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Bosnia and Herzegovina: High Time to Tackle Legislative Loopholes Making It Possible to Avoid Arbitration

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Despite the fact that Bosnia and Herzegovina (BiH) has two arbitration courts – The Arbitration Court attached to the Foreign Trade Chamber of Bosnia and Herzegovina which has existed since 2003 and the Foreign Trade Court of Arbitration of the Republika Srpska ('RS') Chamber of Commerce and Industry since 1998 – arbitration still remains an underdeveloped and avoided mechanism of dispute resolution (institutional arbitration in BiH was discussed previously on the blog here). Part of the reasons why this is so may be found in the shortcomings of BiH Civil Procedure provisions regulating arbitration. I propose in this post amendments to the arbitration provisions in the BiH legal system that may be seen as flawed.

BiH Civil Procedure Acts (CPA) – Stumbling Block for Arbitration

Due to the complexity of BiH legal system, three separate acts govern civil procedure in BiH – and all three allow parties to settle disputes through arbitration and provide regulation of arbitration.

Notwithstanding the fact that the provisions are installed in different acts, arbitration provisions contained in all three are essentially the same and are based on the UNCITRAL Model Law. All three Acts classify arbitration proceedings as "special procedure", thus placing it collectively with other forms of "special procedures" such as trespass litigation and employment disputes. Aceris Law notes that none of the three Acts expressly elaborates general principles of arbitration. Nevertheless, some general principles can be drawn from the provisions dealing with arbitration. For example, the principle of party autonomy is enshrined in Article 443 of the Civil Procedure Acts of the Federation of Bosnia and Herzegovina ('FBiH') and RS, as it allows the parties to agree on rules of arbitral procedure. Also, Articles 434-453 of the Civil Procedure Act FBiH and RS contain basic elements of arbitral proceedings: arbitrability, formal validity of an arbitration agreement, constitution of the arbitral tribunal, challenge of an arbitrator, the general power of the tribunal and the form and legal effect of an arbitral award. Provisions on procedure for setting aside of an arbitral award are contained in Chapter V of the Acts.

Insight into particular language of the Civil Procedure Acts used in BiH can shed some light as to why commercial entities in Bosnia and Herzegovina avert from arbitration as a dispute resolution mechanism. Several provisions of these Acts – These are contained in Articles 440 (Article 419 in CPA of BD), 441 (Article 420 in CPA of BD), and 446 (Article 425 in CPA of BD) – can be seen

as contentious, potentially causing procedural flaws within the arbitral proceedings as they can provide easy access to avoidance of the arbitration agreement to parties.

Possible Termination of the Arbitration Agreement for Failure to Appoint an Arbitrator or Not Electing the President of the Arbitral Panel

One of the shortcomings I discuss is contained in Article 440 CPA FBiH/RS – Article 419 CPA BD that states as follows:

> *1) If an arbitrator has not been appointed on time, the arbitrator shall be appointed by court.*
>
> *2) If the arbitrators cannot agree as to the election of the president of the arbitration board, the president shall be appointed by the court.*
>
> *(…)*
>
> *5) A party that does not want to use the authorization referred to in the paragraphs 1 and 2 of this Article may request in the complaint that the court competent for the appointment proclaims the contract on arbitration terminated.*

Relying on the provisions of Article 440.5., a party who wishes to avoid resolution of a dispute through arbitration and have the arbitration agreement terminated, may simply not appoint an arbitrator in time or not to appoint one at all, as envisaged in the Article 440.1. Similarly, events from Article 440.2. would lead the dispute to the same conclusion if the appointed arbitrators cannot agree as to the election of the president of the arbitration board. Even if one party asks of the court to appoint an arbitrator for the other party who does not want to make an appointment, the latter party could still exercise their right from Article 440.5. and request the termination of the contract on arbitration.

All these situations create possibilities that previously agreed upon arbitration could be avoided quite easily. Comparable provisions can be found, for example, in the Dutch Code of Civil Procedure, in Article 1027, which takes a similar stand regarding the court appointment of the arbitrator if the party or parties fail to appoint their arbitrators on time. However, unlike Article 440.5. of BiH Acts, the Dutch Code of Civil Procedure does not see the failure or unwillingness to appoint an arbitrator as grounds for termination of the entire arbitration agreement. Amending Article 440. of BiH Acts, so to strike out paragraph 5 would maintain its key purpose of permitting the court to solve the procedural gridlock and appoint the arbitrators and the president of the arbitral tribunal without unnecessarily jeopardizing the arbitration agreement.

Termination of the Arbitration Agreement in Case of an Arbitrator Unwilling or Unable to Perform Their Duty

Another shortcoming of the BiH legal system that I discuss is included in Article 441 CPA

FBiH/RS – Article 420 CPA BD that states as follows:

> *Any party may request that the court terminates the arbitration agreement if the parties cannot agree on the appointment of arbitrators or when an appointed arbitrator does not want to or is not able to perform that duty.*

Similarly to Article 440, Article 441 allows the parties to request that the competent court terminates the arbitration agreement if the parties cannot agree on the appointment of the arbitrators. Additionally, scenario set forth in the Article 441.2. would lead to the judicial termination of an arbitration agreement if a person who has been appointed as an arbitrator does not want to or is unable to perform that duty. This enables the party who wants to avoid pursuing arbitration after signing the arbitration agreement to do so by simply appointing an arbitrator for whom that party knows, or has reason to believe, will not want or will not be able to perform that duty. Seeing that potentially unruly Article 441 does not devise a method for the court to appoint a substitute arbitrator instead of one unwilling or unable to arbitrate, better legal certainty in the matters of arbitration would be achieved if this entire article was removed from the discussed BiH Acts.

Possible Termination of The Arbitration Agreement For Failure of Arbitrators to Reach a Majority of Votes

Article 446 CPA FBiH/RS – Article 425 CPA BD states as follows:

> *When the arbitration board is comprised of more than one arbitrator, the judgment shall be reached by majority of votes, and the board is obliged to notify the parties if they cannot reach a majority. In such cases, each party may request the court to terminate the arbitration agreement.*

Article 446 potentially leads to the termination of the entire arbitration agreement if the arbitration board is not able to reach a required majority of votes. The situation remains unsolved in the Rules of the Bosnian Arbitration Court. Article 47 of the Rules on Organization and Operation of the Court of Arbitration provides that:

An arbitral tribunal shall pass its award by a majority of votes. If it is not possible to achieve the majority, Litigation Law shall apply.

This provision is in contrast with, the majority of foreign arbitration rules providing in such case that the award shall be made by the president of the tribunal. *See* Article 26.5 of the LCIA Arbitration Rules (2014); Article 63 of the WIPO Arbitration Rules (2020); Article 38 of Arbitration Rules of the Arbitration Court at the Chamber of Economy of Montenegro (2015). Article 32(1) of the 2017 ICC Rules:

> When the arbitral tribunal is composed of more than one arbitrator, an award is made

> by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone.

Similarly, Article 40(1) of the 2014 Ljubljana Arbitration Rules provides:

When the tribunal is composed of more than one arbitrator, it shall make the arbitral award or decision with a majority of the votes of its members. If a majority of the votes cannot be achieved, the arbitral award or decision shall be made by the Chairman of the tribunal.

In order to avoid the termination of the arbitration agreement as a result of the tribunal's failure to reach a majority of votes, the text of Article 446 should be amended so as to empower the president of the arbitral tribunal to single-handedly deliver an award.

Conclusion

In order to promote and give a much needed impetus to arbitration, a reform of Civil Procedure Acts which regulate arbitration is a must for BiH and its entities, as explained above. Similar need for revision of the current arbitration framework regarding consolidation was discussed here.

The importance of arbitration for BiH, both national and international, is constantly increasing. That has been recognized by many Bosnian legal scholars and practitioners, increasing number of students participating in the Willem C. Vis Moot Competition in International Commercial Arbitration since 2015, and on a non-governmental level by Association ARBITRI continually organizing educations and promotions of arbitration. Now it is the time for the legislators to do their part.

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