Journal of International Arbitration **19(1)**: 73–79, 2002.

Current Developments in the Field of Arbitration in Croatia

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I. INTRODUCTION

As a means of resolving business disputes, arbitration is becoming more and more popular in the countries of Central and Eastern Europe. Among these countries, Croatia plays a prominent role. Once a center of arbitral doctrine and practice in the former Yugoslavia,[1] Croatia has continued this development since acquiring independence ten years ago. The years of war and instability in the region were certainly not a favorable environment for the growth of business and international trade. However, in spite of these difficulties, the arbitration community in Croatia was astonishingly active. Therefore, Croatia and its capital Zagreb are today important places on the regional map of arbitral venues. Since 2000, the political environment has largely improved and the economy is moving in a positive direction. Direct foreign economic assistance has more than tripled and several large business deals have shown that an era of investment and business growth might be approaching.[2] Such economic development will certainly create new challenges for the present law and practice of arbitration in the country.

The most significant recent developments have occurred in three areas: the reform of Croatian arbitration law, which has just been completed;[3] the practice of arbitration and the Permanent Arbitration Court at the Croatian Chamber of Commerce (PAC-CCC); and doctrinal and promotional activities, both at national and international levels. In this paper, we will briefly outline the major trends and achievements in all of these areas

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[1] It should be noted that the former Yugoslavia had a more liberal arbitration policy than the countries of the former Eastern Block. Neither Croatia nor the former Yugoslavia were ever members of the Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation (the Moscow Convention); compulsory arbitration courts of the Soviet type were unknown; and domestic arbitration was permitted and utilized as a means of resolving disputes between companies that enjoyed considerable autonomy under the policy of so-called "self-management socialism."

[2] *E.g.*, the acquisition of the Croatian Telecom by Deutsche Telecom; the privatization and sale of several of the largest Croatian banks; investments in the road infrastructure etc. *See e.g.*, 8 EMERGING EUROPE MONITOR SOUTH-EAST EUROPE 6 (No. 8, 2001).

[3] Following completion of this text, the Draft Law was adopted in the Croatian Parliament (the final vote took place on September 28, 2001). The official publishing and coming into force are scheduled for October 2001.

II. Reform of Croatian Arbitration Law

A. The course of the reform

The reform of Croatian arbitration law may well be described as one of the most carefully prepared legislative projects in the country. The legislative framework that existed after 1991—the adopted former Yugoslav Code of Civil Procedure (CCP) and Conflict of Laws Act (CLA)[4]—was slightly amended in order to address some shortcomings, but was generally not considered to be inadequate. The needs of business and global arbitration developments commanded the changes but it was considered to be more important to ensure quality solutions that could last in the decades to come, than to urgently provide a patchwork of quasi-reform that would not be long-standing. In addition, political priorities frequently lay elsewhere, which contributed both to the duration of the whole project and to the fact that the project was pursued calmly within the circle of legal and arbitration professionals. The entire project, from the first draft to its adoption, lasted more than five years. In the meantime, several drafts were widely distributed, discussed and amended. The whole process took place transparently, with the participation of an international audience and arbitration experts who had the opportunity to follow the evolution and improve the text of the proposal. Only after a very thorough examination and intense debate was the final proposal adopted by the arbitration community and communicated to the Ministry of Justice as the result of professional consensus.[5] The official part of the legislative process started in 1999 and after lingering for a while due to the change of government, it was finally completed and submitted to the Croatian Parliament (*Sabor*) in 2001. In the final stages of the legislative procedure, very few amendments were made to the Third Draft. Some of the most important were those that attempted to incorporate, at least partially, the most recent developments in the work of UNCITRAL and its Working Group on International Commercial Arbitration ("Working Group on Arbitration").

B. The reform concept

As is the case with recent arbitral legislation enacted in other countries (with the exception of Germany), the intention was to collect all provisions on arbitration in a single Act—the Croatian Arbitration Law. Thereby, the previous less transparent bifurcation of arbitral topics between two Acts (the CCP and the CLA), in which arbitration was only a small and less significant part, would be abandoned.

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[4] The Code of Civil Procedure was enacted in 1997, and the Conflict of Laws in 1982. Both Acts were amended several times, but the changes were not significant.

[5] *See* Siniša Triva, *Report on the Achievements of the Working Group for the Reform of the Croatian Arbitration Law*, 4 CROAT. ARB. Y.B. 193 (1997); an English translation of the Final Proposal (Draft Three) with introduction and commentary is published in 5 CROAT. ARB. Y.B. 9 (1998).

maintained—international arbitral disputes are those in which at least one party has a seat or habitual residence abroad.[6] The "internationalization" of a dispute by agreement of the parties or by evaluation of foreign economic involvement in an entity registered under the law of the country is not possible. However, for the first time, the Croatian Arbitration Law contains explicit guarantees with respect to non-discrimination of arbitrators—it is provided that "[n]o person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties."[7] This provision applies both to national and international disputes, since a large number of provisions of the new Act regulate arbitration irrespective of the parties in dispute. It is also true for the provisions on applicable law, languages of arbitration and procedural rules. Such a uniform approach to arbitration can fully compensate for stricter rules that determine the divide between national and international arbitration. The need for an "international" label is minimized if, even in a setting that qualifies as "domestic," parties may freely choose arbitrators, the language of arbitration, the applicable law and the form of arbitration. The only remaining limitation in domestic disputes relates to the place of arbitration—it has to take place in Croatia. Moreover, a case may be submitted to a foreign-based arbitration only if the exclusive jurisdiction of Croatian courts is not provided by law. The previous general limitation of exclusive jurisdiction has, however, been abandoned.[8]

Important changes have also been introduced in the provisions regulating the form of arbitral agreement. Some of the last-minute amendments were inspired by the recent activities of UNCITRAL and the discussions within its Working Group on Arbitration. Partly due to time constraints, the Third Draft has adopted an intermediate solution, largely influenced by the draft submitted for the consideration of the Working Party in November 2000. Subsequent drafts, which introduced even more radical departures from the requirement of the Model Law that the arbitral agreement be in writing, were, for the time being, not regarded as appropriate. The current text, which has followed closely the wording of Article 7 of the Model Law, is significantly amended. Departing from current practice, the Draft has generally provided the validity of a written arbitration agreement irrespective of whether the document is signed by the parties or not. Furthermore, it is recognized that an agreement is valid if a party has consented tacitly to a written offer by the other party. The agreement is also valid if it is concluded orally, but confirmed in written form (tacit confirmation is also sufficient). Arbitration agreements in the maritime bill of lading are also explicitly covered, and stricter rules for consumer contracts are provided.[9]

In connection with maritime bills of lading, the new Croatian Law on Arbitration removes one of the traditional obstacles that made maritime arbitration in Croatia

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[6] In this respect, the strict formal criterion of the Continental European Law was followed—*see e.g.* Switzerland's Federal Code on Private International Law (CPIL), art. 176 (1).

[7] Art. 10(1) of the Draft Law.

[8] *See also* Mihajlo Dika, *Arbitrability and Exclusive Jurisdiction of Courts of Law*, 6 CROAT. ARB. Y.B. 27 (1999).

[9] *See* Zivilprozeßordnung [ZPO] [Code of Civil Procedure] arts. 1031(4) and (5) (F.R.G.). *See* Zivilprozeßordnung [ZPO] [Code of Civil Procedure] arts. 1031(4) and (5) (F.R.G.).

(which is an Adriatic country with more than 1000 islands) virtually impossible. The Croatian Law on Obligations required a special power of attorney for concluding arbitral agreements. This power of attorney had to be in writing—which is, in the practice of international maritime transport, almost never a requirement in the case of bills of lading. The new Arbitration Law explicitly removes this limitation and in Article 8, contains exactly the opposite rule, i.e. that authority to conclude the main contract implies the authority to conclude arbitration agreements and for rights and duties arising from it.

Another central point of the "international" debate found its place in the new Arbitration Law—the issue of provisional measures in arbitral proceedings. Croatia traditionally belonged to a circle of Central and Eastern European countries that did not recognize the right of arbitrators to order interim measures. In the preparatory work, this was still one of the most controversial issues. Finally, after a careful study of several variants, the Model Law formula[10] was fully adopted, supplemented by a provision stating that the party that requested the measure may request its enforcement by the competent state court, if the other party fails to comply with the interim measure.[11]

The Model Law was also largely followed in the provisions that regulate the requests for the setting aside of an award. The result was the abandonment of the previous approach, derived from the Austrian legislation. In practice, this means that setting aside will no longer be possible by relying on the reasons for another remedy in judicial proceedings—the request for reopening the case (*ponavljanje postupka*). In particular, new facts and evidence can no longer be used as a reason for setting aside an award.[12] This is in line with the finding that the invoking of new evidence was, in several cases, misused in practice.[13] However, to preserve some traditional regulation, it is provided that parties may allow for the possibility of setting aside an award if new facts and evidence are found—but this is applicable only if the parties have an express agreement to this effect.[14]

D. STATUS OF INTERNATIONAL INSTRUMENTS

Croatia has ratified the most relevant international arbitration instruments, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[15] and the European Convention on International Commercial Arbitration,[16] as well as the older instruments (such as the Geneva Conventions). Most recently, Croatia ratified the Washington Convention on the Settlement of Investment Disputes

[10] *See* the Model Law, art. 17.

[11] Croatian Arbitration Law, art. 16(2).

[12] For a detailed study of this issue *see* Siniša Triva, *New Facts and Evidence as Grounds for Setting Aside Arbitral Awards*, 3 CROAT. ARB. Y.B. 29 (1996).

[13] *See* Alan Uzelac, *Setting Aside Arbitral Awards in Theory and Practice*, 6 CROAT. ARB. Y.B. 55 (1999).

[14] Croatian Law on Arbitration, art. 36 (5).

[15] Done at New York, June 10, 1958; entered into force, June 7, 1959, 330 U.N.T.S. 38, No. 4739 (1959).

[16] Done at Geneva, April 21, 1961; entered into force, January 1, 1964, 484 U.N.T.S. 364, No. 7041 (1963–1964).

Between States and Nationals of Other States.[17] There are also many bilateral agreements that inter alia deal with arbitration—most notably the agreements on promotion of investments and trade agreements.[18]

III. The Practice of Arbitration in Croatia

A. The Practice and Activities of the Permanent Arbitration Court at the Croatian Chamber of Commerce

The Permanent Arbitration Court at the Croatian Chamber of Commerce is without doubt the central institution for arbitration in Croatia. Having been established in 1853, it may count as one of the oldest arbitration institutions in Europe.[19] In Yugoslavian times, it had a thriving practice in resolving domestic business disputes. Although the PAC-CCC has only been active in the field of international arbitration since 1991, its activities in the past ten years have been significant.

In the 1991–2001 period, the share of international cases regularly amounted to forty-fifty percent (the remainder being national, i.e. domestic, cases). During that time, about 300 cases were filed with the Court, with the participation of parties from twenty-five different countries. The total value of accumulated claims in that period amounted to over 700 million German Marks, which indicates their economic significance and the confidence that the Court enjoyed as a highly professional body for the settlement of complicated and important business disputes. Statistical data shows that the Court mostly receives cases in which the amount in dispute is in the range of 100,000 German Marks and 500,000 German Marks. There are some smaller claims, but recently there has been a trend towards high-value disputes, particularly in domestic arbitration.

Proceedings in domestic and international cases are regulated by two different sets of rules. International cases are governed by the Rules of International Arbitration of the PAC-CCC (Zagreb Rules), enacted in 1992.[20] It is expected that the enactment of the new law will initiate the first changes of the Zagreb Rules, further improving the set of provisions that has proved to be a fair and reliable basis for international arbitration.

The panels of arbitrators of the PAC-CCC correspond to the two sets of rules. Both panels have been newly selected in 2001 for the 2001–2005 period. Currently, there are

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[17] Done at Washington D.C., March 18, 1965, entered into force October 14, 1966, 575 U.N.T.S. 159. The Convention came into force in Croatia on October 22, 1998. *See* Krešimir Sajko, *Washington Convention on Settlement of Investment Disputes*, 6 CROAT. ARB. Y.B. 131 (1999).

[18] A collection of relevant arbitral provisions of these type of agreements was published in: 1 REV. ARB. CENT. & E. EUR. 232 (2000). *See also* Krešimir Sajko, *Arbitration in the Bilateral Treaties for Promotion and Protection of Investments*, 5 CROAT. ARB. Y. B. 123 (1998).

[19] *See* Mihajlo Dika, *Arbitral Settlement of Disputes According to the 1852 Provisional Civil Procedure Code*, 5 CROAT. ARB. Y.B. 187 (1998).

[20] *See* Off. Gaz. No. 25/92 of April 15, 1992. The Rules came into force on May 7, 1992. A full text of the Zagreb Rules is available in English, French, German, Italian and Croatian *at* <http://www.hgk.hr/komora/sud>. The Zagreb Rules largely adhere to the provisions of the UNCITRAL Arbitration Rules, adjusted for the needs of administered arbitration.

110 arbitrators on the domestic list, and 98 arbitrators on the list of arbitrators for international disputes (forty-eight of these are foreign nationals from seventeen different countries). Although the panel of arbitrators in international disputes is composed of highly qualified individuals, the panel is still not binding upon the parties—they may also appoint a suitable arbitrator from outside that list. Following the policy of transparency and informed choice by parties, information regarding the panel members (including their areas of specialization, basic contact data and short curricula) was recently published on the Internet.[21] It will also be available in separate publications.

In addition to its primary activity—the settlement of commercial disputes—the PAC-CCC has developed an unprecedented practice in the area of publishing on arbitral topics and the promotion of arbitration. In 1993, in cooperation with the Croatian Arbitration Association, the PAC-CCC initiated the publication of an English language arbitral review, the Croatian Arbitration Yearbook. Since then, seven volumes with over 1500 pages of scholarly papers, reports, reviews, jurisprudence and other material have been regularly published. Another publication was started in 2000 as a supplement of the Croatian Arbitration Yearbook: the Review of Arbitration in Central and Eastern Europe. The first volume of this supplement was devoted to arbitration in Hungary and Croatia, presenting the most complete set of arbitral materials, including laws, rules and jurisprudence for each country, yet published.

Since 1992, the CAA and the PAC-CCC have jointly organized an international arbitration conference that takes place every December in Zagreb. In 2000, the conference dealt with the topic of new technologies in arbitral proceedings, whereas the 2001 conference dealt with the challenges of harmonization of arbitration laws and practices at an international, regional and national level.

B. Other Arbitral Institutions and Their Activities

Apart from the successful practice of the PAC-CCC, arbitral practice in Croatia is rare. However, in the wake of liberalization provided by the new law, interest in establishing specialized arbitral bodies is increasing. So far, other arbitral bodies, such as the Arbitral Tribunal for Sports at the Croatian National Olympic Committee, have dealt with very few cases. An interesting and novel example of the use of arbitration is the new arbitral tribunal for the settlement of disputes relating to Internet domain names. This tribunal, which is still in the process of formation, will operate at the Croation Academic and Research Network (CARNET),[22] and will deal with disputes dealing with names within this domain, but based on the existing international standards, as defined by the Internet Corporation for Assigned Names and Numbers.[23]

[21] *See* <http://www.hgk.hr/komora/sud>.

[22] The agency responsible for the administration of the national domain (.hr).

[23] The new arbitration rules of the CARNET are generally taken into account in the Uniform Domain Name Dispute Resolution Policy adopted by the Internet Corporation for Assigned Names and Numbers—*see* <http://www.icann.org>.

Journal of INTERNATIONAL ARBITRATION

Volume 19 | February 2002 | Number 1

Chronicles of the *Bulbank* Case—The Rest of the Story	*Mark F. Rosenberg*	1
The Uniform Domain Name Dispute Resolution Process and the Appearance of Impartiality—Panelists Impaled on the Horns of a Dilemma	*M. Scott Donahey*	33
International Arbitration in Singapore—Opting out of the UNCITRAL Model Law	*David Howell, Leigh Duthie and Mark Lim*	39
Combination of Arbitration with Conciliation and Remittance of Awards—with Special Reference to the Asia-Oceania Region	*Wang Sheng Chang*	51
Book Review—*The Practice of Transnational Law* (Klaus Peter Berger, ed., 2001)	*Luke Nottage*	67
Current Developments in the Field of Arbitration in Croatia	*Alan Uzelac*	73