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Institutional Arbitration in Bosnia and Herzegovina: An Overview of Rules and Practices

Nevena Jevremovi? (University of Aberdeen) · Wednesday, December 2nd, 2015

1. Introduction

There is no precise information as to when the Arbitration Court attached to the Foreign Chamber of Commerce of Bosnia and Herzegovina was established (***Arbitration Court***). There is some sporadic information according to which the Arbitration Court was established in the post Second World War period, but at that time the Arbitration Court's competence covered only domestic disputes. This competence was of limited scope, i.e. it only covered some minor transportation related disputes. In 2003, the Rules on Organization and Work of the Arbitration Court (***Rules***) entered into force. The enactment of the Rules coincided with the enactment of the civil procedure code containing statutory provisions on arbitration. It, therefore, appears that in 2003 there was an attempt to establish arbitration framework in Bosnia and Herzegovina (***BiH***). However, it is rather questionable as to how effective this attempt was.

2. Specific aspects of the work and practice of the Arbitration Court

The Rules contain some interesting solutions that are worth discussing below. In addition, the overall management and outreach of the Arbitration Court is equally questionable, since there is basically no set up system that provides potential interested parties with updated and centralized information as to the court's work and practice.

2.1. Formal existence of the arbitration agreement

The Rules define the Arbitration Court as an independent court competent for dispute settlement through arbitration. Its competence encompasses both domestic and international disputes in which case at least one party has to have a seat outside of BiH. In any case, in order for a dispute to be subject to the Arbitration Court, the parties must agree to submit the dispute to the Arbitration Court, subject to the condition that such dispute is of commercial nature (which is interpreted in a very broad sense as to allow different types of commercial transactions to be settled), and that it does not fall within exclusive jurisdiction of the local courts (the outdated solution concerning the exclusive jurisdiction of the courts as a relevant element for determining the arbitrability of disputes was criticized here)

It is interesting that the Rules envisage for a special commission to be formed in case a defendant disputes the existence of an arbitration agreement, or does not respond to the statement of claim.

The members of the commission are the President of the Arbitration Court, the Deputy President, and one of the arbitrators determined by the President. The mandate of the commission is to determine whether arbitration clause is contained in the documents that claimant submitted. If the commission determines that there is such a clause, the procedure will continue even if the other party refuses to participate. The decision of the commission does not prejudice the final decision rendered by the tribunal on the existence and validity of the arbitration agreement. It seems that the purpose of this solution was to have a decision on the existence of the arbitration agreement as a preliminary issue before the tribunal is constituted and the proceedings are conducted. The purpose may be to achieve the efficiency of the proceedings by avoiding the administration of the cases in which there is no arbitration agreement, which falls within the formal requirements defined in the rule or *lex arbitri*. However, the drafters of the Rules have missed one of the basic principles of the arbitration law, i.e. that under the *kompetenz-kompetenz* doctrine, only an arbitral tribunal, constituted duly in line with the parties' agreement, can decide on an issue of the existence and validity of an arbitration agreement. The recent decision of the Singapore High Court in Malini Ventura v Knight Capital Pte Ltd and others [2015] SGHC 225 illustrates the solution of this issue in which the court affirmed that under the *kompetenz-kompetenz* doctrine it has the power to decide on the existence of an arbitration agreement. This issue of jurisdiction and scope of tribunal's power is by default dealt as the first (arguably preliminary) issue in arbitration proceedings. Having said that, there is really no reason for the Rules to stipulate the formation of a special commission and especially to provide for the formation of a special commission without explaining what its nature is, in which form it renders its decisions, and what the relation of the commission and its decision to the arbitral tribunal is.

2.2. Applicable law in the arbitration proceedings

Unlike virtually any other institutional rules, the Rules of the Arbitration Court specifically designate that the seat of arbitration shall be in Sarajevo. This is not a default rule that applies in the absence of the parties' agreement on the matter. Drafted in this way, the provision has several important effects. On one hand, due to the complex territorial organization of BiH, the seat of arbitration in Sarajevo would lead to the application of the Civil Code of Federation of BiH. On the other hand, the Rules explicitly state that the procedure is to be governed by the provisions contained therein. The Rules further stipulate that, in the absence of either the relevant provisions contained therein or the parties' agreement, arbitrators are free to choose the provisions of civil procedure law that they deem are most appropriate in a given case. Therefore, the parties may agree on statutory provisions to be applied. However, the problem is the conflict between *lex arbitri* that applies as a default rule with such parties' choice of the procedural rules. Namely, the Civil Code of Federation of BiH does not explicitly address the issue of the seat of arbitration, nor does it expressly affirm party autonomy in this regard. Nonetheless, party autonomy can be inferred from the language of the provisions governing arbitration in general. Till this date there is no available information as to whether any dispute with a different choice of seat has been administered by the BiH Arbitration Court, and how the meaning and understanding of this particular rule on the seat of arbitration should be interpreted.

As to the applicable material law, it is interesting to note that under the Rules, the tribunal must render its award in line with the provisions of the parties' agreement, and is obliged to take into account international and BiH trade usage that can be applied to the respective transaction. The tribunal must do so irrespective of the material law that it applies. As an illustrative example of what problems may arise in this situation, it should be noted that Article 9 of the UN Convention on International Contracts for Sale of Goods (CISG) sets forth conditions that must be met in order

for a trade usage to apply in a given transaction. By enforcing their authority under the Rules, arbitrators would de facto impose a trade usage as applicable to the international sales agreement irrespective of the fact whether the conditions for such application, as defined in the CISG, are met.

2.3. Overall management of the Arbitration Court

There were no changes to the Rules as of 2013. Aside the actual content of the Rules, the overall management and outreach of the court seems to have significant setbacks. The Arbitration Court does not have its own website with information available concerning its internal organization, location, contact information and relevant documents. The Rules, the Decision on Costs of Arbitration, and the list of arbitrators are not available in English language. Finally, there is no easily accessible model clause, nor are there any form of statistics as to the type and number of disputes it has administered. It is, therefore, virtually impossible for a domestic or an international party to obtain precise and up to date information on the work and practice of the Arbitration Court. Consequently, it is illusionary to speak of the Arbitration Court of BiH as a prospective venue for dispute settlement.

3. Scope of reform of the Arbitration Court

It is evident that the Arbitration Court needs to go through a thorough reform that would firstly be focused on the reform of the Rules and the establishment of a system of centralized and up to date information to be available to end users – companies and legal practitioners. Achieving this requires little investment: setting up a modern website with information provided therein in local and English language. After this starting point, it is worth considering of setting up a system of certified arbitrators in order to give an additional assurance as to the quality of the dispute in a seat with such outdated and archaic framework. Finally, a system of continuous training for the arbitrators and the personnel of the Arbitration Court is a must in order for it to have capacities necessary to deal with the domestic and cross-border disputes in an effective and efficient way.

Nevertheless, the Arbitration Court manages approximately up to three cases per year. The Rules allow the parties to bypass the above outlined ambiguities. Namely, the Rules expressly allow the parties to opt for the UNCITRAL Arbitration Rules to govern their procedure. Moreover, parties may appoint arbitrators which are not on the list of the Arbitration Court. By doing so, parties can have, to the extent it is possible, a quality arbitration procedure. Moreover, there have been initiatives focused on assisting the Arbitration Court in building its capacities, mainly based on the support of foreign organizations and institutions. It remains to be seen how these initiatives will develop in the future.

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