

New Boundaries of Arbitrability Under the Croatian Law on Arbitration

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UDK 347.918.2
Original scientific paper

The Croatian Law on Arbitration has introduced significant changes in regulation of arbitrability. This paper presents a comparison of conditions for submitting disputes to arbitration before and after 2001. In particular, the new law extends the objective boundaries of arbitrability, i.e. the scope of disputes that can be submitted to arbitration, by avoiding reference to exclusive jurisdiction as an obstacle to arbitration. Many of the previously existing limitations in the national disputes have been removed. Now, ad hoc arbitration is permissible in such disputes, and arbitration institutions may be freely established as entities of private law. The remaining limitations are related to the prohibition of submitting national disputes to foreign arbitration tribunals as well as the reduced scope of disputes that can be submitted to arbitration outside the country.

I. Introduction

After long preparations and many drafts, the new Croatian Law on Arbitration has finally seen the light of day.¹ One of the subjects which particularly occupied members of the working groups who prepared the draft act, first under the auspices of the Permanent Arbitration Court at the Croatian Chamber of Commerce (PAC-CCC), and then within the Ministry of Justice, Administration and Local Self-government of the Republic of Croatia, related to determining the boundaries within which, according to the new law, it would be possible to subject disputes to arbitration. Almost all the standard questions on the boundaries of arbitrability drew attention in the discussions as potential problem areas. The questions were the following:

- Which disputes may be submitted to arbitration (objective boundaries of arbitrability or arbitrability *ratione materiae*)?
- Which parties may submit their disputes to arbitration (subjective boundaries of arbitrability or arbitrability *ratione personae*)?

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¹ The Croatian Law on Arbitration [*Zakon o arbitraži*] (LAC) was published in OFF. GAZ. 88/2001. It came into force on 19 October 2001. For legislative history and the basic characteristics of the LAC see S. Triva, *Zakon o arbitraži [Law on Arbitration]*, 40 PRAVO U GOSPODARSTVU 5 (2001), at 4-32.

- Is it possible for some disputes to be submitted only to what is considered to be domestic arbitration (i.e. arbitration seated in the Republic of Croatia) or is it possible for some disputes to be submitted to arbitration abroad (territorial boundaries of arbitrability or arbitrability *ratione territorii*)?
- May some disputes be taken to arbitration institutions only (and what should be possible conditions for their foundation and work) or should it be possible to take disputes to forms of arbitration that have not been organised in advance – what is known as *ad hoc* arbitration (the institutional boundaries of arbitrability, or arbitrability *ratione institutionis*)?

The fact that these issues were exceptionally relevant in the context of the reform of the Croatian arbitration law was underlined at the international conference held in 1998 in Zagreb, whose main topic was dedicated to the boundaries of arbitrability.² Discussions among arbitration experts in domestic and foreign circles showed that conditions were ripe for far-reaching changes.³ Thus in the end the new Law on Arbitration, although it contains many important novelties both in practice and theory, may have brought the greatest changes precisely in this field.

II. Arbitrability according to law before 2001

a) General

Up until 2001, regulations governing arbitration were contained in several legal sources, the most important being the Code of Civil Procedure (hereinafter: CCP)⁴ and the Private International Law Act (i.e. Conflict of Laws Act,

² THE SIXTH CROATIAN ARBITRATION DAYS: THE NEW BOUNDARIES OF ARBITRABILITY [ŠESTI HRVATSKI ARBITRAŽNI DANI: NOVE GRANICE ARBITRABILNOSTI] were held in Zagreb from 10-11 December 1998 under the auspices of the PAC-CCC and the Croatian Arbitration Association.

³ Of literature devoted to the problems of arbitrability during the discussion on reform of the Croatian arbitration law, see for example K. Sajko, *Arbitražni sporazum i arbitrabilnost – riješena i otvorena pitanja u hrvatskom i poredbenom pravu* [Arbitration Agreement and Arbitrability – Resolved and Open Issues in Croatian and Comparative Law], 35 PRAVO U GOSPODARSTVU 3-4 (1996), at 272-281; M. Dika, *Arbitražno rješavanje stečajnih sporova u hrvatskom pravu* [Solving Bankruptcy Disputes by Arbitration under Croatian Law], 36 PRAVO U GOSPODARSTVU 1 (1997), at 50-62; E. Čulinović-Herc, *Arbitrabilnost sporova iz nelojalne utakmice* [Arbitrability of Unfair Competition Disputes], 35 PRAVO U GOSPODARSTVU 3-4 (1996), at 382-395; M. Dika, *Arbitrabilnost i isključiva nadležnost sudova* [Arbitrability and Exclusive Jurisdiction of Courts], 38 PRAVO U GOSPODARSTVU 1 (1999), at 25-42. Many of these works have been published in English in CROATIAN ARBITRATION YEARBOOK.

⁴ Chapter 31, Proceedings before Arbitration Tribunals, Arts. 468a-487.

hereinafter: CLA)⁵. The most important part of the provisions on arbitration was contained in Arts 469 and 469a of the CCP. These provisions were finally drafted in the amendments of 1990, by which the previous text was broken down into two articles and significantly amended,⁶ with the intention of expanding arbitrability, primarily in the personal and personal-causal respect. Namely, up until 1990 for disputes without international element arbitration was only possible between (some) legal persons, i.e. only in relation to disputes arising from commercial relations.⁷ After the introduction of the 1990 amendments, provisions on arbitrability, valid until the Law on Arbitration repealed them, were as follows:

Article 469

For disputes involving foreign parties (i.e. international disputes) concerning rights which the parties may freely dispose of, the parties may stipulate the jurisdiction of a domestic or international arbitration court if one of the parties is a foreign natural or legal person, except for disputes falling under the exclusive jurisdiction of Croatian courts of law.

Article 469a

For disputes involving no foreign parties (i.e. domestic disputes) concerning rights which the parties may freely dispose of, the parties may stipulate the jurisdiction of a permanent domestic arbitration court at chambers of commerce or other organizations provided for by statute, unless it is statutory provided for that certain dispute shall be settled exclusively by other courts.

In other cases, jurisdiction of an arbitration court may be provided for only by statute.

b) *Limitations regarding persons and institutions licensed to carry out arbitration*

During the ten years that these regulations were in force, they were frequently mentioned by Croatian legal circles as an example of relatively liberal and appropriate provisions. This was due to the fact that, in relation to the previous system, these provisions certainly meant a major step forward. Primarily the limitations *ratione personae* were significantly less restrictive, especially in relation to the previous distinction between physical and legal persons in disputes without international elements. After 1990, all persons, regardless of their status,

⁵ Chapter 4, part 2, Recognition and Enforcement of Foreign Arbitration Decisions, Arts. 97-101.

⁶ See Act on Amendments and Supplements to the CCP [*Zakon o izmjenama i dopunama ZPP-a*] OFF. GAZ. SFRY 27/1990 of 16 May 1990, Arts. 43 and 44.

⁷ Until 1990, only so-called “social legal persons” could agree on arbitration regardless of the nature of the dispute. Private legal persons (“social organization and associations of citizens”) could only agree to it in disputes “over economic activities” while physical persons were completely incapable of agreeing on arbitration unless they were small entrepreneurs (owners of small businesses).

could agree to submit to arbitration disputes on their dispositive rights. The reference to commercial disputes was also completely omitted, so that in principle, an entire range of disputes over dispositive rights became arbitrable.

However in some of its elements, the CCP still maintained far-reaching although at first sight not completely obvious, limitations which over time showed themselves to be a potentially limiting factor in terms of the use and development of arbitration in Croatia.

First of all, the CCP at the beginning of the nineties, held on in principle to the attitude of earlier legislation on the differentiation between “national” and “international” disputes, which originated in the time of socialist state paternalism, where it had its full expression. That is to say, the relationship towards arbitration in what was known as the socialist bloc was in general terms, similar everywhere: it was felt that this was an instrument which was above all used to encourage investors from Western countries, who would condition their investments with exception from the jurisdiction of national courts in those countries. Therefore, in relations where there was a foreign party (“disputes with an international element”) arbitration was given privileged treatment. Such “permission to arbitrate” was frequently used as an instrument of ideological propaganda, an example of friendly and fair relations towards foreign capitalist partners, who had “even” been allowed in relations with socialist states and their state or para-state enterprises, to take disputes outside the country, and submit them to “foreign” arbitration. In this context it should be noticed that this kind of relationship towards international arbitration frequently *de facto* led to the major part of economic relevant disputes ending up before foreign arbitration institutions and *ad hoc* arbitration. There were few national arbitration institutions who succeeded in establishing themselves as an acceptable forum for resolving relations between domestic economic entities and foreign partners. Precisely because of the fact that the main part of these cases was taken to arbitration in third countries, increased attention was paid to instruments relating to the recognition and enforcement of foreign arbitration awards.⁸ Arbitration practice in socialist countries, members of the former Eastern bloc, developed to a large extent only in relation to internal economic relations within the bloc, to a large extent on the basis of instruments which prescribed what was called compulsory arbitration.⁹ For this reason, although in relations with an

⁸ We should also see in this light the worldwide success of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958.

⁹ Member countries of the Council for Mutual Economic Assistance were to a large extent signatories of the Moscow Convention of 1972, which prescribed that disputes between enterprises from two

international element *ad hoc* arbitration was permitted in principle also within the country, the practice of *ad hoc* arbitration never developed in the period of the division into blocs on the territory of the socialist states.

Regarding relations between economic entities with the state organized socialist economies, the fact alone that these were mainly state enterprises (that is companies owned by the same owner), shows why the practice of “national” arbitration (arbitration between exclusively domestic entities) in these countries never really took off. Pressure from the state structures (often channeled through informal party mechanisms of the one-party state) was felt to be a more effective and appropriate method of solving disputes than arbitration. If we also add the fact that “true” arbitration rests on the principle of the autonomy of the parties, and that the arbitration as a medium of private justice is not directly subject to direct instruments of state intervention, it is clear why in most real-socialist countries arbitration in relations between entities of the same legal system was generally not permitted.

The former self-managing and socialist Yugoslavia (and Croatia as one of its constituent parts) was in a specific position in relation to the other Eastern European Socialist countries. The SFRY as a result of its non-aligned position was never a member of the Moscow Convention, and therefore did not know its mandatory arbitration mechanism. On the other hand, the doctrine of self-management, the federalization of the economy in the state and the relatively large level of autonomy of economic entities made it possible for arbitration not to be unimaginable in relations between domestic legal entities. The former Yugoslavia was therefore the only European Socialist country which developed some kind of arbitration practice for national (“domestic”) disputes. That is to say, although the CCP of 1956 reserved arbitration in the Soviet manner only for “disputes with foreigners”, already in 1963 new opportunities were opened for arbitration in relations between domestic enterprises, which later led to the formation of an arbitration institution within the Chambers of Commerce of the constitutive parts (republics and the provinces) of the then Yugoslavia.¹⁰

member countries should be resolved by arbitration before an arbitration court within the chamber of commerce of the country of the defendant. An arbitration agreement was not required for this kind of arbitration – and, more importantly, an arbitration agreement which would determine anything else was not permitted.

¹⁰ This was first mentioned in the Constitution of Yugoslavia of 1963, and then maintained in the Basic Enterprises Act [*Osnovni zakon o poduzećima*] of 1965. The CCP of 1976 continued along the same lines.

However, such attitude towards arbitration remained in principle even after 1990, just as the duality in the relationship between “national” and “international” arbitration did. Whilst international arbitration was completely left to the autonomous initiative of the parties, national (“domestic”) arbitration was still treated as a slightly suspect body, placed under scrutiny and the tutorage of the national legislative.

Thus until 19 October 2001 it was not possible to have a valid agreement on arbitration between two Croatian legal entities, if it was not arbitration which satisfied the narrowly determined institutional criteria: that it was arbitration before institutions “founded within the Chambers of Commerce and other organizations foreseen by the law”. Practically, with the small amount of specialized arbitration in some branches, this meant that the only institution to whom a dispute could be brought was the PAC-CCC. Despite the reputation of that institution and the concentration of experience among its arbitrators, it became difficult to justify with any arguments this kind of monopoly on arbitration services. Another problem was that the law in general permitted arbitration in many areas regulated by dispositive legal provisions, whilst the PAC-CCC, as practically the only relevant national arbitration institution could provide a suitable forum only for commercial disputes. In the end, some courts developed the case law that extended the narrow legal limits of arbitrability (thereby refuting the theories about hostile relations between state courts and arbitration). Namely, a few courts tended to respect the arbitration clauses even when they referred to “unauthorized” institutions, that *stricto sensu* should have been considered null and void.¹¹

c) *The problem of exclusive jurisdiction as a factor excluding arbitrability*

What was certainly a more significant limitation contained in the regulations before the Law on Arbitration came into power in 2001, was the specifically formulated limitation *ratione materiae* clothed in the form of an additional (negative) precondition for arbitration agreement – the limitation of exclusive jurisdiction. That is, with the dispositive nature of the dispute (“dispute over rights of which they may freely dispose), the CCP demanded for the admissibility

¹¹ E.g. a court in Slavonia recognised as binding an arbitration clause in a contract on engaging a sporting professional which provided for arbitration by a sporting association, although this did not satisfy the conditions of Art. 469a CCP (and moreover an arbitral institution within the Croatian Olympic Committee was already founded and licensed by law to provide arbitration services).

of arbitration *ratione materiae*, as an **additional** limitation, that no exclusive jurisdiction of state courts be prescribed for the settlement of disputes.¹²

Here too the limitation was formulated differently in relation to disputes with international elements, where it was required that there was no “exclusive jurisdiction of courts in the Republic of Croatia”, or in terms of disputes without the foreign element, where the formulation required that the dispute in question should be “dealt with exclusively by other courts”. Whilst the first formulation can be more or less identified with the notion of exclusive international jurisdiction, the other is not entirely clear, but the potential (maximum) assertion would be that this is about exclusive subject matter and exclusive territorial jurisdiction.¹³ Again, the potential range of restriction here is much broader in relation to disputes between domestic legal entities. The negative effect of this restriction was multiplied by the lack of legal certainty, for a legal standard formulated in this way, even if it is interpreted teleologically and extensively, did not remove the doubt about whether the court in an actual case would declare a dispute to be non-arbitrable for this reason, and therefore quash the arbitration award rendered.

The potential range of dispositive disputes to which this standard could apply (disputes where any form of exclusive jurisdiction is prescribed) was huge. The various forms of exclusive jurisdiction are prescribed for the following types of disputes:

- disputes over ownership and other property rights on real estate¹⁴ (Art. 56(1) CCP and Art. 56 (CLA)
- disputes over trespass on real estate (Art. 56(1) CCP and Art. 56 CLA)
- disputes over tenancy or rental relations on real estate (Art. 56(1) CCP and Art. 56 CLA)
- disputes over contracts for the use of apartments or business premises (Art. 56(1) CCP and Art. 56 CLA)
- disputes over ownership rights¹⁵ and other property rights¹⁶ to aircrafts, maritime ships and inland water vessels (Art. 57(1) CCP)

¹² On exclusive jurisdiction as a negative precondition for agreement to arbitration see Dika, *Arbitrabilnost i isključiva nadležnost sudova [Arbitrability and Exclusive Jurisdiction of Courts]*, *supra*, note 3, at 25-42.

¹³ *Cf. ibid.*, at 33-36.

¹⁴ Here the CCP still gives disputes over the use and disposal of real estate in social ownership, which was abolished after the abandonment of social ownership as a legal category, but which may still be potentially relevant in some cases.

- disputes from rental relations for aircrafts or ships (Art. 57(1) CCP)
- disputes from relations with military units (Art. 61 CCP)
- disputes arising during or caused by court or administrative enforcement proceedings (Art. 63 CCP)
- disputes arising during or as a result of bankruptcy proceedings (Art. 63 CCP)
- disputes over real estate in the Republic of Croatia as the object of an inheritance dispute (Art. 71(4) CLA and Art. 72(3) CLA)
- disputes over rewards for saving Croatian warships and Croatian public ships (Art. 1009(1) Maritime Code)
- disputes over the payment of damages caused by collisions between ships when one is a Croatian warship (Art. 1009(1) Maritime Code)
- disputes relating to the procedure of the limitation of a shipper's responsibility executed by a Croatian court when the creditor denies that his/her claim is subject to this limitation, and the movant does not agree with the dispute etc. (Art. 1009(2) Maritime Code)
- disputes that arise during and in relation to court enforcement proceedings that a Croatian court is executing on ships (Art. 1009(3) Maritime Code)
- disputes over the obligation to notify in relation to shareholders in a corporation (Art. 288(1) Trading Companies Act)
- disputes where the members of a company contest the decision of the general assembly of the company (Art. 447(1) Trading Companies Act)
- disputes over the liquidation of a company (Art. 468 Trading Companies Act).

Alongside this list, which has no ambition to be exhaustive, some forms of exclusive jurisdiction are prescribed according to both bilateral and multilateral conventions.¹⁷

Even a cursory glance at this list of cases is sufficient to show to what extent it may occur as a limiting factor for arbitration. It is enough to say that under this limitation arbitration was impossible in practically every dispute relating to real estate. If therefore, in a complex international investment (where arbitration is

¹⁵ Here too the law still contains a reference to a constitutionally abandoned category of "the right to use and disposal".

¹⁶ The law here especially emphasises the right to mortgage (with former social ownership).

¹⁷ See Dika, *Arbitrabilnost i isključiva nadležnost sudova [Arbitrability and Exclusive Jurisdiction of Courts]*, at 31.

today the world wide standard method of dispute resolution) *inter alia* some real estate was purchased (e.g. a hotel or a factory), and even if the deal was only about lease of business premises or apartments, arbitration would not be permitted. If it were undertaken, the domestic arbitration award rendered would have to be annulled, and a foreign arbitration decision could not be recognized.¹⁸

Exclusive jurisdiction as an impediment to arbitrability could be attributed to the same atmosphere of socialist paternalism which brought into being the other limitations and hindrances which have been placed in the way of the development of domestic arbitration. This limitation did not exist in the Croatian legal tradition up to the Second World War. Neither in the Temporary Civil Procedure Act (*Privremeni parbeni postupnik*) of 1852,¹⁹ nor in the Code on Court Proceedings in Civil Litigation (*Zakonik o sudskom postupku u građanskim parnicama*) of 1929,²⁰ was there any provision which would demand that, along with the dispositive nature of the legal relationship, any positive or negative condition in relation to arbitrability *ratione materiae* should be fulfilled. Nor is there any such provision in the legislation of countries from which Croatia has drawn inspiration for civil procedural legislation – Austria,²¹ Germany²², France²³. The only condition *ratione materiae* in the legislation of these countries is that the parties had to be authorized to settle a dispute, i.e. that they had the right to freely dispose of the rights that were the subject-matter of the dispute.

¹⁸ Attempts were made to tone down the strictness of this conclusion by pointing to the need for a teleological interpretation and flexible approach (e.g. separating property law and obligations law components in a contract on the sale or lease of real estate) but the fact remains that along with the legal uncertainty regarding the universal acceptance of this assertion, the separation itself of aspects may lead to dual standards adjudication. Parallel conduct of arbitration and court proceedings on the same relations causes, moreover, double costs and for that reason alone is unacceptable.

¹⁹ The objective boundaries of arbitrability were determined in Paragraph 376 (The right to conclude an agreed settlement) in the following manner: “The parties may subject their disputed affairs, insofar as they are authorized to dispose of them freely and are able by law to conclude a settlement, in mutual agreement, to the judgement of one or more arbitrators”. See A. RUŠNOV & J. ŠILOVIĆ, *TUMAČ GRADJANSKOMU PARBENOMU POSTUPNIKU* [INTERPRETATION OF CIVIL CONTENTIOUS PROCEDURE], (Zagreb, c. 1895).

²⁰ Art. 672(1) (Contract on Arbitration Courts): “A contract that a legal dispute be resolved by one or more arbitrators (contract on arbitration court) has as much legal effect as the parties are able to reach a settlement regarding the merits of the dispute.” Cf. G. NAJMAN, *KOMENTAR GRADANSKOG PARNIČNOG POSTUPKA* [A COMMENTARY TO CIVIL CONTENTIOUS PROCEDURE] (Belgrade 1935), at 672 etc.

²¹ See §577 ZPO. The text of this paragraph has not been changed from 1895 to the present.

²² See 1025 ÖZPO (both before and after the reform in 1997).

²³ See Art. 1676 Code judiciaire.

The first civil procedural law prescribing this limitation was the 1956 Code of Civil Procedure, according to which disputes were arbitrable "...except disputes for which a court is competent on the basis of the provisions of this act on exclusive territorial jurisdiction"²⁴. The point behind this limitation was certainly contained in the political assessment of the inappropriateness of the fact that a body in a foreign country may rule on cases of particular national interest (which disputes over real estate or military units were considered to be). In accordance with the socialist practice of arbitration at that time, it was mostly expected that arbitration in disputes with a foreign element would take place abroad. When, with the introduction of self-management, arbitration practice expanded, it seems that the same logic was copied without much thought for arbitration without any foreign element, which could only take place within the country.

One of the reasons for keeping the limitation of exclusive jurisdiction in legislation to date was to be found in the alluring character of the notion of exclusive jurisdiction in national procedural law. One could easily think that, if law provides for "exclusive jurisdiction", it meant that the proceedings could not be conducted anywhere else except in the forum prescribed as exclusive. This however is not (necessarily) the case.

The birth place of the idea of exclusive jurisdiction is in the context of exclusive territorial jurisdiction. That idea, as procedural theory teaches us, is one of the kinds of special territorial jurisdiction and is essentially determined in relation to general territorial jurisdiction.²⁵ General jurisdiction means that a forum has default jurisdiction for all cases, irrespective of the subject matter of the dispute (in principle, this is the forum where the defendant has its residence or seat). Exclusive jurisdiction in that context is an exception in the determination of jurisdiction. In the cases of exclusive jurisdiction, the jurisdiction of the *forum generale* (generally competent local court) is excluded. That is, in the absence of an agreement between the parties or other circumstances, a court in another place will be competent, which the legal system considers to be more appropriate in that particular case than the local forum of general jurisdiction. Conceptually, this does not mean that "exclusiveness" automatically means every other form of exclusion – for example in the sense of the exclusion of the possibility to

²⁴ See Art. 437(1); cf. S. ZUGLIA, S. & S. TRIVA, KOMENTAR ZAKONA O PARNIČNOM POSTUPKU [A COMMENTARY TO THE CIVIL PROCEDURE ACT], Vol. II. (Zagreb 1957), at 420-421.

²⁵ This is also the case in S. TRIVA, V. BELAJEC & M. DIKA, GRADANSKO PARNIČNO PROCESNO PRAVO [CIVIL CONTENTIOUS PROCEDURAL LAW], 6th ed. (Zagreb 1986), at 210-211. Unfortunately the relationship between general and special jurisdiction is described here very briefly and in simple terms, which could lead to mistaken conclusions about the absolute exclusiveness of exclusive jurisdiction.

conclude a prorogation contract. This could be seen in the old Croatian and Yugoslav procedural theory where there were express references to the fact that in certain forms of exclusive territorial jurisdiction prorogation of jurisdiction to another court was permitted.²⁶

However, even in those cases where the transfer of jurisdiction to another state court by agreement of the parties was not permitted, this would not intrinsically mean that the parties in these cases would automatically be unable to conclude an agreement on arbitration. This approach – albeit very present and widespread – essentially means the equalizing of the arbitration tribunal with the state court (which was certainly a dominant theme in the socialist self-managing judiciary at certain periods in the development of arbitration). But this kind of attitude overlooks the fact that arbitration is a private justice medium, which works under premises which are sometimes essentially different from those on which the state justice system rests. One of these premises in civil proceedings – precisely the opposite in relation to arbitration – is the lack of possibility of conducting so-called conventional proceedings: the parties, when instituting proceedings before a state court, may come to agreement only within narrow boundaries on some procedural issues, whilst in the vast majority of cases the procedural law is *ius cogens*. Therefore the impossibility of prorogation of jurisdiction in most cases arises from the logic that the parties, when and if they have instituted proceedings before a state court, must respect the rules of the organization and procedures of the state justice system on which they cannot impose their own rules of jurisdiction and procedure. Thus even in a perfectly dispositive dispute the parties cannot prorogue the subject matter jurisdiction (i.e. change the venue to the court of different type, e.g. the specialized court), even if the prorogued court would be more appropriate and better qualified to hear it.

²⁶ For example, in defining the notion of special territorial jurisdiction, Neumann's commentary emphasizes that exclusive territorial jurisdiction is not "exclusive in the sense that in its place no other jurisdiction could take over by an express agreement between the parties", and goes on to say that of all the provisions of the Code on Court Proceedings in Civil Litigation on exclusive jurisdiction (Arts. 73-82) only in relation to disputes in Art. 82 no agreement on prorogation may be concluded. Najman, *supra*, note 20, at 140-141. The commentary by Verona and Zuglia goes further and uses the term exclusive jurisdiction in the context of prorogation of jurisdiction. "*Whether the prorogued court gains exclusive jurisdiction or only by choice, depends on the agreement of the parties. Regularly the parties desire a certain court to have exclusive jurisdiction by agreement, but it may be that the parties agree to elect several prorogued courts electively, but that from several courts, who according to the law itself have jurisdiction electively they choose one as having exclusive jurisdiction*". A. VERONA & S. ZUGLIA, ZAKONIK O SUDSKOM POSTUPKU U GRADANSKIM PARNICAMA (GRADANSKI PARNIČNI POSTUPAK) [THE CODE ON COURT PROCEEDINGS IN CIVIL DISPUTES (CIVIL CONTENTIOUS PROCEDURE)], Zagreb, at 159.

Unlike state courts, the procedure and jurisdiction of arbitration tribunals may to an extremely high level be determined by the will of the parties – practically nothing stands in the way of their agreement on the resolution of dispositive disputes, except the limitations arising from the nature of affairs and the basic rules of procedural fairness (the right to a fair trial). Prorogation of jurisdiction as a result of an agreement on arbitration does not arise from the logic of changing the venue within the state justice apparatus, where parties' authority to effect the change is limited to narrow boundaries. An arbitration agreement is a logical extension of the parties' right to reach a settlement on the merits of the dispute – and if the parties may reach a settlement, then *a fortiori* they can authorize a third party to help them reach the acceptable agreement (in conciliation proceedings), or authorize the third party - in the absence of a settlement - to render a decision which will be binding for them (as result of arbitration proceedings).²⁷ For all these reasons, the extensive limitations of arbitrability by means of “exclusive jurisdiction doctrine” in former Croatian law, especially in domestic disputes, were not only practically unacceptable, but also theoretically untenable, since they imposed restrictions there, where in the new circumstances of the market economy and political democracy, founded on the rule of law, there were no convincing legal or political grounds.

III. Arbitrability according to the Law on Arbitration 2001

a) General

During the preparatory work on the Law on Arbitration, the draft provisions on arbitrability *ratione materiae* and *ratione personae* were altered several times. The common stance of all those taking part in the legislative debate was that the previous provisions were not appropriate and that they needed to be radically reformed. Various opinions were expressed, however, about the direction in which the changes should go. During the expert discussions, which included written comments and suggestions of a number of Croatian and foreign arbitration experts, these opinions gradually matured. Relatively early, a consensus was formed that the limitations that had been imposed previously should be removed as much as possible, especially in “arbitration without a foreign element” (arbitration between domestic parties). The discussion on the issue of exclusive jurisdiction lasted somewhat longer. The final text of the draft was altered right up to the final stage of the legislative procedure. The final text of Art. 3 of the Law on Arbitration therefore reads:

²⁷ On “an internal relation between the arbitration agreement and the settlement” see in Najman, *supra*, note 20, at 95.

Arbitrability

Article 3

- (1) Parties may agree on domestic arbitration for the settlement of disputes regarding rights of which they may freely dispose.
- (2) In disputes with an international element, parties may also agree on arbitration outside the territory of the Republic of Croatia, 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.
- (3) Parties may agree to submit the disputes referred to in paragraph 1 of this article to arbitration, regardless of whether or not the arbitration is administered by an arbitral institution.

The essence of the new definition of arbitrability *ratione materiae* in the first paragraph of Art. 3 is only and exclusively the dispositive nature of the dispute. The definition of a dispositive dispute as one “over rights with which they may freely dispose” is maintained from the previous legislation. Although there have been attempts to differentiate between rights “with which the parties may freely dispose” and “rights on which a settlement may be reached”, it seems that these two expressions for all practical purposes are actually synonymous. The first paragraph is therefore essentially a return to the system present in most countries of Central European legal circle, at the same time a return to provisions that existed in the old national rules of procedure in legislation prior to socialist times.

In the following text, we deal separately with changes in relation to international and national arbitration.

b) Changes with respect to arbitrability in international disputes

In terms of international arbitration, changes are relatively small and in part come down to fine points of wording. What certainly needs to be emphasised is that the objective definition of international arbitration was maintained. Thereby, the approach of the UNCITRAL Model Law On International Commercial Arbitration was not accepted, in respect to the possibility to “internationalise” the dispute by the will of the parties, regardless of their nationality and the status of the dispute in question. Accordingly, the only arbitration that is still considered to be international is an arbitration in which at least one of the parties has its permanent or temporary residence abroad (for natural persons) or disputes involving legal persons established under foreign law²⁸.

²⁸ In determining the nationality of legal persons, the new law abandoned previous reference to seat, and endorsed the approach from the Art. 17 CLA (“established under ... law”). The practical difference between these two methods of determining which country a legal person belongs to is however not too important.

The changes to the definition of arbitrability in international arbitration in the sense of the type of arbitration (arbitrability *ratione institutionis*) were not necessary, since the previous law also allowed the maximum amount of freedom. Therefore, for international arbitration it is, as before, possible to agree on any type of arbitration, whether institutional (administered) or *ad hoc*. The legal permission to agree on *ad hoc* arbitration is now explicit, contained in Art. 3(3) (“regardless of whether or not the arbitration is administered by an arbitral institution...”). However, in relation to international arbitration this was not ever disputed.

In relation to the issue of submitting disputes to foreign arbitration (arbitrability *ratione territorii*) the law now expressly permits agreement to arbitrate in a venue outside the territory of the Republic of Croatia, “unless it is provided by law that such a dispute may be subject only to the jurisdiction of a court in the Republic of Croatia”. This provision corresponds to a large extent to the previous regulation. Under CCP, it was also possible to agree on arbitration in international disputes “if for those disputes the exclusive jurisdiction of a court in the Republic of Croatia was not prescribed”. Due to the already presented problems with the concept of exclusive jurisdiction and its influence on arbitrability, the law here avoids mentioning the expression “exclusive jurisdiction”. In terms of content, this formulation covers those provisions on jurisdiction contained in other laws which indicate that the intention of the legislator was to resolve certain disputes only within the domestic justice system. As displayed by the parliamentary debate during the first reading of the draft Law on Arbitration, the political will was still strongly favouring norms that some disputes, although dispositive, should not be taken to “foreign” mechanisms of dispute resolution. To that extent, agreement to *foreign arbitration* (arbitration whose seat is outside the territory of the Republic of Croatia) – whether institutional or *ad hoc* – is not permitted in any disputes if the law provides that a dispute may only be heard by a court in the Republic of Croatia. This would mean in most cases that foreign arbitration is not permitted if “exclusive international jurisdiction” of a court of law in the Republic of Croatia is provided (although the intention of the new wording was to avoid mechanical interpretation of the “exclusive” notion, but to focus on the content of the individual provision – on the reservation of dispute resolution to domestic fora). For this reason, disputes over real estate, ownership and property rights to aircrafts and ships, disputes arising from relations with military units, and disputes that arise during enforcement or bankruptcy proceedings still could not be subject to arbitration seated outside the Republic of Croatia.

On the other hand, according to the new law even in these “excluded” disputes parties could validly agree on *domestic arbitration*²⁹ – arbitration in the territory of the Republic of Croatia, i.e. arbitration regulated by the LAC.³⁰ In other words, according to the provisions of Art. 3(1) of the Law on Arbitration, for arbitrations seated within the country, only the dispositive nature of the dispute is relevant – the “exclusive court jurisdiction doctrine” is no longer an obstacle to that kind of arbitration.

The new regime of arbitrability was thereby not only brought into line with European and global arbitration standards - it was also brought into a fully logical and natural state of affairs. An arbitration award rendered in the Republic of Croatia was never conceived as a foreign act in relation to domestic mechanisms of dispute resolution. An arbitration award rendered in domestic arbitrations as far as the parties are concerned, has as a rule the power of a final and binding court judgement. The legal order presumes validity of arbitral awards and gives them the effect of legally effective judgements passed by state courts.³¹ An arbitration award in domestic arbitration is *per se* an enforceable title and may be subject to enforcement without any separate recognition procedure.³² Moreover, an award in domestic arbitration is also subject to the control of the state courts of the Republic of Croatia by actions for setting aside. In two key – although very narrowly limited - aspects arbitral awards may also be controlled during the enforcement process - i.e. the court may check the issues of arbitrability and public order. For all these reasons, it may be said that domestic

²⁹ For the definition of “domestic” arbitration as arbitration whose venue is on the territory of the Republic of Croatia, *see* Art. 2(2)(1) LAC. *A contrario*, arbitration whose venue is outside the territory of the Republic of Croatia should be considered foreign. For definition of arbitration as foreign or domestic other circumstances are irrelevant – the nationality of the arbitrators, the language of the proceedings, and the law applied to the merits of the dispute. Since the reference to procedural law is omitted in the LAC, in theory it could even be possible to apply foreign procedural law in domestic arbitration. Domestic arbitration can be with or without international characteristics. Since the definition of arbitration as domestic or foreign is extremely important, the law prescribes that in the award the date and the place of rendering must be stated (Art. 30(4) LAC). The venue of arbitration is determined by the agreement of the parties. In the absence of such an agreement, it should be determined by the arbitrators, taking into account the circumstances of the dispute (Art. 19(1) and 19(2) LAC).

³⁰ In Art. 1, the scope of the application of the LAC is determined as: “1) domestic arbitration, 2) recognition and enforcement of arbitral awards, and 3) court jurisdiction and procedure regarding [domestic] arbitration and in other cases provided by this Law”.

³¹ *See* Art. 31 LAC (defining effects of domestic awards).

³² *See* Art. 39 LAC (dealing with the enforcement of domestic awards).

arbitration is fully integrated into the national legal system of resolving civil, commercial and other dispositive disputes.

Therefore, even if in respect to foreign arbitrations a slightly restrictive attitude remained, in domestic (national) arbitration doubts are now removed, since it was considered that there are sufficient opportunities for controlling domestic awards. Clearly, the present system in principle does not prevent legislators from regulating that some forms of dispositive disputes are only suitable for the state justice system. It is not impossible to ban by law, for certain disputes, any type of arbitration. However, if this would be considered necessary, an explicit legal basis would be necessary - a special law that would partly derogate general provision that for domestic arbitration only the dispositive nature of the dispute is relevant (*lex specialis derogat legi generali*). But, there are no such provisions in the Croatian legal system as yet, and we hope that there will never be, except in very necessary cases that we cannot presently foresee.

c) *Changes with respect to arbitrability in national disputes (disputes without international characteristics)*

The changes regarding arbitrability in arbitrations involving only Croatian parties are much more dramatic. The first change relates to *allowing ad hoc arbitration in domestic disputes*. Until LAC 2001, national arbitration was only permitted if conducted at a licensed arbitration institution (“arbitration court”) - i.e. as *institutional* or *administrated* arbitration. For this reason, in this part of Europe, *ad hoc* arbitration was practically unheard of – the few cases of *ad hoc* arbitration where Croatian parties were involved mainly took place abroad. The new law opens great opportunities in the area of *ad hoc* arbitration, but it also brings considerable dangers, for this is a form of arbitration where the free will of the parties and arbitrators shapes from scratch practically every – even the technical and administrative – aspect of the case. Despite possible wandering and errors which may occur in the early stages, it is to be expected that in the long term, after a period of adaptation, *ad hoc* arbitration, as the most flexible of all forms of arbitration, will find an important place in the spectre of arbitration services.

The other changes relate to the abolition of the monopoly on establishing arbitration institutions. Under former law, only arbitral institutions established within chambers of commerce were licensed to offer arbitration services (so in Croatia, since there is only one national chamber of commerce, arbitration could practically be conducted only at the PAC-CCC). For other institutions, they could provide arbitration services only if they were founded by special legislation. There were only a few of the latter, with hardly any cases. E.g. an arbitration court was established at the Croatian Olympic Committee, on the basis of the provisions of the Sports Act, but in practice it has never really begun to operate. On the other hand, some professional organizations, corporations and business

concerns, have for some time been expressing their desire to found specialized fora for arbitration in relations between their members, but due to the restrictive nature of the former law they were not permitted to do so. The very idea that arbitration institutions must be established on the basis of special legal authorization is the result of the earlier ideology pursuant to which arbitration courts were conceived as a kind of “self-management court”, i.e. as a kind of state para-judicial body. In a private market economy, in a political system organized on the basis of a strict differentiation between the public sphere and the civil society, arbitration courts certainly belong to the sphere of the civil society and should be attributed to the private sector.³³ In the private sector, monopolies are untenable – even if they are set up to support such a respectable, long-lasting and well-known organization as the PAC-CCC.

That is why the Law on Arbitration in Art. 3 omitted any individual reference to licensed arbitral organizations, except a general direction allowing arbitration both with and without their administrative support. In Art. 2, the “arbitral institution” is defined as “a legal entity or a part of a legal entity that organizes and administers the activities of arbitral tribunals.” From this definition, it may be inferred that arbitral institutions may be freely founded and organized, whether as separate organizations with legal personality, or as units within other legal persons. If an arbitration institution is organized as a legal person, it may take any of the legally permitted forms – e.g. as commercial or not-for-profit organizations. One should also expect the emerging of separate arbitration mechanisms within individual professional organizations, which in highly specialized areas could offer highly specialized arbitrators, rules adapted to the subject matter and other special services (literature, techniques, professional advice etc.).

In arbitration involving solely domestic parties the limitation of exclusive jurisdiction has also been abolished, in the same way and for the same reasons as in the case of international arbitration. However, in national arbitration the changes are more important, since previous law was generally construed in the sense that imposed even greater restrictions of “exclusive jurisdiction”, involving not only international, but also exclusive domestic jurisdiction *ratione territorii and ratione materiae*.

³³ Even more so since arbitral institutions do not have public authority – they only organize the environment for the unhindered work of the arbitrators in concrete disputes, offer the parties their rules, a list of arbitrators and tariffs of services. They also assist the parties and arbitrators in their communication with one another etc.

d) *Restrictions on arbitrability - what has not changed*

In the end, one important limitation needs to be mentioned which has still remained in the area of national arbitration (arbitration without international characteristics). In disputes between domestic legal entities, it is provided that the parties may validly agree only on *domestic arbitration* – i.e. arbitration which has its venue (seat) in the Republic of Croatia³⁴. In other words, in disputes where both parties are Croatian legal entities, it is not permitted to submit a dispute to neither institutional nor *ad hoc* arbitration in which place of arbitration would be abroad. Otherwise, the arbitral award rendered would be considered to be a foreign arbitral award, which if it were to have any effect in the Republic of Croatia, would be subject to the procedure of recognition. In the recognition procedure (whether it is conducted in the form of independent recognition proceedings, or whether a decision is made on recognition as a preliminary issue in enforcement proceedings) the court in these disputes would, *sua sponte*, have to refuse to recognize an award rendered due to the lack of arbitrability.³⁵ Clearly, this award as a foreign award would not be subject to setting aside in the Republic of Croatia (*inter alia* because for the Croatian legal order, it would not even legally exist – and what does not exist cannot be annulled). Enforcement of such award would perhaps not be impossible in some third country, but in Croatia such a foreign award rendered in a dispute without international element would be null and void.

This last remaining limitation was maintained after thorough debate as a kind of “incentive restriction”. The purpose of the Law on Arbitration was to encourage arbitration as a method for resolving commercial and other disputes which are burdening the system of national justice. Therefore, special importance was attributed to the development of an arbitration culture in Croatia, i.e. to the development and intensifying of *domestic arbitration*. So far, in many national and international projects devoted to international commercial arbitration, the focus was on liberalizing the regime of recognition and enforcement of *foreign* arbitral awards, which in many countries similar to Croatia led *de facto* to *export of arbitration, rather than its development*: many international disputes which could have been resolved more swiftly and less costly on the spot, were exported to some foreign arbitration forum. In some of these cases the foreign forum was agreed upon the initiative of the stronger contracting party; often, however, the choice of forum was merely the result of positive publicity for “well-known” foreign institutions, what evolved even to a form of fashion (“fancy” clauses

³⁴ Arg. from Art. 3(1) and 3(2).

³⁵ See Art. 40(2).

agreed without any serious examination whether it was appropriate for the case in question). The limitation *ratione territorii* on domestic arbitration in disputes without international characteristics should contribute at least in a few cases to the development of *an active arbitration culture* – and arbitration culture of a country providing and not a country receiving arbitration services.

The right to submit domestic disputes to foreign arbitration fora is not merely an academic issue. Under the definition of national arbitration fall disputes relating to legal persons established in Croatia, but controlled to a greater or lesser extent by foreign shareholders or owners. During the legislative debate, some of the representatives of foreign investors were arguing that at least in cases of companies in which foreigners have a significant or dominant economic share it should be possible to “internationalize” – to treat an otherwise national dispute as an international dispute. There were also suggestions that every limitation should be completely abandoned. Finally, the present text was accepted as an optimal solution. Complete freedom was rejected for the sake of promoting domestic arbitration (and especially because the Law on Arbitration does not apply only to commercial but also to all other dispositive disputes, where for educational and protective reasons it is still necessary to maintain a higher level of restrictions). On the other hand, special exceptions did not fit into the traditional domestic conception of “foreign”, nor did they satisfy the demands of legal certainty. The criterion of economic participation in ownership was considered to be very difficult if not impossible to define consistently (What percentage? At what time? The consequences of changes in the ownership structure?). The freedom to label a dispute as “international” was thought to go against the fundamental concept of categories of “domestic” and “foreign” as *objective* categories.³⁶ The “subjectivization” of the international character of a dispute seemed therefore to be equally acceptable as a declaration of corporations founded under Croatian law that they consider themselves “foreign” for the purposes of avoiding taxation.

In fact, it seems that there should be no substantive motive for exporting disputes between domestic subjects to foreign forums. Under Law on Arbitration, even if a dispute is between two joint stock companies in full ownership of foreign investors, all their possible practical needs for an international arbitration regime may be realized through arbitration in the Republic of Croatia. In other words,

³⁶ In any case, the freedom to agree on “internationality” may easily lead to absurd consequences: a dispute which objectively has several “international characteristics” could be considered to be national, unlike a dispute where there are no such characteristics, but the parties in the arbitration clause have determined that their dispute is to be considered a “dispute with international characteristics”.

both for national and international arbitration, the rules on arbitration are virtually the same, both in terms of the choice of arbitrators, and in terms of the choice of applicable law and language. Thus even in a formally national (“domestic”) dispute, if the parties so desire, a foreign citizen may be chosen as arbitrator; a foreign law chosen as the applicable law; the language of arbitration does not necessarily have to be Croatian; and many, if not all, actions taken in the proceedings may be undertaken abroad. An award rendered in this kind of domestic arbitration will moreover be simpler to enforce for parties in Croatia, for in contrast to a foreign award, it is considered to be effective and binding immediately upon its rendering. If this is not sufficient to satisfy the appetite of the foreign investors, there is still a possibility of providing special exceptions for investors from certain countries by means of bilateral international instruments. Croatia has already made abundant use of this possibility in many international treaties on promotion and protection of investments.³⁷

IV. Conclusion

The Law on Arbitration significantly extends the boundaries of arbitrability in several ways. It opens the doors to the development of arbitration, especially arbitration with a seat within the national territory. For those who today agree on such national (“domestic”) arbitration, it is only relevant whether a dispute is considered to be dispositive or not. If the answer to that is affirmative, i.e. if a settlement may be reached regarding the rights and obligations that are the subject matter of the dispute, arbitration will too be possible and permissible. From now on, both *ad hoc* and institutional arbitration may be selected, and the institution providing arbitration services may freely be chosen. The legal definition of arbitrability has been brought into line with other European national legislations and the recommendations of international organizations.³⁸

The practical importance of the changes in the Law on Arbitration cannot be precisely foreseen at the moment, but their potential is enormous. It is sufficient to note that parties may now agree on arbitration in complex business ventures,

³⁷ See K. Sajko, *Arbitražno rješavanje sporova na osnovi dvostranih konvencija o poticanju i uzajamnoj zaštiti ulaganja: izabrane teme [Solving Disputes by Arbitration On the Basis of Bilateral Conventions on Incentives for and Mutual Protection of Investment: Selected Topics]* 37 PRAVO U GOSPODARSTVU 1 (1998), at 49-65; also published in: 5 CROATIAN ARBITRATION YEARBOOK 1998, at 123-138.

³⁸ Regarding the recent European regulation of arbitrability, as well as the provisions of the Austrian, German and French laws already mentioned, the amended provisions of the Slovenian CCP of 1999 should be noted. Art. 460 contains a very similar definition of arbitrability to the one contained in Art. 3(3) LAC (including the “incentive limitation” in national disputes).

involving amongst other things transactions relating to real estate – land and buildings, their lease or rent etc. New opportunities are also open for arbitration in maritime affairs, for now arbitration may be conducted in Croatia on ownership, mortgages and other property rights to ships. Parties do not need to be concerned for the fate of their arbitration proceedings if bankruptcy proceedings are instituted against their business partner – now, if the trustee in bankruptcy does not recognize the disputed claim, arbitration can continue. Some shareholders disputes are now without any doubt arbitrable. If we add to all this the possibility of founding new, specialized arbitral centers, and the possibility to resolve by arbitration internal problems within closed systems (concerns, holdings), and the possibility to agree on *ad hoc* arbitration, shaped and conducted according to the individual needs of each concrete dispute, it is clear that the new act opens new horizons. Arbitration has been an important instrument in overcoming crisis in business and other relations so far; with the new law, arbitration becomes even more than that – it becomes a powerful weapon in the hands of parties, suitable for resolution of all kinds of dispositive disputes. Like any other weapon, it will certainly bring new challenges. The time has come for practice to learn how to use this weapon in an appropriate manner, and to find suitable responses to the challenges.

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