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Bosnia and Herzegovina: Arbitral Awards Reviewed under the Courts' "Magnifying Glass"

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As previously discussed, the U.S. Department of Commerce, the Bosnian Chamber of Commerce and Industry and the Association ARBITRI organized in April 2016 two arbitration events in Sarajevo, Bosnia and Herzegovina ["BiH"], with the aim to promote awareness of modern international practice and developments of law, and to encourage the reform of national laws, regulations and soft law and to bring them in line with such practices. Just on the eve of these events, the Municipal Court in the Canton of Sarajevo ["Court"] rendered a judgment reminding the arbitration community in BiH on the necessity of such and similar initiatives which can raise the awareness of the current developments in arbitration law and promote pro-arbitration approach.

On March 18, 2016, the Court set aside the award in the case of *Bamcard d.d. Sarajevo* (BiH) ["Plaintiff"] and *Verisoft Bilgi Islen Tic. Ve San. Ltd. Sti.* (Turkey) ["Defendant"], in which the dispute regarding the validity of the termination of a software maintenance agreement arose. The arbitral tribunal, deciding under the auspices of the Arbitration Court attached to the Foreign Chamber of Commerce of Bosnia and Herzegovina ["BiH Arbitration Court"], rendered an award on December 17, 2013, in which it decided in favour of the Defendant (the claimant in the arbitration proceedings). The Plaintiff (the respondent in the arbitration proceedings) commenced the proceedings for the annulment of the award on January 14, 2014, and it based its claim on several grounds provided for in Article 451 of the Procedural Code of the Federation of Bosnia and Herzegovina ["Procedural Code"], which governs the setting aside procedure. All the grounds invoked by the Plaintiff were mainly invoked for one particular claim related to the production and assessment of part of evidence in the arbitration proceedings, which was material and relevant for the outcome of the arbitration. The dispute was pertaining to the issue whether the written notice on the termination of the Contract on Software and Software Support Maintenance ["Contract"] was properly delivered within 60 days before the expiration of the contractually agreed/calendar year, as required under Article 22 para.2(1) of the Contract. According to the tribunal, the Plaintiff failed to do so, and consequently the Contract was not validly terminated, leading to the Plaintiff's responsibility to make the payment which became due on February 21, 2013.

Although the Court did not uphold all the grounds invoked by the Plaintiff, it is interesting to briefly address them since the language used by the Plaintiff implies that the Plaintiff treated these proceedings as appeal rather than a *limited* review of an arbitral award. The Plaintiff invoked several grounds listed in Article 451 of the Procedural Code, but the language which it used to define the procedural, and also material, errors was obviously "borrowed" from litigation and the terms used did not belong to international arbitration practice. In other words, the Plaintiff tried to

widen the scope of the court review by subsuming its arguments and grounds under the narrower content of Article 451 – and it was partially successful in doing so. The main claim submitted by the Plaintiff was that the arbitral tribunal relied on a "non-existent" piece of evidence, while not taking into account evidence submitted by the Plaintiff. The former was solely "a confirmation that the notice [on termination] *was sent*", while the Plaintiff submitted the "confirmation of a *receipt*" of such a notice.

Despite the fact that Rules on the Organisation and Work of the BiH Arbitration Court provide for the tribunal's absolute discretion to "*assess the probative value of the submitted evidence*", the Plaintiff built its claim entirely on this submission. It invoked paragraphs 4 (decision rendered in excess of the tribunal's mandate), 5 (unclear or contradicting decision), 6 (decision not in accordance with the Constitution of BiH, or of the Federation of BiH) and 7 (the existence of reason to remit the case, in accordance with Article 255 of the Procedural Code) of Article 451 of the Procedural Code. Under the umbrella of these grounds, the Plaintiff focused on proving that there was arbitral tribunal's misconduct due to lack of admission and assessment of the evidence insisted on by the Plaintiff. More specifically, besides claiming a rather wide violation of due process, the Plaintiff stated that this tribunal's exercise of discretion was "material breach of procedural rules" ("bitna povreda odredaba postupka"), a non-existing ground under Article 451 of the Procedural Code, which is a usually a ground raised before an appellate court. Furthermore, the Plaintiff claimed the misapplication of the applicable law.

The Court only partially adopted the Plaintiff's submission in regard to the issues elaborated above, and it consequently set aside the arbitral award of January 14, 2014. It decided that the award was in conflict with the Constitution and, since the tribunal assessed evidence which was neither submitted nor produced during the proceedings, it rendered a decision in excess of its mandate. The Court also stated that "*the fact which evidence the [tribunal] assessed and which it did not is of no relevance since neither the [Plaintiff] nor the [Defendant] could influence this [tribunal's decision].*" In other words, the Court restated that the discretion as to the assessment of evidence belongs to the tribunal, but it was concerned with the existence of the evidence itself.

As with many issues in international arbitration, it is a thin line between these two. The question is whether the Court was deciding within the framework of the BiH legislation, or was it indeed using a "magnifying glass" in order to adjust the framework to fit the grounds invoked by the Plaintiff. Perhaps the major mishap was the lack of reasoning by the Court, which could justify such decision. It is difficult to assess the impact of this decision, due to the lack of arbitration jurisprudence in BiH, in general. For this reason, pro-arbitration initiatives, as those mentioned at the beginning of the post, are more than welcome in this jurisdiction.

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