Setting Aside Arbitral Awards in Theory and Practice

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Review

This paper presents the results of a research undertaken to establish how the courts in Croatia apply the provisions of the Code of Civil Procedure on setting aside arbitral awards. After an initial presentation of the setting aside procedure, seven cases in which setting aside arbitral awards of the Permanent Arbitration Court at the Croatian Chamber of Commerce was requested are analyzed (five of them resolved, two still pending). Based on the analysis of the presented data, the author attempts to describe the pattern of judicial behavior in these cases. Although the presented sample shows no cases of successful setting aside of the PAC-CCC awards in the last instance, the author points to several questionable elements in the analyzed proceedings - especially with regard to their length, and the tendency of entering into au fond *evaluation of arbitrators' reasoning. Moreover, it is concluded that the analyzed cases support the approach of the Working Group on the Reform of the Croatian Arbitration Law that proposed the amendment to the current provision, narrowing down (or fully excluding) the extent to which new facts and evidence may be invoked as reasons for setting aside arbitral awards.*

I. Introduction

Arbitration, like other phenomena, has its known and unknown side. The known side is in the normative regulations - laws, sets of arbitration rules and international conventions. Thus, it is known that arbitration proceedings are confidential, closed to the public, so that the parties in arbitration may involve in dispute but at the same time keeping the fact that there is a controversy between them far away from the curious eyes of the public. Mostly for that reason, insight into the reality of arbitration proceedings and the way in which the normative and doctrinal postulates come to life is a rare privilege of a few. In the legal community, arbitration may be compared to the Holy Grail: many seek it, speak and write of it, but only the rare chosen few may get hold of it. This assessment

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may be substantiated by an insight into European legal writing on subjects of commercial law: arbitration is one of the most popular procedural subjects of all.[1] With just a slight effort, it could be demonstrated that in some countries international commercial arbitration was the subject of more essays and treatises (professional, graduate, postgraduate or doctoral thesis) than the number of arbitration proceedings conducted at the same time.[2] Thus, the separation of theory from practice in radical cases becomes almost a paradox as it turns into a form of normative wishful thinking. At the same time, serious research on the real effect of sophisticated procedural theories in the real world of arbitration are rare and insufficient, which is justified by the practical difficulties in obtaining the relevant material barred from release by the confidentiality of the proceedings.

However, not every procedural postulate is immune to empirical scrutiny. This paper investigates one area in which excuses on the grounds of confidentiality are entirely eliminated, because particularly in this area - setting aside awards - arbitration emerges to the surface of publicity.

Since arbitration as a private adjudication process does not function in a legal *vacuum,* its connection to the national legal systems and state apparatus of enforcement is inevitable. In legal literature this relationship is often described by both maritime and air navigation metaphors: arbitration proceedings are "anchored" by a long, but very strong chain which prevents this "arbitration vessel" from sailing too far into the dangerous high seas of arbitrariness; arbitrators may judge as though they are in air space not belonging to any national system - but sooner or later their aircraft will land in the territory determined by defined national sovereignty. In both cases, the connecting point ("anchor", "firm soil") is the authority of a national system to scrutinize an arbitration award before equalizing it with judgments of the state judicial apparatus and supporting its enforcement (if and when so required).

The history of arbitration - especially in the 19th and 20th centuries - may be observed in the struggle to restrain such scrutiny. Today, as an unavoidable part of international arbitration culture, the standpoint that the state judicial apparatus does not have any authority to reopen all factual and legal issues resolved in an arbitration proceeding. Instead of scrutiny *au fond*, the state is authorized only to perform a *contrôle limité*, supervision restricted to scrutiny of compliance with

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1 *Cf.* the copious arbitration bibliography published in 2 CROAT. ARBIT. YEARB. (1994), at 217-227 (prepared by Sandra Obuljen).

2 On the number of arbitration cases in Croatia *see* statistical data published in A. Uzelac, *Five Years of International Commercial Arbitration in Croatia,* 37 PRAVO U GOSPODARSTVU (1998), at 130.

fundamental procedural rules, rules on arbitrability and in accordance with the deepest fundamental value - public order of the state. The procedure in question should be swift, simple and deprived of excess formalities, while the validity of an arbitral award would be substantiated by powerful presumptions which can only be rebutted by strong arguments.

The scrutiny in question may be either prior or posterior. *A priori* - abstractly, universally and generally - an arbitral award may be challenged by a specific legal remedy: a motion for setting aside, which represents the reaction of the legal order of the state in which the arbitration was held. Consequently, the result of such arbitration - an arbitral award - is treated as an act equalized with other individual legal acts of the domestic legal order.[3] *A posteriori* - in concrete cases and particularly - an arbitration award passes through an additional filter in the place in which the support of the state apparatus is sought for its enforcement.

This paper is restricted to the first aspect of scrutiny - to claims to set aside in the Croatian law and practice.[4] Although the other aspect - the aspect of control in the process of enforcement - would also be interesting and complementary to the research herein presented, it seems that it would be difficult to find a suitable *tertium comparationis* for it. The reason for this is well-known malformations in practice which render the enforcement proceedings in Croatia probably one of the most burdensome and ungrateful aspects of legal practice, notwithstanding the nature and origin of the enforcement title by which the enforcement proceedings are set in motion.

The research herein presented compares the doctrinal standpoints on setting aside arbitral awards with the practical implementation of that institute in domestic legal practice. The research was defined by one favorable and one aggravating circumstance. On the one hand, the current situation of international arbitration in the Republic of Croatia may be precisely defined considering that it may be identified with one institution only - the Permanent Arbitration Court

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[3] The criterion of the place of arbitration as an essential element of differentiation of domestic and foreign arbitral awards is not the only one: there is also the criterion of the procedural law applied in the case which is often called upon in domestic and certain foreign legal systems (*see* Art. 97, para. 3 CLA). The latter criterion, however, is being deserted, so that the new draft of the Arbitration Law in Art. 2, para. 1, item 7 defines "a dispute without the international element" exclusively as a dispute in which the parties are natural persons with domicile or habitual residence in the country or legal entities established under the laws of the Republic of Croatia.

[4] In general on setting aside arbitral awards *see* S. TRIVA ET AL., GRADJANSKO PARNIČNO PROCESNO PRAVO [CIVIL PROCEDURAL LAW], Zagreb (4th ed. 1986), §126, item 17. *See* also L. Ude, *Setting Aside Arbitral Awards*, in DIKA & UZELAC (eds.), INTERNATIONAL COMMERCIAL ARBITRATION IN CROATIA AND SLOVENIA, Zagreb (1993), at 101-115.

at the Croatian Chamber of Commerce. Therefore, the practice of setting aside arbitral awards of PAC-CCC could be taken with full confidence as *pars pro toto* for the situation in Croatia. On the other hand, however, the unsatisfactory availability of judicial practice and not always adequate cooperation of the courts and the near absence of a systematic publication of judgments, forced certain constrains in the analyzed data. The methodology was the following: an inquiry into the archives and database of the Permanent Arbitration Court, cases were chosen in which the Court was approached for information on the occasion of a motion for setting aside (in practice, namely, an unwritten, but widely applied rule is that on the occasion of a motion for setting aside the arbitration institution is requested to supply the whole file of the case for which setting aside is sought). After the court at which the setting aside had been applied for was identified and the case file number has been recorded, additional information concerning the course of the proceedings, decision(s) rendered and other relevant facts was requested from the same court. Although detailed information about the case and copies of judicial decisions rendered in initiated litigation proceedings were requested in written applications, the information received was not always of the same quantity and quality, and for that reason the review of the cases in the following text is not equally detailed.

This paper is structured in two parts: the first part shall present all available data on proceedings of setting aside awards, and a special emphasis shall be given to the analysis of the course of the proceedings (the first instance proceedings and legal remedies, if any), the grounds for setting aside, duration of the proceedings, decisions rendered and arguments thereof. The second part generalizes and systematizes the presented data, upon which conclusions are offered both *de lege lata* and *de lege ferenda*.

II. Motions to Set Aside PAC-CCC Awards

a) General

The research was performed for the period from 1991, when PAC-CCC began acting as an international arbitration institution. Because of the duration of the proceedings (arbitration as well as setting aside proceedings), a boundary was not firmly set, so the cases resolved even before that year were included if the court rendered its decision afterwards.

In the stated period, a total of seven cases in which the motion for setting aside was filed were identified, six of which related to disputes without international character and only one in an international case under the *Zagreb Rules*. According to the data available at the moment of completing this paper, of these seven cases, five cases have been finally resolved, while two of them are still *sub*

iudice. The motions for setting aside are distributed evenly: in the period from 1991 to 1994 one motion per year is recorded. The remaining three cases (one of which was resolved by a legally valid judgment) relate to motions from 1995. The presented proceedings were conducted before the Commercial Court in Zagreb (five cases) and Commercial Courts in Rijeka and Varaždin (one motion each).

Since the filing of the motion made the arbitration available for the public, the veil of confidentiality, binding the arbitrators, the parties and the arbitration institution before that moment, may be deemed to have been lifted. Following the comparative practice which does not hesitate to publish the names of the participants, real names of the parties and other persons from the cited cases are used in this paper, in order to contribute to the transparency and quality of judicial decision-making and to heighten the awareness of the main actors of arbitration and the state administration of justice as to their respective responsibilities in the process.

b) Review of the Cases Resolved with Final and Legally Valid Judgments

i) ***Jugolinija* v. *Brodogradevna industrija 3. Maj* (IS-P-6/88)**

The first case under analysis is an arbitration case from 1988, a complex arbitration in which the award was rendered in 1991, and the motion for setting aside filed on May 3, 1991 to (at that time) the District Commercial Court in Rijeka. The subject of the setting aside is the supplemental award rendered on March 1, 1991, which refers to the payment of interest by which the arbitration tribunal accepted the claimant's request for payments of process interest.

The plaintiff in the setting aside proceedings is the respondent from the arbitration proceedings - *3. Maj*. In the motion, he calls upon two crucial grounds: one is the "unjustifiable granting of process interest in the supplemental award" and the other is the claim that "the application for rendering the contested supplemental award had been never communicated to the respondent". Although the cited grounds had not been correctly legally qualified in the motion for setting aside, they might be considered as calling upon procedural errors caused by judging *extra petita* (because allegedly, the claimant had not requested the claim to which the contested award relates) while the other ground might be qualified as a violation of the right to be heard. Finally, the plaintiff especially raises the violation of Art. 279, para. 2 of the Law on Obligations, i.e. an erroneous application of substantive law in arbitration proceedings.

The proceeding for setting aside before the District Commercial Court in Rijeka was conducted rather expeditiously - the first instance judgment denying the

claim to set aside[5] was rendered within nine months. In the explanation of the judgment, the District Commercial Court in Rijeka established that the claimant made a timely modification of the claim by requesting default interest, which the respondent noted, and the proceeding was correctly continued according to the modified request to which the supplemental award relates.[6] The objection relating to violation of the right to be heard is also denied because the arbitration tribunal "in the sense of Art. 340, para. 2 was not obliged to reopen the hearing because it decided that the claim for which the supplement is requested was elaborated enough."[7] The court did not discuss the violation of the rules of substantive law, if any, because it is not a ground for setting aside.

The respondent filed an appeal in which it mainly held to its previous claims, correcting only the statement on violation of the Law on Obligations (misquoted article number). Its appeal was denied by the High Commercial Court of December 13, 1994.[8]

ii) ***Zagreb-film* v. *3Z* (IS-P-6/92)**

The subject of setting aside was the award of the Permanent Arbitration Court of July 10, 1992. It was a procedure that may serve as a model of speed and efficiency of arbitral settlement of dispute, since the procedure ended with a final award within six months of its initiation.

In this case (as in all other analyzed cases) the motion for setting aside was filed by the respondent from the arbitration proceedings. The motion was received at the District Commercial Court in Zagreb on November 11, 1992 (P-13706/92). The motion stated that the "arbitration court had rendered a negative declaratory award which should have followed a negative declaratory claim if the court finds such claim grounded, but the claimant *Zagreb-film* had not requested such type of remedy",[9] so consequently, the arbitration court had exceeded the scope of its authority. The respondent deems that the arbitrators should not have inserted in the disposition of the award the opinion on the claimants' authorities, but rather in the explanation of the award, because the claimant requested only evacuation

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5 *See* the judgment of February 5, 1992, No. II P-3737/91-8 (president of the council: Miljenko Mrakovčić).

6 "Therefore, the plaintiff's claim that the conditions for rendering the supplemental award because the plaintiff failed to raise the request in relation to which the supplemental award was rendered is not grounded." From the explanation of the judgment, at 2.

7 *Id.*

8 The judgment was rendered by the panel consisting of judge Zdravko Momčinović, chairman; judge Dragan Franić and assessor-judge, Božo Dragaš.

9 From the judgment of the District Commercial Court in Zagreb of April 6, 1993, No. XI-P-13706/92, judge Jelka Živčić.

of its business premises (a condemnatory request), but the arbitrators could have not adjudged so even on occasion of the respondent's counter-claim since it was considered a statement of defense because the respondent failed to pay the advance fee.

The court denied the request for setting aside by judgment of April 6, 1993. In the explanation of the judgment the court states that the inquiry to the PAC-CC file No. IS-P-6/92 "[...] showed that there is no violation of the provisions of Art. 485, para. 1 to 6 CCP, which means that the proceedings were conducted by the Permanent Arbitration Court, which was correctly constituted, that the award was explained validly and in detail, and especially the disposition is undoubtedly clear to be executed, that the tribunal rendered the decision within the boundaries of its assignment, that the disposition of the award is not self-contradictory and is not contrary to the Constitution of the Republic of Croatia and public policy thereof."[10]

Against such judgment, the plaintiff filed an appeal on November 3, 1993 in which it called upon fundamental violations of the rules on civil procedure. The Commercial Court of the Republic of Croatia has denied the appeal by a final judgment rendered on January 11, 1994.[11]

iii) ***Hamova-Trade Joint Stock Company* v. *SGF-Trading* (IS-P-30/91)**

The motion for setting aside the award of April 26, 1993 was filed at the District Commercial Court in Zagreb on July 7, 1993, after arbitration proceedings that lasted for about year and a half. The arbitration proceedings, conducted for payment from the contract on assumption of debt of February 19, 1991, was one of the most 'dramatic' arbitration proceedings, presenting a whole series of procedural means, mainly initiated by the respondent and its attorney. Thus, in the cited arbitration proceedings, the plea that the court does not have jurisdiction was stated and denied, the request for challenge of the presiding arbitrator was stated and denied three times, and the respondent used some other dilatory tactics.

In its motion for setting aside, *SGF Trading* called upon several grounds: (1) the main contract and the arbitration agreement were not valid (because both were signed by a person without authorization thereupon), for which reason the dispute was out of the jurisdiction of the court; (2) the request for challenge of the presiding arbitrator was denied by a person not having any authorization to do so, because it was done by the President of the PAC-CCC and not by the

[10] *Id.*, at 2.

[11] The judgment was rendered by the council consisting of judge Andrija Eraković, chairman; judge Veljko Vujović and an assessor-judge Branko Jakaša.

competent state court; and (3) the award was contradictory because the crucial fact (existence of the debt) was not evaluated at all. The plaintiff also stated that "the sentence (*sic! - referring to: award*) violated the substantive law which is contrary to public order, therefore, it is a ground for setting aside". The final ground for setting aside consisted in presentation of new evidence - a facsimile of the Austrian company WECO of July 6, 1993 submitting a contract on assignment of January 31, 1991 (a document which had not been presented during the arbitration proceedings). Together with the motion for setting aside the plaintiff's attorney[12] requested the claim of *Hamova-Trade* from the arbitration proceedings to be denied in its merits and an interim measure of stay of execution of the contested award to be determined.

The Commercial Court in Zagreb decided on the motion for setting aside by a judgment of October 27, 1994.[13] Most of the plaintiff's requests were not accepted by the court: thus, the plea of non-jurisdiction was denied because the plaintiff entered into argument of the merits; the court assessed that the procedure of challenge of the presiding arbitrator had been conducted correctly; the request for adjudging the merit of the case was dismissed because the court had no jurisdiction for such ruling. However, the court nevertheless accepted the plaintiff's final argument - new facts and evidence - and by virtue of Art. 485, para. 1, item 7 in connection with Art. 421, item 9 of CCP reversed the decision by which the award of PAC-CCC of April 26, 1993 was rendered.

Against that judgment, the defendant filed an appeal on December 12, 1994 with the High Commercial Court. The appeal was decided on March 4, 1997, when a three-member council of the High Commercial Court reversed the first instance judgment and denied the plaintiff's request for setting aside.[14] In the explanation of the second instance judgment, the court states that the subsequently submitted contract was erroneously evaluated as new evidence, because the first instance judge overlooked the provision of Art. 422, para. 2 CCP by which the renewal of the proceedings may be allowed only if the party could not have presented the relevant new evidence without her fault in the previous (court, or, in this case, arbitration) proceedings. Considering that the arbitrators repeatedly called the claimant (which was a party to the cited contract) to furnish the original contract to the tribunal, which the plaintiff failed to comply with even after seven hearings and for over a year, the second instance court concluded that the

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12 Ante Vukorepa, Attorney-at-law, Zagreb.

13 The judgment of the Commercial Court in Zagreb of October 27, 1993, file No. XXX-P-9348/93 (sole judge Marijan Jurić).

14 Judgment No. VIII Pž-1266/95-2 (the panel consisting of the judge Maksimilijan Šprljan, chairman; judge Borislav Blažević and an assessor-judge Milorad Ronkulin).

plaintiff, being a party to the contract, should have been in possession thereof, or at least should have obtained a copy during the proceedings.

iv) ***Ceramiche Artistiche Al-Za*** **(Italy) v.** ***Haček Ltd.*** **(IS-P-5/93)**

This case is the only international arbitration proceedings in which a motion for setting aside has been filed. The proceedings were conducted before the Commercial Court in Varaždin.[15]

The grounds for setting aside were the jurisdiction of the arbitration court and validity of the arbitration agreement, exceeding the tribunal's assignment and intelligibility and contradictoriness of the award.

Since all relevant decisions in the case were unavailable, the following basic chronology is presented. Upon a motion for setting aside on July 15, 1994, the Commercial Court in Varaždin denied the request for setting aside by a judgment on January 18, 1995. Against that judgment the plaintiff filed an appeal, which was denied by the High Commercial Court[16] on October 14, 1995 and the first instance judgment of the court in Varaždin was confirmed.

v) ***BMK PARAFARM*** **v.** ***Građevinska zanatska radnja Vladimir Konvični*** **(IS-P-26/93)**

In this construction dispute, the request for setting aside the award of PAC-CCC dated February 12, 1995 was requested in the motion filed to the Commercial Court in Zagreb on April 12, 1995. The claim is grounded solely on new facts and evidence: the plaintiff's attorney[17] claims in the proceedings for setting aside that only after the completion of the arbitration proceedings did she find out that a certain witness that was heard in the proceedings as the supervisory body, "was not only the supervisory body on the project in dispute, but also the designer thereof [...]", and consequently, if the plaintiff had known of this fact during the arbitration proceedings, "he would have suggested the hearing of A. D. as the key witness with respect to the facts which works were contracted for and therefore encompassed by the design documents, and which were additional, since this particular issue was the subject matter of the dispute". [18]

In the first instance proceedings, the court had not only performed the inquiry into the arbitration file, but had also heard three witnesses and the parties to the dispute. After the evidence proceedings thus conducted, the first instance court accepted the claims from the motion and by judgment of July 2, 1996 it

[15] Case No. P-1897/94.
[16] Judgment No. Pž-2344-95.
[17] Karmen Blagojević, Attorney-at-Law.
[18] Judgment No. IX-P-2253/95-15 of July 2, judge Branka Pavlović, chairperson.

cancelled the award of PAC-CCC, deeming that the facts and evidence called upon by the plaintiff in its motion are truly new and that the plaintiff had not known nor could have known about them".[19] Against that judgment, an appeal was filed with the High Commercial Court which cancelled the first instance judgment and reversed the proceedings by the procedural order of XIII-P ž-1031/97 of May 27, 1997.[20] The grounds for cancellation were procedural in nature - the first instance proceedings were conducted by a sole judge, although the amount in dispute was higher than 3.500,00 kuna, and the parties had not agreed upon ruling by a sole judge.

However, a renewal did not occur. Not long after the judgment of the High Commercial Court, the Commercial Court in Zagreb determined that the plaintiff had withdrawn the motion with the pleading of August 2, 1997, stating that the parties have reached an out-of-court settlement.

c) Collective Review of Setting Aside Proceedings Still Pending

i) ***Tempo* v. *Monter* (IS-P-28/91)**

The motion for setting aside was filed against the award of PAC-CCC of January 11, 1995. The proceeding were initiated at the Commercial Court in Zagreb on May 5, 1995 and is conducted under file no. P-2694/95. The plaintiff *Monter* based his motion on several grounds: alleged lack of jurisdiction (pursuant to the arbitration clause, arbitration was conditioned by prior decision by a Co-ordination Committee); alleged bias by the expert witness; alleged insufficiency of the explanation (grounds of the decision) etc. In his reply to this motion, respondent emphasized that claimant did not object to jurisdiction during the arbitration (and has even filed a counter-claim); that court cannot challenge factual findings by the arbitrators and that expert witnesses were impartial and professional; and that award has 14 pages duly stating the grounds of the decision.

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[19] After extensive evaluation of evidence and arguments of the merits of the dispute upon which the arbitrators had already ruled, it is concluded: "By such evaluation of evidence, the court has gained a reliable ground to decide upon a basic fact of the dispute and that is that the defendant found out about the new fact and evidence only after the rendering of the arbitral award and that based on such facts and evidence a more favorable decision could have been rendered if the new fact had been used in the earlier proceedings and that the plaintiff without its fault could not have presented the facts before completion of the previous proceedings with the arbitral award." *Id.*, at 1.

[20] The resolution was rendered by the panel consisting of judge Zdravko Momčinović, chairman; judge Bariša Gašpar and an assessor-judge Mile Šparica.

In the cited case court held more than five hearings, heard an expert evaluation and finally decided to set aside the award.[21] Moreover, the court went even further and reexamined the dispute and, in the same judgement, rendered a decision in the favor of the claimant.

Against both judgement appeals were launched.[22] The appellant points to numerous procedural errors. A decision by the High Commercial Court is still pending.

ii) ***Futura* v. *Hrvatske šume* (IS-P-13/93)**

This case is also conducted at the Commercial Court in Zagreb under file no. P-4817/95. The motion is filed against the award of PAC-CCC of April 18, 1995. The plaintiff in the motion calls upon new facts and evidence and requests setting aside of the items I and II of the award. According to information available, until the end of 1998 no hearings have been scheduled.

III. Results of the Analysis - the General Evaluation and Suggestions

a) General Balance of the Analyzed Cases

The empirical basis the presented cases provide is not entirely reliable or especially wide; therefore, the following evaluations are made with reservations. However, there must be a starting point and in that sense, the analyzed motions for setting aside are an indication that the positions taken are not purely deductive constructions with no grounds in legal reality.

A *prima facie* evaluation indicated by the presented data demonstrate reputation of the Permanent Arbitration Court and reliability of its decisions. Namely, in the last seven years (and probably even during a longer period) there were no cases in which an award of the Arbitration court was cancelled by a final and binding judgment. That certainly confirms the high quality of the awards of the institution and the careful decision-making of its arbitrators.

But, this favorable result, however encouraging, is not a final word – several aspects urge us to issue some warnings. In both comparative judicial and arbitration practice, motions for setting aside are extraordinary and the number of arbitration awards cancelled is small even in the countries that experience

[21] Judgement of February 2, 1998, presiding judge: Branka Pavlović (the same judge who decided to annul the award in the case cited above at 2.e. and whose decision was reversed in the second instance). In the same matter, an additional judgement on the interests is also rendered.

[22] Appeals were received by the court on February 2 and May 5, 1999.

much more arbitration activity. It should be especially emphasized that in the countries which are somewhat unknown to the wider arbitration audience (Croatia being among them, in spite of endeavors to date) the acts of arbitrators and interventions of the state judiciary in connection with arbitration proceedings are closely and attentively observed. When establishing whether a certain country satisfies the arbitration standards and therefore may be considered an arbitration-friendly environment, the first thing that is analyzed is the support that both domestic and foreign arbitral awards in that country enjoy with the state judiciary. The international arbitration community to a great extent functions on casuistic grounds. Therefore, sometimes only a single precedent - such as case of setting aside grounded on dubious and for international practice unacceptable reasons – is enough to put a country to the "black list" of places not recommended for arbitration (and often for investment either).

Fortunately, there was no such precedent in Croatia in the last several years. This gives some reasons for cautious optimism, because Croatia has gained a certain strategic advantage in relation to some of its neighboring states. As examples of cases that should not be followed under any circumstances - and which are moreover warnings to the possible consequences of imprudent judicial intervention - we may state certain recent cases of setting aside in Slovenia [23] and Bulgaria[24]. All similar cases may count on an 'avalanche-effect', because once they are published, they produce long lasting 'tails' in the form of published decisions, papers and reviews, which connect the state to negative arbitration practices.

b) Frequency of Setting Aside

Apart from the collective result, the analyzed data gives the opportunity to calculate the frequency of the attempts to set aside arbitral awards of PAC-CCC. As presented in Table 3 at the end of the text, the Permanent Arbitration Court

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[23] *See Deit* case (*KAJO* v. *Radenska*) in which the arbitral award is set aside by a legally valid judgment. Afterwards, the Austrian courts nevertheless allowed the award to be enforced in the Republic of Austria, justifying such decision, among others, by the argument that the grounds for setting aside do not correspond to international standards. The judgments of Austrian courts are published, among others, in 3 CROAT. ARBIT. YEARB. (1996), at 243-246 (decision of OGH of October 10, 1993) and 5 CROAT. ARBIT. YEARB. (1998), at 255-264 (decision of OGH of February 23, 1998).

[24] *See* setting aside and stay of enforcement in the case No. 223/1989 of the Bulgarian Chamber of Commerce Arbitration Court described in Janevski, *Language of Arbitration as a Ground for Setting Aside Arbitral Awards*, in 37 PRAVO U GOSPODARSTVU (1998), at 139-148; *see* also the decision of the City Court in Sofia No. 570/98 of November 5, 1997 published in 5 CROAT. ARBIT. YEARB. (1998), at 248-255 (decision by which the enforcement was allowed which was cancelled in the appellate proceedings in October 1998).

had 213 cases in the period from 1992 to 1999, in which time 68 awards were rendered. Of the approximately seventy[25] awards rendered within the analyzed period, seven of them were contested in the proceedings of setting aside, which indicates that setting aside occurs in about 10% of the cases, *i.e.*, that the motion for setting aside is filed against every tenth award. It is also important to notice that the motions for setting aside are filed mainly in domestic disputes, which may reflect a litigation practice between domestic subjects, in which the process is dragged out as long as possible and the enforcement is delayed by exhausting each and every legal means regardless of chances for success. The frequency of setting aside arbitral awards may not seem great at a glance, especially compared with a much greater percentage of the legal remedies used in the proceedings before state courts. However, considering both that the motion for setting aside arbitral awards is an extraordinary and restricted legal remedy, and the lack of success of the motions filed, it seems that the percentage is not small.

c) Duration of Setting Aside Proceedings

The advocates of arbitration may be least satisfied with the data on duration of setting-aside proceedings. As one of the key virtues of arbitration that makes it more attractive to parties in commercial transactions, the speed of proceedings is pointed out almost without exception (this is often connected to the fact that appeal as a regular legal remedy is not allowed in arbitration). However, the motions for setting aside contain a potential threat to the speed of obtaining a final realization of the winner's legal rights. Only if the motions for setting aside are maintained within the limits of an extraordinary, restricted and rare legal remedy, that threat may be avoided. On the contrary, more frequent motions for setting aside, with regular stay of enforcement of arbitral awards and long-lasting proceedings of setting-aside may practically equalize the duration of arbitration and judicial proceedings.

Cumulatively, the analyzed cases do not yet lead to the radical conclusion that the speed of arbitration proceedings is compensated by the dragging of setting aside actions. But, the analysis does raise some concerns. Although many of the analyzed cases show that a one-year period was sufficient for deciding on setting aside motion, the setting-aside proceedings in general last longer. It seems that this duration in many cases motivated the plaintiffs: in all cases without exception an appeal was filed. One more fact in that respect is characteristic and almost paradoxical: although the actions of the first instance courts were

[25] Statistics of the PAC-CCC encompass the period from 1992. Therefore, for full comparison the awards rendered before 1991 should be considered, by which the number of awards is raised from 68 (*see* attached table) to above 70.

insufficiently expeditious, in the course of the whole process it was still the shortest stage. Namely, the one stage that should be simple and expeditious - the appeal process - manifests itself as the true cause of delay. Table 3 shows that the first instance setting-aside proceedings lasted from 5 to 15 months (in average 10 months), and the second instance proceedings from 14 to 33 months (in average 26 months), therefore, more than double. An especially radical case is Futura *v.* Hrvatske šume in which from 1995 until 1998, according to the information available, not even the first hearing was scheduled.

d) Actions of Court upon Motions Filed

Apart from the duration of the proceedings, the actions of the court in the analyzed cases deserve a much higher grade. On the whole, it may be said that the process was conducted correctly and professionally, which in the end resulted in a positive balance.

Certain aspects of the actions, especially in the first instance proceedings, may be nevertheless subject to criticism. In certain cases, the Courts forget that the motion for setting aside is a restricted legal remedy conceived as an instrument of *contrôle limité*. Consequently, several cases indicated the tendency of the judges to review the arbitrators' factual and legal findings by tolerating and even granting such objections. The strategy used by the plaintiffs and their attorneys looks a lot like the usual strategy used to reverse factual issues in extraordinary legal remedies: plaintiffs would object to the "intelligibility and consistency of the dispositive part of the award" from Art. 485, para. 1, item 5 CCP. The plaintiffs' attorneys would point out that the dispositive part of the award is not fully consistent with the grounds of the decision offering arguments which in essence require reexamination of the factual findings of the arbitrators. However, it should be noted, as the appellate court in one of the cases pointed out, that "intelligibility and consistency" as the grounds of setting aside an arbitral award is restricted only to the disposition of the award and not the relation of the disposition and the explanation, which significantly narrows that ground in comparison to the ground for absolute nullity of a court judgment. [26] As a *façade* for what is in reality a reexamination of factual and legal issues, the plaintiffs have tried to use the violation of the right to be heard, interpreting the

[26] "With respect to grounds for setting aside of the award of the Permanent Arbitration Court at the Croatian Chamber of Commerce pursuant to Art. 485, item 5 which determines that setting aside may be requested if the disposition of the award is intelligible or contradictory to itself, if the explanation relates to the grounds of explanation and not the disposition of the award. The motion and the explanation of the first instance judgment do not give any grounds for the assertion that the disposition would be in any way intelligible or contradictory." From the judgment No. VII Pž-1266/95-2 of the High Commercial Court in Zagreb of March 4, 1997.

arbitrators' denial to hear certain evidence proposed by the plaintiff (because of its irrelevance) as the violation of the right of a party to be heard. [27] Although those reasons in the end were not accepted, the courts in setting-aside proceedings, in spite of the restrictive nature of the motion for setting aside, have often looked at evidence by hearing the witnesses and parties, even by ordering expert evaluations.[28] The explanations of certain first instance judgments contain extensive analysis of factual and legal issues which could not even be a ground for setting aside.[29]

In all the presented cases, the courts have requested the delivery of the Permanent Arbitration Court file as an obligatory part of the evidencing material. At the same time, the court did not request any explanation or additional information whatsoever on the course of the arbitration proceedings from the arbitrators or the arbitration institution. Although it is logical that the judges in setting-aside proceedings apply the method closest to their practice (and it may be expected that the file should give a complete picture of the course of the proceedings), the practice is problematic. Namely, on the one side, neither the CCP nor the comparative legislature request from the arbitrators to "keep a file", namely, to keep written records of actions undertaken in the proceedings. However, *argumento a simile*, one may assert that the rules of CCP should be applied as subsidiary in arbitration. But, the provision of Art. 478 CCP does not contain such reference - quite the contrary, it restricts itself to the provisions that "if not otherwise agreed between the parties, the arbitrators shall decide the proceedings before the arbitration tribunal". The Rules on PAC-CCC, as an autonomous regulation, on the other hand determines that "if [the Rules] do not contain special provisions and in absence of the parties' agreement thereupon, the procedure shall be determined by the arbitrators by applying the rules of the Code on Civil Procedure of the Republic of Croatia if it complies with the nature of the procedure before the Arbitration Court." Nevertheless, it could hardly be interpreted as an obligation for the Court to keep the files in the way regular courts do, or even to keep on at all.[30] However, the more significant argument derives from the definition of the motion for setting aside as a *restricted* legal

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[27] *See* the arguments for restrictive interpretation of the violation of the right to be heard in Ude, *supra* note 4, at 108.

[28] Thus in the cited case *Tempo* v. *Monter* (still pending) five hearings were held in the process of setting aside and several expert evaluations were performed.

[29] *See* especially the explanation of the first instance judgments in cases *Hamova Trade d.d.* v. *SGF Trading* and *BMK Parafaram* v. *Građevinska zanatska radnja Vladimir Konvični.*

[30] Arbitration as amicable and fellow settlement of disputes developed from the processes conducted by laymen, quickly and informally and such tradition maintained in many cases until present days. Therefore, it could hardly be said that the obligation of a formal recording of a "file" corresponds to the "nature of arbitration".

remedy. As distinguished from regular (and certain extraordinary) legal remedies in court proceedings, the motion for setting aside does not contain any circumstance to be examined *ex officio* by the court. Its only role is to verify the plaintiff's allegations on the existence of severe procedural irregularities, or the assertions on exceeding the scope of assignment defined by the arbitration agreement and public order. Therefore, the law does not authorize the court to go to "fishing expeditions" for errors in procedure, into which the reexamination of the whole file may in effect turn. In the same way, although the setting-aside procedure by nature lifts the initial veil of confidentiality, the courts should understand the interest of the parties to publish the minimum of information in the process of setting aside and consequently, should concentrate on the speediest and best informed sources of information concerning disputable issues. Such sources are primarily the parties (to whom the courts, because of the adversarial nature of the procedure, generally give the opportunity to respond), arbitrators in the case and the arbitration institution under which auspices the arbitration was conducted (which the courts seem to overlook). In absence thereof and with the file usually containing the evidence on which the judgment on the merits depended (but which are not relevant for the grounds for setting aside), the judges are in temptation to reexamine the fact already established by the arbitrators. This entirely contradicts the very essence of arbitration and deprives the arbitral settlement of disputes of its most profound *raison d'être.* This activity is also self-destructive: by undermining arbitration, the judges undermine their own legitimacy because they impose on themselves an unwanted and unnecessary additional burden of new cases in their already critical working overload.

e) Excursus: New Facts and Evidence as a Ground for Setting Aside

An additional encouragement to the courts for examination *au fond* may be found in the existing rules on setting aside - an arbitral award may be set aside "if the party finds out about new facts and evidence or finds or gains the opportunity to present new evidence on the basis of which an award more favorable to him could have been made if these facts or evidence had been presented in the earlier proceedings" (Art. 421, item 9 in connection with Art. 485, item 7 CCP). New facts and evidence were in discussion on the reform of the Croatian arbitration law the most debated issue because the viewpoints thereupon differ both in theory and practice.[31]

[31] *See* more details on new facts and evidence in S. Triva, *New Facts and Evidence as Grounds for Setting Aside Arbitral Awards*, 3 CROAT. ARBIT. YEARB. (1996), 29 *et seq.*

After a thorough discussion on new facts and evidence, the Working Group for the reform of the Croatian arbitration law [32] decided to recommend abandoning new facts and evidence as a ground for setting aside (unless the parties expressly agree thereupon in the pure national disputes). [33] The analysis of the proceedings in this paper may only confirm such conclusions of the Working Group. Namely, in the majority of the analyzed cases, the plaintiff raised "newly discovered" facts and evidence, which - corresponding to doctrinal criticisms - encouraged the courts to reexamine the factual and legal determinations of arbitrators. [34]

Such *au fond* examination resulted in setting aside of the award by the first instance judgments in three of the analyzed cases. Although the cited judgments were reversed in the appellate proceedings (one is still pending, but the chances are that it is also going to be reversed), the very fact of reexamination led to further delay of already lengthy process. It is symptomatic that in two cases the first instance ruling rested exclusively on the "new facts and evidence".

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[32] On the course of the reform of the Croatian arbitration law *see* S. Triva, *Izvještaj o ostvarenjima radne grupe na izradi nove skice - Skica 2 za nacrt Zakona Republike Hrvatske o arbitraži [Report on the Achievements of the Working Group for the Reform of the Croatian Arbitration Law - Draft 2 of the Croatian Arbitration Law]*, 37 PRAVO U GOSPODARSTVU (1998), at 5-25; S. Triva, *Draft Law on Arbitration of the Republic of Croatia"*, 36 PRAVO U GOSPODARSTVU (1997), at 5-47; *see* also S. Triva, *Final Proposal of the New Croatian Arbitration Law (Draft Three)* and the full text of the Final Draft in 5 CROAT. ARBIT. YEARB. (1998), at 9 et seq.

[33] *See* Art. 36, para. 5 of the Draft 3: "If the parties in a dispute without international character expressly so agree in the arbitration agreement, an application against the arbitral award may also be made on the grounds that the party applying for setting aside found new facts or has the opportunity to present new evidence on the basis of which an award more favorable to him could have been made if these facts had been known or evidence produced in the hearings that preceded the making of the challenged award. This ground may only be raised if the applying party could not use them in the arbitration proceedings without her fault".

[34] "If the reopening is requested on the grounds of "regular" (unqualified) new facts and evidence (Art. 421, item 9), the success of the request depends on the success of the argument that the newly discovered facts and evidence could result in a more favorable decision. This can be established only by comparing the facts in the previous procedure with the new facts and by considering their possible effect on the content of the decision on the merits. The request will be sustained only if the court finds out that a more favorable decision could have been rendered had the new evidence been presented. Generally, if the court comes to such a conclusion, it is already prepared to make a new revised decision. That very fact is a serious obstacle for inclusion of this ground among grounds for setting aside. Deciding on such new facts would imply the obligation of the court to revise not only the factual but also legal findings of the arbitral tribunal. This would mean a complete revision of the case (*révision au fond*). Thereby, one should not exclude the possibility that the court would examine the relevance of factual allegations and apply law by criteria that the parties never had in mind." Triva, *supra* note 29, at 41..

4. Epilogue

The arbitral settlement of disputes needs cooperation with state judiciary, without which arbitral awards remain only a dead letter on paper. In return, arbitration may lift a heavy burden from the state courts and contribute to the confidence of foreign investors in the jurisdiction of a certain state. For harmonious coexistence, (state) judges and (private) arbitrators must act in accord. The research presented in this article shows that the basis for such understanding exists, but needs to be intensively and continuously strengthened. Arbitrators should be aware of the conditions imposed for the validity of arbitral awards by state procedure, and judges must be aware of the specifics of arbitration and know how to react thereupon in an adequate manner, repressing malicious motions for setting aside by expeditious and quality judgments restricted to examination of issues regulated by law - the consistency of an arbitral award with basic requirements of procedural fairness and public order.

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