The European Arbitration Review

2019

Slovenia

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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.

Slovenia

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Summary

With its geostrategic position and modern and comprehensive legal framework for commercial arbitration, Slovenia endeavours to develop its potential as an attractive and neutral seat of arbitration in international commercial transactions. The 2008 Arbitration Act (the Arbitration Act)[1] largely incorporates the 1985/2006 UNCITRAL Model Law on International Commercial Arbitration (the UNICTRAL Model Law) and provides a modern framework for arbitration proceedings in Slovenia. Slovenia is also party to all principal multilateral conventions in the field of international arbitration, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the European Convention on International Commercial Arbitration and the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

International commercial arbitration traditionally has strong institutional support in Slovenia. The Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (LAC) and its predecessor, the Tribunal of the Ljubljana Chamber of Trade, Craft and Industry, have been administrating arbitration and mediation proceedings since 1928. The currently applicable LAC Rules entered into force on 1 January 2014 and follow the modern international trends in institutional arbitration ensuring speedy and efficient arbitration proceedings.

This article presents the currently applicable legal framework of international arbitration in Slovenia with special focus on the most recent developments, namely with regard to the border arbitration between Croatia and Slovenia, to third-party funding and the establishment of the Patent Mediation and Arbitration Centre.

SLOVENIAN ARBITRATION ACT

The Arbitration Act, which governs arbitration proceedings conducted in Slovenia, is largely modelled on the UNCITRAL Model Law and expressly provides that its provisions are to be interpreted in accordance with the UNCITRAL Model Law.

The most notable deviation of the Arbitration Act from the UNCITRAL Model Law is its express provision on arbitrability. According to article 4(2) of the Arbitration Act, any natural or legal person, including the Republic of Slovenia and other public entities, may conclude an arbitration agreement. Any pecuniary claim can form the object of an arbitration agreement, while with regard to non-pecuniary claims, only disputes concerning a legal relationship in respect of which the parties may reach a settlement, are arbitrable. Consequently, most of the disputes concerning family and public law may not be submitted to arbitration.[2] On the other hand, competition law disputes are, in principle, deemed as arbitrable, in accordance with the case law of the European Court of Justice, in particular in the ***Eco Swiss*** case,[3] following the US Supreme Court in the landmark ***Mitsubishi*** case.[4]

Consumer and labour disputes may also be referred to arbitration, subject to certain provisions ensuring the protection of the weaker party. Consumer and labour disputes are arbitrable solely if the arbitration agreement is entered into after the dispute has arisen. In addition, the arbitration agreement must be concluded in a special document (separate from the base contract), hand-signed by the consumer or the employee, respectively, and must define the seat of the arbitration. The arbitration tribunal may hold hearings outside the place of its seat only with the prior consent of the consumer or the employee, respectively, or if examining the evidence at the seat of the arbitration would give rise to disproportionate

difficulties. Moreover, arbitration proceedings related to consumer and labour disputes must be conducted in Slovenian, unless expressly agreed otherwise. Finally, grounds for challenging the arbitral awards are wider in consumer and labour disputes than in other disputes.

ARBITRATION AGREEMENT

The Arbitration Act defines the arbitration agreement as:

> an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined contractual or non-contractual legal relationship.

An agreement to refer all future disputes between the parties to arbitration, without reference to an underlying legal relationship, is hence not allowed.[5] Moreover, an arbitration agreement can be concluded in the form of an arbitration clause in a contract or in the form of a separate agreement.

Article 10 of the Arbitration Act follows the general principles of the New York Convention-[6] with regard to the form requirements of the arbitration agreement, requiring that it be concluded in writing. Promoting the arbitral resolution of maritime and corporate disputes, Slovenian law allows an arbitration agreement to be contained in an express reference to an arbitration clause in a shipping contract or in the articles of association of a company, referring all future disputes to arbitration.[7]

Finally, with regard to the validity of an arbitration clause contained in a null or void agreement, Slovenian law applies the severability principle.[8]

APPOINTMENT OF ARBITRATORS

There are no special conditions under Slovenian law for a person to be appointed as an arbitrator and there is no general requirement for arbitrators to have any specific experience or qualifications under the applicable law.[9] As the UNCITRAL Model Law, the Arbitration Act expressly provides that no one is precluded by reason of their nationality from acting as an arbitrator, unless otherwise agreed by the parties.

Party autonomy is at the forefront of the appointment procedure, with the Arbitration Act providing default provisions for appointment in the absence of the parties' agreement. According to article 13 of the Arbitration Act, the arbitration tribunal consists of three arbitrators, with each party appointing one arbitrator, and the two arbitrators thus appointed appointing the chairperson of the tribunal. If a party fails to appoint the arbitrator within 30 days of receipt of a request from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days from their appointment, the appointment is made, upon request of a party, by the District Court of Ljubljana. If parties agreed to have their dispute resolved by a sole arbitrator, but cannot agree on the selection, the arbitrator is to be appointed, upon request of either party, by the District Court of Ljubljana.

The LAC Rules provide for a similar appointment procedure as the Arbitration Act, save in the absence of parties' agreement on the appointment of arbitrators, the appointment is made by the LAC Board. The LAC Rules additionally provide for Emergency Arbitrator Proceedings (EAP), not foreseen by the Arbitration Act, appropriate when a party needs an urgent interim measure that cannot await the constitution of an arbitral tribunal. The application for the

EAP is sent to the LAC via email, the LAC Board appoints an emergency arbitrator within 48 hours from the receipt of the application and a binding decision on interim measures is made within 15 days from the date of transmission of the application to the emergency arbitrator. Upon conclusion of the (underlying) arbitral proceedings, the interim measure ceases to be binding, unless the arbitral tribunal decides otherwise.

ARBITRAL PROCEEDINGS

In line with the modern approach of the Arbitration Act and the UNCITRAL Model Law, the conduct of arbitral proceedings is primarily characterised by party autonomy and subordinately by the discretionary power of the arbitral tribunal, subject to the mandatory provisions of the Arbitration Act.[10] The mandatory provisions include the parties' right to equal treatment, the right to be heard, the capacity to become a party, arbitrator challenges, award challenges and interim measures.[11]

The arbitral proceedings in principle commence with the receipt of the request for arbitration by the respondent. The tribunal may hold an oral hearing or rule based on written pleadings, in accordance with the parties', or in the absence thereof, the tribunal's own decision.

The Arbitration Act and the LAC Rules provide certain limited requirements for written pleadings. The statement of claim must set forth the claimant's claim, including the relief or remedy sought, the facts supporting the claim and the (legal) points at issue. The statement of defence must set out the respondent's position with regard to the claimant, in particular whether and to what extent the respondent admits or denies the relief or remedy sought by the claimant, and the statement of facts and the legal grounds supporting the defence.

The arbitral tribunal has full authority to determine the admissibility, relevance, materiality and weight of any evidence. The LAC Rules expressly provide for the hearing and examination of witnesses and expert witnesses, in the manner set by the arbitral tribunal. Furthermore, the arbitral tribunal may appoint experts and impose information and document production requirements upon the parties for purposes of the expert determination. Finally, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request the assistance of a court of competent jurisdiction in the taking of evidence.

In the absence of any specific statutory provisions, the arbitral tribunal may conduct the discovery at its discretion, including by drawing adverse inferences from a party's failure to disclose or produce documents.

If, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal terminates the proceedings and the settlement may be recorded in the form of an arbitral award at the request of the parties, subject to conformity with the public policy of the Republic of Slovenia.

Under the LAC Rules, the final award must be rendered within nine months from the submission of the case to the arbitral tribunal and the time limit may be extended only for justified reasons.

The arbitral award must be in writing, must state the reasons for the decision and contain a reference to the date and the seat of the arbitration. All arbitrators must sign the award as a general rule, but the signatures of the majority of the arbitrators may suffice if the reason for the failure of an arbitrator to sign the award is set forth therein. As regards the parties, the arbitral award has the effect of a final and binding court judgment.

INTERIM MEASURES

The Arbitration Act allows the arbitral tribunal to grant interim measures, unless the parties agreed otherwise. Contrary to the UNCITRAL Model Law, the Arbitration Act does not define any specific grounds for interim measures, leaving this matter to the discretion of the parties and the tribunal.

In contrast with interim measures granted by the courts, the arbitral tribunal will usually grant interim measures after the respondent party has had an opportunity to present its case with respect to the request for the measure, save when the arbitral tribunal deems an interim measure exceptionally urgent, in which case it may rule on the measure without an adversarial exchange.

Interim measures granted in arbitration are subject to the recognition and enforcement in judicial proceedings,[12] but are not binding on third parties.[13] Recognition and enforcement will not be granted with respect to interim measures granted in the absence of an adversarial exchange, although such an interim measure is legally binding on the parties. The Arbitration Act expressly provides that parties are not limited to the interim measures granted by the arbitral tribunal and may at any time apply for interim measures in the courts.

CHALLENGE OF THE ARBITRAL AWARD

The Arbitration Act allows the parties to challenge the arbitral award before the regular courts, by way of an application for setting aside the arbitral award, within three months from the date on which the party making the application has received the award. This period may be extended for an additional 30 days maximum if either party requests the correction or the interpretation of the arbitral award. The parties may not waive their right to challenge the award in advance.

Article 40 of the Arbitration Act, closely following article 34 of the UNCITRAL Model Law, specifies the grounds on which the parties may base an application for the setting aside of the arbitral award. The Arbitration Act expressly sets forth additional grounds for challenges of awards by consumers and employees, in case of violations of mandatory provisions from which the parties cannot derogate (even in cases with international elements) and in case of grounds for the setting aside of a judgment and remanding the case for a retrial.

In contrast to the UNCITRAL Model Law, article 40 of the Arbitration Act expressly excludes the lack of jurisdiction of the arbitral tribunal as grounds for the setting aside of an award if the court has already decided on this issue upon an application earlier in the proceedings.

The setting aside of an award does not affect the validity of the arbitration agreement on which the arbitration was based, allowing the parties to commence new arbitral proceedings following the setting aside of the award.

RECOGNITION AND ENFORCEMENT OF THE ARBITRAL AWARD

Pursuant to the Arbitration Act, an arbitral award has the effect of a final and binding court judgment between the parties, and can be enforced only after the court has declared it enforceable. Arbitral awards rendered by domestic arbitral tribunals may be refused such a declaration only if the subject-matter of the dispute may not be settled by arbitration or the award is in conflict with the public policy of the Republic of Slovenia.

With regard to foreign arbitral awards, the Arbitration Act specifically refers to the New York Convention.[14] Parties seeking the recognition of a foreign arbitral award have to provide an

original or copy of the arbitral award and, upon request of the court, an original or a certified copy of the arbitration agreement, and certified translations in case the agreement or the award are not in Slovenian.

With respect to the enforceability of interim measures granted by arbitral tribunals, the Arbitration Act specifically provides that the court may refuse to declare an interim measure enforceable if it finds ex officio that it is impossible to enforce the interim measure, and, at the request of a party, appropriately reformulates the interim measure to the extent necessary to ensure enforceability, provided that it does not substantially modify the measure.

CURRENT DEVELOPMENTS

Final Award In The Border Arbitration Between Croatia And Slovenia

On 29 June 2017, the arbitral tribunal composed of Judge Gilbert Guillaume as president and Ambassador Rolf Einar Fife, Professor Vaughan Lowe, Professor Nicolas Michel and Judge Bruno Simma as arbitrators, rendered the long-awaited final award in the arbitration proceedings between Croatia and Slovenia in which it determined the disputed land and maritime border between Slovenia and Croatia.[15]

After a series of unsuccessful attempts to resolve the dispute amicably, an arbitration agreement was signed by the prime ministers of both countries with the facilitation of the European Commission, on 4 November 2009, endowing upon the arbitral tribunal the task to determine the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia, Slovenia's junction to the high sea and the regime for the use of the relevant maritime areas.

With respect to the Bay of Piran, the tribunal applied the principle of uti possidetis and, in the absence of any formal division between the former republics prior to the dissolution of Yugoslavia, delimited the bay based on effectivités, fixing the boundary along a line situated between the lines advanced by the parties and leaving the larger part of the bay to Slovenia.-[16]

In its delimitation of the territorial sea, the tribunal sought to apply the equidistance principle to accommodate the particular configuration of Cape Savudrija.[17]

With regard to Slovenia's junction to the high seas, the tribunal observed that Slovenia's territorial sea boundary does not directly abut upon an area of high sea and found that the junction is to be an area in Croatia's territorial sea, immediately adjacent to the boundary laid down by the Treaty of Osimo, between the Slovenian territorial sea and the high seas, in the approximate width of 2.5 nautical miles. In this area, Slovenia is guaranteed uninterrupted and uninterruptible access from and to the high seas, including:

- the customary freedoms of communication applicable to all ships and aircraft for the purposes of access to and from Slovenia's territorial sea and airspace;
- freedom of navigation and overflight and of the laying of submarine cables and pipelines; and
- other internationally recognised freedoms, including the operation of ships, aircraft and submarine cables and pipelines.

However, such freedoms do not include the freedom to explore, exploit, conserve or manage the natural resources.[18]

With respect to the land boundary, the tribunal determined the boundary in accordance with international law and the principle of uti possidetis, acknowledging that over 90 per cent of the boundary had already been agreed upon by the parties, while for the remainder the tribunal sought to determine the boundary either based on legal title or effectivitées.

Pursuant to the arbitration agreement, the award is binding on the parties and constitutes a definitive settlement of the dispute, and the parties must take all necessary steps to implement it, including by revising national legislation, within six months after the award is rendered.

Croatia's refusal to accept and implement the award, has given rise to various infringements of European Union law, both generally, with regard to the rule of law and duty of loyal cooperation and specifically, in the field of, inter alia, fisheries and border controls. Accordingly, Slovenia initiated proceedings against Croatia pursuant to article 259 of the Treaty on the Functioning of the European Union, by a letter to the European Commission of 16 March 2018, followed by an application to the Court of Justice of the European Union of 13 July 2018.[19]

Third-party Funding

Despite the surrounding controversy, third-party funding (TPF) has come to be accepted as a lawful way of financing of arbitration proceedings.[20] As in numerous other jurisdictions, TPF is not expressly governed in Slovenian law.

Generally, TPF, as external financing of a party's arbitration expenses,[21] is based on a funding agreement between a party to the arbitration and an unrelated funder (eg, hedge funds, banks, insurance companies).[22] The funder is entitled to a share in the awarded proceeds in the case of the party's success in the arbitration, but remains bound to reimburse the costs of the proceedings in the adverse scenario.[23]

TPF can thus provide access to justice for claimants with scarce resources who would otherwise be deprived of their opportunity to have their case heard by an impartial tribunal. In addition, a funder's involvement (due diligence with regard to the claim) can provide a valuable pre-arbitration assessment of the probability of the outcome of the proceedings. However, TPF is not free of pitfalls: through their involvement, funders often obtain privileged and confidential information on the parties and their businesses, which they can potentially misuse in other proceedings involving at least one of the parties.

Even in the absence of applicable express provisions in Slovenian law, TPF is generally permitted and practised in Slovenia, without being subject to any special conditions or prerequisites, including in particular any obligations of disclosure of the involvement of funders in the proceedings.[24]

Filling the current regulatory void with regard to TPF, specifically by ensuring predictability of TPF-related issues,[25] would allow the Slovenian legislator to contribute to the further development of Slovenia as an arbitration-friendly environment, as has been the case with Hong Kong and Singapore. Finally, in the absence of experience of Slovenian financial institutions in this field, foreign funders from abroad have a good chance to establish themselves as major players in the evolving Slovenian market with regard to TPF.

Arbitration In Patent Disputes

On 22 September 2016, Slovenia ratified the Agreement on a Unified Patent Court (AUPC), which had been signed by 25 EU member states three years earlier.[26] The AUPC will enter into force after 13 EU member states, including France, Germany and the United Kingdom, have ratified it, which is expected in 2018.[27]

In addition to the creation of the Unified Patent Court, the AUPC also establishes the Patent Mediation and Arbitration Centre (PMAC), which will be located in Ljubljana and Lisbon and is intended to contribute to the promotion of the use of alternative dispute resolution for intellectual property disputes. The PMAC will provide facilities for the arbitration and mediation of patent disputes, and any settlement reached through the PMAC will be enforced in the same way as a decision or order of the Unified Patent Court (UPC). However, the reach of these alternative dispute solution proceedings is somewhat limited, as a patent cannot be revoked or limited in mediation or arbitration proceedings.

The European patent arbitration and mediation rules provide further details on the mediation process and the arbitration proceedings, but parties remain free to attempt to resolve their dispute independently of the UPC system through separate mediation or arbitration.

In Slovenia, the cooperation with the UPC preparatory committee and the implementation of the relevant provisions of the AUPC, including the creation of the PMAC, is carried out by the interdepartmental working group on the unified patent system established by the Slovenian government in 2013. Pursuant to the publicly available reports, the preparation of the legal framework for the operation of the UPC and the PMAC is in its final stages.[28]

Notes

[1] Official Gazette of the Republic of Slovenia No. 45/2008 et seq.

[2] Ude L, Arbitraz˘no pravo, GV Zaloz˘ba, Ljubljana 2004, p 68–69. See also: Shelkoplyas N, *The Application of EC Law in Arbitration Proceedings*, Europa Law Publishing, Groningen 2009, p 248.

[3] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR, I-3055, 1 June 1999.

[4] *Mitsubishi Motors Corporation v Soler Chrysler Pymouth Inc*, 473 US 614 (105 SCt 3346, 87 Led 2d 444), 2 July 1985.

[5] See, eg, Decision of the Higher Court in Ljubljana, ref. No. II Cp 2060/99 of 5 January 2000.

[6] See, eg, article 2(2) of the New York Convention.

[7] Podgorelec P and Primec A, Arbitraz˘na klavzula v ustanovitvenih aktih gospodarskih druz˘b, Podjetje in delo 8(2013), p 1261.

[8] Ude L, Arbitraz˘no pravo, GV Zaloz˘ba, Ljubljana 2004, p 82–83.

[9] Ibid, p 101. See also Dika M and Sajko K, Arbitraz˘no rješavanje medjunarodnih trgovac˘ih sporova, Ljubljana 1989, p 25.

[10] Ibid, n 8, p 129–130.

[11] Ibid, p 139-143.

[12] The decision of the Constitutional Court Up-20/99, the decision of the High Court of Ljubljana No. I Cpg 215/2007.

[13] Primec A, Zac˘asne odredbe (zac˘asni ukrepi) arbitraz˘e, Podjetje in delo, 2008, GV Zaloz˘ba 3–4, p 542-556; ibid, n 8 above.

[14] Official Gazette of the Socialist Federal Republic of Yugoslavia, International Agreements No. 11/81, and Official Gazette of the Republic of Slovenia, International Agreements Nos. 9/92 et seq.

[15] Permanent Court of Arbitration, case No. 2012-04, Final Award of 29 June 2017. Final Award, paragraphs 886–914.

[16] Ibid, paragraphs 1008–1011.

[17] Ibid, paragraphs 1123–1128.

[18] Case No. C-457/18. See also, eg,

[19] https://english.sta.si/2534705/govt-takes-croatia-to-eu-court-of-justice-over-border-arbitration

[20] See, eg, Nieuwveld B L, 'Third Party Funding – Maintenance and Champerty – Where is it Thriving?', Kluwer Arbitration Blog, available at http://kluwerarbitrationblog.com/2011/11/07/third-party-funding-maintenance-and-champerty-where-is-it-thriving/ (8 October 2016); Clanchy J, 'Third Party Funding in Arbitration: Breaking down Barriers and Building Bridges', *Croatian Arbitration Yearbook*, 2016, p 15; Z˘ivkovic´ P, 'The Recoverability of Outcome-Based Fees Related to Dispute Financing in International Arbitration', *Slovenian Arbitration Review*, 2017, GZS 1, p 39.

[21] Shaw JG, 'Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit', *Arbitration International*, 2017, Oxford Journals 33, p 110.

[22] Ibid, p 111.

[23] Frignati V, 'Ethical implications of third-party funding in international arbitration', *Arbitration International*, 2016, Oxford Journals 32, p 505–522.

[24] Fabiani L, et al, 'Country Chapter: Slovenia', *Survey of International Litigation Procedures: A Reference Guide*, The Foundation of the International Association of Defense Counsel, 2014, p 12.

[25] Eg, the recoverability of outcome-based fees (ie, uplift fees), an issue recently addressed by the English High Court in the case of *Essar Oilfields Services v Norscot Rig Management PVT Limited* EXHC 2361 (Comm) (2016).

[26] Act ratifying the Agreement on a Unified Patent Court (Official Gazette of the Republic of Slovenia No. 13/16).

[27] See 'A Message from the Chairman, Alexander Ramsay' – June 2017, available at www.unified-patent-court.org/news/message-chairman-alexander-ramsay-june-2017.

[28] Reports of the interdepartmental working group on the unified patent system are available at http://vrs-3.vlada.si/MANDAT14/VLADNAGRADIVA.NSF/GLA_PRE_KAT?OpenView&ExpandView&RestrictToCategory=02402%20-%202014%20/%20000009.

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