

# ARBITRATION AS MEANS OF RESOLVING DISPUTES IN THE CASE OF BOSNIA AND HERZEGOVINA

*Hajradin Radončić*  
University of Defence in Belgrade, Military Academy  
*Nebojša Janković*  
Armed Forces of Bosnia and Herzegovina, Joint Staff  
*Predrag Mladenović*  
Serbian Armed Forces, Command of Land Forces

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The process of arbitration is a form of gentlemanly agreement between countries and international entities to resolve certain disputes and it has certain advantages over other mechanisms. Implementation of the arbitration decision is a matter of prestige and honor for parties in dispute, not a matter of coercion or utilization of mechanisms for implementation of decision.

This paper describes arbitration as a way of peaceful settlement of international disputes. The emphasis is on the arbitration procedure in Bosnia and Herzegovina, the establishment of an arbitration tribunal, the conduct of the proceedings and the decision of the arbitration tribunal.

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*Key Words: arbitration, arbitration proceedings, tribunal, argument, Bosnia and Herzegovina, Republika Srpska*

## Introduction

The war in Bosnia and Herzegovina began in 1992 as a result of the break-up of the Socialist Federal Republic of Yugoslavia, and it lasted until 1995 when it ended by the Dayton Peace Agreement. There is no universally accepted categorization of the war, so until today it is treated and described variously by participants, as well as certain international entities. For the Serbs and Republika Srpska it was defensive-patriotic war, the aggression against Bosnia and Herzegovina for the Bosniaks in Bosnia and Herzegovina and patriotic war for Croats in Bosnia and Herzegovina. Although there is no generally accepted judgment about this war, it is undoubtedly the closest one to civil war by its characteristics.

The war has practically ended on November 21<sup>st</sup> 1995, after three weeks of negotiations, by signing the Dayton Peace Agreement in the US military base Wright-Patterson in the state of Ohio. This act closed the circle from unsuccessful negotiations at the beginning of the war to the successful ones in Dayton. Unfortunately, within this circle there was the bloody war that did not bring solution to the dispute, and it took over hundreds of thousands of lives, created some two million refugees and internally displaced persons

and brought enormous destruction. In contrast to war as means of force, which did not bring solutions, the combination of the various peaceful means has made some solutions and finally stopped the bloodiest conflict on the European soil since World War II.

## Arbitration procedure in Bosnia and Herzegovina

Arbitration in Bosnia and Herzegovina was practically created at the Dayton negotiations, by signing the arbitration agreement, and the process went through three stages to reach the final decision. The appointment of arbitrators and the establishment of the arbitration tribunal, which was conducted in 1996, could be marked as the first phase. The establishment of the arbitration tribunal was followed by arbitration hearing and the presentation of arguments of the parties as the second stage in the process, which lasted from 1996 to 1997, when the tribunal moved to the final phase of its work.

Due to the very complex political and security situation in Bosnia and Herzegovina, the final arbitration decision was not brought at first, but successively in three stages. In 1997 the tribunal made an interim decision, which was followed by the amended decision of 1998 to make the final arbitration decision for Bosnia and Herzegovina, which was enacted in 1999, after two and a half years of adjudication and almost four years after the signing of the agreement.

### *The establishment of the arbitration tribunal*

The Federation of Bosnia and Herzegovina and Republika Srpska agreed that each party should appoint one arbitrator. In accordance with this provision, the Federation of Bosnia and Herzegovina has appointed Ćazim Sadiković, PhD and Republika Srpska Vitomir Popović, PhD as arbitrators. Each side chose its arbitrator without objection or rejection of the other. The agreement also stated that the third arbitrator as the president of the arbitration tribunal should be elected 30 days after the agreement between the representatives of the parties, and that if the parties can not agree, the third arbitrator shall be appointed by the President of the International Court of Justice. Since the arbitrators appointed by their parties failed to appoint the third arbitrator within the specified deadline, the President of the International Court of Justice appointed Roberts B. Owen as the third arbitrator and chairman of the tribunal on July 15<sup>th</sup> 1996.

The agreement provides that any decision of the arbitration tribunal is to be made by the majority of the arbitrators. It was agreed in Dayton and also confirmed in writing that if the majority of the Tribunal did not reach a decision, the decision of the presiding arbitrator should be final and binding on both parties. It could be suggested that the decision of the Chairperson should be crucial in this case because right from the start the positions of the parties were highly controversial, and expressly rejected in any possibility of compromise. Due to the lack of real opportunities for arbitration decision to be made by agreement of both sides, it was agreed that the rule on decision-making had to be changed, and that decisions of the Chairperson should be binding. Until January 8<sup>th</sup> 1997 the tribunal Presiding Roberts B. Owen failed to hold a tribunal meeting.

The arbitration process practically started with the hearing in Rome on January 8<sup>th</sup> 1997 in the presence of all three arbitrators. The hearing lasted nine days including the testimony of 19 witnesses (eight called by the Federation, nine by Republika Srpska and two by the tribunal) and administering the final say. In addition, the Tribunal received various written and evidential submission of both parties during the proceedings. (Popović 1999).

Following the Rome hearing, the Tribunal conducted its consultations in Washington. All three arbitrators were present and took active part in the consultations. However, during the last meeting of the day before the deadline for making the decision, the two arbitrators have refused to sign the decision. This refusal was interpreted in the sense that they authorized the tribunal to proceed to a final decision despite the refusal of the arbitrators to sign.

The tribunal also discussed its jurisdiction to conduct this dispute and make a decision. The reasons for this have occurred because Republika Srpska disputed its competence to work, basing their denial of the content of the arbitration agreement signed in Dayton in the context of the general agreement. Republika Srpska argued that the tribunal has the authority only to resolve the final position of the Inter-Entity Boundary Line (IEBL) in the Brčko area as it is stated in the arbitration agreement. In fact, the contract stated that the dispute should be settled by the entity line in accordance with a display on the map. However, there was no map in the appendix of this contract.

Secondly, Republika Srpska argued that it did not understand, during Dayton negotiations, that the possible outcome of the arbitration might be a transfer of Brčko from its territory to the territory of the Federation of Bosnia and Herzegovina. Republika Srpska claimed that it misunderstood the facts with the alleged result that there has been an error that invalidates the arbitration agreement under Article 48 of the Vienna Convention on the Law of Treaties. The arbitration agreement does not mention the "Brčko area", and the area shown on the map and attached later in the appendix shows the territory of the municipality of Brčko including the town of Brčko with a boundary line running through the municipality. Finally, the precise part of the border line through the disputed area is not expressly defined both in the annex and on the map. (Popović 1999).

Imprecise definition of the framework of dispute between two parties, which led to problems of jurisdiction and questions the actual arbitration cases can be explained by the fact that the issue of Brčko "possession" came to the fore only in the final hours and minutes of the Dayton Conference. The lack of any agreement of the parties on this issue in Dayton almost led to the collapse of negotiations. In order to bring this conference successfully to the end and sign the Framework Agreement for Peace, the definition of the exact subject of the dispute was left open to be resolved through the arbitration process. Although it was found that the meaning of IEBL is not the same as the area, the arbitration I tribunal, however, declared itself competent and continued to work and requested accordingly the parties to present their arguments, which they did.

### *Arguments of the Federation of Bosnia and Herzegovina*

The Federation of Bosnia and Herzegovina primarily requested implementation of the agreement according to which Bosnia and Herzegovina and the Federal Republic of Yugoslavia, not Republika Srpska, are parties in dispute, as well as the application of the

principles of the established international law and specifically argued that the international legal doctrine of non-recognition had to be applied in the instant case towards the Federation of Bosnia and Herzegovina. The modern doctrine of non-recognition, when a contract that was supposed to create new territorial rights violates the existing rule of customary or conventional international law, provides that the contract is invalid and can not provide a benefit to the offender in the form of new legal rights or in any other way. In this way, the Federation of Bosnia and Herzegovina primarily wanted to deny international legitimacy of Republika Srpska as mandated by the Dayton Agreement.

Furthermore, the Federation of Bosnia and Herzegovina presented its views on the nature of Republika Srpska's behavior during the war, arguing that the campaign of ethnic cleansing occurred in Brčko relying their claims on comparison of census data from 1991 shown in Table 1 and the situation in Brčko after the war. It stated that Republika Srpska's aggression in Brčko area violated a variety of unconditional norms of the international law and that the United Nations Security Council and other authorities have repeatedly noted that the acquisition of territory by the Bosnian Serbs and Serbs from Yugoslavia through ethnic cleansing violated international law. (Popović 1999).

Table 1 – National structure of the population in the Municipality of Brčko according to the census from 1991. (Statistical Bulletin No.234).

Municipality of Brčko	Population	%
Muslims	38,617	44.07
Serbs	18,128	20.69
Croats	22,252	25.39
Yugoslavs	5,731	6.54
Others	2,899	3.31
Total	87,627	100.00

In addition to the doctrine of non-recognition, the Federation of Bosnia and Herzegovina also claims that historical, demographic, cultural and other factors may pose a source of legal claim to a territory even if these ties did not originally refer to people or entities that did not constitute an independent state or hold traditional legal title to territory. In fact, the Federation of Bosnia and Herzegovina argues that people and places in the Federation of Bosnia and Herzegovina have stronger historical and socio-economic ties to Brčko than Republika Srpska does, and that, consequently, this area should be placed under the control of the Federation of Bosnia and Herzegovina. (Popović 1999).

The Federation of Bosnia and Herzegovina argues that special justice in this case clearly favors the decision on Brčko in its favor with the possibility of assistance from the international presence. Considering that Republika Srpska in its efforts in the Brčko area allegedly failed to comply with any acceptable ethical and moral standards, the Federation of Bosnia and Herzegovina argues that, by allowing the Serbs to retain control of the town of Brčko acquired by force and violence, the tribunal would reward the Serbs for their behavior.

On the basis of the foregoing, the Federation of Bosnia and Herzegovina argued that the tribunal should move the IEBL north to the Sava River and include Brčko and much of the territory south of Brčko in the Federation. In the alternative, the Federation of BiH

expresses willingness to accept the interim international presence in this area, recognizing that international oversight may be the only way to convince citizens of the Federation of Bosnia and Herzegovina and Republika Srpska that the multiethnic municipalities can exist in peace and prosperity.

### *Arguments of Republika Srpska*

During the hearing in Rome, Republika Srpska made several written requests to the defense of the Federation of Bosnia and Herzegovina. Considering the legal principle of non-recognition, Republika Srpska assures that it is inapplicable to this case, and in any event, it has been misstated by the Federation. In addition, Republika Srpska states that the principle of non-recognition is not applicable to the present case, in which the alleged illegal activities that further contributed to the seizure of the territories by Republika Srpska, have been ratified by the Dayton Agreement. When it comes to equitable principles, Republika Srpska stated that the Federation of Bosnia and Herzegovina participated in war crimes and acts of aggression. In order to prove this charge, Republika Srpska has obtained various reports of the United Nations and also presented several witnesses during the hearing.

Republika Srpska opposed the proposed international regime on several grounds. The special international district of Brčko would violate the constitution of Bosnia and Herzegovina, which specifically states that the nation should be composed of two entities and: "That all governmental functions and powers not expressly assigned ... to the institutions of Bosnia and Herzegovina will be entity's." Republika Srpska argued that the international regime could be authorized only by a constitutional amendment. (Popović 1999).

According to Republika Srpska, the Dayton Accords not only ratified control of Republika Srpska over the Brčko area and recognized the concept of continuity of territory, but also recognized the right of Republika Srpska's sovereignty over 49% of the territory of Bosnia and Herzegovina. According to Republika Srpska, the Tribunal must leave two halves of the territory of Republika Srpska linked by a corridor area and if there is a need to change the IEBL it could be moved only to the south in order to increase the territory of Republika Srpska. Republika Srpska further argues that the Brčko area is critically necessary for Republika Srpska to move the refugees and displaced persons and for the economic prosperity of Republika Srpska. (Popović 1999).

The Federation of Bosnia and Herzegovina has made several answers to the allegations of Republika Srpska. Regarding the request of Republika Srpska for 49% of the territory of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina claimed that the agreed principles from September 8<sup>th</sup> 1995 (where the 51-49% formulation appears) were not formally introduced. The Federation of Bosnia and Herzegovina asserts that the preamble of the Dayton Agreement, whereby parties "affirm their commitment to the agreed basic principles", does not constitute a binding position itself, and that the Dayton Agreement does not pose anything that could be by any means related to the territorial allocation of the Brčko area except Annex 2, which explicitly leaves the status undetermined pending the decision of the arbitration tribunal. The Federation has espoused the territorial division set out in the agreed principles, which explicitly raises the possibility that the proposal is subject to revision by the final agreement of the parties.

In response to the assertion of Republika Srpska that the Dayton Accords recognize the existence of a corridor, linking its eastern and western part, the Federation of Bosnia and Herzegovina submitted that such an interpretation contradicts the unambiguous language of Annex 2, which particularly puts the disputed part of the boundary line in the Brčko area under international arbitration, leaving the question of the existence or non-existence of corridors open for later resolution by this tribunal.

### *Arbitration decision*

The very tense and complex security situation in Bosnia and Herzegovina, distinctly opposed positions of the parties to the dispute, a different interpretation of the arbitration agreement and various political pressures followed the course of the process of arbitration.

The arbitration award for Brčko was a series of three decisions taken in the period from 1997 to 1999. This series of decisions was composed of transitional, additional and final decision. It is highly debatable whether this is a final decision in the true sense of the word, as the supervisor for Brčko, as a product of arbitral awards, was given extremely broad authorization. Using this authorization, after the end of the arbitration process the supervisor further edited the Brčko area, and thus exercised the kind of modification of the arbitration decision. Besides that, the arbitration tribunal retains the right to change the final decision if it is informed by the supervisor that there is a need for that.

The Tribunal had the stand that in circumstances of great tension and irreconcilable attitudes of the opposing sides, it would be inappropriate to make a final choice as to which of the competing political entities should be given control of the city and the whole area. The standpoint of the international community, and therefore the arbitration tribunal, was that the organizational arrangements in the Federation of BiH are incomplete, that Republika Srpska does not fully comply with the obligations under the Dayton Agreement, and that the tension and instability in the region are at a higher level than it was expected and that the joint institutions of Bosnia and Herzegovina have not yet developed the government that works effectively. Therefore, the Tribunal's conclusion was that, in these unique circumstances, it would be neither wise nor fair to make a final choice between competing parties in the first decision.

### *Transitional decision*

At the Rome Conference on February 14<sup>th</sup> 1997, the Arbitral Tribunal issued an interim decision, and as such, it had a temporary, but mandatory character. Simultaneously, it represented a solid basis for the further work of the tribunal including the adoption of the following decisions of its superstructure. The essence of this decision was to establish transitional international supervision of the implementation of the Dayton Agreement in the Brčko area.

The main reason for the adoption of the transitional decision was the fear of the international community that a conflict might escalate with any other decision, and that even a new war might break out. The decision requested from the Office of the High Representative for Bosnia and Herzegovina to open an office with staff in Brčko under the leadership of the

Deputy High Representative for Brčko called "the Brčko Supervisor" as soon as possible. (the interim decision of the arbitration tribunal for Bosnia and Herzegovina).

Two basic functions have been placed within the jurisdiction of the Supervisor: firstly, control over the implementation of the Dayton Agreement throughout the Brčko area for a period of at least one year and secondly, to strengthen local democratic institutions in the same area. Taking into account the sensitivity of the issue, it was decided that the implementation would start only when the Supervisor for Brčko in consultation with the High Representative for Bosnia and Herzegovina Steering Board of the Peace Implementation Council and SFOR<sup>1</sup> determines that the key elements of an integrated implementation strategy are present. (Popović 1999).

How broad the authorization to the supervisor is provided can be seen from the paragraph of the decision saying that its regulation has the force of law, and all relevant authorities in the Brčko area including courts and police personnel must respect and enforce all regulations and orders of the supervisor.

The decision of Rome, which is of great importance for the whole international experiment in Bosnia and Herzegovina, ordered that the supervisor should receive authority to make binding orders and regulations. This meant that the future supervisor of Brčko would have executive and legislative authorization that were given to the High Representative for Bosnia and Herzegovina only ten months later at a meeting of the Peace Implementation Council, the international body that oversees implementation of the Dayton Peace Agreement. This authorization given to the High Representative for Bosnia and Herzegovina is known as the 'Bonn authorization'.

Thus, Brčko practically became an international protectorate before the rest of BiH. The Steering Board of the Peace Implementation Council convened the Conference of Brčko, which was held in Vienna on March 7th 1997. It approved the appointment of the US diplomat Robert V. Farrand as the first supervisor for Brčko, supported by the delegation of two deputies from European countries and several other officials to set up his office.

### *Additional decision*

The arbitration tribunal once again avoided ruling on the final status of Brčko when it brought its additional decision on March 15th 1998. In fact, the presiding Arbitrator Roberts Owen made the decision again on behalf of the arbitration tribunal, as his colleagues from the Federation of Bosnia and Herzegovina and Republika Srpska refused to support the additional award. The Federation of Bosnia and Herzegovina still required the entire municipality in the preliminary proceedings in Vienna, claiming that Republika Srpska throughout 1997 flagrantly breached the Dayton Peace Agreement and the decision from Rome.

Practically, additional decision did not bring anything new except that the supervisor was confirmed the same authority given by Bonn Declaration to the High Representative for Bosnia and Herzegovina, and it clearly states that there is a possibility that the Brčko area is permanently excluded from the jurisdiction of both entities and exists in the future independently within Bosnia and Herzegovina. (Popović 1999).

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<sup>1</sup> The international force for stabilization of peace in Bosnia and Herzegovina.

As far as Republika Srpska is concerned, it withdrew the request for extension of the corridor, and asked for confirmation of the current situation explaining it to be its existential need for territorial continuity. After a series of criticisms towards Republika Srpska, Roberts Owen said that the main reason why decision, which would be partially or entirely favorable to the Federation of Bosnia and Herzegovina, was not brought on that occasion, was the fact that behavior of Republika Srpska improved since President Plavšić broke ties with Pale, as well as Milorad Dodik took office in Banja Luka on January 18<sup>th</sup> 1998. These considerations lead to the conclusion that arbitration had its political rather than legal dimension. (Popović 1999).

The additional decision gave Republika Srpska the last chance to save Brčko from the hands of the Federation of Bosnia and Herzegovina, by showing that it really changed the direction of its action and decided to continue implementation of the Dayton Agreement and the rehabilitation of the area. On the other hand, the Federation of Bosnia and Herzegovina has been advised to strengthen its position by facilitating the return of the displaced Serbs, especially to Sarajevo.

### *Final decision*

When the arbitration tribunal, personified in the chief arbitrator Roberts B. Owen, issued its final verdict on March 5<sup>th</sup> 1999, it represented an acceptance of the long-discussed option of creating a unified, demilitarized and neutral field with its own government and under state jurisdiction. This area was also the condominium<sup>2</sup> of both entities. (Todorović 2009). This way, both entities "got" territory although they "lost" administrative authority in it. Condominium status as a territory and as a term in the international law did not "debut" in Bosnia and Herzegovina. Some hundred years ago, Bosnia and Herzegovina was occupied by the Austro-Hungarian Empire and stayed condominium or joint ownership of the Austrian and Hungarian part of the monarchy.

This decision, besides the fact that it represented the final phase of the arbitration tribunal, constituted also, in some way, the final phase of the peace negotiations in Dayton. Thus, the solution was reached at 1995 Dayton Conference, on which representatives of two sides, the Federation of Bosnia and Herzegovina and Republika Srpska, could not agree. The tribunal had to finally resolve this dispute and three basic options were imposed as a solution, namely three basic variants of the final decision.

One was to give Brčko to the Federation of Bosnia and Herzegovina, which claimed its right on the following key reasons: (a) that historically the Brčko municipality has predominantly consisted of the Bosniaks and Croats, and that it is the vital northern gateway between central Bosnia to Europe; (b) it would be unconscionable for Republika Srpska to retain exclusive control of the city, which the Serbs captured and "ethnically cleansed" during the war, and (c) that the only just result would be assigning Brčko to the Federation of Bosnia and Herzegovina. (Popović 1999).

Another option is to accept the contention of Republika Srpska to claim ownership of the sustainable management of these areas due to the fact that, regardless of its history, the Brčko corridor along the Sava River provides a vital strategic connection between two parts of Re-

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<sup>2</sup> Condominium is a word of Latin origin (*con-dominium*), which means common ownership. In the international law it is a joint government and authorities of two or more states over a particular territory.



publika Srpska. Republika Srpska argued that any change in its exclusive possession would be a violation of the principle of territorial continuity and the Dayton objective, which granted Republika Srpska control over 49% of territory of Bosnia and Herzegovina. (Popović 1999).

The third option, which is shown as an optimal solution is creation of a neutral area. The option of taking the exclusive control from either entity and placing its governance to the independent District government under the exclusive sovereignty of Bosnia and Herzegovina was the final solution of the arbitration tribunal and in the spirit of the Dayton agreement. (Popović 1999).

The arbitration tribunal ordered in the last two decisions of 1997 and 1998 that Republika Srpska should clearly demonstrate the full implementation of the Dayton Agreement including specific proof of significant results in terms of the return of former Brčko residents and strong support for the multi-ethnic governmental institutions at that time, being developed under international supervision. The Tribunal expressly stated that it would expect the evidence of this from Republika Srpska during hearings in 1999, and that if this does not happen, it would be forced to change the position of Republika Srpska in the Brčko area.

Therefore, the basic issue before the Tribunal was whether Republika Srpska sufficiently met its burden of proof. Republika Srpska, therefore, found itself in a very difficult situation for two main reasons. Firstly, the implementation of the Dayton Agreement and ensuring the return did not depend only on Republika Srpska, but also on the Federation of Bosnia and Herzegovina, as well as the wishes of the displaced persons to return. Secondly, the fulfillment of these demands could not be precisely measured and presented to the tribunal. The key here was the arbitrator's belief and his authorization to make a decision.

The arbitration tribunal ruled in the final decision in this way. During the discussions in Vienna in 1999, according to the Tribunal, Republika Srpska failed to fulfill the requirements, which were required by the additional decision from March 15<sup>th</sup> 1998. The Tribunal thought that the Serb political leadership, which had the direct local control in Brčko, especially individuals aligned with the anti-Dayton parties such as the Serb Democratic Party (SDP) and the Serbian Radical Party (SRP), were both locally and entity levels tolerated, and it apparently encouraged a significant degree of obstruction of the objectives of the Dayton Agreement.

The final decision practically formed Brčko District. However, Brčko Supervisor was authorized to formalize the appointment of the establishing district. On the basis of the commitments made by Bosnia and Herzegovina and its two entities on "urgent implementation" of the decision of the tribunal, and by the date designated by the Supervisor it should be deemed that the entities delegated all their power of governance within the pre-war municipality of Brčko to a new institution - a multi-ethnic democratic government known as "the Brčko District of Bosnia and Herzegovina" under the exclusive sovereignty of Bosnia and Herzegovina. The loss of authorization in the Brčko area could be a legal aspect of this decision for both entities, as well as its establishment in a form of a unique administrative unit. (the final decision of the arbitration tribunal for Bosnia and Herzegovina).

The decision defines that the new District government is under the jurisdiction of the joint institutions of Bosnia and Herzegovina since those authorities are quoted in the Constitution of Bosnia and Herzegovina. The management of the municipality of Brčko was placed under the exclusive jurisdiction of the District government, and therefore requires entities to submit all authority over this territory to the new District government. During the transition period entity laws are to be applied within entity borders until the supervisor determines that there is no legal significance to it, and that it can be eliminated and therefore

outlawed. The tribunal concluded that the new District plan would adequately protect the legitimate interests of both entities and the international community.

The Tribunal also ordered that the new governmental institutions must be established within the time limit set by the supervisor through concrete measures taken by the state and both entities, and it expressed the hope that it would happen no later than December 31<sup>st</sup> 1999. This way stakeholders were given the option to provide their comments and suggestions for modification within sixty days. In contrast, all other solutions exposed in the final decision are marked as final and binding, and no remarks are permitted.

The basic concept of the decision was to create a single, unitary multi-ethnic democratic government with authority previously enjoyed by entities around the pre-war municipality of Brčko. The District government should essentially consist of: (a) the Assembly of the District, a legislative body whose membership would be selected through democratic elections, which were to be scheduled by the Supervisor; (b) the Executive Committee chosen by the Assembly; (c) an independent judiciary consisting of two courts: first instance and second instance, and (d) the unified police under a single command structure with uniform and badge completely independent from the entities' police structure. (the final decision of the arbitration tribunal for Bosnia and Herzegovina).

In order to regulate all matters related to the military presence in the territory of the District, the supervisor has the authority to determine the date from which not a single entity will allow its military or other armed forces or supporting facilities to be based in the District. Considering that it may be desirable to allow a gradual reduction of the current military presence in the municipality of Brčko the Supervisor was authorized and obligated to prepare a schedule of gradual withdrawal of military forces and facilities. The international community is recommended to provide financial assistance to the entities in the implementation of that withdrawal. The Tribunal agreed that Republika Srpska may have a legitimate need to move military forces and equipment through the District (Figure 1).



Figure 1 – Brčko District territory defined after final arbitration decision from March 5<sup>th</sup> 1999  
(Source: Map taken from the official website of Brčko District)

Brčko District was officially declared on March 8th 2000, one year after the final decision was made, and to the entire pre-war territory of the municipality of Brčko, which is shown in Figure 1. The territory of Brčko District included 48% of the territory assigned to Republika Srpska by the Dayton Agreement including the town of Brčko, and 52% of the territory that was awarded the Federation of Bosnia and Herzegovina by the Dayton Agreement.

The Tribunal's decision stated an objective and practical problem related to the return of the displaced persons. In fact, at that time the return of the Bosniaks and Croats to Brčko was very difficult because Serbs expelled from other parts of Bosnia and Herzegovina, mostly Sarajevo and its surroundings had lived in their homes. Therefore, the High Representative for Bosnia and Herzegovina took some liberty to make specific recommendations related to taking measures to help the Federation of Bosnia and Herzegovina: (a) provide Serbian IDPs from Brčko expedited priority assistance in repossessing their property in the Federation of Bosnia and Herzegovina; (b) provide such persons with employment and security upon their return to the Federation of Bosnia and Herzegovina; (c) provide other Serbian returnees living conditions upon return. (Popović 1999).

In order to strengthen the implementation of the decision, which leans on the Dayton Agreement and to some extent represents its integral part, the Tribunal requested that the entities implement this decision as final and binding without delay, and therefore predicted that serious non-compliance would lead to penalties in the form of additional legal solutions. The most important mechanism in the implementation of the decision were the authorities of supervisors, who could determine penalties, according to their discretion, which would come into effect on the basis of their decision. Also, the Tribunal did not conclude its work, but it extended its word indefinitely, in the penal provisions of the final decision until complete fulfillment of all paragraphs of the decision.

To provide the Supervisor with an alternative solution, the tribunal decided to retain jurisdiction over this dispute until the Supervisor, with the approval of the High Representative, has notified the Tribunal: (a) that two entities have fully complied with their obligations to support the establishment of new institutions described in decision and (b) that such institutions are functioning effectively and permanently in the municipality of Brčko. Until receiving information on this, the Tribunal reserves the right to modify this final decision in case of serious non-compliance by one of the entities. Without limiting the generality of the foregoing terms, the modification of the final decision of the Tribunal may include provisions that would completely transfer district territory from an entity, which does not abide by the terms and place it under the exclusive control of the other entity. (the final decision of the arbitration tribunal for Bosnia and Herzegovina).

The authorities of Republika Srpska have never officially accepted the decision of the international arbitration of March 5<sup>th</sup> 1999, which took its city. This decision made Republika Srpska lose its territorial continuity and it physically cut it into the western and eastern part, almost five years after Dayton, which caused dissatisfaction in this entity. The arbitrator from Republika Srpska, Vitomir Popović, PhD did not agree with this decision, and excluded his opinion from the decision, which he submitted to the chief arbitrator by March 11<sup>th</sup> 1999. The tribunal did not change its decision. (Popović 1999).

At the session held on March 7<sup>th</sup> 1999 the National Assembly of Republika Srpska passed a resolution declaring the decision unfair, but Republika Srpska still implemented it. Republika Srpska continues to believe that the establishment of the Brčko District vio-

lated the basic structure of the Dayton Agreement, which regulated Bosnia and Herzegovina as a state with two entities in the territorial aspect ratio 49-51%. The official position of Republika Srpska, formulated by the Serbian arbitrator, is still in force.

## Conclusion

Although burdened with many problems and setbacks, the arbitration process in BiH is still implemented. The problems were caused primarily due to incomplete or insufficiently clear arbitration agreement entered into by the parties under some pressure from the international community, which led to a different interpretation of the authorization of the arbitration tribunal and the different views of the subject of arbitration proceedings. In addition, the arbitration process is followed by extremely tense and complex security and political situation of post-conflict period in Bosnia and Herzegovina.

Brčko District was formed by a decision, which was not fully satisfactory to both parties in dispute. Having in mind one of the principles of diplomacy, not to have winners or losers, there are more and more opinions that this arbitration process pursued more diplomatic and political objectives rather than legal ones. Whether this is entirely true is, however, questionable. Nevertheless, arbitration in Bosnia and Herzegovina certainly showed that arbitration is no longer the same procedure from the beginning of the 20<sup>th</sup> century.

In the Federation, the decision of the arbitration tribunal has resulted in satisfaction due to the extraction of an important part of the territory of Republika Srpska from its exclusive property, and in addition it destabilized the position of Republika Srpska by cutting it in two parts. On the other hand, the expectations of the Federation of Bosnia and Herzegovina to join the Brčko area were not fulfilled, even though it was in favor of going to the census in 1991, and also the efforts to link the territory with the Republic of Croatia across the Sava River have not been carried out. In addition, they did not respect the request of the Federation of Bosnia and Herzegovina to treat FR Yugoslavia as a party in dispute, which confirmed undisputed international legitimacy of Republika Srpska, and therefore guarantee of its status.

The arbitration as means of resolving disputes will certainly be applicable in the future, and constellation of relations in the world that have been created in this way suggests 'small countries' need for great caution in concluding the arbitration agreement. Being the basic legal framework for conduct of arbitration proceedings, arbitration agreement must be very clear, complete and clearly designed to avoid any possible confusion in arbitration proceedings, and what is most important to avoid the possible adverse effects on a particular country caused by the decisions of the arbitration tribunal.

## Literature

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