

CROATIA

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I. INTRODUCTION: ARBITRATION IN CROATIA- HISTORY AND INFRASTRUCTURE

A. *History and Current Legislation on Arbitration*

1. Historical evolution of law relating to arbitration

The tradition of arbitration in Croatia is long, although the practice was suppressed or reduced at certain stages in history. The use of arbitration was prevalent in the nineteenth century. In 1852, the Croatian Chamber of Commerce had an arbitration court that ruled primarily on smaller commercial and merchant disputes. In the first decades of the twentieth century, this court heard several hundred new arbitration cases annually, primarily relating to disputes between chamber members.¹

After World War II, the first years of the socialist regime led to the temporary discontinuation of arbitration practice. Following Soviet patterns, private dispute resolution mechanisms were abolished, and the term “arbitration” referred to the use of a state tribunal for commercial disputes involving socialist enterprises.²

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¹ See more in Dika, “Arbitral Settlement of Disputes According to the 1852 Provisional Civil Procedure Code,” 5 *Croatian Arbitration Yearbook* (1998) pp. 187-206.

² Glavna državna arbitraža pri Vladi FNRJ [The Main State Arbitration Tribunal at the Government of the FPR Yugoslavia] was the highest court for commercial matters in socialist Yugoslavia for a period of several years

However, this period didn't last as long as it did in other Eastern Block countries. Due to political differences between the Yugoslav Communist Party and Stalin's Soviet Union, both in Yugoslavia and in Croatia as its constituent part, Soviet influence began to wane in the 1960s. Soviet-type "arbitration" courts were transformed into commercial courts and into courts of general jurisdiction. A slight economic liberalization introduced by the doctrine of Yugoslav self-management made not only arbitration with a "foreign element" possible, but also made arbitration among domestic economic players possible (the relatively autonomous "socially owned" state enterprises). Starting in the 1950s, Yugoslavia pursued the policy of the non-aligned countries. The country therefore never became a member of the Moscow Convention. Even in the socialist period arbitration was generally perceived as a voluntary method of dispute settlement, one based on the parties' agreement. At certain times there was a significant number of arbitration cases involving Croatian parties—not only at the national institution of international arbitration, but also under the auspices of foreign arbitral institutions, particularly the ICC Court of International Arbitration.³

When the Republic of Croatia gained its independence in 1991, its law on arbitration was rooted in the federal law of the former Yugoslav federation. Most provisions on arbitration of the former federal laws were contained in the two acts: the Code of Civil Procedure and the Conflict of Laws Act. In Croatia both acts were adopted as national legislation and remained in force, more or less unchanged, throughout the 1990s. However, the preparation for a comprehensive reform that lasted over five years started in the early 1990s, resulting in a major change both in provisions regulating arbitration and in the approach to out-of-court methods of dispute settlement.

after 1953 (competent *inter alia* to enact trade usages). See Zuglia, "Rješavanje imovinskih sporova putem državne arbitraže" [Resolution of property disputes by State Arbitration Tribunal], *Zbornik Pravnog fakulteta u Zagrebu* (1948) pp. 293-331.

³ See Verbist, "The Arbitration of the ICC in Former Yugoslavia and the New Republics that Emerged from It," 1 *Croatian Arbitration Yearbook* (1994) p. 137, stating, *inter alia*, that in 1991 (at the beginning of the dissolution of the Yugoslav federation) there were twenty-three cases filed which involved parties from ex-Yugoslavia.

2. Current law

Since 2001, Croatian arbitration law has been restricted to a single act—the Law on Arbitration. The new act, devoted exclusively to arbitration, abandoned the previous legal dualism of two acts that regulated arbitration as only a marginal matter. It was adopted by the *Sabor* (Croatian Parliament) on September 28, 2001 and came into effect on October 19 of the same year.⁴

Unlike the UNCITRAL Model Law on International Commercial Arbitration, the Croatian Law on Arbitration is applicable to both national (domestic) and international arbitration. It is also applicable to non-commercial disputes, i.e. to all disputes regarding rights of which the parties may freely dispose (see Art 3 para 1).

Compared with the previous law, the Law on Arbitration reflects a significant attitude shift. Despite the fact that Yugoslav law was considerably more tolerant towards arbitration than was the law of other socialist countries (e.g., allowing arbitration in domestic disputes), it was still largely restrictive. It observed arbitration from the perspective of state paternalism, treating it only as a second-rate mechanism of dispute resolution. Legislators' ambivalent relationship with "private justice," reflected earlier in several areas of previous legislation, was done away with or very significantly reduced. The new law attempted to create an "arbitration-friendly" environment that would stimulate, not only tolerate, arbitration.

By enacting a single body of norms on arbitration in a single act that would transparently deal with all issues of arbitration, the Law on Arbitration also departed from the earlier tradition of 1895 Austrian *Zivilprozessordnung*, which still strongly influences national civil procedure legislation. Instead of relying on any particular regional or national arbitration law, the Law on Arbitration largely follows the text and approach of the UNCITRAL Model Law on International Commercial Arbitration. The UNCITRAL Secretariat has closely followed and commented on the reform process and recognizes the new law as one of the acts based on the Model Law. However, some provisions of the new law were also influenced by changes in the national legislation of other countries, especially of those countries that also attempted to implement the Model Law (in particular, Germany and, to a lesser extent, England). A few

⁴ The Law on Arbitration was published in *Narodne novine* (Official Gazette) 88/2001 of October 11, 2001.

provisions from the old legislation have been retained as part of the domestic tradition and legal culture (e.g., the definition of national and international disputes, or the ruling out of judges as party-appointed arbitrators). In certain areas, the Law on Arbitration anticipated new developments in UNCITRAL which aimed at clarifying and improving some model norms (e.g., the form of the arbitration agreement).⁵ However, as the Law on Arbitration was enacted 5 years prior to the 2006 amendments of the UNCITRAL Model Law, it is similar in intent and spirit to the latter, but the text and formulation of the two acts is in part different. In any case, the practical differences between the national law and the amended UNCITRAL Model Law are not significant, so no urgent need to change the law on that account is being felt.

3. Law reform projects

The application of the law since 2001 has already had a positive effect on the promotion of arbitration. It has also pointed to some areas for potential further improvement, e.g., with respect to possibly further reducing court intervention in arbitration matters. Still, no plans for imminent change are pending.

4. Confidentiality and publication of awards

a) Privacy of proceedings

Although confidentiality had long been praised as one of the virtues of arbitral proceedings,⁶ it was only with the coming of the new law into effect that the private nature of the proceedings (unless

⁵ For the legislative history of the Law on Arbitration see several reports by Prof. Siniša Triva who was the main author of its draft versions. Triva, "Adoption of the UNCITRAL Model Law into Croatian Arbitration Law," 2 *Croatian Arbitration Yearbook* (1995) p. 7; Triva, "Reports on the Achievements of the Working Group for the Reform of the Croatian Arbitration Law," 4 *Croatian Arbitration Yearbook* (1997) p. 193; Triva, "Final Proposal of the New Croatian Arbitration Law," 5 *Croatian Arbitration Yearbook* (1998) p. 9; Triva, "Croatian Law on Arbitration," 9 *Croatian Arbitration Yearbook* (2002) p. 107.

⁶ See a typical example in Goldštajn/Triva, *Međunarodna trgovačka arbitraža* [International Commercial Arbitration] Zagreb, 1987 (in Croatian), pp. 84.

otherwise agreed by the parties) was made expressly clear. (Art. 26/5). This remains, however, the only provision on confidentiality in the national arbitration law. Commentators argue that such a provision is on the one hand too meager and general in scope, and on the other too narrow and misdirected, as it creates the false impression that it only relates to oral hearings.⁷ The arbitral rules such as the Zagreb Rules are hardly more precise, and the national privacy legislation does not treat this issue as a matter of public law. Therefore, if confidentiality is a concern, it is advised that the parties, arbitrators and, as the case may be, third persons enter into a special confidentiality agreement.

If a court's proceedings for recognition and enforcement or for an action for the setting aside of an arbitral award are filed with a court of law, the court proceedings generally will be public. The documents filed in legal proceedings are also part of the record of the proceedings. As regards the right to access the record of the court proceedings, such access is not granted automatically to third persons, but is granted only to those who show "legitimate interest" for gaining insight into the court files (Art. 150 of the Code of Civil Proceedings). The decision on whether to grant the right of access to court files (or particular parts of them) is made by the trial judge or, after the termination of the court proceedings, by the president of the court. However, under Art. 307 CCP, the court may close the oral hearings or some parts of them, to the public, if this is required, *inter alia*, to preserve "business secrets," i.e. the documents and data that have been declared confidential by a particular business.⁸ However, such limitation of the publicity of a trial may be ordered only "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."⁹

Witnesses may refuse to testify if their testimony would violate the professional obligation to preserve confidentiality. Among professional privileges there is also lawyer-client privilege. The lawyer (or doctor) may refuse to answer a particular question (or to present documents) if doing so would violate the rules of

⁷ Triva/Uzelac, pp. 187-188.

⁸ The rules on business secrets and the procedure for declaring specific data as confidential are provided in the Law on Protection of Data Secrecy (*Zakon o zaštiti tajnosti podataka*), Off. Gaz. 108/96.

⁹ This condition, inserted by 2003 amendments, copies the language of Art. 6 of the European Human Rights Convention.

professional ethics. However, if a lawyer decides to reply to questions or disclose documents covered by professional privilege, the court may accept such testimony or evidence and use it in the proceedings.

In all cases the court must assess whether the reasons given for the refusal to give evidence are justified (Arts. 237 and 240 CCP). The unauthorized disclosure of duly recognized business secrets is a criminal offence, punishable by a prison sentence of up to 10 years (Art. 295 of the Criminal Code).

b) Publication of awards

The principle of confidentiality—that arbitral proceedings are not public, unless parties have agreed otherwise—applies also to the publication of awards. Normally, awards are not published unless the parties have provided their consent. If the parties agree, an award may be published either in full or with certain omissions. However, in practice, certain parts of the award that contain important legal reasoning, are sometimes published in legal periodicals, but without mention of the specifics of the case (names of the parties, etc.) .

The excerpts from arbitral awards are periodically published in the *Croatian Arbitration Yearbook* (in English or with an English translation), *Pravo u gospodarstvu* and *Ing sudska praksa* (in Croatian). A selection of published awards is contained in the Triva/Uzelac commentary of the Law on Arbitration. The anonymous publication of parts of the awards is not regarded as a violation of the confidential nature of the arbitration proceedings.¹⁰

B. Arbitration Infrastructure and Practice in Croatia

1. Major arbitration institutions

Since declaring independence from the former Yugoslav federation, the practice of both domestic and international arbitration has been confined to the arbitrations administered by the Permanent Arbitration Court at the Croatian Chamber of

¹⁰ On the publication of awards in Croatian and comparative law see Sikirić, "Publication of Arbitral Awards," 4 *Croatian Arbitration Yearbook* (1997) pp. 175-191.

Commerce (PAC-CCC). Prior to 1991, that institution was competent to administer only domestic cases. Since then, the PAC-CCC has assumed international jurisdiction and has become the most important local arbitration venue in Croatia. This was assisted by the fact that, until the enactment of the Law on Arbitration in 2001, it already possessed a legal monopoly on domestic arbitration. Other arbitration institutions in Croatia did not exist; although the opportunity for establishing arbitral institutions as entities of private law that was created by the Law on Arbitration did bring about increased interest in creating new dispute resolution facilities. Also, the first cases of *ad hoc* arbitration¹¹ began to appear.

2. Number of cases and other statistics

To assess arbitration practice in Croatia, PAC-CCC statistics may still be most relevant, as the number of other arbitration cases is small and cannot be systematically traced. Table 1 shows the data for the arbitration cases of the PAC-CCC in the 1992-2008 period. In spite of a relatively modest number of cases (30-40 annually), the data demonstrate that—particularly after 2000—the aggregate amount in dispute became quite significant. The cases submitted to arbitration were quite diverse, from simple sales contracts to complex construction disputes and disputes relating to the process of privatization of state property. The range of foreign parties was also very diverse, including parties from about 30 countries, with the prevailing participation of the Croatian principal trade partners (Italy, Germany, Austria and the post-Yugoslav countries and territories).

¹¹ *Ad hoc* arbitration became legally fully permissible—especially in domestic cases—only since the coming into force of the Law on Arbitration.

Table 1: Statistical data on arbitration cases of the PAC-CCC

Year	Domestic	International	Total
1992	8	7	15
1993	14	12	26
1994	21	13	34
1995	8	10	18
1996	15	12	27
1997	14	16	30
1998	21	8	29
1999	22	14	36
2000	9	25	34
2001	37	10	47
2002	22	16	38
2003	23	5	28
2004	20	7	27
2005	16	10	26
2006	25	10	35
2007	23	9	32
2008	45	8	53
Total	343	192	535

3. Development of arbitration compared with litigation

The practice of arbitration in Croatia was confined, until the 1990s, to the narrow borders of institutions that were licensed to conduct it. For international arbitration, the only institution in Yugoslavia was the Foreign Trade Arbitration Court (FTAC) in Belgrade. For domestic arbitration, the courts of arbitration were those established at the chambers of economy of the Yugoslav republics.¹²

Today, the practice of arbitration is gradually evolving. Although the war in the early 1990s was not favourable for arbitration, a substantial number of cases originated even in the war years.¹³ The frequency of arbitration (as demonstrated *infra* at 2) can hardly be compared with litigation in terms of number of cases, as, even in the

¹² Although *ad hoc* arbitration was allowed in international commercial cases (while prohibited in national ones), the practice was almost entirely confined to institutional arbitration.

¹³ See, e.g., the statistical data of the PAC-CCC presented *infra*, Table 1.

years with peak figures, there are hardly over 50 cases annually. Yet, in terms of economic value and the complexity of those cases, they are of high importance. There is hardly any large investment or international project in Croatia that does not have an arbitration clause in the main contract, and therefore it is to be expected that almost all of the large international commercial disputes in Croatia will be decided by arbitration.

II. CURRENT LAW AND PRACTICE

A. Arbitration Agreement

1. Types and validity of agreement

a) Clauses and submission agreements

Croatian law equally recognizes *submissions* (agreements to submit an already existing dispute to arbitration) and *arbitration clauses* (agreements to refer future disputes to arbitration, contained in a contract or elsewhere). The Law on Arbitration follows the text of the UNCITRAL Model Law, providing in Art. 6(1) *in fine* that “[a]n arbitration agreement may be concluded in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement.” The same approach was taken in the earlier law.

An arbitration clause often used in Croatia is the one recommended by the PAC-CCC. It reads:

All disputes arising out of this contract, including such relating to its breach, termination or invalidity, and any legal consequence thereof, shall be finally settled by arbitration in accordance with the Rules of International Arbitration of the Permanent Arbitration Court at the Croatian Chamber of Commerce as in force.

The parties are advised to include in their arbitration clauses supplementary provisions on the number of arbitrators (one or three), the law applicable to the merits of the dispute, the language or languages of arbitral proceedings, the place of arbitration and the appointing authority.

b) Minimum essential content

The definition and form of the arbitration agreement, as well as the law applicable to it are regulated extensively in Art. 6 of the Law on Arbitration.

The content of the arbitration agreement is defined as “ . . . an agreement of the parties to submit to arbitration all or certain disputes which have arisen or which may arise in the future between them in respect of a defined legal relationship of a contractual or non-contractual nature.”

c) Form requirements

For an arbitration contract to be validly concluded, a written form is generally needed. However, the definition of writing is broad and includes agreements contained in documents signed by the parties or agreements reached in an exchange of letters, telex, faxes, telegrams or other means of telecommunication which provide a record of the agreement, whether signed by the parties or not.¹⁴

In addition to this broad definition, there are a number of situations that are regarded as constituting valid written agreements (even though in some of the situations the written form requirement has been only fictitiously fulfilled). Such situations, expressly provided by law, include tacit acceptance of a written offer or of a written confirmation of an oral offer (Art. 6(3) points 1 and 2). In both cases failure to respond shall constitute a valid acceptance, if so considered by trade usage.¹⁵

¹⁴ The last part of this sentence was inspired by the work of the UNCITRAL Working Group on Arbitration and Conciliation—see the draft text of Art. 7(2) of the Model Law for the 33rd session, document A/CN/WG.II/WP.110. The Law on Arbitration was enacted prior to the conclusion of the UNCITRAL work on Art. 7 of the Model Law, so its drafters could only utilize the preparatory work. See Uzelac, “The Form of Arbitration Agreement and the Fiction of Written Orality. How Far Should We Go?,” 8 *Croatian Arbitration Yearbook* (2001) pp. 83-107. See also Sikirić, “Ugovor o arbitraži u praksi Stalnog izbranog sudišta pri HGK u Zagrebu: (izbor odluka)” [Arbitration agreements in the jurisprudence of the Permanent Arbitration Court at the CCE], *Pravo u gospodarstvu*, 44(2005), 2, pp. 9-38 (in Croatian).

¹⁵ See more in Miladin, “The institution of confirmation in writing (or writings in confirmation) in international commercial law and the so called

On the other hand, the formal requirements are much stricter for arbitration agreements in consumer contracts. For such contracts, the arbitration agreement must appear in a separate document signed by both parties that comprises no agreements other than those referring to the arbitral proceedings. The latter condition does not apply if the agreement was drawn up by a notary public.

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

d) Incorporation by reference

Reference to general conditions which contain an arbitration clause is enough for a valid arbitration agreement, provided that the reference is such as to make that clause part of the contract (Art. 6(4)). The same is applicable to arbitration agreements concluded by the issuance of a bill of lading—they are valid if the bill of lading contains an express reference to an arbitration clause in a charter party (Art. 6(5)).

e) Interpretation

In addition to formal validity, the Law on Arbitration provides for the substantive validity of the arbitration agreement. Since the validity of an arbitration agreement *ratione materiae* is a matter of applicable substantive law, in determining the choice of law rules the Law follows the principle of party autonomy. Thus, the law applicable to substantive validity and the interpretation of the agreement is the law designated by the parties, or, failing such designation, the law applicable to the substance of the dispute or the law of the Republic of Croatia (Art. 6(7)).¹⁶

‘conclusion’) of arbitration agreement by way of silence in commercial relations under the Croatian Arbitration Act,” Croatian arbitration yearbook, 15(2008), pp. 29-57.

¹⁶ See more in Sikirić, “Ugovor o arbitraži” [Arbitration Agreement], 41 *Pravo u gospodarstvu* (2002) pp. 35-57 (in Croatian).

2. Enforcing arbitration agreements

a) Declaratory actions in court

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

An objection to jurisdiction must be raised prior to argument on the merits, *i.e.*, at the preparatory hearing, or, if such hearing does not take place, at the first main hearing before the end of the oral presentation of the statement of defense. After this point, the respondent would be deemed as having tacitly consented to the court's jurisdiction (*prorogatio tacita*).¹⁷

The law does not specify whether it would be possible or not to obtain a court judgment on the validity of an arbitration agreement prior to the arbitral proceedings. Under the general rules of the Code of Civil Procedure, such an action would be permissible, as a declaratory decision that may be brought before the materially competent court at the place where the defendant has its domicile (for natural persons) or its place of business (for legal persons). A contrary argument may be drawn from the rule contained in the Law on Arbitration (inspired by the same provision of the UNCITRAL Model Law) that "no court shall intervene in the matters governed by this Law, except where it is so provided in this Law" (Art. 41(1) of the LA). The case law has not yet ruled on the applicability of this norm to the requests for declaration of the (in)validity of arbitral agreements.

b) Applications to compel or stay arbitration

There are no court procedures to compel arbitration proceedings. According to national procedural philosophy, the methods of legal protection—be they court proceedings or

¹⁷ Art. 42(2) of the LA.

arbitration—are the options available to the parties in dispute, but no one can be compelled to make use of those options, since the initiation of the proceedings remains solely at the disposal of the claimant.

c) Anti-suit and other injunctions

Anti-suit injunctions are not admissible under Croatian law. It is understood that the court cannot prohibit a party from filing its suit in another jurisdiction, as this may have an impact on the party's right of access to a court. Should a valid arbitration agreement be concluded, it would be up to the other party to object to the lack of jurisdiction, in which case the court or other authority with which the suit was filed would rule on such an objection.

3. Effects on third parties

a) Extension of the agreement over third parties

A validly concluded arbitration agreement has a binding effect. However, in principle, this effect is, limited to agreement's parties. The agreement can include two or more parties, and, consequently there can be two or more parties to the arbitration proceedings.

b) Other effects

The transfer of the arbitration agreement to third parties generally does not happen automatically, save in those cases where the third party assumes all the rights and obligations of the contract (e.g. in the case of the merger or acquisition of companies, or in other cases of universal succession). If the third party only acquires some rights, obligation or benefits from the contract, the party will generally not be bound by the arbitral agreement, except if the party has expressly acceded to the agreement in the proper form.

4. Termination and breach

The arbitration agreement may only be terminated under the conditions provided by law. The parties may generally terminate the arbitration agreement only by consent, unless otherwise provided in the contract. An exception to this rule is the doctrine of *clausula*

rebus sic stantibus. Under the general rules of the law on obligations, if, after the conclusion of a contract, the circumstances unexpectedly change to the extent that the contract no longer corresponds to the legitimate expectations of the parties and it would be inequitable to maintain the contract as it is, the agreement may be terminated upon the petition of the affected party. However, the other party may suggest appropriate changes to the contract, or consent to any changes proposed by the court or the arbitral tribunal. There were some cases in which the doctrine of *clausula rebus sic stantibus* was invoked when, during the war in former Yugoslavia, a party from one former republic was required to arbitrate in the other former republic, while both republics were, at the time of the arbitration, in hostile relations with one another.¹⁸

B. Doctrine of Separability

1. Statutory provisions

The doctrine of separability of the arbitration clause from the rest of the main contract is well-established in Croatian law. In the Law on Arbitration, separability is discussed in the second sentence of Art. 15(1)—“For that purpose [ruling on objections to the existence or validity of the arbitration agreement] an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.” It also expressly states that a decision to render the contract null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Thus, no essential difference with respect to the separability of the arbitration clause exists between allegations that the main contract is non-existent and any objections to the clause’s invalidity.

2. Practice and case law

In arbitration and court jurisprudence there have been no instances of decisions that were incompatible with the doctrine of separability.

¹⁸ See Uzelac, Succession of Arbitral Institutions, *Croatian Arbitration Yearbook*. Vol. 3 (1996), p. 85-86 and the decision of the German District Court in Kassel of April 2, 1994.

C. Jurisdiction

1. Which forum decides jurisdiction

The objections as to jurisdiction can be raised both in the arbitral and in the court proceedings. If a party objects to the jurisdiction of the arbitration proceedings, it is of primary importance that the arbitral tribunal decide on such an objection, subject to later review by the court. If an objection to the jurisdiction is raised during the court proceedings, the court should determine whether it has jurisdiction. If the respondent invokes the arbitration agreement and raises an objection to the court jurisdiction in due time, the court is obliged to declare that it lacks jurisdiction, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. It is not inconceivable that the same issue of jurisdiction could be simultaneously the object of examination in the arbitral and in the court proceedings.

2. Prima facie determination

There is no clear jurisprudence regarding the standard of inquiry into the existence or validity of the arbitration agreement. Generally, as this is considered to be a procedural issue, the standard should be *the prima facie review* only.

3. Competence-competence

An arbitral tribunal may rule on its own jurisdiction, including any objections made with respect to the existence or the validity of the arbitration agreement.¹⁹ If a respondent raises an objection as to the arbitrators' jurisdiction on the ground that a valid agreement to arbitrate was not concluded (or that the dispute alleged is not the one encompassed by the arbitration agreement), arbitrators may either rule on this issue in a preliminary ruling, or they may leave this issue to be decided later on in an award on the merits.

The objection that arbitrators do not have jurisdiction must be raised at the latest with the filing of the statement of defense in which the respondent engages in the merits of the dispute. If the respondent fails to object to the jurisdiction of the arbitral tribunal

¹⁹ Art. 15 of the LA

prior to engaging in arguments on the substance, it is deemed to constitute an acceptance to arbitrate (another instance of *prorogatio tacita*). Such failure to object constitutes a valid agreement to arbitrate under Art. 6(8) of the Law on Arbitration.

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

4. Interaction of national courts and tribunals

The preliminary arbitral ruling that arbitrators have jurisdiction can be challenged before the court (Art. 15(3)). Such a request must be made within thirty days from the date of the preliminary ruling granting arbitrators jurisdiction. The court cannot, however, stay the proceedings while deciding this issue. Thus, the arbitrators may continue with the arbitration and even make a final award.²⁰

On the other hand, claims before a court of law to establish the lack of jurisdiction of the arbitrators are not admissible prior to the arbitrators' ruling on their jurisdiction. Equally, if arbitrators have postponed the decision on jurisdiction for the final award, the lack of a valid arbitration agreement (or dealing with matters not encompassed by the agreement) may only be raised in the procedure for the setting aside of such an award—no prior judicial proceedings on the arbitrators' jurisdiction being possible.²¹

²⁰ What should happen if the arbitrators make a final award while the dispute on jurisdiction is still pending before a court (a case that may often occur, since the courts are overloaded with cases and therefore have problems with swiftness of their adjudication) is a question that remains unaddressed. It seems that in such a case having a separate court procedure on the jurisdiction would not make any sense, and that lack of a valid arbitration agreement could be raised only by a claim to set aside the award.

²¹ This reasoning is based on Art. 41(1): if a claim before the court of law is not provided by the Law on Arbitration, it is not admissible ("no court shall intervene in matters governed by this law, except where it is so provided in this Law").

If arbitrators deny their jurisdiction (namely, if they accept an objection to their jurisdiction) this denial is tantamount to a final decision on the dispute in question. Such a decision cannot be challenged before any further authority. In recent times, however, one such decision was quashed by the Constitutional Court for the alleged denial of the constitutional right of access to a court of law.²²

D. Arbitrability

1. Notion and functions of arbitrability

The notion of arbitrability is part of statutory law (see Art. 3. LA) and relates to the issues concerned with the conditions and types of disputes that may be submitted to arbitration. One may distinguish the idea in the distinction drawn between internal arbitrability (the conditions for the validity of submission to domestic arbitration, i.e., arbitration in the territory of the Republic of Croatia) and external arbitrability (the conditions for the validity of agreements on foreign arbitration). The notion may also be seen in the distinction drawn between objective arbitrability (arbitrability *ratione causae*) and subjective arbitrability (arbitrability *ratione personae*). One of the aspects of arbitrability (which has since lost its importance in the current law, but which once played an important role) is that aspect related to the conditions under which parties may submit their dispute to institutional and *ad hoc* arbitration.

The functions of arbitrability are not expressly defined in law and jurisprudence, but have to deal in part with: public policy (the legislator's assessment of the desirability of permitting arbitration in various settings, especially if the result is a foreign arbitral award); in part with the nature and effects of eventual awards (i.e. with the potential that an award may have effects beyond those *inter partes*); and in part with the customary restrictions imposed on jurisdictional agreements (the limitations of exclusive jurisdiction that are also applicable to agreements on different court jurisdictions).

²² See more in Giunio, "Arbitration agreements in the practice of the Constitutional Court of the Republic of Croatia," *Croatian arbitration yearbook*, 12(2005), pp. 79-110; Giunio, "Nadležnost Ustavnog suda za ocjenu odluke arbitražnog suda o nenadležnosti" [The competence of the Constitutional Court regarding arbitral decisions on the lack of jurisdiction], *Pravo u gospodarstvu*, 45(2006),2, pp. 56-73.

2. Applicable law

The law applicable to arbitrability is generally *lex fori*. The conditions for arbitrability from the perspective of Croatian law are contained in Art. 3 LA (separately for internal and external arbitrability), and must be read together with the reasons for setting aside and the reasons for refusal of enforcement. *Inter alia*, in Art. 36(2)(2)(a) LA objective inarbitrability “under the laws of the Republic of Croatia” is listed as reason for setting aside. It is also a reason for non-enforcement of the domestic award (see Art. 39(1) LA), and a reason for the refusal of recognition and enforcement of foreign awards (see Art. 40(2)(a) LA).

As to subjective arbitrability, the capacity to agree on a specific type of arbitration and be a party to the arbitration agreement should be evaluated under the law that is applicable to the party, i.e. under the law of incorporation (law of the seat of the legal entity) or the law of the country of habitual residence (see Art. 7(1) and Art. 36(2)(1)(b) LA).

3. Subjective arbitrability

a) *Natural persons*

If Croatian law applies, the capacity of natural persons to agree on arbitration in all matters relating to rights that they can freely dispose of must be unquestionable. Cases in which natural persons appear as parties to arbitration also regularly occur in the practice of arbitration in Croatia.

For both natural and legal persons, the capacity to resort to arbitration is limited in purely domestic cases, i.e. in the disputes between parties that both have been established under Croatian law (see above the distinction between international and national cases). As a specific case of subjective (in)arbitrability or incapacity, in exclusively domestic cases (cases without a foreign element) Croatian legal and natural persons cannot validly conclude agreements on foreign arbitration (i.e. the arbitration whose seat would be outside of Croatian territory, and for which Croatian courts of law would not have jurisdiction in the case of a setting aside action).

b) *Legal persons*

The capacity of legal person to resort to arbitration is governed by the law applicable to them. If Croatian law applies, this capacity is

very broad—every Croatian entity endowed with legal personality may conclude an arbitration agreement and be a party to arbitration. There are virtually no limitations. Current law no longer requires a specific quality of a party (e.g., professional engagement with commercial activity).

c) State / state enterprises

Although the doctrine has long recognized the capacity of the state and state agencies to resort to arbitration,²³ only since the Law on Arbitration was enacted has this issue been expressly settled. Art. 7(2) of the Law on Arbitration provides that the Republic of Croatia and units of local and regional government and self-government (i.e., municipalities, cities and counties) may submit their disputes to arbitration. Some of the largest disputes that gained public attention were the ones in which one party was a state agency for privatization (Croatian Privatization Fund). Such cases were domestic cases, but the state and the state-owned entities were also capable and willing to arbitrate in international cases as well (also before the foreign arbitral tribunals).²⁴

4. Objective arbitrability

a) Examples of restrictions to objective arbitrability at law

The boundaries of arbitrability *ratione materiae* have gradually expanded in the last several decades, with a final decisive extension made by the Law on Arbitration in 2001.²⁵ Prior to 1990, only commercial disputes could be subject to arbitration (and only those between specific parties). After 1990, generally every dispute “concerning rights which the parties may freely dispose of” could be

²³ A standard view on this matter, see Dika, “The Republic of Croatia and Units of Local Self-government and Administration as Parties to International Commercial and Investment Arbitration,” 2 *Croatian Arbitration Yearbook* (1995) pp. 95-108.

²⁴ See more in Jug, “Republika Hrvatska kao stranka u domaćoj i inozemnoj arbitraži” [The Republic of Croatia as a party in a domestic and foreign arbitration], *Pravo u gospodarstvu*, 47(2008), 2, pp. 313-323 (in Croatian).

²⁵ On the history of the past limitations and the recent changes *see more* in Uzelac, “New Boundaries of Arbitrability under the Croatian Law on Arbitration,” 9 *Croatian Arbitration Yearbook* (2002) pp. 139-159.

submitted to arbitration, unless contained in the “exclusive jurisdiction of Croatian courts” category.²⁶ The rules on exclusive jurisdiction ruled out the arbitration of disputes over property rights in real estate (land and buildings); many housing disputes and disputes regarding the lease of property (even disputes regarding the rental of business premises); disputes regarding aircraft, ships and inland water vessels; disputes arising from relations with the military, disputes arising out of or connected to bankruptcy proceedings or compulsory enforcement proceedings; as well as a number of shareholder disputes in trading companies.

b) Cases restricting objective arbitrability

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

For domestic arbitration, virtually no subject-matter limits are provided, except that the dispute must deal with the dispositive rights of the parties (rights that parties may freely dispose of, *i.e.*, the transfer of rights, the conclusion of a settlement regarding these rights, etc.). Therefore, every dispute that could be settled, including those on patents and trademarks, could be arbitrated in Croatia.

On the other hand, “exporting” a dispute to arbitration abroad (permissible only in international disputes) could take place “unless it is provided by law that such a dispute may be subject only to the jurisdiction of a court in the Republic of Croatia.” The latter exception, although formulated more flexibly than it had been previously, can still be interpreted as referring to the above limitations of exclusive jurisdiction. For example, whereas it should now be accepted that a bankruptcy case dispute of one of the parties could be submitted to arbitration in Croatia, it is unlikely that such a

²⁶ See Arts. 469 and 469a of the Code of Civil Procedure (now abrogated). For a review of previous law on this matter see Dika, “Arbitrability and Exclusive Jurisdiction of Courts of Law,” 6 *Croatian Arbitration Yearbook* (1999) pp. 27-46.

case would be capable of being submitted to arbitration with a seat in a foreign country.²⁷ On the other hand, the Bankruptcy Law of 1996 (BL) already allowed judges of the bankruptcy tribunal to refer disputed claims to arbitration, i.e., to order the parties upon the request of a creditor to settle their dispute by arbitration at some permanent arbitration court in the Republic of Croatia (Art. 178(6)-(10) BL).²⁸ However, ever since that time, this has almost never been the practice.

As far as antitrust disputes are concerned, there are no specific legal rules or court jurisprudence. Their arbitrability would have to be regarded under the above conditions, in particular regarding the ability to freely dispose of such rights and obligations.²⁹

E. Arbitral Tribunal

1. Status and qualifications of arbitrators

a) Number of arbitrators

The parties may freely determine the number of arbitrators. If they have not made any designation regarding the number of arbitrators, the Law on Arbitration provides for the appointment of three arbitrators.³⁰ The alternative of one or three arbitrators is provided in the Zagreb Rules 2002, with a default rule that disputes of up to 50,000 EUR have to be decided by a sole arbitrator, while disputes above this amount will be heard by a panel of three arbitrators.³¹

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

²⁷ This limitation does not, however, exclude the possibility of resorting to arbitration conducted by an arbitral tribunal composed of foreign nationals, with foreign substantive law being applicable, as long as the seat of arbitration is in the territory of Croatia.

²⁸ See Dika, "Arbitration in Bankruptcy? New Window of Opportunities in Croatian law," 4 *Croatian Arbitration Yearbook* (1997) pp. 27-38.

²⁹ See more in Čulinović-Herc, "Arbitrability of Unfair Competition Disputes," 3 *Croatian Arbitration Yearbook* (1996) pp. 57-70.

³⁰ Art. 9 of the LA.

³¹ Art. 6 of the Zagreb Rules 2002.

b) Legal Status

The arbitrators are private persons who are entrusted by the parties to finally decide on their dispute. Anyone can be appointed to be an arbitrator. The only legal exception to persons who cannot be appointed relates to active judges of national courts. Namely, continuing the tradition from the previous law, judges of Croatian courts may be appointed only as presiding arbitrators or sole arbitrators, i.e., they cannot act as party-appointed arbitrators.³² The position taken by national law is that party-appointed judges may jeopardize their independence in the eyes of the parties and the public, and perhaps raise the possibility of corrupt behaviour, especially if the party that had appointed the judge as an arbitrator would have appeared in subsequent court proceedings before the same judge (even if it should happen in unconnected proceedings).

Another issue concerning the status of arbitrators relates to their nationality. The Law on Arbitration now provides an express rule, adopted from the UNCITRAL Model Law, that “[n]o person shall be precluded by reason of his nationality from acting as an arbitrator.”³³ This is, however, not a mandatory rule, and the parties may agree otherwise in their agreement. Although the wording of this rule is the same as that in Art. 11(1) of the UNCITRAL Model Law, its scope of application is broader, since the Law on Arbitration applies both to international and national arbitration (i.e., even if the dispute does not have an international character according to its legal definition).

c) Qualification and accreditation requirements

Croatian law does not require arbitrators to have any particular qualifications. Under default legal provisions of the arbitration law, no specific legal qualifications are required for arbitrators as far as training, experience, admittance to the bar or other qualifications are concerned. There are also no accreditation requirements, and there is no organisation (including the Croatian Arbitration Association) that has accreditation procedures or practices. Thus, any adult of sane mind may become an arbitrator, except if some specific qualifications are required according to the parties’ agreement or

³² Art. 10(2) of the LA.

³³ Art. 10(1) of the LA.

the selected arbitration rules.³⁴ The same approach is also taken by arbitral institutions. However, in practice, the vast majority of arbitrations are conducted by persons with a high level of legal expertise and knowledge.

d) Arbitrators' rights and duties

All of the aforementioned rules on general qualifications for arbitrators apply insofar as they are capable of performing their tasks and duties in a specific case. Namely, arbitrators are required to possess qualities agreed by the parties, and to possess those specific abilities necessary to deal with the case with appropriate speed. By accepting to arbitrate, the arbitrators assume various duties connected with their mandate. Their principal duty is to conduct arbitration in good faith and to attempt to settle the dispute in a fair and impartial manner. They also need to have the qualifications and abilities that correspond to those disclosed to the parties. One of the important duties expressly contained in the law is the duty of the arbitrator to conduct arbitration with due expeditiousness and undertake measures on time in order to avoid any delay in the proceedings (Art. 11(2)).

e) Relevant codes of ethics

There are no codes of ethics designed specifically for the arbitrators. Partly relevant to arbitration may be the codes of ethics for lawyers or judges.

2. Appointment of arbitrators

a) Methods of appointment

The parties are free to determine the procedure for appointing arbitrators.³⁵ In practice this is most often done by reference to the rules of arbitral institutions. However, the Law on Arbitration provides a system for appointing arbitrators if parties have not come, either directly or indirectly, to any agreement in this respect.

³⁴ For the (negative) exception, i.e. limitation in respect to the acting judges of the courts of law see *supra* at b.

³⁵ Art. 10(3) of the LA.

Under the default rule of Art. 10 of the Law on Arbitration, if three arbitrators are to be appointed, each party must appoint one arbitrator. The two co-arbitrators must select and appoint the third, presiding arbitrator. If a party fails to appoint an arbitrator within thirty days from receipt of a request to appoint an arbitrator, or if two arbitrators fail to appoint the third one within thirty days from the last appointment, a party may request appointment from the appointing authority. The same procedure is used if the Zagreb Rules 2002 were agreed upon.

If a sole arbitrator is to be appointed (in cases where the parties agreed to a sole arbitrator, but have failed to determine the procedure for his or her appointment) under the Law on Arbitration the appointment must be made jointly by both parties. However, if the parties fail to reach agreement (*inter alia* also because one of them refused to co-operate) each may request that the appointing authority make the appointment.

Under Zagreb Rules 2002, if a sole arbitrator is to be appointed, the parties must communicate the name of the agreed arbitrator within the time limit set by the secretary of the PAC-CCC. This cannot be less than fifteen days from the submission of the statement of defense by the respondent (or its failure to do so). After this time limit has passed, the appointing authority will make the appointment.³⁶

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

For the appointment of arbitrators in the case of multiparty arbitration see *infra* at II.F.6.a.

b) Appointing authorities

If the parties have not designated the appointing authority, either directly or by arbitration rules, the appointment will be made

³⁶ Art. 7 of the Zagreb Rules 2002.

in accordance with Art. 43 of the Law on Arbitration. The body designated as the default appointing authority is the Commercial Court in Zagreb (or County Court in Zagreb, for non-commercial cases). The appointment will be made by the president of the court, and as his appointment shall not be construed to be a judicial or administrative activity (Art. 43(3), there will be no appeal against the decision on appointment.

If the parties have selected the Zagreb Rules 2002, the appointing authority under these arbitration rules is the President of the PAC-CCC.

c) Payment agreements

Under Art. 11(4), arbitrators have the right to reimbursement of expenses and a fee for their work. There are, however, no specific legal rules on payment agreements. The fees of the arbitrators are regularly determined according to the applicable arbitration rules. The arbitral institutions, such as the PAC-CCC, have their own schedules of fees. The parties and the arbitrators can also conclude specific payment agreements in advance, when accepting the mandate to arbitrate. For rare cases in which such an agreement is not made in advance, the law provides that, if an arbitrator has determined the amount of his own expenses and fees, his decision does not bind the parties unless they accept it. If the parties do not accept this decision, the expenses and fees will be determined by the appointing authority (Art. 11(5)) upon request of an arbitrator or of a party. The decision made by the appointing authority is a title for enforcement against parties to the dispute.

d) Resignation and its consequences

The Law on Arbitration recognizes the arbitrators' right to withdraw from his function. He can do so because of legal or other relevant reasons, e.g. if he was challenged (Art. 12) or if he became *de facto* or *de iure* unable to perform his functions, but also if he "for other reasons fails to act" (Art. 13). The Law does not provide a special procedure in this case, and there is no body that could or should accept the arbitrator's resignation (withdrawal). His mandate terminates by the withdrawal as a unilateral act of the arbitrator. However, this does not affect the parties' right to sue the arbitrator and demand damages that were caused by the unjustified resignation.

3. Challenge and removal

a) Grounds for challenge

A request to challenge an arbitrator can be made on three grounds related to the qualities of arbitrators as described in the preceding paragraph. Such grounds are:

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

b) Procedure for challenge

The procedure for challenge may be agreed on by the parties. However, the default rule is that the challenge shall be decided by the arbitral tribunal itself, including the challenged arbitrator.³⁷ Naturally, a decision on challenge will not be necessary if the arbitrator withdraws from his office. If the parties have not provided any other time-limit, the challenge procedure must be initiated by written request with the grounds for challenge within 15 days after such grounds have been made known.

c) Removal procedure

If the arbitral tribunal rejects the challenge, a further (mandatory) rule provides that a party who requested the challenge may seek a final decision on this issue by the appointing authority. This is one of the departures from the text of the UNCITRAL Model Law, insofar as the appointing authority may be different from the state court. If an appointing authority was not determined by the parties, it will be the President of the High Commercial Court or the President of the County Court in Zagreb (for non-commercial matters).³⁸ In case law, the courts have already ruled that they have no jurisdiction if parties have, under the Arbitration Rules of the PAC-CCC, designated a different appointing authority. Assuming this case-law will be followed, decisions on challenge made autonomously

³⁷ Art. 12(6) of the LA.

³⁸ Art. 43(2) of the LA.

within an arbitration institution (i.e., by its appointing authority) will be final, with no subsequent court control. The only way to attack a finding that an arbitrator was independent and impartial would be in the procedure for setting aside of the award.

Similarly as in the case of qualities of arbitrators, the Zagreb Rules 2002 have departed from the earlier practice and avoided providing any rules on challenge, assuming that (dispositive) rules of the Law on Arbitration would apply. The only possible exception is the general default rule designating the President of the PAC-CCC as the appointing authority (Art. 10 Zagreb Rules 2002).

The state courts would not review the decision on challenge if the parties have agreed upon a specific procedure as such, but the issues of the independence and impartiality of the arbitrators may be reviewed in the proceedings for setting aside, under Art. 36(2)(e). The right to apply for setting aside (and the reasons for setting aside, except the reason in Art. 36(5)) may not be waived in advance.³⁹

d) Replacement of arbitrators

If an arbitrator is successfully challenged, or if his mandate terminates for any other reason (the arbitrator's withdrawal, revocation of his mandate by the parties, etc), the substitute arbitrator will be appointed under the same rules that were applicable to the appointment of the arbitrator that has been replaced.⁴⁰

There are neither specific rules nor any jurisprudence on "truncated tribunals," i.e. under the present law it would appear that the decisions of such tribunals would not be considered valid. The only exception is the rule under which an award would be valid even if some arbitrators failed to sign the award, provided that it was signed by the majority of all members of the arbitral tribunal, and that the omission of a signature or signatures was stated in the award (Art. 30(5)). It is assumed, however, that the arbitrator who failed or refused to sign the award did participate in the decision-making process. Otherwise, the substitute arbitrator should be appointed.

³⁹ Art. 36(6) of the LA.

⁴⁰ Art. 14 of the LA.

4. Arbitrator liability and immunity

There are no explicit rules on the liability of arbitrators in Croatian law. There has been no case law on this matter either. The doctrine regards the relationship between the parties (and/or arbitral institutions) and the arbitrators as a contractual relationship (a kind of an employment contract). Every arbitrator is asked to accept his appointment in writing (and, thus, to accept his rights and duties as an arbitrator *vis-à-vis* the parties). Acceptance may also be made by simply signing the arbitration agreement (Art. 11(1) of the Law on Arbitration). Therefore, it is submitted, that as a consequence, arbitrators may be sued for failure to comply with their duties and eventually also be ordered to pay damages caused by their failure, inability, lack of qualifications and/or manifest bias. The limitation or exclusion of an arbitrator's liability is not provided for in the Croatian Law on Arbitration. The lacuna can be filled by the general provisions of the Code of Obligations.

With respect to decision-making, arbitrators perform a jurisdictional activity that may result in an act that is of equal legal force to a final court judgment and therefore they should also enjoy the same immunity as the judges of state courts. This position in legal doctrine has, however, not yet been confirmed in practice.

F. Conducting the Arbitration

1. Law governing procedure

a) Determination of law and rules governing procedure

The parties are free to agree, directly or by reference to any established set of rules, statute or in some other appropriate manner, to the procedure to be followed by the arbitral tribunal in the conduct of the proceedings. Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, as long as it observes the mandatory rules of the law. The power conferred upon the arbitral tribunal includes the power to determine the rules of procedure either directly or by reference to a set of rules (e.g., the arbitration rules of the PAC-CCC or rules for an *ad hoc* arbitration such as the UNCITRAL Arbitration Rules), to a statute, or in some other appropriate manner (Art. 18).

b) Notion and role of the seat of arbitration

The parties may freely determine the place (seat) of arbitration by their agreement.⁴¹ This place may be either inside or outside Croatia. The only exception made is that for domestic disputes (disputes between domestic parties) the seat of arbitration must lie within the territory of the Republic of Croatia. However, if the parties determine to have the seat of arbitration abroad, the Law on Arbitration may not be used as a source of rules on arbitral proceedings, since its scope is limited to arbitrations that have their place in the territory of the Republic of Croatia.

The Law on Arbitration has introduced the pure principle of territoriality to determine whether an arbitration will be considered foreign or domestic.⁴² Therefore the place of arbitration is the sole criterion designating the nature of an arbitral award. If the parties have selected a seat of arbitration in Croatia, their award shall be domestic, if not, it will be considered to be a foreign award.

The seat of arbitration is a legal, not a factual determination. Parties and arbitrators may hold their meetings at any other appropriate place, either inside Croatia or abroad, for consultations, hearing witnesses, experts or the parties, or for the inspection of goods or documents.⁴³

c) Methods for selection of seat absent party choice

Because of the weight and consequences of the selection of the seat of arbitration, it is highly unlikely that parties will fail to determine, either directly or by reference to some arbitration rules,⁴⁴ where the seat will be. However, for such unlikely cases the law provides that "... the seat of arbitration will be determined by the arbitral tribunal having regard to the circumstances of the case,

⁴¹ Art. 19 of the LA.

⁴² Art. 1(1) in connection with Art. 2(1) point 2. The Law on Arbitration uses the term "domestic arbitration" to denote both international and national arbitration ("domestic" according to the nature of the parties) that is attributed to the domestic legal order.

⁴³ Art. 19(4) of the LA. For additional aspects see Sikirić, "Selection of the Place of Arbitration," 3 *Croatian Arbitration Yearbook* (1996) pp. 7-27.

⁴⁴ E.g., the Zagreb Rules 2002 provide in Art. 4 that, if parties have not agreed otherwise, arbitration will take place at the seat of the PAC-CCC, i.e., in Zagreb.

including the convenience of the place for the parties.”⁴⁵ If arbitrators have failed to expressly provide such a determination during the arbitral proceedings, it is presumed that the seat of arbitration is the one designated in the award as the place where the award was made. This rule is interlinked with the provision of Art. 30(2) (“the award shall be made in the place of arbitration”). In any case, it is necessary to expressly designate the seat of arbitration in the award according to this rule. Failure to do so may result in not being able to determine whether the award is made inside or outside the country and therefore lead to problems with its enforcement.

d) Mandatory rules of procedure

The mandatory rules to be observed in the arbitral proceedings are very few, and deal with the basic concepts of the Law of Arbitration. Among them there are e.g. the provisions of Art. 3 (arbitrability), Art. 5 (waiver), Art. 6 (form of the arbitration agreement), Art. 17 (equal treatment), the provisions on setting aside and enforcement, as well as the obligation to respect public policy (Art. 36(2)(b)).

2. Conduct of arbitration

a) Basic procedural principles

The most important procedural principle in arbitration proceedings is the obligation of the arbitrators to treat parties with equality and ensure that their right to be heard is respected (Art. 17 of the LA). As stated in Art. 17(2), each party shall be given the opportunity to answer the allegations and submissions of the other party. Of similar value are the principle of impartiality and the independence of the arbitrators, embodied in the challenge rules of Art. 12. Among the important procedural principles are also the duty of the arbitrators to conduct arbitration with due expeditiousness and the duty to undertake measures on time in order to avoid any delay of the proceedings.

⁴⁵ Art. 19(2) of the LA.

b) *Party autonomy and arbitrators' power to determine procedure*

If the parties fail to determine the arbitration rules or if some procedural details were not addressed by such rules, the rules of arbitration proceedings may be set by the arbitrators. The arbitral tribunal may “conduct the arbitration in such a manner as it considers appropriate.”⁴⁶ This power given to arbitrators may be utilized in various ways—by direct and detailed determination of applicable rules, by referring to a set of rules contained in institutional or *ad hoc* rules or in some national legislation, or by any other appropriate manner (see *supra* at II.F.1.a). The limitations of the right of arbitrators to determine the ways arbitration proceedings are to be conducted are generally the same as those regarding the parties, with some exceptions that arise from separate rules on commencement and language of the proceedings and oral hearings (see *infra*).

The arbitrators may determine the procedure by their procedural order. There is no specific definition of procedural orders in the Law on Arbitration. Yet, as the Law defines the awards as “decisions of the arbitral tribunal on the merits of the dispute,” all other issues would have to be handled in another form, such as a procedural order. In practice, tribunals deal with provisional measures, jurisdiction, challenges and other procedural matters in the form of a procedural order (*zaključak*). Such a rule is expressly provided in the Zagreb Rules 2002, e.g. in respect to interim measures.⁴⁷ Procedural orders in principle require no enforcement and cannot be challenged in a setting aside procedure.⁴⁸

Art. 28 of the Law of Arbitration provides how decisions (both of a procedural and substantive nature) are made if the arbitral tribunal consists of more than one arbitrator. Unless otherwise agreed by the parties, decisions have to be passed by the majority of tribunal members. If such a majority cannot be reached, arbitrators will deliberate again about the reasons for and against different options, with a view to reaching a decision. If the members of the tribunal are not in session, the presiding arbitrator (chairman) may

⁴⁶ Art. 18(2) of the LA.

⁴⁷ See Art. 26(2) Zagreb Rules 2002.

⁴⁸ Exceptionally, a provisional measure issued in the form of a procedural order may be enforced with the court's assistance.

decide alone on procedural issues regarding the conduct of the proceedings, unless this is contrary to the parties' agreement or an agreement among the members of the panel. In such cases, the procedural orders can be issued by the chairman alone. Other procedural orders, e.g. those that impose interim measures, must be issued with the same procedure as the one used for the awards.

c) Style and characteristics of the oral hearing

The principle of orality is provided by default, however, oral hearings need not be held if arbitrators consider that the case can be appropriately decided on the basis of documents and if none of the parties request the holding of oral hearings.⁴⁹ Yet, if any of the parties request holding of an oral hearing, the tribunal has no discretion and has to schedule an oral hearing.

d) Documents only arbitrations

Although parties may agree on "documents only" arbitration, either expressly or by tacit consent to the arbitrators' decision that no oral hearing is necessary (see *supra* at c), in most arbitrations oral hearings are customary. The notable exception may be found in the national rules on Internet domain names (arbitration on domain names within the *.hr* domain), which have "documents only" arbitration as a rule, and oral hearings as an exception.

e) Submissions and notifications

There are very few rules both within the Law on Arbitration and within the arbitration rules that regulate the form and content of the parties' submissions. The most important are those that regulate the way the arbitral proceedings are to commence.

With respect to the commencement of the proceedings, the Law on Arbitration provides default rules that apply if the parties have not agreed otherwise. These rules are a specific compromise that distinguishes between *ad hoc* and institutional arbitration. For the latter, arbitral proceedings are initiated by submission of the statement of claim to the arbitral institution (according to previous

⁴⁹ Art. 23 of the LA.

practice that emulates court proceedings).⁵⁰ On the other hand, *ad hoc* arbitration commences on the date on which a written statement of claim (that includes notification of the appointment of the arbitrator and the invitation to appoint the other arbitrator, or proposal regarding the appointment of a sole arbitrator) is received by the respondent (Art. 20). Thus, an exchange of written pleadings will in the vast majority of cases take place at the very beginning of the proceedings. Such pleadings should contain factual allegations, points at issue and relief or remedy sought. Departure from this rule would be possible only if the parties have provided some other way of initiating the arbitral proceedings. Written pleadings may be amended or supplemented during the course of the arbitral proceedings, unless the parties have agreed otherwise or the arbitral tribunal considers it inappropriate because of possible undue delay (Art. 22).

Several provisions of the Law on Arbitration mention notifications, and the law also contains default rules on methods of notifications (receipt of written communication).

Under Art. 4(1), unless otherwise agreed by the parties, any written communication is ordinarily considered as delivered on the day when it is delivered to the mailing address of the addressee or the person designated to receive written communications. The way that notification is generally forwarded does not matter—in principle, use of the regular mail would suffice. The mailing address is defined as the address at which the addressee regularly receives his or her mail. If the addressee has not expressly defined any other address or if the address is not determined by the circumstances of the case, the mailing address shall be the address of the seat or branch office of the addressee, his habitual residence, or the address referred to in the main contract, or in the arbitration agreement. For the sake of providing evidence, in the practice of arbitration for the forwarding of notifications, registered mail is often used for all letters, although it is necessary only when the notification is being made at the last known address (fictitious delivery, see *infra* at h).

More important notifications mentioned in the law are: the notifications of the statement of claim or of the appointment of arbitrators, which mark the commencement of arbitration (Art. 20); the notification of the plea that the arbitral tribunal does not have

⁵⁰ The same method of commencing arbitration is also provided by Art. 13 of the Zagreb Rules 2002.

jurisdiction, and the arbitrators' decisions on this plea (Art. 15); the notification of the challenge of arbitrator (Art. 12); and the notifications of any hearings or meetings, which have to be given sufficiently in advance (Art. 26). The Law on Arbitration also makes provision for the service of an award by the tribunal (Art. 30(6)). If the proceedings are held before an institution, then the institution shall serve the award to the parties, otherwise it is incumbent on the tribunal to serve the award to the parties.

f) Deadlines and methods for their extension

Some provisions of the Law on Arbitration stipulate deadlines for the procedural actions of the parties or the other participants in the proceedings. The power to set deadlines is also part of the tribunal's power to conduct the arbitration in such manner as it deems appropriate (Art. 18/2). The Law on Arbitration states the general obligation of arbitrators to "conduct arbitration with due expeditiousness and [to] undertake measures on time in order to avoid any delay of proceedings." Among these measures is also the setting of appropriate time-limits. The time-limits set for particular actions are mentioned in several places in the arbitration law, in particular in Art. 24 which regulates the default of a party. If a claimant fails to submit his statement of claim with proper content and within the time ordered⁵¹ the tribunal will terminate the proceedings; if the respondent fails to submit his statement of defense within the determined time-limit, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations (Art 24(1)(2)). The effect of non-compliance with the deadlines in the evidentiary proceedings should be evaluated according to the rule that, if any party fails to appear at a hearing or to produce documentary evidence within the time-limit provided for their production, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. This casuistically drafted rule may serve as the guide for other kinds of defaults as well.

⁵¹ This is in particular applicable in ad hoc arbitrations which, per default rule, commence by the notice of arbitration. In the institutional arbitration, the default rule is that they only start by the submission of the full-fledged statement of claim.

g) Legal representation

The law does not require a party in arbitral proceedings to be represented by a legal representative or an attorney. The Law on Arbitration also does not deal specifically with the capacity and status of legal representatives of the parties. As the Code of Civil Procedure, according to which only registered Croatian lawyers may represent parties in court proceedings, does not apply any more as an ancillary source of law, this means that a party's counsel can be any natural person with business capability (business capability is acquired at 18 years of age). *A fortiori*, members of foreign law firms can also act as attorneys in international cases, as well as foreign in-house lawyers and experts.⁵²

Under the Zagreb Rules 2002, if a party wishes to nominate its counsel, it must communicate its name to the PAC-CCC and to the other party in writing. The party must also specify whether the nomination is for the purpose of representation or only for assistance.⁵³

h) Default proceedings

In some cases, the arbitration has to be conducted in spite of the passive behaviour of the parties. In particular, the respondents may fail to respond, and sometimes it is even impossible to notify them of the beginning of the arbitration. Therefore, the Law on Arbitration contains several rules which should enable the arbitration to progress even in such situations.

First, the law provides for the possibility of fictitious delivery of documents. If the current mailing address is unknown, a written communication is deemed to have been received on the day when its delivery has been attempted to the last known address, provided it has been properly forwarded by registered mail with return receipt or in some other way that can provide evidence of attempted delivery (Art. 4(3)).

Further on, if the respondent fails to communicate his statement of defence, the arbitral tribunal may proceed with the arbitration. In this case, the failure to respond will not be treated in itself as an admission of the claimant's allegations (Art. 24(1)(2)).

⁵² See Porobija, "Foreign Attorneys as Party Representatives in Arbitration Proceedings," 2 CAY (1995), pp. 185-194.

⁵³ Art. 5 of the Zagreb Rules 2002.

If the claimant fails to communicate his statement of claim, the tribunal shall terminate the proceedings (Art. 24(1)(1)).

If any party fails to appear at a hearing or to produce documentary evidence within the time-limit provided for the production of evidence, the tribunal may continue the proceedings and make the award on the basis of the evidence before it (Art. 24(1)(3)).

In all cases of default, the tribunal has a certain discretion to extend the time limits or allow submissions after the expiry of the time-limits, if the parties show sufficient cause for their failure.

The rules on default are of a dispositive nature, and the parties' agreement or the applicable arbitration rules may provide otherwise.

3. Taking of evidence

a) Admissibility

The rule taken from the UNCITRAL Model Law, according to which the power conferred upon the arbitral tribunal shall include the power to determine the admissibility, relevance, and weight of any evidence, has been literally reproduced in the Law on Arbitration (see Art 18(2)). The argument of non-admissibility of evidence is rarely raised in arbitral practice, as it rarely is in the court proceedings, where generally the free evaluation of evidence doctrine is accepted as a rule.

b) Burden of proof

Unlike court proceedings in Croatia, which, despite several reforms, still maintain strong elements of inquisitorial psychology, arbitration proceedings are predominantly adversarial.

Although the notion of the burden of proof is not expressly addressed in the Law on Arbitration, the right of the tribunal to resort to the burden of proof rules when deliberating is derived from the right of the tribunal to continue and conclude the proceedings in the case of the failure of the party to submit the required written statements, failure of the party to reply to the allegations of the other party, failure of the party to appear at the hearings, or failure to produce evidence (Art. 24). In all such cases of default, the tribunal is authorized to make substantive decisions which may, in the absence of conclusive evidence, be based on the burden of proof

considerations. The extent to which the tribunal will extend the time-limits for parties to submit evidence, or engage in collecting evidence (*inter alia* by resorting to court assistance in taking evidence, Art. 45) depends on the circumstances of the case and on individual arbitrators.

c) Standards of proof

The Law on Arbitration does not contain any rules on the required standard of proof. Generally, the standard in national procedural law depends on the nature of facts that have to be established. For the facts that determine the substantive decision on the claim, a higher probability or even certainty is required. The facts that need to be established in order to make procedural decisions may be chosen on the balance of probabilities. However, whether these standard of proof rules, derived from the Code of Civil Procedure, or some other standard, will be applied is a question left to the discretion of the arbitrators.

d) Evidentiary means—in general

The law and arbitration rules have only a few rules on evidentiary means. Specifically, the law regulates the use of witnesses (Art. 25) and experts (Art. 26) and occasionally mentions documentary evidence. Unlike the national rules of civil procedure, there are no specific rules with regard to the testimony of the parties. However, the law maintains that arbitrators may hear the evidence provided by the parties, applying *mutatis mutandis* the rules applicable to witnesses.

e) Documentary evidence and privilege

There are only a few legal provisions that deal with the production of written evidence. The law provides that parties may already submit documents at the stage of the exchange of written pleadings. Every document that is relevant to the case has to be presented to the other party. The parties have to be given sufficient advance notice about any hearing that is held *inter alia* for the inspection of documents.⁵⁴ The Zagreb Rules 2002 also provide that

⁵⁴ See Art. 21(1) and Art. 22(3) and (4).

arbitrators may set time limits for a party's delivery to the tribunal and to the other party a summary of the documents and other evidence that it intends to present in support of the facts at issue as set out in the statement of claim or statement of defence.

f) Production of documents

During the proceedings, arbitrators may also set deadlines for the production of documents and other evidence (Art. 22(2) and (3)). Other than that, there are no rules on discovery or disclosure of documents. The tribunal does not have the power to compel the parties to jointly produce certain documents. The Zagreb Rules 2002 give the tribunal the authority to request the production of documents from a party.

If the party fails to comply with the tribunal's order, the tribunal can always draw adverse inferences from such non-compliance. Another option for the tribunal is to request court assistance in taking evidence under Art. 45 LA. The court may order the party to produce a document to the tribunal and/or the other party. Yet, it would have to assess whether the other party is legally obliged to supply such document. Such obligation exists only in some cases, as a matter of substantive law. There is no general procedural obligation of the party to provide information or documents to the other party.

g) Witnesses

As a rule, witnesses are examined at oral hearings (Art. 25(1)). However, the arbitral tribunal can ask witnesses "to answer questions in writing within a certain period of time" (para 2). Thereby, the use of depositions—written witness statements—is generally not forbidden, although their use would be at the discretion of the arbitral tribunal. In spite of the fact that witness statements are regularly not used in proceedings before Croatian courts, the tribunal may order their submission or authorize the parties to submit a written statement of the witnesses as a preparation, supplement, or *in lieu* of oral statements of witnesses.

The arbitrators may also determine the way in which witnesses are heard in the proceedings. There are no rules on the method of hearing witnesses (*e.g.*, whether they will be examined directly by arbitrators or whether they will be cross-examined); it is at the

discretion of arbitrators to decide on this after consulting the parties and taking into account other relevant circumstances (the procedural background of the arbitrators, the legitimate expectations of the parties, applicable law, etc.).

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

An express provision stipulates that witnesses “shall be examined without taking an oath” (Art. 25(3)). Since this refers to arbitration proceedings, witnesses could theoretically still be sworn if arbitrators request the court’s assistance. However, in Croatian legal practice the swearing in of the witnesses has almost been completely abandoned, even in court proceedings where it is legally permitted.

The arbitral tribunal does not have any compulsory means for compelling witnesses to appear and give their statements in the proceedings. However, Art. 4(1) of the Law on Arbitration provides that “the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request legal assistance from a competent court in taking evidence which the arbitral tribunal itself could not take.” Acting upon such request, the court will use the same rules as if it were requested to take evidence by another court. As a rule, the competent court⁵⁵ would call the witness and take his statements according to the protocol. If a witness refuses to appear, all legal means available in court proceedings could be utilized to compel him or her to appear and provide information (police assistance, monetary penalties and imprisonment). Arbitrators have the right to be present at the court hearing held upon their request and may put questions to witnesses that are being examined.

⁵⁵ According to Art. 43(5), it would be a court which has subject-matter jurisdiction for the action, territorially competent according to the place where the particular activity must be undertaken.

h) Tribunal-appointed experts

In Croatian legal practice it is customary to use neutral experts appointed by the body entrusted to adjudicate the case. Therefore, the Law on Arbitration provides that the arbitral tribunal may appoint one or more experts to report on specific issues chosen by the arbitrators.⁵⁶ The tribunal is legally not required to consult with the parties beforehand, although, as a matter of good practice, it is considered prudent to do so, especially in light of the general recommendation that arbitrators should speak openly with the parties, disclose their opinions, and give appropriate explanations (see Art. 17(3)).

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

There are no particular rules on the admissibility and role of expert witnesses. As with all evidence, the tribunal's power includes the right to decide on the admissibility of any evidence. The expert's findings and opinion is also included in this power. As in court proceedings, the national procedural tradition has very few rules on the admissibility of evidence, as it is customary to rely on the experience and integrity of professional fact-finders.

In the case of tribunal-appointed experts, the tribunal will decide on the expert's mandate. However, the principle of equal treatment requires that parties have the opportunity to read and comment on an expert's opinion. Prudence on the part of the arbitrators would also recommend that they consult with the parties regarding the question to be submitted to the expert. The law expressly provides that they may request an oral hearing where they will be able to discuss all relevant issues with the expert, and that at the hearing that they have the right to put questions to the him or her. If parties opt to present their experts in response to the tribunal-appointed expert, the experts may testify on the points at issue (Art. 26(1)(2)).

The experts appointed by the arbitral tribunal must be independent and impartial. The rules regarding the challenge of arbitrators apply accordingly to experts (Art. 26(3)). Although the

⁵⁶ Art. 26(1) of the LA.

law does not expressly distinguish the experts appointed by the parties from the tribunal-appointed experts, it is considered that the requirements of independence and impartiality do not *stricto sensu* apply to experts presented by the parties, who cannot be challenged for the lack of impartiality.⁵⁷

There are no specific rules on the right of the parties to reject a proposed or appointed expert. As with all other procedural matters, the tribunal should give the parties the right to be heard, and must carefully consider the arguments presented by the parties. If both parties were to disagree with the appointed expert, this would bind the tribunal, since the parties may vary the rules of procedure by their agreement. Yet, if both parties do not give their consent, neither has a unilateral right to reject the expert, but either one may challenge the (tribunal-appointed) expert, in which case the tribunal would rule on the challenge. The decision of the tribunal would be final.

Under Art. 26(2), if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties shall have the opportunity to put questions to him. In practice, experts are almost always invited to present their reports in the oral hearings and provide the parties with the opportunity to ask questions relevant to the expert's report.

i) Party-appointed experts

The parties are also entitled to present their own expert witnesses. This conclusion is derived from Art. 26(2) of the LA which states that an expert witness appointed by the tribunal shall, at the request of either party, participate in the hearing where the parties shall have the opportunity *inter alia* to “present [party appointed] experts in order to testify on the points at issue.”

However, party-appointed experts thus far have been more of an exception than the rule in arbitrations governed by Croatian law. They are regarded as a supplementary and ancillary source of evidence, which may be used in addition to tribunal-appointed experts.

Still, as the provisions of Arts. 26(1) and 26(2) are of a dispositive nature, the parties may decide otherwise, *e.g.* they may follow the global trends and agree on the exclusive use of party-appointed experts.

⁵⁷ See Triva/Uzelac, p. 215.

4. Interim measures of protection

a) *Jurisdiction for granting interim measures*

One of the new features of the Law on Arbitration 2001 is the positive attitude towards the interim measures of protection ordered by the arbitrators.⁵⁸ Whereas the previous law did not allow arbitrators to issue any interim measures, Art. 16(1) of the new act provides that arbitrators are authorized, unless otherwise agreed by the parties, to “order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.”

In theory, the arbitral tribunal does have wide discretion in ordering interim measures. Still, in practice, arbitral interim measures are not used on a large scale. One of the limits of the tribunal’s power to order interim measures is related to the fact that interim measures can be ordered only *inter partes*, i.e. the interim measures cannot be ordered in respect to third persons. In this way, the orders freezing the bank account of a party or prohibiting a bank to make payments to a party are generally not regarded as permissible, unless the bank is also a signatory to the arbitration agreement.

b) *Availability of preliminary or ex parte orders*

There are no specific provisions on the procedure by which requests for preliminary measures will be decided. State courts are often asked to make *ex parte* decisions on interim measures. This is also the usual expectation of the Croatian parties in arbitral proceedings, since the surprise effect is considered to be one of the substantive conditions for the efficiency of the ordered measure, especially when employed against respondents who are known to use all available means to block the proceedings or evade enforcement.

The Zagreb Rules provide that interim measures shall normally be ordered after the other party has been heard, except if the applicant demonstrates that *ex parte* issuance is necessary to ensure

⁵⁸ On the background of this change in attitude, see more in Triva, “Privremene mjere osiguranja u arbitraži” [Interim measures of protection in arbitration], *Zbornik Pravnog fakulteta u Rijeci*, (Suppl. 1998) pp. 713-744.

that the measure is effective. In such cases, the applicant would disclose all the relevant circumstances and submit a statement of his coverage of any damage caused by the lack of proper disclosure (Art. 26(1) Zagreb Rules 2002).

c) Types of measures

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

d) Form of measures

The term “award” (in Croatian: *pravorijek*) is legally defined as a “decision on the merits of the dispute”(Art. 2(1) point 8)). Therefore, the preliminary measures can, just as any other decisions on procedural and temporary issues, be regularly made only in the form of procedural orders (*zaključak*).

e) Security for costs

The Law on Arbitration has no provisions on security for costs. The provisions of the Croatian Conflict of Laws (applicable to court proceedings) Act may apply accordingly.⁵⁹ The conditions for ordering a party to post security for costs would be its inability to pay its costs of arbitration, but also the unenforceability of such an award in the party’s country. However, whether ordering security for costs would at all be appropriate in arbitration proceedings is a question that has been debated. In practice, the claims for security have been raised in PAC-CCC proceedings. Already in 1992, the Presidium of the PAC-CCC decided to issue a general statement on the claims for security, and came to the conclusion that such requests cannot be granted. *Inter alia*, the Presidium stated that

⁵⁹ Arts. 82 – 84 of the Croatian Conflict of Laws Act.

“arbitration means a voluntary jurisdiction” and that “it is presumed that the parties, by agreeing to arbitration, waive some other privileges that they may eventually have in the process before public courts”; that “granting security for costs to domestic parties would be contrary to the principle of equal treatment of the parties” and that “requesting such security is also not in line with the practice of international arbitration.”⁶⁰ Because of the enactment of the Law on Arbitration, it could, however, be possible to construe the orders to post security for costs as another type of interim measure.⁶¹ There is still no known jurisprudence on this issue.

f) Enforcement mechanisms

Under Art. 16(2) the party that has obtained such interim measures can request enforcement of the measures by a competent court. This rule, inserted before the amendments to the UNCITRAL Model Law, is broad and rather general. The commentators recommend that this rule be interpreted in the spirit of new Art. 17 *novies* and *decies* of the Model Law.

5. Interaction between national courts and arbitration tribunals

a) Court assistance before the arbitration begins

Before the arbitration begins (but also after the arbitration begins) the parties may apply to a court to grant interim measures of protection. Such a request is not considered to be inconsistent with the agreement to arbitrate, nor is it considered to be incompatible with the concurrent authority of the arbitral tribunal to issue interim measures (Art. 44).

b) Court assistance during the arbitration

In the initial stages of arbitration, the court may assume some of the roles of the appointing authority, which occurs only in rare cases when the applicable arbitration rules do not specify any other person or body. In these cases and in this respect, the court’s role would involve the appointment or challenge of arbitrators, and the termination of the arbitrator’s mandate due to the *de iure* or *de facto*

⁶⁰ See Decision of the Presidium of the PAC-CCC of November 17, 1992, Croat. Arbit. Yearb. 5(1998), at 247-248.

⁶¹ See Triva/Uzelac, p. 121.

inability of the arbitrator to perform his functions. These activities are performed by the president of the Commercial Court in Zagreb (for commercial cases) or the president of the County Court in Zagreb (for non-commercial cases).

The Law on Arbitration also expressly regulates the power to request court assistance in the gathering of evidence. Under Art. 45, the assistance in gathering evidence may be requested either by the tribunal, or by a party, with the approval of the arbitral tribunal. This request may be made with respect to evidence “that the arbitral tribunal itself could not take.” Court assistance would in principle be given according to the national procedural rules applicable to mutual assistance of courts of law. However, under Art. 45(3), the arbitrators are entitled to participate in the procedure of gathering evidence before the judge competent to provide assistance. If witness testimonies are being heard, the arbitrators may also question the persons being examined.

Under the provisions of the Law on Courts, court assistance to the arbitral tribunal is given under the condition that the court requested be competent and the requested assistance legal. This wording allows the court to also undertake some activities of assistance according to the procedural rules agreed on by the parties (*e.g.* the taking of witness depositions), even if these rules are not recognized by national procedural law.

During the arbitration, the parties may also request that the court grant interim measures of protection (see *supra* at a).

c) Court assistance after the arbitration

The courts will also provide assistance in the authentication and deposition of the award. The authentication and deposition through the court is no longer a condition for establishing the validity of the award, but the parties may nevertheless agree on the methods of authentication and deposition. In the event of such an agreement, the court would complete the authentication and deposition pursuant to the rules for rendering assistance to arbitral tribunals, and, if requested, send the transcripts of the award that were deposited in the court to the party or parties to the arbitral proceedings (Art. 46(2-3)).

In its capacity as default statutory appointing authority, the court (*i.e.* the president of the competent court) may set the fees or expenses of the arbitrators, if they are not accepted by the parties and no other appointing authority was agreed upon (see *supra* at E.2.c).

d) Case law examples of best and worst practices

The power of the state courts to intervene during the proceedings generally does not depend on the procedure used by the arbitral tribunal. As stated *supra*, the assistance may be given also under rules different from the national procedural rules. As the freedom to agree on the rules of procedure applies irrespective of the seat of arbitration, it should be understood that the rules on court intervention are generally the same for assistance to “domestic” as for foreign arbitral tribunals. The only differences arise out of the application of the rule that court assistance to foreign arbitral tribunals be given under the same conditions as the assistance to foreign courts of law.

Therefore, the conditions for assistance (in gathering evidence, but also for other assistance activities) have to be enlarged with the reciprocity clause (Art. 11(4) of the Law on Courts). In addition, the court may refuse the assistance if the request is considered contrary to public policy. In such a case, the final opinion on the compatibility with public policy is given by the Supreme Court (see Arts. 181 and 182 of the Code of Civil Procedure).

6. Multiparty, multi-action and multi-contract arbitration

a) Consolidation of arbitrations

Generally, in a multi-party situation a valid arbitration agreement that binds every party is necessary. The Zagreb Rules (2002) only provide that multiple claimants and/or multiple respondents must agree on the appointment of their joint arbitrator. Failing such an agreement or a joint proposal, their arbitrator shall be appointed by the appointing authority: the President of the PAC-CCC (Art. 9 Zagreb Rules 2002). Although situations in which a single entity as a party would thus have more opportunity to autonomously select an arbitrator than (disagreeing) multiple parties have been considered on certain occasions. However, thus far no specific appointment rules exist in this respect.

The consolidation of two or more concurrent arbitration proceedings would also be possible only with the consent of all parties, or based on the arbitral rules agreed by the parties. The possibility of consolidating arbitration proceedings is provided in Art. 16 of the Zagreb rules, however this consolidation is limited to

arbitration proceedings in which the same parties have commenced arbitration proceedings against each other regarding different legal relationships.

b) Joinder of third parties

Third party intervention is a common feature of national procedural law. The Zagreb Rules 2002 provide an Accidental Party rule (intervener, *umješač*) in Art 17. The only prerequisite for such a party's participation in the proceedings as an accidental party is obtaining the consent to that effect from both parties. The third party, if accepted by the other parties, may undertake procedural actions in the arbitration proceedings, *e.g.* by stating relevant facts or by submitting evidence. The third party should generally intervene on the side of one of the parties in the proceedings, and would be permitted to act only by motions and submissions that are beneficial to the case of that party. Although the third party is not regarded to be the proper party in the proceedings, it would generally be bound by the results of the arbitral proceedings, to the extent that the findings of the award would be of relevance to the eventual new case in which the third party would be sued by one of the parties from the arbitration in which the third party intervened.

c) Parallel and concurrent proceedings

There are no specific rules on parallel and concurrent arbitration proceedings. The arbitrators are not bound to stay or dismiss the proceedings in the event that the parties initiate another proceeding in the same matter before the court or another arbitral tribunal. They may, however, take this into consideration when ruling on their jurisdiction upon the objection of a party.

For the limited possibility of consolidating parallel proceedings under the Zagreb rules see *supra* at 6.a. In arbitral practice a series of parallel cases initiated by various investment funds against the State Privatization Fund, arising from almost identical contracts, arose some public attention when different arbitral tribunals of the PAC-CCC, in spite of attempts of the arbitral institution to co-ordinate their work, reached different conclusions on the same legal issue.⁶²

⁶² See Vukić, Treba li arbitražna institucija imati ujednačena pravna shvaćanja: ocjena dvaju pravorijeka" [Should an arbitral institution have uniform interpretation of law?], *Pravo u gospodarstvu*, 42(2003),2, pp. 49-56.

7. Law and rules of law applicable to the merits

a) *Determining the applicable law and rules*

The arbitral tribunal shall always decide according to the rules of law, unless the parties have expressly authorized the arbitral tribunal to decide as *amiable compositeurs* (*ex aequo et bono*) (Art. 27(3)).⁶³

b) *Party autonomy*

In the first place, the applicable law may be determined by the agreement of the parties. The parties may freely agree on the rules of law that should be applicable to the merits of the dispute.

Under the scope of the application of the Law on Arbitration, the same rules are applicable to national and international arbitrations in Croatia. Thus, there is generally no difference whether a dispute is regarded as one having “international character” or not. Consequently, even in those disputes regarded as domestic, the parties are free to agree on the application of foreign law.

To avoid doubt, the Law on Arbitration provides that any reference in the arbitration agreement to the law or legal system of a particular state should be interpreted as a direct reference to the substantive law of that country and not as a reference to its conflict of law rules (Art. 27(1)).

c) *Determination by arbitrators*

If the parties have not made any selection of the rules applicable to the subject matter of the dispute, the arbitrators may determine what law should be applicable.

In deciding on the applicable law, they must select the law they consider to be most closely connected with the dispute (Art. 27(2)).⁶⁴ Naturally, in pure national disputes it will be assumed that substantive Croatian law will be applicable.

⁶³ For a comparative perspective of arbitration *ex aequo et bono* see Sikirić, “Arbitration in Equity – *ex aequo et bono*,” 2 Croatian Arbitration Yearbook (1995) pp. 125-145.

⁶⁴ The Law on Arbitration has abandoned the previous practice of determining the applicable law by applying the law determined by the conflict of laws rules that the arbitrators consider applicable (see, e.g., Art. 38 of the Zagreb Rules of 1992).

The arbitrators must select “applicable law,” and not “applicable rules of law.” From that designation, it follows that the arbitrators are bound to apply one unique body of national substantive rules (e.g., German law or Swiss law), and not some combination of rules, general principles of law, or *lex mercatoria* (see *infra* at d.).

Regardless of the rules of law that are being applied, the arbitrators must observe the terms of the contract and must take into account the applicable trade usage (or other usage relevant to the subject matter). In practice, contractual terms and commercial practices are more important than the applicable rules of law.

d) *Non-national substantive rules, general principles of law and transnational rules*

The phrase “rules of law” enables the parties to choose either the substantive law of a particular country, some combination of national substantive laws, or even some other system of rules, e.g., *lex mercatoria*. If parties have not selected such “rules of law,” the arbitrators may not substitute their choice, but must find the most closely connected national law (see *supra* at c.).

e) *Mandatory rules*

The arbitrators should observe the mandatory rules of the applicable law, but also take into consideration the public policy of the *lex fori*, since its violation may be an *ex officio* ground for setting aside (see *infra* at II.H.1.a). However, it is held that the notion of public policy must be construed narrowly, and that it is not the case that any violation of the mandatory rules of *lex fori* pertains to public policy, just as it is not the case with the public policy as a ground to refuse enforcement (see *infra* at III.B.3.c.).

8. Costs

a) *Arbitration costs*

The Law on Arbitration expressly provides in Art. 35 that, upon a party’s request, the arbitrators have the right to decide on the costs of the proceedings. This authorization includes the power to apportion the costs among the parties and to order, if necessary, that one party reimburse the full amount or a portion of costs to the other. As a criterion for the decision on costs, the law provides that

the arbitrators should decide “*according to their discretion, taking into account all circumstances of the case, in particular the outcome of the dispute.*” Arbitral institutions such as the PAC-CCC have their decisions on costs constructed along the same lines.⁶⁵ Thus, the Rules on Costs of Arbitration and Conciliation of the PAC-CCC⁶⁶ provide in Art. 3 that the arbitral tribunal will decide on the costs “*taking into account the success in the arbitration proceedings and other relevant circumstances.*”

b) Legal costs

The law provides that the costs of arbitration regularly include the costs of legal assistance. Such costs would therefore also have to be borne by the unsuccessful party. Requests for reimbursement of such costs are almost always made in the arbitration proceedings. If Croatian lawyers participate in the proceedings, they often refer to the tariffs of the Croatian Bar Association (CBA).⁶⁷ The arbitrators will generally decide on the costs of legal assistance taking into account the motions and other activities of party representation considered to be useful and meaningful, and apportioning such costs in proportion to the parties’ success in the proceedings. Arbitrators could also take into account other circumstances of the case and in general enjoy broad discretion with respect to the determination of actions that were “*necessary for the conduct of arbitration.*”⁶⁸

c) Security for costs

For the issue of security for costs see *supra* at F.4.e.

⁶⁵ On the principles and practices regarding costs see Uzelac, “Costs of Arbitral Proceedings,” 1 *Croatian Arbitration Yearbook* (1994), p. 109-125.

⁶⁶ Off. Gaz. 108/2003, in force since 8 July 2003.

⁶⁷ The Tariff of the CBA is generally also based on the amounts in dispute; it should be noted that the Tariff specifically provides for a possible increase of 100% for memoranda in international arbitration (Tariff no. 7 p. 5), i.e., “for every hearing in international arbitration where arguments on the merits were presented or taking of evidence took place” (Tariff no. 9 p. 3).

⁶⁸ See Art. 35(1) of the Law on Arbitration; see also Arts. 2 and 3 of the Rules on Costs of Arbitration and Conciliation of the PAC-CCC (the costs of legal assistance are not expressly included among the other costs since they are not deposited, but the decision issuing from Art. 2 normally covers them as well).

G. Arbitration Award

1. Types of awards

a) Partial awards

Partial awards are awards that finally settle one or more of several claims in the dispute (but not all of them), or a part of one (divisible) claim. They are regarded as independent awards. Partial awards are capable of direct enforcement. In this sense, a partial award can also be regarded as a “final award” under the legal definition of the Law on Arbitration (see *infra* at b). Partial awards can be subject to an independent setting aside procedure.

As under the Law on Arbitration the term “award” means the decision reached on the merits of the dispute, the procedural issues cannot be settled by a partial award. Consequently, the decisions on applicable law or jurisdiction of the arbitrators—which are procedural and temporary, and generally do not need any enforcement—cannot be issued in the form of the partial award.

b) Final awards

The definition of the “final award” as the “award [issued] on the basis and the amount of an individual claim” is listed among the definitions in Art. 2(1) point 9 of the Law on Arbitration. The notion of “finality” does not imply the eventual impossibility of a challenge before a higher arbitration court. It also does not refer to the awards that finally dispose of all claims, terminating the arbitration. Under the legal definition of a final award, partial awards are also final awards, whereas interim awards are not (see *infra* at c).

c) Interim awards

The Law provides that, unless the parties have agreed otherwise, the arbitral tribunal may issue not only final awards, but also partial and interim awards. (Art. 30(1)). Thus, arbitrators may either deal with all of the issues at the same time, or separate the issues and rule first on the claims that are ripe for decision-making, while leaving the rest for later resolution at the time of the final award.

As already mentioned, under Croatian law decisions on preliminary measures are not made in the form of the award (see *supra*). Therefore, the term “interim award” (*međupravorijek*)

mentioned in Art. 30 does not relate to interim measures. Just like an “interim judgment” in the court proceedings (in German: *Zwischenurteil*) the “interim award” refers to the substantive decision rendered regarding the *basis* of a monetary claim (e.g., the decision made concerning *responsibility* for damages, whereas the actual amount of damages would be left for determination at the time of the final award). Unlike partial awards, which may finally settle one or more of several claims in the dispute (but not all of them), or a part of one (divisible) claim, interim awards are not independent awards. That is, unlike partial awards, they are not capable of direct enforcement, but only may be enforced when a final decision on a claim (both on the basis of a claim and on its amount) is made. Interim awards can only be challenged within the application that is filed to set aside the final award (Art. 36(1) second sentence).

d) Default awards

Unlike the national rules of civil procedure, the arbitration law does not recognize the term “default award.” Even in the case of default, the arbitrators are obligated to continue the proceedings and issue a (final) award. In such cases, the default of the party may invoke negative inferences or trigger the application of the burden of proof rules, but it will not, of itself, lead automatically to any “default award.”

e) Consent awards

Consent awards (awards on agreed terms) are expressly recognized by the Law on Arbitration. If settlement is reached, the parties may request that the arbitrators record the settlement in the form of an award on agreed terms. In the latter case, the award will have the same force and effects as any other award on the merits (Art. 29(1) and (3)). The arbitral tribunal shall only refuse to make an award on the agreed terms if it considers that such agreement would violate public policy (Art. 29(2)). An award on agreed terms is subject to the same formal requirements that exist for other types of awards, except that stating the reasons for the award is not required (Art. 30(3)).

There are no explicit provisions for the setting aside of consent awards, but *mutatis mutandis* they would be subject to setting aside as would any other award.

f) Awards and other decisions of the tribunal

While the law may define the notion of the “award,” there are no other rules outlined for the other types of decisions made by arbitral tribunals. In practice, these other decisions are usually issued as procedural orders (*zaključci*). See also *supra* at F.2.b.

2. Form requirements

a) Essential content

The award has to be made in written form (Art. 30(3)). Unlike the rules outlined on the form of the arbitration agreement, this provision generally requires a “strict” written form. This, however, does not exclude the issuing and signing of some forms of awards electronically, if using this form could be taken as the functional equivalent of the “classical” written form.⁶⁹

The award must be made at the place of arbitration, and must be dated (Art. 30(4)). The designation of the place and date must conform to the rules established by the arbitration law. Although both the lack of place and date specified on the award or their incorrectness would constitute violation of the mandatory rules of the arbitration law, the absence or inaccuracy of this information would not in itself provide sufficient ground for the setting aside of the award.⁷⁰

b) Reasons

The award must state the reasons upon which it was based, unless the parties have agreed that no reasons are to be given or the award is an award made on agreed terms (Art. 30(3)). While there are no specific guidelines for outlining the adequacy of reasons—the reasons should be evaluated by the courts on a case by case basis.

c) Time limits for making award

Apart from the general obligation of the arbitrators to conduct arbitration with due expeditiousness, the law does not stipulate any

⁶⁹ See Triva/Uzelac, p. 252.

⁷⁰ See Triva/Uzelac, p. 255.

specific or default time limit for the making of the award (the proposal to insert such a time limit made in the first drafts of the law being subsequently rejected as counter-productive). The parties may, however, agree otherwise. The time limit for making an award is also absent from the arbitration rules of the arbitral institutions, with the notable exception of the arbitration rules for domain name dispute resolution of the CARNET (Croatian Academic and Research Network), which stipulates that the arbitral award must be made within sixty days from the transfer of the file to the arbitrator.

d) Notification to parties and registration

The Law on Arbitration has abandoned the requirement of authenticating or depositing the awards with the court or other institution. The parties may, however, agree to do otherwise. Arbitral institution rules usually require that a representative of the institution (secretary, president) sign the award.

Unlike earlier regulation, the law no longer requires that the state courts deliver the awards. The delivery of the award is governed by the same rules applicable to the transmission of all other written communications.

Under national procedural rules, proof of delivery is the usual condition for the enforceability of court judgments and other enforceable deeds. Based on such deliberations, until the 2005 amendments to the Enforcement Act the commercial courts required the certificate of enforceability for the enforcement of arbitral awards from the arbitral tribunals. This requirement has been abandoned legally, but is still required by the court of enforcement, when requested by the other party, for establishing delivery of the award and the status of the time limit for voluntary fulfilment of the award.

3. Remedies

a) Damages

The arbitrators may award damages for breach of contract, and occasionally may even rule on the extra-contractual damages, if they are covered by the arbitration agreement. The standard arbitration clause (see *supra* at II.A.1.a) which refers to “all disputes arising out of this contract, including such relating to its breach...” is interpreted as a clause that empowers the arbitrators to rule on damages.

b) Specific performance

Under general procedural rules and principles of national law, the courts and the arbitral tribunals are empowered to rule on specific performance as one of the possible claims in the proceedings.

c) Other typical remedies

The arbitral tribunal may also rule on requests for declaratory relief, *i.e.* on the requests to include in the dispositive (operative) part of the judgment the declaration of rights and obligations of the parties [*e.g.* the finding that the claimant is the owner of the disputed property, or the finding that a contract is null and void].

In addition to monetary relief, the arbitrators may also rule on the claims to intervene in the legal relationships between the parties, *e.g.* to terminate or transform their contracts.

d) Interest

The arbitrators are generally empowered to rule on interest as an ancillary claim in the proceedings. The scope and rates of interest to be awarded depend on the contractual arrangements and the applicable law.

4. Decision making

a) Deliberations

Art. 28 of the Law of Arbitration sets forth how decisions are made if the arbitral tribunal consists of more than one arbitrator. The rules differ depending on whether arbitrators decide on issues of a procedural nature or on issues of a substantive nature.

b) Majority or consensus?

Unless otherwise agreed by the parties, decisions must be passed by the majority of tribunal members. However, if the members of the tribunal are not in session, the presiding arbitrator may decide alone on certain procedural issues regarding the conduct of the proceedings, unless his action would be contrary to the parties' prior agreement or to an agreement made among the members of the panel.

When deliberating on the issues, the arbitrators should strive to reach consensus on all of the points at stake. In arbitral practice, the

arbitrators in most cases succeed in reaching this objective. But, for a decision to be deemed valid, it is sufficient that a majority of arbitrators should have agreed on it.

Yet, if a majority cannot be reached because of a split vote or because of the different positions taken by all of the arbitrators, under Art. 28(2), the arbitrators must once again deliberate on the reasons for their lack of consensus, with a view to reaching a decision. If, after repeated voting a majority still cannot be reached, the award will be issued solely by the presiding arbitrator.

c) Dissenting and concurring opinions

Both the law and the arbitration rules are silent with regard to the treatment of dissenting opinions. In practice, dissent is regarded as an internal matter for arbitrators' decision-making as the tribunal is expected to speak with one voice to the parties. The arbitrators or arbitral institutions usually do not inform the parties whether the award was done unanimously or by majority vote and do not send any dissenting opinions to the parties.

d) Signature

The original and all of the copies of the award must be signed by all members of the arbitral tribunal. Yet, if one or more arbitrators should fail to sign the award, the award is still valid, provided that the majority of the members of the tribunal have signed the award and that the award states that one or more arbitrators failed to sign it (Art. 30(5)).

5. Settlement

a) Settlement recorded in an award

Under Art. 29(1), if the parties settle the dispute during the arbitral proceedings, the arbitral tribunal shall terminate the proceedings, unless the parties request the recording of the settlement in the form of an arbitral award on the agreed terms. This rule applies both to the settlement reached with and without the support of the arbitral tribunal. If upon the parties' request the award on the agreed terms is issued, such an award has a binding effect and is as directly enforceable as any other award.

b) Settlement without an award

The settlement reached during the arbitration, either with or without the support of the arbitrators, has in principle the same effect as any private contract. If the settlement is concluded, it is valid irrespective of its form, but will not be directly enforceable.

In order to have the arbitral proceedings terminated, the parties must communicate to the tribunal that they have reached settlement. It is not necessary that they communicate the content of their settlement (unless the issuance of the award on the agreed terms is sought), but the tribunal can only terminate the arbitral proceedings if the fact that the dispute is settled is made known to the tribunal. Otherwise, the arbitration may continue and the arbitrators may make the award.

A third option, not expressly set forth in the Law on Arbitration, but one noted by the commentators⁷¹ is the conclusion of the settlement which would, without issuing an arbitral award, be recorded by the arbitrators. Such a settlement, which corresponds to a customary “judicial settlement,” and which was the only form of settlement prior to the enactment of the Law on Arbitration, is still recognized as enforceable by the national enforcement law (see Arts. 21 and 22 of the Enforcement Act).

c) Use of settlement techniques by arbitrators

There are no specific rules or practices on the use of settlement techniques. Desirable as they may be, the arbitrators must utilize them carefully, taking care that the appearance of independence and impartiality is not jeopardized in the eyes of the parties. The parties that have a specific need for assistance in reaching settlement may also opt for a special clause of the PAC-CCC on mediation followed by arbitration.

6. Effects of award

a) Effects between parties

The arbitral award is by default final and binding for the parties (Art. 31). However, the parties may agree on recourse to the appeal

⁷¹ See Triva/Uzelac, p. 239.

to an arbitral tribunal of the higher instance, in which case (depending on the parties' agreement) the award would not be binding until the agreed mechanism for arbitral remedies with suspensive effect had been exhausted. In practice, however, there are very few, if any, instances of such agreements.

b) Effects against third parties

The arbitral award has in principle only effects *inter partes*—meaning it is binding for the parties, but not for the third persons who have not participated in the arbitral process. In this respect, the arbitral award differs from some court judgments that may have accidentally also *erga omnes* or *ultra partes* effects. However, the arbitral award is binding also for the third parties that have assumed all of the rights and obligations of the party in the proceedings (for the universal successors). Some authors also argue that in limited cases the award also binds singular successors.⁷² Another specific exception may be derived from the Bankruptcy Act, since the claim established in the arbitral award after its denial in the bankruptcy proceedings binds the bankruptcy debtor and all bankruptcy creditors.⁷³

c) Res judicata

A final and binding arbitral award made in domestic arbitration (arbitration with a seat in Croatia) is presumed to have the same force as a final court judgment: it is regarded to be *res iudicata* which produces instantly the same consequences as judgments issued in Croatia. So, e.g. domestic awards do not need to undergo a process of recognition and may be instantly submitted for enforcement. The presumption of *res iudicata* force, however, is a rebuttable one. In the process of enforcement, the courts must control domestic awards with respect to the arbitrability of the subject matter of the dispute and the compliance with public policy (Art. 39(1)).⁷⁴

⁷² Dika, "Effects of the arbitral award under the Croatian law on arbitration," Croatian arbitration yearbook, 13(2006), pp. 21-23.

⁷³ See Bankruptcy Act, Art. 178(10).

⁷⁴ See more in Triva/Uzelac, p. 259-267. See also some critical remarks in Dika, op. cit., p. 7-27.

7. Correction, supplementation, and amendment

a) Correcting the award

Under Art. 34 of the Law on Arbitration, every party may request the corrections of any errors in writing, miscalculations or other clerical or similar errors. The request must be made within thirty days of receipt of an award,⁷⁵ and notice must be given to the other party. If the arbitrators consider the request to be justified, they shall make corrections within a further thirty days from receipt of the request. The correction provided to the parties shall form part of the award. Within thirty days from making an award, clerical errors may also be corrected by the arbitral tribunal on its own motion, without the initiative of the parties. With regard to formal requirements and the communication of the corrections all of the rules regarding the award will be applicable.

b) Additional award

Within thirty days of the receipt of the award, and upon notice to the other party, each party may also request of the arbitral tribunal that it make an additional award as to claims presented in the arbitral proceedings, but omitted from the award. If the arbitral tribunal considers the request justified, it shall make the additional award (Art. 33).

All other requests for amendments to the award are not admissible. Outside the provisions on additional awards, and correction and interpretation of awards (see *infra* at c), the arbitrators are considered to be *functi officio* (as having discharged their duty) after issuance of the award, unless expressly specified in the law.

c) Interpretation of the award

If the parties have so agreed, it is also possible to request the interpretation of a specific point or part of the award. The request must be made within thirty days of receipt of an award,⁷⁶ and notice

⁷⁵ This time limit is subject to the parties' agreement—see the introductory clause of Art. 34(1).

⁷⁶ This time limit is subject to the parties' agreement—see the introductory clause of Art. 34(1).

must be given to the other party. If the arbitrators consider the request justified, they shall give an interpretation within a further thirty days from receipt of the request. The interpretation provided to the parties shall form part of the award.

H. Challenge and Other Actions against the Award

1. Setting aside

a) Grounds

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

As an exception, until the Law on Arbitration, setting aside was possible "if new facts or evidence were found on the basis of which an award more favorable to a party could have been made if these facts would have been known or evidence produced in the hearings." Now, new facts and evidence can only be raised as a ground for setting aside if the parties have expressly so agreed in their arbitration agreement (Art 36(5)).

Otherwise, the grounds for setting aside in Art. 36 largely follow the text of Art. 34 of the UNCITRAL Model Law. To the same degree as in the Model Law and in Art. V of the New York Convention, the grounds are divided into two groups—into grounds that may be reviewed only upon the request of a party in the proceedings, and into grounds that the court may take notice of *ex officio*. For the first group of grounds, the burden of proof is on the claimant, *i.e.*, on the party applying for setting aside.

The grounds that can be raised only by the applicant are: (i) the lack or invalidity of an arbitration proceedings; (iii) lack of proper notice of the commencement of arbitration or other inability to present the case in the arbitration; (iv) non-contemplation of the dispute by or failure of the dispute to fall within the terms of the submission to arbitration, or presence of decisions on the matters lying beyond the scope of the submission to arbitration; (v) composition of the arbitral tribunal or an arbitral procedure not in accordance with this Law or a permissible agreement of the parties and that this fact could have influenced the content of the award; or

(vi) the lack of reasons in the award or that the award was not duly signed.

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

Violation of the rules of public policy can always constitute a ground for setting aside and thus it forms a certain exception to the rule “no control on the merits.” Public policy issues are, as has already been noted, also taken into account in the process of the enforcement of the award.⁷⁷ However, it is generally maintained that for such violations the rules of public policy have to be narrowly construed, especially in international cases.

b) Time limits

Pursuant to Art. 36 para. 3 of the Law on Arbitration, an application for setting aside must be filed with the court within three months from the date of the applicant’s receipt of the award. If setting aside is requested with respect to an additional award or correction or interpretation of the award, this date is calculated from the receipt of the decision. After expiry of the above time-limits, no application for setting aside is admissible, regardless of the grounds. However, public policy objections may be raised in enforcement proceedings in Croatia at any time; thus, after expiry of the three month period, a domestic award could become irrefutable, yet unenforceable—at least in the country.

c) Procedure

Only awards rendered in a domestic arbitration (*i.e.* arbitration with a seat of arbitration in Croatia, both in national and international disputes) are subject to a setting aside procedure. The criteria for jurisdiction with respect to the applications for setting aside are not linked to the applicable procedural rules (as in the law before the LA) but to the “nationality” of the award only.

⁷⁷ Moreover, if a preliminary issue in a court proceeding is decided by a final domestic arbitral award, the court shall treat this issue as *res iudicata* unless it finds that the award violates public policy (or shall deal with the issues that cannot be submitted to arbitration). See Art. 39(3) of the Law on Arbitration.

The court competent for setting aside is the Commercial Court in Zagreb (for commercial cases) or the County Court in Zagreb (for non-commercial cases). The court decides on the setting aside application according to the rules of contentious proceedings provided in the Code of Civil Procedure.

As setting aside proceedings are an instance of contentious proceedings,⁷⁸ regular appeal is always permissible. Appeal is possible both on facts and the law, but only in respect to the correctness of the setting aside judgment. The courts that will decide on the appeal are the High Commercial Court (if the setting aside was decided by the Commercial Court in Zagreb), or the Croatian Supreme Court (if the first instance court was the Zagreb County Court). The secondary appeal (*revizija*) at the Supreme Court is also generally possible, but only on the legal issues.

d) Limiting judicial review of awards by contract

The provisions on setting aside are among the very few mandatory provisions of the Law on Arbitration. Art. 36(6) expressly states that the parties cannot derogate in advance their right to contest the award by an application for setting aside. Neither can the parties exclude one or more grounds for setting aside by their agreement, at least not before the action for setting aside has been set into motion. They also cannot in any other way limit, expand or vary the legal provisions on setting aside, with only one exception. The only dispositive rule that opens a possibility for expansion of the grounds for setting aside by agreement is the one permitting the parties to agree in a domestic dispute on an additional ground. They may agree that 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 certain evidence had been produced in the hearings preceding the making of the challenged award (Art. 36(5)). This option, taken from the old law, now applies only in an *opt-in* form, if the parties expressly agree on its application.

⁷⁸ See Art. 41(2) of the LA.

e) Effects of successful challenge

The arbitral award that has been set aside has no effect. The decision on setting aside has the effect *ex tunc*, *i.e.* it is as though the award had never been made. The same effect is also attributed to the decisions on the setting aside of foreign arbitral awards made by the competent foreign court. Under Art. 40(1), upon request of a party, the recognition and enforcement of the foreign award shall be refused if the award has been set aside or suspended in the country in which, or under the law of which, that award was made, without further inquiries into the correctness of the decisions of the foreign courts. The foreign court decision on setting aside does not need to be recognized in separate proceedings, as the defense of the setting aside of the foreign award may be raised as an incidental issue in the proceedings in which recognition and enforcement is being sought.

2. Appeal on the merits

a) Is it allowed?

No court appeal is admissible against an arbitral award (understood as a full appeal on the merits of the award by a court that would be a second instance with respect to the arbitration proceedings). The Law on Arbitration expressly provides that, except for an application for setting aside, no other legal remedies in court proceedings may be sought against an award (Art. 36 para 1).⁷⁹ This is a strict rule, and thus a parties' agreement to submit its award to appellate proceedings before a Croatian court of law would be null and void.

The Law on arbitration allows an appeal to a second arbitral instance only if the parties have expressly agreed that the award may be contested by an arbitral tribunal of a higher instance (Art. 31). By default, there is no appeal against an arbitral award.

⁷⁹ In addition, Art. 41 establishes that no court should intervene in matters governed by the Law on Arbitration except where there is an express provision—and there is no legal provision that would allow appeal against an award.

b) Grounds

The provisions on the grounds for appeal and the scope of review can be agreed on between the parties. Party arrangements providing appellate review of the award before a higher arbitral tribunal are extremely rare in practice. In practically all arbitration cases thus far the award rendered “in the first instance” has been final and binding.

c) Excluding the right to appeal by agreement

There is regularly no need to exclude an appeal in the arbitration clause, as the award has by default, with respect to the parties, the force of a final judgement (*res iudicata*)—see Art. 31. Because of the dispositive nature of this rule, it is also permissible to agree on the arbitral rules that contain the appeal option, but exclude expressly the part of the rules that deals with the appeal.

III. RECOGNITION AND ENFORCEMENT OF AWARDS

A. Domestic Awards

1. Statutory or other regime

a) Distinction between recognition and enforcement

The rules on enforcement differ with respect to domestic awards (*i.e.*, awards made in Croatia) and foreign awards. For awards in arbitrations with a place within the national territory, the law provides that the award will be directly enforceable, *i.e.*, no special leave for enforcement (*exequatur*) will be needed. However, as in the case of final and enforceable court judgments, the enforcement must be sought through the special enforcement procedure which lies also in the hands of a court.

b) Grounds for refusing recognition and enforcement

Upon application for enforcement, the court shall order the enforcement, unless there are grounds for its refusal. The enforcement shall be refused in only two situations: if the court finds

that the subject matter of the dispute was incapable of being submitted to arbitration, or if the enforcement would violate public policy (Art. 39(1)). These two sole grounds for refusing enforcement of a domestic award cannot be raised if a court has already refused to set aside the award on such grounds, or if a court has already found in separate proceedings that these two grounds do not exist (Art. 39(2)).⁸⁰

c) Formal requirement for enforcement of awards

In the process of enforcement, the party relying on a domestic award must submit a written request for enforcement and supply the original award or its duly certified copy. In practice, it is sufficient to submit a copy whose authenticity is confirmed by a notary public. No specific further requirements are needed, unless parties have specifically agreed on the supplementary formal requirements (e.g. deposit or certification of the award). For enforcement of a domestic award, the submission of the original arbitration agreement is no longer necessary (this formality, however, must still be adhered to for the recognition and enforcement of foreign awards).

d) Enforcement procedure

The application for enforcement must be submitted, as in the case of final and binding court judgments, to the competent court.

The competent court for ordering enforcement in commercial arbitration cases is the Commercial Court (*Trgovački sud*) in Zagreb, whereas in the other cases the County Court (*Županijski sud*) in Zagreb has jurisdiction. Jurisdiction for the undertaking of particular enforcement actions is determined according to the regular rules of the Law on Enforcement.

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

⁸⁰ See also Art. 39(4) which authorizes parties to launch a court action in which the sole remedy sought would be in the finding that grounds for refusal of enforcement do not exist.

The decisions granting or refusing the enforcement can be appealed, but the appeal in principle would not suspend the continuation of the enforcement. Upon the party's application, the court may suspend the enforcement of the award if an application for setting aside was initiated with the competent court. In any of these two cases, the suspension of the enforcement would be ordered only if the applicant supplied proof that enforcement would cause irreparable or hardly reparable damage, or proof that enforcement is necessary to prevent violence. The suspension would be ordered only after the opposite party had an opportunity to be heard, and may be conditioned on provision of adequate security.⁸¹

e) Execution

The enforcement procedure regarding domestic awards is *mutatis mutandis* the same as the procedure of enforcement of any domestic, enforceable deed or any other recognized foreign judgment. The provisions of the Enforcement Act apply to the enforcement. Among other measures, they also empower the party to request the attachment of the other party's bank accounts.

B. Foreign Awards

1. Various regulatory regimes

a) Domestic rules

The rules applicable for recognition and enforcement of foreign awards are provided in the Law on Arbitration. They apply in the absence of other specific rules, such as the rules of the international and multilateral treaties governing enforcement of foreign awards, such as the New York Convention of 1958.

Foreign awards are considered to be the awards that are made in a place outside the territory of the Republic of Croatia.

Under Art. 40 of the Law on Arbitration, the court shall recognize and enforce the award unless the opposing party successfully proves the existence of the reasons for annulment of the award contained in Art. 36(1) or if the award has not yet become binding, or has been

⁸¹ See Art. 61 of the Enforcement Act (*Ovršni zakon*).

set aside or has been suspended by a competent authority of the country in which, or under the law of which, that award was made. The court shall refuse recognition and enforcement *ex officio* if the subject matter in dispute was not arbitrable or if the recognition and enforcement would be contrary to public policy. The Croatian Law on Arbitration thereby incorporated all the solutions of Art. V of the New York Convention, with the additional ground—that the award does not state reasons or lacks signatures as required by the Law on Arbitration.

i) Requirements to be fulfilled by the applicant
(procedure, time limits)

The procedure is initiated by filing an application for recognition and enforcement of a foreign arbitral award (*Prijedlog za priznanje i ovrhu*). The application must be accompanied by the award and the arbitration agreement (original or notarized copy in both cases). If the award or the arbitration agreement was not made in Croatian, the party must acquire a certified translation.

The competent court is, again, the Commercial Court in Zagreb (Art. 44(1)). Like the New York Convention, the Law on Arbitration also provides for adjournment of the decision on the enforcement of the award, if an application for setting aside or suspension of the award has been made to a competent authority. The authority may also, on the application of the party claiming enforcement of the award, order the other party to give a suitable security.

b) *New York Convention*

The most important international instrument regarding recognition and enforcement of foreign arbitral awards is the 1958 New York Convention. It has been applied continuously in Croatia since Croatia gained its independence on October 8, 1991, on the basis of succession. With regard to its application, Croatia has maintained the reservations originally made by Yugoslavia when the Convention was ratified in 1981. Accordingly, the 1958 Convention will apply:

- (a) only to recognition and enforcement of awards made in the territory of another Contracting State (reciprocity);

- (b) only to differences arising out of legal relationships, contractual or non-contractual which are considered as commercial under Croatian law;
- (c) only to those arbitral awards which were adopted after the Convention came into effect (no retroactive effect).

There are few reported Croatian decisions on application of the New York Convention in practice. From some court decisions, it would seem that the courts prefer to recognize foreign arbitral decisions based on the national law, even if the application of the New York Convention would be possible.⁸²

c) Other international conventions

In addition to the New York Convention, by succession effective October 8, 1991, Croatia also became party to the following Conventions:

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

d) Court practice applying regimes other than the New York Convention

The procedure for the enforcement of foreign awards, to the extent that it is not regulated by an applicable international instrument, is governed by national law. The procedure is generally the same as the procedure for the enforcement of foreign awards where no international treaty applies (see *supra* at III.B.1.a.). In the process of recognition and enforcement the court must limit its examination and review of the award to the extent provided in the

⁸² See e.g. the Supreme Court decision Gž 6/08-2, in which the award made in the Czech Republic was recognized based on Art. 40 of the Law on Arbitration, without any mention of the Convention.

applicable international instrument or on the grounds set forth in the national law on arbitration.

2. Distinction between recognition and enforcement

Leave for enforcement (*exequatur*) can be sought by a separate action for recognition of the foreign award. Alternatively, the court can grant leave for enforcement in the process of enforcement, where the recognition of the foreign award would be handled as a preliminary issue in the proceedings. Unlike the *exequatur* granted in a separate action which, if granted, would be generally and universally valid in any subsequent enforcement procedure, the *exequatur* granted in the process of enforcement would have effect and validity only within the more concrete enforcement proceedings.

The court must always permit the defendant to reply to an application for *recognition*, but the same right may be withheld for an application for *enforcement* if the application could imperil the enforcement. Decisions on recognition and enforcement must be defended. The parties may lodge an appeal to the Croatian Supreme Court within fifteen days of the delivery of the decision on recognition. No such appeal is provided for the decision on enforcement.

3. Application of New York Convention by local courts

a) *Grounds for refusing recognition and enforcement*

There have been thus far no reported cases in which the courts would apply grounds other than those set forth in the New York Convention.

b) *Enforcement procedure*

The enforcement procedure is governed by the rules of procedure set in the national law. The procedure is identical irrespective of whether the foreign judgment is enforced under the New York Convention or under the Law on Arbitration. The conditions, charges and fees are also identical.

c) Public policy as a ground to refuse enforcement

The defence of public policy was raised in several cases of enforcement of foreign arbitral awards. In several decisions, the courts held that “public policy cannot be identified with the violation or incorrect application of the mandatory rules of law.”⁸³ In legal doctrine, the need to adhere to a restrictive, narrow interpretation of public policy (in the sense of *international public policy*) has been also emphasized.⁸⁴

d) Examples from practice

Thus far, apart from the already mentioned cases, there have been few reported examples from practice. Future examples will be reported and are expected to be included in the CLOUT collection of UNCITRAL (<http://www.uncitral.org/clout/>).

IV. APPENDICES AND RELEVANT INSTRUMENTS

A. National Legislation (See CD-ROM.)

Law on Arbitration

B. Arbitration Institutions

Permanent Arbitration Court
Croatian Chamber of Commerce
(*Stalno izbrano sudište pri Hrvatskoj gospodarskoj komori*)
Rooseveltove trg 2
P.O. Box 630
HR-10 000 Zagreb
Tel.: +385 1 4848-622, 4848-623
Fax.: +385 1 4848-625
E-mail: sudiste@hgk.hr
Web-site: <http://www.hgk.hr>

⁸³ Supreme Court decision Gž 2/08-2 of May 20, 2008. Similar, narrow construction of public policy was also present in decisions of the High Commercial Court, see e.g. VTSRH Pž-4486/02-3 of March 1, 2005.

⁸⁴ See Sikirić, “Javni poredak kao razlog za poništaj pravorijeka” [Public policy as a reason for the annulment of the arbitral award], *Zbornik Pravnog fakulteta u Zagrebu*, 59(2009), 2-3, pp. 225-268.

C. Cases

The following list contains references to cases originally published on the internet, in the collections of decisions of respective courts, or in legal periodicals. All cases except those published after 2007 are also cited with a short summary in Triva/Uzelac, *Hrvatsko arbitražno pravo*, Zagreb, 2007 (in Croatian).

1. Court decisions

Visoki trgovački sud (High Commercial Court)

Pž-3338/02-3, Pž-6181/03-3, Pž-2800/05-3, Pž-2721/05-3,
Pž-2640/05-3, Pž-510/02-3, Pž-195/04-2, Pž-1552/02-2,
Pž-2631/03-2, Pž-2730/00-2, Pž-2808/04-4, Pž-3182/02-2,
Pž-3599/03-2, Pž-3909/04-2, Pž-4714/01-2, Pž-5168/01-2,
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