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INTERNATIONAL COMMERCIAL ARBITRATION LAW AND PRACTICE IN BOSNIA AND HERZEGOVINA: LESSONS FROM INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) REFORM

Summary

International arbitration, both commercial and investment, is generating increasing interest and practice in Bosnia and Herzegovina (BiH), as well as more generally in the Western Balkans region. The past decade has seen an increased number of international business transactions and investments, but also related disputes involving parties or claims connected to BiH. However, the desired progress and growth of commercial arbitration are hampered by the outdated legislative and institutional framework, and the lingering lack of capacity of the local courts, which are expected to act as domestic legal anchors of arbitration agreements and awards.

The sluggish development of the commercial arbitration framework lies in stark contrast to the dynamics in investment arbitration, which is undergoing intensive reforms in BiH and in the world. In this space, BiH has been at the forefront of innovative legal and institutional reforms, revitalizing its investment protection standards and creating mechanisms for their effective application.

This paper explores the distinct features of the two legal systems in BiH, looking into the underlying issues faced, their common denominators, and the investment arbitration reform success factors that can be emulated to enhance the commercial arbitration framework. As such, it aims to reverse engineer the adopted reforms and lessons learnt from the investment arbitration sphere that could help unlock the potential of commercial arbitration in BiH.

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The article will unfold as follows: it will first provide a primer on the existing legal and institutional framework for commercial arbitration in BiH, highlighting their special features, distinct from the prevailing international standards. Then the analysis turns to investment arbitration, outlining the motivations, policy background, and concrete reform measures implemented in this field. Finally, the paper arrives at the potential intersections between the two fields and provides recommendations for their mutual reinforcement.

Keywords: international commercial arbitration, investment arbitration, Bosnia and Herzegovina, ISDS Reform, dispute resolution, dispute prevention and mitigation.

PRAVNI OKVIR I PRAKSA MEĐUNARODNE TRGOVINSKE ARBITRAŽE U BOSNI I HERCEGOVINI: "LEKCIJE" IZ REFORME REŠAVANJA SPOROVA IZMEĐU INVESTITORA I DRŽAVE (ISDS)

Sažetak

Međunarodna arbitraža, kako trgovinska tako i investiciona, postaje predmet sve većeg interesovanja, a takođe i njena uloga u praksi u Bosni i Hercegovini (BiH), kao i regionu Zapadnog Balkana uopšte sve više raste. U protekloj deceniji zabeležen je povećan broj međunarodnih poslovnih transakcija i investicija, što posledi

no povećava i broj sporova koji iz njih nastaju. Međutim, željeni napredak i rast trgovinske arbitraže su otežani zastarelim zakonodavnim i institucionalnim okvirom, dugotrajnim nedostatkom kapaciteta lokalnih sudova.

Spor razvoj okvira trgovinske arbitraže leži u oštroj suprotnosti sa dinamikom u investicionoj arbitraži, koji prolazi kroz intenzivne reforme u BiH i širom sveta. U tom smislu, BiH je na čelu inovativnih zakonskih i institucionalnih reformi, revitalizujući svoje standarde zaštite investicija i stvarajući mehanizme za njihovu efikasnu primenu.

Ovaj članak istražuje različite karakteristike dva pravna sistema u BiH, te tako analizira osnovna pitanja sa kojima se isti suočavaju, zatim njihove zajednički osobine, i faktore koji su doveli do "uspeha" investicione arbitraže, a koji bi mogli poslužiti kao primer prilikom reforme trgovinske arbitraže.

U radu će se najpre će pružiti analiza postojećeg pravnog i institucionalnog okvira trgovinske arbitraže u BiH, uz naglašavanje njihove posebnosti, te ukazivanje na razlike u odnosu na važeće međunarodne standarde. Zatim se analiza okreće investicionoj arbitraži i navode se motivi, pozadina i konkretne reformske mere sprovedene u ovoj oblasti.

Konačno, u članku se ukazuje na pojedine razlike između ova dva polja, te se nastoje da daju preporuke za njihovo međusobno unapređenje.

Ključne reči: međunarodna trgovinska arbitraža, investiciona arbitraža, Bosna i Hercegovina, ISDS reforma, rešavanje sporova, sprečavanje i ublažavanje sporova.

1. Introduction: Special Features of the BiH Legal and Institutional Framework

Bosnia and Herzegovina (BiH), a transitioning market economy tucked in the heart of Southeast Europe, disposes of a complex government structure. Stemming from an international peace agreement (The General Framework Agreement for Peace in Bosnia and Herzegovina, hereinafter: Dayton Peace Agreement, 1995), the BiH Constitution (Dayton Peace Agreement, 1995, Annex 4) lays out a multi-tiered system consisting of the State government headed by a three-member Presidency, and two entities (Federation of BiH, which itself consists of 10 cantons, and Republic of Srpska) (Annex 4, Art. 3, Dayton Peace Agreement, 1995).

The status of the city of Brčko, as the last outstanding territorial issue during the Dayton Peace Accords, was resolved by arbitral proceedings under the United Nations Commission on International Trade Law (UNCITRAL) Rules (UNCITRAL Rules of International Arbitration, 2021). The Final Award granted Brčko neutral status as a district (District of Brčko BiH), keeping it outside of the jurisdiction of either entity, as a separate administrative unit under State sovereignty (*The Federation of Bosnia and Herzegovina v. Republic of Srpska* – Final Award, 1999, paras. 9-10).

In total, there are fourteen governments operating within the country, with parallel legislative competencies. The regulation of civil law and procedure, commercial and contract law is within the remit of the entities. This framework has contributed to uneven and fragmented legal systems, which can be particularly challenging to navigate in commercial matters with a foreign element.

2. Overview of Commercial Arbitration Law, Institutions and Practice in Bosnia and Herzegovina

2.1. Legal Framework

There is no self-standing law governing arbitration in Bosnia and Herzegovina, whether domestic or international. Instead, the national arbitration legislation is condensed to 12 articles in the Civil Procedure Codes (CPC) at the entity and District levels (Arts. 434-453, The Code of Civil Procedure of Federation Bosnia and Herzegovina – hereinafter: CPC FBiH; Arts. 434-453, The Code of Civil Procedure of the Republic of Srpska – hereinafter: CPC RS; Arts. 427-446, The Code of Civil Procedure of Brcko District – hereinafter CPC BC) (hereinafter: BiH arbitration legislation, unless indicated otherwise).

The respective provisions on "Arbitration Procedure" were included in the section on "Special Procedures" and largely maintained the current civil procedure framework, with elements influenced by the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: UNCITRAL Model Law). The texts of the three applicable laws are largely identical, which further indicates the lack of legislative attention to the specificities of the arbitration framework and its position in the BiH legal system. Although BiH is considered a Model Law country, its arbitration legislation deviates from the prevailing international standards, including those emulated by other countries in the region.

For example, Croatia (Arbitration Law, 2001), Montenegro (Arbitration Law, 2015), North Macedonia (Arbitration Law, 2006) and Serbia (Arbitration Act, 2006) all have standalone arbitration legislation, which is adapted to the objectives and purpose of the Model Law.

2.2. Alignment with International Standards

When compared to contemporary arbitration legislation, the BiH Arbitration Law can be described as a hybrid between the outdated norms from the Yugoslav Code of Civil Procedure and the Model Law, which it does not fully emulate in content and spirit. Such gaps and deviations from the Model Law artificially create space for misinterpretations and inconsistencies, in an area that is largely settled in international practice. This relates, for example, to the definition of the arbitration agreement (Art. 435, CPC RS), which appears to be more restrictive than the Model Law definition (Art. 7, UNCITRAL Model Law, 2006). Namely, the Arbitration Law in BiH strictly requires the arbitration agreement to be in writing and signed by the parties, which precludes the conclusion of valid arbitration agreements orally or by

conduct. In addition, the law does not expressly refer to electronic communication as a means to conclude arbitration agreements, but the existing definition could be interpreted to allow such practices.

Perhaps most importantly, the standards for the setting aside of arbitral awards deviate from the well-established norms under the Model Law. For example, the BiH arbitration legislation provides that awards can be set aside if they are not properly reasoned, or signed by the tribunal; if the award is incomprehensible or contradictory; if the award is contrary to the State and entity Constitution; and if there are any grounds for remand under the CPC (Art. 451, CPC FBiH; Art. 451, CPC RS). There are no provisions on the enforcement of foreign arbitral awards, which means that the NYC would apply directly. Therefore, parties considering arbitration in BiH, as a Model Law country, may face unexpected challenges during the arbitral proceedings, and in the post-award period.

2.3. Special Features of the BiH Arbitration Legislation

While otherwise supportive of party autonomy in arbitral proceedings, the BiH arbitration legislation provides some unusual and potentially problematic default rules related to the appointment of and decision making by arbitrators, in the absence of party agreement.

The provisions on the judicial termination of the arbitration agreement are a blatant example of such rules. Namely, in case the parties cannot agree on a jointly appointed arbitrator, or the co-arbitrators cannot agree on a presiding arbitrator, or the person named as the arbitrator in arbitration agreement cannot or will not act, either party can: 1. request the competent court to make the relevant appointment, or 2. it can request the same court to terminate the arbitration agreement instead. The laws do not provide any standards or qualifications under which the requested court could assess whether to proceed with the termination, or the consequences of the termination for the parties in the pending disputes.

Rather, Articles 440 and 441 of the FBiH and RS Civil Procedure Code, and Articles 433 and 434 of the BD Civil Procedure Code state that:

> "A party who does not wish to use [the default court appointment] can file a motion to the competent appointing court to declare the arbitration agreement as terminated."

Separately, the same mechanism applies in situations when the arbitral tribunal cannot reach a unanimous decision (Art. 446, CPC FBiH and CPC RS; Art. 436, CPC BD), which is particularly harmful, as the entire process has unfolded, and the parties have already invested time and expenses into the arbitration proceedings. In addition,

the Rules of the BiH Arbitration Court do not provide a solution for the deadlock, but instead in Article 47, they reference the relevant provisions of the CPC.

Arbitration rules in other countries provide default solutions to break the possible deadlocks in appointments or decision-making by the tribunal, which do not create avenues to terminate the arbitration agreement. For example, the Rules of the Court of Arbitration of Republic of Srpska (Arts. 27-30, The Rulebook on Arbitration of the Chamber of Commerce of Republic of Srpska, 2018) provide that the stalled appointments will be made by the President of the Arbitration Court. In the other scenario, when the tribunal cannot reach a majority decision, arbitral rules often provide that the decision in such cases will be made by the presiding arbitrator (e.g. Art. 40, Ljubljana Arbitration Rules, 2014).

Under the combined application of the BiH Arbitration Law and Arbitration Rules, however, the parties can effectively break the deadlock by breaking out of the arbitration agreement. If so applied, the BiH arbitration laws would effectively enable judicial overreach into the arbitration process and the underlying contractual relationship between the parties.

This framework is contrary to Article II of the New York Convention (*Scherk v. Alberto-Culver Co.,* paras. 506, 517, no.10; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., paras. 614, 626-27), and the long-held international standard adopted by courts around the world, giving effect to arbitration agreements, acting from a presumption of validity and enforceability of the arbitration agreement (*B.K.M.I. Industrieanlagen v. Dutco,* 1989, para. 723; *Fillold C. M. v. Jacksor Enterprise, Fillold C. M. v. Jacksor Enterprise*, 1986, para. 179).

These provisions also open the gates for far-reaching unilateral measures by parties seeking to avoid arbitration and perhaps an unfavorable outcome in a specific case, even against the will and under objection from the opposing side. All it would take is to delay or refuse to appoint an arbitrator, or otherwise derail the appointment process. It can even lead to a paradoxical situation where one party approaches the competent court to act as appointing authority, and the other requests the termination of the arbitration agreement.

In addition, there are no mechanisms against the abuse of this process by the parties, and consequently the fate of the arbitration agreement is put at the discretion of the requesting party and the requested court. There are no known cases under these provisions, and thus no indication on how the BiH courts would deal with these matters.

However, these provisions run contrary to the international arbitration framework and its main principles and purpose as they add uncertainty, potentially frustrating the process and the parties' access to a binding determination by a neutral tribunal. By concluding an arbitration agreement, the parties express their common

intention to resolve their disputes outside of national courts, in a flexible, neutral, and arguably more efficient process. Instead, the BiH arbitration laws empower the national courts to give effect to either party's desire to withdraw from an arbitration proceeding and commitment which is no longer convenient.

For these and other reasons, the provisions on the judicial termination of the arbitration agreement should be a reform priority, and should be removed from the BiH arbitration laws as their very existence defeats the purpose of the arbitration law itself.

2.4. Legislative Gaps in the BiH Arbitration Legislation

The BiH arbitration legislation also lacks provisions on crucial elements of international arbitration, such as the initiation of arbitral proceedings, *competence-competence* and separability of the arbitration agreement, judicial support for arbitral proceedings, the seat of arbitration, the law applicable to the arbitration, the replacement of arbitrators, amicable settlement (e.g. through mediation), etc. These legislative gaps require the disputing parties to rely on the default rules of civil procedure in the relevant law. This would certainly contravene the purpose of opting for international arbitration over national courts.

The current state of the BiH Arbitration Law is not only detrimental to the reputation of BiH as a seat of arbitration, but it may also have significant practical implications. Since the national arbitration laws (*lex arbitri*) generally provide default rules in the absence of party agreement on particular matters, the existing gaps in the BiH Arbitration Law leave a legal vacuum, which causes uncertainty, time and cost delays and may require additional support by local courts. Such practices are contrary to the essential objectives of international arbitration, to provide a neutral, flexible, efficient and effective alternative to local courts.

2.5. Institutional Framework

On the other hand, there seems to be no political will or appetite for the reform of the arbitration legislation in BiH, nor are such initiatives coming from the arbitral institutions established in the country: the Court of Arbitration of the Foreign Chamber of Commerce BiH, and the Court of Arbitration of the Chamber of Commerce of Republic of Srpska, which are the primary arbitration venues in the country.[1]

[1] Information about the BiH arbitration institutions is available on their respective websites: The Court of Arbitration of the Foreign Chamber of Commerce BiH, 2024. Available at: https://komorabih.ba/pravilnik-o-arbitrazi-2/, 20 September 2024; The Court of Arbitration of the Chamber of Commerce of Republic of Srpska, 2021. Available at: https://komorars.ba/arbitraza/, 20 September 2024.

From the outside, it is difficult to learn about the arbitration practice in BiH, since the institutions do not publish their caseload statistics, or any summaries of cases and outcomes. The institutional rules are behind on the international standards and practice, although the Rules of the Arbitration Court in Republic of Srpska provide a more detailed procedural frame than the Rulebook of the Arbitration Court of BiH, whose provisions date back to 2003. Although amendments to the Rulebook were adopted in 2023, they focused primarily on the changes in the internal organization and function of the court, and not the arbitral procedure itself (Rulebook on Amendments BiH, 2023).

3. Judicial Interpretation of the BiH Arbitration Legislation

The BiH judiciary, organized around the complex government structure and allocation of powers, is known for its slow pace and extensive backlog of cases (OSCE, 2022, pp. 16-27). In FBiH, there are no specialized courts that would deal with arbitration-related proceedings, and such cases are within the competence of the courts that would hold jurisdiction if there were no arbitration agreement between the parties (Art. 440, CPC FBiH, 2003). The situation is somewhat different in the RS entity, where cases related to commercial contracts and arbitration are within the jurisdiction of the commercial courts (High Commercial Court Banja Luka, and six regional courts).

The lack of efficiency and predictability is one of the main reasons disputing parties seek to avoid the BiH courts by concluding arbitration agreements. Just as any other transitioning economy, BiH courts and institutions are also perceived as more prone to bias and influence, which impacts also the level of legal certainty and rule of law (USAID & MEASURE, 2022. pp. 16-23; World Justice Project, 2024).

However, regardless of whether the parties ultimately trust the domestic courts, modern arbitration legislation provides two functions for the courts of the seat of arbitration – 1. a supporting role during the proceedings (e.g. issuance of interim measures, ordering security for costs, conducting evidentiary measures, appointing arbitrators as appointing authority, etc.), and 2. deciding on requests to set aside or enforce arbitral awards. This internationally accepted standard is reflected in the UNCITRAL Model Law, which also clarifies that the exercise of the parties' rights to approach the competent courts in this regard does not represent a waiver of the arbitration agreement, or a withdrawal of their consent to arbitration (Art. 9, UNCITRAL Model Law, 2006).

As noted above, BiH has only partially adopted the UNCITRAL Model Law in its arbitration legislation, and in doing so, it has failed to integrate the provision on the supporting role of the judiciary. It has also deviated from the grounds set aside provided in the Model Law, further distancing the BiH system from the international standards.

While BiH courts have not inherently demonstrated any animosity towards arbitration, both in terms of the proceedings or the resulting awards, the incomplete and outdated legal framework in BiH makes it difficult for them to interpret the existing provisions consistently with international law. This was particularly challenging in more complex cases related to the jurisdiction of the tribunal and the validity of the arbitration agreement.

Nevertheless, the courts have managed to bridge the normative gaps by referencing the UNCITRAL Model Law, the New York Convention, and the European Arbitration Convention, applying their standards in combination with the basic rules under the BiH arbitration legislation. For instance, courts have affirmed the separability principle and competence-competence, even though they are not provided under the BiH Arbitration Law. In doing so, they have recognized the international standards established under the UNCITRAL Model Law, affirming the jurisdiction of the arbitral tribunal to decide on matters related to the validity of the arbitration agreement, as well as the validity of the underlying contract itself.

More complex issues, such as the determination of the law applicable to the arbitration agreement, have lead to less elegant solutions, requiring the intervention of the Supreme Court of FB&H (SCFBiH). In one such instance, the SCFBiH reversed the appellate court's ruling that the arbitration agreement provided online in terms and conditions was invalid as it was not signed by the parties (Meškić, 2020, pp. 42-43). The SCFBiH affirmed that the validity of the arbitration agreement must be determined under the law applicable to it. In the absence of party agreement in the relevant case, and the silence of the BiH arbitration legislation on the matter, the court explored the various conflict of law rules provided in the UNCITRAL Model Law, the NYC, and the EAC to finally arrive at French law as the law of the seller under the standards of the BiH conflict of law rules (Meškić, 2020, pp. 30-36). While the detailed analysis of this decision is beyond the scope of this chapter, it is a clear example of a complex issue that could have had a much clearer and effective solution if the BiH Arbitration Law closely followed the standards established in the UNCITRAL Model Law.

This perfect storm of circumstances has prevented the necessary reforms and progress in the field, despite the growing interest and expertise among legal practitioners and scholars. However, there are still vast opportunities for effective progress, even under these conditions, as demonstrated by the recent developments in the BiH investment protection and dispute resolution framework, including investment arbitration. The following sections will outline the robust set of legal and institutional reforms in the field, the lessons for the commercial arbitration framework in BiH, and potential areas of interaction for the mutual benefit of both regimes.

4. Lessons and Best Practices from Investment Arbitration for the Commercial Sphere

Unlike the sphere of commercial arbitration, the reforms and developments of investor-state policies and dispute resolution mechanisms have been much more active and dynamic. Over the past five years, Bosnia and Herzegovina has been at the forefront of the regional efforts to enhance the investment protection policies and safeguard the States' right to regulate in the public interest. These reforms are currently unfolding at the international level (UNCITRAL Working Group III, 2024), fortified by the efforts to mitigate climate change and enable a streamlined and just energy transition (Energy Chapter Treaty Modernization Proposal, 2022).

The international reforms target primarily the international investment treaties that form the legal framework for investment protection and investment arbitration against the host States. After its first experiences in investor-State disputes, Bosnia and Herzegovina has initiated significant reform efforts in the legal and institutional frameworks for investor-State disputes, based on the lessons from previous cases and international best practices (including those in the EU) (Sulejmanović, 2023). This section will outline some of the most prominent reform solutions already adopted in BiH and lessons that could be useful in future reforms of commercial arbitration in the country.

It should be noted as a preliminary matter that the reforms of international investment policies are distinct from the commercial area in several significant aspects. Firstly, investor-State disputes implicate the political and economic interests of the host State, including the effects of any unfavorable outcomes on local communities and its general population. Considering the growing public interest in investor-State disputes, BiH and other States are compelled to make visible and tangible efforts to strengthen their legal framework and institutional capacities to reduce the risks and possible negative effects of investment arbitration. In addition, investor-State disputes are more transparent, and a large volume of arbitral awards is publicly available (and in some cases the hearings can be viewed by the public as well) (e.g. the hearings in the *Vattenfall v. Germany* or *Rand Investment v. Serbia* cases). Therefore, States design and implement the desired reforms, as the main stakeholders and decision-makers in the reform process. Commercial parties and practitioners can only propose necessary policies and reforms for the commercial arbitration legal and institutional frameworks, but there is no guarantee of any specific outcome in this respect.

Furthermore, interventions in the field of investment protection and dispute resolution are made in a unified legal framework in Bosnia and Herzegovina, since matters of foreign trade and investment are regulated at the State level. Therefore,

the legal framework is not fragmented and consists of a network of international investment treaties negotiated by a single institution (the Ministry of Foreign Trade and Economic Relations BiH, MoFTER BiH), and the BiH Law on Foreign Investment Policies. On the other hand, commercial arbitration is subject to entity laws, while the State level laws (including the New York Convention) come into play at the enforcement stage.

To date, Bosnia and Herzegovina has been the Respondent in five known investment arbitrations, two of which were decided in favor of the investor, one was settled, and two remain pending, including the largest investment claim against BiH brought by "Elektrogospodarstvo Slovenia" worth EUR 750 million (*ESG v. BiH;* UNCTAD, 2014). It is possible that the total number of investment claims is bigger, with some cases remaining confidential or others settled before the notice of arbitration. In any case, through this limited exposure to investment arbitration, BiH has already faced significant financial exposure and has identified the weaknesses in its legal and institutional frameworks for investor-State disputes. This has prompted intensive reform measures to address the risks and challenges faced by the State in investment arbitration, starting from the substantive and procedural provisions for future investment treaties.

4.1. New BiH Model Bilateral Investment Treaty (BiH Model BIT)

BiH developed a new model BIT in 2023, which will serve for the re-negotiation of the existing and negotiation of new investment treaties (BiH Model Bilateral Investment Treaty, 2023 – hereinafter: BiH Model BIT).[2] The BiH Model BIT addressed both the substantive and procedural risk factors that existed under the old-generation treaties and served as the legal basis for all the investment claims brought against BiH. On the substantive side, the primary aim was to narrow the interpretive discretion of the arbitral tribunal and set out in precise terms the nature and scope of the investment protection standards provided by the State. Most importantly, this includes qualified provisions on fair and equitable treatment, full protection and security, most favored nation and national treatment, and expropriation. For further clarity and context, MoFTER BiH also prepared the Principles and Standards for Investment Treaty Negotiation, which can serve as an interpretive tool during the negotiations with other States, and for arbitral tribunals deciding investment disputes brought under the treaty (Principles and Standards). While a detailed analysis of the substantial reforms is beyond the scope of this chapter, suffice it to say that the modernized provisions should help reduce

[2] The BiH Model BIT has not been published as of the date of writing, but the author has access to a copy.

the risk of future investment claims, and rebalance the largely asymmetrical treaties, which previously focused solely on investment protection.

The procedural reforms laid out in the dispute resolution clause demonstrate the thoughtful and calibrated consideration of experiences from past cases, and international best practices resulting in robust and layered solutions. The procedural reform encompassed both the pre-dispute phase (dispute prevention and amicable settlement) and the investment arbitration procedure, tied to the existing international and domestic institutions.

4.2. Dispute Prevention and Mitigation

In the pre-dispute phase, the investor is required to submit a request for consultations, providing details of the investment, its status as covered investor, the factual background, contested measure, and the government institution or agency involved in the dispute. Investors can only initiate arbitration based on claims specified in the request for consultations, and subject to a time limitation after the first notice. The parties are also encouraged to initiate amicable settlement proceedings at any time, which would suspend the consultations and arbitral proceedings.

These provisions are a direct response to the common challenge States face in investor-State disputes, where gaps and inefficiencies in pre-dispute communication with investors often prevent any effective opportunity to avoid or at least mitigate potential claims (World Bank & Energy Charter Secretariat, 2023). In an effort to improve the communication channels in the pre-dispute phase and increase the chances of effective settlement outside of arbitral proceedings, the BiH Model BIT refers the parties to choose the mediation rules governing the process, which now include specialized rules issued by ICSID (ICSID, 2021a) and other arbitral institutions, or the Mediation provisions and guidelines recently adopted by UNCITRAL WGIII (UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, 2023; UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution, 2023).

The dispute prevention and mitigation process defined in the BiH Model BIT is embedded in the institutional innovations adopted by BiH in the ISDS reform process (Sulejmanović, 2023), i.e., the two-tier mechanism consisting of a focal point for early investor grievances (within the network of foreign investment protection agencies), which would seek to resolve the issue at a direct, technical level, and a coordination body, which would engage in attempts of amicable settlement. The coordination body consists of competent institutions in the area of international law and dispute resolution, with *ad hoc* members related to the specific case (Council of Ministers BiH, 2017). If this process does not lead to a settlement, the coordination body supports

the State Attorney's Office, which represents BiH in all proceedings between international courts and tribunals (Council of Ministers BiH, 2017).

This structure, supported by the clear and streamlined rules and directions provided in the BiH Model BIT, creates a promising framework, which should enable BiH to provide a timely reaction to emerging investment disputes and reduce the risks of their escalation to investment arbitration. Even when attempts to prevent and settle investor claims are not successful, the activities in the pre-dispute phase enable the coordination of the relevant institutions and preparation of materials and evidence that can be useful in further adversarial proceedings. If applied consistently and effectively, these reforms can bring significant improvement compared to the existing practices.

4.3. Investor-State Dispute Settlement (ISDS) Clauses

If a dispute survives the consultation phase and the cooling-off period, investors can initiate proceedings in the national courts of the host State or opt for arbitration under the ICSID Rules (ICSID, 2021b), *ad hoc* arbitration under the UNCITRAL Rules (UNCITRAL Guidelines on Mediation for International Investment Disputes, 2023), or other rules selected by the parties. The claims can only relate to the alleged treaty breaches identified in the request for consultations (Art. 21(2), BiH Model BIT, 2023).

Although the referenced arbitration rules typically provide detailed procedural steps and mechanisms for investment arbitration, the BiH Model BIT explicitly lays out several key procedures of importance for the State. This includes an express authorization for the arbitral tribunal to order security for costs and consolidation, and requires the disclosure of the name and address of third-party funders (Arts. 22-23, BiH Model BIT, 2023). This normative choice is a direct reflection of the previous ISDS experiences by BiH and other countries in the region.

In addition, and in line with the international ISDS reform processes, the ISDS provision incorporates by reference the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and the UNCITRAL Transparency Rules (UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014). This makes BiH one of the first countries to adopt these instruments into their model investment treaties.

5. Future Reform Prospects and Opportunities

The outlined legal and institutional improvements in the area of investment arbitration provide a robust and fresh example for the nature and scope of reforms that are possible in BiH, despite its complex legal framework and other disadvantages, which are evident in the commercial arbitration spheres. Although the two systems operate in different contexts, the reform method and scope are widely transferrable to the dispute resolution process. Thus, there are opportunities for stakeholders in commercial arbitration to benefit from experiences and practices in the investment regime, and *vice versa*. The following sections will outline first the investment arbitration reform lessons for the commercial context, and subsequently the possible intersections and areas of mutual support between these two fields in BiH.

5.1. Possible Intersections between Commercial and Investor-State Dispute Resolution and Areas of Mutual Support in BiH – – No Need to Reinvent the Wheel

Considering the broad scope of legal and institutional reforms that would be necessary to revitalize the framework for commercial arbitration in BiH, there is a risk that policy-makers may be reluctant to embark on any efforts in this direction. However, and as demonstrated in the field of investment law and dispute resolution, there are avenues to accomplish meaningful progress without dismantling the entire legal framework, and to build on the existing norms and structures.

As noted above, the Arbitration Law in BiH is based on the UNCITRAL Model Law, despite the gaps and inconsistencies that have created the existing legal and practical issues. Therefore, future amendments would be fully consistent with the existing framework, but they would fill the legislative gaps and provide the necessary interpretive clarity for the parties and adjudicators.

In this sense, the government could opt to extend and revise the existing BiH arbitration legislation, although the preferable solution would be to adopt a detailed and dedicated standalone law on arbitration. If there is no political will to endorse a standalone law, the reform efforts should not be abandoned as significant improvements could be made through the amendment of the existing framework. There are examples of jurisdictions without standalone arbitration laws, which are perceived as desirable seats for international arbitration.

The BiH policy makers and other stakeholders can take advantage of the rich expertise of BiH practitioners and scholars who can develop and propose initial draft provisions with annotations explaining the nature and functions of the

relevant norms. This legislative history, if well documented and distributed, can be of immense benefit in fostering a harmonized application and interpretation by arbitral tribunals and judges alike.

Finally, to ensure coherency and cohesiveness within the BiH legal framework, it will be important to harmonize the arbitration legislation in both entities and the District of Brčko. To the extent possible, the arbitration rules of the respective entity arbitration courts should also be aligned with the revised legislation to avoid inconsistencies and overlaps that could be detrimental to the arbitral process itself.

The systemic integration of international standards in the legal and institutional frameworks in BiH would go a long way towards overcoming the existing challenges. This has been accomplished in the investment arbitration sphere through the development of the Principles and Standards for Treaty Negotiation and the BiH Model BIT. The same could be done by strengthening the legal and institutional framework for commercial arbitration in BiH through alignment with the well-established international standards.

5.2. Common Language of the International Framework and More Predictable Standards and Procedures

The adoption of arbitration legislation compliant with international standards would not only bolster the status of a jurisdiction as a favorable seat of arbitration, but also be an effective way to align the interpretation of the legal norms by arbitral tribunals and the competent courts with the expectations of the disputing parties. As demonstrated by the BiH case law, the existing arbitration legal framework in BiH has created difficulties for the domestic courts applying best efforts to interpret the law in congruence with the applicable international legal standards. The arbitration laws adopting the UNCITRAL Model Law would have spared the court of the interpretive expeditions through secondary connecting sources and provided a clear path to the norms governing the contested issues.

In addition to clear legislation based on international standards, the legislator could provide further guidance through an official commentary and legislative history outlining the policy background and intentions behind the relevant provisions. The MoFTER BiH Principles and Standards for Treaty Negotiation in BiH are a fresh example of BiH institutions recognizing the importance of interpretive guidance for the effectiveness of key policies, which provide legal certainty and narrow the discretionary space for broad interpretations by the disputing parties and adjudicators (both arbitral tribunals and domestic courts).

5.3. Building Judicial Capacities in Support of Arbitral Proceedings

One less-explored, but highly valuable area of collaboration in BiH lies in the potential to bolster the capacities of the competent institutions and judiciary through direct engagement with arbitration practitioners and experts. Capacity development activities in this field could help bridge the analytical and terminological gaps that exist within the BiH institutions, drawing from the international and domestic experience of the experts, and helping to foster sustained institutional knowledge over time. Such activities could become a part of the regular educational programs within the government and judicial systems.

Through the continuous capacity development of the judiciary, aligned with international best practices and domestic law, the BiH courts would be in a better position to fulfill their main two roles related to arbitration. As noted above, BiH courts strive to implement the standards derived from the Model Law and the NYC, but they have had difficulties in delineating judicial support from intervention in this space. Unless national courts are confident in their role related to arbitral proceedings, the parties could be deprived of their procedural and substantive rights in the arbitration.

5.4. Transparency

To enable a continuous exchange of information and assessment of the trends unfolding in practice, BiH should foster a more transparent and open framework for international arbitration. This primarily relates to the proper categorization and publication of court decisions related to arbitration, which would allow the assessment of the application of the arbitration law over time. In addition to the benefits of transparency as a function of the rule of law, it would also provide insights into the relevant areas for normative and practical improvement on an ongoing basis.

The same applies to the arbitral institutions, which should consider publishing annual case reports, and overviews of the main features of its caseload (such as those published by the International Chamber of Commerce International Arbitration Court (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Center (SIAC), etc.). This way, the policy makers and practitioners can track the development of judicial and arbitral jurisprudence in BiH and identify progressively the emerging trends and needs for legislative amendments.

5.5. Openness and Flexibility: Expanding the Spectrum for Commercial Dispute Resolution

The laws and rules on commercial arbitration in BiH leave much to the imagination in terms of procedural flexibility and adaptability to the needs of the disputing parties. As such, arbitral institutions are in the position to limit party autonomy, even in the context of amicable settlement, the selection and appointment of arbitrators or neutrals, and other procedural aspects of the dispute.

Since disputing parties cherish their autonomy in appointing arbitrators and mediators and the continuous availability of non-adversarial mechanisms (Queen Mary University & Pinson Masons, 2022, p. 31), the BiH legal framework should not minimize these rights. The BiH Model BIT demonstrates how an open and flexible dispute resolution spectrum can be placed in an otherwise sensitive and calibrated set of norms, setting clear expectations and a balance between both parties (Art. 21, BiH Model BIT, 2023).

Mediation is increasingly explored and fortified in the investor-State dispute settlement system, as a viable alternative or complement to investment arbitration (ICSID, 2021b). As such, it is becoming a feature of new generation investment treaties, either as a mandatory pre-arbitration step, or an option available at all stages of the process (for example, European Union (EU)-Vietnam Investment Protection Agreement (IPA), 2019; Burkina Faso-Canada Bilateral Investment Agreement (BIT), 2015. Art. 23; Netherlands Model Bilateral Investment Agreement (BIT), 2019. Art. 17(1)). Some recent EU treaties include a bespoke set of mediation rules, and a code of conduct that applies equally to adjudicators and mediators (Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 2017; General Secretariat of the Council of Europe, 2016; EU-Singapore IPA, 2018, Annex 14-B; EU-Vietnam IPA, 2019, Annex 15-B). In its Model BIT, BiH opted for providing consultations in the pre-arbitration phase, and mediation at any stage of the dispute, leaving it to the disputing parties to select mediation rules that they prefer (Art. 21, BiH Model BIT, 2023). This is a robust and predictable procedural framework, suitable for both commercial and investment disputes, ensuring effective dispute resolution.

While both the arbitration courts in BiH provide administrative service for "amicable settlement", the procedure resembles conciliation more than mediation, as the neutral can propose solutions to the disputing parties (Arts. 5-10, Arbitration Court BiH, 2003; Art. 6, Arbitration Court RS, 2018). Mediation, on the other hand, is a much more flexible process, where the neutral facilitates negotiations between the parties towards a common solution, without offering proposed settlements, unless requested by the parties. The recently adopted Alternative Dispute

Resolution Act in Montenegro (Alternative Dispute Resolution Act Montenegro – hereinafter: Montenegro ADR Act, 2020) encompasses mediation, early neutral assessment, and sector-specific dispute resolution methods, in line with international standards (Art. 1, Montenegro ADR Act). As such, it is a good model, which BiH legislators could consider in devising such policies in the future.

As the final point, to secure the finality and enforceability of settlement agreements, it is crucial that the parties can formalize settlement agreements as awards, which can be enforced under national laws and the New York Convention. The rules of both the BiH arbitration courts allow the parties to request the issuance of the settlement agreements in the form of a binding arbitral award. The Singapore Convention on Mediation (United Nations Convention on International Settlement Agreements Resulting from Mediation – hereinafter: Singapore Convention, 2019) could provide an additional layer of protection, as it sets forth an international framework for cross-border enforcement of settlement agreements among its member states. BiH is not yet a signatory, while Montenegro, North Macedonia and Serbia have signed, but still have to ratify the Convention (UN Treaties Status, 2024). This convention could apply equally to commercial and investment disputes, demonstrating a cohesive and harmonized dispute resolution framework in BiH.

6. Conclusion and Outlook for Bosnia and Herzegovina: Opportunities to Unlock the Arbitration Potential

Just as the system of international commercial arbitration does not exist in a vacuum, and inevitably interacts with domestic laws, the worlds of commercial and investment arbitration also have areas of intersection and complementarity. Quite counterintuitively, the development and modernization of the investment arbitration framework in BiH has been much more dynamic and tangible than the commercial realm, despite a growing cohort of arbitration experts and arbitration claims converging in the region and in the country itself.

This is largely due to the outdated laws operating in the fragmented legal framework in BiH, and the lack of insights and information related to the practice of commercial arbitration in the arbitration institutions, which could prompt targeted legislative reforms. Nevertheless, until there are more insights from the commercial perspective, the inherently more transparent investment protection system could offer valuable reform models and lessons for the commercial space.

As the BiH example demonstrates, the policy makers for investment protection have engaged in a systemic reform tackling normative improvements through the new BiH Model BIT, while simultaneously creating an institutional framework that can effectively implement the new standards. The reforms also embraced the emerging

international best practices, calibrated to the legal and institutional frameworks in BiH. Although the new mechanisms are formally established for the first time, they are built around existing agencies and institutions, which are now placed in better coordination. Finally, the reform process and the implementation of the resulting solutions is padded with continuous capacity development activities and practical training to build institutional knowledge and sustain the attained progress.

This reform model can be emulated in commercial arbitration, starting from the adoption of a standalone arbitration law, more closely aligned with international standards and practices, to the intensified engagement between legal practitioners with institutions and the judiciary to enhance their capacities in this realm. As a general matter, the BiH legislators should strive to create a more flexible and open space for the parties to exercise their party autonomy in full and to take advantage of non-adversarial methods that are suitable and favorable to their needs. These positive changes will depend largely on modern legislation that would fill the existing gaps and amend the problematic provisions that may deter parties from choosing to arbitrate in BiH.

It remains to be seen if commercial arbitration in BiH will become a vibrant field, which is not only practiced, but also seen as a transparent, predictable and modern legal framework. With many conditions already in place, there will be no need to reinvent the wheel, but to effectively put it in motion.

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