Kluwer Arbitration Blog

The Peculiar Case of Arbitration in Bosnia and Herzegovina

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The Report of the International Finance Corporation [IFC] “Investing Across Borders” for the year 2010 outlined that a stable, predictable arbitration regime, as a part of broader framework for the rule of law, is one of the factors that drive foreign investment and it should be country’s top priority. Despite the fact that reforming an arbitration system is of even greater importance for countries in transition, relevant legal reform in Bosnia and Herzegovina (BiH) was executed only in terms of mediation, leaving arbitration aside. From the time of the IFC report until today, there has been no reform activities indicated on any governmental level in BiH.

BiH does not have one coherent law providing for a detailed regulation of arbitration. Statutory provisions on arbitration come down to nineteen articles set forth in the civil procedure acts. Therein, arbitration is classified as a “special procedure”, and placed alongside other types of “special procedures” such as expedited procedure in employment disputes, or special procedures concerning small claims. In any case, these nineteen provisions cover the formal validity of an arbitration agreement, the composition of an arbitral tribunal, the challenge of arbitrators, court involvement in the procedure, limited procedural aspects, and rendering and setting aside the arbitral award.

At the time when the IFC report was prepared, BiH, together with Albania, Ethiopia and Liberia, fell within the group of 8% of countries that had some provisions scattered throughout civil codes or other laws which do not provide the sufficient regulation of arbitration. Until today, only Poland and Montenegro have adopted their respective arbitration laws. BiH is ranked with the overall score of 72,6 concerning the strength of legal framework, while on the matter of the ease of the procedure the rank was 57,1.

Some interesting aspects of the statutory regulation on arbitration are illustrated in the text below. It should be noted that the official commentaries of the civil procedure litigation shed little to no light on the issues illustrated below. There is a significant lack of practice, and it is not possible to predict with certainty what practical results of these issues would be. Therefore, the illustrations below demonstrate the risks of misinterpretation of relevant institutes, and thereby indicate an urgent need for a reform in this field. Latest developments concerning the latter will also be mentioned.

Statutory provisions on arbitration

Arbitrability

Parties may subject their current or future dispute to either institutional or ad hoc arbitration, provided that the dispute is arbitrable, and there is a formally valid arbitration agreement. Formal requirements are identical to those found in the New York Convention and the UNCITRAL Model Law (Model Law). However, interesting matter is that of arbitrability. A general rule is that a dispute can be subject to arbitration provided that it is a matter which parties can freely dispose of as defined in the general provisions of the Civil Procedure Code [CPC]. At first glance, there is nothing extraordinary in this rule. However, there is an explicit reference to the general principles of civil litigation in this regard, and one cannot disregard the official commentaries thereto.

As an illustrative example: under the current system of uniform regulation of arbitration and civil litigation, if the law provides for the exclusive jurisdiction of courts, arbitral tribunals would most likely not have jurisdiction. This approach misses out the point that provisions on exclusive jurisdiction only settle territorial jurisdiction among the courts of a certain country, and they do not (or, at least, should not) settle the arbitrability *ratione materiae*. This solution is not in accordance with the trends in arbitration today, but it also leads to the great lack of legal certainty. This is a residue from a previous system of great state's protectionism and lack of trust towards non-state forums. In order to foster BiH as a competitive arbitration market, relevant legal reform must settle this issue with precision, and in line with the modern trends.

The appointment of arbitrators

A party may file a motion to the competent court for declaring the arbitration agreement terminated if either: (i) an arbitrator is not appointed in due time, (ii) appointed arbitrators cannot agree on the appointment of chairman, (iii) parties cannot agree on an arbitrator they have to appoint jointly, (iv) the appointed arbitrator cannot, or will not act as arbitrator. The reasons for such regulation are not quite clear, especially in comparison to the solution stipulated in the Model Law. Namely, the Model Law provides that in these types of situations court shall take necessary measures, unless the agreement itself provides for another appointing procedure. The Model law does not take a radical stand as to have the agreement terminated merely because the appointment procedure is facing obstacles. The official commentaries of the relevant BiH legislation provide no clarifications as to what was the intent of the legislator for providing this solution. Similarly, there is no available practice that can shed some light on the matter.

The choice of the applicable law

In the absence of the parties' agreement, arbitrators can decide which law to apply. From the wording of the provision it is not clear whether this means that arbitrators are free to decide on substantive and/or procedural law. In any case, the law does not differentiate domestic from international arbitration, and it is not clear what the purpose of this provision was. Without any guidance from the statute, the question is whether a tribunal should resort to private international law in case of an international dispute. If yes, should it apply the private international law rules of BiH, or "*the conflict of laws rules which it considers applicable*" as provided by the Model Law? There is no relevant case law on this matter; the answer would definitely depend on the circumstances of the case, and one can only hope that the tribunal would strive to the Model Law standard in this matter, and not to the domestic approach.

Interim measures

Finally, one of the interesting aspects of an arbitration procedure in BiH concerns the issuance of

interim measures. Filing an interim measure prior to the statement of claim obliges the party to start civil proceedings before the court. There are no guidelines or practical examples as to how this issue would be reconciled with an existing arbitration agreement and a parties' choice to subject their dispute to arbitration. A request for an interim measure can also be filed with the statement of claim, or in the course of procedure. The section on arbitration is silent as to whether arbitral tribunal may grant interim measures. Theoretically, there are no obstacles for applying these rules by analogy to the arbitration proceedings. However, given the overall restrictive regulation, it is more likely that it will be interpreted that the tribunal has no power to grant interim measures, and that this issue is reserved for courts only.

Recommendation for future development

A complete reform of alternative dispute mechanisms, especially arbitration, is a must for BiH. At the moment, there are no official strategies or action plans in defining and implementing necessary reform activities. On a non-governmental level, Association ARBITRI, which was established in 2013, implements three sets of activities focused on education, promotion, and legislative reform. The underlying idea is to strategically work on creating the basic three pillars of arbitration system: educated and skilled lawyers, business companies aware of arbitration and its benefits, and a coherent modern legal framework. In its short time of work, Association has: (i) assisted three public universities in BiH in implementing Willem C. Vis Moot in their curriculum, (ii) participated in creating training for judges on ADR, with focus on arbitration, and (iii) launched an annual conference – Sarajevo Arbitration Day – in cooperation with the local business community. Association is also actively working on networking with the local stakeholders, such as Chambers of Commerce, business community, law firms and individual arbitrators, and is being perceived as a valuable partner in the field. However, these are merely starting points; there is yet a long way to go until BiH achieves a stable, predictable and efficient arbitration system, which will require the recognition of arbitration as an important segment of BiH's legal system, and result in a joint action from governmental bodies, business, and legal community.

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