Key Amendments in the Bulgarian Arbitration Law

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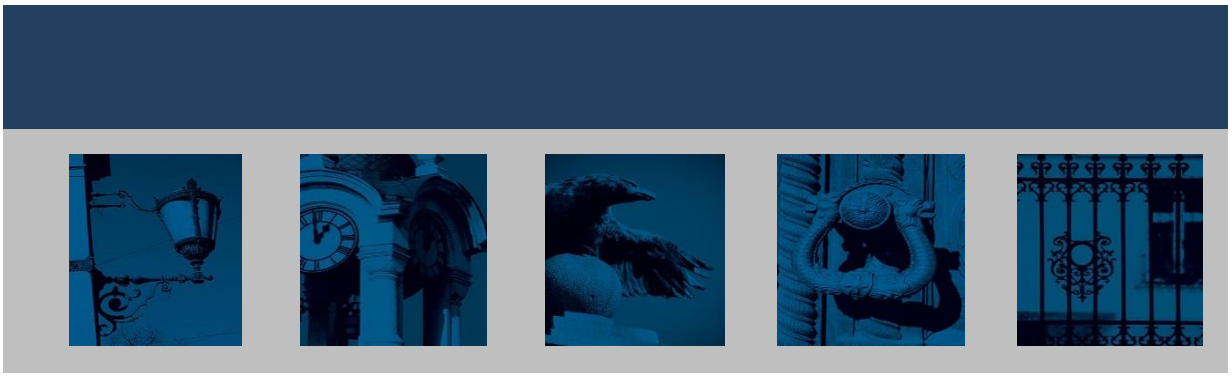

The Bulgarian Parliament has recently adopted important amendments of the Law on International Commercial Arbitration (the "**LICA**") and of the Civil Procedure Code (the "**CPC**"), concerning fundamental arbitration issues such as the scope of non-arbitrable disputes, the grounds for setting aside domestic arbitral awards as well as the criteria for establishing tacit prorogation of arbitral jurisdiction. The 2017 amendment of the Bulgarian arbitration laws also saw the introduction of previously not existing minimum professional requirements for arbitrators and the establishment of a special state body responsible for exercising limited supervisory functions with respect to arbitrators and arbitration institutions.

The amendments discussed were promulgated on 24th January 2017 in State Gazette issue No. 8 and constitute part of the effective Bulgarian legislation as from 28th January 2017.

1. Expanding the Scope of Non-arbitrable Disputes

By virtue of the 2017 CPC amendment disputes in which one of the parties has the quality of a consumer were included in the list of non-arbitrable disputes. According to the Bulgarian Consumer Protection Act, a 'consumer' is any natural person who acquires products or uses services for purposes that do not fall within the sphere of his or her commercial or professional activity, and any natural person who, as a party to a contract under the Consumer Protection Act, acts outside his or her commercial or professional capacity. The fact that consumer disputes are not arbitrable means that an arbitration clause or agreement concluded with respect to a consumer dispute is null and void.

Since the amendment in question was introduced with view to combating existing malpractices in arbitrations against consumers based on an arbitration clause contained in general terms, the Transitional Provisions of the law introducing the said amendment to the CPC provide that all arbitration proceedings with respect to non-arbitrable disputes pending at the time the discussed amendment entered into force shall be terminated.

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2. Amended Grounds for Setting Aside Arbitral Awards

(i) Non-arbitrability

Prior to the 2017 amendment of the LICA, Article 47 thereof provided that non-arbitrability of the dispute is grounds for challenging the arbitral award rendered with respect to such a dispute. Under Article 19 of the CPC disputes involving rights in rem in and possession of real estate assets, alimony, rights arising out of employment relationships as well as disputes in which one of the participating parties is a 'consumer' are not arbitrable.

The 2017 LICA amendment provides that the arbitral awards rendered with respect to non-arbitrable disputes are null and void. Thus, while prior to the discussed amendment arbitral awards rendered on non-arbitrable disputes were valid, but could be challenged by the interested party before the Supreme Court of Cassation, currently, by virtue of the 2017 amendment of the LICA, the interested party may rely directly on the nullity of the arbitral award delivered with respect to a non-arbitrable dispute without undergoing the process of challenging the award. In order to further protect the rights of the party affected, the CPC amendment provides that courts shall not issue a writ of execution requested on the basis of an arbitral award rendered with respect to a non-arbitrable dispute.

(ii) Public Policy

Incompliance with public policy became grounds for setting aside a domestic arbitral with amendment of the LICA in 2001. By virtue of the 2017 amendment of the LICA, however, public policy is no longer grounds for challenging a domestic arbitral award. The motives behind the replacement of "incompliance with public policy" as grounds for setting aside an arbitral award are unclear. Breaches of due process, for example, were most common grounds for challenging arbitral awards under the qualification of "incompliance with public policy".

The amendment discussed creates dualistic treatment of domestic and international arbitral. This is because public policy remains, by virtue of the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards grounds for refusing recognition of international arbitral awards.

3. Tacit Prorogation

According to Article 7, para 3 of the LICA, as drafted prior to the 2017 amendment, an arbitration agreement is considered concluded when the defendant takes part in the arbitration proceedings without questioning the jurisdiction of the arbitration. This gave rise to disputes and inconsistent case law as to what qualifies to taking part in arbitration proceedings sufficient to establish an arbitration competence and in particular - is it necessary for the party to take active steps to participate in the proceedings, or it is enough that the party was duly notified for the initiated arbitration procedure and did not contest the tribunal's jurisdiction. The recent 2017 amendment of the LICA introduced that filing written objections, submitting evidence, filing a counterclaim, or attending the arbitral hearing without challenging the competence of the arbitration tribunal is the participation that qualifies for establishing jurisdiction in favour of the arbitration tribunal. Thus, the mere failure of the respondent to object to the jurisdiction of the arbitration tribunal when such respondent was duly notified about the arbitration proceedings is not sufficient to confer jurisdiction to the arbitration tribunal.

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4. Requirements for Arbitrators

The 2017 LICA amendment introduced for the first-time statutory requirements for being an arbitrator. Pursuant to Article 11 (3) of the LICA only a person of legal capacity and full age, who has not been sentenced for an intentional criminal offence, has at least eight years of professional experience, and possesses high moral qualities is eligible to act and be appointed as arbitrator. The professional qualification of the arbitrator is one of the grounds for challenge of the arbitrator's appointment.

5. Administrative Sanctions

Following the 2017 amendment of the LICA all arbitrators and arbitration institutions operating in Bulgaria are now subject to supervision by an Inspectorate with the Bulgarian Ministry of Justice. The introduction of such supervision seems to be rather controversial in so far as it allows for the Minister of Justice to issue mandatory prescriptions to the arbitrators and the arbitration institutions and to impose fines for non-compliance with these prescriptions. Since the scope of the said prescriptions remains unclear, it seems that the introduction of a possibility that an executive body would give prescriptions to arbitrators and would sanction them for non-compliance with these prescriptions, interferes with the concept for independence of the arbitrators, viewed not only as requirement for lack of ties between the arbitrator and any of the parties to the dispute, but also as functional independence of the arbitrator from executive state authorities.

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