CROATIA

Country Report on International Commercial and Investment Arbitration Legal Framework

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Disclaimer

The report below is a shorter version of previously written and published arbitration reports:

1. Uzelac, A., Croatia (Croatian National Report), in: J. Paulsson (ed.), International Handbook on Commercial Arbitration, Suppl. 109 (February 2020), Croatia-1 to Croatia-64 plus Annexes - Law on Arbitration & Law on Conciliation

2. Butorac Malnar, V., Interpretation and application of the New York Convention in Croatia. In: George A. Bermann (ed.), Recognition and Enforcement of Foreign Arbitral Awards – The Interpretation and Application of The New York Convention by National Courts. Cham: Springer International Publishing AG, 2017, pp. 239-261

I. COMMERCIAL ARBITRATION

1. What domestic law(s) regulate(s) commercial arbitration in your country?

a. Is this legislation applicable to both domestic and international arbitration? Are these rules based on the UNCITRAL Model Law? If yes, what are the meaningful differences?

b. Are there any legislative initiatives ongoing to amend the domestic law? If yes, on what aspect of the arbitration law(s) and for which reasons?

c. By your expertise, is the legislative framework efficient and effective?

Since 2001, the Croatian arbitration law has been contained in a single Act – the Law on Arbitration ("CLA") .[1] The new Act, devoted exclusively to arbitration, abandoned the previous

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1 Official Gazette: Narodne novine 88/01.

legal dualism of two acts that regulated arbitration as only a marginal matter. Furthermore, instead of relying on any particular regional or national arbitration law, the CLA largely follows the text and approach of the 1985 version of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("the UNCITRAL Model Law"). However, some provisions of the new law were influenced also by 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 part of the domestic tradition and legal culture (e.g., definition of national and international disputes, and the exclusion 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).

Unlike the UNCITRAL Model Law on International Commercial Arbitration, the Croatian Law on Arbitration is applicable to both national (domestic) and international arbitration. It is also applicable to non-commercial disputes, i.e., to all disputes regarding rights of which the parties may freely dispose. The legal definition of international and national disputes is different from the UNCITRAL concept and follows the unique principle of the seat/residence of the parties, customary in continental Europe. The treatment of national and international disputes is almost completely identical (including the free choice of foreign law and foreign arbitrators), with the only notable difference being that in national disputes (i.e., disputes without an international character) arbitral agreements on a seat of arbitration outside Croatia are not permitted. In such a way, in "pure" national disputes the option of universal control in the form of the setting aside action has been reserved for the national courts.

The practical differences between the national law and the amended UNCITRAL Model Law are not significant, so no urgent need to change the law on that account is being experienced in Croatia. No plans for imminent change are pending.

The application of the law since 2001 has already assisted in promoting 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. The legislative framework is coherent and does not require urgent amendments.

2. Is there an arbitration institution in your country? If yes, how is it structured and are these structures sufficient? Did this institution create its own procedural rules?

Ever since declaring independence from the former Yugoslav federation, the practice of both domestic and international arbitration continued at the Permanent Arbitration Court at the Croatian Chamber of Commerce (PAC-CCC), which prior to 1991 only handled domestic cases. The other arbitration institutes in Croatia did not exist, although the opportunity to establish arbitral institutions as entities of private law that was opened by the CLA brought about increased interest in establishing new dispute resolution facilities.

The latest revision of the arbitration rules of the PAC-CCC came into force on 5 December 2015 (latest amendments issued in May 2017). This version of the rules, also known as the Zagreb Rules, enacted a single set of rules for both domestic and international arbitration. The Zagreb Rules are available in Croatian and English editions.[2]

3. How is the commercial arbitration practice in your country?

a. How many commercial arbitration cases are there annually in your country?

b. Which are the main subject-matters the cases deal with? Are there any subject matters considered non-arbitrable in domestic laws?

The table below shows the data for the arbitration cases of the PAC-CCC in the 1991-2018 period. In spite of a relatively modest number of cases (thirty to forty annually), the data demonstrate that – particularly after 2000 – the aggregate amount in dispute became fairly significant. The cases submitted to arbitration were quite diverse, from simple sales contracts to complex construction disputes and disputes relating to the process of privatization of state property. The range of foreign parties was also very diverse, including parties from about thirty countries, with prevailing participation by Croatia's principal trade partners (Italy, Germany, Austria and the post-Yugoslav countries and territories).

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2 Official publication in Croatian: <http://narodne-novine.nn.hr/clanci/sluzbeni/2015_11_129_2456.html>; English text: <http://www.hgk.hr/documents/zagreb-rules20155a61a5b9e3eb3.pdf>.

Year	Domestic	International	Total
1991	26	5	31
1992	11	5	16
1993	16	10	26
1994	22	12	34
1995	8	10	18
1996	16	11	27
1997	14	16	30
1998	21	8	29
1999	22	14	36
2000	9	26	35
2001	36	11	47
2002	16	22	38
2003	23	5	28
2004	18	9	27
2005	15	11	26
2006	23	12	35
2007	21	11	32
2008	45	8	53
2009	93	9	102
2010	36	13	49
2011	51	17	68
2012	38	12	50
2013	25	11	36
2014	23	9	32
2015	19	4	23
2016	25	6	31
2017	37	3	40
2018	31	6	37
Total	740	296	1036

The CLA recognizes a distinction between arbitrability in the context of domestic arbitration and arbitrability in the context of foreign arbitration. According to Art 3 of the CLA, parties may choose domestic arbitration to settle disputes regarding any right they may freely dispose of. This is a very wide and permissive notion of arbitrability and it allows parties to submit to arbitration even those disputes over which national courts have exclusive international jurisdiction (*i.e.*, disputes which parties cannot refer to foreign courts), and disputes that otherwise fall under the competence of administrative bodies.

However, the CLA appears to be more stringent in relation to foreign arbitrations. According to Art 3(2) of the CLA, in relation to disputes with an international character, parties may agree on arbitration outside the territory of the Republic of Croatia, unless it is provided by law that such dispute may be subject only to the jurisdiction of a Croatian court. The above distinction may result in a situation where a foreign arbitral award is denied recognition and enforcement on the ground of non-arbitrability due to the exclusive international jurisdiction of the courts in Croatia,

while an identical domestic arbitral award does not face the same impediment. Nevertheless, a more lenient approach to arbitrability in the context of domestic arbitrations is justified because under the CLA, a domestic arbitral award has the same effect as a final court decision and it is subject to setting aside procedures before courts in Croatia.

4. What are the grounds for refusal of enforcement and recognition of arbitration awards in your country? Is your country party to the New York Convention (with reservations)? How strict are your national courts when enforcing awards (e.g. in relation to public policy)?

Recognition and enforcement of foreign arbitral awards in Croatia may be subject to the New York Convention on recognition and enforcement of foreign arbitral awards (Convention), or the Croatian Law on Arbitration.

Croatia became a party to the New York Convention by way of succession. The Convention was originally ratified by the former Socialist Federal Republic of Yugoslavia ("SFRY") on 26 February 1982.[3] Subsequently, when Croatia gained independence on October 8, 1991,[4] it succeeded the SFRY as a party to the Convention. The relevant notification of succession was deposited with the Secretary General of the United Nations on July 26, 1993.[5] Thus, Croatia has been a party to the Convention since October 8, 1991. According to the Croatian Constitution,[6] international treaties which have been concluded and ratified in accordance with the Constitution, and have been published, and have entered into force, are a component of the domestic legal order of the Republic of Croatia and possess primacy over domestic laws. Consequently, in Croatia, the Convention and the CLA apply directly and concurrently – the Convention possessing primacy over the CLA.

It should be noted that the CLA also contains provisions on the recognition and enforcement of foreign arbitral awards. However, in light of the legal hierarchy noted above, these provisions of the CLA should (in theory) apply to foreign arbitral awards only in those cases where the Convention (by way of the reservations made) or some other ratified international treaty does not

3 Official Gazette: SFRJ MU 11/81.

4 See Official Gazette: Narodne novine 53/91.

5 Official Gazette: Narodne novine MU 4/94.

6 Official Gazette: Narodne novine 85/2010 (consolidated text), 5/2014.

apply. Nonetheless, there are only a few reported decisions on the application of the Convention in Croatia as the courts in Croatia usually apply the provisions of the CLA. Notwithstanding the above, in most cases, the provisions of the CLA yield the same result as the provisions of the Convention.

Croatia has maintained the three reservations to the Convention originally made by the SFRY. These are:

1. that the Convention shall be applicable only to arbitral awards rendered in the territory of another Contracting State;
2. that the Convention shall be applicable only to arbitral awards rendered after its ratification; and
3. that the Convention shall be applicable only to arbitral awards concerning differences, whether contractual or not, which are considered as "commercial" under Croatian law.

Croatian law does not explicitly define the term "commercial differences." However, the term may be considered as referring to differences arising out of "commercial relationships." The existence of a "commercial relationship" is usually determined by the status of the parties and the nature of the activities pursued. Accordingly, "commercial relationships" may be defined as professional legal relationships between traders.[7] There is at least one instance where a Croatian court refused to apply the Convention by relying on this reservation.

The CLA defines an "arbitral award" as a decision on the merits of the dispute. This definition encompasses final, interim and partial awards. A final award is defined as an award on the basis and the amount of an individual claim. The CLA does not define partial and interim awards.[8] However, these terms have the same meaning as partial and interim judgments as defined by the

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7 Further, as per the Croatian Companies Act, a trader, unless otherwise provided by the Act, is defined as any natural or legal person who independently and permanently conducts an economic activity with the aim of gaining profit by production, trade of goods or provision of services. Art 1(1) of the Croatian Companies Act (published in the Official Gazette: Narodne novine 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 111/2012, 125/2011, 68/2013).

8 An "interim award" should not be confused with an "interim order." The former refers to an arbitral award that relates only 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).

Civil Procedure Act.[9] Accordingly, partial awards are awards on one or several claims, or on part of a single claim ripe for adjudication. Partial awards are independent awards and remain amenable to enforcement procedure. On the other hand, interim awards are decisions on legal grounds underlying monetary claims rendered in situations in which both the legal grounds and the amounts of the monetary claims are under challenge. According to CLA, unless otherwise agreed by the parties, an arbitral tribunal is authorized to make partial and interim awards. However, interim awards are not independent awards, and thus may not be subject to enforcement. Consequently, only final and partial awards may be subject to recognition and enforcement.

The CLA does not explicitly define the term "foreign arbitral award". However, from the statutory language of the CLA, it can be inferred that a foreign arbitral award is an award that is made in a place outside the territory of the Republic of Croatia. This definition is derived from the language of Art 38 of the CLA, which states that an arbitral award has the nationality of the state where the arbitration is seated. Further, the principle of territoriality has been expressly incorporated in the CLA in the definition of a domestic arbitration. Art 2(1)(2) of the CLA defines a "domestic arbitration" as an arbitration that takes place in the territory of the Republic of Croatia (regardless of the nationality of the parties or the applicable substantive or procedural law). *Argumentum a contrario*, a "foreign arbitration" is an arbitration that takes place outside the territory of the Republic of Croatia. Consequently, a domestic arbitral award would be an award made in the territory of the Republic of Croatia, while a foreign arbitral award would be an award made in any other place.

Art 38 of the CLA (dealing with the nationality of awards) is beneficial not only for providing a simple method of distinguishing domestic awards from foreign awards, but also for attributing a nationality to every arbitral award made and thereby avoiding problems of "a-national" arbitral awards.

Under certain circumstances, a party seeking recognition or enforcement of a foreign arbitral award can opt to rely on the CLA or international instruments other than the Convention as more favorable laws as provided under Art VII of the Convention. Besides the Convention, Croatia is a party to the following multilateral conventions – (i) the Geneva Protocol on

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9 Official gazette SFRJ 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, and Narodne novine 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19.

Arbitration Clauses (1923); (ii) the Geneva Convention on the Execution of Foreign Arbitral Awards (1927); (iii) the European Convention on International Commercial Arbitration (1961); and (iv) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965). The relationship of the Convention to the 1923 Geneva Protocol and the 1927 Geneva Convention is dealt with by the Convention itself. In that sense, the Convention has precedence over these international instruments.

Recognition and enforcement of foreign arbitral awards are regulated by Art 40 of the CLA which relies on the wording of Art V of the Convention. Accordingly, recognition and enforcement of foreign arbitral awards may be denied when the party making the application furnishes proof that:

a) there was no agreement to arbitrate, or such agreement was not valid;
b) a party to the arbitration agreement was incapable of concluding the arbitration agreement or to be a party to an arbitration dispute or that a party was not duly represented;
c) the party against whom the award is invoked was not given proper notice of the commencement of the arbitral proceedings or was otherwise unable to present his case before the arbitral tribunal;
d) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; or
e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the CLA.
f) that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

CLA features an additional ground for refusal of recognition and enforcement of a foreign arbitral award – lack of reasons or signature of the award. If applicable, this ground becomes a powerful tool in the hands of the party resisting recognition and enforcement.

Finally, subject to Art 49 (2) of the CLA recognition and enforcement may be denied *ex officio* when the court finds that:

a) the subject-matter of the dispute is not abritrable under Croatian law
b) the recognition or enforcement of the award would be contrary to the Croatian public policy.

It may be concluded that unless a foreign arbitral award lacks reasons or signature, it would be practically irrelevant whether the CLA or the Convention applies in a particular case, as both sets of provisions would yield the same result

There are few cases in which Croatian courts have discussed the concept of public policy within the meaning of the Convention. However, there is substantial case law on the concept of public policy within the meaning of the CLA – be it as a ground for setting aside a domestic award or as a ground for refusal of recognition and enforcement of a domestic or foreign arbitral award. The general tendency of the courts in Croatia is to interpret the concept of public policy narrowly and to apply the same concept of public policy to domestic and foreign arbitral awards. According to the Supreme Court, the non-application of mandatory rules does not necessarily constitute a ground for refusal of recognition and enforcement.

Croatian law does not explicitly draw a distinction between international and domestic public policy for the purposes of recognition and enforcement of arbitral awards. However, the courts in Croatia are allowed to proceed on the basis of their own understanding of international public policy, and they have done so in a number of cases. The case law available clearly demonstrates that the courts in Croatia interpret the concept of public policy very narrowly even in a purely domestic context. Thus, on certain occasions, the distinction between international and domestic public policy might appear to be very thin or non-existent. This approach has been welcomed by commentators, who have suggested that the acceptance of a separate standard of domestic public policy would be a big step back for arbitration law in Croatia.

Finally, it is worth mentioning that by way of application of EU law, there is at least one set of mandatory rules that should always be covered by the concept of public policy – the EU competition law rules (*i.e.*, Arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)).

5. Is commercial arbitration in your country perceived as a viable alternative to taking cases in front of national courts?

As already stated, the number of cases on the PAC-CCC are rather modest, which does not mean that arbitration is not perceived as a viable alternative to taking cases in front of national courts. Many companies opt for *ad-hoc* arbitrations and arbitrations under different arbitration rules, depending on the country where their business partners have their seats (e. g. ICC Rules, VIAC Rules, DIS Arbitration Rules etc.). This is not surprising, as parties rely on international commercial arbitration as more suitable dispute resolution method in international cases, compared to general court proceedings.

I. INVESTMENT ARBITRATION

6. How is the international legal framework for investment arbitration constituted?

a. Do(es) your country's arbitration law(s) also apply to investment arbitration?

b. Has your country signed and ratified the ICSID Convention?

c. Which arbitration rules are the most often used?

d. Is your country party to many BITs and/or regional investment treaties (such as the Energy Charter Treaty)?

e. Does your country have a Model BIT, or otherwise use model language in its BITs?

The ICSID Convention is in force in Croatia since 22 October 1998 which has considerably contributed to the legal certainty and predictability of foreign investments in Croatia. ICSID Convention Arbitration Rules are usually applied in proceedings under the ICSID Convention.

In July 2013, the moment when Croatia joined the EU, it had signed fifty-eight Bilateral Investment Treaties (BITs), fifty-two of which were then in force. Out of these agreements, twenty-three agreements were concluded with other Member States of the European Union. In light of the *Achmea* decision of the European Court of Justice, arbitrations initiated under intra-EU BITs are problematic, and Croatia has already started to raise invalidity arguments in the context of some concluded and pending investment arbitrations. The full status of the Treaties is

available on the website of the Croatian Ministry of Foreign Affairs.[10] A list of concluded BITs and the PDF version of the text of some of them can also be found on the website of the Ministry of Economy.[11]

Many of the treaties were adopted by accession to the treaties concluded by the former SFR Yugoslavia. Therefore, there is no particular model BIT currently used in Croatia. On the contrary, the wording of the concluded BITs, and in particular their dispute resolution clauses, varies greatly and is in several cases considerably unclear, which has caused some criticism in legal doctrine.

Further references to arbitration can be found in a number of trade agreements, and the protection of foreign investments is also the subject of certain multilateral agreements to which Croatia is a party, such as the Energy Charter Treaty of 1994.

7. How is the investment arbitration practice in your country?

a. How many investment arbitration cases are there annually against your country?

b. How many investment arbitration cases are there annually initiated by investors from your home country?

Since 2000, Croatia has been party to several investment arbitration cases. According to UNCTAD data, at the time of writing, there had been twelve cases in which Croatia was the respondent State, and three cases in which Croatia was the home State of the claimant. Seven cases were still pending at the time of writing; one was initiated in 2013 and six of them were initiated in 2016 and 2017. Of the remaining five cases, three were decided in favor of the State, one in favor of the investor, and one in favor of neither party (liability was found but no damages awarded). As to the enforcement of investment awards, in the only case that was decided in favor of the investor (*Gavrilović v. Croatia*, decided in July 2018), the State had raised objections based on the *Achmea* decision. The objection was dismissed by the ICSID tribunal, and the State subsequently enforced the award voluntarily. However, in the future, the enforcement of arbitral awards based on intra-EU BITs will ultimately depend on the final outcome of the current EU position regarding the validity of arbitral awards made under intra-EU bilateral investment treaties.

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10 See <www.mvep.hr>.

11 See <www.mingorp.hr>.