* arbitration became legally fully permissible - especially in domestic cases - only since the coming into force of the Law on Arbitration. See also footnote 6 *supra*.

However, to assess arbitration practice in Croatia, PAC-CCC statistics may still be the most relevant. Table 1 shows the data for the arbitration cases of the PAC-CCC in the period from 1992 through 2002. In spite of a relatively modest number of cases (30-40 annually), the data demonstrates that – particularly after 2000 – the aggregate amount in dispute became quite significant. According to student research that compared commercial jurisdiction of the state courts with arbitration, in 2001 the PAC-CCC had only 0.6% of the caseload of the largest commercial court in the country (the Commercial Court in Zagreb), but at the same time the aggregate value of its cases was about 25% of the annual aggregate value of that court. The cases submitted to arbitration were quite diverse, from simple sales contracts to complex construction disputes and disputes relating to the process of privatization of state property. The range of foreign parties was also very diverse, including parties from twenty-seven countries, primarily from Croatia’s principal trade partners (Italy, Germany, Austria and the other post-Yugoslav countries and territories).

Table 1: Arbitration cases of the PAC-CCC<sup>20</sup>

Year	Domestic	International	Total	Value (EUR)
1992	8	7	15	2,690,000
1993	14	12	26	3,844,000
1994	21	13	34	11,212,000
1995	8	10	18	4,717,000
1996	15	12	27	10,136,000
1997	14	16	30	27,520,000
1998	21	8	29	8,778,000
1999	22	14	36	5,327,000
2000	9	25	34	54,643,000
2001	36	10	46	298,235,000
2002	16	21	37	135,779,000
Total	184	148	332	560,192,000

<sup>20</sup> As for the matter of the new PAC-CCC confidentiality policy, the figures for 2003 are not available.

## 2. ARBITRATION AGREEMENT

### 2.1 Applicable law

*Which law is applicable to the arbitration agreement?*

*See also below at 2.5.*

The Law on Arbitration does not deal explicitly with the law applicable to the interpretation of the arbitration clauses. This gap may be filled by reference to Art. 6(7) of the Law on Arbitration, which deals with the substantive validity of arbitration agreements. The applicable law is the law chosen between the parties. In the absence thereof, the law to be applied is that applicable to the substance of the dispute, or ultimately the law of the Republic of Croatia. The issue of what law is applicable is governed by the provisions of the Conflict of Laws Act, and generally points to the law that is most closely connected with the subject-matter of the dispute.

In addition to formal validity, the Law on Arbitration provides for the substantive validity of the arbitration agreement. Since the validity of an arbitration agreement *ratione materiae* is a matter of applicable substantive law, in determining the choice of law rules the Law on Arbitration follows the principle of party autonomy. Thus, the law applicable to substantive validity of the agreement is the law designated by the parties, or, in the absence of such designation, the law applicable to the substance of the dispute or the law of the Republic of Croatia.<sup>21</sup>

### 2.2 Other dispute settlement agreements

*How are arbitration agreements distinguished from other dispute settlement agreements (e.g. mediation, expert determination)?*

In contrast to arbitration, which provides for *final and binding* dispute resolution, parties may also agree on conciliation

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<sup>21</sup> Art. 6(7). See further in Sikirić, "Ugovor o arbitraži" [Arbitration Agreement], 41 *Pravo u gospodarstvu* (2002) pp. 35-57 (in Croatian).

(mediation). Under the Law on Conciliation that was enacted in 2003, conciliation is considered to be any process, “regardless of the expression used to describe it, whereby parties attempt to settle their dispute with the assistance of one or more conciliators who assist the parties to reach settlement, without the authority to impose upon the parties a binding solution to the dispute”.<sup>22</sup> The lack of authority to impose a solution should be construed as the lack of authority to make an enforceable decision that could, if needed, be enforced in state courts. This definition would cover all forms of ADR, from neutral evaluation, expert determination, mediation and conciliation to mini-trials. Conciliation agreements are binding if they “have expressly undertaken not to initiate or continue during a specified period of time, or until a specified judicial event, arbitration or other proceeding has occurred”.<sup>23</sup>

### **2.3 Submission agreements and arbitration clauses**

- a) *Is there a distinction between submission agreements and arbitration clauses or contracts?*
- b) *If so, what are the criteria and the consequences?*

The Law on Arbitration provides that an arbitration agreement may apply to any existing or future dispute arising out of a specific legal relationship. Such law recognizes both a submission (an agreement to submit an already existing dispute to arbitration) and an arbitration clause (an agreement to refer future disputes to arbitration, contained in a contract or elsewhere).<sup>24</sup>

### **2.4 Minimum content**

*What is the minimum content of the arbitration agreement?*

The required content of an arbitration agreement is set forth as “... an agreement of the parties to submit to arbitration all or certain disputes which have arisen or which may arise in the future

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<sup>22</sup> Art. 2/1.a of the Law on Conciliation, NN (Off. Gaz.) 163/2003.

<sup>23</sup> Art. 15/2 of the Law on Arbitration.

<sup>24</sup> Art. 6 of the Law on Arbitration.

between them in respect of a defined legal relationship of a contractual or non-contractual nature". See also below at 2.5.

## 2.5 Formal requirements

- a) What are the form requirements for the arbitration agreement?
- b) Do they only apply to the minimum content or in general?
- c) If the arbitration agreement was concluded in the proper form, but got lost, can its existence be proven by other means?
- d) How can an initial lack of form be cured afterwards (e.g. by not raising a timely objection with respect to the jurisdiction of the arbitral tribunal)?

The definition and formal requirements for arbitration agreements, as well as the law applicable to them, are set forth extensively in Art. 6 of the Law on Arbitration, which follows in principle the text of the UNCITRAL Model Law.

For an arbitration agreement to be valid, it generally must be in writing. The definition of written is broad, and includes agreements contained in documents signed by the parties or agreements reached by an exchange of letters, telexes, faxes, telegrams or other means of telecommunication which provide a record of the agreement, whether signed by the parties or not.<sup>25</sup>

In addition to this broad definition, the text of the UNCITRAL Model Law was expanded by adding a number of situations that are regarded as constituting valid written agreements (even though in some of the situations the writing requirement is only fictitiously fulfilled). Such situations, expressly provided by law, include tacit acceptance of a written offer or of a written confirmation of an oral offer.<sup>26</sup> In both cases failure to respond constitutes a valid acceptance, if so considered by trade usage (or other applicable usage).

On the other hand, the formal requirements are much stricter for arbitration agreements in consumer contracts. This

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<sup>25</sup> Art. 6/2 of the Law on Arbitration *in fine*.

<sup>26</sup> Art. 6(3) points 1 and 2.

limitation, which also exists in German law, was motivated by the fact that uneven negotiating power and knowledge of the parties in such a contract and special mandatory rules for consumer protection in court proceedings require that consumers be fully aware of the meaning of the clause. For such contracts, the arbitration agreement must be contained in a separate document signed by both parties that contains no provisions other than those referring to the arbitral proceedings. This latter condition does not apply if the agreement was drafted by a notary public.

The formal requirements apply to both the essential elements of the arbitration agreement, as well as any additional provisions and amendments.<sup>27</sup>

The previous arbitration law<sup>28</sup> provided that the existence of the arbitration agreement may be proved only by documents. As a result, if the original agreement was lost, it was conceivable that a party could prove its existence, but only with limited evidentiary means. In the new Law on Arbitration, no comparable provision is to be found, but instead the rules on form are relaxed, and some forms of oral arbitration agreements are as enforceable as the "conventional" written form. In particular, an orally concluded arbitration agreement may become valid if it is subsequently confirmed by a written communication, unless the other party objects in due time.<sup>29</sup> In these cases, a written confirmation would be both constitutive for the formally valid agreement, and the proof of the existence of such an agreement.

All formal insufficiencies of the arbitration agreement can be cured if the respondent fails to object to the jurisdiction of the arbitral tribunal in due time, i.e., at the latest in his statement of defense in which he raises issues relating to the substance of the dispute.

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<sup>27</sup> See Art. 27(2) of the Code of Obligations.

<sup>28</sup> Art. 470(4) of the CCP.

<sup>29</sup> Cf. Art. 6/3/1 of the Law on Arbitration.

## 2.6 Proxy

*What are the requirements for conclusion of arbitration agreements by proxy?*

Art. 8 of the Law on Arbitration states that *“If the validity of a power of attorney is governed by Croatian law, the authority to conclude the main contract implies an authority to conclude an arbitration agreement.”*<sup>30</sup> The power of attorney must conform to the form required for the agreement itself,<sup>31</sup> i.e. it has to be given in writing (subject to the same rules of interpretation as applicable for the form of the arbitration agreement).

## 2.7 Special requirements as to form and content

*What are any special requirements as to form and content for arbitration agreements contained in:*

- a) standard forms*
- b) general conditions of business*
- c) articles of association?*

*See also above at 2.1 and 2.5.*

Reference to the general terms of a contract which contain an arbitration clause is enough for a valid arbitration agreement, provided that the reference is such as to make that clause part of the contract.<sup>32</sup> The same is applicable to arbitration agreements concluded by the issuance of a bill of lading – they are valid if the bill of lading contains an express reference to an arbitration clause in a charter party.<sup>33</sup>

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<sup>30</sup> This provision of the Law on Arbitration has replaced the previous norm of the federal statute that required a special power of attorney (express authorization) for conclusion of arbitration agreements by proxies.

<sup>31</sup> Art. 90 Code of Obligations.

<sup>32</sup> Art. 6(4).

<sup>33</sup> Art. 6(5).

## 2.8 Personal capacity

*Who has the personal capacity to conclude arbitration agreements?*

The capacity of a natural or legal person to resort to arbitration is governed by the law applicable to them. If Croatian law is applicable, such capacity is very broad – every Croatian entity endowed with legal personality may conclude an arbitration agreement and be a party to arbitration. There are virtually no limitations – current law no longer requires a specific quality of a party (e.g. professional engagement with commercial activity). One limitation exists, however, with respect to the type of arbitration clause that may be concluded in domestic disputes. If both parties are Croatian entities (natural persons with domicile in the country or legal persons established under Croatian law), only domestic arbitration (i.e. arbitration that has its legal seat on the Croatian territory) can be agreed upon.<sup>34</sup> Consequently, an agreement that would provide for arbitration between two Croatian companies that would have a seat outside the Republic of Croatia (and result in a foreign arbitral award) would be invalid. For such an agreement to be valid “an international element” must exist, e.g. at least one party must be a foreign party.<sup>35</sup>

## 2.9 The state and state organisations

*What are the special issues with respect to the conclusion of arbitration agreements by the state and/or state organizations?*

Although the legal doctrine has long assumed the capacity of the state and state agencies to resort to arbitration,<sup>36</sup> only since the

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<sup>34</sup> See Art. 3(1) and 3(2) in conjunction with definitions in Art. 2.

<sup>35</sup> This limitation does not prevent application of foreign substantive law, foreign language or foreign arbitral rules. Even between Croatian parties (i.e. in domestic disputes) an ICC arbitration or ad hoc arbitration would be permissible, provided that the seat of arbitration is in Croatia. The arbitrators may also be foreign citizens (see Art. 10(1) of the Law on Arbitration).

<sup>36</sup> A standard view on this matter, see Dika, “The Republic of Croatia and Units of Local Self-government and Administration as Parties to International Commercial and Investment Arbitration”, 2 *Croatian Arbitration Yearbook* (1995) pp. 95-108.

Law on Arbitration was enacted has this issue been expressly settled. Art. 7(2) of the Law on Arbitration provide that the Republic of Croatia and units of local and regional government and self-government (i.e. municipalities, cities and counties) may submit their disputes to arbitration. In recent times, there were in fact several large disputes that gained public attention in which one party was the state privatization agency (Croatian Privatization Fund). Such cases were domestic cases, but a fortiori there is no doubt that the state and state-owned entities are capable and willing to arbitrate in international cases as well. Therefore, such persons cannot claim state immunity before either state courts or before an arbitral tribunal.

### 2.10 Objective arbitrability

*Which matters cannot be decided by arbitration (objective arbitrability)? If there is no exhaustive list, but a general rule, please provide examples.*

The boundaries of arbitrability *ratione materiae* have gradually expanded in the last several decades, with a final decisive extension by the Law on Arbitration in 2001.<sup>37</sup> Prior to 1990, only commercial disputes could be subject to arbitration (and only those between specific parties). After 1990, generally every dispute “concerning rights which the parties may freely dispose of” could be submitted to arbitration, unless contained in “exclusive jurisdiction of Croatian courts” category.<sup>38</sup> The rules on exclusive jurisdiction ruled out the arbitration of disputes over property rights in real estate (land and buildings); many housing disputes and disputes regarding the lease of property (even disputes regarding the rental of business premises); disputes regarding aircraft, ships and inland water vessels; disputes arising from relations with the military; disputes

<sup>37</sup> On the history of the past limitations and the recent changes see Uzelac, “New Boundaries of Arbitrability under the Croatian Law on Arbitration”, 9 *Croatian Arbitration Yearbook* (2002) pp. 139-159.

<sup>38</sup> See Arts. 469 and 469a of the Code of Civil Procedure (now abrogated). For a review of previous law on this matter see Dika, “Arbitrability and Exclusive Jurisdiction of Courts of Law”, 6 *Croatian Arbitration Yearbook* (1999) pp. 27-46.

arising out of or connected to bankruptcy proceedings or compulsory enforcement proceedings; and a number of shareholder disputes in trading companies.

After 2001, the rules on arbitrability were restructured. The previous approach that distinguished arbitrability in domestic and international cases was replaced by a distinction between arbitration taking place inside Croatia, i.e. having its seat in Croatia ("domestic arbitration" under its definition in the Art. 2(1) point 2 of the Law on Arbitration), and foreign arbitrations (i.e. arbitrations that have their legal place outside of national territory).

For domestic arbitration virtually no subject-matter limits are provided, except that the dispute has to deal with dispositive rights of the parties (rights that parties may freely dispose of, i.e. transfer, conclude a settlement with respect thereto, etc.). Therefore, every dispute that can be settled, including those on patents and trademarks, may be arbitrated in Croatia.

On the other hand, "exporting" a dispute to a foreign arbitration (permissible only for international disputes) may take place "unless it is provided by law that such a dispute may be subject only to the jurisdiction of a court in the Republic of Croatia". This exception, although formulated in a more flexible way than its predecessor, can still be interpreted as referring to the above limitations of exclusive jurisdiction. For example, whereas it should now be accepted that a dispute in a case of bankruptcy of one of the parties could be submitted to arbitration in Croatia, it is unlikely that such a case would be capable of being submitted to arbitration with its seat in a foreign country.<sup>39</sup> On the other hand, the Bankruptcy Law of 1996<sup>40</sup> already allowed judges of the bankruptcy tribunal to refer disputed claims to arbitration,

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<sup>39</sup> This limitation does not, however, exclude possibility of resorting to arbitration conducted by an arbitral tribunal composed of foreign nationals, with foreign substantive law being applicable, as long as the seat of arbitration is in the territory of Croatia.

<sup>40</sup> Hereinafter the "BL".

i.e., order the parties, upon the request of a creditor, to settle their dispute by arbitration at some permanent arbitration court in the Republic of Croatia.<sup>41</sup> However, this has almost never been used in practice since this law went into effect.

As far as antitrust disputes are concerned, there are no specific legal rules or jurisprudence. Their arbitrability would have to be regarded under the above conditions, in particular regarding the ability to freely dispose of such rights and obligations.<sup>42</sup>

### 2.11 Interpretation

*Are there any rules governing the interpretation of arbitration agreements?*

There are no specific rules on the interpretation of arbitration agreements. Generally, arbitration agreements should be interpreted according to the rules of interpretation under the law that is applicable to the validity of the arbitration agreement *ratione materiae*. Legal commentary states that there is a general presumption in favour of the validity of the arbitration agreement (*favor validitatis*). This is supported by some court decisions.<sup>43</sup> For other issues of interpretation, general rules of interpretation of contracts of Croatian Code on Obligations would apply.

### 2.12 Scope

*What scope does an arbitration agreement have (e.g. under which conditions are claims relating to the business relationship but based on statutory provisions such as unfair enrichment, tort, etc., subject to arbitration)?*

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<sup>41</sup> Art. 178(6)-(10) BL. See Dika, "Arbitration in Bankruptcy? New Window of Opportunities in Croatian law", 4 *Croatian Arbitration Yearbook* (1997) pp. 27-38.

<sup>42</sup> See more in Čulinović-Herc, "Arbitrability of Unfair Competition Disputes", 3 *Croatian Arbitration Yearbook* (1996) pp. 57-70.

<sup>43</sup> See e.g. Decision of Croatian Commercial Court of 11 January 1994, No. 3317/93 - excerpts in *Praxis Iuridica Mercatoria* (1994), No. 100. See Dika/Sajko, "International Commercial Arbitration in Croatia", 1 *Review of Arbitration in Central and Eastern Europe* (2000), pp. 45-46.

The wording of the arbitration clause is generally construed broadly in practice. So far, there are no reported cases in which the courts restricted the arbitral competence based on the narrow interpretation of the words such as “arising out of” or “in connection with the contract”. The model clauses of the Permanent Arbitration Court at the Croatian Chamber of Commerce are broadly drafted, but even in the absence of precise wording, it was assumed that referring to the jurisdiction of this institution would generally have the same meaning (except if the parties have deliberately and expressly limited their clause to certain disputes).

### **2.13 Separability**

*What are the rules on the separability of arbitration agreements?*

The doctrine of separability of the arbitration clause from the remainder of the contract is well-settled in Croatian law. In the Law on Arbitration, the regulation of separability follows the UNCITRAL Model Law closely. The applicable provision is Art. 15(1), second sentence – “for that purpose [ruling on objections to the existence or validity of the arbitration agreement] an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract”. It also expressly provides that a decision to render the contract null and void shall not require *ipso iure* the invalidity of the arbitration clause. No essential differences with respect to the separability of the arbitration clause exist between claims that the underlying contract is non-existent and objections to the validity of the arbitration clause.

### **2.14 Termination**

*How can an arbitration agreement be terminated and with what effect?*

The Law on Arbitration itself provides no express answer regarding the circumstances under which an arbitration clause can be cancelled or terminated by a party. The provisions of the Code of Obligations apply. Under Art. 111 thereof, a party may terminate the contract, *i.e. an arbitration agreement*, due to the lack of free will or under the conditions otherwise provided by

applicable law. An agreement, as every other contract, can also in principle be terminated due to changed circumstances (*clausula rebus sic stantibus*), if it can be shown that due to an unforeseeable change in circumstances the legitimate expectations of the parties can no longer be met.<sup>44</sup> This was, *inter alia*, used as a ground for termination of some arbitration agreements concluded by Croatian parties that provided arbitration with a seat in Belgrade during the years of hostilities in 1990s.<sup>45</sup>

### 2.15 Third parties

*What effect does an arbitration agreement have with respect to third parties (e.g. legal successors, beneficiaries, group companies etc.)?*

Unless otherwise agreed between the parties, an arbitration agreement will bind each party's successors<sup>46</sup>, including the purchaser in an acquisition or merger transaction<sup>47</sup>. Case law has not yet addressed this issue. With respect to universal succession, it seems that there is no doubt as to the binding effect of the arbitration agreement. On the other hand, in cases of singular succession (assignment of contract, assignment of claim, assumption of debt), the effect of the agreement in the original contract for the successor would have to be assessed on the basis of the wording in the actual case. If the parties would expressly refer to the arbitration clause of the original contract, then such clause would certainly be binding. In other cases, in our opinion one would have to take into account the nature of contractual rights and obligations and the true will of the parties, as well as the rules on the form of the arbitration agreement that would have to be complied with both in respect to the original arbitration agreement and the agreement on assignment. The attitude of Croatian practice was until now reserved in respect to new theories such as "group of companies" – it is usual to require an express binding arbitration agreement with respect to every party to the dispute.

<sup>44</sup> Art. 133 Code of Obligations.

<sup>45</sup> See footnote 8 for further reference.

<sup>46</sup> Inheritance Law (Off Gaz. 84/03), Art. 5.

<sup>47</sup> Company Law (Off. Gaz. 111/93., 34/99. i 52/00, 118/03.), Art. 512.

As to third party participation, this is a common feature of national procedural law in court proceedings. The Zagreb Rules 2002 provide a rule on Accidental Party in Art 17. The only prerequisite for such party to participate in the proceedings as an accidental party is to obtain consent to that effect from both of the primary parties. Of course, a third party entering into a pending arbitration would also have to assent to the arbitration agreement, expressly or by actively engaging in the arguments on the merits.

### **2.16 Multi-party arbitration agreements**

*Are there any special issues concerning multi-party arbitration agreements?*

Under Croatian procedural law, it is not unusual to have more than one claimant and/or respondent (co-parties, or *suparničari*) in the same proceedings, so no objection that the arbitration clause does not specifically provide for a plurality of parties in the same procedure can be raised (an assumption is that the arbitration agreement covers all of the parties). A customary approach to multi-party appointment of arbitrators can be found in Art. 9 of the Zagreb Rules 2002 (which is the same as, e.g., Art. 10, 1998 ICC Rules of Arbitration).<sup>48</sup>

As to the consolidation of pending arbitral proceedings, the Law on Arbitration contains no express rules. However, consolidation is in principle possible under national procedural law, subject to the express agreement of the parties. Art. 16(1) of the Zagreb Rules provides that "If the parties in dispute file against each other separate claims arising out of different legal relations in which they agreed on the jurisdiction of the arbitral tribunal attached to the Court, the Secretariat of the Court shall endeavor to consolidate the hearings and deliberations in such actions and proceed before the same arbitrators." Consolidation is not, however, possible without the consent of the parties.

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<sup>48</sup> Under this provision, co-claimants or co-defendants have to come to an agreement on the appointment of their "joint" arbitrator. If they fail to reach an agreement the arbitrator shall be appointed by the President of the PAC-CCC from the list of arbitrators of the arbitral institution.

### 2.17 Competence in case of challenge

*Is the arbitral tribunal competent to decide on the challenge of its jurisdiction?*

An arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or the validity of the arbitration agreement.<sup>49</sup> If a respondent raises an objection as to the arbitrators' jurisdiction on the grounds that a valid agreement to arbitrate was not concluded (or dispute alleged is not the one encompassed by the arbitration agreement), the arbitrators may either rule on this issue in a preliminary ruling, or they may leave this issue to be decided later in their award on the merits.

The objection that arbitrators do not have jurisdiction must be raised at the latest with the filing of the statement of defense in which the respondent engages in the merits of the dispute. If the respondent fails to so object prior to engaging in arguments on the substance, this is deemed to be a consent to the arbitration (another instance of *prorogatio tacita*). Such failure to object constitutes a valid agreement to arbitrate under Art. 6(8) of the Law on Arbitration.

Thus, if objections to jurisdiction are not raised in due time, they would have to be rejected in all further proceedings, both before the arbitrators and before the courts of law. However, there are two exceptions: (i) if the objection is raised because the subject matter of the dispute is not capable of settlement by arbitration, or (ii) because of violations of public policy, no action or default by parties may lead to a valid agreement or waiver to object, since these two issues may be ruled on by courts *ex officio* both in the setting aside proceedings, and even during proceedings for the enforcement of the arbitral awards.

The preliminary ruling that arbitrators have jurisdiction can be challenged before a court.<sup>50</sup> Such a request must be made within thirty days from the preliminary ruling that arbitrators have

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<sup>49</sup> Art. 15 of the Law on Arbitration

<sup>50</sup> Art. 15(3).

jurisdiction. The court cannot, however, stay the arbitration proceedings while it decides this issue, so that the arbitrators may continue with the arbitration and even make a final award.<sup>51</sup>

On the other hand, claims before a court of law on the lack of jurisdiction of the arbitrators are not permitted prior to the arbitrators' own ruling on their jurisdiction. Further, if arbitrators have postponed the decision on their jurisdiction until the final award, a claim of the lack of a valid arbitration agreement (or dealing with matters not encompassed by the agreement) may only be raised before a court in a procedure for setting aside such an award – no prior judicial proceedings on the arbitrators' jurisdiction is permitted.<sup>52</sup>

If arbitrators rule that they lack jurisdiction (i.e. grant the objection to their jurisdiction) this is a final decision in the dispute in question. Such decision cannot be challenged before any further authority. As this is a final decision, the only way to resolve the underlying dispute would be to initiate proceedings in a court of law.

## **2.18 Court proceedings**

*What effect does the arbitration agreement have on court proceedings in Croatia?*

The Law on Arbitration regulates the effects of the arbitration agreement on court proceedings in Art. 42, largely following the text and approach of the UNCITRAL Model Law. Under Art.

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<sup>51</sup> It is not provided what should happen if the arbitrators make a final award while the jurisdictional dispute is still pending before a court (a case that may often occur, since the courts are overloaded with cases and therefore often are unable to render a swift decision). It seems that in such a case a separate court procedure on the jurisdiction would not make any sense, and that a claim of a lack of a valid arbitration agreement could be raised only in a claim to set aside the award.

<sup>52</sup> This reasoning is based on Art. 41(1): if a claim before of the court of law is not provided by the Law on Arbitration, it is not admissible ("no court shall intervene in matters governed by this law, except where it is so provided in this Law").

42(1), if an action is submitted to a court in Croatia and the respondent invokes the existence of an arbitration agreement in due time, the court is obliged to declare that it lacks jurisdiction. It must then annul all actions taken in the proceedings and refuse to rule on the statement of the claim, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

An objection to jurisdiction has to be raised prior to engaging in arguments on the merits, i.e. at the preparatory hearing or, if such hearing does not take place, at the first main hearing before the end of the oral presentation of the statement of defense. After this point, the respondent is deemed to have tacitly consented to the court's jurisdiction (*prorogatio tacita*).<sup>53</sup>

When making its decision on jurisdiction, the court first has to consider the timeliness of the objection.<sup>54</sup> Second, it will have to review whether the matter is of a type that may be arbitrated and public policy concerns (which it may do *ex officio*)<sup>55</sup> and then the claims with respect to jurisdiction raised by the parties. If it finds that a valid agreement to arbitrate exists, the court has to declare that it lacks jurisdiction and reject any further substantive claims regarding the case.<sup>56</sup> If an objection to jurisdiction is raised in arbitral proceedings, and the arbitrators have ruled that the arbitral tribunal is competent to hear the case, within thirty days from the date the notice on such a ruling was received by the requesting party, either party may seek a final decision on this issue from the competent court.<sup>57</sup> Such court proceedings would have to be urgent. Nevertheless, the

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<sup>53</sup> Art. 42(2) of the Law on Arbitration.

<sup>54</sup> See Art. 42(2): the objection has to be raised "no later than at the preparatory hearing, or, if no preparatory hearing is held, at the main hearing before the end of the presentation of the statement of defense."

<sup>55</sup> The issues of public policy and whether a matter is of a type that may be arbitrated always have to be taken into account by the court on its own initiative. For such an authority, see Art. 36(2) point 2, Art. 39(2) and 40(2) of the Law on Arbitration.

<sup>56</sup> Art. 42(1) of the Law on Arbitration.

<sup>57</sup> Art. 15(3) of the Law on Arbitration.

request for such a specific court ruling on jurisdiction does not prevent arbitrators from continuing the arbitration and making an award.

According to the Croatian Code of Civil Procedure, the court shall dismiss an action brought before it if there is already an ongoing suit between the parties with respect to the same matter or if the matter has been finally resolved.<sup>58</sup> The existence of pending suits, or *res judicata*, acts as a bar to any subsequent proceedings, and any decision reached in such subsequent proceedings is null and void.<sup>59</sup> In arbitration, however, this is only partly the case. The courts in Croatia do not *ex officio* look into the existence of pending arbitral proceedings. If a party fails to raise an objection in due time, the jurisdiction of the court cannot be contested because of already pending arbitration proceedings.

The law does not specifically settle whether it is possible to obtain a court judgment on the validity of an arbitration agreement prior to submitting the claim to arbitration. Under the general rules of the Code of Civil Procedure, such an action would be permissible, as a declaratory decision that may be brought before the materially competent court at the place where the defendant has its domicile (for natural person) or its place of business (for legal person). A contrary argument may be drawn from the rule contained in the Law on Arbitration (inspired by the same provision of the UNCITRAL Model Law) that “no court shall intervene in the matters governed by this Law, except where it is so provided in this Law”.<sup>60</sup> Case law has not yet ruled on the applicability of this norm to requests for a declaration of the (in)validity of an arbitral agreement.

**There are no court procedures for compelling arbitration proceedings.**

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<sup>58</sup> Art. 28(2) of the CCP.

<sup>59</sup> Art. 345(2) point 11 of the CCP.

<sup>60</sup> Art. 41(1) of the Law on Arbitration.

### 3. JURISDICTION OF STATE COURTS

#### 3.1 Functions

*Describe the functions of the state courts with respect to arbitration (types of assistance of the arbitral proceedings, interference, challenge of awards, enforcement of awards).*

State courts basically have two main functions with respect to pending arbitration proceedings: they assist the parties and arbitrators with respect to certain activities and oversee the integrity of the arbitral process. The most important oversight competence of the courts relates to ruling on applications for setting aside arbitral awards (proceedings that are admissible only with respect to domestic arbitral awards).<sup>61</sup> The court also rules on the recognition and enforcement of arbitral awards.<sup>62</sup> The court competence in these cases cannot be transferred to any other person or body. On the other hand, courts also may assist the arbitration proceedings by deciding on the jurisdiction of the arbitral tribunal,<sup>63</sup> authentication and deposition of the award,<sup>64</sup> appointment of arbitrators,<sup>65</sup> and challenge of arbitrators.<sup>66</sup> In all these cases, however, the parties may agree on another appointing authority (such as Chamber of Commerce or the boards of the arbitral institution) to undertake such activities instead of the courts. The parties may also turn to courts for legal assistance in taking evidence<sup>67</sup> and serving the award,<sup>68</sup> or request interim court measures for protection of their claims.<sup>69</sup> Regarding requests for interim measures, *see* more *infra* at 5.3.1.

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<sup>61</sup> Art. 36 of the Law on Arbitration.

<sup>62</sup> Arts. 39 and 40 of the Law on Arbitration.

<sup>63</sup> Art. 15(3) of the Law on Arbitration.

<sup>64</sup> Art. 46 of the Law on Arbitration.

<sup>65</sup> Art. 10(4)-(7) and Art. 14 of the Law on Arbitration.

<sup>66</sup> Art. 12(7) of the Law on Arbitration.

<sup>67</sup> Art. 45 of the Law on Arbitration.

<sup>68</sup> Art. 30(7) of the Law on Arbitration.

<sup>69</sup> Art. 44 of the Law on Arbitration.

### 3.2 Competence

*Which of the state courts is competent for the different functions?*

After enactment of the Law on Arbitration, court jurisdiction to intervene in arbitral matters was to a large extent concentrated. Instead of several hundreds of municipal courts (as before 2002), now only two courts are competent to intervene in the first instance in most arbitral matters: the Commercial Court in Zagreb (for commercial matters) and the County Court in Zagreb (for all other matters). Other courts may act in connection with arbitral matters only with respect to carrying out enforcement measures,<sup>70</sup> for ordering interim measures of protection<sup>71</sup> or for legal assistance and service of awards.<sup>72</sup>

Within the competent court, a sole judge or panel of judges will decide on the setting aside and recognition and enforcement of the award, as well as on some other petitions (e.g. deciding on jurisdiction of the arbitral tribunal and depositing of awards). Yet, for a number of other assistance functions, the competence to perform such functions will lie directly with the president of the court or with the judge that is designated by the president. Thus, a significant specialization is made possible within the court, enabling decisions of higher quality and efficiency.

### 3.3 Remedies

*What remedies against a court decision are available with respect to the different functions?*

Legal remedies that may be sought against court decisions depend on the type of proceeding. In setting aside proceedings, the general rules of court procedure apply; therefore, both an appeal to the competent higher court (as an ordinary remedy) and

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<sup>70</sup> Art. 43(2) of the Law on Arbitration.

<sup>71</sup> Art. 44 of the Law on Arbitration.

<sup>72</sup> Art. 43(5) of the Law on Arbitration.

an appeal to the Supreme Court (as a special remedy) may be made. Appeal to the competent higher court is permissible both with respect to findings of fact and findings of law, but only with respect to the correctness of a judgment setting aside an arbitral award. The competent courts for such an appeal are the High Commercial Court (if the court in the first instance was the Commercial Court in Zagreb) or the Croatian Supreme Court (if the court in the first instance was the Zagreb County Court).

In recognition and enforcement proceedings and proceedings challenging the jurisdiction of the arbitral tribunal, the rules of non-contentious civil proceedings are applicable,<sup>73</sup> so that, in principle only appeal is possible. The assistance functions that are performed by the president of the court (see supra at 3.2.) are not considered to be activities in court or administrative proceedings and therefore no remedy or means of recourse are available against such assistance actions.

### 3.4 International jurisdiction

*What are the criteria to establish the international jurisdiction of the state courts for the different functions?*

In international cases, Croatian courts have sole and exclusive jurisdiction to decide on applications to set aside awards made within the territory of the Republic of Croatia (i.e. domestic awards). They also have jurisdiction to decide on the recognition and enforcement of all foreign awards, if enforcement in Croatia or recognition of legal effects of the award within Croatia is sought. Most of the assistance functions of the Croatian courts are only available in arbitrations seated in Croatia, but in some cases, e.g. with respect to assistance in taking of evidence, a request may be made also by foreign arbitral tribunals, under the same conditions that are applicable to legal assistance to foreign state courts.<sup>74</sup>

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<sup>73</sup> Art. 41(2) of the Law on Arbitration.

<sup>74</sup> See Art. 11(4) of the Law on Courts.

## 4. CONSTITUTION OF THE ARBITRAL TRIBUNAL

### 4.1 Number and qualifications of arbitrators

*What are the rules with respect to the number and qualifications of arbitrators? To what extent may the parties provide for otherwise?*

The parties may freely determine the number of arbitrators. If they have not made any designation regarding the number of arbitrators, the Law on Arbitration provides for the appointment of three arbitrators.<sup>75</sup> The alternative of one or three arbitrators is provided in the Zagreb Rules 2002, with a default rule that disputes of up to €50,000 have to be decided by a sole arbitrator, while disputes above this amount to be heard by a panel of three arbitrators.<sup>76</sup>

The Law on Arbitration has abandoned the previous rule that required the appointment of an odd number. In practice, though, it is customary to appoint either one or three arbitrators.

Croatian law does not require arbitrators to have any particular qualifications. Generally, every adult of sane mind may become an arbitrator. No specific legal qualifications are required for arbitrators as far as training, experience, admittance to the bar or other qualification is concerned. The same approach is also taken by the arbitral institutions. However, in practice the vast majority of arbitrations are conducted by persons with a high level of legal expertise and knowledge.

Aside from legal knowledge, there is also the issue of nationality of arbitrators. Until 2001, there were no specific rules in this regard. The Law on Arbitration now provides an express rule, adopted from the UNCITRAL Model Law, that “[n]o person shall be precluded by reason of his nationality from acting as an arbitrator”.<sup>77</sup> This is not, however, a mandatory rule, and the parties may agree otherwise in their agreement. Although the

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<sup>75</sup> Art. 9 of the Law on Arbitration.

<sup>76</sup> Art. 6 of the Zagreb Rules 2002.

<sup>77</sup> Art. 10(1) of the Law on Arbitration.

wording of this provision is the same as Art. 11(1) of the UNCITRAL Model Law, its scope of application is broader, since the Law on Arbitration applies both to international and domestic arbitration (i.e. even if the dispute does not have an international character according to its legal definition).

All the preceding rules on general qualifications for arbitrators apply insofar as they are capable of performing their tasks and duties in a specific case. Specifically, arbitrators are required to possess qualities agreed by the parties, and specific abilities necessary to deal with the case with appropriate speed.

*Which national arbitration institutions may be contacted for obtaining information about qualified (and specialized) arbitrators?*

The Permanent Arbitration Court at the Croatian Chamber of Commerce maintains a list of arbitrators for domestic arbitration as well as a list of arbitrators for international arbitration.

The only exception to the general rule regarding qualifications of persons who may be appointed as arbitrators relates to active judges of national courts: continuing the tradition from the previous law, judges of Croatian courts may be appointed only as presiding arbitrators or sole arbitrators, i.e. they cannot act as party-appointed arbitrators.<sup>78</sup> It is the position of national law that party-appointed judges may jeopardize their independence in the eyes of the parties and the public, and perhaps raise the possibility of corrupt behavior, especially if the party that had appointed the judge as an arbitrator were to appear in subsequent court proceedings before the same judge (even if this were in an unrelated matter).

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<sup>78</sup> Art. 10(2) of the Law on Arbitration.

## 4.2 Begin and end of tenure

*What are the rules with respect to the:*

- a) appointment*
- b) revocation*
- c) replacement*
- d) resignation of arbitrators*

*To what extent may the parties provide for otherwise?*

The parties are free to determine the procedure for appointing arbitrators.<sup>79</sup> In practice this is most often by reference to the rules of a specific arbitral institution. However, the Law on Arbitration provides a system of appointing arbitrators if parties made no agreement (neither explicitly nor implicitly) in this respect.

Under the default rule of Art. 10 of the Law on Arbitration, if three arbitrators are to be appointed, each party must appoint one arbitrator. These two arbitrators then have to select and appoint the third, presiding arbitrator. If a party fails to appoint an arbitrator within thirty days from receipt of a request to appoint an arbitrator, or if the two arbitrators chosen by the parties fail to appoint the third arbitrator within thirty days from the last appointment, an interested party may request appointment from the appointing authority determined in Art. 43 of the Law on Arbitration, *i.e.* the state court.

If only a sole arbitrator is to be appointed (in cases where the parties agreed to a sole arbitrator, but have failed to determine the procedure for his or her appointment), the appointment has to be made jointly by both parties. However, if the parties fail to reach agreement, each of them may request the appointing authority to make the appointment.

If the parties have selected the Zagreb Rules 2002, a very similar procedure to the one described above would generally have to be followed. The appointing authority under these arbitration rules is the President of the PAC-CCC. The

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<sup>79</sup> Art. 10(3) of the Law on Arbitration.

procedure for the appointment of three arbitrators is the one provided for in the Law on Arbitration.

If a sole arbitrator is to be appointed, the parties have to communicate the name of the agreed arbitrator within the time limit set by the secretary of the PAC-CCC. This cannot be less than fifteen days from the submission of the statement of defense by the respondent (or its failure to do so). After this time limit has passed, the appointing authority will make the appointment.<sup>80</sup>

When making an appointment, the appointing authority should use the list procedure, unless the parties have agreed otherwise or the appointing authority considers the list procedure inappropriate for the specific case. The list procedure involves sending a list of at least three names to both parties. Every party has the right to strike one or more names from the list and rank the rest according to its preferences. The appointing authority should generally make appointment according to the parties' preferences. If a party fails to state its preferences or does not return the list within the designated fifteen days, the appointing authority shall make the appointment on its own discretion.

The Law on Arbitration also recognizes the right of each arbitrator to withdraw from its function. He can do so because of legal or other relevant reasons. The Law does not provide a special procedure in this case.<sup>81</sup>

### **4.3 Challenge of arbitrators**

*What are the rules with respect to the challenge of arbitrators (grounds, procedure)? To what extent may the parties provide for otherwise?*

A request to challenge an arbitrator can be made on one of three grounds, each related to requirements for arbitrators described in the preceding section. Such grounds are:

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<sup>80</sup> Art. 7 of the Zagreb Rules 2002.

<sup>81</sup> See Art. 13 of the Law on Arbitration.

- justifiable doubts as to the impartiality or independence of the arbitrator;
- lack of qualifications agreed by the parties; and
- failure to conduct the arbitration with due expeditiousness.

The procedure for challenge may be agreed by the parties. The default rule is that the merits of the challenge shall be decided by the arbitral tribunal itself, including the challenged arbitrator.<sup>82</sup> Naturally, a decision on the challenge will not be necessary if the arbitrator withdraws on his own. If the parties have not provided any other time-limit, the challenge procedure has to be initiated by a written request, including the grounds for the challenge, within 15 days after the challenging party has become aware of such grounds.

If the arbitral tribunal rejects the challenge, a further (mandatory) rule provides that the party who requested the challenge may seek a final decision on this issue by the appointing authority. This is one of the departures from the text of the UNCITRAL Model Law, as the appointing authority may be different from the state court. If an appointing authority was not determined by the parties, it will be the President of the High Commercial Court or the President of the County Court in Zagreb (for non-commercial matters).<sup>83</sup> The courts have already ruled that they have no jurisdiction if parties have, under the Arbitration Rules of the PAC-CCC, designated a different appointing authority. Assuming this precedent will be followed, decisions on challenge made autonomously within an arbitration institution (i.e. by its appointing authority) will be final, with no subsequent court control. The only way to attack a finding that an arbitrator was independent and impartial would be in the procedure for setting aside the award.

As in the case of requirements for arbitrators, the Zagreb Rules 2002 have departed from earlier practice and avoided

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<sup>82</sup> Art. 12(6) of the Law on Arbitration.

<sup>83</sup> Art. 43(2) of the Law on Arbitration.

providing any rules regarding challenges, assuming that the (dispositive) rules of the Law on Arbitration would apply. The only possible exception is the general default rule of Art. 10 of the Zagreb Rules 2002 designating the President of the PAC-CCC as appointing authority.

Croatian courts will not review the decision on challenge if the parties have agreed upon a specific procedure as such, but the issues of independence and impartiality of arbitrators may be reviewed in the proceedings regarding a request to set aside an award under Art. 36(2)(e). The right to apply for the setting aside (and the grounds for setting aside, other than that in Art. 36(5)) may not be waived in advance.<sup>84</sup>

If an arbitrator is successfully challenged, or if his mandate terminates for any other reason (arbitrator's withdrawal, revocation of his mandate by the parties, etc), the substitute arbitrator will be appointed under the same rules that were applicable to the appointment of the arbitrator that has been replaced.<sup>85</sup>

#### 4.4 Fees and expenses

*Are there any statutory provisions on fees and expenses of arbitrators?*

Arbitrators' fees. The Law on Arbitration contains no provisions with respect to arbitrators' fees. Arbitrators' fees are regulated in details by the PAC-CCC Regulation.<sup>86</sup>

Under Croatian law, arbitrators are, in principle, entitled to a fee, and the parties are jointly and severally liable for the payment thereof.<sup>87</sup> However, the exact amount of the fees, as well as the rules for their determination, must be agreed between the arbitrators and parties. Under Art. 11(5) of the Law

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<sup>84</sup> Art. 36(6) of the Law on Arbitration.

<sup>85</sup> Art. 14 of the Law on Arbitration.

<sup>86</sup> Decision on costs in arbitration and conciliation proceedings, Off. Gaz. 108/2003, in force as of 8 July 2003.

<sup>87</sup> Art. 11(4) of the Law on Arbitration.

on Arbitration, “if an arbitrator has determined the amount of his own expenses and fees, his decision does not bind the parties unless they accept it.” If the parties and the arbitrators cannot agree, they may request the appointing authority under Art. 43(3) to make an appropriate determination.<sup>88</sup> The decision of such an authority is binding on the parties to the dispute.

In *ad hoc* arbitrations, the parties and arbitrators shall usually fix the arbitrators’ fees in the Terms of Appointment. Such fees can be modified at any time by the consent of the parties. If no determination is made as to the arbitrators’ fees, the appropriate authority will determine the fees by using the “reasonable” standard, for which the PAC-CCC tariff schedule may serve as a guideline.

The parties’ influence in determining the fees is restricted in PAC-CCC arbitrations; in other arbitrations there are no restrictions for the parties to deviate from the pre-determined scale of the arbitrators’ fees.

#### **4.5 Civil liability**

*To what extent may arbitrators incur civil liability?*

There are no explicit rules regarding the liability of arbitrators in Croatian law. Furthermore, there is no case law on this issue. The relationship between the parties, arbitral institutions and the arbitrators is a contractual one (a kind of an employment contract). Every arbitrator is requested to accept his appointment, and hence a legal relationship *vis-à-vis* the parties is established. It follows, therefore, that the arbitrators may be sued for failure to comply with their duties and eventually also be ordered to pay damages caused by their failure, inability, lack of qualifications or manifest bias.

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<sup>88</sup> In most cases this is the same authority that acts as appointing authority, i.e. the authority designated by the parties or, in the absence of such a designation, the president of the competent court (Commercial or County Court in Zagreb).

As arbitrators also have a duty to conduct the proceedings with due expeditiousness, undue delaying of the proceedings may also lead to liability for the damage caused. On the other hand, when engaged in decision-making activity, arbitrators perform a jurisdictional activity that may result in an act of equal legal force to a final court judgment and therefore should be vested with the same immunity as the judges of the Croatian courts.

Arbitrators are deemed to have a contractual relationship with the parties irrespective of possible participation of an arbitral institution that administers the proceedings. The contract with arbitrators is generally concluded in the form of a work contract (*ugovor o djelu*).

#### 4.6 Exclusion of civil liability

*Can any civil liability of the arbitrators be excluded, and if so, how and to what extent?*

The limitation or exclusion of an arbitrator's liability is not provided for in the Croatian Law on Arbitration. The gap can be filled by the general provisions of the Code of Obligations. The Code of Obligations generally does not prevent party agreements that depart from the default provisions of the law.<sup>89</sup> However, such agreements would have to observe the principle of *bona fide* (good faith).<sup>90</sup> Thus, limitations or exclusions would have to be reasonable and not excessive; in no case would, e.g., a clause be valid that excludes *any* liability or liability for damages that arbitrators have caused knowingly and intentionally. Nevertheless, exclusion of liability for damages caused by *culpa levis* or limitation of damages to direct damages and exclusion of consequential damages would, in our view, be appropriate and permissible.

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<sup>89</sup> Regarding the principle of party autonomy, see, e.g., Art. 20 of the Code of Obligations.

<sup>90</sup> See Art. 11 of the Code of Obligations.

## 5. ARBITRATION PROCEDURE

### 5.1 General aspects

#### 5.1.1 Which procedural law applies in the absence of an agreement by the parties?

The parties may freely choose the rules of the arbitral proceedings. The parties may use the right to choose the rules of the arbitral proceedings either directly or by reference to a set of rules (e.g., the arbitration rules of the PAC-CCC or rules for an *ad hoc* arbitration such as the UNCITRAL Arbitration Rules).<sup>91</sup> If the parties fail to specify the applicable arbitration rules, or if some procedural details were not addressed by such rules, the rules of the arbitration proceedings may be set by arbitrators. The arbitral tribunal may “conduct the arbitration in such a manner as it considers appropriate”.<sup>92</sup> This power given to arbitrators may be utilized in various ways – by direct and detailed determination of applicable rules, by referring to a set of rules contained in institutional or *ad hoc* rules or in some national legislation, or any other appropriate manner. The limitations of the power of arbitrators to determine the rules applicable to the arbitration proceedings are generally the same as those of the parties, with some exceptions that arise from separate rules on commencement and language of the proceedings and oral hearings (see *infra*).

In principle, the Law on Arbitration has no restrictions on choosing foreign procedural law to govern the procedure before the arbitral tribunal; however, public policy and mandatory rules of the Croatian Law on Arbitration must be taken into account. Before the enactment of the Law on Arbitration, if foreign procedural law was applied, the arbitration was regarded as foreign. Now, such a rule no longer exists. However, in practice it rarely – if ever – happens that the parties select a foreign procedural law; rather, a set of arbitration rules is agreed upon.

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<sup>91</sup> See Art. 18(1) of the Law on Arbitration.

<sup>92</sup> Art. 18(2) of the Law on Arbitration.

The issue of whether an issue is a matter of substance or procedure is distinguished by its impact on the claims in the arbitration. If an issue only affects the manner in which the arbitral tribunal proceeds, without affecting the substantive outcome of the dispute, such an issue is procedural. Most of the issues regulated by the Law of Arbitration are procedural. Under Croatian law, for example, the interim measures ordered by the tribunal would also be a matter of procedure.

**5.1.2** *Which provisions of national arbitration law governing the arbitration procedure must be respected to avoid challenge of award or refusal of enforcement in Croatia?*

The right to be heard is embodied in arbitration proceedings by Art. 17 of the Law on Arbitration. Paragraph 1 states that the parties shall be treated equally in the proceedings and paragraph 2 goes on to state that each party shall be given the opportunity to answer the allegations and submissions of the other party. The right to be heard does not impose mandatory oral proceedings, but oral hearings have to be held if one of the parties so requests.<sup>93</sup>

The principles to be observed in arbitral proceedings are those contained in the mandatory provisions of the Law on Arbitration, but there are very few such rules. The most important one can be found in Art. 17. Other principles are those contained in the other applicable laws (mainly the Code of Civil Procedure and the Croatian Constitution).

The mandatory rules to be observed in the arbitral proceedings in Croatia can be either found in the law explicitly<sup>94</sup> or can be derived from the list of grounds for setting aside (e.g., the obligation to respect public policy).

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<sup>93</sup> Art. 23 of the Law on Arbitration.

<sup>94</sup> Such as Art. 3 (arbitrability), Art. 5 (waiver), Art. 6 (form of the arbitration agreement), Art. 17 (equal treatment), provisions on setting aside and enforcement.

### 5.1.3 *Who may represent parties in an arbitration in Croatia?*

The law does not require a party in arbitral proceedings to be represented by a legal representative or an attorney. That means that a party's counsel can be any natural person (legal capability) with business capacity (business capacity is acquired with 18 years of age). Under the Zagreb Rules 2002, if a party wishes to have a counsel, it must communicate such counsel's name to the PAC-CCC and to the other party in writing. The party must also specify whether the counsel is for representation or only assistance.<sup>95</sup> Members of foreign law firms may act as attorneys in international cases, as well as foreign in-house lawyers and experts.<sup>96</sup>

In proceedings for setting aside an arbitral award before Croatian courts, as in other litigation cases, generally only Croatian lawyers (members of the Croatian Bar Association) may represent the parties. The parties have also the right of self-representation, i.e. natural persons or CEOs of legal persons may directly represent the party without an attorney. Instead of attorneys, legal persons (companies) may also engage their employees for representation (not only employed in-house counsel, but also other persons employed in the company that is a party to the dispute), but when the value in dispute exceeds 50,000 Kunas, an employee representing the company must be a person that has passed the bar exam. Other persons (including foreign attorneys) may not represent the parties in court proceedings.

### 5.1.4 *In ad hoc arbitration, who determines the place of arbitration in the absence of an agreement of the parties?*

The parties may freely determine the seat of arbitration in their agreement.<sup>97</sup> This place may be either inside or outside Croatia. However, for domestic disputes (disputes between

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<sup>95</sup> Art. 5 of the Zagreb Rules 2002.

<sup>96</sup> See Porobija, "Foreign Attorneys as Party Representatives in Arbitration Proceedings", 2 CAY (1995), pp. 185-194.

<sup>97</sup> Art. 19 of the Law on Arbitration.

domestic parties) the seat of arbitration must be within the territory of the Republic of Croatia. However, if the parties determine a seat of arbitration abroad, the Law on Arbitration will not be applicable as a source of rules on arbitral proceedings, since its scope is limited to arbitrations with their seat in the territory of the Republic of Croatia. The Law on Arbitration has introduced the pure principle of territoriality to determine whether an arbitration will be considered foreign or domestic.<sup>98</sup> Therefore the seat of arbitration is the sole criterion for determining the nature of an arbitral award. If the parties have selected a seat of arbitration in Croatia, their award is domestic, if not, it is considered to be a foreign award.

Because of the weight and consequences of the selection of the seat of arbitration, it is highly unlikely that parties will fail to determine it themselves, either directly or by reference to specific arbitration rules.<sup>99</sup> However, for such unlikely cases the law provides that "... the seat of arbitration will be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the place for the parties".<sup>100</sup> If arbitrators have failed to expressly provide such a determination during arbitral proceedings, it is presumed that the seat of arbitration is the one designated in the award as the place where the award was made. This rule is interlinked with the provision of Art. 30(2) ("the award shall be made at the seat of arbitration"). In any case, it is necessary to expressly designate the seat of arbitration in the award according to this rule. Failure to do so may result in not being able to determine whether the award is made inside or outside the country and therefore lead to problems with its enforcement.

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<sup>98</sup> Art. 1(1) in connection with Art. 2(1) point 2. The Law on Arbitration uses the term "domestic arbitration" to denote both international and national arbitration ("domestic" according to the nature of the parties) that is attributed to the domestic legal order.

<sup>99</sup> E.g., the Zagreb Rules 2002 provide in Art. 4 that, if parties have not agreed otherwise, arbitration will take place at the seat of the PAC-CCC, i.e., in Zagreb.

<sup>100</sup> Art. 19(2) of the Law on Arbitration.

The seat of arbitration is a legal, not a factual determination. Parties and arbitrators may hold their meetings at any other appropriate place, either inside Croatia or abroad, for consultations, hearing witnesses, experts or the parties, or for the inspection of goods or documents.<sup>101</sup>

**5.1.5** *Under the law of Croatia is the statute of limitation part of procedural law or law on the merits?*

The statute of limitations is a matter of substance. Applicable periods for particular legal transactions are contained in the Code on Obligations and in other substantive laws. According to Art. 388 of the Code on Obligations, the time limit set by the statute of limitations is tolled by submission of the statement of claim in a court or other proceedings, including arbitration proceedings. Therefore, the moment when the time limit is tolled depends on the moment of initiation of the proceedings. Otherwise, the principle established in Croatian Code of Obligations is that the parties cannot modify the limitation time limits. Art. 4(2) of the 1998 ICC Rules correspond to the Art. 13 of the Zagreb Rules 2002 and therefore complies with Croatian law.

For the purpose of establishing when statute of limitations was tolled, it is important to establish the precise moment of the commencement of the proceedings. On this point the Law on Arbitration provides default rules that apply if the parties have not agreed otherwise. These rules are a specific compromise that distinguish between *ad hoc* and institutional arbitration. For the latter, arbitral proceedings are initiated by submission of the statement of claim to the arbitral institution (according to previous practice that emulates court proceedings).<sup>102</sup> On the other hand, *ad hoc* arbitration commences on the date on which a

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<sup>101</sup> Art. 19(4) of the Law on Arbitration. For additional aspects, see Sikirić, "Selection of the Place of arbitration", 3 *Croatian Arbitration Yearbook* (1996) pp. 7-27.

<sup>102</sup> The same method of commencing arbitration is also provided by Art. 13 of the Zagreb Rules 2002.

written statement of claim (that includes notification of the appointment of arbitrator and invitation to appoint the other arbitrator or proposal regarding appointment of a sole arbitrator) is received by the respondent.<sup>103</sup>

*5.1.6 What is the effect if a request for arbitration is withdrawn? Is this considered a waiver of the claim?*

The Law on Arbitration provides that the arbitration proceedings will be terminated by a procedural order by the tribunal if the claimant withdraws its claim and “unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final award in the dispute”.<sup>104</sup> Withdrawal of the claim is generally not considered a waiver of the claim, and the case may be resubmitted to the arbitral tribunal.

*5.1.7 What effect does the insolvency of a party domiciled in Croatia have on the arbitral procedure?*

According to the Croatian Bankruptcy Law, the party is succeeded by a new company “in bankruptcy” and the dispute can be further managed by the administrator of the party in bankruptcy, which takes over the management of the company.<sup>105</sup> Opening of the bankruptcy proceedings over one of the parties causes an automatic stay (prekid postupka) in judicial litigation.<sup>106</sup> This was also the case in arbitration proceedings before enactment of the Law on Arbitration. Now, as the CCP is no more directly applicable, arbitration is no longer automatically stayed. Instead, the arbitrators would have to make their own decision on the course of such proceedings, taking into account their obligation to ensure a fair hearing and give every party a right to present its case.

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<sup>103</sup> Art. 20 of the Law on Arbitration.

<sup>104</sup> Art. 32(1)(1) of the Law on Arbitration.

<sup>105</sup> Bankruptcy Law (Off. Gaz. 44/96, 161/98, 29/99, 129/00 and 123/03).

<sup>106</sup> See Art. 212 of the CCP.

**5.1.8** *How may the arbitral tribunal proceed in the absence of the Claimant?*

If a party refuses to participate in the proceedings, the tribunal may nevertheless continue the proceedings and render a final award. Such award will represent an enforceable legal title and will be enforced by the Croatian courts. If the party that failed to participate wishes to challenge such an award, it can do so successfully if it demonstrates that it was deprived of the opportunity to present its case and be heard. This defence will not, however, be successful if proof can be given that the party was in fact informed of the procedural steps taken by its opponent. For this purpose, it is advisable to keep proof of delivery of the notice, statement of claim and any other submissions in the case.

The default of the claimant may have twofold consequences. The tribunal shall terminate the proceedings if the claimant, without showing sufficient cause, fails to communicate a statement of claim that complies with requirements set in Art. 22(1).<sup>107</sup> On the other hand, the tribunal may also continue the arbitral proceedings if the Claimant, without showing sufficient cause, fails to appear at the hearing or fails to produce documentary evidence within the time limit provided, and make the award on the evidence before it.<sup>108</sup>

**5.1.9** *How may the arbitral tribunal proceed in the absence of the Respondent?*

The default of the respondent is treated similarly to a claimant's default. If the respondent fails to communicate his statement of defence in accordance with Art. 22(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.<sup>109</sup> Failure to appear at a hearing or produce evidence by the

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<sup>107</sup> Art. 24(1)(1) of the Law on Arbitration.

<sup>108</sup> Art. 24(1)(3) of the Law on Arbitration.

<sup>109</sup> Art. 24(1)(2) of the Law on Arbitration.

respondent has the same consequences as such default of the Claimant: the tribunal may continue the proceedings and make an award – see above at 5.1.8. In both cases, there will be no default award, but the tribunal will have to evaluate the available evidence and render a decision, *inter alia*, applying the rules of burden of proof.

**5.1.10** *Are there any national rules governing the service of documents by the arbitral tribunal on the parties or vice versa?*

Service of documents in arbitral proceedings is regulated by Art. 4 of the Law on Arbitration (Service of Written Communications). Rules on service are of a dispositive nature, and apply only to communications in arbitral proceedings. For service in court proceedings, CCP rules apply. Under Art. 4(1) of the Law on Arbitration, any written communication is deemed to have been delivered on the day when it is delivered to the mailing address of the addressee or to the person designated to receive written communications. The law also defines the concept of mailing address, and contains rules on fictitious delivery, i.e. rules on service to the last known address of the addressee,<sup>110</sup> if the regular mailing address is unknown (e.g. because communications cannot be delivered successfully to the address of the seat or the branch office of the party, or another address was agreed between the parties).

## 5.2 Evidence

The Croatian Law on Arbitration adopted the party autonomy principle with respect to the choice of the rules of evidence. If the parties have not made an explicit arrangement in this respect, the tribunal shall have the power to determine the admissibility, relevance and weight of any evidence. This power is incorporated in the tribunal's power to determine the rules of procedure.<sup>111</sup>

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<sup>110</sup> Art. 4(3) of the Law on Arbitration.

<sup>111</sup> Art. 18(2) of the Law on Arbitration.

The Croatian legal tradition has embraced the doctrine of free evaluation of evidence. Therefore, Croatian arbitrators would not generally be bound by the Croatian rules of evidence (there are very few such rules in the Croatian courts so far).

No statutory provisions exist which limit the parties to particular types of evidence. As to the standard of proof, the Law on Arbitration also gives no particular answer whether a preponderance of evidence or a higher standard would apply to arbitral proceedings. In proceedings before the Croatian state courts, the standard of *certainty*<sup>112</sup> (interpreted by *Triva*<sup>113</sup> as a “high level of probability”) is needed to prove a substantive allegation, whereas for facts that determine procedural issues, simple *probability* suffices.

The Law on Arbitration contains no provision regarding the right of arbitrators to rely on their own knowledge when considering facts as proven or not. The CCP allows the judges before the state courts to rely on their own expert knowledge in evaluating evidence, hence the same would apply for arbitrators. However, private knowledge of adjudicators regarding the disputed facts cannot be taken into account, neither in judicial nor in arbitration proceedings.

**5.2.1** *What rules govern any pre-hearing contacts of parties or parties' representatives with experts and witnesses?*

Croatian law and practice do not prevent the parties or their lawyers from meeting with and talking to their witnesses before the hearing. According to the Code of Ethics of the Croatian Bar Association (Rule 98), “the attorneys may, in principle, talk to witnesses before and after the commencement of the proceedings, but such conversations have to take place in a manner that will avoid any doubt regarding possible influence on witnesses.”

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<sup>112</sup> See Art. 221a of the CCP.

<sup>113</sup> *Triva/Belajec/Dika, GPPP*, § 101/2.

The law also does not prevent a party from approaching an expert or conducting an interview. However, experts are deemed to be independent from the parties and the parties should therefore refrain from any action that would bring the expert's independence into question.

*5.2.2 Are there any rules on oral or written witness statements?*

The arbitrators may determine the way in which witnesses are heard in the proceedings. The Law on Arbitration provides that witnesses should generally be heard at the oral hearing. However, with the consent of the witnesses, they may also be examined outside oral hearings. There are no rules on the method of hearing witnesses (e.g., whether they will be examined directly by arbitrators or whether they will be cross-examined); it is within the discretion of arbitrators to decide this after consulting the parties and taking into account other relevant circumstances (procedural background of the arbitrators, legitimate expectations of the parties, applicable law, etc.).

The arbitral tribunal can also request witnesses "to answer questions in writing within a certain period of time". Thereby, the use of depositions - written witness statements - would also be permissible, but only to the extent such witness depositions are prepared by the witness and submitted to the tribunal. The tribunal has no power to order witnesses to appear for depositions before the lawyers of both parties. Otherwise, written witness statements are generally not used in the proceedings before Croatian courts.

Under Art. 25(2) of the Law on Arbitration (drafted in line with the UNCITRAL Model Law) the arbitral tribunal may request witnesses to answer questions in writing within a certain period of time. The arbitrators shall give adequate weight to the evidence given in the form of a witness statement as opposed to the oral presentation and cross-examination.

Although written witness statements are permitted, the general principle is that the witnesses are to be heard orally.

Also, if an oral hearing has to be held if so required by one party, it would seem that the arbitrators would have to schedule a hearing for questioning of the witnesses that have submitted their written statements. The priority of oral examination would follow from the principle of immediacy, which is widely accepted in Croatian procedural law. However, ultimately all evidence will be assessed pursuant to the principle of free evaluation of evidence.

The Law on Arbitration has no provisions on the method of examination of witnesses. It is left to the parties and the tribunal to decide on the mode of examination. In Croatian court practice a witness is usually examined by the judge first, then cross-examined by the parties, and only rarely re-examined.

**5.2.3** *Are there any rules on the appointment of experts (party experts vs. tribunal appointed experts)?*

In Croatian legal practice it is customary to use neutral experts appointed by the body entrusted to adjudicate the case. Therefore, the Law on Arbitration provides that the arbitral tribunal may appoint one or more experts to report on specific issues determined by the arbitrators.<sup>114</sup> The tribunal is legally not required to consult the parties beforehand, although it is prudent to do so as a matter of good practice.

The parties are entitled to present their own expert witnesses as well.<sup>115</sup> Parties may agree otherwise concerning both Art. 26(1) and (2). In any case, the principle of equal treatment requires that the parties have the opportunity to read and comment on an expert's opinion. The law expressly provides that they may request an oral hearing where they will be able to

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<sup>114</sup> Art. 26(1) of the Law on Arbitration.

<sup>115</sup> This conclusion is derived from Art. 26(2) of the Law on Arbitration which provides that an expert witness appointed by the tribunal shall, at the request of either party, participate at the hearing where the parties shall have opportunity *inter alia* to "present [party appointed] experts in order to testify on the points at issue".

discuss all relevant issues with the expert, the other party and the arbitrators.

With regard to the methods of selection of experts, the Law on Arbitration has a default rule which states that the arbitrators may appoint an expert and also determine its mandate and set the relevant facts and questions for the expert's consideration. The parties may give their opinion on the tribunal's choice, but the tribunal will not be bound to accept it.

If the procedure chosen by the parties does not provide otherwise, the tribunal may allow the parties to proceed according to the Anglo-American system where each party may appoint one or more expert witnesses.

*5.2.4 Is there a difference between a party and a witness? If so what is the distinction and what are the consequences?*

The Law on Arbitration has no provision on who can appear before the tribunal as a witness. Therefore all persons may appear as a witness before the tribunal. Even the parties themselves fall into this category because the Law on Arbitration, unlike the rules on civil proceedings before Croatian courts, contains no specific provision on hearing of the parties.

There are no special rules on assessing the evidence given by the party so it is left to the tribunal to decide on the weight it will give to the party's testimony. In court proceedings, parties have to testify only if other evidence is not sufficient, so the law seemingly has the least confidence in party testimony. However, the principle of free evaluation of evidence prevails both in judicial and in arbitration proceedings.

*5.2.5 What methods of examining witnesses or experts are common in arbitration proceedings in Croatia?*

Witnesses and experts are usually examined orally at the hearing. Frequently, they would be questioned both by parties and by the arbitrators, although the level of active involvement

of arbitrators depends on their legal or cultural background. In practice, written witness statements are rarely used, but in almost every case experts would be requested to provide in advance a written report on the specific issues presented. An express provision of law stipulates that witnesses “shall be examined without taking an oath”.<sup>116</sup> In Croatian legal practice testimony under oath, though theoretically possible in court proceedings<sup>117</sup>, has almost completely vanished from both court and arbitration proceedings.

The arbitral tribunal does not have any means for compelling witnesses to appear and testify in the proceedings. However, Art. 45 of the Law on Arbitration provides that “the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request legal assistance from a competent court in taking evidence which the arbitral tribunal itself could not take”. Acting upon such request, the court will use the same rules as if it were requested to take evidence by another court. As a rule, the competent court<sup>118</sup> would call the witness and take his statements on the protocol. If a witness refuses to appear, all legal means available in court proceedings could be utilized to compel such witness to appear and provide information (police assistance, monetary penalties and imprisonment). Arbitrators have the right to be present at the court hearing held upon their request and may put questions to witnesses that are being examined.

The extent of the parties’ influence in determining the issues to be elaborated by the expert is not set by any law or rules. The parties shall, in practice, agree with the tribunal on issues that an expert will deal with in their report.

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<sup>116</sup> Art. 25(3) of the Law on Arbitration.

<sup>117</sup> This also applies to the court proceedings upon requests by the arbitral tribunal for assistance in taking of evidence. Thus, it would be possible (though not likely) that witnesses in arbitration proceedings be heard on oath upon such requests (*see infra*).

<sup>118</sup> According to Art. 43(5), it would be a court which has subject-matter jurisdiction for the action, territorially competent according to the place where the particular activity has to be undertaken.

Experts should be independent and impartial, so the rules on the challenge of arbitrators apply, as appropriate, to the challenge of experts.<sup>119</sup> This is at least true for experts appointed by the tribunal, whereas party-appointed experts may be heard as witnesses in the proceedings, even though they may not be fully independent of the party who appointed them (and paid for their opinion).

Expert evidence will as a rule be given in writing, but the tribunal may call the expert to give its opinion and be examined at a hearing by both the tribunal and the parties.

According to the Law on Arbitration, an expert is obliged to appear at a hearing.<sup>120</sup> The tribunal may compel the expert through the judicial assistance of the competent court.

*5.2.6 May a party be forced to submit documents to the arbitral tribunal and the other party either by the arbitral tribunal or with the assistance of state courts?*

The tribunal does not have the power to compel the parties to produce certain documents. The Zagreb Rules 2002 give the tribunal the authority to request the production of documents from a party. If the party fails to comply with the tribunal's order, the tribunal can only draw adverse inferences from such non-compliance. Another option for the tribunal is to request court assistance in taking evidence under Art. 45 Law on Arbitration. The court may order the party to produce a document to the tribunal and/or the other party. Yet it would have to assess whether there is a legal obligation of the other party to supply such document, and such obligation exist only in some cases, as the matter of substantive law. There is no general procedural obligation of the party to provide information or documents to other party.

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<sup>119</sup> Art. 26(3) of the Law on Arbitration.

<sup>120</sup> Art. 26(2) of the Law on Arbitration.

**5.2.7** *Is the cross-examination of witnesses and experts permitted?*

The cross-examination of witnesses and experts is not forbidden, and the arbitrators may allow it pursuant to their general authority to conduct the proceedings in the most appropriate manner. In practice, arbitrators tend to discourage too adversarial and aggressive a style of questioning, but they also almost always provide an opportunity to parties to ask witnesses and experts questions directly.

**5.2.8** *Are there any rules governing the protection of confidential documents?*

The Law on Arbitration has no provision on protection of confidential documents. What will be considered confidential may depend upon the parties' agreement or a Law on Confidentiality of Information may serve as a reference.

The correspondence between the party and its lawyer is protected under the Law on Attorneys. However, if such evidence is produced, it will not be disregarded, but will be taken into account under the principle of the free evaluation of evidence.

### **5.3 Interim measures**

**5.3.1** *What interim measures may an arbitral tribunal grant?*

The Law on Arbitration does not distinguish among particular kinds of preliminary measures that may be requested either by arbitrators or by the courts, and there is very little jurisprudence so far in this respect. However, it seems that the words "*such interim measure as considered necessary in respect of the subject-matter of the dispute*" could both embrace the measures aimed at conserving the value of particular property, requests for bank guarantees or attachment orders, as such forms of interim measures are known and widely used in national procedural law.

One of the new features of the Law on Arbitration 2001 is a positive attitude towards the interim measures of protection

ordered by the arbitrators.<sup>121</sup> Whereas the previous law did not allow arbitrators to issue any interim measures, Art. 16(1) of the new act provides that arbitrators are authorized, unless otherwise agreed by the parties, to “order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute”.

The arbitration law does not specify any further requirements for issuing interim measures (such as urgency). It is up to arbitrators to decide under what prerequisites the interim measures of protection are “necessary in respect of the subject-matter of the dispute”. As to form, the measures are regularly issued as procedural orders (under the Law on Arbitration, the term “award” is reserved for the decisions on the merits of the dispute). The issuing of an interim measure may be conditioned by an appropriate security provided either by the party who requested the measure, or by the party wishing to avoid such a measure.

In any case, the power of the arbitrators to order interim measures does not preclude the parties from requesting an interim measure to be ordered by a court. As provided by Art. 44, “... it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant such a measure”. The provisions of the Enforcement Law on the jurisdiction for ordering and enforcing interim measures remain unaffected.<sup>122</sup> The Law on Arbitration has not changed the previous way of requesting a provisional remedy from a national court. Therefore, during proceedings, the parties may now choose whether they will request a preliminary measure by the arbitrators (who are best informed about the case), or whether they will request the same measure before the competent court of law (which may still be the only solution prior to the appointment of the members of the arbitral tribunal).

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<sup>121</sup> On the background of this change in attitude, see more in Triva, “*Privremene mjere osiguranja u arbitraži*” [Interim measures of protection in arbitration], *Zbornik Pravnog fakulteta u Rijeci*, (Suppl. 1998) pp. 713-744.

<sup>122</sup> Art. 43(6) of the Law on Arbitration.

As the prerequisites for granting of an interim or conservatory measures under the Law on Arbitration are not defined, except that the arbitrators will order "any such measures" when they consider them "necessary", the arbitral tribunal has broad discretion in making its decision. However, at least in domestic disputes, it may be expected that arbitrators will consider the prerequisites that apply for the courts of law under the provisions of the Croatian Law on Enforcement (Art. 292-307). These provisions provide a number of prerequisites, depending on the type and subject matter of the measure. Generally, for money claims, an interim measure of security will be ordered if "the applicant makes probable that his claim is founded, and that there is a serious danger that his opponent will frustrate the enforcement of eventual award, or make the payment substantially difficult by removing or concealing the assets, or otherwise disposing with it." Although there is no case law on this issue, it is probable that the arbitrators would have to take into account the prerequisites for interim measures in court proceedings, if the court assistance will be requested in enforcing them.

There are also no rules for the proceedings in which requests for preliminary measures will be decided. State courts are often requested to make *ex parte* decisions on interim measures. This would also usually be the expectation of the Croatian parties in the arbitral proceedings, since the surprise effect is considered one of the substantive conditions for the efficiency of the ordered measure, especially against such respondents that are known to use all available means to block the proceedings or evade enforcement.

However, the Zagreb Rules provide that interim measures shall normally be ordered after hearing the other party, except if the applicant demonstrates that *ex parte* issuance is necessary to ensure that the measure is effective. In such cases, the applicant should disclose all the relevant circumstances and submit a statement that he will cover any damage caused by the lack of proper disclosure (Art. 26(1) of the Zagreb Rules 2002).

### 5.3.2 *How are interim measures granted by an arbitral tribunal enforced?*

It is generally expected that the party ordered to undertake a measure of protection will do so voluntarily (e.g. preserve perishable goods in a certain manner, or sell them and deposit the proceeds in a special account). Only if a party fails to do so, the opposite party may request enforcement of the measure issued by the arbitral tribunal by a competent court. The competence and proceedings of the court requested to enforce the measure will be determined according to the general rules of the Enforcement Code, i.e., the court approached in connection with the preliminary measure shall act under the same rules as if it had to enforce a measure of protection it had granted. The arbitral tribunals themselves do not have any power (or means) to enforce the interim measures they have granted.

With regard to enforcement proceedings with respect to interim measures ordered by the court, a party that has obtained an interim measure from the arbitral tribunal may make a request for the enforcement of such a measure before the competent court.<sup>123</sup> The law does not provide any specific further conditions for court assistance in enforcement proceedings. Therefore, normal enforcement rules applicable in court proceedings apply.<sup>124</sup> If the ordered measure is compatible with the measures that the court would be able to order had the measure been requested directly by the court, the process of enforcement would follow the same path as in the case of court-ordered measures. According to prevailing legal doctrine, the court would also have the right to change the form of the ordered measure in order to make it enforceable, to the extent the court decision does not affect the substance of the interim measure.

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<sup>123</sup> Art. 16(2) of the Law on Arbitration.

<sup>124</sup> In Croatia, as in some other countries (e.g. in Austria) the court has considerable control over the enforcement process; no independent private or state bailiffs exist, so practically all decisions during enforcement process are made directly by the court.

**5.3.3** *Does a state court enforce interim measures granted by an arbitral tribunal which has its seat outside Croatia?*

*a) always*

*b) never*

*c) only if the interim measures are rendered in the form of an award*

*d) under the following circumstances (please explain)?*

The right to turn to state courts for enforcement of arbitral interim measures in Art. 16(2) seemingly applies only to arbitral tribunals seated in Croatia (as for foreign arbitral tribunals, no comparable right exists under arbitration legislation). Nothing would be changed if the foreign interim measures would be issued in the form of arbitral awards: under Art. 2(1)(8) the term “award” only relates to the decisions on the merits, and not on interim measures. Therefore, any decision of a foreign arbitral tribunal regarding interim measures would be treated as a procedural order, and its (false) denomination as an “award” would not make it enforceable under NYC or Croatian law. However, as parties in foreign arbitral proceedings could request interim measures directly from a Croatian court under Art. 44 (see above at 5.3.1), they may supply in such proceedings a copy of the interim measure issued by the arbitrators. In such a case, this decision, albeit not binding, could provide proof of the necessity of the measure and provide usable guidance to the judge who decides on the application.

## **6. AWARD**

### **6.1 Types of awards**

*Are different types of awards distinguished?*

The Law on Arbitration provides that, unless the parties have agreed otherwise, the arbitral tribunal may issue not only final awards, but also partial and interim awards.<sup>125</sup> Thus, arbitrators may either deal with all of the issues at the same time, or

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<sup>125</sup> Art. 30(1) of the Law on Arbitration.

bifurcate the issues and rule first on the claims that are ripe for decision-making, leaving the rest for the final award.

However, it should be emphasized that the term “award” (in Croatian: *pravorijek*) is legally defined as a “decision on the merits of the dispute”.<sup>126</sup> Decisions on procedural issues can regularly be made in the form of procedural orders (*zaključak*). Therefore, as already mentioned, decisions on preliminary measures would regularly not require an award (see *supra* Chap. IV.5).<sup>127</sup> The same would be the case with decisions on applicable law or jurisdiction of the arbitrators – such decisions are viewed to be merely of a temporary, procedural nature, and generally do not require any enforcement (nor it would be possible to submit them to a setting aside procedure).<sup>128</sup>

The “interim award” (*međupravorijek*) does not relate to interim measures, but to substantive decisions on the basis of a monetary claim (e.g. a decision on the existence of liability for damages, whereas the amount of damages would be left for the final award). Unlike partial awards, such interim awards are not independent awards. That is, unlike partial awards, they are not capable of direct enforcement, but only when a final decision on a claim (both on the basis of a claim and on its amount) is made.

In this sense, a partial award can also be regarded as a “final award” under the legal definition of Art. 2(1) point 9 of the Law on Arbitration.<sup>129</sup> Partial awards finally decide one or more of

<sup>126</sup> Art. 2(1) point 8 of the Law on Arbitration.

<sup>127</sup> E.g., Art. 26(2) of the Zagreb Rules 2002 provides for issuing of preliminary measures by means of procedural orders.

<sup>128</sup> Yet, since this may also be regarded as an issue of terminology and translation, if the parties would need for some particular purpose a procedural decision that is in English entitled “award”, it seems that they could make such an agreement. Under Croatian law, such a decision would be regarded as a valid procedural order, under principle *falsa nomination non nocet* (false nomination does not affect the validity of the action). Foreign “interim awards” would, however, also not be regarded as awards, and the rules on recognition and enforcement of awards would not apply to them.

<sup>129</sup> Croatian legal practice and doctrine distinguish between two senses of “finality” regarding decisions on the merits of a dispute, i.e. the award that finally settles one or more claims in the same dispute (final awards as *konačni*

several claims in the dispute (but not all of them), or a part of one (divisible) claim can be subject to an independent setting aside procedure, whereas the interim awards can only be challenged within the application to set aside the final award.<sup>130</sup>

There are no provisions in the Law on Arbitration that deal separately with procedural orders. However, it defines awards as “decisions of the arbitral tribunal on the merits of the dispute” and therefore all other issues would have to be in another other form, i.e. in the form of a procedural order. In practice, a tribunal deals with provisional measures, jurisdiction, challenges and other procedural matters in the form of a procedural order (*zaključak*). Such a rule is expressly provided in the Zagreb Rules 2002, e.g. with respect to interim measures.<sup>131</sup> Procedural orders in principle require no enforcement, nor can they be challenged in a setting aside procedure.<sup>132</sup>

Both partial awards (*djelomični pravorijek*) and interim awards (*međupravorijek*) are binding in the same arbitral proceedings. Such awards are valid and binding even if one arbitrator is subsequently successfully challenged and removed. However, setting aside may be requested based on improper composition of the tribunal, but in such a case it should be proven that such composition could have influenced the content of the award.<sup>133</sup>

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*pravorijek*), or where the process as such (with all outstanding issues) is finally settled by award (final award as *potpuni pravorijek*, “full award”). The Law on Arbitration only uses the term “final award” in the first sense, *inter alia*, also in Art. 32 (“final award terminates the proceedings on the issues decided by it”).

<sup>130</sup> Art. 36(1), second sentence, of the Law on Arbitration.

<sup>131</sup> See Art. 26(2) Zagreb Rules 2002.

<sup>132</sup> Exceptionally, a provisional measure issued in the form of a procedural order may be enforced with the court’s assistance.

<sup>133</sup> Art. 36(2)(e) of the Law on Arbitration. The need to prove that composition of the tribunal that was not in accordance with the law and the permissible parties’ agreement could have influenced the content of the award is an addition to the UNCITRAL Model Law, which further limits the conditions for setting aside.

## 6.2 Decision taking

*How are the decisions of the arbitral tribunal taken?*

The arbitral tribunal shall make an award when the issues are ripe for decision-making.<sup>134</sup> There is no time limit for the making an award in either the Law on Arbitration or in the arbitration rules of the various arbitral institutions.<sup>135</sup> However, the duty to make an award within appropriate time limits arises from the already-mentioned general duty of the arbitrators to conduct arbitration in a speedy manner and avoid undue delay established in Art. 11(2) of the Law on Arbitration.

Art. 28 of the Law of Arbitration provides how decisions (both of procedural and substantive nature) are made if the arbitral tribunal consists of more than one arbitrator. Unless otherwise agreed by the parties, decisions have to be agreed upon by the majority of tribunal members. If such a majority cannot be reached, arbitrators will deliberate again about the reasons for and against different options, with a view to reaching a decision. If a majority still cannot be reached, the award will be made by the presiding arbitrator. If the members of the tribunal are not in session, the presiding arbitrator may also decide alone on certain procedural issues regarding the conduct of the proceedings, unless this is contrary to the parties' agreement or an agreement among the members of the panel.

Both the law and the arbitration rules are silent with regard to the treatment of dissenting opinions. In practice, dissents are regarded as an internal matter for arbitrators' decision-making as the tribunal is expected to speak with one voice towards the parties. The arbitrators or arbitral institutions usually do not

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<sup>134</sup> For a rule expressly setting forth such a standard, see Art. 1(1) of the Zagreb Rules 2002.

<sup>135</sup> An exception can be found in the arbitration rules of the CARNET (Croatian Academic Research Network) regarding domain name disputes within the Croatian national internet domain (.hr) – see <http://www.dns.hr>. Under Art. 21 of these rules, the arbitral award has to be made within sixty days from the transfer of the file to the arbitrator.

inform the parties whether the award was made unanimously or by majority vote and do not send any dissenting opinions to parties.

In the practice under the PAC-CCC, the arbitrators were free to add their dissenting opinion to the file kept by the institution, but it was not permitted that such an opinion be forwarded or otherwise notified to the parties. A note that an award was not made unanimously was also not regarded as permissible.

### **6.3 Special circumstances**

*What happens if one arbitrator does not or cannot participate in the proceedings or the decision taking?*

The failure of one arbitrator to co-operate should not obstruct the course of the proceedings. The absence of one arbitrator, if he was given proper notice of deliberations, would not in se constitute a ground for setting aside of the award. Such a conclusion can be drawn from the express provision of the Art. 30(5) of the Law on Arbitration that provides for the duty to sign the award, but also provides that a majority of signatures of the arbitrators would suffice for the validity of the award, if the omission (or refusal) to sign the award by one or more arbitrators was noted in the award.

### **6.4 Method of determining the applicable law**

*In the absence of a choice of the parties, how is the law applicable the merits of the dispute determined?*

If the parties have not made any selection of the law applicable to the subject matter of the dispute, the arbitrators may determine such law, applying the law that they consider to be most closely connected with the dispute.<sup>136</sup> In purely domestic disputes it will

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<sup>136</sup> Art. 27(2) of the Law on Arbitration. The Law on Arbitration has abandoned the previous practice of mediated determination of the applicable law, i.e. by application of the law determined by the conflict of laws rules which the arbitrators consider applicable (see, e.g., Art. 38 of the Zagreb Rules 1992). This is one of the departures from the text of the Model Law (Art. 28(2)) that

be assumed that substantive Croatian law will be applicable, although the right of parties to agree on some other legal rules is not expressly excluded. *See also* below at 6.5.

Under the Law on Arbitration, the same rules are applicable to national and international arbitrations. Thus, with respect to applicable law, there are generally no differences as to whether a dispute is regarded to be one “with international character” or not, although in domestic arbitrations one may regularly assume the application of domestic law.

Article 27 of the Law on Arbitration contains an autonomous and direct conflict of law rule that points to the application of the law with the closest connection if the applicable law has to be determined by the arbitrators. However, the parties have broad freedom to agree on the applicable law by reference to “rules of law” chosen as applicable. Although by default any designation of the law or legal system has to be construed as direct reference to substantive law of a particular state,<sup>137</sup> by their express agreement parties may instead designate the applicable law by reference to conflict of law rules.

### 6.5 Who determines the applicable law?

*May the arbitral tribunal determine any rules of law (e.g. UNIDROIT Principles), or only rules which were enacted by a sovereign body?*

The applicable rules of law are those agreed by the parties. The phrase “rules of law” enables the parties to choose either a substantive law of a particular jurisdiction, or some combination of substantive laws of various jurisdictions, or even some other system of rules, e.g., *lex mercatoria*.<sup>138</sup> For avoidance of doubt, it is provided that any reference to the law

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followed the method that was considered to be simpler and modern (the same approach is also followed in Swiss law, Art. 187(2) CPIL, and in German law, Art. 1051(2) of the ZPO).

<sup>137</sup> Art. 27(1), last sentence, of the Law on Arbitration.

<sup>138</sup> Croatian scholarship considers the application of *lex mercatoria* as the application of the rules of law. *See Goldštajn/Triva, Međunarodna trgovačka arbitraža*, 1.2:32-54.

or legal system of a particular jurisdiction should be interpreted as a direct reference to the substantive law of that jurisdiction and not as a reference to its conflict of law rules. Regardless of the rules of law that are being applied, the arbitrators have to observe the terms of the contract and have to take into account the applicable usages of trade (or other usages relevant for the subject matter). In practice, contractual terms and commercial practices are more important than the applicable rules of law. Also, while deciding *ex aequo et bono*, arbitrators often seek to find a solution that is not radically different from the application of rules and principles of the legal systems connected to the dispute.

The Law on Arbitration provides that the arbitral tribunal may, failing any designation of applicable rules of law by the parties, “apply the law which it considers to be most closely connected with the dispute”.<sup>139</sup> Although arbitrators have considerable freedom in making their determination, the term “law” means that they can choose any substantive law of the particular jurisdiction. Therefore, other combinations of legal rules or principles (e.g. of *lex mercatoria* or UNIDROIT principles) cannot be selected by the arbitrators alone, since they are not considered to be “law”.<sup>140</sup>

## 6.6 The principle of *iura novit curia*

*Does the principle iura novit curia apply?*

The principle “*iura novit curia*” is accepted in Croatian procedural law.<sup>141</sup> In court proceedings, the determination of applicable law has to be made by the court, and the parties do not have to prove it (although they may assist by providing appropriate documents and certificates by competent authorities, e.g. for foreign law). Otherwise, as any substantive rules are regarded to be law, and not facts, the determination of

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<sup>139</sup> Art. 27(2) of the Law on Arbitration.

<sup>140</sup> This interpretation is consistent with the common understanding and legislative history of Art. 28. of the UNCITRAL Model Law.

<sup>141</sup> *Triva/Belajec/Dika, Građansko parnično procesno pravo*, § 29/7.

applicable rules is not regarded to be a part of evidentiary process. In arbitration, there are no explicit obligations for the arbitrators to “know the law”. The parties by their choice (impliedly or expressly) make the knowledge of certain legal system important. As some means that are used in court proceedings to establish the content of applicable (foreign) rules – e.g. inquiries with the Ministry of Justice – are not available in arbitration, the legal means that arbitrators use may be different and include those that would otherwise generally be used in court proceedings (e.g. hearing of expert witnesses, collection of texts and authorities from unofficial sources, etc.).

### 6.7 *Ex aequo et bono*

*When may an arbitral tribunal decide ex aequo et bono?*

Under Article 27 of the Law on Arbitration, the arbitral tribunal shall always decide according to rules of law unless the arbitrators were expressly empowered to decide as *amiable compositeurs* (*ex aequo et bono*).<sup>142</sup>

### 6.8 Minimum content of an award

*What are the form requirements for an award and what are the consequences if they are not met?*

The original and all of the copies of the award have to be signed by all members of the arbitral tribunal. However, if one or more arbitrators fail to sign the award, it is still valid, provided that the majority of the members of the tribunal have signed it and that it is stated in the award that one or more arbitrators failed to sign it.

Pursuant to Art. 30 of the Law on Arbitration, the award shall be made in writing. It has to be made at the seat of arbitration, and it has to be dated.

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<sup>142</sup> For a comparative perspective of arbitration *ex aequo et bono*, see Sikirić, “Arbitration in Equity – *ex aequo et bono*”, 2 *Croatian Arbitration Yearbook* (1995) pp. 125-145.

### 6.9 Minimum content of an award

*What is the minimum content of an award (in particular as opposed to other decisions of the arbitral tribunal)?*

*See also* above at 6.8. The award must be reasoned, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms.

The award must indicate the place where it was made. The statement of the time/date when the award was made is required as well.

### 6.10 Rules governing interest in arbitration

*Are there any rules governing interest in arbitration?*

There are no special rules governing interest in arbitration. Failing an agreement by the parties, the law that would apply to interest is the law applicable to the main contract. If Croatian law is applicable, the legal interest rate would apply, which is currently about 15% p.a. (on debt in local currency - Kuna). Legal interest on foreign currency debts is considerably smaller than the interest on debts in Kuna. It is currently determined according to the interest rates on *a vista* savings (regular savings, short term savings) in the relevant currency for bank accounts at the place where the payment was due (currently between 0.15% and 0.25% annually).

### 6.11 Compound interest

*May compound interest be granted?*

The possibility to grant compound interest under Croatian law is limited. Generally, interest may be calculated on interest (*anatocizam*) only in the form of so-called "procedural interest". Under Art. 279(2) of the Code on Obligations, interest on calculated but unpaid interest may be requested only from the date when a request for payment of interest has been submitted to court.<sup>143</sup> This applies *per analogiam* to arbitral proceedings

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<sup>143</sup> *See, inter alia*, Supreme Court decisions Rev-930/1996-2; *Izbor odluka VSRH*,

under Croatian law, i.e. compound interest (*kamata na kamatu*) may be granted only on the amount of interest that was claimed, and calculated from the date when the arbitral proceedings were initiated.

### 6.12 Rules governing the service of the award

*Are there any rules governing the service of the award and what the consequences are if they are not met?*

The law provides that awards made under the auspices of arbitral institutions have to be delivered to the parties by such institutions. At the same time, such institutions should keep a record of delivery of the award.

In *ad hoc* arbitrations, Art. 30(6) provides that the arbitral award shall be delivered to the parties by the arbitral tribunal. In any case, regular means of delivery (e.g., registered mail) and the rules on the receipt of written communications will be applicable.<sup>144</sup> Upon request of both parties, delivery of the award may be made by the court or notary public.

If the parties have agreed on the appeal before an arbitral tribunal of second instance (which happens rarely, if ever), service of the award is relevant for establishing the effect of *res judicata* and enforceability of the award (also for timeliness of the launched appeal). In other cases, the proof of service would generally not affect the enforceability. Under Art. 47. of the Law on Arbitration, no proof of receipt of the award is needed in the process of enforcement (yet, in practice there may be some confusion about this, since the rules of the Enforcement Act are still not fully harmonized with the Law on Arbitration). In any case, valid service of the award triggers deadlines for setting-aside applications from Art. 36(3). If service of the award was not made properly, the time for launching setting aside does not start to run.

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<sup>144</sup> Art. 30(7) in conjunction with Art. 4 of the Law on Arbitration.

### 6.13 Rules governing the registration of the award

*Are there any rules governing the registration of the award and what are the consequences if they are not met?*

The Law on Arbitration has abandoned the previous obligation to deposit an award with the court in *ad hoc* arbitrations.<sup>145</sup> Therefore, an award is effective without any mandatory registration, authentication or deposition, although the parties or arbitrators may, in order to avoid any doubts arrange to keep a copy of the award in a safe place, arrange an appropriate method of preservation (e.g. with a notary public) or arrange the authentication of their signatures. The law expressly provides that the parties may also agree to deposit the award with a court.<sup>146</sup> In such cases, the court will treat such a request as a request for assistance, i.e. the court will normally have a duty to grant such a request.<sup>147</sup>

Croatian law equally does not require registration of foreign awards with a Croatian court or agency.

If parties choose to deposit the award, no significant court fees would be associated with deposition. Notarial fees would be slightly higher than the court fees.

### 6.14 Rules governing award on consent or settlement before the arbitral tribunal

*Are there any rules governing an award on consent or a settlement concluded before the arbitral tribunal? What is its legal force?*

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<sup>145</sup> See former Art. 482 of the CCP.

<sup>146</sup> The courts competent for such deposition would be the Commercial Court in Zagreb (in commercial arbitrations) and the County Court in Zagreb (in other arbitral cases) – see Art. 43(1) of the Law on Arbitration.

<sup>147</sup> See Art. 46 of the Law on Arbitration. In addition to the rules on court assistance to arbitral tribunals in the Law on Arbitration (e.g., in taking evidence), Art. 11 of the Law on Courts (Off. Gaz. 3/94, 100/96, 115/97, 131/97, 129/00, 67/01, 5/02) provides that the courts shall provide assistance to arbitral tribunals “if their request is legally grounded, if the requested action is admissible, and if the court is competent to undertake it”.

The Law on Arbitration contains explicit provisions regarding settlements reached during the arbitration proceedings.

If the parties reach a settlement agreement, the tribunal must either terminate the proceedings by a procedural order or, upon the request by both parties, issue an award on the agreed terms (award by consent). The arbitrators do not have any power to review the content of the settlement with respect to its appropriateness. However, they must refuse to make an award on the basis of a settlement that would violate public policy.<sup>148</sup> The award on the agreed terms has the same legal force as an arbitral award and is subject to the same formal requirements as other types of awards, except that – as already noted – stating of reasons is not required.<sup>149</sup>

If arbitrators terminate the proceedings by their procedural order, the form and enforceability of settlement will be entirely left to the parties; basically, the settlement reached will have only the effect of a civil law contract. If the parties request that the arbitrators record the settlement in the form of an award on agreed terms (award by consent), the award issued will have the same force and effects as any other award on the merits.<sup>150</sup>

There are no explicit provisions on the setting aside of awards on agreed terms, but in principle they would be subject to rules for setting aside as other types of awards. Some differences would, however, arise out of the legal nature of the award on agreed terms. Since an award on agreed terms is a direct product of the parties' agreement, some of the grounds for setting aside would not be applicable. A lack of stated reasons would, e.g., not be covered by Art. 36(2)(2)(f). Also, due to the nature of the award on agreed terms, it would be implied that some other grounds would also be excluded (e.g. lack or invalidity of the arbitration agreement, inability to

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<sup>148</sup> Art. 29(2) of the Law on Arbitration.

<sup>149</sup> Art. 30(3) of the Law on Arbitration.

<sup>150</sup> Art. 29(1) and (3) of the Law on Arbitration.

present one's case or falling outside the scope of the submission to arbitrate). Other grounds, such as violations of public policy, the non-arbitrability of the subject matter, or the incapability or improper representation of the parties could be raised in the setting aside proceedings, and – according to the practice of challenging judgments by consent in court proceedings – also error, fraud or duress that has led a party to conclude the settlement.

#### **6.15 Rules governing the correction, interpretation, and amendment of an award**

*Are there any rules governing the correction, interpretation and amendment of an award?*

Under Art. 34 of the Law on Arbitration, every party may request corrections of any errors in writing, miscalculations or other clerical or similar errors.

If the parties have so agreed, it is also possible to request an interpretation of a specific point or part of the award.

In both cases, the request has to be made within 30 days of receipt of the award,<sup>151</sup> and notice has to be given to other party. If the arbitrators consider the request to be justified, they shall make corrections or give an interpretation within a further 30 days from receipt of the request. The correction or interpretation provided to the parties shall form part of the award.

Within 30 days from making an award, clerical errors may also be corrected by the arbitral tribunal on its own motion, without the initiative of the parties. With regard to formal requirements and the communication of the corrections or interpretations, all of the rules regarding the award are applicable.

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<sup>151</sup> This time limit is subject to parties' agreement – see introductory clause of Art. 34(1).

## 7. COST

### 7.1 Rules governing a security for costs

*Are there any rules governing a security for costs in arbitral proceedings?*

The Law on Arbitration has no provisions on security for costs. The provisions of the Croatian Conflict of Laws Act (applicable to court proceedings) may apply accordingly.<sup>152</sup> The conditions for ordering a party to post security for costs are such party's inability to pay its costs of arbitration as well as if an award would not be enforceable in the party's country. However, it is disputed whether ordering security for costs would be appropriate at all in arbitration proceedings. In practice, claims for security have been raised in the PAC-CCC proceedings. Already in 1992, the Presidium of the PAC-CCC decided to issue a general view on the claims for security, and came to conclusion that such requests cannot be granted. The Presidium stated, *inter alia*, that "arbitration means a voluntary jurisdiction" and that "it is presumed that the parties, by agreeing on arbitration, waive some other privileges that they may eventually have in the process before public courts"; that "granting security for costs to domestic parties would be contrary to the principle of equal treatment of the parties" and that "requesting such security is also not in line with the practice of international arbitration".<sup>153</sup>

### 7.2 Rules governing an advance on costs

*Are there any rules governing an advance on costs?*

As to advances on costs, they are not regulated by provisions of arbitral law, but by rules and practices of arbitral institutions (or direct agreement with arbitrators, in the case of *ad hoc* arbitration). In the practice of the PAC-CCC, under rules on costs of the proceedings, the parties are obliged to provide an advance of full foreseeable costs of the proceedings at the

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<sup>152</sup> Arts. 82 - 84 of the Croatian Conflict of Laws Act.

<sup>153</sup> See Decision of the Presidium of the PAC-CCC of November 17, 1992, Croat. Arbit. Yearb. 5(1998), at 247-248.

beginning of the proceedings. The advance covers the fees of arbitrators and the arbitral institution, as well as the foreseeable costs of evidence-taking. However, if during the proceedings additional evidence should be taken, or the amount of dispute changes, so that the available advances no longer cover the costs, the parties may be invited to pay additional advances.

### **7.3 Consequence of not meeting obligation of advance on costs**

*What are the consequences if a party who is obliged to make an advance on costs (e.g. under the applicable rules of arbitration) does not do so?*

There are no direct remedies against the party that does not pay its part of the advance on costs. There are, however, indirect incentives to pay the advances, provided in the rules of arbitral institutions. For example, the PAC-CCC Rules provide that until the advance has been paid, the file will not be transferred to the arbitrators. If payment of advance is not made in due time, the case will be deleted from the registry of disputes.<sup>154</sup> In past PAC-CCC practice, when advances were requested both by claimants and respondents, respondents were encouraged to pay the advance by the way of calculation. Under this scheme, if the respondent paid its part of the advance on the claim, for the purpose of calculating the advance on the counterclaim, the amounts of the claim and counterclaim were summed up, and the advances on both were calculated and paid jointly by both parties. Otherwise, if the respondent did not pay his part of the advance, the claimant had to pay both his and the respondent's share.

Since 2003, the rules on costs of the PAC-CCC have changed, and now in all cases all advances for claims are requested from the claimant, and all advances for the counterclaims are requested from the respondent/counterclaimant only.<sup>155</sup> The consequence of initial non-payment is the striking out of the case from the PAC-CCC registry. The consequence of non-payment of further advances, if such advances are requested due to an

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<sup>154</sup> See Art. 5 and 6 of the Rules on Costs in Arbitration and Conciliation Proceedings of PAC-CCC, Off. Gaz. 108/2003; in force as of 8 July 2003.

<sup>155</sup> See Art. 5(2) of the Rules on Costs.

increase of the amount of dispute, is that such increase will not be taken into consideration. If the additional advance covers evidence-taking, the consequence of non-payment will be that such additional piece of evidence will not be taken.

Under the rules on costs of the PAC-CCC, counterclaims will not be decided upon if the corresponding advances have not been paid. For set-off claims, advances are normally not required, but their success can at best result in diminishing or excluding the claimant's claim, not in an award that would order payment in respect to the claimant. The set-off claims would, in addition, have to be covered by the arbitration agreement as well.

#### **7.4 Rules governing the determination of costs borne by one party**

*Are there any rules governing the determination of the costs to be borne by one party?*

The Law on Arbitration expressly provides in Art. 35 that, upon a party's request, the arbitrators have the right to decide on the costs of the proceedings. This authorization includes the power to apportion the costs among the parties and to order, if necessary, that one party reimburse the full amount or a portion of costs to the other. As a criterion for the decision on costs, the law provides that the arbitrators decide "*according to their discretion, taking into account all circumstances of the case, in particular the outcome of the dispute*".

Such costs normally include attorneys' and arbitrators' fees. The decision on costs may either form a part of the award, or be contained in a procedural order terminating the proceedings. If the arbitral tribunal has failed to decide on costs, or if such a decision would be possible only after termination of the proceedings, the arbitrators may issue a separate award on the costs of the proceedings. Arbitral institutions such as the PAC-CCC have developed their rules on costs along the same lines.<sup>156</sup>

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<sup>156</sup> On principles and practices regarding costs, see Uzelac, "Costs of Arbitral Proceedings", 1 *Croatian Arbitration Yearbook* (1994), p. 109-125.

Thus, the Rules on Costs of Arbitration and Conciliation of the PAC-CCC<sup>157</sup> provide in Art. 3 that the arbitral tribunal will decide on the costs “taking into account the success in the arbitration proceedings and other relevant circumstances”.

The law provides that the costs of arbitration regularly include the costs of legal assistance. Such costs would therefore also have to be borne by the unsuccessful party. Requests for reimbursement of such costs are almost always made in the arbitration proceedings. If Croatian lawyers participate in the proceedings, they often refer to the tariffs of the Croatian Bar Association (CBA).<sup>158</sup> The arbitrators will generally decide on the costs of legal assistance taking into account the motions and other activities of party representation considered to be useful and meaningful, and apportioning such costs in proportion to the parties’ success in the proceedings. Arbitrators could also take into account other circumstances of the case and in general enjoy broad discretion with respect to determination of actions that were “necessary for the conduct of arbitration”.<sup>159</sup>

Under Croatian law, only self-employed lawyers (*odvojnici*, members of the CBA) may request fees for their representation. For in-house counsel, only material expenses would be reimbursed. The provisions on legal fees are, however, not mandatory, and the parties may agree otherwise. As foreign lawyers may represent the parties in arbitration proceedings, they may also charge fees as they would in their country.

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<sup>157</sup> Off. Gaz. 108/2003, in force since 8 July 2003.

<sup>158</sup> The Tariff of the CBA is generally also based on the amounts in dispute; it should be noted that the Tariff specifically provides for a possible increase of 100% for memoranda in international arbitration (Tariff no. 7 p. 5), i.e., “for every hearing in international arbitration where arguments on the merits were presented or taking of evidence took place” (Tariff no. 9 p. 3).

<sup>159</sup> See Art. 35(1) of the Law on Arbitration; see also Arts. 2 and 3 of the Rules on Costs of Arbitration and Conciliation of the PAC-CCC (the costs of legal assistance are not expressly included among other costs since they are not deposited, but the decision arising from Art. 2 normally cover them as well).

The arbitrators are by default entitled and obliged to rule on the recoverable costs upon parties' requests.<sup>160</sup> This may, however, be excluded by the agreement of the parties.

### 7.5 Determination and enforcement of fees

*May the arbitrators determine their own fees? If so, is this determination enforceable against the parties?*

Under the Law on Arbitration, arbitrators have the right to request a fee for their services and reimbursement of costs incurred for their participation in arbitration, unless they have issued a written waiver of these rights.<sup>161</sup> In the practice of administered arbitration, the fees of arbitrators are usually predetermined in the relevant institutional regulations. An example of the schedule of fees for arbitrators are the tariffs contained in Art. 9 of the Rules on Costs of Arbitration and Conciliation of the PAC-CCC. The fees mostly depend on the amount in dispute; however, other elements, such as the complexity of the case, may also play a role.

As to the fees in *ad hoc* arbitration, the amounts and the criteria for determination of the fees would normally be agreed directly between the parties and the arbitrators in advance. At the end of an arbitration, the arbitrators may determine the exact amount of their own expenses and fees. However, such a determination does not bind the parties unless they accept it. If parties object to the arbitrators' decision in this respect, the amount of fees and expenses shall be determined by the authority specified in Art. 43(3) (normally the president of the competent state court). The competent authority will make such a decision upon a request either by arbitrators or the parties. The decision on costs issued by such an authority is an enforceable title against the parties in the proceedings.<sup>162</sup>

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<sup>160</sup> See Art. 35(1) of the Law on Arbitration.

<sup>161</sup> Art. 11(4) of the Law on Arbitration.

<sup>162</sup> Art. 11(5) of the Law on Arbitration.

## 7.6 Rules governing appropriation costs

*Are there any rules governing which party bears which part of the costs?*

Unless otherwise agreed between the parties, the successful party may claim reimbursement of the legal costs incurred during the arbitration. *See also* above at 7.4.

## 8. CHALLENGE OF AWARDS

### 8.1 Type of decisions

*What types of decisions of an arbitral tribunal can be subject to a challenge?*

The Law on arbitration allows an appeal to a second arbitral instance only if “the parties have expressly agreed that the award may be contested by an arbitral tribunal of a higher instance”.<sup>163</sup> By default, there is no appeal against an arbitral award. The provisions regarding grounds for appeal and scope of review can, in principle, be agreed between the parties. Party arrangements providing appellate review of the award before a higher arbitral tribunal are extremely rare in practice. In practically all arbitration cases so far, the award rendered “in the first instance” was final and binding.

Under Croatian arbitration law, no court appeal is permitted against an arbitral award (understood as a full appeal on the merits of the award by a court that would be a second instance in respect to the arbitration proceedings). The Law on Arbitration expressly provides that, except for an application for setting aside, no other legal remedies in court proceedings may be sought against an award.<sup>164</sup> This is a strict rule, and thus a parties’ agreement to submit their award to appellate proceedings before a Croatian court of law would be null and void.

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<sup>163</sup> Art. 31 of the Law on Arbitration.

<sup>164</sup> Art. 36(1) of the Law on Arbitration.. In addition, Art. 41 provides that no court should intervene in matters governed by the Law on Arbitration except where there is an express provision – and there is no legal provision that would allow appeal against an award.

Under Croatian law, only awards may be challenged by setting aside application<sup>165</sup>. Both full and final awards, as well as partial and interim awards, may be set aside. The term “interim award” does not relate to awards providing interim measures (see above at 6.1) but to decisions on the basis of the claim, i.e. a decision establishing plainly that the respondent is liable (e.g. for damages), while leaving the determination of the precise monetary amount to the final award. Thus, awards that would provide interim relief would generally not be subject to challenge in setting aside proceedings. Generally, only awards rendered with a seat of arbitration in Croatia are subject to the setting aside procedure.

Interim decisions on jurisdiction are also not considered to be awards (but have to be made in the form of procedural orders). Therefore, they are also not subject to setting aside under Art. 36 Law on Arbitration. Yet, under Art. 15 of the Law on Arbitration, the preliminary ruling made by arbitrators that they have jurisdiction may be challenged before the competent court (see above at 2.17, 3.1. and 3.2).

Regularly, the decision on costs constitutes a part of the award, and can be challenged in the same process as the rest of the award. The decision on costs may also be issued as a separate award.<sup>166</sup> In such a case, it will be considered as a separate award and could be challenged before the courts separately from the challenge of the award on the merits.

## 8.2 Time limit

*What is the time limit for filing a challenge?*

Pursuant to Art. 36(3) of the Law on Arbitration, an application for setting aside must be made to the competent court within three months from receipt of the award by the applicant. If setting aside is requested with respect to an additional award or correction or interpretation of the award, this date is calculated from the receipt of the decision. After expiry of the this time limit,

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<sup>165</sup> Art. 36 of the Law on Arbitration.

<sup>166</sup> Art. 35(3) of the Law on Arbitration.

no application for setting aside is permitted, regardless of the grounds. However, public policy objections may be raised in enforcement proceedings in Croatia at any time; thus, after expiry of the three month period, a domestic award could become irrefutable, yet unenforceable – at least in Croatia.

A challenge of preliminary rulings on jurisdiction would have to be commenced within 30 days after the requesting party has received the notice of that ruling.<sup>167</sup> When the court decides on the validity of a separate decision of the arbitral tribunal to assume jurisdiction, it would have to do it in a “urgent procedure”.<sup>168</sup>

### 8.3 Grounds for challenge

*What are the grounds for challenge? (Please describe in detail) Is the list exhaustive?*

An application for setting aside is the only available remedy against an arbitral award in court proceedings. However, it does not serve to reopen the case and review the arbitrators’ decision on the merits of the dispute. Therefore, in principle, neither factual errors, nor errors in the application of substantive law can be used as grounds for setting aside.

As an exception, prior to enactment of the Law on Arbitration, setting aside was possible “if new facts or evidence were found on the basis of which an award more favourable to a party could have been made if these facts would have been known or evidence produced in the hearings”. Now, new facts and evidence can only be raised as a ground for setting aside if the parties have expressly agreed so in their arbitration agreement.<sup>169</sup>

Otherwise, the grounds for setting aside in Art 36 largely follow the text of Art. 34 of the UNCITRAL Model Law. Just as in the Model Law and in Art. V of the New York Convention, the grounds are divided into two groups – grounds that may be

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<sup>167</sup> Art. 15(3) of the Law on Arbitration.

<sup>168</sup> Art. 15(4) of the Law on Arbitration.

<sup>169</sup> Art. 36(5) of the Law on Arbitration.

reviewed only upon the request of a party to the proceedings, and grounds that the court may take notice of *ex officio*. For the first group of grounds, the burden of proof is on the claimant, i.e. on the party applying for setting aside.

The grounds that can be raised only by the applicant are: (i) there was no agreement to arbitrate or such agreement was invalid; (ii) a party to the arbitration agreement lacked capacity or was not duly represented; (iii) the applicant was not given proper notice of the commencement of arbitration or was otherwise unable to present its case in the arbitration; (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on the matters beyond the scope of the submission to arbitration; (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Law on Arbitration or a permissible agreement of the parties and that fact could have influenced the content of the award; and (vi) the award has no reasons or has not been duly signed.

The grounds that can be taken into account *ex officio* are: (i) the subject matter of the dispute is not capable of settlement by arbitration; and (ii) public policy.

Violation of public policy can always constitute a ground for setting aside and thus forms a certain exception to the rule prohibiting review on the merits. Public policy issues are, as already noted, also taken into account in the process of enforcement of the award.<sup>170</sup> However, it is generally argued that the rules of public policy have to be narrowly construed, especially in international cases. Practice in this respect is gradually being built up. Generally, there are very few cases of successful setting aside of arbitral awards.<sup>171</sup>

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<sup>170</sup> Besides, if a preliminary issue in a court proceeding is decided by a final domestic arbitral award, the court shall treat this issue as *res judicata* unless it finds that the award violates public policy (or deal with the issues that cannot be submitted to arbitration). See Art. 39(3) of the Law on Arbitration.

<sup>171</sup> See Uzelac, "Setting Aside Arbitral Awards in Theory and Practice", 6 *Croatian Arbitration Yearbook* (1999) pp. 55-74.

#### 8.4 Loss of objections

*May a party lose its right to challenge if it did not raise objections during the arbitral proceedings?*

Most of the grounds for setting aside may in principle be raised irrespectively from the fact that a party has or has not raised them in the arbitral proceedings, in particular those relating to arbitrability and public policy, since such grounds are taken into account *ex officio*.<sup>172</sup> However, some of the grounds would have to be raised in the arbitral proceedings. Specifically, under Art. 5 of the Law on Arbitration, a party who knows or might have known that any non-mandatory legal requirement or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay is considered to have waived its right to object.

#### 8.5 Suspended

*May enforcement of an award be suspended while a challenge of an award is pending? If so, under what conditions?*

If a claim for setting aside is submitted to the court, upon request of a party the court deciding on enforcement may (but does not have to) stay the enforcement proceedings until an application to set aside the award is decided.<sup>173</sup> In this case, enforcement may be suspended (but does not have to be). Upon request from the party who requested the enforcement of the award, the court may also request appropriate security as a condition for staying the enforcement.<sup>174</sup>

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<sup>172</sup> Art. 36(2)(2) of the Law on Arbitration.

<sup>173</sup> Enforcement Law (*Ovršni zakon*), Art. 61(1)(3). Generally, it would be needed to demonstrate probability of an irreparable harm or other important reason for granting suspension of the proceedings.

<sup>174</sup> Art. 48 of the Law on Arbitration.

## 8.6 Remedies

*If the challenge of an award is justified what decisions may the state court take (e.g. set aside, correct the award, remit it to the arbitral tribunal)?*

If the challenge of the award was successful, the court should in principle set aside the award. However, while deciding on an application for setting aside, the court may, if it finds it appropriate or if so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

If the award was set aside, in appropriate cases the arbitral agreement will still be a valid basis for arbitration. Art. 37(1) provides that "if an award made on the basis of a valid arbitration agreement not specifying the names of the arbitrators has been set aside on the grounds other than those related to existence or validity of the arbitration agreement, such arbitration agreement shall be a valid legal basis for new arbitration in the same dispute." In case of doubt, each party may approach the court to issue a separate ruling to this effect. Thus, if requested by a party, the court may in appropriate cases refer the file back to the arbitral tribunal for repeated proceedings.<sup>175</sup>

In none of the cases would courts have power to correct the award on their own motion, as this power rests with the arbitral tribunal.

## 8.7 Waiver

*Can the parties waive any grounds for challenge?*

Croatian arbitration law does not provide for the possibility of waiving an action for setting aside. On the contrary, in Art. 36(6) it is provided that the parties cannot derogate in advance their

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<sup>175</sup> Art. 37(2) of the Law on Arbitration.

right to contest the award by an application for setting aside. However, the wording of this provision (“in advance”) would open the possibility of waiving the right to apply for setting aside once the arbitral award has been made and communicated to the parties. This could relate only to some grounds that have to be raised and proved by the applicant (e.g., lack of arbitration agreement), and would not in any case involve objective arbitrability or public policy.

## 9. ENFORCEMENT OF AWARDS

### 9.1 Types of awards

*Is there a difference between the enforcement of domestic and foreign awards? If so, what are the criteria for a “foreign award” and what are the differences?*

For awards in arbitrations seated within Croatian territory, the law provides that the award will be directly enforceable, i.e. no special leave for enforcement (*exequatur*) will be needed. The application for enforcement must be submitted, as in the case of final and binding court judgments, to the competent court. Upon application for enforcement, the court shall order the enforcement unless an exception is applicable.

Specifically, the enforcement shall be refused in two situations: if the court finds that the subject matter of the dispute was incapable of being submitted to arbitration (non-arbitrability), or if the enforcement would violate public policy.<sup>176</sup> These two sole grounds for refusing enforcement of a domestic award cannot be raised if a court has already refused to set aside the award on such grounds, or if a court has already found in separate proceedings that these two grounds do not exist.<sup>177</sup>

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<sup>176</sup> Art. 39(1) of the Law on Arbitration.

<sup>177</sup> Art. 39(2) of the Law on Arbitration. *See also* Art. 39(4) of the Law on Arbitration, which authorizes parties to commence a court action in which the sole remedy sought would be in the finding that grounds for refusal of enforcement do not exist.

The law distinguishes between domestic and foreign awards. This difference is defined according to the seat of arbitration: if the seat was in Croatia, an award is regarded to be domestic, if not, the award is foreign.<sup>178</sup> Separate provisions of the Arbitration Law regulate enforcement of domestic awards<sup>179</sup> and recognition and enforcement of foreign awards.<sup>180</sup> As already indicated in the titles of respective articles, foreign awards require leave for enforcement whereas domestic awards are directly enforceable.

## 9.2 More favorable national law

*With respect to the enforcement of New York awards, is the national law more favorable for the enforcement than the New York Convention? If so, in what respect?*

Croatia has maintained the reservations to the New York Convention originally made by Yugoslavia in 1981. Accordingly, the Convention will apply:

- (a) only to the recognition and enforcement of awards made in the territory of another contracting state (reciprocity);
- (b) only to differences arising out of legal relationships, whether contractual or non-contractual, that are considered commercial under Croatian law; and
- (c) only to those arbitral awards which were adopted after the Convention came into effect (no retroactive effect).

The rules on recognition and enforcement of foreign arbitral awards provided in Art. 40 of the Law on Arbitration are considerably broader than the scope of application of the New York Convention. Thus, under national law, recognition and enforcement of foreign awards can be sought irrespective of the country in which the foreign award was made (no reciprocity requirement); it can be sought if the subject-matter of dispute

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<sup>178</sup> Art. 38 of the Law on Arbitration.

<sup>179</sup> Art. 39 of the Law on Arbitration.

<sup>180</sup> Art. 40 of the Law on Arbitration.

was any claim dealing with the rights that parties may dispose of (no commercial disputes requirement); and irrespective of the time when the award was made (no requirement *ratione temporis*). Grounds for refusal of recognition and enforcement are generally the same as the grounds from the New York Convention; in the Law on Arbitration, they are linked to the grounds for setting aside (that were modelled after the text of the New York Convention and UNCITRAL Model Law).

### 9.3 Recognition and enforcement procedure

*What is the procedure to obtain the recognition and enforcement of*

*a) a New York Convention award?*

*b) a domestic award?*

*Indicate also a (likely) time frame for the different procedural steps.*

The competent court for ordering enforcement in commercial arbitration cases for both foreign and domestic awards is the Commercial Court (*Trgovački sud*) in Zagreb, while in non-commercial cases the County Court (*županijski sud*) in Zagreb has jurisdiction.<sup>181</sup> Jurisdiction for undertaking of particular enforcement actions is determined according to the regular rules of the Law on Enforcement. In case of recognition and enforcement of foreign awards, these rules on jurisdiction are applicable both to the awards made under New York Convention, and to other foreign awards that are enforced under the rules of the Law on Arbitration.

In enforcement proceedings, the opposing party must be heard “*unless it would jeopardize a successful implementation of the requested enforcement*”, i.e. *ex parte* decisions are possible if the opposite party, if notified, might conceal the property or otherwise obstruct the enforcement proceedings.

A leave for enforcement is not required for awards that are considered to be domestic (i.e. the awards that were made in

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<sup>181</sup> Art. 43(1) of the Law on Arbitration.

Croatia, either in international or national cases). The award is automatically enforceable. In the process of enforcement, two types of remedies may be sought, the appeal<sup>182</sup> and the objection (*prigovor*).<sup>183</sup> Commencement of proceedings for either of these remedies generally does not suspend the enforcement process.

The party requesting enforcement has to submit the original award or a duly certified copy thereof. If the award is not in Croatian, a duly certified translation must be supplied as well. If domestic awards are being enforced, no further documents are needed. For foreign awards, in addition to the award, the original arbitration agreement or a certified copy thereof also has to be submitted).<sup>184</sup>

The court that decides on the enforcement shall only examine whether the documents needed are properly submitted. If they are, it may refuse to give leave for enforcement only on the grounds of public policy or the lack of arbitrability.

The competent court is, again, the Commercial Court in Zagreb.<sup>185</sup> Like the New York Convention, the Law on Arbitration also provides for adjournment of the decision on the enforcement of the award if an application for the setting aside or suspension of the award has been made to a competent authority. The authority may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

For foreign awards to become effective, they have to be first recognized. However, recognition and enforcement may take place within the same process. Under Art. 49(5) of the Law on Arbitration, "an appeal against a decision rendered in the proceedings where recognition is the main issue may be

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<sup>182</sup> Art. 46 and 47 of the Enforcement Act.

<sup>183</sup> Art. 48-50 of the Enforcement Act.

<sup>184</sup> Art. 47 of the Law on Arbitration.

<sup>185</sup> Art. 44(1) of the Law on Arbitration.

submitted to the Supreme Court of the Republic of Croatia within fifteen days from the delivery of the decision on recognition." The court always has to allow the defendant to reply to an application for *recognition*, but the same right may be restricted for an application for *enforcement* if it could imperil the enforcement. Decisions on recognition and enforcement must be reasoned.

It is difficult to give a likely time-frame for the enforcement proceedings since no concrete examples or indications are available. It may be said, however, that enforcement of a domestic award would take as long the enforcement of a domestic court judgment, depending on the actual circumstances.

#### **9.4 Opposition to recognition and enforcement**

*How may the recognition and enforcement be opposed in case of*

*a) a New York Convention award?*

*b) a domestic award?*

The Court shall recognize and enforce the award unless the party successfully proves the existence of the reasons provided for in Art. 40(1) of the Law on Arbitration (reasons for annulment of the award set by Art. 36(1) of the Law on Arbitration or if the award has not yet become binding, 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). The court shall refuse recognition and enforcement *ex officio* if the subject matter of dispute was not arbitrable, or if the recognition and enforcement would be contrary to public policy. The Croatian Law on Arbitration incorporated all the solutions of Art. V of the New York Convention, with the additional ground - that the award does not state reasons or lack signatures as required by the Law on Arbitration.

Thus, the enforcement proceedings cannot be used as a vehicle for re-adjudication. The facts that relate to the substance of the dispute cannot therefore regularly be invoked. It can, however, be argued that after the award has been made the debt

was paid, or that obligation to fulfil the award did otherwise cease to exist, or that it became unenforceable.

Set-off claims cannot be used as arguments to oppose enforcement, irrespective whether they came into existence before or after the award was made.

### 9.5 Suspension

*May enforcement of an award be suspended while such an "opposition" is pending? If so under what conditions?*

As stated above (see 8.5), if a party has opposed enforcement of the award, it may request the enforcement court to stay (suspend) the enforcement proceedings. The court has discretionary power to grant the suspension, if this is considered necessary under the circumstances.

## 10. BIBLIOGRAPHY

*Provide a bibliography of all relevant books and articles*

The bibliography consists mainly of publications dating before the new Law on Arbitration.<sup>186</sup> The commentary to the new law is about to be published, but reference is also made to several articles dealing with the law. In addition, the following publications may be consulted for legal reference.

### *Books*

#### Dika/Sajko

*Arbitražno rješavanje međunarodnih trgovačkih sporova* [Arbitral Settlement of International Commercial Disputes] Zagreb, 1989 (in Croatian)

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<sup>186</sup> For a more comprehensive bibliography of relevant writings (prior to 1995) see "Arbitration Bibliography – Croatian Authors on Arbitration" in 2 *Croatian Arbitration Yearbook* (1995) p. 217.

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"Croatian Law on Arbitration", 9 *Croatian Arbitration Yearbook* (2002) pp. 107-138

"Recognition and Enforcement of Domestic Arbitral Awards", 8 *Croatian Arbitration Yearbook* (2001) pp. 67-82

"Constitutional Complaint as Means of Setting Aside Arbitral Award", 7 *Croatian Arbitration Yearbook* (2000) pp. 107-138

"Final Proposal of the New Croatian Arbitration Law (Draft Three)", 5 *Croatian Arbitration Yearbook* (1998) pp. 9-18

"Report on the Achievements of the Working Group for the Reform of the Croatian Arbitration Law", 4 *Croatian Arbitration Yearbook* (1997) pp. 193-204

"New Facts and Evidence as Grounds for Setting Aside Arbitral Awards", 3 *Croatian Arbitration Yearbook*, 1996, pp. 29-42

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*Journals dealing specifically with arbitration*

*Croatian Arbitration Yearbook*, published annually since 1994, is the major publication on arbitration in Croatia. It is published by the Permanent Arbitration Court at the Croatian Chamber of Commerce. It contains articles on international arbitration in and outside Croatia, arbitral jurisprudence and other documents (English text of relevant rules and statutes, bibliography etc.). It is published predominantly in English (summaries in Croatian, occasionally in other foreign languages).

*Other journals*

Other periodicals with some content relevant for arbitration include *Pravo u gospodarstvu* [The Law in Economy], published by the Croatian Association of Business Lawyers; *Pravo i porezi* [The Law and Taxes], published by RRiF, *Odvjetnik* [The Lawyer], published by Croatian Bar Association; *Zbornik Pravnog Fakulteta u Zagrebu* [Collected Papers of the Zagreb Faculty of Law]. All of these journals contain papers predominantly in Croatian.

## 11. COURT DECISIONS

*Provide a reference for all relevant court decisions*

High Commercial Court, Pž-186/86 of March 18, 1986 (CAY 1995, p. 215)

High Commercial Court, Pž-957/92 of April 29, 1992 (Review, p. 322)

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([www.vsrh.hr](http://www.vsrh.hr))

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Sources: CAY = Croatian Arbitration Yearbook; Review = Review  
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