April 2017

ARBITRATION COURTS WILL NOT HEAR CONSUMER DISPUTES

THE NEW LAW

On 27 January 2017 a new bill amending the Bulgarian Civil Procedure Code entered into force (the "**Bill**"). Among others, the Bill (i) reduces the scope of the competences of the arbitration courts and (ii) sets new requirements for the organisation of those courts' activity. Apart from the Civil Procedure Code, the Bill also amends and supplements the International Commercial Arbitration Act and the Consumers Protection Act.

In brief, the Bill provides for the following:

- Exclusion of consumer disputes from the competences of the arbitration courts **with no exceptions**;
- Issuance of a writ of enforcement on the grounds of an arbitration tribunal's ruling (*in Bulgarian* "***определение***") (thus supplementing the current list of grounds, such as arbitration courts' awards and settlement agreements);
- *Ex nunc* effect of the legislative amendments with respect to new arbitration proceedings (i.e. they apply only from now onwards) except for arbitration proceedings initiated before the entry into force of the Bill where the dispute is declared non-arbitrable – those should be terminated (*in Bulgarian* "***прекратени***");
- Voidance (*in Bulgarian* "***нищожност***") of arbitral awards rendered in disputes which could not be subject to arbitration;
- Removal of one of the grounds for challenging arbitral awards – the inconsistency with public policy (*ordre public*);
- Extending the authorities of the Minister of Justice to supervise whether arbitration courts comply with the Bill;
- Qualification criteria for the arbitrators – e.g. a degree from an institute of higher education and a minimum of 8 years of professional experience;
- Additional administrative requirements for the arbitration courts, i.e.: (i) to maintain an electronic information system providing online access to the case for the parties to it and (ii) to keep records of the completed cases for a period of not fewer than 10 years;
- The Sofia City Court shall no longer be the only court competent to issue writs of enforcement on the grounds of awards and settlement agreements from Bulgarian arbitration courts (currently, the district courts where the debtor has a registered seat are competent).

The amendment to the rules on arbitration cases and courts was inspired by the increased number of consumers' complaints who were brought to arbitration by the utility or debt collection companies. At those proceedings, the consumers were ordered to pay the amounts claimed without being duly notified that they were brought before a tribunal. This development was a result of the utility companies' practice of including

such arbitration clauses in their general terms and conditions which often were not subject to negotiation.

The amendments are aimed at increased consumer protection, thus the exclusion of the consumer disputes from arbitration review seems to be a step serving that purpose. Some of the new provisions, however, may introduce difficulties in the day-to-day activities of the arbitration courts, as outlined below.

EXPECTED PRACTICAL IMPLICATIONS FROM THE BILL

Higher qualification criteria for the arbitrators - The Bill introduces requirements of arbitrators for the first time. According to the Bill, arbitrators may be only (i) *sui juris* mature persons, (ii) with completed degrees from institutes of higher education, (iii) not convicted for a criminal offence subject to public prosecution, (iv) having at least 8 years of professional experience and (v) of good morals.

These requirements seem too general and could allow for dubious interpretations. As an example: there are no specifics on the professional experience and on the fields in which the arbitrator should be an expert. Further, it is unclear how an arbitrator's experience should be proven.

In addition, the Bill does not provide clarity as to the cases where an arbitral award was rendered by a tribunal consisting of arbitrators not meeting the mandatory criteria. As the subsidiary application of civil law procedural stipulations is not possible in arbitral proceedings, since they are separate institute of law, this issue remains open. The question on the validity of the awards is important because it directly interlinks to the mechanisms of objections to them and their enforceability.

Maintaining case records and access to electronic database of the arbitration courts: Arbitration courts must keep an archive with all completed cases for 10 years after rendering awards. After the 10th year, only awards and settlement agreements should be kept. In combination with the obligation to ensure remote access to the court files for the parties, the data keeping requirements aim to ensure transparency and accessibility to arbitration files. The introduction of these measures also serves the purpose of addressing issues arising in regard to so-called "pocket arbitration courts", i.e. arbitration institutions established and funded by companies bringing all of their disputes to those arbitration institutions. However, it is not clear in practical terms how *ad hoc* arbitrations are supposed to comply with these new statutory requirements.

Ministerial Control over the arbitrations: The Bill provides that the Inspectorate at the Ministry of Justice is authorised to exercise control over arbitration institutions and arbitrators. The Inspectorate is entitled to initiate examinations for compliance with the provisions of the International Commercial Arbitration Act. Based on the outcome of the examination, the Minister of Justice or its proxy may issue instructions to arbitrators and arbitration courts. In case the latter fail to follow the instructions given by the Inspectorate, the Bill envisages the imposition of fines. A fine could also be imposed to

arbitrators and arbitration courts which render awards under non-arbitrable disputes. However, it remains unclear whether and, if applied, how the controlling functions will be applicable to international arbitration institutions or arbitrators.

Current arbitration proceedings under disputes declared as non-arbitrable: The Bill provides that currently pending arbitration proceedings under non-arbitrable disputes should be terminated with immediate effect. However, the Bill does not shed light as to the effect of such termination in terms of fees that have already been paid and/or the fact that proceedings were initiated based on mutual consent of the parties.

Inconsistency with public policy is still grounds for challenging awards of international arbitration institutions: Removal of the inconsistency with public policy as grounds for challenging arbitral awards will affect Bulgarian arbitration institutions only. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), adopted by Bulgaria, recognising this as legal grounds for challenging arbitral awards, will apply to international arbitration institutions.

COMMENT

Despite all the open questions the Bill fails to address, it addresses enduring issues with the notorious "pocket arbitration courts" by attempting to limit their authority. An initial reading of the Bill yields the conclusion that some if not all of the aims of the Bill related to consumer protection will be achieved. Yet the questions related to the day-to-day activities in arbitrations and the administrative capacity of the Inspectorate at the Ministry of Justice to exercise control effectively remain open.

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