

ARBITRATION IN CROATIA WORK GLOBALLY, ARBITRATE LOCALLY

A PRESENTATION OF THE ARBITRATION SERVICES OF THE
PERMANENT ARBITRATION COURT AT THE
CROATIAN CHAMBER OF COMMERCE

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1. Introduction

Arbitration is in the business community often regarded as an activity linked to the major industrial powers of the world. The word “arbitration” is for many businesspeople somehow associated with large arbitral centers in several traditional arbitration-providing countries, e.g. Switzerland, Great Britain, Austria, Sweden, USA etc. However, in the contemporary world, globalization of the economy and permanent search for new markets has led to an increased importance of alternative dispute resolution methods with respect to business activities in less developed countries, in the Third World and in the “new democracies”, i.e. in post-socialist countries, especially those of Central and Eastern Europe.

The second half of the 90’s has witnessed a period of intensive development of arbitration institutions all over the world, in particular in regions that had previously little or no experience with arbitration. The challenge of new regional centers has not remained unanswered by larger arbitration institutions, that are rapidly expanding their activities and reforming their rules (ICC International Court of Arbitration may come only as an epitomizing example of such developments). Nowadays, when

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formation of a new arbitral center may even come as a matter of prestige, it is time to raise a question: is there enough space for so many competitors in the market of arbitration services? Although the need for arbitration services may seem to increase every day, it seems that the time has come for setting new standards: only those institutions that can offer high quality of services, arbitrators of international reputation, speed of proceedings and low level of costs will have chances to find their place in the busy network of organizations that provide arbitration services.

In this paper, an institution that can only hardly be qualified as a newcomer in the arbitration community will be presented: the Permanent Arbitration Court at the Croatian Chamber of Commerce (hereinafter: PAC-CCC). Many arbitration experts will have heard about this international arbitral center situated in Zagreb, Croatia. However, in a broader circle of users of arbitration services, it has still not reached wider name-recognition, although some authors have already started to qualify it as a “forerunner of arbitration in South-Eastern Europe”.

2. Establishment and activities

The PAC-CCC has emerged as an institution for providing international arbitration services only relatively recently, in 1991. But, due to the particular history of arbitration in the former Yugoslavia, so different from the history of arbitration in many other East-European new democracies, it would be wrong to categorize it as a “young” or “inexperienced” institution. In the former Yugoslav federation, unlike in other states of the region, arbitration was (moderately) liberalized since the mid-60’s. In states of the Soviet bloc, arbitration was principally used as a showcase of neutrality in dealing with foreign investors; therefore, only “international arbitration” was allowed, but limited to the narrow scope of very few national institutions and some reputed foreign arbitral centers. Domestic arbitration was unnatural in a planned economy of Soviet style, and therefore it was largely forbidden. On the other hand, the Yugoslav

doctrine of self-management, although it did not develop the full freedom of a Western market economy, contributed to an establishment of economic competition – and development of domestic arbitration. The new opportunity was used locally, at the levels of particular republics of former Yugoslav states. Among the first centers for domestic arbitration established in the early 60's was the PAC-CCC. Its good reputation in the former state – that contributed to its present status and reputation within the international arbitration community – is due to several fortunate coincidences: since its inception in 1963 it was run by experts of renown academic excellence; it was never victim of political influences and was always estimated as a highly neutral and independent organization; and finally, its arbitrators were among the best in the former federation, and often active not only in domestic arbitrations, but also in international cases, under auspices of renown Western arbitral institutions.

Certainly, this development was not only accidental. Some historical data provide insight in deep roots of arbitration in Croatia: the first modern permanent arbitration court was established at the Croatian Chamber of Economy and Manufacture in 1853. In 1930, according to archives of that institution, at the peak of its career, this Court had a caseload of several thousand cases, mostly dealing with smaller merchant cases, but also with matters of greater economic importance. Since use of private arbitration mechanisms was wide-spread at that time, short period of Soviet-type state “arbitration courts” between 1945-60 did not delete memories of arbitration as an essentially private jurisdiction agreed upon freely by businesspeople. This tradition continues to live today, although the profile and type of cases resolved before PAC-CCC has largely changed.

3. Current arbitration law

An important factor in the development of arbitration certainly consists in an existence of an adequate legal framework. For potential users of arbitration services it is often the starting point – although other

factors, like tradition, experience and legal culture also play an important role in the choice of venue. It is not the purpose of this paper to provide a scholarly analysis of Croatian arbitral legislation; therefore, only few points of major practical importance will be mentioned.

Arbitration-friendly environment – adopting UNCITRAL Model Law.

If all countries may generally be divided into two categories, depending on whether they are arbitration-friendly or not, there is no doubt that Croatia falls into the first category. Relatively modern former-Yugoslav legislation was improved in 1990 to meet the requirements of a full-fledged market economy, and a new legislative reform, that is planning to endorse even higher standards of quality and open even more space to arbitration, is underway. Current legislation, contained in two large “systemic laws” – the Code of Civil Procedure and the Conflict of Laws Act – has proved no major failures in practice. The two major objections to current legislation are the lack of *prima facie* transparency for foreign users (current law is more or less a “home-made” product), and the division of arbitral provisions between two acts. Therefore, the new approach is to unify all issues of arbitration in a single act, and bring arbitration law closer to the circle of potential foreign users by implementation of legislation that would be familiar to most experts for international arbitration. It seems that a consensus has been reached that the optimal pattern is to be found in the provisions of the *UNCITRAL Model Law for International Commercial Arbitration*. Since model legislation is a product of compromise and therefore sometimes provides “less-than-perfect” solutions in a particular legal environment, Croatian reformers have adopted an approach close to the recent German reform: most of the provisions of the UML, and its general spirit, will be retained, complemented with an effort to make the law as precise and as adapted to local circumstances as possible. Currently, after two years of work, the Working Group on the Reform of Arbitral Law is just about to present the final draft and thereby finalise a project that was subject to scrutiny of over 30 foreign and many domestic arbitration experts.

Wide party-autonomy, arbitrability and flexibility. Until a new law replaces the present one, provisions of current legislation have to be considered. Generally, the provisions of the current law are based upon familiar principles, such as principles of party-autonomy, flexibility of procedural arrangements and a wide area of arbitrability. As to the subjective (personal) arbitrability (*arbitrability rationae personae*), arbitral agreements may be concluded by any natural or legal persons; state and state agencies may be parties to an arbitral agreement as well. With respect to objective arbitrability (*arbitrability rationae causae*) all disputes regarding “rights which the parties may freely dispose of” (Art. 469 CCP) may be submitted to arbitration, provided that no exclusive jurisdiction of courts of law is provided; currently, it means that only a limited area of disputes, such as disputes with regard to ownership over immovable property and certain disputes with regard to registration of companies are excluded from arbitration. Limitation of arbitrability to commercial disputes was abolished in 1990, and since then new types of disputes have already started to emerge before arbitral tribunals in Croatia, e.g. collective and individual labour disputes. Limitations of arbitrability have remained only in the area of jurisdictional arbitrability (*arbitrability rationae fori*). They are limited to the choice of forum in domestic disputes (defined as disputes in which parties are either legal persons seated (registered) in the Republic of Croatia or natural persons that have their permanent or habitual residence in the Republic of Croatia. In such domestic disputes, only institutional arbitration in Croatia may be agreed upon; both *ad hoc* arbitration, or arbitration placed outside of the country (and thereby subject to a foreign legal order) are not permitted. Both remaining limitations are currently under consideration. Flexibility of procedure is also warranted; current (and future) legislation contains very few mandatory rules, and generally parties and arbitrators are free to agree upon the applicable procedural rules and substantive law, within the boundaries of elementary procedural fairness and (narrowly defined) public policy. Both

boundaries are defined by the grounds for setting aside of arbitral awards that are more or less identical with the similar provisions of UNCITRAL Model legislation.

Implementation of international arbitral instruments. An important factor in the choice of forum is also the applicability of international arbitral instruments. Former Yugoslavia had adopted a relatively wide set of arbitral conventions; after the splitting of the former state, Croatia rapidly notified its willingness to continue application of all relevant arbitral instruments. Among these instruments are the most important ones, starting with the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958); the European Convention on International Commercial Arbitration (Geneva, 1961), and the Convention on Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965). Older Geneva conventions and protocols (1923, 1927) are also effective, although with a very limited application. Several bilateral treaties have also separate provisions on the promotion of arbitration. Since the implemented international conventions cover most of the relevant areas, and encompass a full set of instruments important for international arbitration, it can be argued that the legal system in Croatia fulfills the highest international standards.

Judicial system familiar with arbitration. Abstract legal rules (“law in books”) are, naturally, not enough. It is important to note that the Croatian judiciary has a consistent history of “arbitration-friendly” decisions, and considerable experience in the application of stable domestic regulations and relevant international conventions. A good indicator of the judicial attitude is the fact that in at least a decade, there were no disputable court decisions denying recognition of foreign awards, or annulling domestic awards. This is partly due to the efforts of the arbitration community to familiarise local judges with the arbitral issues and to explain the importance of arbitration; partly, the arbitration-friendly attitude is due to the awareness of the judiciary that

arbitration may lift at least a fraction of the heavy caseload that has been burdening Croatian commercial courts in recent years.

4. Zagreb Rules

Before 1991, in former the Yugoslav federation there existed only one arbitration institution that dealt with international arbitration – the Foreign Trade Arbitration Court in Belgrade. Until dissolution of the federation, this court had the legal monopoly on international arbitration. Formation of new independent states opened the opportunity for new international arbitral centers, that naturally emerged out of previous centers for domestic arbitration that existed at local economic chambers. However, the need for such centers differed: Croatia and Slovenia started with such development very early, whereas Macedonia and embattled Bosnia only gradually followed. At the same time, the once important Belgrade arbitration institution lost most of its cases due to international embargo, departure of most arbitrators and loss of experienced staff.

A step urgently needed after assuming jurisdiction in international cases was the adoption of new sets of rules. Some of the former domestic cases became “international” after dissolution of the federation; new cases were initiated – and the existent domestic rules were inappropriate for a number of situations. The PAC-CCC was the first to react – already in April 1992, new Rules of International Arbitration (subsequently known as Zagreb Rules) were enacted. These Rules, drafted largely after consideration of well-known international rules, such as the UNCITRAL Arbitration Rules, ICC Rules of International Arbitration, the UNCITRAL Model Law and rules of some other regional arbitral institutions, have set the model to be followed by other post-Yugoslav arbitral institutions. This somewhat eclectic approach produced rules which unify some of the best achievements reached in the international arbitral community and similar arbitration

rules with a continental procedural style. These Zagreb Rules proved to be operable and popular. They were soon translated into English, German, French and Italian, and published in many significant arbitral reviews and other publications. During six years of their application, they remained unchanged, because their flexible and permissive approach and familiar solutions found widespread acceptance among the users of Zagreb arbitration services.

5. Arbitrators

The Zagreb Rules provided a part of the infrastructure needed for international arbitration; the other part were the arbitrators. Since even the best rules can be spoiled by inexperienced application, it was of utmost importance to find arbitrators that could ensure a high level of arbitration services. For a new arbitral institution, this is even more important, since one mistake can easily ruin its whole reputation. Fortunately, a relatively small country like Croatia (5 million inhabitants) produced a number of arbitral experts – mostly legal scholars and practitioners that gained their experience in ICC or FTAC arbitrations. Therefore, it was possible to compose a panel of arbitrators in international cases that responded to the current needs. In the first years, such a panel consisted only of local experts, and served only as a recommendation for parties, who were free to choose other appropriate arbitrators, including foreign citizens. The first years of practice in the arena of international arbitration brought many contacts with international experts, so that another step to the full internationalization was possible – since 1997, the panels of arbitrators in international cases were extended to include a number of foreign experts. Currently, the panel of arbitrators in international disputes consists of 47 arbitrators – distinguished domestic experts, and 45 arbitrators – foreign citizens from 16 different countries. Most of the arbitrators have reputation that speaks for itself. However, in order to harmonize the practice and to

contribute to the quality and formal uniformity of arbitral awards, the PAC-CCC has adopted in its rules the system of scrutiny of arbitral awards similar to those of the ICC International Court of Arbitration. Pursuant to Art. 43, paras. 4 and 5 of the Zagreb Rules, “[t]he Court may lay down modifications as to the form of the draft;... [it] may, without affecting the liberty of decision of the arbitral tribunal, draw it's attention to points of substance.” In practice, this has proven to be an effective mechanism for preserving the quality of decision-making. In the last five years of practice, there were only a few arbitral awards that were challenged in setting aside or enforcement procedures, and up to date there were no data on cases in which such challenges were successful.

6. Past record: some data on arbitral jurisprudence of the PAC-CCC

Even though the practice of arbitral institutions is judged according to its past and present cases, there are very few statistics on arbitral jurisprudence of many arbitral institutions. Few different examples, like a series of ICC publications of arbitral awards, confirm that rule. Often, confidentiality of arbitral proceedings is invoked as a reason of such situation. It could be argued, however, that at least a part of insufficient statistics roots in the fact that many of such statistics would not discover glowing examples of hundreds of important cases. Whereas the largest international arbitral institution, the ICC International Court of Arbitration, resolves annually about 300 cases, other renown European centers have, as a rule, less than a quarter of this number, whereas many new local centers still await their chance to be proven.

Having that in mind, the PAC-CCC has in the last five years developed a moderate, but significant caseload. Since 1992, it has acted in over 170 cases, and about 80 cases thereof do fall within the scope of proper international disputes. Until now, parties from 20 different countries participated in PAC-CCC arbitration. Most of the cases were

arbitrations with companies from Italy, Austria, Germany, England and Switzerland, but cases with a regional element also make a significant portion. Cases submitted before the Court are of varying type, complexity and amount in dispute, but generally they are not economically insignificant: the aggregate amount in disputes in the years 1992-1998 ranges over 50 million US Dollars; the average amount in dispute in the same period was about US\$ 300.000. Since 1992, the PAC-CCC has issued over 60 awards – a number that may be viewed as a good start for the formation and publication of jurisprudence that would witness the quality and procedural style of the Court.

7. Spreading activities: conferences, publications, web-presence

The development of arbitral activities of a particular arbitral institution depends ultimately on parties willing to agree upon its jurisdiction. There are no arbitration institutions without arbitration cases; there are no arbitration cases without arbitral agreements; and there are no agreements unless parties have learned about the arbitration facilities and their services. For that reason, the Court has engaged a lot of efforts in the promotion of arbitration. Since 1992, the Court hosts an international arbitral conference in Zagreb every year. This year, the *Sixth Croatian Arbitration Days* will take place from December 10-11, 1998. It is expected that the conference will again be the meeting point for arbitration experts from the region and the world. The main subject will deal with the last draft of the Croatian Arbitration Act that is expected to be presented for the first time to a domestic and international audience. Other subjects will deal with the presentation of current developments in the region, as well as with a number of reports and scholarly topics, such as arbitration in banking disputes, arbitration among shareholders of large publicly owned corporations, arbitrability of disputes in bankruptcy etc.

The Court also acts as a co-publisher (with the Croatian Arbitration Association) of the *Croatian Arbitration Yearbook* – the unique journal for the issues of international arbitration published in English language. Until now, four issues are published, each filled with over 200 pages of papers and reports of distinguished regional and international arbitration experts. The Yearbook is devoted to four principal circles of issues: to current topics in international arbitration (e.g. arbitration and foreign investments, narrowing reasons for setting aside, arbitration in labor disputes, succession of an arbitral institution); to arbitration in the region (e.g. arbitration in Slovenia, Bosnia-Herzegovina or Macedonia); to experience of other arbitral centers (such as the ICC Court, Vienna Arbitral Center, CIETAC); and to the current developments in the PAC-CCC arbitration (e.g. presenting new rules and analyzing their application). The Yearbook often uses papers and presentations from the Arbitration Days, but also features a number of contributions written primarily for publication in the *Yearbook*. Particular attention is devoted also to the presentation of material that is potentially interesting for an international audience; in past issues, English translations of various key documents were published, such as the provisions of Croatian arbitration law and the draft reform, arbitration rules, cooperation agreements, bibliography of books and papers on arbitration issues, and a significant portion of arbitral jurisprudence – arbitral awards and court decisions relating to arbitration. The *Croatian Arbitration Yearbook* is also distributed world-wide in full text version on the world's largest legal electronic database – *Lexis-Nexis*.

Cooperation of arbitration institutions has recently started to be increasingly important. A formation of a network of people and institutions interested in arbitration certainly contributes to the development of an arbitral culture. Considering this aspect of promotion of arbitration, the PAC-CCC has in past years concluded eight formal agreements on cooperation in the field of arbitration. Agreements are concluded with the American Arbitration Association, Swiss Arbitration

Association, Court of International Commercial Arbitration at the Chamber of Commerce and Industry of Romania, German Institute of Arbitration (DIS), Vienna Arbitral Center, and Permanent Arbitration Courts at the Slovenian and Macedonian Chamber of Commerce.

Modern means of communication are rapidly finding their place in the arbitration community. The PAC-CCC was also a forerunner in the introduction of new technologies for the promotion of arbitration. The Web site of the PAC-CCC is regarded as one of the first and most comprehensive sites of European arbitration institutions, and can be viewed at the following address:

<http://www.hgk.hr/komora/sud/english.htm>.

Audience interested for on-line communication may send e-mail and get response at sudiste@hgk.hr.

8. Considerations in choosing an arbitral forum: why Zagreb?

Finally, in spite of the preceding presentation, a question may be raised: after all, what are the reasons for choosing a forum such as the Permanent Arbitration Court at the Croatian Chamber of Commerce? In competition with other, traditional venues, it can still be described as a relatively new and unfamiliar institution – and therefore, why not stick to a “conservative” choice?

Several considerations must be taken into account in replying to such a question. Types of cases that appear before a particular arbitral institution may vary, but in general it could hardly be argued that any arbitral institution is equally appropriate for all possible types of disputes. Large, “traditional” arbitral institutions usually provide highest level of quality, but are not equally effective with respect to the speed and costs of the proceedings. Therefore, it is at least recommendable to consider local alternatives to the eminent “international” centers that are sometimes chosen “by default”.

Comparing the PAC-CCC arbitration to other possible choice of venues, one could find clear advantages at least in the following categories: first, in disputes between Croatian and foreign companies relating to investments in the country; second, in disputes with a post-Yugoslav element (cases in which parties from the territory of former Yugoslavia participate); third, in disputes of lower to mid-range amount in dispute that require speedy – and relatively inexpensive – action. All too often, some important factors are forgotten while agreeing upon arbitration; surprisingly, costs of the proceedings are among them, probably because arbitration provisions in commercial contracts are, at the time of their conclusion, often regarded as unnecessary “safety valves” that are supposed *not* to be used. But, once arbitration becomes imminent, some problems often occur. Arbitrating far away from the site may bring excessive travelling costs; the need to translate every document, and statements of every witness and expert written in the “local” language may be expensive, too; finally, the busy schedule and high fees of many international arbitrators and arbitral centers round up the picture of a “less-than-optimal” arbitration solution, especially for the parties for which cost-awareness is important. The PAC-CCC has built arbitration services that are intended to bring an intermediate solution: an easily recognizable set of rules and arbitrators of good standing, combined with low administrative costs, reasonable costs of arbitrators’ fees, and the ability to provide good quality of services on the very spot where the dispute occurred. The time will show whether developments in the 21st century will move away from centralism of “elitist” large institutions, and towards stronger participation of local and regional arbitral centers. In any case, many businesspeople, when considering various conflict-resolution clauses, may find it prudent to adopt the following philosophical principle: doing business globally, arbitrating locally.

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