BOSNIA AND HERZEGOVINA

Country Report on Commercial and Investment Arbitration Legal Framework

Ivana Grubešić,, Dženana Radončić, Aida Mulalić, Nasir Muftić, and Amina Hasanović*

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I. COMMERCIAL ARBITRATION

1. What domestic law(s) regulate(s) commercial arbitration?

The complex territorial-political structure of the Bosnia and Herzegovina translates to a rather complicated legal system applicable, inter alia, to the issue of commercial arbitration. Since only a limited number of expressly indicated issues fall within competencies of the institutions of Bosnia and Herzegovina[1], all other issues not expressly assigned to the institutions of B&H are those delegated to the entities (the Federation of Bosnia and Herzegovina and the Republic of Srpska). The matters of business and obligations law and civil procedural law are not indicated as those exclusively assigned to the institutions of B&H, therefore, are assigned to the entities. Hence, three legal systems are applicable to the issues of business relations, civil procedures and arbitration issues as well – those of the Federation of Bosnia and Herzegovina, the Republic of Srpska and the Brčko District. However, civil law is mostly harmonized between these legal systems, and thus, only laws of FB&H will be analysed in this part of the Report, with conclusions and finding applicable to all three legal systems.

The issue of commercial arbitration is not regulated by one single legal act – it is comprised of provisions contained in several legal acts regulating different areas of civil and business law.

The laws governing civil procedure of the entities and the BD are those regulating commercial arbitration in general.[2] They create a general legal framework for conducting arbitration

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* Elaborated by Doc.dr Ivana Grubešić, Faculty of Law, University of Zenica; Doc.dr Dženana Radončić, Faculty of Law, University of Zenica; Doc.dr Aida Mulalić, Faculty of Law, University of Zenica; As. Nasir Muftić, Faculty of Law, University of Sarajevo; As. Amina Hasanović, Faculty of Law, University of Zenica.

1 Art. III(1) of the Constitution of Bosnia and Herzegovina.

2 These are:

procedure through 19 articles (arts. 434 – 453). The arbitration procedure is placed in the fifth part of the Code of civil procedure FBiH, called "Special procedures", along with other special procedures (i.e. special procedure for small claims). These articles regulate basic issues of the arbitration procedure:

a) Arbitrability – the parties may agree to resolve their present or future dispute on the rights that they can freely dispose with by way of arbitration, unless disputes fall inside the exclusive jurisdiction of the state courts (Art. 434).
b) Formal validity of the arbitration agreement – an arbitration agreement may be concluded with regard to a certain dispute as well as with regard to possible future disputes that could arise out of a certain legal relation (an arbitration clause). The arbitration agreement must be concluded in written form and signed by the parties, or concluded by other means of communication provided these have written form too (Arts. 435, 436). The Code does not provide for elements of the agreement, or what happens if a contract containing an arbitration clause is to be found null or void.[3]
c) Constitution of an arbitral tribunal – the number of arbitrators must be an odd number (1, 3, 5 etc). If the parties have not agreed on the number of arbitrators, the arbitration panel will consist of three arbitrators (each party appoints its arbitrator and they jointly appoint the president of the arbitration tribunal (Art. 437). Articles 438 and 439 also regulate the procedure for the appointment of arbitrators, resolving the dispute of the parties on the presiding arbitrator, the appointment of the arbitrators by the court. Art. 440 provides the parties the ability to request the termination of the arbitration agreement by the court, if the parties cannot agree on the presiding arbitrator, or the person appointed as an arbitrator cannot/does not want to act as arbitrator.
d) Challenge of an arbitrator (Art. 442) – the Code here refers to Art. 357, which provides the reasons for the challenge of the judges in the civil procedure. Such regulation of the challenge of an arbitrator is much broader than the one provided by the UNCITRAL Model Law (an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his/her impartiality and independence), and not suitable for the arbitration procedure as such.

- Code of Civil Procedure FBiH, „Official Journal of FBiH" Nos. 53/2003, 73/2005, 19/2006, 98/2015,
- Code of Civil Procedure RS, „Official Journal of RS" Nos. 58/2003, 85/2003, 74/2005, 63/2007, 105/2008, 45/2009, 49/2009, 61/2013,
- Code of Civil Procedure BDBiH, „Official Journal of RS" No. 28/2018.

3 Assessment of Alternative Dispute resolution/ Mediation in Bosnia and Herzegovina - Final report, prepared by ARS Progetti Framework Contract BENEF 2013 Lot 7, 2013, p. 93.

e) Arbitration procedure (Arts. 443, 444) – the Code does not provide a detailed procedure before the arbitrators, nor the provisions regarding their powers and duties. However, the Code, quite generally, entitles the arbitrators to determine the procedure. It also restrains an arbitrator from using any means of force or pronouncing sanctions. The arbitral tribunal may request the territorially competent court for providing legal assistance to present evidence that the tribunal cannot present on its own.

f) Arbitral award (Arts. 445 – 448) – these articles regulate the decision-making process, formal elements of the arbitral award and its legal effect. The arbitral award is decided by the majority of votes, however, if the majority is not attained, the parties will be informed, and can, as the last resort, call upon the court to terminate the arbitration agreement. The arbitral award has the legal effect of the final judgement, unless the arbitration agreement provides for the possibility of challenging the award before the higher instance arbitration.

g) Process of annulment of the arbitral award (Arts. 450 – 452) – the Code provides an exhaustive list of reasons for the annulment of the award. The process of the annulment can be initiated by any of the parties before the court in accordance with Art. 440(3). The parties can bring the claim in 30 days after they have received the award or have been informed of the reason for the annulment, but not longer than one year after delivering the award.

The Civil Procedure Code FB&H does not provide any provisions containing general principles on arbitration (i.e. party autonomy), still, it is presumed that the general rules governing the civil procedure can be used for the arbitration as well. However, it would be much more useful for the arbitration process that the Code (as the legal act providing the general framework for arbitration) provides at least the reference to international standards providing general principles of the arbitration (UNCITRAL Model Law).

According to the Code, the arbitral tribunal does not have the power to adopt interim measures (only the court does), which can prolong the arbitral process (while waiting for the municipal court to enact one).[4]

Other legal acts relevant for commercial arbitration at the entity level are:

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[4] See for more details in: Abedin Bikić, „Arbitraža u Bosni i Hercegovini“, Godišnjak Pravnog fakulteta u Sarajevu, LXII – 2019., p. 319.

a) Law on obligations[5] is relevant for the substantive validity of the arbitration agreement. The arbitration agreement is considered a contract covered by the Law on obligations, therefore, all the provisions related to the general principles of contract law are applied.
b) Private International Law[6] is relevant for determining whether the arbitral award is international or not. Pursuant to Art. 97, the arbitral award is considered international if enacted by the foreign court/tribunal, or if the domestic tribunal applied foreign procedural law.[7]
c) Laws on enforcement procedure at the entity level[8] are relevant for enforcing both domestic and recognized foreign court and arbitral awards.

Besides these legal acts, it is worth mentioning that domestic arbitration institutions have their rules on arbitration, too. The Arbitration Court (the Court) attached to the Foreign Chamber of Commerce of Bosnia and Herzegovina (the arbitration institution at the state level) established in 2003, operates under the "Rules on organisation and operation of the Court of Arbitration".[9] The Arbitration Court of the Republic of Srpska, attached to the Chamber of Commerce of the Republic of Srpska, established in 1998, is governed by "Rules of the Foreign Trade Court of Arbitration of the Republika Srpska Chamber of Commerce and Industry".[10]

a) Is this legislation applicable to both domestic and international arbitration? Are these rules based on the UNCITRAL Model Law? Is yes, what are the meaningful differences?

The civil procedure laws do not provide for the information on whether their provisions are applied in both domestic and international arbitration. However, the rules of both arbitral institutions in B&H (the Arbitration Court at the state level and the Arbitral Court at the level of the Republic of Srpska) provide their application to both domestic and international arbitration. According to Art. 2 of the Rules of the Arbitration Court B&H, its rules apply to the dispute of the parties with a permanent or habitual residence in B&H, as well as to the disputes in which at

5 Law on Obligations, "Official Gazette of Former Yugoslavia", Nos. 29/78, 39/85, 45/89 and 57/89, "Official Gazette of RBiH", Nos. 2/92, 13/93 and 13/94, "Official Gazette of RS", Nos. 17/93 and 3/96.
6 Law on Private International Law Rules, "Official Gazette Former Yugoslavia", Nos. 43/82 and 72/82, "Official Gazette RBiH", Nos. 2/92, 13/94.
7 For more details see: Nevena Jevremović, „Debugging The Arbitration Legal Framework In Bosnia And Herzegovina", Stroški arbitražnega postopka, Letnik VI, Številka 1 (marec 2017).
8 Law on Enforcement Procedure, "Official Gazette of Brčko District", No. 39/13, Law on Enforcement Procedure, "Official Gazette of FBiH", Nos. 32/03, 52/03, 33/06, 39/06, 39/09, 35/12 and 46/16, and Law on Enforcement Procedure, "Official Gazette of Republic of Srpska", Nos. 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14.
9 Available at: http://www.komorabih.ba/wp-content/uploads/2019/05/Pravilnik-o-arbitrazi-engleski-jezik.pdf
10 Available at: http://komorars.ba/wp-content/uploads/2015/06/THE-RULES-OF-THE-FOREIGN-TRADE-COURT-OF-ARBITRATION.doc

least one party has a permanent or habitual residence in another state. It also applies both to domestic and international arbitration.

The rules of the aforementioned laws are mostly based on the UNCITRAL Model Law. The civil procedure laws do not provide for the refence to the UNCITRAL Model Law, which would facilitate the interpretation of the provisions of the codes in line with the general principles of international standards. However, the Rules of the Arbitration Court of B&H provide the possibility of the parties to agree that the proceedings before the Arbitration Court should be conducted in line with the UNCITRAL Arbitration Rules (Art. 43). The same is provided in the Rules of the Arbitration Court of RS (Art. 45).

Even though the civil procedural laws regulate basic issues of arbitration, not all solutions are in line with the UNCITRAL Model Law. Some of the differences are:

- Challenge of the arbitrator – while the UNCITRAL Model law provides for an arbitrator to be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, the civil procedural laws provide a list of the grounds for challenging applicable for the judges, which is too broad for arbitration;
- Civil procedural laws do not provide the competence of the arbitral tribunal to rule on its own jurisdiction, unlike the UNCITRAL Model Law (Competence-Competence). However, the rules governing institutional arbitration courts (both on the state and the level of the RS) provide the competence of the arbitration institution to decide on its own jurisdiction;
- Civil procedural laws do not provide the power of the arbitral tribunal to order interim measures, unlike the UNCITRAL Model Law. Only the competent court can order the interim measures upon the request of the parties;
- The codes do not entitle the arbitral tribunal with the power to act if one of the parties does not participate in the arbitration, while the UNCITRAL Model law entitles arbitral tribunals to proceed with the arbitration procedure and to render an award despite the respondent's absence;
- The grounds for challenging the arbitral award are much more numerous in the codes than anticipated in the UNCITRAL Model Law.[11]

These are the basic differences among civil procedure codes of the entities and the UNCITRAL Model law. By adopting the amendments to the national codes in line with the

[11] For more detailed overview of differences among national civil procedural codes and the UNCITRAL Model Law, see: Nevena Jevremović, „Debugging The Arbitration Legal Framework In Bosnia And Herzegovina".

UNCITRAL Model Law, legal certainty would be enhanced and, consequently, the rate of its application would increase.

b) How are the laws aligned with European rules/regulations and what is the status of progress reports of the EU?

According to the *Bosnia and Herzegovina 2020 Progress Report* prepared by the European Commission,[12] the state is overall at an early stage i.e. has some level of preparation regarding its level of preparedness and ability to take on the obligations of EU membership and needs to significantly step up the process to align with the EU *acquis* and implement and enforce related legislation.[13] Limited to no progress was made on the different EU *acquis* chapters during the reporting period.[14]

Despite the fact that BiH is equipped with a more or less modern legal framework for alternative dispute resolution processes, it seems that the (business) practice has been sceptic about surrendering the jurisdiction of the state courts to ADR mechanisms within the legal system of BiH. The use of court settlement and alternative dispute resolution methods needs to be promoted and applied in line with European standards and best practices.[15]

Regarding the functioning of product markets and, more concretely, business environment, the rule of law and the functioning of the judiciary continue to be a crucial weakness. Improvements in this area have remained very limited.[16] Among others, important issues are contract enforcement, in particular settling commercial disputes, a substantial backlog in court cases, and problems with establishing property rights, in particular real estate registration in some areas. Insufficient cooperation and coordination among the various stakeholders is a major impediment to the rule of law and a proper functioning of the judiciary, impeding the establishment of a level playing field on a country-wide level, with wide-ranging negative effects on the country's

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12 COMMISSION STAFF WORKING DOCUMENT, Bosnia and Herzegovina 2020 Report, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 6th October 2020, p. 50. Available via link: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/bosnia_and_herzegovina_report_2020.pdf (access October 2020).

13 Council of the European Union, *COUNCIL CONCLUSIONS ON COMMISSION OPINION ON BOSNIA AND HERZEGOVINA'S APPLICATION FOR MEMBERSHIP OF THE EUROPEAN UNION*, 14954/19, Brussels, 10 December 2019, available via link: https://www.consilium.europa.eu/media/41692/bih-st14954-en19.pdf (access October 2020). The Commission's Opinion, issued on 29 May, provides a comprehensive roadmap for reforms to guide and support the country on its path towards EU integration.

14 Bosnia and Herzegovina 2020 Report, p. 6.

15 Bosnia and Herzegovina 2020 Report, p. 21.

16 Bosnia and Herzegovina 2020 Report, p. 50.

business environment. The resource endowment and independence of numerous regulatory and supervisory institutions continues to be insufficient. [17]

c) Are there any legislative initiatives ongoing to amend the domestic law? If yes, on what aspect of the arbitration law(s) and for which reasons?

Currently there are no legislative initiatives for amending the domestic laws related to arbitration.

d) By your expertise, is the legislative framework efficient and effective?

Since there are no official statistics available on arbitration cases in BiH or the use of arbitration clauses in contracts, it cannot be concluded that the legislative framework is efficient. However, if considered the fact that the legislative framework in both entities provide the possibility of the commercial arbitration before the recognised arbitration institutions, and that the legal framework is mostly in line with the UNCITRAL Model Law, accompanied with the relevant legal framework for recognition and enforcement of a foreign arbitral award, it could be concluded that the legal framework is effective. However, there is room for the improvement of the legal framework, particularly considering the fact that not all the relevant arbitration issues are regulated by the civil law procedures and some issues are not regulated in accordance with the UNCITRAL Model Law.

2. Is there an arbitration institution in your country? If yes, how is it structured and are these structures sufficient? Did this institution create its own procedural rules?

The complex constitutional structure of Bosnia and Herzegovina is reflected in myriad issues related to arbitration, such as the existence of three separate pieces of legislation governing civil procedure. This often puzzling complexity also impacts the governing national institutions/courts that are in charge in this field. Arbitration is not an exception. Consequently, arbitration institutions in Bosnia and Herzegovina have been established on both state level and entity level.

The institution in charge of conducting arbitration on the state level in Bosnia and Herzegovina is the Arbitration Court (the Court) attached to the Foreign Chamber of Commerce of Bosnia and Herzegovina. The Court operates in current form since 2003, when the Board of Directors of the Chamber of Commerce of Bosnia and Herzegovina adopted the Rules on Organization

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[17] Key Findings on the 2020 Report on Bosnia and Herzegovina, available via link: https://ec.europa.eu/commission/presscorner/detail/en/country_20_1793 (access October 2020)

and Work of the Arbitration Court (the Rules). Laws on Civil Procedure containing provisions on arbitration had also been adopted in 2003 which had been a significant step forward in the development of legal framework for arbitration in Bosnia and Herzegovina that was scarce at the time. Thus, at the time they had been adopted, the Rules could be understood as an attempt to fill the gap in the framework and provide for an arbitration institution in Bosnia and Herzegovina. Unfortunately, the arbitration framework had barely been changed ever since and has remain incomplete hitherto. The current regulatory framework the Court operates in can be seen through such lens.

The Rules operate as a functional equivalent of the organization's statute, settling the character of the Court as an independent arbitral institution with the power to settle both domestic and international disputes. They provide the institutional structure of the Court that consists of a president, deputy president, arbitration councils and sole arbitrators. The seat of the Court is in Sarajevo and the existence of a formal arbitration agreement is a precondition for submitting the dispute. The Court published the list of arbitrators and the pricelist available on the website.[18] The procedures of the Court are contained partially in the Rules. If certain matter is not regulated by the Rules, they prescribe that the Law of Civil Procedure is to be applied absent parties' agreement. Due to the incomplete and incoherent *lex arbitri* in Bosnia and Herzegovina, two problems are possible. First, there might be a conflict between the Rules and the Law of Civil Procedure. It has been recognized that the rules governing the seat of arbitration are vague and prone to different understanding.[19] Second, certain matters have not been covered by any of the applicable legal instruments.[20] A partial consolation is that the Rules provide parties with a possibility to opt for application of the UNCITRAL Arbitration Rules to govern their procedures.

On the entity level, Republika Srpska is the sole entity in Bosnia and Herzegovina that operates an arbitration institution. The Arbitration Court of Republika Srpska (the RS Court) is established by the Law on the Chamber of Commerce of Republika Srpska. The Chamber of Commerce of Republika Srpska adopted the Rules (the RS Rules) whereby the RS Court is in charge of settling commercial disputes of domestic and foreign character. The RS Rules governing the RS court provide for the structure of the institution as well as for procedural rules. The RS Court structure consists of the presidency and the secretariat. The presidency consists of

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18 http://www.komorabih.ba/pravilnik-o-arbitrazi-2/

19 http://arbitrationblog.kluwerarbitration.com/2015/12/02/institutional-arbitration-in-bosnia-and-herzegovina-an-overview-of-rules-and-practices/

20 Nasir Muftić, LLM: Dostupnost privremenih mjera u međunarodnoj trgovačkoj arbitraži Godišnjak Pravnog fakulteta u Sarajevu, LXII – 2019., s. 391–416, http://www.pfsa.unsa.ba/pf/wp-content/uploads/2020/01/Godisnjak-PFSA-2019-za-web1.pdf

a president, a deputy president, a secretary and two members. The secretariat consists of a secretary and associates and provides administrative aid.

The seat of the Court is in Banja Luka and the existence of a formal arbitration agreement is a precondition for submitting the dispute. The Court published the list of arbitrators and the pricelist available on the website.[21] The rules of procedure of the RS Court are partially contained in the RS Rules. The aforementioned problems pertaining to the Court on the state level are present here as well – lack of a comprehensive and modern *lex arbitri* adversely impacts the rules of procedure.

The duality of arbitration institutions must be explained from a legal point of view. Both institutions settle domestic and international commercial disputes. They do not differ with respect to expertise for certain industry or territory they operate on. Also, the *lex arbitri* governing the operation of both institutions is of high resemblance.

3. How is the commercial arbitration practice in your country?

a) How many commercial arbitration cases are there annually in your country?

Arbitration proceedings are seldom used in BiH and the practice is very limited. Therefore, it is very difficult to give any estimates as to the duration, costs and other matters relevant for arbitration proceedings. Additionally, the number of arbitration cases before the arbitration institutions in B&H is not publicly available. According to another analysis[22], there were approximately 10 cases of arbitration before the Arbitral Court B&H for the 10-year period between 2003 and 2013, and afterwards, there were usually two cases per year. Similarly, there is no information on the number of cases before the Arbitral Court RS.

Generally, arbitration is still not popular among the companies in B&H for numerous reasons – domestic companies rarely include arbitration clauses in their contracts, they are used to a court resolving their disputes, foreign companies usually choose foreign arbitration institutions, which are more competitive than domestic ones, etc. Moreover, some larger companies in the local market which form part of the international affiliation such as *Siemens*, *Energopetrol* or *G-Petrol* use arbitration clauses in their contracts; however they face a problem of a lack of understanding of an arbitration procedure by their local partners.[23]

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21 https://komorars.ba/poslovno-okruzenje/arbitraza/

22 Assessment of Alternative Dispute resolution/ Mediation in Bosnia and Herzegovina - Final report, prepared by ARS Progetti Framework Contract BENEF 2013 Lot 7, 2013, p. 101.

23 Assessment of Alternative Dispute resolution/ Mediation in Bosnia and Herzegovina - Final report, prepared by ARS Progetti Framework Contract BENEF 2013 Lot 7, 2013, p. 92.

b) Which are the main subject-matters the cases deal with? Are there any subject matters considered non-arbitrable in domestic laws?

According to relevant provisions of the Civil Procedure Code of FBiH and RS, namely articles 434-435, 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. Regarding the condition of arbitrability, a general rule is that a dispute can be subject to arbitration provided that it is a matter which the parties can freely dispose of as defined in the general provisions of the Civil Procedure Code. Taking into consideration such an explicit reference to the general principles of civil litigation, conclusion can be drawn that 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.[24] 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.[25]

Additionally, and according to the Rules on organisation and operation of the Arbitration Court B&H, the Arbitration Court has competence for settling disputes which arise out of trade relations (both national and international).[26] On the other hand, the Court of the Arbitration RS settles disputes arising out of international business relations[27], thus excluding disputes without

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24 N. Jevremenović, The Peculiar Case of Arbitration in Bosnia and Herzegovina, October 28, 2015. Available via link: http://arbitrationblog.kluwerarbitration.com/2015/10/28/the-peculiar-case-of-arbitration-in-bosnia-and herzegovina/ (access on 9th November 2020).

25 Ibid.

26 Pursuant to the Art. 1 of the Rules, other preconditions must be met too (that the parties can freely dispose woth their daim, that the dispute does not fall under exdusive jurisdiction of a court of a law, and that the parties have agreed upod the jurisdiction of the Arbitration Court B&H).

27 Pursuant to the Art. 12 of the Rules, it indudes, but is not limited to:
1. disputes related to ships and aircraft, that is the international disputes to which the law of air or water navigation applies,
2. disputes arising out of company artides of association and other forms of organization in mixed ownership,
3. disputes arising out of foreign investment contracts,
4. disputes arising out of concession contracts,
5. disputes arising out of contracts on intellectual property rights (copyright and related rights, industrial property rights, legal protection of know-how, rights in the field of unfair competition) and disputes on the protection of company name,
6. and other disputes arising out of international business relations.

an international element (i.e. one of the parties being foreign natural or legal person). Therefore, the jurisdiction of the arbitration institutions in B&H is set narrower than it is presupposed by civil procedure codes of the entities, since it does not include all the civil matters disputes, but only those related to the trade relations.[28]

4. What are the grounds for refusal of enforcement and recognition of arbitration awards in your country? Is your country party to the New York Convention (with reservations)? How strict are your national courts when enforcing awards (e.g. in relation to public policy)?

Unless the possibility of contesting an arbitration award before a higher instance arbitral tribunal has been envisaged by the arbitration agreement, the arbitration award shall be considered final for the parties.[29]In the latter case the deadline for the appeal, the composition of an arbitral tribunal and the scope of review must be defined.[30]

The original copy of the arbitration award and the delivery receipt are kept in the competent first-instance court.[31] At the request of the party, the same court puts a note on the copy of arbitration on its finality and enforceability.[32]

Additionally, there is a possibility for final recourse against an arbitral award, namely a request for initiating a setting–aside procedure before the competent national court (first-instance court).[33] In case no procedure for contesting arbitral award has been initiated or if such procedures were unsuccessful, the arbitral award shall be considered final and subject to recognition and enforcement procedure.

<u>Recognition and enforcement of a domestic arbitral award</u>

The procedure for recognition and enforcement of domestic awards is governed by the Laws on Enforcement Procedure[34]. An enforcement procedure starts by filing a motion for enforcement

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28 For example, even if the labour disputes are arbitrable according to the Civil procedure Code FB&H, it is not covered by the Arbitration Court B&H, thus leaving this legal field without possibility to settle disputes before the institutional arbitration.

29 The grounds for such a request in the Civil Procedure Code are largely similar to artide 34 of Model Law, and refer mostly to procedural irregularities. Nevena Jevremović, „Debugging The Arbitration Legal Framework In Bosnia And Herzegovina", Stroški arbitražnega postopka, Letnik VI, Številka 1 (marec 2017), p. 11.

30 Assessment of Alternative Dispute resolution/ Mediation in Bosnia and Herzegovina - Final report, prepared by ARS Progetti Framework Contract BENEF 2013 Lot 7, 2013, p.97.

31 Code of Civil Procedure FBiH, artide 448.

32 Code of Civil Procedure FBiH, artide 449. Assessment of Alternative Dispute resolution/ Mediation in Bosnia and Herzegovina - Final report, prepared by ARS Progetti Framework Contract BENEF 2013 Lot 7, 2013, p.97.

33 Code of Civil Procedure FBiH, artide 454.

34 Official Gazette FBiH no. 32/03, Official Gazette RS no. 59/2003, Official Gazette of the Brčko Distrikt no. 39/13.

before the competent court and if all legal requirements have been fulfilled, the court issues a decision of enforcement. A decision of enforcement does not need to contain any reasoning and could be issued only by affixing a seal to the motion for enforcement. It is not provided by the BiH's law that the court may deny a request for declaring a domestic arbitral award as enforceable if it discovers that the subject of the dispute cannot be subject to arbitration procedure or if the arbitral award is contrary to the public order of the BiH.

Recognition and enforcement of a foreign arbitral award

A foreign arbitral award can be recognized in BiH under the New York Convention or under the Law on Private International Law.[35]

1) A foreign arbitral award must be recognized by the competent BiH courts before it can be enforced in BiH.[36] A foreign award is defined as an award rendered abroad as well as an award rendered in BiH, but applying foreign procedural law.[37] A party, seeking recognition of a foreign arbitral award, must submit the following along with the motion for recognition/execution of a foreign arbitral award: original or certified copy of the foreign arbitral award for which recognition is sought, including certification from the competent authority that the award became legally valid and binding under the law of the country where the award was rendered; official translation of the foreign arbitral award; proof that the court fee has been paid.[38]
2) The same documents must be submitted with a motion for recognition and enforcement of a foreign arbitral award under the New York Convention. In FBiH, court fees for an application varies from canton to canton, while in RS the party seeking the recognition of a foreign arbitral award has to pay maximum amount of BAM 10,000. The required court fees must be paid irrespective of the success of an application.[39]

Bosnia and Herzegovina adhered by succession to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, expressing two declarations and a reservation, namely that it will apply the Convention only to awards made in the territory of another Contracting State, only to differences arising out of commercial relationships and only to those awards

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35 Nevena Jevremović, „Debugging The Arbitration Legal Framework In Bosnia And Herzegovina", Stroški arbitražnega postopka, Letnik VI, Številka 1 (marec 2017), p. 12.

36 Pursuant to the entity Laws on courts, the second instance courts have the competence to decide on recognition of foreign arbitral awards, i.e. cantonal courts in FBiH and district courts in RS, while the enforcement procedure is held before municipality courts in the first instance in FBiH, before basic courts in RS and before the Basic Court in the Brčko District.

37 Artide 97 of the Law on Private International Law.

38 Artides 98-99 of the Law on Private International Law.

39 Assessment of Alternative Dispute resolution/ Mediation in Bosnia and Herzegovina - Final report, prepared by ARS Progetti Framework Contract BENEF 2013 Lot 7, 2013, p.97.

rendered after the Convention came into force.[40] Arbitration awards rendered in a country which has not signed the New York Convention are therefore not enforceable in BiH under the New York Convention provisions, but under slightly stricter provisions of the Law on Private International Law (Chapter IV).

The following preconditions must be met for recognition of foreign arbitral award[41]:

- the subject matter of the foreign arbitral award is not exempt from arbitration according to BiH law;
- the subject matter of the foreign arbitral award is not under the exclusive jurisdiction of the BiH courts or other authorities;
- the foreign arbitral award does not contradict principles set forth in the BiH Constitution, the FBiH Constitution or RS Constitution and/or public order;
- reciprocity of recognition exists between BiH and the country of origin of the foreign arbitral award;
- the relevant parties have concluded a written arbitration agreement and such agreement is valid and binding;
- the party against which the arbitral award has been rendered was duly informed of the appointment of the arbitral tribunal and of the arbitration proceedings and there were no obstacles for such party to participate in the arbitration proceedings;
- the composition of the arbitral tribunal and the arbitration proceedings were in accordance with the provisions of the arbitration agreement and the arbitration rules;
- the arbitral tribunal has not exceeded its authority determined by the arbitration agreement;
- the foreign arbitral award is final and enforceable; and
- the foreign arbitral award is not ambiguous or contradictory.

Except for the reciprocal recognition and enforcement condition and the obligation of the clear and not contradictory award, other grounds for refusal are more or less identical to the grounds incorporated in article 5 of the New York Convention. Moreover, the New York Convention provides two grounds that the competent authority/the court may consider on its own initiative, namely non-arbitrability of the subject-matter of the dispute and violation of public policy of that country. An appeal against a decision on the enforcement of a foreign award may be filed within fifteen days from the date of the delivery of the court decision. The submission of a request or an appeal does not *per se* suspend the course of the enforcement procedure, however a

40 http://www.newyorkconvention.org/list+of+contracting+states

41 Artide 99 of the Law on Private International Law BiH.

settlement of a claim is postponed until the decision of the court is rendered with regard to the filed request or appeal. Since there is no integral, publicly available data on cases dealing with the recognition and enforcement of foreign arbitral awards in BiH, it is difficult to acknowledge whether the stance of the courts in BiH towards the recognition and enforcement of foreign arbitration awards is favourable or strict. Nevertheless, it is important that the courts refrain from the unduly widening of the concept of public policy in order to find additional grounds for rejecting the enforcement of foreign awards.[42]

Once recognized, the decision has legal effects of a domestic court decision and as such is subject to enforcement under the relevant entity laws.

5. Is commercial arbitration in your country perceived as a viable alternative to taking cases in front of national courts?

Commercial arbitration in BiH is still not considered as viable alternative to taking cases before the national courts. It is an underdeveloped and avoided mechanism of alternative dispute resolution due to several reasons[43] – the complexity of the national legal system, the discrepancies between national civil procedural laws and the UNCITRAL Model Law, which causes certain legal insecurity for foreign companies conducting business in BiH, etc. Domestic companies manifest an insufficient level of awareness regarding the benefits of ADR. This fact coupled with the lack of public policy or strategy on the promotion of the alternative dispute resolution is one of the main disadvantages in the entire process of rising awareness of commercial arbitration as a viable alternative to the dispute resolution before the national courts.

II. INVESTMENT ARBITRATION

The following answers are based on the official Analysis of the effect of the agreements on promotion and protection of investments concluded by the Bosnia and Herzegovina with proposals for further activities prepared by the Ministry of foreign trade and economic relations of Bosnia and Herzegovina in 2016 and on the available information on activates since 2016.

6. How is the international legal framework for investment arbitration constituted?

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42 Assessment of Alternative Dispute resolution/ Mediation in Bosnia and Herzegovina - Final report, prepared by ARS Progetti Framework Contract BENEF 2013 Lot 7, 2013, p.98.

43 Irfan Osmanović, Bosnia and Herzegovina: High Time to Tackle Legislative Loopholes Making It Possible to Avoid Arbitration, Kluwer Arbitration Blog, 08.07.2020., available at: http://arbitrationblog.kluwerarbitration.com/2020/07/08/bosnia-and-herzegovina-high-time-to-tackle-legislative-loopholes-making-it-possible-to-avoid-arbitration/

International legal framework in this area is complex. When it comes to the legal sources, different international treaties (multilateral, regional, bilateral), international customary law, general legal principles and court judgments/arbitral awards can be taken into account.

a) Do(es) your country's arbitration law(s) also apply to investment arbitration?

National arbitration rules in the field of international investment arbitration have *de iure* applicability. However, *de facto*, they are inefficient and not supportive regarding the *ratio* of arbitration in international investment disputes. In order to apply national arbitral rules, contained in Article 434 of the Law on civil procedure of the Federation of Bosnia and Herzegovina (the same rules apply in the Republic of Srpska), several conditions must be met. The first condition is related to the arbitration agreement between all parties in the potential dispute. The aforementioned laws contain 19 articles related to the basic elements of the arbitration procedure, such as the form of the arbitration agreement, the establishment of the arbitration tribunal, the annulment of the arbitration awards. However, there are many questions which are not regulated at all. It is not clear to what extent rules on civil procedure are applicable to arbitration. Certain substantive questions in regards to the arbitration agreement and the applicable law are not covered by those provisions. In terms of judicial hierarchy, courts of the first instance have jurisdiction over questions such as the validity of the arbitration agreement, the appointment of the arbitrators, annulment of the arbitral awards and the enforcement of arbitral awards, in accordance with the Laws on civil proceeding and Laws on the enforcement proceeding. The courts of second instance have jurisdiction over the enforcement of the arbitral awards in accordance with the Law on conflict of laws or the New York Convention on Recognition and Enforcement of foreign arbitral awards.[44] When it comes to the state level, the non-existence of the explicit jurisdiction of the Arbitral Court of Bosnia and Herzegovina in investments disputes is the main issue. This court is established to resolve international commercial disputes in accordance with the Rules on organization and operation of the court of arbitration BiH. An extension of the jurisdiction of this court to the investment related disputes could be potentially problematic, both, in respect of the *rationae personae* as well as the *rationae materiae* jurisdiction. The aforementioned Rules do not necessarily recognize the state as a party to the dispute. Besides, current BITs concluded between Bosnia and Herzegovina and other states reflect the notion of the ICSID Convention as the international instrument tailored for specific investment relations. Due to the aforementioned reasons the rationale of international

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44 J. Omerdić/N. Jevremović, Analiza sudske prakse vezane za arbitražu u Bosni i Hercegovini, Udruženje ARBITRI, 2016, 4-5.

investment arbitration might be completely frustrated if such general arbitration rules apply. This is probably the reason why parties in international investment arbitration in Bosnia and Herzegovina choose either the ICSID Convention or the UNCITRAL Arbitration Rules.

b) Has your country signed and ratified the ICSID Convention?

The ICSID Convention was signed by Bosnia and Herzegovina on the 25th of April 1997. The ICSID Convention was ratified on the 14th of May 1997 and it entered into force on the 13th of July 1997.

c) Which arbitration rules are the most often used?

Agreements in which Bosnia and Herzegovina is a signatory party contain a dispute resolution mechanism which is usually either under the UNCITRAL Arbitration Rules or under the ICSID Convention. Amicable resolution of dispute is always agreed upon as a first phase in the dispute resolution procedure. A number of treaties also provide for the dispute resolution before the courts or before an ad hoc arbitration tribunal which is authorized to apply any rules of its choice.

d) Is your country party to many BITs and/or regional investment treaties (such as the Energy Charter Treaty)?

Bosnia and Herzegovina is a party to 42 international treaties that regulate the protection of foreign investments in the territory of Bosnia and Herzegovina. A large number of these treaties is a bilateral treaty on the promotion and protection of investment where it was agreed upon the parties the reciprocal treatment of the investors from one signatory party in the territory of the other signatory party. Out of 42, 39 of the treaties are bilateral treaties on promotion and protection of the investments between two countries. The treaty signed between Bosnia and Herzegovina and the Republic of India on promotion and protection of the investment was terminated in 2019 upon notice of intention to terminate given by the Republic of India. Bosnia and Herzegovina has signed treaties that do not provide for the reciprocal treatment, rather than solely protection of the investment of the foreign investor in the territory of Bosnia and Herzegovina. Such agreements are: Agreement between Federal executive council of Socialist Federal Republic of Yugoslavia and the Government of Canada on protection of the investments (signed in 1979, succession), Agreement on the promotion of investments between

the Government of the United States of America and the Government of Bosnia and Herzegovina (signed in 1996) and Agreement on the promotion and protection of the investments between Bosnia and Herzegovina and OPEC Fund for international development (signed in 2003). Bosnia and Herzegovina is a signatory state to the Energy Charter Treaty since 2000 when the treaty was ratified.

e) Does your country have a Model BIT, or otherwise use model language in its BITs?

A first draft of the Agreement on the promotion and protection of the investment of Bosnia and Herzegovina was prepared in 2001 by the Ministry of foreign trade and economic relations of Bosnia and Herzegovina and was proposed for adoption by the Council of Ministers of Bosnia and Herzegovina and Presidency of Bosnia and Herzegovina. The draft was adopted by the Presidency of Bosnia and Herzegovina the same year. In 2011, the draft was updated and modernized and the updated version was adopted in 2012 by the Presidency of Bosnia and Herzegovina. Agreements that were signed by the Bosnia and Herzegovina contain generally accepted terms and conditions and they follow the usual practice of the European countries when concluding investment treaties. Such clauses are: MFN clause, national treatment of the investments, fair and equitable treatment of the investments, protection from nationalization and expropriation, compensation for losses or damages which are a result of war, revolution, etc. 16 treaties contain an „*umbrella clause*". 29 of the treaties contain a „*non-derogation* „clause.

7. How is the investment arbitration practice in your country?

Despite having many advantages, arbitration is still not a very popular dispute resolution mechanism in Bosnia and Herzegovina and this applies to the investment arbitrations as well. Foreign companies choose foreign arbitration forums mostly. Furthermore, the situation in Bosnia and Herzegovina is even more complicated due to the complex government system, lack of available information and lack of awareness about the responsibility and obligations under the investment treaties concluded by Bosnia and Herzegovina and the lack of available statistics on arbitration in Bosnia and Herzegovina.. The regulatory framework for arbitration is not completely comprehensive and the provisions are partly regulated in the Law on Civil Procedure, Law on Enforcement Procedure and Law on Conflict of Laws. Those provisions fail to address relevant substantive and procedural law issues such as commencement and termination of the proceedings, seat, appointment of experts, counsel and attorney's fees, etc.[45] When it comes to the lack of information on investment arbitration, the Ministry of foreign trade and economic

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45 Assessment of Alternative Dispute resolution/Mediation in Bosnia and Herzegovina, Final Report, *Project realised by ARS Progetti Framework Contract BENEF 2013 Lot 7 and funded by the European Union*, 90-104.

relation of Bosnia and Herzegovina is working towards signing the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "**Mauritius Convention on Transparency**"). However, Bosnia and Herzegovina is still not a signatory party to this treaty. Furthermore, one of the challenges, according to the Ministry of foreign trade and economic relations of Bosnia and Herzegovina, is the lack of experts in the field of investment arbitration, with relevant education and experience.

a) How many investment arbitration cases are there annually against your country?

So far, Bosnia and Herzegovina has not faced a large number of disputes. However, even though the number of disputes is not high, the value of disputes is. A first dispute that Bosnia and Herzegovina had to face was in 2007. The claim was brought by the Austrian company "ALAS International" requesting EUR 20 million. However, the parties managed to agree on settlement and the proceedings ended.

In 2014, "Elektrogospodarstvo Slovenije – razvoj in inzeniring d.o.o." filed an arbitration claim against Bosnia and Herzegovina seeking damages in the amount of EUR 750 million (*ICSID Case No. ARB/14/13*). However, the details of this case are not publicly available.

"Strabag (AG)" filed a claim against the Ministry of Telecommunication and Transport before the Permanent Court of Arbitration seeking damages in the amount of EUR 640,000 for the breach of agreement. The status of this case is not known to the public. Another ICSID case against Bosnia and Herzegovina was initiated by "Viaduct d.o.o. Portorož, Vladimir Zevnik and Boris Goljevšček" (*ICSID Case no. ARB/16/36*). The claim is based on the Energy Charter Treaty and Slovenia-Bosnia and Herzegovina BIT. Furthermore, there were several requests for amicable dispute resolution. In 2012, the Slovenian investor "KAPIS dodo" requested payment of the amount BAM 919.385,76, based on the Agreement on promotion and protection of the investment between Bosnia and Herzegovina and Slovenia. There is no information whether KAPIS withdrew its request. A second request for amicable dispute resolution was in 2015 from "Male hidroelektrane d.o.o. Zagreb" based on the Agreement between Bosnia and Herzegovina and the Republic of Croatia on promotion and reciprocal protection of investments. There is no further information available.

Therefore, it can be seen that there are not many cases initiated against Bosnia and Herzegovina overall, but the value of disputes is quite significant.

b) How many investment arbitration cases are there annually initiated by investors from your home country?

There is no information that any investor from Bosnia and Herzegovina initiated an arbitration case.