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Sketching the Setting Aside of Arbitral Awards in Serbia

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For many doing business in Serbia, the local legal framework, including for arbitration, is the great unknown. However, a short introduction to this legal culture should suffice to reveal that when it comes to arbitration-related matters, Serbian laws are not so different from those in countries hosting some of the most popular arbitral seats.

In fact, one might find the Serbian legal framework on arbitration to be very familiar, having been transplanted from the 1985 UNCITRAL Model Law on International Commercial Arbitration.

Chiefly in that regard, the Serbian Arbitration Act (2006) largely reflects the solutions offered in the UNCITRAL Model Law, from its basic principles, to the more specific provisions on arbitral proceedings and recourse against the award.

In particular, when it comes to challenging an arbitral award rendered in Serbia (if Serbian procedural law was applied to the arbitration proceedings), the only recourse envisaged is setting aside.

The Serbian Arbitration Act adopted the UNCITRAL Model Law's general pro-enforcement tendency and provided for much of the same grounds (limited in number and scope) for setting aside, with only one additional ground to be proven by the applicant, i.e. that the award was based on a false witness or expert testimony, counterfeit documents or criminal acts by arbitrators or parties, as established in a final and binding criminal court judgment.

Likewise taking after the UNCITRAL Model Law, the time window for the unsuccessful party to apply for setting aside under the Serbian Arbitration Act is relatively narrow: three months from receiving the award. Interestingly, the same also applies in cases where the applicant wishes to argue the additional ground for the setting aside of the award. Since this particular ground can only be relied upon if the applicant is in possession of a final and binding criminal court judgment, meeting the three-month deadline may become difficult.

Regardless, in the overall spirit of the Serbian Arbitration Act, court practice also adopts a pro-enforcement bias.

For example, violations of public policy, one of the most frequently invoked grounds, has been interpreted restrictively, as violations of fundamental principles of justice on which the legal system rests or violations of those domestic norms which protect the most basic values of our legal system. Additionally, courts hold that this ground may not be invoked where Serbian substantive

law was applied in the underlying arbitration.

Furthermore, although non-arbitrability as a ground for setting aside has not yet been widely discussed in Serbian state court practice, the existing court rulings give rise to some basic considerations. In general, an arbitrable dispute is a pecuniary dispute concerning rights which the parties can freely dispose of, except for those that fall under the exclusive jurisdiction of the Serbian state courts. Exclusive jurisdiction of the Serbian state courts, a rare occurrence as it is, has been mostly discussed in terms of real property rights, insolvency proceedings, privatisations, intellectual property rights and specific corporate matters. Still, a relatively young national arbitration system may find it a tough challenge, despite the nicely wrapped setting aside mechanism, if the unsuccessful party tries to re-argue the merits of the underlying case or to sway the court to interpret the setting aside grounds beyond, or even contrary to, their intended meaning.

However, for all the well-tested UNCITRAL Model Law solutions implemented in the Serbian Arbitration Act, there is a drawback: The setting aside procedure may, and almost always will, go through several court instances.

Owing to the lack of specific provisions for this type of court proceedings, setting aside is a standard litigation in Serbia. The first instance court judgment regarding the application for setting aside of an arbitral award can be brought before an appellate instance, which may return the case for retrial, but even the decision on remand is susceptible to a separate appeal. The dissatisfied party may further resort to extraordinary legal remedies, in some cases even bringing the case to the Supreme Court of Cassation.

This does not align well with the general rule that domestic arbitral awards are, by law, equal to final and binding domestic court judgments. Final and binding court judgments are subject only to extraordinary legal remedies as per the Serbian Code of Civil Proceedings, and judges are familiar with the legal standards applicable under such remedies because they have to a large extent been applying the same provisions for decades. Final arbitral awards are subject only to setting aside, which is in essence an extraordinary legal remedy, but the real difference between the “regular” extraordinary legal remedies and setting aside is not only in the judges’ familiarity with the applicable standards.

Indeed, when a court judgment is challenged through extraordinary legal remedies, the decisions on the remedies pursued are not further susceptible to challenge in an appeal or extraordinary legal remedies of their own. These decisions are final. Yet, when a final arbitral award is challenged in a set-aside procedure, the court’s decision is not final, but is effectively treated as a common first instance litigation judgment.

However, the general pro-enforcement bias still outweighs this potential difficulty. Setting aside does not affect the enforcement of the final arbitral award. The winning party may move for enforcement before the public bailiff, obtain a decision on enforcement, and even receive the funds awarded to it, all while the setting aside procedure is pending. There are not many ways for the unsuccessful party, the enforcement debtor, to disrupt enforcement, and these are subject to stringent conditions. Until the arbitral award is set aside with a final and binding effect (i.e. if the setting aside has been upheld in the second instance), it is, indeed, a solid enforcement title.

Ultimately, although some obstacles were noted in the Serbian Arbitration Act, they should not be so hard to remove. Amendments to the Arbitration Act could be enacted to provide for a different

deadline for submission of the application arguing the one additional ground for the setting aside, and for a limitation of the set-aside procedure to only one court instance. Such amendments also could be the opportunity to further improve the existing legal framework and reflect the developments in the UNCITRAL Model Law of 2006, such as elaboration on arbitral interim measures.

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