Kluwer Arbitration Blog

Trees do not grow from the sky: Promoting institutional arbitration in Bosnia and Herzegovina

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There is a saying in Bosnia and Herzegovina: “A tree does not grow from the sky”.

In the same vein, an arbitration-friendly legal environment does not come about without much persistence and hard graft. As expert consultants tasked with assisting the Commercial Law Development Programme (**CLDP**) division of the U.S. Department of Commerce with its mission in the Balkans, this is what Lee Caplan (partner in Arent Fox’s Washington DC office) and I sought to emphasise to the participants of a two-day training held in Sarajevo from the 12th to the 14th of April 2016. The training was organised by the CLDP, in conjunction with the Association ARBITRI, and the Arbitration Court attached to the Foreign Chamber of Commerce of Bosnia and Herzegovina (**BiH Court**).

The continuing CLDP mission in Bosnia and Herzegovina (**BiH**) aims to promote awareness of modern international practice and developments in the law, and to encourage the reform of national laws, regulations and soft codes to bring them in line with such practices.

The training was set to conclude on the third day with a one-day conference on international arbitration during Sarajevo’s 2nd Arbitration Day, organised by Wolf Theiss and Association ARBITRI. The conference, which will be discussed in detail in one of the following posts, was aimed to tackle different issues in arbitration and seeking to attract a wider audience of students and practitioners from the region and beyond.

Our mission was to introduce delegates to changes in modern international arbitral practice as practised elsewhere in Europe, and the United States. The training included an overview of the ICC Rules and the practices of the Secretariat and the Court, and the UNCITRAL Model Law and procedural rules. We aimed to promote an interactive two-way discussion whereby the CLDP would seek to understand the arbitral laws in BiH and to impart some guidance as to how the CLDP may assist in improving, and enhancing awareness of, the services and facilities of the BiH Court.

It became apparent from the first day that our audience was a sophisticated and experienced group of academic professors, government representatives or advisors, or management staff from regional arbitral institutions (including the BiH Court, and Belgrade’s arbitral institution), and legal practitioners. They needed little or no introduction to the theory or concept of international arbitration. On the other hand, they could well benefit from greater practical experience in

arbitration cases. Arbitration institutions in the Balkans region (to varying degrees) are relatively new, and have struggled to afford adequate opportunities for arbitration appointments.

By way of background, it has been reported that there is no precise information as to when the BiH Court was established. It appears that only in 2003 were attempts made to introduce arbitration provisions into the civil procedure law, and the BiH Court arbitration rules were established. Prior to this, it would seem that arbitration in BiH was limited to certain types of domestic disputes only.

Until today, the BiH Court is rumoured to have disposed of up to 50 cases only. However, such data cannot be verified. Indeed, transparency is one of the main issues that the BiH Court must tackle. It is said to be virtually impossible for any party to obtain precise and up-to-date information on its work and practice. What we do know is that several decisions have been subject to set-aside proceedings in the BiH courts. In this regard, Professor Meliha Povlakic, one of the participants in the CLDP training, informed us at the conference of a decision that had just been released in which a BiH award had been annulled by the BiH courts. The courts had conducted a full (de novo) instead of limited review, for "due process" reasons, without any justification whatsoever. The case, which pitted Bamcard d.d. Sarajevo (BiH) against Verisoft Bilgi Islen Tic. Ve San. Ltd. Sti. (Turkey), concerned a dispute surrounding the validity of the termination of a software maintenance agreement. It will be discussed in more detail in one of the following posts. As such, we realised that the BiH Court was not only relatively underexposed, but that it has attracted some scepticism and distrust from the business, legal and judicial communities in BiH.

What could be the cause of this apparent lack of confidence? Apart from the usual problem (i.e., lack of sufficient funding) one may hazard that this was for two main reasons. First, the inadequacy of the legal framework governing arbitration in BiH. Currently, the arbitration law is not contained in a separate law, but contained within fours different civil procedure codes, which in itself generates confusion. It is, moreover, not an arbitration-friendly regime, and provides for court intervention in numerous aspects of the arbitral process. Moreover, the procedural rules of the BiH Court, though drafted with the best of intentions, require substantial updating to bring them into line with modern arbitration rules, such as, for instance, those of UNCITRAL. The second potential reason for the lack of confidence in the system is that there is a lack of transparency in the arbitral institution's operations, including (most crucially) its arbitral selection process.

Of course, in order to sell a product well, one has to be confident that it does what it says on the tin. Accordingly, one of the most important issues we needed to address was to explain why the law needed to be amended so that it was more arbitration-friendly. Mr Caplan explained that in order to garner the trust of the international business community, and therefore to attract more cases involving international parties to the BiH Court (and potentially increase foreign investment in the region), users needed to satisfy themselves that if disputes were to occur, they could rely on a system with features that were internationally recognised and a court system that supported the resolution of disputes through arbitration. In this sense, the UNCITRAL Model Law was used as a model example of a globally understood and respected framework law, preserving principles such as competence-competence, separability, independence and impartiality of arbitrators, and the arbitrators' rights (amongst others) to make interim measures orders. These are all areas that the BiH law on arbitration requires to address, and in which reform is needed.

In conjunction with the reform of the law, trust needs to be placed in BiH's arbitral institutions themselves. In particular, what are the hallmarks of an effective and reputable arbitration institution? In this regard, my presentation focused on an introduction to the main aspects of ICC

arbitration. In essence, the most recent version of the ICC Rules in 2012 have sought to build upon the already successful precedent established by the ICC since the ICC Court was created in 1923. Though they are not perfect, the 2012 ICC Rules and their application by the Court, assisted by its Secretariat, aim to promote efficiency both in terms of costs and minimising delay, and to ensure that awards rendered by ICC arbitrators were as far as possible enforceable at law, subject to the intricacies of the different jurisdictions in which they are applied to be recognised and enforced.

Specific hallmarks of the current ICC practice from which the BiH Court could take inspiration are its increasing transparent procedures in the appointment of arbitrators, the general services offered with respect to notification of the Request and other communications, the provision of assistance (on procedure and case management) to the arbitral tribunal and the parties during the pendency of an arbitration, management of the financial aspect depending on the size and the complexity of the dispute, procedure for dealing with challenges or objections to arbitrators on the basis of independence and impartiality or the "otherwise" exception in the ICC Rules, dealing with multi-party or multi-contract situations (consolidation and joinder), and with non-participating or non-paying parties, and the allocation to the tribunal of certain powers (such as decisions on language and applicable law) where required, to facilitate and speed up the arbitral process. Although it was pointed out that the ICC Rules were instigated and updated in large part to cater for high-value disputes of more than several million US dollars (of which there are currently few in BiH), many of the principles and practices of the ICC Court could be adapted for smaller and more regional disputes, as their underlying concepts are of universal appeal.

The training concluded with a positive note: that the BiH Court is a relatively young institution, and has achieved much to date given the obstacles (lack of funding, a reticent judiciary, a slow legislative reform process) that it has faced to date. That being said, in order to grow further, and to build on the progress made so far, it is vital that the BiH Court embrace more opportunities to foster education in this field to professionals in the legal field (not only professors, but lawyers, and specialists in corporate, finance, media and other fields beyond dispute resolution). It must also embrace the youth community in BiH and seek to involve them in the BiH Court, whether through internships for students, or conferences and first-time appointments for young arbitrators in cases of lower value. It is with the input and enthusiasm of BiH's young lawyers that change at the grassroots level in the arbitration framework of BiH can occur. This, it is hoped, will lead to reform at the top, through an overhaul of the legislation and increased acceptance by the BiH judiciary of the international and domestic arbitral process.

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