GAR KNOW HOW COMMERCIAL ARBITRATION

Serbia

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Infrastructure

1 Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?

Yes, the New York Convention entered into force in Serbia (then part of the federal Yugoslavia) in October 1981. The reservations of non-retroactivity, reciprocity and commercial disputes were made at the time and remain in place to date. In court practice, however, it has been held that these reservations became irrelevant following the promulgation of the Arbitration Act in 2006.

2 Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?

Yes, Serbia is a party to the European Convention on International Commercial Arbitration and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Additionally, Serbia concluded a number of bilateral agreements concerning recognition and enforcement issues.

3 Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?

Yes, Serbia enacted its Arbitration Act in 2006 to govern all arbitrations with their seat in Serbia. The Arbitration Act is based on the UNCITRAL Model Law of 1985, with certain additions to the effect that, for example: (i) the number of arbitrators must be odd; (ii) the parties must appoint arbitrators within a certain time frame; (iii) an award may be set aside if based on a false witness or expert testimony, counterfeit documents or criminal acts by arbitrators or parties (as established by a final and binding criminal court judgment).

4 What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?

There are two permanent arbitral institutions in Serbia for general dispute settlement, ie, not specialised for a specific industry: (i) Permanent Arbitration at the Chamber of Commerce and Industry of Serbia (Permanent Arbitration), and (ii) Belgrade Arbitration Center (BAC). Both institutions may act as appointing authority. In the Permanent Arbitration, its President carries out the functions of appointing authority, unlike BAC, where those functions are carried out by the Board.

5 Can foreign arbitral providers operate in your jurisdiction?

Serbian law generally allows foreign arbitral institutions to administer arbitrations seated in Serbia. As to more permanent operations, foreign arbitral institutions currently have no branches or bodies in Serbia.

6 Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with, and supportive of, the law and practice of international arbitration?

There are no specialist arbitration courts; however, higher courts and commercial courts (depending on the parties to the dispute) are competent to decide arbitration-related matters. Development in this field is strongly encouraged and the courts' track record in this area is expected to strengthen in the coming years.

Agreement to arbitrate

7 What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?

Under the Arbitration Act, to be valid and enforceable, an arbitration agreement: (i) must refer to an arbitrable dispute; (ii) must be in writing; (iii) must be concluded by the parties having the necessary qualities or capacity; (iv) may not be concluded by a party acting under duress, fraud or error; and (v) must refer to a dispute involving a defined legal relationship. Furthermore, some commentaries suggest that where the arbitration agreement provides for an arbitration tribunal, the number of arbitrators in the tribunal must be uneven (odd), otherwise, the arbitration agreement will be invalid. An arbitration agreement can cover both already existing and future disputes.

8 Are any types of dispute non-arbitrable? If so, which?

The courts' overall position is that an arbitrable dispute is a pecuniary dispute concerning rights that the parties can freely dispose of, except where the courts have exclusive jurisdiction. In practice, certain disputes concerning (i) property rights over real estate; (ii) Serbian insolvency proceedings; (iii) privatisation issues; (iv) intellectual property; and (v) specific corporate matters relating to Serbian companies, have been deemed non-arbitrable.

9 Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?

While, generally, only the parties to an arbitration agreement are bound by its terms, the rights and obligations arising out of the arbitration agreement are, unless agreed otherwise, transferable by way of transfer of contract or claim (eg, assignment), and by subrogation.

While the Arbitration Act does not expressly regulate third-party participation in the proceedings, the Arbitration Rules of Permanent Arbitration do allow a person with legal interest in bringing proceedings to join one of the parties; however, only with both parties' consent.

10 Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?

The Arbitration Act does not provide for consolidation of separate arbitral proceedings. However, consolidation would be an option if the parties (i) agreed on applying the Arbitration Rules of Permanent Arbitration; and (ii) submitted multiple statements of claim against each other (arising from the same or different legal relationships).

11 Is the "group of companies doctrine" recognised in your jurisdiction?

The Arbitration Act does not specifically recognise the group of companies doctrine. Serbian company law does, however, recognise, in certain circumstances and as a matter of substantive law, the principle of corporate veil piercing. But while the piercing of the corporate veil may relate to questions of liability, there appears to be no practice allowing this concept to operate so as to establish a binding effect of an arbitration agreement for a non-signatory.

12 Are arbitration clauses considered separable from the main contract?

Yes, under the Arbitration Act an arbitration clause is considered separable from the main contract.

13 Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunal's jurisdiction and competence?

Yes, the principle of competence-competence is recognised in Serbian law. Yet, under the Arbitration Act, a party may only request a court to decide on an arbitral tribunal's jurisdiction when the arbitral tribunal has decided on any objections to jurisdiction as a preliminary question. A party may request the court to decide the matter within 30 days from receiving the tribunal's ruling. The arbitral tribunal may continue the proceedings and render an award while the court proceedings are still pending (provided the arbitral tribunal has retained jurisdiction).

14 Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?

In addition to the requirements for validity and enforceability of an arbitration agreement and the arbitrability issue, there have been cases of courts requiring that an agent concluding an arbitration agreement for his principal be granted a special written power of attorney to conclude the arbitration agreement as such.

15 Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?

There appears to be no available data on the number of ad hoc and institutional arbitrations with their seats in Serbia. From practical experience, ad hoc and institutional arbitration (especially Permanent Arbitration and the ICC), are almost equally applied in Serbia. In ad hoc arbitrations, the UNCITRAL Arbitration Rules are commonly applied. Moreover, both arbitral institutions in Serbia assist in the administrative aspects of ad hoc proceedings under the UNCITRAL Arbitration Rules.

16 What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your jurisdiction in mind? In relation to, for example, the appointment of arbitrators.

The Arbitration Act does not explicitly regulate multi-party arbitrations or, consequently, the appointment of arbitrators in such cases. From this perspective, it is advisable to envisage the procedure for the appointment of arbitrators in the arbitration agreement, taking into account the particularities of multi-party agreements and arbitrations.

Commencing the arbitration

17 How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?

If an arbitration is administered by a permanent arbitral institution, the arbitral proceedings commence on the day the institution receives a request for arbitration or a statement of claim (unless otherwise agreed by the parties). In an ad hocarbitration, the proceedings commence on the day the respondent receives the request for arbitration or a statement of claim. However, in the latter case, the claimant must also notify the respondent that it has appointed an arbitrator or proposed a sole arbitrator and invite the opposing party to appoint its own arbitrator or state its position with respect to the proposed sole arbitrator. There

are no procedural limitation periods in terms of submission of a request for arbitration or a statement of claim. The parties should, however, be aware of the statute of limitations provided by the law governing the main contract.

Choice of law

18 How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?

The parties are generally free to choose any law or rules to govern their contract. If the parties did not agree on a governing law, the arbitral tribunal will apply such law or rules as referred to by the appropriate conflict of laws rules.

Appointing the tribunal

19 Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?

Under the Arbitration Act, the parties are free to choose any natural person that: (i) has full business capacity; (ii) has qualities agreed upon by the parties (if any); and (iii) is impartial and independent of the parties and the subject matter of the dispute. Additionally, a person sentenced to unsuspended imprisonment may not serve as arbitrator while the conviction consequences are in effect.

20 Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?

Non-nationals are free to serve as arbitrators in Serbia.

21 How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?

The Arbitration Act provides a default procedure for the appointment of arbitrators in such cases.

Thus, when a dispute is to be resolved by a sole arbitrator and the parties fail to agree on an appointment within 30 days from one party's request to the other to jointly appoint the arbitrator, the appointment will be made by the appointing authority.

When a dispute is to be resolved by three arbitrators, and (i) a party fails to appoint an arbitrator within 30 days from the other party's request to that effect; or (ii) the two appointed arbitrators fail to appoint a presiding arbitrator within 30 days from their own appointment, the appointing authority will make the required appointment.

In both cases, if the appointing authority was not agreed on or fails to make the appointment, a court would step in.

Furthermore, the two arbitration institutions – Belgrade Arbitration Centre and Permanent Arbitration at the Chamber of Commerce and Industry, have their own solutions in their respective Rules in cases where parties fail to agree on arbitrator appointments.

22 Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?

The Arbitration Act does not regulate the issue of arbitrator's immunity. However, in practice, immunity is commonly agreed on in the terms of reference or terms of appointment for each particular case; however, even then, liability cannot be excluded in cases of wilful misconduct or gross negligence on the arbitrator's part.

23 Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?

There are no specific provisions in Serbian law providing for security for payment of arbitrators' fees. Pursuant to the Arbitration Act, however, arbitral tribunals may request an advance payment of the costs of proceedings. Such advance payment of arbitrator's fees, among other anticipated costs, is commonly requested in both ad hoc and institutionally administered proceedings. For example, the two arbitration institutions – Belgrade Arbitration Centre and Permanent Arbitration at the Chamber of Commerce and Industry – require advance payment of arbitrators fees.

Challenges to arbitrators

24 On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?

The Arbitration Act provides that each party may challenge an arbitrator in circumstances that may justifiably raise doubts as to his or her impartiality or independence; or if he or she does not possess the qualities agreed upon by the parties.

The parties are free to agree on the challenge procedure. If, however, they fail to do so, the Arbitration Act provides that the requesting party should submit a written request within 15 days from becoming aware of an arbitrator's appointment or grounds for challenge. A party cannot challenge the arbitrator it appointed, unless grounds for challenge have materialised or that party became aware of such grounds only after the appointment. Unless agreed otherwise, the competent court is to decide the challenge. In doing so, the court is not obliged to take into account the IBA Guidelines on Conflicts of Interest in International Arbitration, unless the parties have explicitly agreed on their application.

Interim relief

25 What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?

Both a court and an arbitral tribunal may order interim relief at a party's request. Types of interim relief (eg, asset disposal prohibition, claim settlement prohibition and mandatory funds or assets deposit) are listed only by way of example. The court may order any relief it deems appropriate, including the provision of appropriate security, both before and during arbitral proceedings (whether conducted in Serbia or abroad).

Serbian law does not recognise the admissibility of anti-suit injunctions that would provide for the termination of proceedings commenced in another jurisdiction in breach of an arbitration agreement.

26 Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?

Given that the Arbitration Act is largely inspired by the UNCITRAL Model Law of 1985, the courts and tribunals should be deemed authorised to order the provision of security for costs within their more general power to order interim relief as mentioned above.

Procedure

27 Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?

Pursuant to the Arbitration Act, the following mandatory rules apply regardless of the parties' agreement:

- duty of arbitrators to conduct the proceedings conscientiously and efficiently;
- equality of the parties;
- the right to be heard; and
- the arbitral tribunal has a duty to duly notify the parties about the hearings, meetings for the examination of goods, objects or documents; and duly forward to the parties all submissions of the opposing party, expert reports and documents submitted as evidence.

28 What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?

Even if a respondent fails to submit its response to a claim, attend a hearing or submit evidence, the proceedings will continue and the arbitral tribunal will decide based on the submitted evidence. A respondent's failure to submit a response to the claim will not be considered as an admission of the claim or of its allegations.

29 What types of evidence are usually admitted, and how is evidence usually taken? Will the IBA Rules on the Taking of Evidence in International Arbitration generally be taken into account?

The arbitral tribunal may decide on the admissibility, relevance and probative value of the proposed and presented evidence, unless the parties have agreed otherwise. Documentary evidence is commonly admitted, as well as factual evidence and expert witness opinions. The IBA Rules on the Taking of Evidence in International Commercial Arbitration as well as the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration may be taken into account if so agreed by the parties, or, otherwise, if preferred by the arbitrators as best practice.

30 Will the courts in your jurisdiction play any role in the obtaining of evidence?

Yes, the arbitral tribunal may seek a court's assistance in the obtaining of evidence.

31 What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?

The Serbian Arbitration Act does not contain rules on document production. Thus, document production will depend on parties' agreement. In absence of such agreement, the arbitral tribunal may define the rules. Both the arbitral tribunal and the parties are likely to refer to the IBA Rules on the Taking of Evidence, or perhaps the Prague Rules, for instructions. In addition, pursuant to the Arbitration Act, the arbitral tribunal may order the parties to provide the expert witness with documents, information or access to the goods necessary for expertise.

32 Is it mandatory to have a final hearing on the merits?

A hearing is not mandatory. However, the arbitral tribunal will hold a hearing at either party's request, unless the parties previously agreed that a hearing would not be held.

33 If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?

Yes. Unless the parties have agreed otherwise, an arbitral tribunal may decide to meet at any place it deems most appropriate for a hearing, examination of witnesses, experts or the parties, voting, or review of documents.

Award

34 Can the tribunal decide by majority?

Yes, the arbitral tribunal decides by majority except where the parties agreed otherwise.

35 Are there any particular types of remedies or relief that an arbitral tribunal may not grant?

The Arbitration Act does not provide for such restrictions. Available types of remedies or relief are related to the law applicable to the merits. However, such remedy or relief may not be contrary to Serbian public policy (otherwise, it could be ground for annulment of arbitral award).

36 Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?

Yes, an arbitrator who is not satisfied with the decision or the reasoning of an award may give a dissenting opinion. The dissenting opinion will be delivered to the parties only if the arbitrator so requests. In practice, we have seen few dissenting opinions.

37 What, if any, are the legal and formal requirements for a valid and enforceable award?

To be valid and enforceable, an arbitral award must (i) be issued in writing; (ii) be signed by all the arbitrators; (iii) indicate a date and place of issuance; and (iv) contain an introduction, an operative part, a decision on costs and a reasoning, unless the parties have excluded it in the arbitration agreement. An award by consent need not include a reasoning.

If there is more than one arbitrator, the award will be valid if signed by the majority, provided that the arbitrators give a reason for the missing signature.

38 What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

The Arbitration Act does not specify a time limit for the arbitral tribunal to render an award. The deadline for challenging an award is three months as of the date of receipt of the award.

A party may request interpretation and correction of an award within 30 days of its receipt. However, if a party has requested interpretation or correction of an award, the award may be challenged within three months of receipt of the interpreted/corrected award.

Costs and interest

39 Are parties able to recover fees paid and costs incurred? Does the "loser pays" rule generally apply in your jurisdiction?

A decision on costs is a mandatory part of an arbitral award. When making such a decision, the arbitrators should take into consideration all the facts of the case, including the outcome. The "loser pays" rule is not explicitly provided for under the Arbitration Act, although it applies in Serbian litigation. While it is often applied by arbitral tribunals, they are also free to apply other principles. At the request of the tribunal, the parties are obliged to make an advance payment on the costs.

40 Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?

The Arbitration Act is silent on the matter of interest. In litigation, however, interest is only allowed on the principal claim.

In Serbia, the applicable interest rate is either determined by the parties in the underlying agreement (contractual interest rate) or provided for under the law (statutory interest rate). However, mentioned rules are generally regarded as a part of substantive law and would apply in arbitration only if Serbian law were chosen as the applicable substantive law.

Challenging awards

41 Are there any grounds on which an award may be appealed before the courts of your jurisdiction?

No. An arbitral award is final and binding upon the parties. The Arbitration Act does not provide for an appeal mechanism against an award. The grounds for setting aside an award (see question 42) allow for very limited control of the award by the court, which does not include control of the decision on the merits.

42 Are there any other bases on which an award may be challenged, and if so what?

The Arbitration Act is based on the UNCITRAL Model law of 1985, including the grounds for setting aside an award. Thus, an award can be challenged before a Serbian court if the party proves that:

- the arbitration agreement is not valid under the law selected by the parties, or, in absence of such selection, under the laws of Serbia;
- it has not been properly notified of the appointment of an arbitrator, or the arbitration proceedings, or it was otherwise unable to present its case;
- the award deals with a matter not contemplated by the terms of the arbitration agreement; or contains decisions on matters beyond the scope of the arbitration agreement. The award can be set aside only in part falling outside the scope of the arbitration agreement, if such part can be separated from the rest of the award;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement, or rules of arbitral institution administering the proceeding, unless such agreement is in conflict with a mandatory provision of the Arbitration Act; or, in absence of parties' agreement, if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Arbitration Act;
- the arbitral award is based on a false statement of a witness or an expert or falsified document, or the award was a consequence of criminal offence of an arbitration or a party, if these reasons are evidence by final and binding judgment.

or the court finds that:
- the subject matter of the dispute is not arbitrable under Serbian law; or
- the award is in conflict with the public policy of Serbia.

43 Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?

The parties may not waive their rights in this respect in advance, but only once the award is issued. They can agree that the party will waive its right to request setting aside once the award is issued, but enforceability of such agreement is questionable (especially if reason for setting aside the award was not known at the time of award).

Enforcement in your jurisdiction

44 Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?

A court in Serbia might deny recognition and enforcement of an award that has been set aside by the courts in the seat of arbitration.

If the set aside proceedings are pending before a court at the seat of arbitration, a Serbian court may stay the enforcement proceedings and await the decision of the court at the seat.

At the opposing party's request, a Serbian court may also make the stay of the enforcement proceedings conditional on a provision of an appropriate security by the applicant.

45 What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?

Recent enforcement decisions suggest a strict interpretation of the grounds for refusal of enforcement set out in the Arbitration Act. For instance, the courts have held so far that public policy encompasses only the fundamental principles of justice that underlie a legal system. Thus, violation of public policy as a ground for refusal of enforcement should not be used as a ground for an appeal on the merits of the award.

46 To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

Under the Serbian Enforcement and Security Act, enforcement proceedings against a foreign state or international organisation are allowed only with a written permission of the Ministry of Foreign Affairs or upon explicit consent of such state or international organisation. Thus, it is advisable to obtain such explicit consent to that effect in advance, ie, at the time of concluding an arbitration agreement. In addition, when enforcement is sought against the Republic of Serbia, certain assets are generally exempt from enforcement.

Further considerations

47 To what extent are arbitral proceedings in your jurisdiction confidential?

The Arbitration Act does not regulate confidentiality of the arbitration proceedings.

Thus, for the avoidance of any doubt, if the parties wish to ensure confidentiality of their arbitration proceedings, they are strongly advised to stipulate it in advance.

48 What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?

Since the Arbitration Act does not provide for confidentiality of the arbitration proceedings, unless the parties agree otherwise, it is generally possible to use the pleadings and evidence produced in an arbitration in other proceedings.

49 What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?

The Arbitration Act does not contain specific rules governing counsel's conduct in an arbitration. Generally, counsel, a member of the Serbian Bar, is bound by the Bar's Code of Ethics and the international standards governing counsel's conduct. These rules apply regardless of the seat of arbitration. On the other hand, foreign counsel are only bound by the rules of the bar they belong to.

With respect to arbitrators, the Arbitration Act provides for a general duty to conduct the proceedings conscientiously and efficiently. In addition, each arbitrator has the duty to inform the parties of any circumstances that could raise doubts as to his or her impartiality.

50 Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?

Since the Serbian Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration, there should be no surprises.

51 Is third-party funding permitted in your jurisdiction? If so, are there any rules governing its use?

The Arbitration Act does not regulate third-party funding, nor has a Serbian court decided on the matter yet.

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Jelena Bezarević Pajić is a partner at Moravčević Vojnović and Partners in cooperation with Schoenherr. Jelena is primarily focused on international commercial arbitration and investment arbitration. Her most recent accomplishment is leading the state of Montenegro to seven major arbitration wins, five in investor-state arbitrations and two in high-value, high-complexity commercial arbitrations. She has been involved in arbitrations under the ICSID, ICSID Additional Facility, ICC, UNCITRAL, LCIA, FTCA (Foreign Trade Court of Arbitration with the Serbian Chamber of Commerce) and other sets of arbitration rules. Jelena is also an experienced commercial litigator in proceedings before all instance courts. Jelena is on the list of arbitrators of the Permanent Arbitration at the Serbian Chamber of Commerce, and has been listed as one of the future leaders in arbitration by the acclaimed legal directory *Who's Who Legal*.

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