# CROATIA

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including

ANNEX I: Law on Arbitration

## Chapter 1. Introduction

### 1. LAW ON ARBITRATION

At the time 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 throughout the 1990's, more or less unchanged. However, the preparation of a comprehensive reform that lasted over five years started in the early 1990's, resulting in a major change both in provisions regulating arbitration and in the approach to out-of-court methods of dispute settlement.

Since 2001, Croatian arbitration law is contained in a single act – the Law on Arbitration (**Annex I)**. 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 28 September, and came into effect on 19 October 2001.[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 other socialist

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

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. The ambiguous relationship of legislators to suspect "private justice", reflected earlier in several areas of previous legislation, was removed 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 transparently deals with all issues of arbitration, the Law on Arbitration also departed from the earlier tradition of 1895 Austrian *Zivilprocessordnung*, that 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 influenced also by recent changes in national legislation of other countries, especially those that also attempted to implement the Model Law (in particular, Germany and, to a lesser extent, England). A few provisions from the old legislation have been retained as a part of the domestic tradition and legal culture (e.g., definition of national and international disputes, ruling out of judges as party-appointed arbitrators). In certain areas, the Law on Arbitration anticipated new developments in UNCITRAL aimed at clarifying and improving some model norms (e.g., the form of the arbitration agreement).[2]

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

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2. 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.

The scope of the Law on Arbitration does not, however, include other means of dispute settlement. In recent times, there has been increased interest in particular for commercial conciliation, as well as for possible court-annexed conciliation programmes. At the time of publishing this Report, the Parliament has adopted a new Law on Conciliation, but the text has not yet been published (see *infra* at VIII).

## 2. PRACTICE OF ARBITRATION

The tradition of arbitration in Croatia is long, although the practice was at certain stages in history suppressed or reduced. The use of arbitration was significant in the nineteenth century. In 1852, the Croatian Chamber of Commerce had an arbitration court that ruled primarily in smaller commercial and merchant disputes. In the first decades of the twentieth century, this court had several hundred new arbitration cases annually, primarily relating to disputes between chamber members.[3]

After World War II, the first years of the socialist regime brought a temporary discontinuation of arbitration practice. Following Soviet patterns, private dispute resolution mechanisms were abolished, and the name "arbitration" referred to a state tribunal for commercial disputes involving socialist enterprises.[4] However, this period didn't last as long as 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 started to fade in the 1960's. Soviet-type "arbitration" courts were transformed into commercial courts and courts of general jurisdiction. A mild economic liberalization introduced by the doctrine of Yugoslav self-management made not only arbitration with a "foreign element" possible, but also arbitration among domestic economic players (relatively autonomous "socially owned" state enterprises). Starting in the 1950's, 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, based on the parties' agreement. At certain times there were a significant number of arbitration cases involving Croatian parties – not only at the national

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3. See more in Dika, "Arbitral Settlement of Disputes According to the 1852 Provisional Civil Procedure Code", 5 *Croatian Arbitration Yearbook* (1998) pp. 187-206.
4. Glavna dr_avna arbitra_a 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 after 1953 (competent *inter alia* to enact trade usages). See Zuglia, "*Rješavanje imovinskih sporova putem dr_avne arbitra_e*" [Resolution of property disputes by State Arbitration Tribunal], *Zbornik Pravnog fakulteta u Zagrebu* (1948) pp. 293-331.

institution of international arbitration, but also under the auspices of foreign arbitral institutions, particularly the ICC Court of International Arbitration.[5]

5. 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 lodged which involved parties from ex-Yugoslavia.

On the other hand, practice of arbitration in the country was, until the 1990's, confined within 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, these were the courts of arbitration established at the chambers of economy of the Yugoslav republics.[6]

Today, the practice of arbitration is gradually evolving. Although the war in the early 1990's was not favourable for arbitration, a substantial number of cases originated even in the war years.[7] Since declaring independence from the former Yugoslav federation, practice of both domestic and international arbitration continued at the Permanent Arbitration Court at the Croatian Chamber of Commerce (PAC-CCC), that prior to 1991 only handled domestic cases. From the start of the war, arbitration clauses providing for arbitration at Belgrade's FTAC were considered null and void in Croatia.[8] Thus, the PAC-CCC became 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 also had a legal monopoly on domestic arbitration. Therefore, other arbitration institutions in Croatia

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6. Although *ad hoc* arbitration was allowed in international commercial cases (while prohibited in the national ones), the practice was almost entirely confined to institutional arbitration.
7. See, e.g., the statistical data of the PAC-CCC presented *infra*, Table 1.
8. Regarding the status of arbitral clauses indicating ex-Yugoslav arbitral institutions on "hostile territory" in Croatia and abroad *see* Bajons, "Der Einfluß der geänderten Staatsverhältnisse auf völkerrechtliche Übereinkommen und private Schiedsvereinbarungen", 1 *Croatian Arbitration Yearbook* (1994) pp. 145-155 and Uzelac, "Succession of Arbitral Institutions", 3 *Croatian Arbitration Yearbook* (1996) pp. 71-89.

did not exist, although the opportunity to establish arbitral institutions as entities of private law that was opened by the Law on Arbitration brought about increased interest in establishing new dispute resolution facilities. Also the first cases of *ad hoc* arbitration[9] started to occur.

However, to assess arbitration practice in Croatia, PAC-CCC statistics may still be most relevant. Table 1 shows the data for the arbitration cases of the PAC-CCC in the 1992-2002 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. According to a student study that compared commercial jurisdiction of the state courts with arbitration, in 2001 the PAC-CCC had only 0.6% of the caseload of the largest commercial court in the country (the Commercial Court in Zagreb), but at the same time the aggregate value of its cases was about 25% (i.e., one quarter) of the annual aggregate value of the same court. 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 twenty-seven countries, with prevailing participation of the Croatian principal trade partners (Italy, Germany, Austria and the post-Yugoslav countries and territories).

Table 1: Arbitration cases of the PAC-CCC

| Year | Domestic | International | Total | Value (EUR) |
|---|---|---|---|---|
| 1992 | 8 | 7 | 15 | 2,689,702.79 |
| 1993 | 14 | 12 | 26 | 3,843,743.18 |
| 1994 | 21 | 13 | 34 | 11,212,410.24 |
| 1995 | 8 | 10 | 18 | 4,716,793.49 |
| 1996 | 15 | 12 | 27 | 10,136,277.53 |
| 1997 | 14 | 16 | 30 | 27,520,079.46 |
| 1998 | 21 | 8 | 29 | 8,778,343.67 |
| 1999 | 22 | 14 | 36 | 5,326,762.65 |
| 2000 | 9 | 25 | 34 | 54,643,576.96 |
| 2001 | 36 | 10 | 46 | 298,234,873.34 |
| 2002 | 16 | 21 | 37 | 135,779,101.43 |

9. *Ad hoc* arbitration became legally fully permissible – especially in domestic cases – only since the coming into force of the Law on Arbitration. See also footnote 6 *supra.*

| Total | 184 | 148 | 332 | 560,191,961.95 |
|---|---|---|---|---|

The contact data of the PAC-CCC are the following:

Permanent Arbitration Court
Croatian Chamber of Commerce
(*Stalno izbrano sudište pri Hrvatskoj gospodarskoj komori*)
Rooseveltov trg 2
HR-10 000 Zagreb
Tel.: +385 1 4606 777
Fax.: +385 1 4606 752
E-mail: sudiste@hgk.hr
Web-site: http://www.hgk.hr/komora/sud

The latest revision of the arbitration rules of the PAC-CCC came into force on 25 December 2002. This version of the rules, also known as the Zagreb Rules, replaced previous double standards by enacting a single set of rules for both domestic and international arbitration. Generally, the Zagreb Rules would have to be available in Croatian, English, German, Italian and French (currently, only older sets are available, new translations are pending).

## 3. BIBLIOGRAPHY

The bibliography consists mainly of publications dating before the new Croatian Arbitration Law.[10] The commentary of the new Law is about to be published, but reference is also made to several articles dealing with the Law. In addition, the following publications may be consulted for legal reference.

### *Books*

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*Arbitra_no rješavanje me_unarodnih trgova_kih sporova* [Arbitral Settlement of International Commercial Disputes] Zagreb, 1989 (in Croatian)

Goldštajn/Triva
*Me_unarodna trgova_ka arbitra_a* [International Commercial Arbitration] Zagreb, 1987 (in Croatian)

10. For a more comprehensive bibliography of relevant writings (prior to 1995) *see* “Arbitration Bibliography – Croatian Authors on Arbitration” in 2 *Croatian Arbitration Yearbook* (1995) p. 217.

Sikiri_, H.
*Schiedsgerichtsbarkeit in Kroatien* [Arbitration in Croatia] Heidelberg, 2001 (in German)

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*Review of Arbitration in Central and Eastern Europe: Arbitration in Hungary and Croatia*, Vol.1 (2000) supplement to *Croatian Arbitration Yearbook* (in English)

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"Arbitrability and Exclusive Jurisdiction of Courts of Law", 6 *Croatian Arbitration Yearbook* (1999) pp. 27-46

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"Arbitration and State Courts", 2 *Croatian Arbitration Yearbook* (1995) pp. 147-162

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Sajko, K.
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"Arbitration Agreement and Arbitrability: Solutions and Open Issues in Croatian and Comparative Law", 3 *Croatian Arbitration Yearbook* (1996) pp. 43-56

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"Arbitration in Equity – *ex aequo et bono*", 2 *Croatian Arbitration Yearbook* (1995) pp. 125-145

Triva, S.
"Croatian Law on Arbitration", 9 *Croatian Arbitration Yearbook* (2002) pp. 107-138

"Recognition and Enforcement of Domestic Arbitral Awards", 8 *Croatian Arbitration Yearbook* (2001) pp. 67-82

"Constitutional Complaint as Means of Setting Aside Arbitral Award", 7 *Croatian Arbitration Yearbook* (2000) pp. 107-138

"Final Proposal of the New Croatian Arbitration Law (Draft Three)", 5 *Croatian Arbitration Yearbook* (1998) pp. 9-18

"Report on the Achievements of the Working Group for the Reform of the Croatian Arbitration Law", 4 *Croatian Arbitration Yearbook* (1997) pp. 193-204
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"New Facts and Evidence as Grounds for Setting Aside Arbitral Awards", 3 *Croatian Arbitration Yearbook*, 1996, pp. 29-42

"Adoption of the UNCITRAL Model-Law into Croatian Arbitration Law", 2 *Croatian Arbitration Yearbook* (1995) pp. 7-26

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"Current Developments in the Field of Arbitration in Croatia", 19 Journal of International Arbitration (2002, no. 1) pp. 73-79

"New Boundaries of Arbitrability Under the Croatian Law on Arbitration", 9 *Croatian Arbitration Yearbook* (2002) pp. 139-160

"The Form of Arbitration Agreement and the Fiction of Written Orality: How Far Should We Go?", 8 *Croatian Arbitration Yearbook* (2001) pp. 83-108

"Setting Aside Arbitral Awards in Theory and Practice", 6 *Croatian Arbitration Yearbook* (1999) pp. 55-74

"International Arbitration in Croatia 1991-1998: A Log of the Activities of the Permanent Arbitration Court at the Croatian Chamber of Commerce", 5 *Croatian Arbitration Yearbook* (1998) pp. 111-120

"Succession of Arbitral Institutions", 3 *Croatian Arbitration Yearbook* (1996) pp. 71-89

Vi_i_, A.
"Attorneys and Arbitration in Croatia", 2 *Croatian Arbitration Yearbook (*1995) pp. 195-203

*Journals dealing specifically with arbitration*

*Croatian Arbitration Yearbook,* published annually since 1994, is the major publication on arbitration in Croatia. It is published by the Permanent Arbitration Court at the Croatian Chamber of Commerce. It contains articles on international arbitration in and outside Croatia, arbitral jurisprudence and other documents (English texts of relevant rules and

statutes, bibliography etc.). It is published predominantly in English (summaries in Croatian, occasionally in other foreign languages).

*Other journals*

Other periodicals with some content relevant for arbitration include *Pravo u gospodarstvu* [The Law in Economy], published by the Croatian Association of Business Lawyers; *Pravo i porezi* [The Law and Taxes], published by RRiF, *Odvjetnik* [The Lawyer], published by the Croatian Bar Association; *Zbornik Pravnog Fakulteta u Zagrebu* [Collected Papers of the Zagreb Faculty of Law]. All of these journals contain papers predominantly in Croatian.

## Chapter II. Arbitration Agreement

### 1. FORM AND CONTENTS OF THE AGREEMENT

*a.* Croatian law recognizes equally a submission (agreement to submit an already existing dispute to arbitration) and an arbitration clause (agreement 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 followed in the earlier law.

*b.* 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".

For an arbitration contract to be validly concluded, a written form is generally needed. However, as in the UNCITRAL Model Law, 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.[11]

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 is 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 the trade usages.

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)).

On the other hand, the formal requirements are much stricter for arbitration agreements in consumer contracts. For such contracts, the arbitration agreement must be contained 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 cured 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 he raises issues relating to the substance of the dispute.

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11. 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 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.

In addition to the 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 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)).[12]

*c.* An arbitration clause that is 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.

## 2. PARTIES TO THE AGREEMENT

*a.* The capacity of a physical or legal person to resort to arbitration is governed by the law applicable to them. If Croatian law is applicable, such 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).

12. See more in Sikiri_, "Ugovor o arbitra_i" [Arbitration Agreement], 41 *Pravo u gospodarstvu* (2002) pp. 35-57 (in Croatian).

*b.* Although the doctrine has long recognized the capacity of the state and state agencies to resort to arbitration,[13] 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. In recent times, there were in fact several large disputes that gained public attention in which one party was a state agency for privatization (Croatian Privatization Fund). Such cases were domestic cases, but *a fortiori* there is no doubt that the state and the state-owned entities would be capable and willing to arbitrate in international cases as well.

*c.* There are no specific rules for multi-party arbitration in Croatian law. Generally, in a multi-party situation a valid arbitration agreement with regard to every party is necessary. The Zagreb Rules (2002) only provide that multiple claimants and/or multiple respondents have to 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 were discussed on some occasions, so far no specific appointment rules exist in this respect.

## 3. DOMAIN OF ARBITRATION

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13. 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.

*a.* The boundaries of arbitrability *ratione materiae* have gradually expanded in the last several decades, with a final decisive extension by the Law on Arbitration in 2001.[14] 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 submitted to arbitration, but with a number of opaque limitations, contained in another additional condition. If exclusive jurisdiction of Croatian courts was provided for, the subject-matter was not capable of arbitration.[15] The rules on exclusive jurisdiction in fact 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.[16]

14. 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.
15. See Arts. 469 and 469a of the Code of Civil Procedure (now abrogated).
16. 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.

After 2001, the rules on arbitrability were restructured. The previous approach that distinguished arbitrability in domestic and international cases was replaced by a distinction between arbitration that is taking place inside Croatia ("domestic arbitration" under its definition in Art. 2(1) point 2 of the Law on Arbitration), and arbitrations that are regarded as foreign in Croatia. For arbitration on the territory of Croatia virtually no subject-matter limits, except the dispositive nature of the dispute, are provided. Therefore, every dispute that would be capable of settlement, including those on *patents* and *trademarks*, could be arbitrated in Croatia. On the other hand, "exporting" a dispute to arbitration abroad (permissible only for international disputes) may 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 in a more flexible way than a previous one, can still be interpreted as referring to the above limitations of exclusive jurisdiction. For example, whereas it should now be accepted that a dispute in a case of bankruptcy of one of the parties could be submitted to arbitration in Croatia, it is unlikely that such a case would be capable of being submitted to arbitration with a seat in a foreign country.[17] 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., 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).[18] However, since that time, this has never been used in 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.[19]

*b.* Under Art. 27(4) of the Law on Arbitration, arbitrators have to "decide in accordance with the terms of the contract and shall take into account the applicable usages". This obligation, it is submitted, includes the right to interpret the parties' contract and, where needed, *fill in gaps* or resolve uncertainties by appropriate interpretation. However, since arbitrators may not decide *ex aequo et bono* unless expressly authorized, they should neither change nor amend the terms of the contract (e.g., the terms of a long-term construction contract) without an express authorization. The Law

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17. This limitation does not, however, exclude possibility of resorting to arbitration in such cases by an arbitral tribunal composed of foreign nationals, with foreign substantive law being applicable, as long as the place of arbitration is in the territory of Croatia.
18. See Dika, "Arbitration in Bankruptcy? New Window of Opportunities in Croatian Law", 4 *Croatian Arbitration Yearbook* (1997) pp. 27-38.
19. See more in _ulinovi_-Herc, "Arbitrability of Unfair Competition Disputes", 3 *Croatian Arbitration Yearbook* (1996) pp. 57-70.

on Obligations (LO) permits a third party to be empowered to fill in gaps in a contract or interpret it. This should also apply to arbitrators.[20] Authorization to fill in the gaps could also be given implicitly and its scope largely depends on the circumstances of the case.

*c.* If Croatian substantive law is applicable, arbitrators are allowed to *adapt a contract* to fundamentally changed circumstances according to the doctrine of *clausula rebus sic stantibus.* If, after conclusion of a contract, the circumstances unexpectedly change to the extent that the contract no longer corresponds with the legitimate expectations of the parties and it would be inequitable to maintain it as it is, an arbitrator could terminate the contract 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 arbitral tribunal.[21] As a rule, arbitrators do not need specific authorization to make use of these provisions.

20. See Arts. 50 and 102 LO (Off. Gaz. SFRY 29/78, 39/85, 46/85, 57/89 and Off. Gaz. 53/91, 73/91, 3/94, 7/96, 112/99 and 88/01).
21. See Art. 133 CO.

4. SEPARABILITY OF THE ARBITRATION CLAUSE

The doctrine of separability of the arbitration clause from the rest of the main contract is well-settled in Croatian law. In the Law on Arbitration, the separability is provided in Art. 15(1) second sentence – "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 provides that a decision to render the contract null and void shall not entail *ipso jure* the validity of the arbitration clause. Thus, no essential differences with respect to the separability of the arbitration clause exist between the allegations that the main contract is non-existent and the objections to its invalidity.

In any case, such objections to the jurisdiction of the arbitral tribunal shall be raised no later than the submission of a statement of defence. A plea that the arbitral tribunal is exceeding the scope of its authority should be raised as soon as the matter alleged to be beyond the scope of its authority is raised in the arbitral proceedings (Art. 15(2)).

5. EFFECT OF THE AGREEMENT

If an action is submitted to the court in Croatia and the respondent invokes the 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 (Art. 42(1)).

An objection to jurisdiction has to be raised prior to engaging in 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 defence. After this moment, the respondent is deemed to have tacitly consented to the court's jurisdiction (*prorogatio tacita*) (Art. 42(2)).

For the sake of speed and avoiding undue delays, submission of an action in a court of law does not preclude the possibility of an arbitration in the same case. Pending decision on jurisdictional objections in the court proceedings, arbitrators may continue the arbitral proceedings and make their award (Art. 42(3)).

If an objection to jurisdiction is raised in arbitral proceedings and the arbitrators have ruled that the arbitral tribunal is competent to hear the case, it is also possible to request a final decision on this issue by the competent court within thirty days (Art. 15(3)). Such court proceedings would have to be urgent. Nevertheless, the request for such a specific

court ruling on jurisdiction does not prevent arbitrators from continuing arbitration and making any award (see *infra* Chap. V.4).

## Chapter III. Arbitrators

### 1. QUALIFICATIONS

Croatian law does not require arbitrators to have any particular qualifications. Generally, every adult of sane mind may become an arbitrator. No specific legal qualifications are requested for arbitrators as far as training, experience, admittance to the bar or other qualification is concerned. The same approach is also maintained by the arbitral institutions. However, in practice the vast majority of arbitrations are conducted by persons with a high level of legal expertise and knowledge.

Aside from legal knowledge, there is also the issue of nationality and/or residence of arbitrators. Until 2001, there were no specific rules. The Law on Arbitration has now provided 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" (Art. 10(1)). 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 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).

The only legal exception to persons who cannot be appointed relates to the 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 (Art. 10(2)).

All the preceding rules on general qualifications for arbitrators apply in so far 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 specific abilities necessary to deal with the case with appropriate speed. The Law on Arbitration provides that arbitrators have a duty to conduct arbitration with due expeditiousness and undertake measures on time in order to avoid any delay of proceedings (Art. 11(2)). If any of these proves not to be the case, parties may discharge the arbitrator by their consent. This can also be a ground for challenge of an arbitrator.

The most essential feature regarding personal qualities of arbitrators is their impartiality and independence. Both qualities are regarded as a

fundamental feature of the due process in arbitration[22] and therefore even the parties themselves cannot agree in advance on the appointment of biased arbitrators. Every person approached in connection to appointment as an arbitrator is under an obligation to disclose facts which may raise doubts about his or her impartiality and/or independence (Art. 12(1)). This obligation does not cease with the appointment so if any new circumstances arise later, the arbitrator must disclose them to the parties as soon as possible.

The approach of the Law on Arbitration is also reflected in the arbitration rules. The Zagreb Rules 2002, unlike previous sets of rules, rely on the provisions of the Law on Arbitration so heavily that they do not provide any more rules on the qualities of arbitrators, apart from the provision on the non-exclusive character of its panels of arbitrators.

### 2. CHALLENGE OF ARBITRATORS

A request to challenge an arbitrator can be made on three grounds related to 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.

The challenge procedure may be agreed by the parties. The default rule is, however, that the challenge shall be decided by the arbitral tribunal itself, including the challenged arbitrator (Art. 12(6)). Naturally, a decision on challenge will not be necessary if the arbitrator withdraws from office. If the parties have not provided any other time-limit, the challenge procedure has to be initiated by a written request with the grounds for challenge within fifteen days after becoming aware of such grounds.

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.

If such 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)(Art. 43(2)). Although the rule on quasi-appellate decision-making on challenge was inspired by the UNCITRAL Model Law, Art. 13(3)), there is a subtle difference, since

22. See the obligation to treat the parties equally found in Art. 17.

under the UNCITRAL provision the "court or other authority specified in Art. 6" cannot be determined by the parties, while the "appointing authority" from Art. 43(3) enables the parties to specify "that some or all of the assisting activities are to be performed by an arbitral institution or some other appointing authority". Although it may be disputable whether the final decision on challenge is an "assisting activity", in practice, the President of the High Commercial Court has already decided that he has 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 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 is not biased 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 appointing authority (Art. 10 Zagreb Rules 2002).

### 3. 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 provides for the appointment of three arbitrators (Art. 9). 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. 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 (see Art. 6 Zagreb Rules 2002).

### 4. APPOINTMENT OF ARBITRATORS

The parties are free to determine the procedure for appointing arbitrators (Art. 10(3)). In practice this is most often by reference to rules of arbitral institutions. However, the Law on Arbitration provides a system of appointing arbitrators if parties made no, either direct or indirect, agreement in this respect.

#### *a. Appointment according to the Law on Arbitration*

Under the default rule of Art. 10 of the Law on Arbitration, if three arbitrators are to be appointed (which is generally the case unless parties have provided otherwise), each party appoints one arbitrator. These two then appoint the third arbitrator. If a party fails to appoint an arbitrator within thirty days from receipt of a request, or if two arbitrators fail to appoint the third one within thirty days from the last appointment of party-appointed arbitrators, an interested party may request appointment from the appointing authority determined in Art. 43.[23]

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) the appointment has to be made jointly by both parties. However, if the parties fail to reach agreement, each of them may request the appointing authority to make the appointment.

*b. Appointment according to the Arbitration Rules of the PAC-CCC*

If the parties have selected the Zagreb Rules 2002, a very similar procedure to the one described above would generally have to be followed. The appointing authority under these arbitration rules is the President of the PAC-CCC.

For appointment of three arbitrators, the Zagreb Rules 2002 once again fully rely on the provisions of the Law on Arbitration.

If a sole arbitrator is to be appointed, the parties have to 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 defence by the respondent (or its failure to do so). After this time limit has passed, the appointing authority will make the appointment (Art. 7 Zagreb Rules 2002).

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 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 in its own discretion.

*c. Mandatory rules (rules the parties cannot deviate from)*

In the process of appointment, the appointing authority (court or other authority designated by the parties) shall have due regard to any qualifications required of the arbitrator by the parties' agreement and to

23. See preceding comments on the appointing authority, *supra* Chap. III. 2.

such considerations as are likely to secure the appointment of an independent and impartial arbitrator. In an international dispute, in the case of a sole or presiding arbitrator, the appointing authority shall also take into account the advisability of appointing an arbitrator of a nationality other than those of the parties (Art. 10(6)). The decision on the appointment of an arbitrator is not subject to any appeal.

### 5. LIABILITY OF ARBITRATORS

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 requested to accept his appointment in writing (and, thus, his rights and duties as an arbitrator *vis-ŕ-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, 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. However, 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.

## Chapter IV. Arbitral Procedure

### 1. PLACE OF ARBITRATION

Under Art. 19 of the Law on Arbitration, the principle of party autonomy is applicable to the selection of the place of arbitration as well. Parties may freely determine the place of arbitration by their agreement. This place may be either inside or outside Croatia. However, if the parties determine a place of arbitration abroad, the Law on Arbitration will not be applicable 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 to be foreign or domestic (Art. 1(1) in connection with Art. 2(1) point 2).[24] Therefore the

24. 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

place of arbitration is the sole criterion designating the nature of an arbitral award. If the parties have selected a place of arbitration in Croatia, their award is domestic, if not, it is considered to be a foreign award.

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attributed to the domestic legal order.

Because of the weight and consequences of the selection of the place of arbitration, it is highly unlikely that parties will fail to determine it, either directly or by reference to some arbitration rules.[25] However, for such unlikely cases the law provides that "… the place of arbitration will be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience for the parties" (Art. 19(2)). If arbitrators have failed to expressly provide such a determination during arbitral proceedings, it is presumed that the place 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 place 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 in its enforcement.

The place 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 (Art. 19(4)).[26]

## 2. ARBITRAL PROCEEDINGS IN GENERAL

The rules of the arbitral proceedings may be freely chosen by the parties to the proceedings. The parties may use this power 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).[27] The freedom to determine the rules of procedure is only limited by the mandatory rules of the Law on Arbitration, but there are very few such rules. The most important limitation is contained in the general provision of

25. 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.
26. For additional aspects see Sikiri_, "Selection of the Place of Arbitration", 3 *Croatian Arbitration Yearbook* (1996) pp. 7-27.
27. See Art. 18(1) of the Law on Arbitration.

Art. 17 dealing with equal treatment of parties. Other limitations could be derived from the list of reasons for setting aside (e.g., the obligation to respect public policy). The rules agreed by the parties must not lead to inclusion of parties or issues that are not covered by the arbitration agreement.

If the parties fail to determine arbitration rules or if some procedural details were not addressed by such rules, the rules of arbitration proceedings may be set by arbitrators. The arbitral tribunal may "conduct the arbitration in such manner as it considers appropriate". 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 any other appropriate manner. The limitations of the right of arbitrators to determine the ways arbitration proceedings are conducted are generally the same as those regarding the parties (see above), with some exceptions that arise from separate rules on commencement and language of the proceedings and oral hearings (see *infra*).

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 distinguish 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 practice that emulates court proceedings).[28] 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 arbitrator and invitation to appoint the other arbitrator or proposal regarding 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 in 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 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).

The Law on Arbitration also provides rules on the selection of languages of the arbitral proceedings. The parties may determine the language or languages of the proceedings. If the parties have failed to do so, this issue may be resolved by the arbitrators. In both cases, until the language is determined, submissions may be exchanged either in the language of the

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

main contract, in the language of the arbitration agreement or in the Croatian language. The Croatian language will also be the default language if both parties and arbitrators fail to reach agreement on the language of the proceedings (Art. 21).

In most cases, the arbitration proceedings will involve holding one or more oral hearings. The parties may, however, agree otherwise, and the arbitrators may also decide whether oral hearings for the presentation of evidence or for oral arguments shall be held, or whether the proceedings shall be conducted solely on the basis of documents. However, unless the parties agreed that no hearings shall be held, arbitrators have a duty to hold a hearing if any of the parties so request (Art. 23).

In practice, arbitrators mostly hold oral hearings, and there is often an inclination to hold too many hearings (as is the practice of state courts) rather than to decide without hearing the parties in person. The Zagreb Rules 2002 rely on the provisions of the Law on Arbitration, supplementing them only by technical details on time limits for submitting evidentiary and other motions (generally fifteen days prior to the date of the hearing), and the rule on confidentiality of oral hearings (unless the parties have agreed that hearings will be held in public).[29]

## 3. EVIDENCE

Croatian law expressly includes the authority to decide on the admissibility, relevance and weight of any evidence in the power to determine the rules of procedure (Art. 18(2)). The Croatian legal tradition has embraced the doctrine of free evaluation of evidence. Therefore Croatian arbitrators would not generally be bound by the rules of evidence (there are very few such rules in the Croatian courts so far).

The arbitrators may determine the way in which witnesses are heard in the proceedings. The Law on Arbitration provides that witnesses should generally be heard at the oral hearing. However, with the consent of the witnesses, they may also be examined outside oral hearings. 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 within the discretion of arbitrators to decide this after consulting the parties and taking into account other relevant circumstances (procedural background of arbitrators, legitimate expectations of the parties, applicable law, etc.).

The arbitral tribunal can also request from witnesses “to answer questions in writing within a certain period of time”. Thereby, the use of depositions – written witness statements – would also be permissible.

29. See Art. 25 of the Zagreb Rules 2002.

Otherwise, witness statements are not as a rule used in proceedings before Croatian courts.

However, 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 assistance by the court, However, in Croatian legal practice swearing 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 court[30] would call the witness and take his statements on 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.

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 exchanging of written pleadings. Every document that is relevant to the case has to be communicated 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.[31] The Arbitration Rules also provide that arbitrators may set time limits within which parties have to deliver to the tribunal and to the other party a summary of the documents and other evidence that they intend to present in support of the facts in issue as set out in the statement of claim or statement of defence. During the proceedings, arbitrators may also set deadlines for the production of documents and other evidence (Art. 22(2) and (3) Zagreb Rules 2002).

## 4. EXPERTS

30. 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 has to be undertaken.
31. See Art. 21(1) and Art. 22(3) and (4).

In Croatian legal practice it is customary to use neutral experts appointed by the body entrusted to adjudicate the case. Therefore, the law provides that the arbitral tribunal may appoint one or more experts to report on specific issues determined by the arbitrators (Art. 26(1)). The tribunal is legally not required to consult the parties beforehand, although, as a matter of good practice, it is prudent to do so. The parties are entitled to present their own expert witnesses as well (Art. 26(2)).[32] Parties may agree otherwise concerning both Art. 26(1) and (2). In any case, the principle of equal treatment requires that the parties have the opportunity to read and comment on an expert's opinion. The law expressly provides that they may request an oral hearing where they will be able to discuss all relevant issues with the expert, the other party and the arbitrators.

Experts are supposed to be independent and impartial, so the rules on the challenge of arbitrators as appropriate apply to the challenge of experts (Art. 26(3)). This is at least true for experts appointed by the tribunal, whereas party-appointed experts may be heard as witnesses in the proceedings, even though they may not be fully independent of the party which appointed them (and paid for their opinion).

## 5. INTERIM MEASURES OF PROTECTION

32. This conclusion is derived from Art. 26(2) of the Law on Arbitration which provides that an expert witness appointed by the tribunal shall, at the request of either party, participate at the hearing where the parties shall have opportunity, *inter alia,* to "present [party appointed] expert witnesses in order to testify on the points at issue".

One of the new features of the Law on Arbitration 2001 is a positive attitude towards the ability of arbitrators to decide on interim measures of protection.[33] 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". The issuing of an interim measure may be conditioned by an appropriate security provided either by the party who requested the measure, or by the party wishing to avoid such a measure.

It is generally expected that the party ordered to undertake a measure of protection will do so voluntarily (e.g., preserve perishable goods in a certain manner, or sell them and deposit the proceeds in a specific account). However, if a party fails to do so, the opposite party may request enforcement of the measure issued by the arbitral tribunal by a competent court. The law does not make any formal requirements regarding interim measures. It is therefore not necessary to issue them in the form of an interim award – a simple order of the arbitral tribunal suffices. The competence and proceedings of the court requested to enforce the measure will be determined according to the general rules of the Enforcement Code, i.e., the court approached in connection with the preliminary measure shall act under the same rules as if it had to enforce its own measure of protection.

In any case, the right of the arbitrators to order interim measures does not preclude the parties from requesting a provisional measure to be ordered by the court. As provided by Art. 44, "…. It is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure for protection of a claim and for a court to grant such a measure." The provisions of the Law on Enforcement on the jurisdiction for ordering and enforcement of provisional measures remain unaffected (Art. 43(6)). The Law on Arbitration has not changed the previous way of requesting a provisional remedy from a national court. Therefore, during proceedings, the parties may now choose whether they will request a preliminary measure by the arbitrators (who are best informed about the case), or whether they will request the same

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

measure before the competent court of law (what may still be the only solution prior to the appointment of the members of the arbitral tribunal).

The wording 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, requests for bank guarantees or attachment orders.

There are also no rules for the proceedings in which requests for preliminary measures will be decided. State courts are often requested to make *ex parte* decisions on interim measures. Is is submitted that this would also usually be the expectation of the Croatian parties in the arbitral proceedings, since the surprise effect is considered one of the substantive conditions for the efficiency of the ordered measure, especially against such respondents that are known to use all available means to block the proceedings or evade enforcement.

However, the Zagreb Rules provide that interim measures shall normally be ordered after hearing the other party, except if the applicant demonstrates that *ex parte* issuance is necessary to ensure that the measure is effective. In such cases, the applicant should disclose all the relevant circumstances and submit a statement that he will cover any damage caused by the lack of proper disclosure (Art. 26(1) Zagreb Rules 2002).

## 6. REPRESENTATION AND LEGAL ASSISTANCE

There are no mandatory rules with respect to the right of parties to appear in the arbitration proceedings without a representative, or regarding the choice of a representative, neither in the Croatian arbitration law, nor in the arbitration rules of Croatian arbitral institutions. Naturally, if a party is otherwise unable to participate in business and other transactions without a legal representative (e.g., minors), it has to be duly represented in the proceedings. Lack of proper representation may be a ground for setting aside (see Art. 36(2) point 1.b *in fine*). The representatives in the proceedings should also be able to conclude transactions, or have to be represented by a proxy.

On the contrary, the Zagreb Rules 2002 provide that the parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other

party; such communication must specify whether the appointment is being made for purposes of representation or assistance.[34]

Another explicit legal rule is contained in the Law on Attorneys,[35] providing that foreign attorneys may represent the parties in the international arbitration cases.[36] There is, however, no restriction for other types of representatives and parties to arbitration proceedings are often represented by their in-house counsels or other experts. Often, especially if a party decides not to engage a lawyer, the representatives of legal entities are not lawyers.

Although there are generally no restrictions regarding those who can represent parties in the proceedings, a valid power of attorney is regularly needed to prove the authorization and capacity of the representative. Arbitration rules do not contain any rules on the form and substance of the power of attorney, and according to usual practice, a simple (uncertified) written form is sufficient.

## 7. DEFAULT

Under Art. 25 of the Law on Arbitration, the failure of a duly notified party to appear before the arbitral tribunal or undertake certain action does not prevent arbitrators from continuing the proceedings. In such situations, which increasingly often occur in practice, it is within the discretion of the arbitrators to assess whether there was a sufficient cause for the default. If not, failure to communicate the statement of defence, or the failure to appear at a hearing, or failure to produce documentary evidence will not prevent arbitrators from making the award. In no case will failure to appear be treated as an admission. Rather, the arbitrators can in such cases make an award on the basis of available evidence. Rules on default are also of a dispositive nature – the parties could agree otherwise. In practice, parties usually rely upon the standard solutions of the law, and

34. Art. 5 Zagreb Rules 2002 (this rule, also contained in the earlier versions of the Zagreb Rules, was adopted from Art. 4 of the UNCITRAL Arbitration Rules.
35. See *Zakon o odvjetništvu* [Law on Attorneys], Off. Gaz. 9/94, Art. 47.
36. See Porobija, "Foreign Attorneys as Party Representatives in Arbitration Proceedings", 2 *Croatian Arbitration Yearbook* (1995) pp. 185-194.

the arbitration rules generally treat the default in the same way, also providing some other means to prevent delays in the proceedings.[37]

37. Concerning default of the parties, the Zagreb Rules 2002 do not contain any rules that would deviate from the Law on Arbitration. In addition, they authorize arbitrators to use their discretion and decide, taking into account all the circumstance, whether they will take into account the procedural actions of the parties undertaken after expiry of the time limits (Art. 18).

# Chapter V. Arbitral Award

## 1. TYPES OF AWARD

The Law provides that, unless 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, leaving the rest for the final award.

Yet, it should be emphasized that the term "award" (in Croatian: *pravorijek*) is legally defined as a "decision on the merits of the dispute"(Art. 2(1) point 8)). Decisions on procedural issues can regularly be made in the form of procedural orders (*zaklju_ak*). Therefore, as already mentioned, decisions on preliminary measures would regularly not require an award (see *supra* Chap. IV.5).[38] The same would be the case with decisions on applicable law or jurisdiction of the arbitrators – such decisions are viewed to be merely of a temporary, procedural nature, and generally do not need any enforcement (nor would it be possible to submit them to a setting aside procedure).[39]

The "interim awards" (*me_upravorijek*) mentioned in Art. 30 do not relate to interim measures, but to substantive decisions regarding the basis of a monetary claim (e.g., a decision on responsibility for damages, whereas the amount of damages would be left for the final award). Unlike partial awards, which finally decide one or more of several claims in the dispute (but not all of them), or a part of one (divisible) claim, such interim awards are not independent awards. That is, unlike partial awards, they are not capable of direct enforcement, but only when a final decision on a claim (both on the basis of a claim and on its amount) is made. In this sense, a partial award can also be regarded as a "final award" under the legal

38. E.g., Art. 26(2) of the Zagreb Rules 2002 provides for issuing of preliminary measures by means of procedural orders.
39. Yet, since this may also be regarded as an issue of terminology and translation, if the parties would need for some particular purpose a procedural decision that is in English entitled "award", it seems that they could make such an agreement.

definition of Art. 2(1) point 9 of the Law on Arbitration.[40] Partial awards can be subject to an independent setting aside procedure, whereas interim awards can only be challenged within the application to set aside the final award (Art. 36(1) second sentence).

40. Croatian legal practice and doctrine distinguish between two senses of “finality” regarding decisions on the merits of a dispute , i.e., the award that finally settles one or more claims in the same dispute (final awards as *kona_ni pravorijek*), or where the process as such (with all outstanding issues) is finally settled by award (final award as *potpuni pravorijek,* “full award”). The Law on Arbitration only uses the term “final award” in the first sense, *inter alia,* also in Art. 32 (final award terminates the proceedings on the issues decided by it).

## 2. MAKING OF THE AWARD

The arbitral tribunal shall make an award when the issues are ready for decision-making.[41] There is no time limit for making an award neither in the Law on Arbitration, nor in the arbitration rules of the arbitral institutions.[42] However, the duty to make an award within appropriate time limits arises from the already mentioned general duty of the arbitrators to conduct arbitration in a speedy manner and avoid every undue delay established in Art. 11(2) of the Law on Arbitration.

Art. 28 of the Law of Arbitration provides how decisions (both of 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 a majority still cannot be reached, the award will be made by the presiding arbitrator. If the members of the tribunal are not in session, the presiding arbitrator may also decide alone on certain 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.

Both the law and the arbitration rules are silent with regard to the treatment of dissenting opinions. In practice, dissents are regarded to be 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 parties.

## 3. FORM OF THE AWARD

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41. For an express rule stating such a standard see Art. 1(1) of the Zagreb Rules 2002.
42. An exception can be found in the arbitration rules of the CARNET (Croatian Academic Research Network) regarding domain name disputes within the Croatian national Internet domain (.hr) – see http://www.dns.hr. Under Art. 21, the arbitral award has to be made within sixty days from the transfer of the file to the arbitrator.

Pursuant to Art. 30 of the Law on Arbitration, the award shall be made in writing. It has to be made at the place of arbitration, it has to be dated and it must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms.

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 fail to sign the award, it is still valid, provided that the majority of the members of the tribunal have signed it and that it is stated in the award that one or more arbitrators failed to sign it.

On provisions regarding delivery of the award see *infra* Chap. V.9.

### 4. PLEAS AS TO THE ARBITRATORS' JURISDICTION

It has already been mentioned that the arbitral tribunal has the power to rule on its own jurisdiction (see *supra* Chap. II.4 and 5). If a respondent raises an objection as to the jurisdiction of the arbitrators on the ground that a valid agreement to arbitrate was not concluded, arbitrators may either rule on this issue in a preliminary ruling, or they may leave this issue to be decided later in an award on the merits. As noted above, the preliminary ruling that arbitrators have jurisdiction may be challenged before the court (Art. 15(3)). Such a request should be made within thirty days from the preliminary ruling that arbitrators have jurisdiction; however, as already mentioned, while the court is deciding this issue, arbitrators may continue with the arbitration and even make a final award.[43]

On the other hand, claims before a court of law on the lack of jurisdiction of the arbitrators are not admissible prior to the arbitrators' ruling on their jurisdiction. Equally, if arbitrators have left a decision on jurisdiction for the final award, the lack of a valid arbitration agreement may only be raised in

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

the procedure for setting aside such an award – no prior judicial proceedings on the arbitrators' jurisdiction is possible.[44]

The plea that arbitrators do not have jurisdiction shall be raised at the very latest within the statement of defence in which the respondent engages in the merits of the dispute. If the respondent fails to object to the jurisdiction of the arbitral tribunal prior to engaging in arguments on the substance, it is deemed to be 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.

Thus, if objections to jurisdiction are not raised in due time, they would have to 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 of violations of public policy, no action or default by parties may lead to a valid agreement or waiver to object, since these two issues may be controlled by courts *ex officio* both in the setting aside proceedings, and even on the occasion of the enforcement of the arbitral awards.

## 5. APPLICABLE LAW

Under the scope of application of the Law on Arbitration, the same rules are applicable to national and international arbitrations. Thus, there are generally no differences whether a dispute is regarded to be one "with international character" or not. It should, however, be emphasized that, different from the UNCITRAL Model Law, the distinction between the national and international disputes is the more conventional one, i.e., a dispute is legally regarded as international only if "at least one party is a natural person with domicile or habitual residence abroad, or a legal person established under foreign law" (Art. 2(1) point 7).

44. 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").

The arbitral tribunal shall always decide according to rules of law unless the parties were expressly empowered to decide as *amiable compositeurs* (*ex aequo et bono*) (Art. 27).[45] The applicable rules of law are those agreed by the parties. The phrase "rules of law" enables the parties to choose either a substantive law of a particular country, or some combination of national substantive laws, or even some other system of rules, e.g., lex mercatoria. For avoidance of doubt, it is provided that any reference 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. Regardless of the rules of law that are being applied, the arbitrators have to observe the terms of the contract and have to take into account the applicable usages of trade (or other usages relevant for the subject matter). In practice, contractual terms and commercial practices are more important than the applicable rules of law. Also, while deciding *ex aequo et bono* arbitrators often seek to find a solution that is not radically different from the application of rules and principles of the legal systems connected to the dispute.

If the parties have not made any selection of the rules applicable to the subject matter of the dispute, the arbitrators may determine such rules, applying the law that they consider to be most closely connected with the dispute (Art. 27(2)).[46] Naturally, in pure national disputes it will be assumed that substantive Croatian law will be applicable.

45. For a comparative perspective of arbitration *ex aequo et bono* see Sikiri_, "Arbitration in Equity – *ex aequo et bono*", 2 *Croatian Arbitration Yearbook* (1995) pp. 125-145.
46. The Law on Arbitration has abandoned the previous practice of mediate determination of the applicable law, i.e., by application of the law determined by the conflict of laws rules which the arbitrators consider applicable (see, e.g., Art. 38 of the Zagreb Rules 1992).

## 6. SETTLEMENT

It is often stated that one of the main advantages of arbitration consists in an atmosphere that is, compared to judicial proceedings, more amicable and less litigious. In Croatian practice it is not uncommon that the parties attempt to reach an amicable solution during arbitration, sometimes with the assistance of arbitrators. If settlement is reached, the law provides two options: either the arbitrators will terminate the proceedings by their procedural order, whereas the form and enforceability of settlement will be entirely left to the parties, or 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 arbitrators do not have any power to check the content of the settlement with respect to its appropriateness. However, they must refuse to make an award on the basis of a settlement that would violate public policy (Art. 29(2)).

An award on agreed terms is subject to the same formal requirements as other types of award, except that – as already noted – stating reasons is not required (Art. 30(3)).

There are no explicit provisions on setting aside awards on agreed terms, but in principle they would be subject to setting aside as any other award. However, since an award on agreed terms is a direct product of the parties' agreement, some of the grounds for setting aside would not be applicable. The lack of reasons for a decision was already mentioned *supra* at Chap. V.3. Also, from the nature of the award on agreed terms it would be implied that some other grounds would also be excluded (e.g., lack or invalidity of the arbitration agreement, inability to present one's case or falling outside the scope of the submission to arbitrate). Other grounds, such as violations of public policy, non-arbitrability of the subject matter or incapability or improper representation of the parties could be raised in the setting aside proceedings, and – according to the practice of challenging settlements in court proceedings – eventually also error, fraud or duress that has led a party to conclude the settlement.

## 7.A. CORRECTION AND INTERPRETATION OF THE AWARD

Under Art. 34 of the Law on Arbitration, every party may request corrections of any errors in writing, miscalculations or other clerical or similar errors. If the parties have so agreed, it is also possible to request an interpretation of a specific point or part of the award. In both cases, the

request has to be made within thirty days of receipt of an award,[47] and notice has to be given to the other party. If the arbitrators consider the request to be justified, they shall make corrections or give an interpretation within a further thirty days from receipt of the request. The correction or interpretation 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 or interpretations, all of the rules regarding the award discussed *supra* at Chap. V.3 will be applicable.

### 7.B. ADDITIONAL AWARD

Each party may request within thirty days from the receipt of the award, and with notice to the other party, the rendering of an additional award if the arbitrators have omitted to decide one or more substantive issues submitted to arbitration, but omitted from the award (Art. 33). The rules on awards will be applicable as in the case of corrections or interpretation. However, arbitrators may not issue an additional award on their own initiative. After expiry of the time limits for both parties, omitted claims can only be decided by arbitrators through new arbitration proceedings. The preceding legal provisions on additional awards may be modified by the parties' agreement.

## 8. FEES AND COSTS

47. This time limit is subject to parties' agreement – see introductory clause of Art. 34(1).

The Law on Arbitration expressly provides in Art. 35 that the arbitrators have the right to decide on the costs of the proceedings upon a party's request. 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 decide according to their discretion, taking into account all circumstances of the case, in particular the outcome of the dispute. The costs regularly include attorneys' and arbitrators' fees. The decision on costs may either form a part of the award, or may be contained in a procedural order terminating the proceedings. If the arbitral tribunal has omitted to decide on costs, or if such a decision would be possible only after termination of the proceedings, the arbitrators may issue a separate award on costs of the proceedings. Arbitral institutions such as the PAC-CCC have their decisions on costs constructed along the same lines.[48] Thus, the Rules on Costs of Arbitration and Conciliation of the PAC-CCC[49] 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".

*a. Deposit*

Since depositing an amount for costs is a matter of free agreement by the parties and arbitrators and/or arbitral institutions, there are no legal rules in this respect. However, in practice such deposits are regularly required and the appropriate rules are regularly contained in the regulations on costs of arbitral institutions.[50] In the practice of the PAC-CCC, if deposits on costs are not paid in due time, the case may be deleted from the list of cases. Such a case may be resubmitted as a new case, involving *inter alia,* payment of a new filing fee and possibly some other expenses connected with the recommencement of the arbitration.

*b. Fees of Arbitrators*

Under the Law on Arbitration, arbitrators have a right to request a fee for their services and reimbursement of costs incurred by their participation in arbitration, unless they have issued a written waiver of these rights (Art. 11(4)). In the practice of administered arbitration, the fees of arbitrators are usually predetermined in the appropriate institutional regulations. An example of the schedule of fees for arbitrators are the tariffs contained in Art. 9 of the Rules on Costs of Arbitration and Conciliation of the PAC-CCC. The fees mostly depend on the amount in dispute; however, other elements, such as the complexity of the case, may also play a role.

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48. On principles and practices regarding costs see Uzelac, "Costs of Arbitral Proceedings", 1 *Croatian Arbitration Yearbook* (1994), pp. 109-125.
49. Off. Gaz. 108/2003, in force since 8 July 2003.
50. See, e.g., the Rules on Costs of Arbitration and Conciliation of the PAC-CCC, Art. 5.

As to the fees in *ad hoc* arbitration, the amounts or the criteria of determination of the fees would regularly be agreed directly between the parties and the arbitrators in advance. At the end of an arbitration, the arbitrators may determine the exact amount of their own expenses and fees. However, such a determination does not bind the parties unless they accept it. If parties object to the arbitrators' decision in this respect, the amount of fees and expenses shall be determined by the authority specified in Art. 43(3) (usually by the president of the competent state court). The competent authority will make such a decision upon a request either by the arbitrators or the parties. The decision on costs issued by such an authority is an enforceable title against the parties in the proceedings (Art. 11(5)).

*c. Costs of Legal Assistance*

As already noted, 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 losing 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).[51] 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 proportional 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 determination of actions that were "necessary for the conduct of arbitration".[52]

## 9. DELIVERY OF THE AWARD AND REGISTRATION

51. 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).
52. 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 other costs since they are not deposited, but the decision arising from Art. 2 normally cover them as well).

The law provides that awards made under the auspices of arbitral institutions have to be delivered to the parties by such institutions. At the same time, such institutions should keep a record of delivery of the award. In *ad hoc* arbitrations, the arbitral award shall be delivered to the parties by the arbitral tribunal (Art. 30(6)). In any case, regular means of delivery (e.g., registered mail) and the rules on the receipt of written communications will be applicable (Art. 30(7) in connection with Art. 4). Upon request of both parties, delivery of the award may be made by the court or notary public. The Law on Arbitration has abandoned the previous obligation to deposit an award with the court in *ad hoc* arbitrations.[53] Therefore, an award is effective without any mandatory registration, authentication or deposition, although the parties or arbitrators may, in order to avoid any doubts arrange to keep a copy of the award in a safe place, (e.g., with a notary public) or arrange the authentication of their signatures. The law expressly provides that the parties may also agree to deposit the award with a court.[54] In such cases, the court will treat such a request as a request for assistance, i.e., the court will regularly have a duty to grant such a request.[55] No significant court fees would be associated with deposition of the award.

## 10. ENFORCEMENT OF THE AWARD

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. The application for enforcement will have to be submitted, as in the case of final and binding court judgments, to the competent court. Upon application for enforcement, the court shall order the enforcement – with only one exception.

Namely, the enforcement shall be refused in 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

53. See former Art. 482 of the Code of Civil Procedure.
54. The courts competent for such deposition would be the Commercial Court in Zagreb (in commercial arbitrations) and the County Court in Zagreb (in other arbitral cases) – see Art. 43(1).
55. See Art. 46 of the Law on Arbitration. In addition to the rules on court assistance to arbitral tribunals in the Law on Arbitration (e.g., in taking evidence), Art. 11 of the Law on Courts (Off. Gaz. 3/94, 100/96, 115/97, 131/97, 129/00, 67/01, 5/02) provides that the courts shall provide assistance to arbitral tribunals “if their request is legally grounded, if the requested action is admissible, and if the court is competent to undertake it”.

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)).[56]

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

In enforcement proceedings the other party has to 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, may conceal the property or otherwise obstruct the enforcement proceedings.

The enforcement of foreign arbitral awards will be discussed *infra* at Chap. VII.

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56. See also Art. 39(4) that 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.

11. PUBLICATION OF THE AWARD

As already noted, arbitral proceedings in Croatia are not held in public, unless parties have agreed otherwise. The same principle applies to awards – they are not normally published unless parties have provided their consent. If the parties agree an award could be published either in full or with certain omissions. However, in practice certain parts of the awards that contain important legal reasoning, without mentioning the specifics of the case (names of the parties, etc.) are sometimes published in legal periodicals such as *Pravo u gospodarstvu, Ing sudska praksa,* and in the *Croatian Arbitration Yearbook.* This is not usually regarded as a violation of the confidential nature of the arbitration proceedings.[57]

## Chapter VI. Means of Recourse

1. APPEAL FROM AN ARBITRAL AWARD

*a. Appeal to a Second Arbitral Instance*
In Croatian practice, it is often emphasized that one of the principal reasons for comparative speed of arbitration proceedings as compared to court adjudication is because there is regularly no appeal against the award. In preparatory work on draft versions of the Law on Arbitration, some drafts even planned to exclude the possibility of appeals. In the final text, though, the possibility of an appeal to a second arbitral instance was maintained, but only if "the parties have expressly agreed that the award may be contested by an arbitral tribunal of a higher instance" (Art. 31). Since such an arrangement is extremely rare in practice, in practically all arbitration cases so far the award rendered "in the first instance" would be final and binding.

*b. Appeal to a Court*

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

In Croatian arbitration law, 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 in 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(1).[58] This is a strict rule, and thus the parties' agreement to submit their award to appellate proceedings before a Croatian court of law would be null and void.

## 2. REMEDIES AGAINST DECISION ON LEAVE FOR ENFORCEMENT

The party requesting enforcement has to submit the original award or its duly certified copy. If the award is not in Croatian, a duly certified translation should be supplied as well. If domestic awards are being enforced, no further documents are needed (for foreign awards, in addition to the award, the original arbitration agreement or its certified copy also has to be submitted) (Art. 47).

The court that decides on the enforcement shall only examine whether the documents needed are properly submitted. If they are, it may refuse to give leave for enforcement only on the grounds of public policy or the lack of arbitrability (see *supra*).

As already mentioned, if enforcement of domestic awards is requested the court may exceptionally also decide *ex parte.* If needed, the court may also hear other persons – the arbitrators or the person with whom a copy of the award was deposited according to the parties' agreement (Art. 49).

All other issues can be raised only if a claim for the setting aside is submitted. In this case, the court deciding on enforcement may (but does not have to) stay the proceedings until an application to set aside the award is decided. Upon request from the party who requested the enforcement of the award, the court may also request appropriate security as a condition for staying the enforcement (Art. 48).

Otherwise, the system of remedies in the process of enforcement of arbitral awards is not further regulated in the arbitration law. In principle, the same rules apply as regarding enforcement of final and binding Croatian judicial judgments. Complaints in the enforcement process can only be based on limited grounds. In principle, only external circumstances could be raised, e.g., those regarding the facts that have happened after making the award (voluntary fulfilment of the claim after the award, other way of ceasing an obligation), or the issues related to the method of

58. In addition, Art. 41 provides 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.

enforcement (e.g., objections regarding objects that are being seized). An appeal to a higher court is possible only in rare cases.[59]

59. The general system of remedies in the enforcement proceedings is currently under examination in Croatia, with a view to further narrowing the possibility of appeal and grounds that can be raised.

## 3. SETTING ASIDE OF THE ARBITRAL AWARD (ACTION FOR ANNULMENT)

### *a. Grounds for Setting Aside*

An application for setting aside is the only available remedy against an arbitral award in court proceedings. However, it 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 favourable 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 agreed so 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. Equally 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. For the sake of brevity they are summarized as follows:

(a) The grounds that can be raised only by the applicant are:
– the lack or invalidity of an arbitration agreement;
– incapacity of a party to the arbitration agreement or improper representation in the proceedings;
– lack of proper notice of the commencement of arbitration or other inability to present the case in the arbitration;
– the dispute was not contemplated by or does not fall within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
– composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Law or a permissible agreement of the parties and that fact could have influenced the content of the award;
– the lack of reasons in the award or the award was not duly signed.

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

Violation of 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 already noted, also taken into account in the process of enforcement of the award.[60] However, it is generally argued that the rules of public policy have to be narrowly construed, especially in international cases. Practice in this respect is gradually being built up.[61] Generally, there are very few cases of successful setting aside of arbitral awards.[62]

*b. Procedure*

Pursuant to Art. 36(3) of the Law on Arbitration, an application for setting aside must be made to the court within three months from receipt of the award by the applicant. If setting aside is requested with respect to an additional award or correction or interpretation of the award (see *supra* at V.7A and 7B), this date is calculated from the receipt of the decision. After expiry of the above terms, 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 Croatia.

Deciding on an application for setting aside, the court may, if it finds it appropriate or if so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to

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60. Besides, if a preliminary issue in court proceedings is decided by a final domestic arbitral award, the court shall treat this issue as res judicata unless it finds that the award violates public policy (or deals with issues that cannot be submitted to arbitration). See Art. 39(3) of the Law on Arbitration.
61. Several court decisions on setting aside on the grounds of public policy are currently awaiting their final epilogue on appeal.
62. See Uzelac, "Setting Aside Arbitral Awards in Theory and Practice", 6 *Croatian Arbitration Yearbook* (1999) pp. 55-74.

take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside. If the award was set aside, in appropriate cases[63] the arbitral agreement will still be a valid basis for arbitration. Thus, if requested by a party, the court may in appropriate cases refer the file back to the arbitral tribunal for repeated proceedings (Art. 37).

*c. Waivers*

Croatian arbitration law does not provide for the possibility of waiving an action for setting aside. On the contrary, in Art. 36(6) it is provided that the parties cannot derogate in advance their right to contest the award by a setting aside application. However, the wording of this provision ("in advance") would open the possibility of waiving the right to apply for setting aside once the arbitral award has been made and communicated to the parties. This could, it is submitted, relate only to some grounds that have to be raised and proved by the applicant (e.g., lack of arbitration agreement), and would not in any case involve objective arbitrability or public policy.

### 4. OTHER MEANS OF RECOURSE

63. See Art. 37(1) of the Law on Arbitration for details.

Except those already noted, there are no other means of recourse against arbitral awards in Croatia. On the possibility of remitting the case to arbitrators in the setting aside proceedings (not as an independent means of recourse) see *supra* Chap. VI.4.B. Some doubts as to whether it is possible to challenge arbitral awards directly by constitutional complaints for violation of fundamental constitutional rights were resolved by a decision of the Constitutional Court that, in a proper voluntary arbitration, such an action would be admissible only against court decisions on setting aside, not against the arbitral awards as such.[64]

## Chapter VII. Foreign Arbitral Awards

### 1. CONVENTIONS AND TREATIES

*a. Multilateral Conventions*

By succession effective from 8 October 1991, Croatia 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;
– The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
– The 1965 Washington Convention for the Settlement of Investment Disputes between States and Nationals of Other States.

*b. Bilateral Treaties*

Croatia signed forty-nine Bilateral Investment Treaties, twenty-five of which are currently in force. The full status of the Treaties is available at the Croatian Ministry of Foreign Affairs (see www.mvp.hr ).

The BITs signed (S), ratified (R) and enforced (E) by Croatia are as follows:

Albania (10 May 1993 (S), 10 February 1994 (R), 16 April 1994 (E));
Argentina (2 December 1994 (S), 27 March 1996 (R), 1 June 1996 (E));

64. See Triva, "Constitutional Complaint as Means of Setting Aside Arbitral Award", 7 *Croatian Arbitration Yearbook* (2000) pp. 107-138.

Austria (19 February 1997 (S), 30 October 1997 (R), 1 November 1999 (E));
Belgian and Luxembourg Economic Union (31 June 2001 (S));
Bosnia and Herzegovina (26 February 1996 (S), 12 May 1997 (R), 4 August 1997 (E), 23 July 2002 (Amended));
Belarus (26 June 2001 (S));
Bulgaria (25 June 1996 (S), 5 December 1996 (R), 20 February 1998 (E));
Cambodia (18 July 2001 (S), 15 June 2002 (E));
Canada (3 February 1997 (S), 11 July 1997 (R), 30 January 2001 (E));
Chile (28 November 1994 (S), 5 April 1996 (R), 15 June 1996 (E));
China (7 June 1993 (S), 10 February 1994 (R));
Czech Republic (5 March 1996 (S), 21 April 1997 (R));
Cuba (16 February 2001 (S));
Denmark (5 July 2000 (S), 16 November 2000 (R));
Finland (1 June 1999 (S), 1 July 2001 (R), 1 November 2001 (E));
France (3 June 1996 (S), 15 January 1997 (R), 5 March 1998 (E));
Germany (21 March 1998 (S), 3 September 1998 (R), 28 September 2000 (E));
Greece (18 October 1996 (S), 10 April 1997 (R), 21 October 1998 (E));
Hungary (15 June 1996 (S), 15 January 1997 (R), 1 March 2002 (E));
India (4 May 2001 (S), 22 November 2001 (R), 19 January 2002 (E));
Indonesia (10 September 2002 (S));
Iran (17 May 2000 (S), 23 November 2000 (R));
Italy (5 November 1996 (S), 6 March 1997 (R), 12 June 1998 (E));
Israel (1 August 2000 (S));
Jordan (10 October 1999 (S), 17 February 2000 (R), 27 April 2000 (E));
Kuwait (8 March 1997 (S), 26 June 1997 (R), 2 July 1998 (E));
Macedonia (6 July 1994 (S), 31 August 1995 (R));
Malaysia (16 December 1994 (S), 18 June 1996 (R));
Malta (11 February 2002 (S), 7 March 2002 (Publ.), 10 July 2002 (E));
Moldova (5 December 2001 (S));
Netherlands (28 April 1998 (S), 9 July 1998 (Publ), 1 June 1999 (E));
Poland (21 February 1998 (S), 4 October 1999 (E));
Portugal (10 May 1995 (S), 24 July 1997 (R), 24 October 1997 (E));
Qatar (12 November 2002 (S));
Romania (8 June 1994 (S), 11 May 1995 (R), 30 April 1998 (R));
Russia (20 May 1996 (S), 13 December 1996 (R));
Serbia and Montenegro/Yugoslavia (18 August 1998(S), 21 January 2002(R), 31 January 2002 (E));
Slovakia (12 February 1996 (S), 6 February 1997(E));
Slovenia (12 December 1997 (S));
Spain (21 July 1997 (S), 24 July 1998 (R), 17 September 1998 (E));
Sweden (10 January 2001 (S), 28 June 2001 (R), 1 August 2001 (E));
Switzerland (30 October 1996 (S), 21 April 1997 (R));

Thailand (18 February 2000 (S), 11 May 2000 (R));
Turkey (12 February 1996 (S), 18 September 1997 (R), 21 April 1998 (E));
Ukraine (15 December 1997 (S));
United Kingdom (11 March 1997 (S), 7 August 1997 (Publ.), 16 April 1998 (E));
USA-OPIC (15 January 1993 (S), 3 February 1994 (R));
USA (13 July 1993 (S), 21 April 1994 (R));
Zimbabwe (18 February 2000 (S), 11 May 2000 (R)).

Further references can be found in a number of trade agreements.[65]

## 2. CONVENTION OR TREATY APPLIES

Croatia has maintained the reservations to the New York Convention originally made by Yugoslavia when ratifying it in 1981. Accordingly, the 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 retrospective effect).

The enforcement procedure is conducted before the Commercial Courts in Zagreb (Art. 43(1) of the Arbitration Law and Art. 19(5) of the Law on Courts). When enforcement is sought under the provisions of the Convention, the provisions of the Convention shall prevail over the corresponding provisions of the relevant domestic legislation.

## 3. NO CONVENTION OR TREATY APPLIES

If no Convention or treaty applies, the rules applicable for recognition and enforcement are provided in the Law on Arbitration. The award shall be

65. E.g., Austria (15 July 1992 (S), 18 December 1992 (R), 1 March 1993 (E)); Japan (28 February 1959 (S), 28 April 1959 (R), 13 December 1996 (E)); Switzerland (12 March 1999 (S), 12 March 1999 (R), 17 February 2000 (E)).

considered to have the nationality of the state of the place of arbitration. (Art. 19).

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

The Court shall recognize and enforce the award unless the party successfully proves the existence of the reasons provided for in Art. 40(1) of the Law on Arbitration (reasons for annulment of the award set by Art. 36(1) of the Law on Arbitration or if the award has not yet become binding, or has been set aside or 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 of dispute was not arbitrable or if the recognition and enforcement would be contrary to public policy. The Croatian Law on Arbitration incorporated all the solutions of Art. V of the New York Convention, with the additional ground – that the award does not state reasons or lack signatures as required by the Law on Arbitration.

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 suitable security.

The court always has to allow the defendant to reply to an application for *recognition,* but the same right may be restricted for an application for *enforcement* if it could imperil the enforcement. Decisions on recognition and enforcement must be reasoned. 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.

## 4. RULES OF PUBLIC POLICY

Violation of public policy is always a reason for refusal to recognize and enforce a foreign award. According to Croatian law, control over the merits of the dispute can be exercised only via public policy grounds (see *supra* Chap. VI.4a).

There is very scarce jurisprudence on the public policy issue. However, in theory, in international cases stricter rules should apply, although one

may expect that the courts will have an inclination to apply Croatian public policy standards. No court practice in this respect currently exists.

# Chapter VIII. Conciliation

## 1. GENERAL

In the past few years Croatia has experienced a very noticeable rise in interest in conciliation and other alternative means of dispute resolution.[66] Several domestic and international initiatives in this area have been started. A few organizations have set up their conciliation facilities in recent years, among others the Croatian Employers' Association.

The Croatian Employers' Association can be contacted at:

Croatian Employers' Association
(*Hrvatska udruga poslodavaca (HUP)*)
Pavla Hatza 12
HR-10 000 Zagreb
Tel.: +385 1 4897 555
Fax: +385 1 4897 556
E-mail: hup@hup.hr
Website: http://www.hup.hr

Another provider of conciliation services is the Croatian Chamber of Commerce, which previously had a history of conciliation rules as part of its arbitration services.[67] The number of conciliation proceedings under the previous rules was, however, insignificant.[68] Otherwise, an amicable settlement was always regarded as a desirable outcome of any arbitration and the parties were often encouraged and occasionally assisted by arbitrators to reach it. However, at least in national arbitrations, the rate of

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66. The term conciliation is used in this text broadly, in the meaning defined by Art. 1(3) of the UNCITRAL Model Law on International Commercial Conciliation.
67. Since 2002, the Croatian Chamber of Comerce has separated the arbitration and conciliation services of the PAC-CCC and established a separate Conciliation Center. A separate set of Conciliation Rules was issued in July 2002 (Off. Gaz. 81/2002, in force since 17 July 2002). The administrative services and addresses remained the same. For the contact data of the Croatian Chamber of Commerce see *supra* Chap. I.2.
68. In the 1992-2002 period (the period of validity of the Zagreb Rules 1992) there were altogether four conciliation proceedings before the PAC-CCC (three of which in the 2000-2002 period).

assisted settlements was not very high (as demonstrated by the fact that there were only a few awards on agreed terms).

Some programmes of conciliator training, supported by foreign donors such as the USAID (US Agency for International Development), took place in 2002 and 2003. There is also increased interest for programmes of court-annexed conciliation.

Such interest was also met by legislative projects. A new Law on Conciliation, inspired largely by the UNCITRAL Model Law on International Commercial Conciliation, has been adopted by the Parliament, but, at the time of completing this Report, had not yet been published.

## 2. LEGAL PROVISIONS

At the time of writing, in Croatian law, apart from the new Law on Conciliation, there are only a few rules on settlement. Except general norms of contract law, the most important are the rules on the legal effects of settlements reached in court proceedings and in arbitration proceedings. For court proceedings, the Code of Civil Procedure provides that the settlement recorded before a judge in civil judicial proceedings ("in-court settlements" as opposed to "out-of-court settlements") have equal power as final and binding court judgments. As for settlements reached in arbitration proceedings, the only relevant rules – those dealing with the award on agreed terms – have already been presented *supra* at Chap. V.6.

As the Law on Arbitration has deliberately left out of its scope all other rules regarding conciliation (e.g., the commencement and conduct of conciliation proceedings, the definition and choice of conciliators, confidentiality of information, the effect on statute of limitations rules, etc.), it is expected that all such matters will be regulated in the Law on Conciliation.