The European Arbitration Review

2019

Montenegro

The European Arbitration Review

2019

The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

Montenegro

Vesko Božović
VMB Law Firm

Summary

INTRODUCTION

On 31 July 2015, Parliament adopted the Law on Arbitration.[1] With it, Montenegro became one of 90 states that has implemented the UNICTRAL Model Law. The law came into force in August 2015. As the provisions from the Law on Civil Procedure had been applied before the Law on Arbitration was passed, it had been noticed that the Law on Civil Procedure was not suitable for the current needs of businesses, investors and other interested parties as the Law on Civil Procedure was incomplete, and in certain provisions contradictory.[2] In addition, one of the provisions, inter alia, stipulated that in case the arbitration court was composed of persons among which one person was a judge at one of the state courts, he or she had to be the chairperson of the arbitral tribunal or a sole arbitrator.[3] With the adoption of the Law on Arbitration the distinction between domestic disputes and disputes with a foreign element was eliminated. Soon after the enforcement of the Law on Arbitration, drafting of the new arbitration rules commenced.[4] Prior to the adoption of Rules on Arbitration of Montenegro (Montenegrin Rules) before the Chamber of Commerce of Montenegro (CCM), the Assembly of the Chamber of Commerce of Montenegro (ACCM) brought the decision on the constitution of the arbitration court before the CCM, which means that the previous two arbitration courts were abolished: the Permanent Elected Court and the Foreign Trade Arbitration Court. The permanent list of arbitrators was abolished according to the new regulation that contains only a list of arbitrators having the informative character.

While drafting the Montenegrin Rules,[5] the working group carried out examinations regarding comparative resolutions and concluded that in the past few years, drafting and adoption of new arbitration rules occurred with the following:

- the UNCITRAL Rules (2010);[6]
- the International Chamber of Commerce (ICC) Rules (2012);[7]
- the Rules of Lewiatan Court of Arbitration (2012);[8]
- Vienna International Arbitral Centre (VIAC) Rules (2013);[9]
- the Abu Dhabi Commercial Conciliation and Arbitration Centre Rules (2013);[10]
- the Beijing Arbitration Commission Rules (2013);[11]
- the London Court of International Arbitration Rules (LIAC) (2014);[12] and
- the Ljubljana Arbitration Rules (2014).[13]

There was also the adoption of Arbitration Rules of Zagreb by the end of 2015,[14] as well as the Arbitration Rules of the Permanent Elected Court before the Chamber of Commerce of Serbia in June, 2016.[15] There is a good example of Singapore International Arbitration Centre (SIAC) that originally adopted its arbitration rules in 2013 and after three years new rules were adopted indicating the awareness of how important it is to achieve more efficient and thorough dispute resolution through arbitral proceedings and continuous adjustments to current trends. New SIAC Rules (2016) will obtain consolidation of disputes and will give a chance for parties to join the existing arbitrations and by doing so to provide resolution of proceedings at an early stage. These modifications contributed to more expedient and more efficient proceedings of SIAC arbitration.[16]

When it came to the drafting new Montenegrin Rules, the Ljubljana Arbitration Rules, the VIAC Rules, the new ICC Rules and UNICTRAL Rules were all compared. Since the adoption

of modifications and amendments to the UNICTRAL Model Law, new provisions have been established such as:

- interim measures;
- emergency arbitration;
- emergency arbitrator; and
- multiparty arbitration.

There was caution as to whether to accept the amendments to national law or to enact new laws on arbitration on the basis of the adopted amendments to the UNICTRAL Model Law.-[17]

In this article, special attention will be paid to the following sections prescribed by the Montenegrin Rules:

- the number of arbitrators;
- the appointment of arbitrators;
- the impartiality and independence of arbitrators;
- the confirmation of arbitrators;
- the challenge of arbitrators; and
- the release and replacement of arbitrators.

All these sections as prescribed by Montenegrin Rules will be compared to the arbitration rules of leading arbitration institutions.

NUMBER OF ARBITRATORS

In the great majority of international commercial arbitrations, parties appoint either one or three arbitrators. Appointing two arbitrators (or any even number of them) or more than three arbitrators is far less common, but not completely unheard of in IP disputes resolved by means of international arbitration.[18] A few other institutional rules contain a presumption in favour of three arbitrators (Stockholm Chamber of Commerce Rules, article 12 and the China International Economic and Trade Arbitration Commisssion Rules 2015, article 25(2)). Article 7(1) of the UNCITRAL Rules provides that, where the parties have not otherwise agreed, 'the number of arbitrators shall be three'. Similarly, the Montenegrin Rules on arbitration provide that:

> Where the parties have not agreed on the number of arbitrators, the dispute is to be decided by a panel of three arbitrators unless the Presidency, taking into account the complexity of the case, the amount in dispute or other circumstances, decides that the dispute is to be decided by a sole arbitrator.-[19]

In expedited proceedings disputes shall be resolved by a sole arbitrator unless the Presidency determines, with respect to the complexity and other circumstances of the case, that the dispute shall be resolved by an arbitral tribunal consisting of three arbitrators.[20] The Presidency shall appoint an emergency arbitrator as soon as possible, albeit within 48 hours of receiving the application. After the appointment has been made, the Secretariat

shall transmit the application to the emergency arbitrator without delay. Article 18 of the Montenegrin Rules shall apply to the emergency arbitrator, with the exception of the time limit referred to in article 18(2) of these rules, which is three days.

In contrast, many institutional rules (including the ICC, SIAC, LCIA, Swiss and American Arbitration Association (AAA) Commercial Rules) provide presumptively for a sole arbitrator, with the institution being granted discretion to appoint three arbitrators in larger (or otherwise more complex) cases.[21] Other rules do not presumptively provide for one or three arbitrators; the institution will decide the appropriate number of arbitrators by taking into account the circumstances of each case (Hong Kong International Arbitration Centre Rules 2013, article 6(1); Netherlands Arbitration Institute Rules 2015, article 12(2); VIAC Rules 2013, article 17(2)).[22]

The German Arbitration Institute (DIS) Rules 2018 promote flexibility by, inter alia, including more open regulations on the number of arbitrators, even permitting any odd number. Flexibility is also reflected in regulations addressing consolidation, multiparty and multi-contract situations (article 8 and articles 17–20).[23]

APPOINTMENT OF ARBITRATORS

Appointment of arbitrators commences by filing a request by a claimant within which the arbitrator has to be proposed.[24]

Article 7 of the Montenegrin Rules prescribes that:

> The Secretariat shall send the statement of claim to the respondent and invite the respondent to submit a statement of defense within 30 days from the date of receiving the statement of claim. Statement of defense should contain the proposal of appointment of one or more arbitrators if that is prescribed by the agreement on arbitration.[25]
>
> If the arbitral tribunal has not been appointed within the time period agreed by the parties or, where the parties have not agreed on a time period, within the time period set by the Secretariat, the arbitrators shall be appointed pursuant to Articles 14 and 15 of these Rules. In appointing an arbitrator under these Rules, the Presidency shall consider the nature of the dispute, the substantive law, the place of the arbitration, the language of the proceedings, the nationality of the parties and other circumstances of the case.[26]
>
> Where a dispute is resolved by more than one arbitrator, each party shall nominate an equal number of arbitrators. The arbitrators thus nominated shall, after their confirmation, within 15 days of being invited to do so by the Secretariat, nominate the arbitrator who is to act as the Chairperson of the Arbitral Tribunal.[27]

According to DIS Rules:

- new and stricter time limits are prescribed (eg, the respondent must now nominate its arbitrator no later than 21 days after the receipt of the request for arbitration and the president must be nominated within 21 days after the co-arbitrators were notified by DIS to do so, in both cases instead of 30 days);

- new procedural management techniques (eg, case management conference 21 days after constitution of tribunal); and
- cost sanctions in the event of a delay.[28]

In Australia, if the parties have not previously agreed on the number of arbitrators and if within 30 days after the receipt by the Respondent of the Notice of Arbitration the parties cannot agree, the Australian Centre for International Commercial Arbitration shall determine the number of arbitrators (section II, article 10, ACICA Rules 2016).

Pursuant to the International Centre for Settlement of Investment Disputes (ICSID) Rules, parties have 60 days from registration of the request in which to reach an agreement. This time limit may be, and often is, extended by agreement. If the parties cannot agree within the deadline on the parameters for constituting a tribunal, Rule 3 provides that either party may invoke the default formula for a three-member panel set out in article 37 (2)(b) of the ICSID Convention: each party names one arbitrator and the two parties then agree on the third arbitrator, who becomes president of the tribunal.[29]

APPOINTMENT OF ARBITRATORS IN MULTI-PARTY PROCEEDINGS

Article 15 of the Montenegrin Rules reads that:

> Where there are multiple claimants and/or respondents, the arbitrators shall be appointed pursuant to Article 14 of these Rules unless otherwise provided by these Rules.
>
> Where a dispute is resolved by more than one arbitrator and there are multiple claimants and/or respondents, all multiple claimants, jointly, and all multiple respondents, jointly, shall nominate an equal number of arbitrators. If either side fails to make such joint nomination within the time period, agreed upon by the parties or set by the Secretariat, the arbitrator or arbitrators shall be appointed by the Presidency. In such case the Presidency shall revoke the appointments already made and appoint one arbitrator or all arbitrators and designate an arbitrator among them who is to act as the chairperson of the arbitral tribunal.

The LCIA Rules, like other prominent arbitration institutions,[30] contain a specific provision for the appointment of arbitrators in a multiparty context (ie, if there are more than two parties to the dispute).[31]

IMPARTIALITY AND INDEPENDENCE OF THE ARBITRATORS

According to Montenegrin and ICC Rules every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.[32] According to Codes of Ethics of Montenegro a person nominated as an arbitrator shall submit to the Secretariat a signed declaration of acceptance, availability, impartiality and independence. In that declaration the person nominated as an arbitrator shall disclose any circumstances which may give rise to justifiable doubts as to his or her impartiality or independence. The Secretariat shall send a copy of the declaration to the parties and the other arbitrators and set a period of time, within which they may submit comments.[33]

National ethical rules and enforcement regimes are firmly entrenched in cultural expectations and national procedural traditions. International arbitration, by contrast, has special procedures designed to transcend national legal cultures and procedural traditions.-[34] Therefore, it can be assumed that independence is understood as an objective criterion for the connection of the arbitrator to the parties, and impartiality as a subjective criterion for the mental attitude of the arbitrator to the case to be decided (Lionnet 2005: 246).[35]

CONFIRMATION OF ARBITRATORS

Article 17 of the Montenegrin Rules provides that:

> The confirmation of nominated arbitrators shall be decided upon by the Secretariat. In doing so, the Secretariat shall consider the declaration referred to in Article 16(2) of these Rules and all circumstances which may give rise to doubts as to an arbitrator's impartiality or independence, availability and ability to perform his functions properly and with due dispatch and any comments by the parties. The Secretariat has no obligation to give reasons for its decision.

ICC Rules prescribe that the Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the court.[36]

According to Swiss Rules, all designations of an arbitrator made by the parties or the arbitrators are subject to confirmation by the court, upon which the appointments shall become effective. The court has no obligation to give reasons when it does not confirm an arbitrator.

Where a designation is not confirmed, the court may either:

- invite the party or parties concerned, or, as the case may be, the arbitrators, to make a new designation within a reasonable time-limit; or
- in exceptional circumstances, proceed directly with the appointment.

In the event of any failure in the constitution of the arbitral tribunal under Swiss Rules, the court shall have all powers to address such failure and may, in particular, revoke any appointment made, appoint or reappoint any of the arbitrators and designate one of them as the presiding arbitrator.[37]

Pursuant to VIAC Rules, after an arbitrator has been nominated, the Secretary General shall obtain the arbitrator's declarations pursuant to article 16, paragraph 3. The Secretary General shall forward a copy of these statements to the parties. The Secretary General shall confirm the nominated arbitrator if no doubts exist as to the impartiality and independence of the arbitrator and his ability to carry out his mandate. The Secretary General shall inform the board of such confirmation at the subsequent meeting of the board.[38]

CHALLENGE OF ARBITRATORS

Article 18 of the Montenegrin Rules prescribes that:

> A party may challenge an arbitrator within 15 days after the circumstances referred to in paragraph 1 of this Article became known to that party. Failure by a party to challenge the arbitrator within this time period constitutes a waiver of the right to make a challenge. The party challenging the arbitrator shall send the request for its challenge to the Secretariat. The request shall be made in writing and contain the reasons for the challenge. The Secretariat shall notify the challenged arbitrator, the other parties and the other arbitrators of the challenge and set a time period within which they may submit comments on the challenge.

The majority of arbitration laws and rules recognise both the lack of independence and impartiality as justifiable reasons for a challenge.[39] Under the UNCITRAL Rules, the application must be sent within 15 days directly to the parties and all members of the arbitration tribunal.[40]

The LCIA Rules do not dictate the manner in which submissions may be made to the LCIA Court in respect of a challenge. Parties, however, should not expect that they will have unlimited discretion in this matter. The terms of article clearly give power to the LCIA Court to decide how and when such submissions may be made.[41]

RELEASE AND REPLACEMENT OF ARBITRATORS

Article 19 of the Montenegrin Rules reads that:

> The Presidency shall release an arbitrator from appointment where:
>
> - all parties agree to the release of the arbitrator;
> - or the arbitrator is de jure or de facto unable to perform his or her functions or fails to perform them in accordance with these Rules; or it accepts the withdrawal of the arbitrator; or it sustains a challenge of the arbitrator.

In international commercial arbitration a replacement for a party-appointed arbitrator should be by the same party to ensure that both parties have the same influence on the appointment of the tribunal that will finally render the award.[42]

According to LCIA Rules any party may apply to the LCIA Court for the expedited appointment of a replacement arbitrator under article 11.

Such an application shall be made in writing to the Registrar (preferably by electronic means), delivered (or notified) to all other parties to the arbitration; and it shall set out the specific grounds requiring the expedited appointment of the replacement arbitrator.

The LCIA Court shall determine the application as expeditiously as possible in the circumstances. If the application is granted, for the purpose of expediting the appointment of the replacement arbitrator, the LCIA Court may abridge any period of time in the arbitration agreement or any other agreement of the parties (pursuant to article 22.5).[43]

Pursuant to Swiss Rules, in all instances in which an arbitrator has to be replaced, a replacement arbitrator shall be designated or appointed pursuant to the procedure provided for in articles 7 and 8 within the time-limit set by the court. Such procedure shall apply even if a party or the arbitrators had failed to make the required designation during the initial appointment process.

In exceptional circumstances, the court may, after consulting with the parties and any remaining arbitrators:

- directly appoint the replacement arbitrator; or
- after the closure of the proceedings, authorise the remaining arbitrators to proceed with the arbitration and make any decision or award.[44]

In accordance with the Stockholm Rules, the board shall appoint a new arbitrator where an arbitrator has been released from appointment pursuant to article 20, or where an arbitrator has died. If the released arbitrator was appointed by a party, that party shall appoint the new arbitrator, unless the board otherwise deems it appropriate. Where the arbitral tribunal consists of three or more arbitrators, the board may decide that the remaining arbitrators shall proceed with the arbitration. Before the board takes a decision, the parties and the arbitrators shall be given an opportunity to submit comments. In taking its decision, the Board shall have regard to the stage of the arbitration and any other relevant circumstances. Where an arbitrator has been replaced, the newly composed arbitral tribunal shall decide whether and to what extent the proceedings are to be repeated.[45]

SIAC Rules prescribe that in the event of the death, resignation, withdrawal or removal of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed in accordance with the procedure applicable to the nomination and appointment of the arbitrator being replaced.

In the conclusion, it can be noticed that, with regard to the crucial and sometimes sensitive issue on arbitrators, the Montenegrin Rules are generally aligned to the UNICTRAL Rules. Consequently, the Montenegrin Rules are similar to arbitration rules of almost all institutions worldwide while keeping the record of all modifications applied in arbitration rules of leading arbitration institutions in the world.

Notes

Law on Arbitration, Official Gazette of Montenegro, No. 47/2015.

[1] Law on Civil Procedure, Official Gazette of Montenegro, No. 22/2004 and 76/2006.

[2] Law on Civil Procedure, Art. 475(2).

[3] Arbitration rules of the Arbitration court before the Chamber of commerce of Montenegro, 2015.

[4] Working group avails of the opportunity to express special gratitude to the Embassy of the Kingdom of Norway, GIZ and especially to Prof. Dr. Aleš Galicˇ, vice-chairperson of the Ljubljana Arbitration Centre, who was the main bearer of all activities related to drafting the 2015 Arbitration rules of the Arbitration court before the Chamber of commerce of Montenegro.

The United Nations Commission on International Trade Law.

[6] ICC International Court of Arbitration.

[7] Rules of the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan.

[8] The International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna International Arbitral Centre).

[9] Abu Dhabi Centre for Arbitration and Mediation.

[10] Rules of the Belgrade Arbitration Centre.

[11]

London Court of International Arbitration Centre.

[12] Arbitration Rules of the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (the Ljubljana Arbitration Rules), 2014.

[13] The Rulebook on arbitration before the Permanent Arbitration Court of the Croatian Chamber of Economy (The Rules of Zagreb), 2015.

[14] The Rulebook on Permanent Arbitration before the Chamber of Commerce of Serbia (Official Gazette of the RS, No. 58/2016).

[15] See www.bakermckenzie.com/-/media/&les/insight/publications/2016/07/new-sia c-rules-2016/al_singapore_newsiacrules (15.07. 2016).

[16] Boz˘ovic´, V (2016). Slovenac˘ka arbitraz˘na praksa, V(3), 23–29.

[17] Trevor Cook and Alejandro I Garcia, *Intellectual Property Arbitration*, Wolters Kluwer (2010: 141).

[18] Rules on arbitration of Montenegro, (article 13).

[19] Boz˘ovic´, V, *GAR: The European Arbitration Review 2018*, 'Expedited procedure', pp 81–85.

[20] The ICC Rules 2012, article 12(2); SIAC Rules 2013, article 6(1); LCIA Rules 2014, article 5(8); International Centre for Dispute Resolution Rules 2014, article 11; AAA Commercial Rules 2013, Rule 16(a); Swiss Rules 2012, article 6(2); Korean Commercial Arbitration Board Rules, article 1; Bahrain Chamber for Dispute Resolution Rules 2017 8(1).

[21] Gary B Born, *International arbitration: Law and Practice*, second edition, Wolters Kluwer (2016: 132–133).

[22] Markus Burianski, Alexandra N Diehl (2018), 'Global Law Practice New DIS RULES after 20 years', www.whitecase.com/publications/alert/new-dis-rules-after-20-years.

[23] Article 5 (1) Rules on Arbitration of Montenegro.

[24] Article 5 (1) Rules on Arbitration of Montenegro.

[25] Article 14 (6) Rules on Arbitration of Montenegro.

[26] Article 14 (1) Rules on Arbitration of Montenegro.

[27] Markus Burianski, Alexandra N Diehl (2018), 'Global Law Practice New DIS RULES after 20 years', www.whitecase.com/publications/alert/new-dis-rules-after-20-years.

[28] Lucy Reed, Jan Paulsson, Nigel Blackaby, *Guide to ICSID Arbitration*, second edition, Wolters Kluwer (2011: 131–132).

[29] ICC Rules 2012, articles 12.6–12.8; VIAC Rules 2013, article 18; SCC Rules 2010, article 13.4; Swiss Rules 2012, Article 8; China International Economic and Trade Arbitration Commisssion Rules 2015, article 29; SIAC Rules 2013, article 9; Hong Kong International Arbitration Centre Rules (2013), article 8.2.

[30] Maxi Scherer, Lisa M Richman, Remy Gerbay, *Arbitrating under the 2014 LCIA Rules*; Wolters Kluwer, p 131.

[31] Catherine A Rogers, *Ethics in International Arbitration*, Oxford University Press, London (2014: 75).

[32] Codes of ethics of arbitrators of Montenegro.

[33] Catherine A Rogers, *Ethics in International Arbitration*, Oxford University Press, London (2014: 6).

[34] Karl-Heinz Bockstiegel, Stefan Michaell Kroll and Patricia Nacimiento, *Arbitration in Germany: The model Law in practice*, second edition, Wolters Kluwer (2015: 186).

[35] ICC Rules 2017, article 13 (2).

[36] Swiss Rules, Section II, article 5.

[37] Vienna Rules (2018), article 19.

[38] DIS Rules section 18(1).

[39] Julian, D M Lew, Loukas A Mistelis, Stefan M Kröll, *Comparative International Commercial Arbitration*, Wolters Kluwer (2003: 310).

[40] Maxi Scherer, Lisa M Richman, Remy Gerbay, *Arbitrating under the 2014 LCIA Rules*; Wolters Kluwer, p 173.

[41] Julian, D M Lew, Loukas A Mistelis, Stefan M Kröll, *Comparative International Commercial Arbitration*, Wolters Kluwer (2003: 318).

[42] LCIA Rules (2014), article 9 C.

[43] Swiss Rules, section II, article 12.

[44] Stockholm Rules (2017), article 21.

[45]

Vesko Božović vesko.b.adv@t-com.me

Read more from this firm on GAR