BULGARIA

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I. INTRODUCTION: ARBITRATION IN BULGARIA – HISTORY AND INFRASTRUCTURE

A. History and Current Legislation on Arbitration

1. Historical evolution of law relating to arbitration

For a long period arbitration in Bulgaria operated with extraordinary jurisdiction based on mandatory authority similar to state courts. After 1948, the Arbitration Court with the Bulgarian Chamber of Commerce ("BCCI") operated with extraordinary jurisdiction with respect to disputes arising from the international supply of goods. In 1972 the Court's authority was expanded by the Moscow Convention to all civil disputes between economic organizations of the states members to the former Council for Mutual Economic Assistance. Domestic arbitration was not allowed and therefore inadmissible. During that period the Court acted as an arbitration institution with respect to disputes submitted to it based on arbitration agreement between Bulgarian economic organizations and companies outside the framework of the former Council for Mutual Economic Assistance.

In 1964 the Republic of Bulgaria became party to the European Convention on International Commercial Arbitration of 21 April 1961 under the auspices of the Economic Commission for Europe of

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the United Nations ("the European Convention")[1] and in 1965 party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 under the auspices of UNCITRAL ("the New York Convention").[2]

The Law on International Commercial Arbitration (Закон за международния търговски арбитраж) ("LICA") adopted in 1983[3] and implementing the UNCITRAL Model Law on International Commercial Arbitration for the first time provides for more extensive regulation of international commercial arbitration. Domestic arbitration was first allowed between companies in 1989.

In 2001 the Republic of Bulgaria became party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States under the auspices of the International Bank for Reconstruction and Development (the World Bank) (the "ICSID Convention").[4]

2. Current law

Bulgarian Law has special rules for international and domestic arbitration. Therefore the international or domestic character of arbitration may result in the application of different rules. The criteria employed for the classification of the arbitration as international are to be found in the LICA.

The LICA makes use of both objective and subjective criteria for establishing the international character of arbitration. Both criteria are to be applied cumulatively.

The objective criterion focuses on the international character of the underlying transaction. According to Article 1(2) of the LICA

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[1] Ratified by Decree No 114 of the Presidium of the National Assembly of 14.03.1964 – State Gazette, No 23/20.03.1964. promulgated in SG No 57/21.07.1964, effective as of 11.08.1964

[2] Ratified by Decree No. 284 of the Presidium of the National Assembly of 8.07.1961 – Известия, No. 57/18.07.1961, promulgated State Gazette, No. 2/8.01.1965

[3] Promulgated State Gazette No. 60/5.08.1988, amended and supplemented, SG No. 93/2.11.1993, amended, SG No. 59/26.05.1998, amended and supplemented, SG No. 38/17.04.2001, 46/7.05.2002, Judgment No. 9/24.10.2002 of the Constitutional Court of the Republic of Bulgaria – SG No. 102/1.11.2002, amended, SG No. 59/20.07.2007, effective 1.03.2008

[4] Ratified by law of the National Assembly from 4.10.2000 – State Gazette, No. 85/17.10.2000. Issued by the Ministry of Foreign Affairs, promulgated State Gazette, No. 110/21.12.2001, effective – 13.05.2001

"international commercial arbitration settles civil property disputes arising out of international relations." Hence the cross-border element of the underlying relationship is the objective criterion for the arbitration to qualify as international.

According to the subjective criterion the focus is on the different domicile or corporate seat of the parties. Pursuant to Article 1(2) LICA commercial arbitration would qualify as international if at least one of the parties is domiciled or its seat is in a country other than Bulgaria.

Any arbitration, which is not international, is deemed to be domestic.

The distinction between international and domestic arbitration, save theoretical significance, has a practical importance as follows:

(i) nationality of arbitrators

According to the general rules a foreign national might be appointed as arbitrator only where the arbitration qualifies as an international one. However, by application of paragraph 3 of the Transitional and Concluding provision in conjunction with Article 11(2) of the LICA, a party to a dispute which is an enterprise with a majority foreign participation may appoint an arbitrator who is not a Bulgarian national.

(ii) language of arbitration

To the extent that the proceeding qualifies as a domestic arbitration, paragraph 3 of the Transitional and Concluding provisions expressly excludes the application of Article 26 of the LICA which provides that in international commercial arbitration parties may choose the language to be used in the course of the arbitration proceedings. The question is whether such legislation technique, i.e. the lack of express right to choose language, is tantamount to implied prohibition to do so. It is usually said that only the mandatory provisions of *lex arbitri* limit party autonomy.

(iii) seat of arbitration

Pursuant to the Civil Procedure Code the seat of arbitration can be outside Bulgaria provided that one of the parties has habitual residence, a corporate seat defined in its

constitutional document, or location of the management abroad. It seems that only arbitration which qualifies as international according to the criteria set out in the LICA may be conducted outside Bulgaria.

3. Law reform projects

As specified above in the field of arbitration the Republic of Bulgaria is a party to three multilateral international conventions – the New York Convention, the European Convention and the ICSID Convention.

The bilateral agreements to which the Republic of Bulgaria is a party providing for mutual recognition and enforcement of arbitral awards shall prevail and derogate the application of the New York Convention on the matters governed by them.[5] Furthermore agreements for mutual promotion and protection of investments to which Bulgaria is a party may contain mandatory or optional arbitration clauses with regard to settling of investment disputes arising between a state party to the convention and an investor from the other contracting state.[6]

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[5] Such bilateral agreements providing for mutual recognition and enforcement of arbitral awards to which Bulgaria is a party are for example: The Agreement with Hungary for legal assistance in civil, family and criminal proceedings, *ratified by Decree No 595 of the Presidium of the National Assembly of 4.08.1966, promulgated in State Gazette, issue 29 of 11.04.1967, effective as of 10.03.1967*; the agreement with Yugoslavia (currently in force for its successors Serbia, Bosnia and Herzegovina, Slovenia and Croatia) for mutual legal assistance, *ratified by Decree No 167 of the Presidium of the National Assembly of 8.06.1956 - Известия, Issue No 16 of 1957, promulgated in Известия, issue 16 of 22.02.1957, effective as of 26.01.1957*; the Agreement with Tunis for legal assistance in civil and criminal proceedings, *ratified by Decree No 2464 of the State Council of 26.12.1975 – State Gazette, issue 3 of 9.01.1976, issued by the Ministry of Foreign Affairs, promulgated in State Gazette, issue 2 of 6.01.1978 г., effective as of 31.08.1976*; the Agreement for trade and marine navigation with Japan, *ratified by Decree No 647 of the Presidium of the National Assembly of 16.04.1970 – State Gazette, issue 64 of 14.08.1970, promulgated in State Gazette issue 64 of 14.08.1970, effective as of 5.08.1970*

[6] Such agreements are for example the agreement with the United Kingdom, *ratified by law, adopted by the 37th National assembly on 13.09.1996 – SG No. 82/27.09.1669, Issued by the Ministry of finance, promulgated, SG No. 55/11.07.1997, effective 24.06.1997,* the Agreement with Hungary, *ratified by law, adopted by the 38th National assembly on 2.03.1995 – SG No.*

Pursuant to Article 5, paragraph 4 of the Constitution of the Republic of Bulgaria[7] any international treaty, which has been ratified according to a procedure established by the Constitution, which has been promulgated, and which has entered into force for the Republic of Bulgaria, shall be part of the domestic law of the land. Any such treaty shall prevail over any conflicting standards of domestic legislation. Thus the New York Convention, the European Convention, the ICSID Convention and any and all bilateral agreements in the field of arbitration to which the Republic of Bulgaria is a party meeting the above requirements for ratification and entry into force, prevail over any conflicting provisions of the domestic legislation governing arbitration.

The LICA is based on, and implements, the UNCITRAL Model Law on International Commercial Arbitration however with certain deviations. Several reforms of LICA are aimed at closer harmonization with the UNCITRAL Model Law and the introduction of domestic arbitration, subjecting its regulations to the rules of international arbitration, as well as providing for specific circumstances. Currently the LICA governs both international and domestic arbitration. The provisions of LICA apply only if the seat of the arbitral tribunal is in Bulgaria. As with the Model law's "place of arbitration," the seat of the tribunal refers to the legal rather than to the factual venue of the arbitration.

The structure of the law closely follows the UNCITRAL Model Law. The first chapter which deals with general issues such as the scope of application of the law is followed by a chapter on the arbitration agreement (definition, arbitrability, and from of the arbitration agreement). The third chapter deals with the installation of the arbitral tribunal and the challenging of arbitrators, the fourth

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24/14.03.1995, Issued by the Ministry of finance, promulgated, SG No. 98/7.11.1995, effective 7.09.1995, the Agreement with Austria, *ratified by law, adopted by the 38th National assembly on 31.07.1997 – SG No. 64/8.08.1997, Issued by the Ministry of finance, promulgated, SG No. 99/29.10.1997, effective 1.11.1997,* the agreement with China, *ratified by law, adopted by the National Assembly on 7.06.1994 – SG No. 58/19.07.1994, Issued by the Ministry of finance, promulgated, SG No. 48/26.05.1995, effective 24.08.1995.*

[7] Promulgated, State Gazette No. 56/13.07.1991 (effective 13.07.1991), amended and supplemented, SG No. 85/26.09.2003, SG No. 18/25.02.2005, SG No. 27/31.03.2006, Decision No. 7 of the Constitutional Court of the Republic of Bulgaria of 13.09.2006 – SG No. 78/26.09.2006, SG No. 12/6.02.2007

chapter with the tribunal's jurisdiction (including the power to issue interim measures). The conduct of the arbitration proceeding and the making of the award are governed by the fifth and sixth chapters. The seventh chapter deals with the possibility of setting aside an award under Bulgarian law and the recognition and enforcement of foreign awards.

The Bulgarian Code of Civil Procedure (Граждански процесуален кодекс)[8] also provides for certain rules concerning arbitration, in particular, provisions related to the arbitrability and enforcement of arbitral awards. Unless otherwise provided in an international treaty to which the Republic of Bulgaria is a party, the recognition and admission to enforcement of foreign arbitral awards is governed by the Code on Private International Law (Кодекс на международното частно право).[9]

The rules of the arbitration institutions may not be qualified as legislative acts. However they become mandatory for the parties to a dispute based on their agreement to submit such dispute to be finally settled by such arbitration institution or based on incorporation of such rules by reference in their agreement to settle their dispute by arbitration and for the arbitrator based on his consent to settle the dispute on behalf of the institution.

4. Confidentiality and publication of awards

a) Privacy of proceedings

In contrast to the civil procedure before the courts of law,[10] pursuant to LICA the arbitration procedure is confidential, this characteristic stemming from the "conventional" nature of the arbitration proceedings. As a result, the arbitral award is not subject to publication, regardless of the consent of the parties thereto.

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[8] Promulgated in State Gazette No. 59/20.07.2007, effective as of 1.03.2008, amended and supplemented, SG No. 50/30.05.2008, effective as of 1.03.2008, modified by Judgment No. 3 of the Constitutional Court of the Republic of Bulgaria of 8.07.2008 - SG No. 63/15.07.2008, amended, SG No. 69/5.08.2008, SG No. 12/13.02.2009, effective as of 1.05.2009, supplemented, SG No. 19/13.03.2009

[9] Promulgated, State Gazette No. 42/17.05.2005, amended, SG No. 59/20.07.2007, effective 1.03.2008

[10] The Civil Procedure Code provides that the court decision shall be published in the court register which is publicly available.

b) Publication of awards

Practically, some decisions of the arbitration institutions are subject to publication. For instance, the Rules of Arbitration of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry provide that the Secretaries of the Arbitration Court, upon the instructions of the Chairperson of the Arbitration Court, keep a register with selected arbitral awards of principle importance for the jurisprudence. The registry is publicly available and any third party may by way of written application to the Chairperson of the Arbitration Court obtain a copy of an award therefrom.

Further on, with the express permission of the Chairperson of the Arbitration Court selected arbitral awards of principle importance are being published in biennial editions of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry, available at the premises of Bulgarian Chamber of Commerce and Industry. Since the establishment of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry,[11] the latter has issued thirteen editions with selected awards. By virtue of the Rules of Arbitration of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry the names of the parties and any data which may be used to the detriment of the latter are not being published. As a result, the parties' consent for publication is not obtained.

The Rules of Arbitration of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry do not contain any provisions regarding publication of awards.

B. Arbitration Infrastructure and Practice in Bulgaria

1. Major arbitration institutions

A leading arbitration institution in Bulgaria is the Arbitration Court with the Bulgarian Chamber of Commerce and Industry (the "Arbitration Court with BCCI"). Most of the domestic commercial arbitrations and almost all of the international commercial

[11] The ARBITRATION COURT with the BCCI is a successor of the Commercial Arbitration Court established in 1886 and existed until the Second World War. The ARBITRATION COURT with the BCCI is "re-established" in 1953 and is initially called "International Trade Arbitration Commission."

arbitrations in Bulgaria are conducted under the auspices of or administered by the Court. There is information published on its web site showing that 1350 international arbitrations and 708 national arbitrations have been conducted over a period of ten years. More than 60 % of the cases have been completed within six to nine months. According to the same source, the Court settles between 250 and 300 disputes annually, whereas 82% of the national arbitration cases are completed within 9 months and 66% of the international arbitration cases are completed within 12 months.

In addition, there are other domestic arbitration institutions. The Arbitration Court with the Bulgarian Industrial Association (the "Arbitration Court with BIA") also has general competence to handle any disputes which may be subject to arbitration, but concentrates mainly in intellectual property disputes.

2. Number of cases and other statistics

Statistical information provided to the writer by the BIA since 2000, when the Arbitration Court with BIA began its activity as an independent adjudicative body, is presented below:

Year	Total number of instigated arbitral proceedings	National	International
2000	7	7	-
2001	14	12	2
2002	22	22	-
2003	18	15	3
2004	15	14	1
2005	21	17	4
2006	22	18	4
2007	23	23	–
2008	17	16	1 ad hoc
Total	159	144	15

There has been no major difference between the duration of domestic and international arbitral proceedings carried out before the Arbitration Court with BIA since in only one of the cases of international arbitration a party has been summoned from abroad.

In the remainder of the international arbitral proceedings the parties had their seat in Bulgaria or had a proxy with address in Bulgaria.

According to the same source of information the average duration of the proceedings is between three and five sessions of the arbitration court. No delays of the proceedings have been ascertained due to the fault of the arbitration institution or the arbitrators. Fifteen of the cases have been completed by court settlement agreement. Six arbitral awards of the Arbitration Court with BIA have been challenged before the Supreme Court of Cassation whereas two of the awards have been set aside. The data regarding the challenged decisions of the Arbitration Court with BIA by years is as follows:

Year	Awards Challenged	Set Aside	Remained in Force
2003	3	1	2
2005	2	1	1
2006	1	–	1
Total	6	2	4

The Arbitration Court with the Bulgarian Stock Exchange – Sofia AD ("the Stock Exchange") handles disputes arising out of the execution and performance of stock-exchange transactions; membership to the Stock Exchange; and other cases related to trading in financial instruments or the activities of the Stock Exchange. The National Institute for Reconciliation and Arbitration with the Ministry of Labour and Social Policy offers arbitration and mediation facilities aimed specifically at resolution of collective labor disputes.

3. Development of arbitration compared with litigation

Although arbitration has gained more popularity as an alternative to the state civil action procedure, in view of the positive legislative reforms aimed at the regulation of the arbitration institute, during the last few years litigation remains the most common way to seek redress of civil rights violations.

II. CURRENT LAW AND PRACTICE

A. Arbitration Agreement

1. Types and validity of agreement

a) Clauses and submission agreements

The arbitration agreement (AA) may be in the form of an arbitration clause, thus forming part of the principal agreement to which the AA refers, or in the form of a separate agreement for submission to arbitration.

The AA is usually in the form of an arbitration clause when it refers to disputes that may potentially arise in the future between/among the relevant parties out of or in relation to the principal legal relationship between/among such parties. The AA is usually in the form of a submission agreement when it refers to one or more disputes that already exist and those in which the parties are willing to submit to arbitration.

By an AA a dispute may be submitted to an institutional arbitration as well as to arbitration *ad hoc*. The AA must be entered into between/among the same parties that are parties to the principal legal relationship.

The subject matter of the AA may lawfully include any disputes of proprietary nature arising out of or relating to contractual, quasi-contractual or non-contractual (such as *delictum* or *condictio sine causa*) civil law relationships, except for disputes arising out of or relating to property ownership title and other rights *in rem*, payment of support or alimony, and employment relationship. Respectively, under the Bulgarian law, any dispute of non-proprietary nature (such as a dispute relating to the establishment of person origin or marriage dissolution) as well as any dispute arising out of or relating to a public receivable, administrative penalty or other sanction, committed crime, real estate title of ownership, payment of alimony or employment relationship is non-arbitrary and an AA with respect to such dispute may not be validly concluded. The Bulgarian law recognizes both national and international AAs.

b) Minimum essential content

The LICA requires the AA to have some minimum content. Such content is essential to the AA and is a condition to the AA validity.

The essential content of AA is limited and it includes only the following: an agreement between/ among the parties that a specific dispute is submitted to arbitration. A dispute is specified by the relationship out of which it arises or to which it refers.[12]

The law permits parties to the AA to provide in the AA, further to the essential content, for all the following:

1. the arbitration institution (if the arbitration institution is not specified, the assumption is that the AA refers to arbitration *ad hoc*);
2. the proceedings to be followed in any of the following:
   (i) the formation of the arbitration tribunal; and/or
   (ii) the challenge and replacement of arbitrators; and/ or
   (iii) the hearings, collection of evidence, and issuance of the award; and/ or
3. the place of arbitration; and/ or
4. the language of arbitration; and/ or
5. the governing law.

If the AA includes express provisions on any of these permissible items of content, such express agreement of the parties to the AA prevails. If the AA does not expressly regulate any of these issues, the arbitration tribunal applies the applicable law or, if no legal provision is applicable, rules in accordance with its discretion.

In Bulgaria the AA is usually in the form of an arbitration clause and, as per example, such clause provides for the following:

> The agreement shall be governed by the [Bulgarian or any other governing] law. Any dispute, controversy or claim arising out of or in relation to the agreement, including any question regarding its existence, validity, interpretation, breach, termination or modification, to the extent that such dispute, controversy or claim shall have not been resolved by good-faith negotiations and agreement within [specific term period], shall be submitted for resolution and final

[12] With respect to the arbitrability of a dispute, please refer to our comment in Section II, A, 1 hereof.

> settlement to the Court of Arbitration with the Bulgarian Chamber of Commerce and Industry [or with the Bulgarian Industrial Association] in compliance with its Rules by [specific number of] arbitrators appointed in accordance with such Rules.

AAs in the form of submission agreements are rarely seen. It is also rare for an AA drafted under the Bulgarian law to include express provisions on the arbitration proceedings.

c) Form requirements

Under the Bulgarian law the AA is a formal contract. The AA, and any amendment or annex thereto, must be in writing. With respect to the AA the written form is a form of validity.

No notary certification or other official form is required.

The written form requirement is fulfilled in any of the following cases:

1. all parties have signed the AA in one counterpart;
2. each party has signed the AA in a different counterpart;
3. the AA is composed of different letters, telexes, fax messages, e-mails, or other forms or written communication exchanged between/among the parties; or
4. in the event that one of the parties has already brought a claim before an arbitration tribunal and the responding party under such claim confirms in writing within the arbitration proceedings that it accepts the dispute to be submitted to arbitration, or takes part in the arbitration proceedings without challenging the competence of the arbitration tribunal.

d) Incorporation by reference

It is permissible under the Bulgarian law and not unusual for a contract of general terms and conditions to include an arbitration clause. The incorporation of an arbitration clause in a contract of general terms and conditions is permissible under the Bulgarian law and is recognized by the applicable case law. Legal requirements regarding the form and validity of an AA fully apply with respect to such arbitration clause.

e) Interpretation

As a contract, the AA is subject to contract law and is interpreted in accordance with the principles and rules of the applicable contract law. Respectively, if the parties have agreed that the principal agreement of which the arbitration clause forms part is governed by, as per example, Bulgarian law, the arbitration clause will also be interpreted in conformity with Bulgarian law. Parties may further agree that the arbitration clause, unlike the rest of the principal agreement, is governed by any other law. If parties to the AA have not made an express choice of law, the arbitration tribunal decides on the applicable law based on the conflicts law rules and interprets the AA in accordance with such applicable law.

2. Enforcing arbitration agreements

a) Declaratory actions in court

Theoretically, an interested party may file a suit with a Bulgarian court for a declaratory judgment seeking to establish that the arbitration agreement is valid and binding. Under Article 4 of the Private International Law Code which is applicable to the extent that the matter does not fall within the ambit of the EU Regulation 44/2001, Bulgarian courts are internationally competent where either (i) the respondent is domiciled in Bulgaria or (ii) the claimant or the respondent is a Bulgarian national or a legal entity registered in Bulgaria.

There is otherwise no meaningful legal mechanism under Bulgarian law to compel arbitration.

b) Applications to compel or stay arbitration

Under Article 8(1) of the LICA, where a party has filed court proceedings in a dispute which is subject to an arbitration agreement, the court must dismiss and terminate such proceedings if the respondent invokes the arbitration agreement. To this end, the respondent must raise its objection within the time limit for submitting its response to the statement of claim; failure to do so within this time limit means that the state court must take jurisdiction over the dispute. Article 131(1) of the Civil Procedure Code sets the generally applicable time limit for filing a response to the statement of

claim at one month from receipt of such statement. This time limit, however, is shorter in certain special proceedings under the Civil Procedure Code. Importantly, this is the case in special proceedings applicable to commercial disputes, where the limit is only two weeks from receipt of the statement of claim.

The court may refuse to dismiss the proceedings brought before it only if it finds that the arbitration agreement invoked by the respondent is null and void, inoperative or incapable of being performed, in which case the state court must assume jurisdiction over the dispute.

The most frequent remedy to enforce an arbitration agreement is the invocation of such agreement in pending court proceedings. In addition, enforcement of arbitration agreements is facilitated by Article 8(2) of the LICA whereby arbitration proceedings may commence and continue and an arbitral award may be delivered, even though the same dispute is pending before a national or foreign court. However, in the decision already discussed in footnote 12 above, the Supreme Court of Cassation held that Article 8(2) of the LICA did not apply to disputes with respect to which the state courts had exclusive jurisdiction, effectively meaning that arbitration proceedings commenced or continuing in such circumstances would result in an arbitration award that risks being set aside

3. Effects on third parties

Bulgarian law recognizes assignment and subrogation with respect to an AA. Respectively, if a third person, in full or in part, steps into the rights and/or obligations of a party to the AA, such third person will also become a party to the AA. This will usually be the case in the event of assignment, subrogation, inheriting, succession, merger or acquisition, or other transfer or joint undertaking of obligations by a party under the principal legal relationship to which the AA refers.

The constitution of a third person as party to the AA would require the consent of the other parties to the AA subject to the general requirements of the contract law.

4. Termination and breach

Being a contract, the AA may lawfully terminate on the grounds permissible to any other contract, including, *inter alia*, the following:

1. mutual consent of the parties to the AA;
2. expiration of the agreed term period of validity;
3. completion of a condition with terminating effect;
4. complete enforcement of the AA by issuance of an arbitration award or entrance into effect of a settlement agreement thereunder;
5. unenforceability of the AA due to the death or other objective incapacity of the agreed arbitrator to arbitrate or due to the permanent closing of the agreed arbitration institution.

The AA may further terminate on legal grounds specific only for the AA and unusual for other types of agreements. Such specific termination grounds include, for example, (i) termination of arbitration proceedings by a settlement agreement or issuance of an arbitration award, and (ii) the failure of a party to an effective AA to challenge on the grounds of such AA the competence of a state court to which a dispute covered by the AA is submitted by the other party.

Case law on this matter is very limited.

B. Doctrine of Separability

1. Statutory provisions

Under both the LICA and the BCCI Arbitration Rules, the arbitration agreement is separable from the remaining clauses of the contract giving rise to the dispute and the mere fact that such contract might be nonexistent or invalid does not automatically render null and void the arbitration agreement incorporated therein. In other words, circumstances that normally give rise to invalidity of contractual arrangements must affect specifically the arbitration agreement, if such agreement is to be declared null and void. Accordingly, the arbitral tribunal may decide on its own jurisdiction even if a party has raised objections thereto on the basis of an alleged nonexistence or invalidity of the arbitration agreement.

C. Jurisdiction

Under Article 20 of the LICA and Article 26 of the BCCI Arbitration Rules, respondent's objections to the jurisdiction of the arbitral tribunal must be formulated not later than with the

submission of its response to the claimant's request for arbitration. Participation of the objecting party in the constitution and appointment of the arbitral tribunal may not operate as a waiver of its rights to raise objections to the jurisdiction of the tribunal. If a party is of the opinion that the tribunal is acting beyond its authority, it must raise an objection as soon as this circumstance occurs. The arbitral tribunal may accept an objection to its jurisdiction at a later stage of the proceedings provided that the delay was justifiable. While the LICA is silent on the matter, Article 26(6) of the BCCI Arbitration Rules directs the arbitral tribunal to render a decision on the objection before it proceeds with the merits of the case, unless both jurisdiction and merits turn on the same issues. Ultimately, the tribunal retains a wide margin of appreciation on the matter.

Neither the LICA nor the BCCI Arbitration Rules provide for any specific limitation on the power of the arbitral tribunal to decide on its own jurisdiction. Generally, the arbitral tribunal is required to decide on this issue upon the request of the party objecting to its jurisdiction. Conceivably, however, circumstances may occur where the arbitral tribunal will have to review the question of its own motion (e.g. possible lack of jurisdiction due to the non-arbitrability of the dispute, which is a matter of public policy, or a party refraining from any participation whatsoever in the arbitration proceedings).

1. Interaction of national courts and tribunals

It is obvious, however, that a limitation on the powers of the arbitral tribunal to decide on its own jurisdiction would exist where a state court decision with a *res judicata* effect has already addressed the issue of the jurisdiction of such tribunal. In this respect, the state courts may be called upon to decide matters relating to the scope of the jurisdiction of the arbitral tribunal in circumstances such as court proceedings initiated with a view to setting aside an arbitral award or the invocation of an arbitration clause in court proceedings.

D. Arbitrability

1. Subjective arbitrability

Under Bulgarian law, any natural person having the capacity to dispose of its rights may validly enter into an arbitration agreement. The capacity to dispose of its rights will be assessed in accordance with applicable conflict of law rules (the Bulgarian Private

International Law Code[13] generally refers to the national law of the natural person in question).

In the context of domestic disputes, the capacity of the parties to enter into arbitration agreements is restricted in the sense that such parties may not validly choose a seat of arbitration outside Bulgaria in the event the arbitration agreement is governed by Bulgarian law.[14] If the choice of a seat outside Bulgaria was decisive for the agreement of such parties to submit their disputes to arbitration and the agreement was governed by Bulgarian law, then the Bulgarian courts would treat such arbitration agreement as null and void. The national or international character of the arbitration is determined as of the date of the arbitration agreement and any change of the domiciliation of any party after the arbitration agreement was entered into does not affect such determination.[15]

The capacity of the legal entities to enter into arbitration agreement is governed by the law of the place of incorporation. There is no general prohibition under Bulgarian law restricting the

[13] Promulgated State Gazette No. 42/17.05.2005, amended and supplemented, SG No. 59/20.07.2007.

[14] The Supreme Court of Cassation, in its Decision No. 717 of 27 July 2005, civil case No. 18/2004 (published in the Supreme Court of Cassation Bulletin No. 6/20005) delivered in the context of proceedings for recognition in Bulgaria of an English arbitration award, had to deal with the question whether non-observance of the restriction on the choice of the seat of arbitration (a restriction deriving from Bulgarian law) in an arbitration clause governed by English law raised a public policy issue under Article V.2(b) of the New York Convention. The Supreme Court of Cassation confirmed that the restriction in question did not constitute an element of Bulgarian public policy and, therefore, non-observance of this restriction by the arbitration clause could not form the basis, under Article V.2(b) of the New York Convention, for a refusal to recognize the arbitration award based on such arbitration clause. The Supreme Court of Cassation further held that, in any case, the possible invalidity of the arbitration clause by reason of the non-observance of the restriction at issue could only be analyzed in the context of Article V.1(a) of the New York Convention and from the perspective of English law, which was the law governing the arbitration clause. As the appellant did not furnish any proof of invalidity of the arbitration clause under English law, the Supreme Court of Cassation recognized the arbitration award.

[15] Sofia District Court Decision No. 53 of 7 November 2008 in civil case No. 593 / 2008.

capacity of legal entities to enter into arbitration agreements (subject to the limitations discussed below).

Article 3 of the LICA expressly permits the participation of a state or state entity in arbitrations. Whilst the LICA only applies to arbitrations having their seat in Bulgaria, there is no general prohibition restricting the capacity of the Bulgarian state or Bulgarian state enterprises to become parties to arbitrations seated outside Bulgaria. On a related note, Bulgaria is a party to the ICSID Convention as well as the Energy Charter Treaty and a number of bilateral investment treaties referring to the dispute settlement mechanism under the ICSID Convention; the Bulgarian state may accordingly become a party to arbitration proceedings aimed at resolving investment disputes contemplated in such instruments.

2. Objective arbitrability

Under Bulgarian law, only private law disputes may be submitted to arbitration; administrative and criminal cases are not arbitrable. Article 19 of the Bulgarian Civil Procedure Code further provides that not any private law dispute but only pecuniary disputes (i.e. amenable to monetary evaluation) may be the subject matter of arbitration. Finally, under Article 19 of the Bulgarian Civil Procedure Code disputes involving rights *in rem* in and possession of real estate assets, alimony and rights arising out of employment relationships are not arbitrable.

In addition, in the context of civil and commercial matters falling within the scope of Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the disputes referred to in Article 22 of Regulation No. 44/2001 (dealing with exclusive jurisdiction of the national courts of a Member State) are not arbitrable.

In the context of matters falling outside the scope of Regulation No. 44/2001, a number of provisions of the Private International Law Code providing for the exclusive jurisdiction of Bulgarian courts with respect to certain categories of disputes, likewise operates to exclude the arbitrability of the disputes in question. Such provisions include: disputes involving immovable property located in Bulgaria (Article 12(1)); disputes involving industrial property rights where a patent or

other registration has been issued in Bulgaria (Article 13(2));[16] and disputes affecting the legal status of entities registered in Bulgaria (Article 19).

In addition to issues which are explicitly excluded from the scope of arbitration, other matters are reserved for the exclusive jurisdiction of the state courts.[17] Insolvency and family law matters are a typical case in point.

E. Arbitral Tribunal

1. Status and qualifications of arbitrators

a) Number of arbitrators

The LICA stipulates that the arbitration tribunal may consist of one or more than one arbitrators. The number of the arbitrators

[16] However, it should be noted that whilst an arbitral tribunal may not determine *erga omnes* the validity of a patent or a trademark registered in Bulgaria, it may still decide on the rights and obligations of the parties flowing from intellectual property rights.

[17] Supreme Court of Cassation Decision No. 560 of 18 November 2008, civil case 437/2007 provides an unusual example of non arbitrability. This decision was rendered in the context of proceedings for setting aside an arbitral award. The award under review had found that the purchaser under a sale of goods contract had not performed its contractual obligations and the seller was accordingly awarded damages. The obligations of the purchaser under the sale of goods contract had been secured with a mortgage over real estate assets owned by a third party. Prior to the arbitration proceedings, that third party had instituted proceedings (due to procedural requirements both the seller and the purchaser were constituted as respondents in these proceedings) before the competent state court with a view to obtaining the de-registration of the mortgage on the basis of the alleged rescission of the sale of goods contract by reason of the alleged default of the seller. Under Bulgarian law, the action aimed at the de-registration of the mortgage falls within the exclusive competence of the state courts. The Supreme Cassation Court found that (i) the dispute being the object of the arbitration had been an element of the separate dispute previously brought before the state courts and (ii) no arbitration clause could be invoked against the proceedings pending in the state courts because the claimant (i.e. the mortgagor seeking de-registration of the mortgage) was not a party to the arbitration agreement. In such circumstances, it was the Supreme Court of Cassation's view, the dispute that had been the object of the arbitration was actually non arbitrable and the award was accordingly set aside.

shall be defined by the parties. The arbitration tribunal shall be composed of three arbitrators in case the parties have not specified their number in the arbitration agreement.

Furthermore, the parties may agree on the procedure of establishment of an arbitration tribunal. Pursuant to the LICA, should there be no agreement between the parties on the procedure and if the arbitration tribunal consists of three arbitrators, each of the parties shall appoint an arbitrator while the third one shall be appointed by the two arbitrators who had already been appointed by the parties. The Chairman of the BCCI may appoint an arbitrator upon request by one of the parties in case the other party does not appoint an arbitrator within 30 days or in case the two arbitrators do not reach an agreement on the appointment of the third arbitrator within 30 days from their appointment.

Should the case be adjudicated by a sole arbitrator and in case the parties could not reach an agreement on his/her choice, he/she shall be appointed by the Chairman upon request by one of the parties. Such decisions of the Chairman regarding the constitution of the arbitration tribunal are final and are not subject to appeal.

The LICA provides that the arbitrator may be either citizen of the Republic of Bulgaria, or a person of foreign nationality.

Pursuant to the BCCI Arbitration Rules and the Rules of the Court of Arbitration with BIA, the arbitral tribunal may be composed of a sole arbitrator or of three arbitrators. When the arbitral tribunal is composed of three arbitrators, each of the parties shall appoint one arbitrator and his/her substitute and the two appointed arbitrators on their part shall elect the presiding arbitrator.

The Rules of the Court of Arbitration with BIA provides that the arbitrator shall be elected from a list of arbitrators with the Court of Arbitration. Besides that there is not an explicit provision whether the arbitrator shall be citizen of the Republic of Bulgaria, or may be a foreigner. As of the date of this report all thirty-seven arbitrators of the Arbitration Court with BIA are Bulgarian nationalities.

The Arbitration Court with BCCI maintains three different lists of arbitrators: (i) List of the Arbitrators for National Disputes; (ii) List of the Arbitrators for International Disputes; and (iii) List of the Foreigners-Arbitrators at the BCCI. In disputes where one of the parties is a foreign entity or a local entity with prevailing foreign participation, such party may appoint for arbitrator a foreign citizen who is not included in the list under item (iii) hereinabove. The presiding arbitrator may be elected under the same conditions. As of

the date of this report the List of the Arbitrators for National Disputes consists of fifty-five arbitrators; the List of the Arbitrators for International Disputes consists of forty-two arbitrators; and the List of the Foreigners-Arbitrators at the BCCI consists of thirty-three arbitrators.

b) Legal status

Pursuant to the LICA, during the course of their activities the arbitrators must stay independent and impartial and therefore when a person is nominated as an arbitrator for a dispute, he/she must point out all circumstances which may raise any well grounded doubts for his/her impartiality or independence. In addition, the arbitrator is subject to this obligation after his/her appointment. The presence of any interest on the outcome of the dispute is one of the most frequently met grounds for challenging an arbitrator.

The Arbitration Court with BCCI has adopted special Ethical Rules of Conduct for Arbitrators ("Ethical Rules"). The Ethical Rules shall apply to all member arbitrators of the Arbitration Court with BCCI and they are intended to encourage the professionalism and quality of work of the arbitrators, to bear out the justice and impartiality of the arbitration procedure and to raise the public faith in the arbitration as a method for solving disputes. The basic principles set out in the Ethical Rules are concerned with the professional and personal conduct of the arbitrators and their conduct in the public area, as well. A breach of the Ethical Rules may lead to the removal of the arbitrator from the lists of arbitrators with BCCI.

The status of the arbitrators with the Court of Arbitration with BIA is not settled in its rules. Pursuant to these rules every appointed arbitrator should file an affidavit showing the lack of circumstances that may raise any doubts to his/her independence.

c) Qualifications and accreditation requirements

The LICA does not set forth an explicit provision regarding the qualification of the arbitrators. The only reference in the law concerning the qualification of the arbitrators is that the professional qualification of the arbitrator is one of the grounds for challenge.

The Rules of the Arbitration Court with BCCI stipulate qualification requirements that have to be met by the arbitrators.

They should be graduates in law, who are versed in domestic and international economic relations and in the law which governs such relations, have at least ten years of legal practice experience and have no criminal records.

The Rules of the Court of Arbitration with BIA does not settle the question regarding the qualification of the arbitrators. Despite that, it should be noted that all thirty-seven arbitrators of the Arbitration Court with BIA have a master's degree in law.

d) Arbitrators' rights and duties

The relationship between the arbitrator and the parties to the arbitration agreement is civil (not public) by its nature and is based on a contract entered into upon the appointment by which the arbitrator agrees to settle the dispute between the parties against certain remuneration. An agreement exists even where a party refuses to participate in the procedure for the appointment of the arbitrator since the consent to the settling of a dispute by arbitration is also consent for constituting the arbitration tribunal. The contractual relationship exists between each of the parties and each of the appointed arbitrators. Although such contract resembles an agency agreement or an agreement for provision of services, it is strongly influenced by the adjudicative function assumed by the arbitration. In particular the arbitrator has to be, and remain, independent and impartial. The arbitrator is not an agent of the party, even of the one who has appointed him/her.

The main obligation of the arbitrator arising out of its contract with the parties is to settle the dispute between them. This includes in particular a duty to conduct the arbitration in such a way that it leads to a valid award not open to challenge. If the arbitrator exceeds its authority beyond the scope of the submission to arbitration the consequent award may be set aside or refused enforcement.

As noted above it is the duty of the arbitrator to be unbiased in the settlement of disputes between parties. To ensure compliance with such principles, Article 13 of the LICA provides that when a person is approached in connection with his possible appointment as an arbitrator he/she has to disclose any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. This duty continues after the appointment stage throughout the arbitral proceedings. In this respect the arbitrator has to avoid all ex parte communications with the parties to the

dispute which are incompatible with his/her capacity of a third party alien to such dispute.

The arbitrator should conduct the arbitral proceedings without undue delay, in a fair manner, treating both parties equally and respect each party's right to be heard. Furthermore it follows from the contractual nature of the relationship that the arbitrator has to complete its mandate. Pursuant to Article 17 of the LICA where the arbitrator becomes de jure or de facto unable to perform his functions or fails to act without undue delay his mandate is terminated. If such arbitrator does not withdraw from office and no agreement could be reached between the parties for the termination of the arbitrator's mandate, each party is entitled to request the Sofia City Court to decide on the termination of the mandate, which decision is final. In any case of termination of the mandate, a substitute arbitrator should be appointed according to the rules that were applicable to the appointment of the replaced arbitrator. The Rules of the Arbitration Court with the BCCI (Правилник на Арбитражния съд при Българската Търговско-Промишлена Палата)[18] provide for the nomination of a substitute arbitrator at the appointment stage who automatically replaces the arbitrator in case the latter dies or is prevented to or fails to exercise his functions for more than 60 days. The Chairman is replaced according to the rules that were applicable to his appointment. The Rules of the Arbitration Court with the BIA (Правилник на Арбитражния съд при Българска Стопанска Камара)[19] also provide for a substitute arbitrator. The arbitrator has to preserve the confidential nature of the arbitral proceedings.

[18] Adopted by the Management Board of the BCCI by Resolution recorded in Minutes No. 1 of 31 March 1993 and enters into force on 1 July 1993, abrogating all effective Rules existing up to that time. These Rules were amended by a resolution of the Executive Council of BCCI under No.47/3-2002 of 29.01.2002 effective as of O1.02.2002, further amended a resolution of the Executive Council of BCCI under No.95/1-2008 of 15.01.2008 effective as of O1.02.2008.

[19] Adopted by the Management Board of the BIA by Minutes No. 12 of 15 December 1998 and enters into force on 4 January 1999. These Rules were amended by a resolution of the Arbitration Collegium of BCCI of 06.03.2001 approved by the Management Board of the BIA by Minutes No. 19 of 14.06.2001 effective as of the same date.

e) Relevant codes of ethics

Guidelines as to what circumstances are subject to disclosure can be found in Article 1 (3) and Article 2 of the Code of Ethics for Conduct by Arbitrators of the Arbitration Court with the BCCI[20] which is mandatory for the arbitrators enlisted with this arbitration institution. These provide that doubts as to the impartiality and independence of the arbitrator and the lack of personal interest in the outcome of the case occur if the arbitrator: (i) is a person who is a party in the proceedings, a proxy of such party, a relative of such party or of its proxy, as well as where such person and a proxy of the party work in the same law firm; (ii) is a relative to another arbitrator; (iii) before his appointment has provided legal advice to a party in the arbitral proceedings in connection with legal relationships which are their subject matter; (iv) has been a witness, civil appraiser or expert; (v) has common rights, obligations or other common interests (joint work under labour or consultancy agreements) with a party to the arbitral proceedings or its proxies. The existence of circumstances that give rise to justifiable doubts as to the impartiality or independence of an arbitrator may serve as grounds for his challenge.

2. Appointment of arbitrators

a) Methods of appointment

The procedure applicable to the appointment of the arbitral tribunal is essentially a matter to be agreed upon by the parties and there are no explicit mandatory rules under Bulgarian law to curb party autonomy in this area. Obviously, parties may detail the appointment procedure in the arbitration agreement. Where the arbitration agreement is silent on the appointment procedures but refers to a set of existing institutional or *ad hoc* arbitration rules, such rules typically provide for an appointment procedure in reasonable detail (e.g. Articles 13 –15 of the BCCI Arbitration Rules; Article 27 – 30 BIA Arbitration Rules). Finally, the provisions of the LICA, which is applicable to arbitrations having their seat in Bulgaria, may step in where the agreement of the parties on the appointment

[20] Adopted by Resolution of the General Meeting of the Arbitration Collegiums of the Arbitration Court with the BCCI dated 23 February 2005.

procedure is not otherwise established or the agreed appointment procedure was of no avail.

b) Appointing authorities

In case no party agreement is evident from either explicit clauses in the arbitration agreement or a reference therein to some existing arbitration rules, Article 12 of the LICA sets out the rules to be followed with a view to appointing the arbitral tribunal.

In the event a sole arbitrator is contemplated in the arbitration agreement, such arbitrator is to be appointed by mutual consent of the parties. If the parties are unable to reach an agreement, the LICA designates the President of the BCCI[21] as the authority that is to appoint the sole arbitrator upon the request of either party. The LICA does not specify a particular time limit within which the parties must attempt to reach agreement on the joint appointment before the President of the BCCI may be requested to step in to the process.

In arbitrations with three arbitrators (i.e. where the arbitration agreement either explicitly contemplates an arbitral tribunal composed of three arbitrators or is otherwise silent), each party is to appoint an arbitrator and the two arbitrators so appointed are to appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days of receiving a request to that effect by the other party, the President of the BCCI must make the appointment for the defaulting party upon the other party's request. Likewise, if the two appointed arbitrators are unable to reach agreement on the third arbitrator within 30 days of their appointment, the President of the BCCI acts again as the appointing authority.

In each case, the President of the BCCI must, in making the appointments under the LICA rules, have due regard for any qualifications required of the arbitrators by the arbitration agreement and to such considerations as may secure the appointment of independent and impartial arbitrators.

It is noteworthy that in disputes not arising out of commercial transactions, the LICA designates the Sofia City Court as the appointing authority (instead of the President of the BCCI).

In the context of an institutional arbitration, the refusal of either party to cooperate in the constitution of the arbitral tribunal is typically dealt with in the relevant institutional arbitration rules

[21] The President of the BCCI is different from the President of the BCCI Arbitration Court.

applicable to the dispute. Thus, under the BCCI Arbitration Rules each party must appoint an arbitrator and a substitute arbitrator in arbitrations with three arbitrators. If either party fails to do so, the BCCI Arbitration Rules designate the President of the BCCI Arbitration Court[22] as the authority that must appoint, from among the arbitrators on the list of the BCCI Arbitration Court, the arbitrator and substitute arbitrator for any defaulting party. Likewise, in arbitrations with a sole arbitrator, failure by the parties to reach agreement on the arbitrator and substitute due to either party's refusal to cooperate or otherwise, transfers the appointing authority to the President of the BCCI Arbitration Court.

Under the BCCI Arbitration Rules, the President of the BCCI Arbitration Court steps in as the appointing authority also in the event of multiparty proceedings where parties on the claimant and / or respondent side are unable to come up with a joint appointment of an arbitrator and a substitute.

Where, in the context of an *ad hoc* arbitration, the parties have agreed on the appointment procedure short of contemplating a scenario under which either party refuses to cooperate in the constitution of the arbitral tribunal, the LICA rules will again apply (subject to the place of arbitration being in Bulgaria) with the effect that the appointing authority is transferred from the defaulting party to the President of the BCCI (where the dispute to be arbitrated arises out of a commercial transaction) or the Sofia City Court (where the dispute to be arbitrated does not arise out of a commercial transaction). In such cases, the President of the BCCI or the Sofia City Court, as the case may be, is not under obligation to appoint the arbitrator from among the individuals on the list of the BCCI Arbitration Court.

c) Resignation and its consequences

While the LICA and institutional arbitration rules are largely silent on the matter, some conclusions may be drawn on the basis of provisions dealing with the grounds for challenging an arbitrator and termination of an arbitrator's mandate.

Given that under Article 14 of the LICA an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts

[22] The President of the BCCI Arbitration Court is different from the President of the BCCI.

as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties (a provision that is essentially reiterated in the BCCI Arbitration Rules), a resignation by the arbitrator under these types of situations may be deemed to be for valid reasons.

Further, under Article 17 of the LICA an arbitrator is expected to resign if he is unable to perform his functions or fails to act without undue delay (failing resignation, the parties may agree on the termination of the arbitrator's mandate or either party may request such termination from the Sofia City Court).

Outside the circumstances described above, an arbitrator is generally under the obligation to complete his mandate and settle the dispute between the parties. This principle, however, could be put under pressure by an interpretation whereby the arbitral tribunal may not question the resignation of an arbitrator where such resignation is based on the arbitrator's assessment that he is unable to perform his functions.[23] In light of this interpretation, the risk cannot be excluded that the arbitrator could misuse his right to resign by invoking a feigned inability to perform.

3. Challenge and removal

a) Grounds for challenge

Under Article 14(1) of the LICA, any party may challenge an arbitrator "if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties." However, this right is limited by Article 14(2) of the LICA whereby "a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made." With respect to reasons of which the party became aware before the appointment, the appointment operates as a waiver of its challenging rights.

Similarly, Article 17(2) of the BCCI Arbitration Rules provides that any party may challenge an arbitrator if "it has doubts about its

[23] Decision of 26 February 2001 in domestic arbitration case No. 54/2002. In this case, the arbitrator appointed by the respondent is prevented from continuing to carry out his duties and filed a letter with the chairman of the arbitral tribunal explaining that he will no longer serve as arbitrator in that case.

impartiality, in particular if there is evidence that such arbitrator has a personal interest, direct or indirect, in the outcome of the case."

b) Procedure for challenge

Whilst the parties are free to agree on the challenging procedure, they may not exclude the supervisory powers of the Sofia City Court in the event the challenge is dismissed by the arbitral tribunal.

Unless the challenged arbitrator elects to resign or the other party consents to the challenge, the arbitral tribunal is to decide on the matter in the absence of a challenge procedure specifically agreed upon by the parties. Under both the LICA and the BCCI Arbitration Rules, a written statement of the reasons for the challenge is to be filed with the arbitral tribunal within a certain time (15 days and 7 days, respectively under the LICA and BCCI Arbitration Rules) after the challenging party has become aware of the constitution of the arbitral tribunal or any circumstances that may justify the challenge. In addition, no challenge may be made under the BCCI Arbitration Rules after evidence and legal arguments have been presented and the arbitral tribunal has declared that the case is fully submitted and closed the proceedings.

If the arbitral tribunal dismisses the challenge, the challenging party may file an appeal with The Sofia City Court within 7 days of notification that the challenge has been dismissed (Article 16 of the LICA). The decision of the Sofia City Court is final. Neither the challenge nor the appeal against a dismissed challenge prevents the arbitral tribunal from reviewing the case and rendering an award. However, as a matter of practice, arbitral tribunals tend to refrain from proceeding with the case until the outcome of the challenge is clear since the irregular composition of the arbitral tribunal may be invoked as a reason for setting aside the arbitral award at a later stage.

c) Removal procedure

Article 18 of the LICA provides that, where the mandate of an arbitrator terminates for any reason, a new arbitrator is to be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

d) Replacement of arbitrators

Similarly, the BCCI Arbitration Rules provide that, where an arbitrator has been successfully challenged, a new arbitrator is to be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. However, under Article 18(4) of the BCCI Arbitration Rules if the newly appointed arbitrator does not approve of the presiding arbitrator in place, (obviously in arbitrations with three arbitrators), then a new presiding arbitrator must be appointed by the two arbitrators.

4. Arbitrator liability and immunity

Following from the contractual nature of the relationship an arbitrator may be held liable for damages caused as a result of non-performance of his obligations. The LICA does not provide specific rules governing the contractual liability of the arbitrator. In this respect the general rules of contractual liability should apply. However it should be underlined that it is generally accepted[24] in view of the adjudicative function of the arbitrator that the principle of immunity applicable to state judges should also apply to arbitrators. In particular the arbitrator should not be held liable for the arbitral award granted unless his actions qualify as a capital offence (for example the arbitrator has been bribed to grant a wrong arbitral award). Thus premature withdrawal from the arbitration process without good reason for such resignation, failure to act without undue delay, and violation of confidentiality, are possible breaches of contractual duties which may entail liability for the resulting damage.

The LICA does not provide for specific rules governing the possibility to restrict or exclude the arbitrators' liability. In this respect the general rules of contractual liability should apply. Under Bulgarian law complete exclusion of liability is not possible. Pursuant to Article 94 of the Law on Obligations and Contracts (Закон за задълженията и договорите)[25] any agreement by which

[24] Zh. Stalev, Bulgarian Civil Law of Procedure, (Eight Edition, Ciela, Sofia, 2006), 6810

[25] Promulgated State Gazette No. 275/22.11.1950, effective 1.01.1951, Corrected, Izv. No. 2/5.12.1950, amended No. 69/28.08.1951, 92/7.11.1952, SG 85/1.11.1963, 27/3.04.1973, 16/25.02.1977, 28/9.04.1982, 30/13.04.1990, amended and supplemented, SG No. 12/12.02.1993, amended, SG No.

the liability of the debtor for willful misconduct or gross negligence is excluded or restricted shall be considered null and void. Thus parties may agree on restriction or exclusion of arbitrators' liability in other cases.

F. Conducting the Arbitration

1. Law governing procedure

a) Determination of law and rules governing procedure

Under the LICA the chairman of the arbitration tribunal, as opposed to the sole arbitrator, is not empowered to solely decide on the procedural issues. All resolutions of the tribunal, including those on the organization and conduct of arbitration procedure, should be adopted by all the members of the arbitration panel. The tribunal is explicitly empowered by the LICA to issue procedural orders (or resolutions) on specific matters while running the arbitration process including:

(i) resolution for termination of the arbitration proceedings[26] in the cases of: withdrawal of the claim by the claimant (except for the respondent opposes to such withdrawal and the tribunal finds that the respondent has legitimate interest in issuance of an award), mutual consent of the parties or obstacle for consideration of the case on its essence;

(ii) resolution for termination of the arbitration proceedings[27] in case the claimant without being prevented by objective inability does not submit statements of claim within the term agreed by the parties or determined by the tribunal;

56/29.06.1993, amended and supplemented, SG No. 83/1.10.1996, effective 1.11.1996, amended, SG No. 104/6.12.1996, effective 7.01.1997, SG No. 83/21.09.1999, effective 1.01.2000, SG No. 103/30.11.1999, effective 1.01.2000, amended and supplemented, SG No. 34/25.04.2000, effective 1.01.2001, supplemented, SG No. 19/28.02.2003, amended, SG No. 42/17.05.2005, SG No. 43/20.05.2005, effective 1.09.2005, supplemented, SG No. 36/2.05.2006, effective 1.07.2006, amended, SG No. 59/20.07.2007, effective 1.03.2008, supplemented, SG No. 92/13.11.2007, SG No. 50/30.05.2008, effective 30.05.2008

[26] Art. 42 of the Law on International Commercial Arbitration

[27] Art. 33 of the Law on International Commercial Arbitration

(iii) resolution for admission or non-admission of alteration of the claims or material objections of the parties.[28] It is provided for in the LICA that the tribunal should not admit such alteration if it will considerably cumber the opposite party;

(iv) resolution for appointment of one or more expert in order to clarify specific issues that require special knowledge;

(v) order to one or both parties to provide the expert(s) with the necessary documents and information;

(vi) order to the appointed expert to participate in the oral hearing and to explain and clarify the expert report on the assigned task.

As evident from the above examples, in some of the cases (e.g. in case the parties agree on termination of the arbitration) the tribunal should simply apply the respective legal provision stating that a procedural order has to be issued. In most of the cases however, the tribunal has discretion to estimate and decide whether the respective procedural order corresponds to the relevant facts and circumstances ascertained on the case. The tribunal, for instance, should precisely estimate whether the omission of the claimant to submit timely his statements of claim is due to objective inability, whether the alteration of the claim requested by one of the parties shall encumber the other party and to what extent, etc.

As the arbitration is one-instance procedure the procedural orders or resolutions of the tribunal may not be appealed. However, since some of them may affect the validity of the award they may be indirectly controlled by the state court in the set aside process.

The substance-procedure distinction is closely related to the choice of law as well as to the grounds for challenge of the arbitration award. This issue is also connected with the course of the arbitration process in accordance with the principle of efficiency: it is common practice of the Bulgarian courts, including the arbitration institutions, to run the dispute proceedings by resolving the procedural issues first and finally to decide on the cases by considering the substantive matters. However, such a distinction may not be absolute and in all cases the close relation between the substantial and procedural issues should be taken into consideration.

[28] Art. 28 of the Law on International Commercial Arbitration

The LICA as well as the Rules do not provide for special definitions or provisions on distinction between substantive and procedural matters. Under the legal doctrine the maters of substance are those related to the issue whether the claim is grounded and the procedural matters refer to the issue whether the claim is admissible. In general, substantive rules state what are the rights and obligations of the legal persons; the procedural norms instruct them how to defend their infringed rights and interests before competent judicial bodies.

b) Notion and role of seat of arbitration

The place of arbitration is extremely important for the enforcement of the award. The seat of arbitration determines the nationality of the award. If the seat is in Bulgaria then the award qualifies as domestic while an award made in arbitration seated abroad makes it a foreign arbitration award (FAA). Bulgarian procedural law subjects domestic awards and FAAs to different enforcement regimes. While domestic awards are directly enforceable, without need for any special recognition procedure, FAAs undergo three separate court procedures for recognition and enforcement which usually takes years. In view of the writer this dualistic treatment runs counter to the public law obligation of Bulgaria undertaken by virtue of Article III of the New York Convention. According with the said provision there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which New York Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Application of a great number of the provisions of the LICA is presupposed by an arbitration seated in Bulgaria. Therefore, the seat of arbitration determines *lex arbitri* as *lex loci arbitri.* Hence mandatory procedural rules of the place of arbitration are relevant.

The place of arbitration in Bulgaria empowers Bulgarian courts to exercise supportive and supervisory powers in relation to arbitration. The court may order conservatory measures aiming at restraining the dissolution of assets. The courts of the seat (*locus arbitri*) are competent to adjudicate upon challenge of the award.

c) Methods for selection of seat absent party choice

The LICA stipulates that parties may agree on the place where the arbitration will take place. In case of the absence of an agreement by the parties on this issue, the place shall be determined by the arbitration court. In such scenario the circumstances of the dispute and the convenience of the parties should be taken into consideration by the arbitration tribunal.

Pursuant to the BCCI Arbitration Rules the place of the arbitration hearings should be the city of Sofia. However, the arbitration tribunal may determine a place of the arbitration other than the city of Sofia upon request by the parties or on its own initiative.

d) Mandatory rules of procedure

When the seat of arbitration is in Bulgaria, party autonomy with respect to the application of the substantive law chosen by the parties is restricted by the mandatory rules of Bulgarian law. Although there is no express provision in the LICA, as a matter of practice, in absence of express choice of applicable substantive law, the tribunal would apply the conflict of laws rules of the place of arbitration.

2. Conduct of arbitration

a) Basic procedural principles

Besides the principles of disposition and equality of the parties, the arbitral tribunal should observe and apply the following basic principles and rules:

(i) Adversarial (competitive) process. The parties are entitled to participate in the arbitration process, to engage and present evidence supporting their positions, to object and oppose to the statements, evidence and position of the other party as well as to be informed and react to the actions of the arbitral tribunal.

(ii) Independence and impartiality. The arbitral tribunal must lead the process in an impartial manner and ground its award on the ascertained facts, collected evidence and the applicable law.

(iii) Confidentiality. The arbitration is non-public and any information disclosed by the parties in the course of the arbitration process must be kept strictly confidential.

(iv) Efficiency. The arbitration dispute should be conducted and resolved with reasonable promptness, in a manner convenient and efficient for both parties.

(v) Due Process and Timely Notification. It is a mandatory rule provided for in the Law[29] that the parties must be timely notified for any procedural actions carried out with regard to the arbitration case so that they will be able to prepare their case and answer the case of their opponent.

b) Party autonomy and arbitrators' power to determine procedure

Party autonomy is an expression of the principle of disposition[30] in civil proceedings, whether in the state court civil process or arbitration. Because of the consensual nature of the arbitration process the disposition principle finds therein much broader application also expressed in the possibility of the parties to freely determine how the arbitration should be conducted. The parties in this respect may agree on the manner of constitution of the arbitration panel as well as on the place and the language of the arbitration, the applicable law and the particular procedural rules to be followed. Undoubtedly, the freedom of the parties to agree upon the procedural rules of the arbitration gives them the flexibility and control which is considered of essential importance and a main advantage of arbitration compared to state court dispute resolution.

Pursuant to the effective Bulgarian legislation, party autonomy to determine the arbitral procedure is not limited by explicit provisions. However, this autonomy is not absolute and may not override the following mandatory principles:

(i) Equality of the parties in dispute. Explicitly the Law[31] requires that the arbitration procedure notwithstanding

[29] Art. 31 of the Law on International Commercial Arbitration.

[30] Under Bulgarian legal doctrine the principle of disposition is apprehended as subjection of the defense of the infringed rights and interests to the will of the concerned party.

[31] Art. 22 and Art. 24 of the Law on International Commercial Arbitration.

whether agreed by the parties or determined by the arbitrator must ensure equal possibilities of the parties to defend their rights. Any arrangement stating that one of the parties shall not be able to participate, present evidence, object, give opinion or exercise other procedural rights in the arbitration shall be null and void.

(ii) Compliance with the public order and the moral norms. Although not explicitly provided for in the LICA it is inadmissible under the general provisions of the Bulgarian law that the parties agree an arbitration procedure in contradiction of the public order or the moral norms.

(iii) Mandatory provisions of the applicable law and the principles accepted by the institutional arbitrations. In all cases the parties may not ignore by their agreement on the arbitral procedure the mandatory rules of the applicable law. This limitation is explicitly adopted by the Rules of the leading arbitration institutions [32] where, furthermore, it is envisaged that the parties' stipulations on the arbitral procedure may not contradict the principles of the Rules.

(iv) Control of the state court over the defective award. The parties may not exclude by their arrangement the provisions of the law establishing grounds and procedure on challenging of the award by the state court. These rules are designated to ensure the control of the state upon the arbitration and have mandatory nature.

c) Documents only arbitrations

Pursuant to an explicit provision of the LICA[33] the parties may agree that their case shall be resolved based on written evidence and opinion only and without oral hearings. The same option is regulated by the Rules,[34] where it is also stated that the case shall be considered without open hearings if the respondent acknowledges

[32] Art. 3 (2) of the BCCI Arbitration Rules, Art. 5 (2) of the Rules of the Arbitration Court at the Bulgarian Industrial Association.
[33] Art. 30 of the Law on International Commercial Arbitration.
[34] Art. 24 (3) of the Rules of the Arbitration Court at the BCCI and Art. 36 (3) of the Rules of the ARBITRATION COURT at the BIA.

the claim by his written response to the statements of claim.[35] In this second hypothesis the arbitration tribunal is bound to proceed based on written documents only, while in the case of an agreement between the parties for arbitration procedure without open hearings, the tribunal may decide that, nevertheless, an oral hearing is necessary.

d) Submissions and notifications

Submissions are regulated lightly by the LICA.[36] The only formal requirements in this regard concern the minimal content of the statement of claim and the written response of the respondent as follows:

> The statement of claim must specify: i) the names and the addresses of the parties, ii) the factual circumstances on which the claim is based, iii) what the tribunal is requested for (*petitum*), iv) what evidence the claimant will present. The written evidence should be enclosed to the statement of claim.

The written response to the statement of claim must state the respondent's position and opinion on the statement of claim and specify what evidence will be engaged by the respondent. The written evidence should be presented jointly with the written response. Both the statement of claim and the written response must be in simple written form signed by the parties or their duly authorised representatives. Contents of the statement of claim and necessary appendices thereto are regulated in more detail by the Rules of the arbitral institutions.[37]

e) Deadlines, and methods for their extension

The only statutory deadline of preclusive nature is that related to submission of a counterclaim. Pursuant to the LICA[38] the respondent

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[35] Art. 24 (4) of the Rules of the Arbitration Court at the BCCI and Art. 36 (4) of the Rules of the ARBITRATION COURT at the BIA.
[36] Art. 27 (1) and (3) of the Law on International Commercial Arbitration.
[37] Art. 5 of the Rules of the ARBITRATION COURT at the BCCI; Art. 17 of the Rules of the ARBITRATION COURT at the BIA.
[38] Art. 28 of the Law on the International Commercial Arbitration

may file a counterclaim together with the written response at the latest. However, the Rules differ from said provision stating that the counterclaim must be submitted until the first hearing at the latest[39] or at a later stage if the counter right is confirmed by a final judgment/award or not disputed by the claimant.[40]

Other legal deadlines (e.g. for submission of statement of claim and written response) could be agreed between the parties or determined by the arbitral tribunal.[41] Failure to comply is permissible if the failure is due to a good reason[42] subject to proof by the party in delay.

Notifications related to the arbitration process must be served to the parties in a timely and proper manner. Pursuant to the LICA[43] it is mandatory that each party is informed in a timely fashion of the arbitral hearing and all procedural actions and issues, including on site inspection to be carried out by the tribunal, experts reports, and presentation of new evidence and submissions of the opposite party. The said imperative rule is designed to further the adversarial process.

In case the respondent is declared insolvent or in insolvency procedure conducted under Bulgarian law,[44] any pending arbitration or state court proceedings related to proprietary claim shall be stayed by operation of law. Provided that the claim, which is being arbitrated, has not been recognized within the framework of the insolvency process, then the arbitration proceedings shall be resumed with the participation of the receiver and the claim whatever its nature originally was, shall be deemed a claim for a declaratory relief aiming to establish the existence of the debt. The stay of the proceedings prescribed by the law is not applicable to arbitration cases which concerns non-proprietary claims, e.g. a claim concerning deficiencies in a contract or contract adaptation to newly arisen circumstances and the like. The idea behind the mandatory rule for stay and standstill of all pending proprietary claims is that the insolvency procedure is a process of universal execution against

[39] Art. 9 (4) of the Rules of the ARBITRATION COURT at the BCCI
[40] Art. 22 (4) of the Rules of the ARBITRATION COURT at the BIA
[41] Art. 27 (2) of the Law on the International Commercial Arbitration
[42] Art. 33 of the Law on the International Commercial Arbitration
[43] Art. 31 of the Law on the International Commercial Arbitration
[44] Under the Bulgarian law insolvency may be ascertained and announced only within a special procedure conducted by the state court under the provisions of the Law on Commerce, Chapter IV

the entire property of the insolvent debtor aiming at satisfaction of all recognised claims provided that there are sufficient proceeds. It is for this reason why all creditors, including plaintiffs in arbitration cases, should attest their rights within the insolvency procedure.

f) Legal representation

The LICA and the Rules do not provide for any specific rules regarding procedural representation of the parties in the arbitration process. Each party has the unrestricted right to choose and authorise its representative(s) in the arbitration. In this regard the persons able to represent a party in arbitration proceedings must be validly authorised in accordance with the applicable law. Special capacity or qualification of the representative is not required.

3. Taking of evidence

a) Admissibility

There are no formal requirements determining the admissibility and weight of evidence in the arbitration process. It is a general rule promulgated expressly in the Rules[45] that the tribunal considers the evidence freely and by its internal belief. The only more specific power of the tribunal in this respect provided for in the Rules of the Arbitration Court at the BCCI states that, taking into consideration all the circumstances of the case, the tribunal may accept as proven certain facts regarding which one of the parties has impeded collection of evidence admitted by the tribunal.[46]

b) Burden of proof

Under Bulgarian law the arbitration procedure is qualified as adversarial or competitive. It is based on the concept that each party is entitled to participate in the process and may influence equally its own progress as well as the final decision of the tribunal. As explained herein above, the tribunal must ensure the compliance of the arbitration process with this principle.

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[45] Art. 29 (5) of the Rules of the ARBITRATION COURT at the BCCI; Art. 38 (3) of the Rules of the ARBITRATION COURT at the BIA.
[46] Art. 29 (2) of the Rules of the ARBITRATION COURT at the BCCI.

The collection of evidence could be described as a competition between the parties in which they strive to prove their positions and statements. It is a general rule that each party bears the burden of proof for the facts and circumstances which ascertain its alleged rights and from which the party derives favourable consequences. This principle is reproduced in the Rules of the institutional arbitration courts[47] stating that each party must prove the circumstances on which it bases its claim or objection.

Nevertheless, the arbitrators are not indifferent to the process of collecting evidence. The tribunal may require the parties to present evidence, to check the evidence already collected or to collect evidence by its own initiative.

c) Standards of proof

The party which bears the burden of proof has to demonstrate the relevant facts in such manner so that the arbitrators are firmly convinced that the alleged facts are true. Proof aimed at establishing only a probability for the existence of the asserted facts is admissible as far as such facts do not determine the final conclusion about the subject of the dispute.

d) Documentary evidence and privilege

The claimant shall attach to its statement of claim the written evidence relevant to the dispute, whereas the respondent shall attach such evidence to the response of the statement of claim.

The parties may either present the original written documents or copies thereof, certified as true to the original by the parties themselves. At the request of the arbitral tribunal, any original must be presented for inspection. The arbitral tribunal may request the translation of the documents to another language when such translation is considered important for the case.

Email correspondence may also be used as evidence. In case of disagreement on the authenticity of the email messages or their delivery to the addressee, other reliable evidence shall be used including testimony of officers of the internet delivery companies.[48]

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[47] Art. 29 (1) of the Rules of the ARBITRATION COURT at the BCCI; Art. 38 (1) of the Rules of the ARBITRATION COURT at the BIA.

[48] Article 29, para.3 of the Rules of the Arbitration Court at the Bulgarian Chamber of Commerce and Industry

The system of privilege is not applied in Bulgaria. However, the arbitral tribunal and parties shall keep confidential the information disclosed during the arbitration proceedings. Any minutes from the hearings, reports and other documents, received by the arbitral tribunal, shall be deemed confidential.[49]

e) Production of documents

The arbitral tribunal is entitled to require from parties the submission of additional documents, as well as to request third parties (physical persons and legal entities) to issue certificates or submit documents at their disposal. The arbitrators may fix time limits for submission of evidence, as well as may extend or restore such time limits in case the respective party has justified valid reasons therefore.[50]

Failure to comply with the time limits would have a different impact on the party's position depending on each particular case. On one hand, in case the argued circumstances are favorable for the party's case, such circumstances would not be considered established and the arbitral tribunal would not take them into account during the deliberations on the case. However, in case the party has created obstacles to the collection of evidence as required by the arbitral tribunal, the latter might consider the respective circumstances as being established.[51]

f) Witnesses

Generally every person, including a party's officer, employee or other representative, who has knowledge about the circumstances of the dispute, can act as a witness, except where the parties have provided otherwise. The parties and legal advisors of the parties, however, cannot be witnesses within the same proceedings. Whether a particular witness is reliable or the weight that should be given to his evidence is a matter to be decided in due course by the arbitral tribunal, taking into consideration all relevant circumstances of the case.

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[49] Article 6, para.1 of the Rules of the Arbitration Court at the Bulgarian Industrial Association

[50] Article 30, para.5 of the Rules of the Arbitration Court at the Bulgarian Chamber of Commerce and Industry

[51] Article 29, para.2 of the Rules of the Arbitration Court at the Bulgarian Chamber of Commerce and Industry.

The LICA and Rules[52] do not provide for any special rules related to the preparation of witnesses. The Law and Rules do not provide for any special rules related to written witness statements. Since there is no explicit prohibition on the admissibility of such evidences and provided that the parties have not agreed otherwise, the tribunal is entitled to admit such statements (i.e. affidavits).

The LICA and Rules do not provide for any special rules related to the cross-examination of witnesses. However, the parties are entitled to question the other parties' witnesses without limitations. The arbitral tribunal may question witnesses at any time before, during, or after examination by the parties.

Witnesses shall be questioned at the hearing only in case the party presenting the witness has specified the circumstances to be clarified thereby, provided that the witness appears voluntarily before the arbitral tribunal.[53]

If a party wishes to present evidence from a person who will not appear voluntarily, upon approval of the arbitral tribunal the party shall apply for a subpoena before the state court having jurisdiction on this matter. The party shall identify the intended witness (name and address), describe the subjects on which the witness's testimony is sought and state why such subjects are relevant and material to the outcome of the case. The state court is under obligation to subpoena and question the designated witness.[54] The practice of the courts differs with regard to the procedure. On one occasion the court requested the party applying for such assistance to get a list of questions approved by the arbitration tribunal prior to examination of the witness.

g) Tribunal-appointed experts

According to the Law and Rules, upon request of the parties or at its own discretion, the arbitral tribunal is entitled to appoint one or more experts having special knowledge in order to report on specific issues determined by the arbitral tribunal.

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[52] The Rules of the Arbitration Court at the Bulgarian Chamber of Commerce and Industry <http://www.bcci.bg/bulgarian/arbitration/bg/> and The Rules of the Arbitration Court at the Bulgarian Industrial Association <http://www.bia-bg.com/arbitration/documents/Pravilnik.doc>

[53] Article 30, para.4 of the Rules of the Arbitration Court at the Bulgarian Chamber of Commerce and Industry.

[54] Article from the Civil Procedure Code.

Expert evidence normally assists the arbitral tribunal in forming an opinion in relation to technical matters of specialist knowledge. Therefore, the expert merely assists the arbitral tribunal to determine relevant issues of fact but the decision is ultimately the tribunal's. The arbitral tribunal may request that the parties provide any relevant and material information to the experts or to provide access to any relevant documents, goods, samples, personal or real property, for inspection when necessary for the preparation of the report. [55] The parties shall submit any evidence, on which the report is grounded except where the parties have provided otherwise.

The expert shall report in writing to the arbitral tribunal. The report shall describe the method, evidence and information used in arriving at the conclusions. The tribunal shall ensure that a copy of the report has been sent to the parties in a sufficient time prior to the hearing so as to give them opportunity to review the report and prepare for the oral examination of the expert.

The basic rule is that the arbitral tribunal shall designate the issues on which the expert shall report after consulting with the parties. It follows that the parties are entitled to submit questions to the experts; however, the arbitral tribunal decides on their relevance to the dispute and finally designates the issues subject to the expert report.

The experts shall be independent from the parties and the arbitral tribunal. They shall not be relatives of the arbitrators or be employees or otherwise related to the parties. The absence of relationships between experts, parties and arbitrators ensures the experts' impartiality in the case.

The LICA and Rules do not stipulate special rules regarding the right to reject a proposed/appointed expert. Generally the arbitral tribunal appoints three experts, where each party is entitled to propose one expert and the arbitral tribunal appoints the third expert.

Although not compulsory, in the prevailing number of cases, the arbitral court, upon request of the parties or at its own discretion, summons the expert to be present and questioned at the hearing. The parties have an opportunity to comment and ask the tribunal to include additional issues to be determined by the expert. In case of a disagreement with the expert report, the parties are entitled to request the appointment of other experts to provide conclusions on

[55] Article 36, para.1 of the Law on International Commercial Arbitration.

the controversial issue. Alternatively, each party may request a report on the same issues to be prepared by three experts. If the request is granted, each party shall appoint one expert and then the court shall appoint the third expert.

h) Party-appointed experts

Bulgarian Law does not recognize the concept of party-appointed experts.

4. Interim measures of protection

a) Jurisdiction for granting interim measures

Besides limitations on the arbitrator's authority stemming from the ambit of the applicable rules and mandatory rules of *lex arbitri*, there are inherent limits on the arbitrator's power arising directly from the contractual nature of arbitration. A tribunal may not order provisional measures addressed to third parties not parties to the arbitration. Furthermore, unless agreed by the parties, a tribunal lacks coercive power to enforce its measures and cannot impose penalties for non- compliance. This disadvantage is mitigated by the persuasive powers of the tribunal. It can draw negative interference from non-compliance with its orders or take that into account when deciding on the cost of arbitration. The third limitation is that interim relief can be granted only once the tribunal has been set up.

The tribunal is not entitled by operation of law to impose attachments of assets. Even if such power stems from the arbitration agreement, the order of the tribunal cannot be enforced. According to Bulgarian Procedural Law this power is exclusively reserved for the state courts.

b) Availability of preliminary or ex parte orders

Article 21 of the LICA introduces the right of the parties to submit motions to the arbitration tribunal to compel the other party in taking suitable measures, which will serve as a conservatory measure insuring the rights of the demanding party. The tribunal may ask the other party to undertake such measures. Evident from this provision is that the tribunal has very limited power with reference to the imposition of appropriate interim measures of protection.

The LICA and applicable Rules do not impose the requirement that the measure of interim relief be connected with the subject matter of the dispute. Thus the main purpose of the provisional measure is to preserve the status quo, to stabilize the relations between the parties to the dispute and to secure a successful enforcement of the award.

As a matter of practice the arbitral tribunals abstain from making such orders, as the arbitrators feel that by imposing such measures they may prejudice the case.

c) Security for costs

Should the tribunal, following the request of one of the parties, enter an order for interim relief, it may ask the requesting party to provide security. The purpose of this security is to indemnity the other party if the claim proves to be unsuccessful.

5. Interaction between national courts and arbitration tribunals

According to Article 6 of the LICA, state court actions related to arbitration procedures are allowed only in the cases envisaged by the LICA. Therefore, Bulgarian Arbitration Law enjoys the principle that the state court shall not encroach upon the jurisdiction and authority of the arbitration tribunal and interfere with the parties' contractual agreement to try their dispute by the chosen method for dispute settlement. The state court shall assist in the arbitration process before or during arbitration proceedings, and after the arbitral award has been passed.

The provisions of Bulgarian Legislation regulating the court intervention are of mandatory nature and therefore apply to all arbitrations seated in Bulgaria, irrespective of which is the national law applicable to the arbitration procedure. This is expressly stated with reference to the supervisory powers of the Sofia City Court in the event a challenge against an arbitrator is dismissed by the arbitral tribunal.

a) Court assistance during the arbitration

Section 37 of the LICA allows the arbitration tribunal, or a party to the arbitration proceedings with approval of the arbitration tribunal, to ask for the assistance of the state court in the gathering

of evidence under the compelling regime of the Civil Procedure Code. The state courts are under obligation to assist the arbitration court. The assistance of the state court may for example be required to compel the attendance of witnesses and interrogate them, order third party disclosure, or require an inspection of the subject-matter.

The difficulty associated with this provision is that there is no special procedure for the collection of evidence in support of the arbitration process. As a result the judges apply different rules. For instance, if the requested evidence is an examination of a witness then the court may simply subpoena the witness without having any knowledge of the facts of the case to give the parties opportunity to question the witness. Alternatively, the state court may ask the arbitration tribunal to approve a list of questions which shall be addressed to the witness. Application of different procedures leads to uncertainty. As has been stated above, the tribunals lack power to order the attachment of assets.

The parties to the arbitration agreement are entitled at any moment before or after the commencement of the proceedings to seek interim relief available to the state courts as per the Civil Procedure Code. It is noteworthy that pursuant to Article 25 of the Code on International Private Law, Bulgarian Courts have jurisdiction to enter an order for provisional measures provided that the asset is located in Bulgaria and the award is capable of being recognized and enforced in Bulgaria.

b) Court assistance after the arbitration

Once an award has been rendered, Court assistance may be sought when a challenge is mounted against the award or a party seeks to enforce it.

6. Multiparty, multi-action and multi-contract arbitration

a) Consolidation of arbitrations

The applicable rule on multi-party arbitrations is that any party to the AA can be a party to the arbitration proceedings, staying therein either on the part of the claimant or on the part of the respondent.

In the event that the AA is entered into among more than two parties and all of such parties are constituted either as claimant or respondent in the arbitration proceedings, the objection to the

plurality of either party to the arbitration proceedings will be unsustainable.

In the event that the AA is entered, as per example, between two parties and such parties are constituted in the arbitration proceedings as claimant and respondent, respectively, the objection to the plurality of either party to the arbitration proceedings will be valid and sustainable, since the arbitration proceedings may validly be developed and binding only on the parties to the AA.

If the AA does not include an express provision regarding the constitution of the arbitral tribunal, the applicable rules of the Bulgarian law provide that a dispute submitted to arbitration will be resolved by one or three arbitrators. In the event of a single arbitrator, the claimant and respondent agree on the arbitrator. In the event of an arbitration tribunal of 3 arbitrators, the claimant and respondent each appoint one arbitrator and such two appointed arbitrators jointly appoint the third arbitrator on the tribunal.

It is permissible under the law to consolidate arbitration proceedings subject to the applicable requirements regarding the arbitrability of the relevant disputes. Case law on this issue is very limited.

b) Joinder of third parties

A third party to the arbitration proceedings can step in (or be dragged into) the proceedings as claimant or respondent subject to consent of both the claimant and the respondent, and of the third person. This procedural action is permissible until the date of the respondent's statement of response to the statement of claim under the proceedings.

In any event, the third person must have been or must become a party to the AA and such person's claim or the claim against such person, as the case may be, must be arbitrable.

7. Law and rules of law applicable to the merits

a) Determining the applicable law and rules

The issue of applicable substantive law arises in the context of international arbitration cases. In case of domestic arbitration, i.e. between parties with residences or seats in the Republic of Bulgaria, the provisions on the determination of the applicable substantive law applies when the legal relations have such an international

private law element which as result of application of the Bulgarian Private International Law leads to the application of foreign law.[56]

b) Party autonomy

The LICA recognizes party autonomy, i.e. parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration.[56] This choice is and shall be binding on the arbitration tribunal. This is also confirmed in BCCI Arbitration Rules, Article 36 (1). The intention of the parties as to the applicable law may be express or implied. Arbitrators have found there to be an implied choice of the applicable law where the parties argue their case on the basis of the same law, even though they have not expressly agreed on its application.[57] The choice of applicable law made by the parties is a choice of substantive law. Therefore reference to the conflict of laws rules of the chosen legal system, i.e. renvoi, is excluded. Party autonomy is subject to certain limits such as the mandatory rules of the applicable law and the mandatory rules of the seat of arbitration. The latter shall be applied in cases where failure to do so may be inconsistent with public policy, e.g. where an element of illegality or immorality is asserted.

c) Determination by arbitrators

When parties have made no choice of law with respect to the merits of the dispute, the arbitration tribunal shall determine the applicable law using the conflict of law rules which it considers appropriate (*voice inderecte*). As a matter of practice, arbitration tribunals apply conflict rules of the place of arbitration. The BCCI Arbitration Rules provides that when there is a convention applicable to the subject matter of the dispute, the tribunal shall apply the rules of the convention. On one occasion the arbitration tribunal stated that the Convention on International Sale of Goods (CISG) shall apply to the merits of the dispute provided that all

[56] Law on International Commercial Arbitration, Transitional and Concluding Provisions, para 3 (3).
[56] Law on International Commercial Arbitration Article 38(1).
[57] BCCI International Arbitration Case 2/1994 Ciela.

conditions for application of the CISG were present.[58] In all cases the tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

The LICA deviates from the Model Law by not providing the option for the parties to authorize the arbitration tribunal to decide *ex aequo et bono* or as amiable compositeur. Therefore, in no circumstances may the tribunal may decide according to fairness and common sense principles at the exclusion of the applicable rules of law.

d) Non-national substantive rules, general principles of law and transnational rules

There is no legislative ground for the application of *lex mercatoria* as general principles of international commercial law and common standards and rules. According to the respective provision of LICA and BCCI Arbitration Rules, the choice made by the parties shall refer to law and not to general principles of law or to rules which have not made a legal order.

8. Costs

a) Arbitration costs

Costs related to arbitration can be divided into two main groups: arbitration costs and legal costs. Arbitration costs include the arbitrator's fees, expenses connected with the hearings, fees and expenses of any expert appointed by the tribunal, and the administrative expenses of the arbitration institution.

Statutory law does not expressly address advance on costs in arbitral proceedings. The BCCI Rules operate under an advance on costs system. The advance on cost is payable solely by the claimant. The Chairperson of the Arbitration Court with the BCCI determines the amount of the advance on the costs associated with expenses connected with the hearings. The Chairperson fixes the deposit

[58] BCCI International Arbitration Case 33/1998 Ciela, the principle applied by the arbitration tribunal in BCCI International Arbitration Case 16/2006 (not published).

based upon anticipated costs related to the proceedings. The amount of the advance for costs associated with arbitrator's fees and administrative expenses of the arbitration institution is determined in the Tariff on Arbitration Fees and Costs for International Arbitration Cases which is a part of BCCI Rules.[59]

The Chairperson fixes separate advances with respect to principle claim and a counterclaim. When in the course of the arbitral proceedings one of the parties requests that evidence be collected, the arbitration tribunal has discretion to determine the additional advance on costs payable by the requesting party. [60]

When the hearing and meetings are conducted at location different from the place and seat of the arbitration, the arbitration tribunal has discretion to determine additional advance on cost payable in equal shares by claimant and respondent.[62]

When a party appointed arbitrator has incurred expenses connected with his/her participation, the respective party shall bear those expenses regardless of the outcome of the case.[61]

The BCCI Rules do not expressly provide the consequences for a claimant failing to pay an advance on cost. However, it is established practice that if the claimant fails to pay the initial advance on cost, the Chairperson of the Arbitration Court will not proceed with the service of the statement of claim to the respondent. If a party fails to pay an advance on cost for the collection of evidence, the arbitration tribunal has discretion to refuse collection of that evidence.[62]

Upon filing of the claim the claimant is required to pay an arbitration fee, which covers both administrative costs and arbitrators' fees. The arbitration fee is fixed on the basis of the amount in dispute and is calculated in accordance with the schedule of costs contained in the Tariff on Arbitration Fees and Costs for International Arbitration Cases ("Tariff") of the BCCI Rules.

The Tariff indicates the maximum tariff amount to be charged and provides a scale of administrative charges applicable depending on the value in dispute.

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[59] See Article 47 (1) from BCCI Rules.
[60] See Article 47 (2) from the BCCI Rles.
[62] See Paragraph 7 (1) from the Tariff on Arbitration Fees and Costs for International Arbitration Cases.
[61] See Paragraph 7 (2) and (3) from the Tariff on Arbitration Fees and Costs for International Arbitration Cases.
[62] See Article 47 (3) from the BCCI Rles.

If a sole arbitrator adjudicates the case, the arbitration fee is decreased by 50%.

In addition, if the arbitral proceedings are prematurely terminated depending on the stage of the procedure, 75% or 50% of the arbitration fees as the case may be shall be reimbursed to the claimant.

In the absence of an agreement by the parties, the arbitration tribunal shall order the losing party to pay the cost for arbitration.[63] The amount of the cost includes the arbitration cost and the legal cost of the prevailing party.

The arbitration tribunal shall make special provisions regarding the allocation of costs in its final award.

b) Legal costs

The arbitration institutions do not collect value added tax as part of the advance on cost. Providing a private dispute resolution service for the parties qualifies the arbitrators as persons exercising independent business activity. As such, arbitrators are subject to registration with the competent tax authority for the purpose of VAT taxation.

There are no binding tariffs which determine legal fees for representation in arbitration proceedings. Regulation № 1 in effect as of 9 July 2004 issued by the Supreme Bar Council (hereinafter referred to as "Supreme Bar Council's Regulation") fixes the minimum tariff amount to be charged. As per this regulation, fees are calculated based on the amount in dispute. However it is the usual practice for attorneys to agree on higher amounts. Fee arrangements between lawyers and their clients, such as an hourly rate for legal work or flat fees, are becoming common practice. Under Bulgarian Law, contingency and success fees are not prohibited save in the case of legal representation in criminal cases.

The prevailing party may make a claim to the tribunal that it be paid costs for legal representation and assistance if such costs were proved during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable. In defining what legal cost may be reasonable the tribunal shall take into account the amount in dispute, the

[63] See Paragraph 8(1) from the Tariff on Arbitration Fees and Costs for International Arbitration Cases.

complexity of the subject-matter, the time spent, and any other relevant circumstances of the case. Provided that the tribunal finds that the amount of the legal cost is not reasonable, it may award a less amount but the minimum, which is subject to recovery, is three times the minimum as per the Supreme Bar Council's Regulation.

If the successful party fails to prove the legal costs incurred in the proceedings, and provided that the successful party claims reimbursement of legal cost, the tribunal shall determine this cost at the minimum as set out in the Supreme Bar Council's Regulation.

G. Arbitration Award

1. Types of awards

a) Partial awards

With the exception of the BCCI Arbitration Rules there are no other legal entities that examine partial arbitration award issues. In analogy with the interim awards, the Arbitration Court with the BCCI may pass a partial award if the circumstances on the dispute demand such award.

Furthermore, the LICA provides a special provision regarding additional arbitration awards. An additional award may be passed on the claims that have not been considered by the arbitration tribunal. Such additional award may be requested by one of the parties that shall notify the opponent party for its claim within 30 days after receiving the award. The arbitration court should render an additional award within a 60-day period if the claim is well-grounded.

b) Final awards

The arbitration dispute shall be terminated by the final arbitration award pursuant to the provisions of the LICA. Where the arbitrators are more than one, the final award shall be rendered by a majority unless the parties have agreed otherwise. The final award shall become effective by its delivery to one of the parties and shall become obligatory to both parties. The Rules of the Arbitration Courts with BCCI and BIA strictly follow the compulsory regulations of the law that the arbitral award should be final and put an end to the dispute.

c) Interim awards

Neither the LICA, nor the *BIA Arbitration Rules* set forth any explicit provisions regarding the interim type of award. The BCCI Arbitration Rules provides that a preliminary award may be rendered in case the circumstances on the arbitration dispute demand so.

It is to be noted that to the best of our knowledge the courts of arbitration with BCCI and BIA, which are the leading arbitration institutions in the Republic of Bulgaria, do not have a large practice on setting such preliminary awards.

d) Consent awards

Pursuant to the LICA, the BCCI Arbitration Rules, and the BIA Arbitration Rules, the dispute shall be dismissed if the parties reach an agreement. Furthermore the parties may request the arbitration court to incorporate such agreement in an arbitration award under agreed conditions. The award on agreed terms shall have the same force as the award on the merits of the dispute. It is to be noted that the grounds for an award on agreed terms do not have to be specified in the award.

e) Default awards

The issues regarding the default award, where the arbitration tribunal may continue with the arbitration proceedings and pass an award in the absence of the party that fails to appear in person or to be represented at the arbitration hearings, are not covered by Bulgarian legislation. Nor is this procedure recognized by the BCCI and BIA. Furthermore, the Rules of the Court of Arbitration with BCCI stipulate that each party may require the case to be heard in its absence.

2. Form requirements

a) Essential content

According to the LICA, the award shall be made in writing. The Rules provide for the mandatory content of the award: the name and seat of the arbitration court; date and place of the award; arbitrators' names; identification of the parties and the other participants in the case; subject and summary of the circumstances of the dispute; the

rulings, including the obligations imposed upon the respective parties, (i.e. payment of the costs); reasons behind the rulings; and arbitrators' signatures.

The Rules of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry additionally specify that in case the arbitrators are not listed by the Bulgarian Chamber of Commerce and Industry, the chairman of the arbitration court shall appoint a three-member committee, which shall verify whether the award complies with the requirements of the LICA and the Rules of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry in terms of form and minimum content of the award. The committee shall decide in writing thereon within 3 days as of the award's submission with the court. The arbitrators shall comply with the recommendations of the committee within 3 days as of their submission.

b) Reasons

According to the LICA and Rules, the award shall state the reasons upon which it is based, except where the parties have provided otherwise or where the award is based on a settlement on agreed terms. The need for a reasoned award is a guarantee that the award will be recognised and enforced in national courts since the absence of grounds might be deemed contrary to the public policy of the country in which enforcement is sought.[64]

c) Time limits for making award

According to the LICA and Rules, the award shall indicate the place and date it was made. Indicating the date is significant because there are fixed time limits for requesting an amendment, correction and interpretation of the award running as of the date of the award's making.

d) Notification to parties and registration

According to the LICA, once the award is signed by the arbitrators, it shall be delivered to the parties. The award is considered announced and entered into effect with its delivery to

[64] Lawrence W. Newman, Richard D. Hill, Leading Arbitrators' Guide to International Arbitration (2nd Edition, Juris Publishing, 2008), p.402.

one of the parties. The effective award becomes enforceable and binding on the parties.

According to the Rules, once signed the award shall be registered in the awards' book, whereas a copy of the award shall be delivered to the parties only after the costs associated with the arbitration case have been fully paid by the parties. The parties and their representatives shall have access to the awards' book.

In case the parties have not agreed on the language of the award and one of the parties has its seat abroad, the award may be translated and sent to such party at its cost if requested thereby. The copies and translations of the award shall be certified by the secretary of the arbitration court with his signature and the stamp of the court. In case of delay of the translation, the secretary of the court shall communicate to the foreign party the award's content.

The secretary of the court shall keep files on cases for 10 years as of the date on which the awards and rulings were announced. After this term the files shall be destroyed, except for the awards and settlement agreements, which shall be kept in perpetuity.

3. Decision making

a) Deliberations

Generally, the award shall be made once the tribunal decides that the case is fully submitted.

The LICA does not provide time limits for the arbitral tribunal to make an arbitral award. However, the parties may determine such time limits in the respective agreement. In the latter case, the arbitral tribunal shall comply with such time limits. According to the Rules of Arbitration of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry the award shall be registered with the secretariat within one month as of the day on which the tribunal closed the proceedings. As a matter of practice, it is widely accepted that the term for issuance of the award commences on the day the parties submitted their final written pleadings. The term provided for in the Rules of Arbitration of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry is not mandatory and delivery of the award after expiration of this term is not a ground for challenge of the award.

According to the Rules, the arbitration tribunal may decide to reopen the case when:

(i) the right of any parties to be heard was violated,

(ii) a party was not able to attend the hearings for reasons beyond its control, as well as was not able to notify the arbitral tribunal therefore,

(iii) it determines that additional evidence shall be gathered on the case, or that,

(iv) additional circumstances should be established with a view of fair dispute resolution.

b) Majority or Consensus?

When the case is being adjudicated by a sole arbitrator, the award shall be made and signed by this arbitrator.

According to the LICA, in case there is an arbitral tribunal, the award shall be made by the majority of the arbitrators unless the parties have agreed otherwise. If a majority cannot be reached, the award shall be made by the chairman of the panel.

According to the Rules, the award shall be made in camera by the majority of the arbitrators, and the chairman of the panel shall vote last.

c) Dissenting and concurring opinions

The LICA expressly acknowledges the arbitrators' right to attach dissenting opinions in writing.

The Rules further specify that an arbitrator having a dissenting opinion shall sign the award simultaneously with the majority, indicating his position with the abbreviation "о.м." Within 7 days as of signing the award, the arbitrator shall attach to the award the dissenting opinion. The Rules of the Arbitration Court at the Bulgarian Chamber of Commerce and Industry additionally state that in case the 7 day period has lapsed and the dissenting opinion has not been submitted, the chairman certifies the lapse of the term and there is a presumption that the arbitrator has waived the dissenting opinion.

d) Signature

According to the LICA, the award shall be signed by the arbitrators. In case of a panel, the majority of the arbitrators shall

sign the award; however, the reasons for missing signatures, if any, shall be stated by the signatories.

According to the Rules of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry the award shall be drafted by the arbitrator, reporting the case, and signed by the chairman and all members of the panel. In case an arbitrator cannot or refuses to sign the award, the chairman certifies the respective circumstance with his signature on the award specifying the reasons thereby.

4. Settlement

a) Settlement recorded in an award

After reaching a settlement the parties may request the tribunal to reproduce their arrangements in an arbitration award (award on agreed terms) which will have the full effect of an award on the essence of the case. The award on agreed terms shall not be questioned. It is sufficient that the parties have reached a settlement and requested the tribunal to resolve on the case in this way. Special requirements for the form of the settlement are not envisaged in the law. It could be signed in simple written form or even reflected in the protocol of oral hearings.

b) Settlement without an award

At any stage of the arbitral procedure the parties may decide to arrange their relations by conclusion of a settlement agreement with or without the support of the arbitral tribunal. As a general rule settlement should be encouraged by the tribunal. Under Bulgarian law[65] the settlement agreement represents a stipulation for avoidance or termination of a potential or pending dispute by mutual concessions.

The parties may reach a settlement agreement outside the arbitration procedure. In such a case the arbitration should be terminated by a resolution of the tribunal without consideration of the dispute on its merits.

[65] Art. 365 of the Law on the Obligations and Contracts.

5. Correction, supplementation, and amendment

a) Correcting the award

Correction of the award is admissible in case of a factual inaccuracy, which refers to wrong calculation, writing or other evident incorrectness.[66] Correction may be initiated by a party or by the tribunal *ex officio* within a definite term. In this regard the LICA fixes a deadline of 60 days[67] as of, respectively, receipt of the award by the party or issuance of the award but the parties may agree or the Rules may provide for a shorter term.[68] The tribunal resolves on the correction request following a special hearing or exchange of written opinion between the parties, as the tribunal may decide how to proceed. The resolution on the correction shall be adopted under the same rules as the adoption of the award and is considered integral part of the award. Therefore the resolution for correction has retroactive effect.

b) Additional award

In case the tribunal has omitted to resolve on certain claim each party is entitled to request issuance of an additional award on the claim omitted. The request may be initiated within 30 days as of receiving the awards and the requesting party must notify the other party within the same term.[69] This request should also be considered under the rules for adoption of the award. In fact, the procedure on issuance of additional award represents a renewal of the arbitration process regarding the non-considered claim. If the request is grounded, the tribunal should issue the additional award within 60 days as of being approached. Unlike the resolutions on correction and interpretation of the award the additional award takes effect *ex nunc* and binds the parties as if it was duly served to them.

c) Interpretation of award

Each of the parties may ask the tribunal to interpret the award. The interpretation aims at clarifying the unclear points of the award and shall be conducted under the same procedure as the correction

[66] Art. 43 (1) of the Law on the International Commercial Arbitration.
[67] Art. 43 (3) of the Law on the International Commercial Arbitration.
[68] Pursuant to the Rules of the International Court at the BIA the deadline for initiation of correction or interpretation procedure is 1 month.
[69] Art. 44 of the Law on the International Commercial Arbitration.

discussed herein above. The only difference is that the tribunal may not initiate an interpretation procedure *ex officio.* The tribunal's resolution on the interpretation also represents an integral part of the award and, thus, has a retroactive effect.

H. Challenge and Other Actions against the Award

1. Setting aside

a) Grounds

The arbitral award can be challenged before the Supreme Court of Cassation on the following grounds:

a. if the claimant proves incapability upon execution of the arbitration agreement;
b. the arbitration agreement has not been executed or is invalid under the law to which the parties have subjected it or, failing any indication thereon, under LICA;
c. the dispute could not be subject to arbitration or the arbitration award is incompliant with the public policy in Republic of Bulgaria (the Supreme court of cassation ascertains this condition ex officio);
d. if the claimant was not given a proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise, owing to circumstances beyond his control, unable to present his case;
e. the arbitration award stipulates on a dispute not subjected in the arbitration agreement or rules on matters beyond the dispute;
f. either the arbitration tribunal's composition or the arbitration procedure exceeds parties' agreement except when the latter is in breach of mandatory provisions of LICA or on failure for identification thereon, where the provisions of LICA have not been applied.

b) Time limits

The setting aside request can be made within three months from the date of the receipt of the award by the appellant.

c) Procedure

The appeal is submitted with the Supreme Court of Cassation. The Supreme Court of Cassation is not allowed to examine the merits of the case.

d) Limiting judicial review of awards by contract

The grounds for challenge are introduced in imperative manner. The parties are not free to either contract out of the envisaged grounds for challenge or to expand the scope of appeal of an arbitral tribunal beyond the grounds available in the LICA.

e) Effects of successful challenge

Should the Supreme Court of Cassation sets aside the award and provided that the grounds of "a," "b" and/or "c" listed in H.1.a. above are present, the party is entitled to file a claim with a competent state court. On the other hand, when the grounds of "d," or "e," or "f" are present the Supreme Court of Cassation shall remit the case back to the arbitral tribunal for rehearing. In this case the parties are allowed to require new arbitration tribunal to hear the case.

The judgment of the Supreme Court of Cassation is final and binding and is not subject to further judicial review. In recent resolution it has been held that the judgment of the Supreme Court of Cassation is not subject to reversal procedure which is seen as extraordinary means for challenging of binding court decision.[70]

2. Appeal on the merits

a) Is it allowed?

LICA does not provide a procedure for appeal of the award on the merits.

b) Grounds

The award is subject to setting aside on very limited grounds set out in the LICA mirroring the grounds for refusing recognition as per the Article V of the New York Convention.

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[70] Resolution № 23/24.02.2009, commercial case 44/2009 Supreme Court of Cassation, Commercial Division, Ciela.

III. RECOGNITION AND ENFORCEMENT OF AWARDS

A. Domestic Awards

1. Statutory or other regime

a) Formal requirement for enforcement of awards

In contrast to the UNCITRAL Model Law, the LICA no longer provides for a specific procedure for recognition and enforcement of a domestic arbitral award in order to render it enforceable.[71] This is considered a remarkable diversion of the LICA. The arbitral award shall be recognized as final, binding upon the parties thereto, and enforceable with the sole fact of serving it to one of the parties to the dispute. Thereafter, the award is subject to foreclosure and may be challenged only through the setting aside procedure.

b) Enforcement procedure

Pursuant to the LICA, the enforcement procedure shall be initiated by the party seeking to enforce the arbitral award. The party shall file an application with the Sofia City Court to obtain a writ of execution. The application shall be accompanied by the original or certified copy of the arbitral award and evidence that it has been served to the party against which the enforcement is sought. At this stage of proceedings debtor shall not be served notice for the application.

Pursuant to the Civil Procedure Code, The Sofia City Court shall adjudicate on the application in *ex parte* proceedings within a period of 7 days as of submission of the application. It is noteworthy that the scope of court's examination is limited to formal check of whether (i) the award is valid on the face of it and (ii) it certifies receivables subject to foreclosure against a debtor. The writ of execution shall be issued in one original document and a note thereof shall be made on the award.

The writ of execution is not subject to appeal. Nevertheless, the interested party is entitled to appeal the court order whereby the issuance of the writ of execution was allowed. The court order shall

[71] The procedure for recognition and enforcement of a domestic arbitral award was abolished with an amendment of LICA, promulgated in State Gazette Issue 93 as of 2 November 1993.

be appealed before the Sofia Appeal Court within a 2-week period as of the date on which the order was served to the applicant. The period for challenging the order runs for the debtor as of the date on which the latter is served with an invitation for voluntary performance by the enforcement agent. The appeal shall not suspend the enforcement procedure. The resolution of the Sofia Court of Appeals is final and not subject to further review.

Once the party seeking to enforce the award has obtained the writ of execution it may, at its sole discretion, initiate execution proceedings with the competent enforcement agent.[74] The application shall be accompanied by the writ of execution and shall specify the foreclosure method(s), e.g. foreclosure over tangibles or real estates, receivables or shares. The following enforcement measures may be requested so as to prevent debtor from disposal with his assets: freezing of bank accounts, detrain on shares and company participations, attachment of real estates of debtor, etc. The consequence of the attachment is that the debtor shall not be entitled to dispose of the attached property/receivables. Any disposal to that effect following the attachment shall not be enforceable vis-à-vis the applicant. At this stage of the execution proceedings, the enforcement agent shall serve the debtor an invitation for voluntary performance wherein the attachments imposed, or the date on which they shall be imposed, shall be specified. The term for voluntary performance is 2-weeks as of receipt of the invitation.

Debtor's failure to perform within the period for voluntary performance entitles the enforcement agent to commence compulsory foreclosure over the debtor's assets without necessity to grant another notice for voluntary performance, and/or without the possibility to extend such period.

[74] The application for initiation of execution proceedings shall be filed with the enforcement bailiff in whose region (i) the tangible or intangible assets of debtor are located; (ii) the seat or the permanent address of the third party is, when the foreclosure is over receivables of debtor towards such third party; (iii) the place of performance of certain actions or inactions of debtor; or (iv) the permanent or the temporary address of the applicant or debtor, at the discretion of the applicant, if debtor owes alimony. If the applicant has filed the application with the enforcement bailiff in whose region applicant's permanent address is, then the bailiff shall send the file with the competent bailiff as per the rules above, except when the foreclosure is over receivables of debtor towards a third party.

B. Foreign Awards

1. Various regulatory regimes

a) Domestic rules

The LICA provides that the enforcement of the foreign arbitration awards shall take place in accordance with the International Treaties to which Bulgaria is a party.[72] As a Contracting State, Bulgaria is bound by the provisions of the New York Convention.[73] The New York Convention has left it to the domestic legislation to provide procedural rules for recognition and enforcement of the Foreign Arbitral Award (FAA). Bulgarian judicial practice has accepted that FAA shall be recognized and enforced by way of the special procedure, which is in place for the recognition and enforcement of foreign judgments. However, unlike the case of a domestic arbitral award, the cancellation or proclamation of invalidity of a foreign arbitral award may not be pursued before a Bulgarian court.

The judgment of the Sofia City Court is subject to appeal before the Sofia Court of Appeals by the aggrieved party. The decision of the Appeals Court is subject to appeal before the Supreme Court of Cassation. Pursuant to Civil Procedure Code provisions the cassation procedure will be facultative and the party wishing to challenge the appellate decision should provide evidence for the presence of the grounds for admission of the cassation appeal. If the Supreme Court of Cassation is satisfied that the cassation appeal is admissible then it shall consider the merits of the appeal.

b) New York Convention

Bulgaria is a signatory to the United Nation Convention on Recognition and Enforcement of Foreign Arbitral Awards[74] ("New York Convention"), subject to the reservation that it applies only to awards made in the territory of another contracting party. In case

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[72] Article 51(2) LICA: "For the recognition and enforcement of foreign awards the international treaties concluded by the Republic of Bulgaria shall apply."

[73] Convention on the Recognition and Enforcement of Foreign Arbitral Awards , Promulgated in State Gazette, issue 2 as of 8 January 1965.

[74] Promulgated in State Gazette Issue No.2/8 January 1965.

the arbitration award is not rendered on the territory of a signatory to the New York Convention, Bulgaria reserves the right to apply the New York Convention rules subject to strict reciprocity. The New York Convention was ratified 1961 and promulgated on 8 January 1965.

2. Application of New York Convention by local courts

a) Grounds for refusing recognition and enforcement

The Sofia City Court shall not review the merits of the dispute and shall recognize the FAA provided that the recognition requirements set out in Article IV, paragraph 1 of the of the New York Convention are met and none of the obstacles referred to in Article V of the New York Convention has been proven (in case of Article V, paragraph 1) by the party which attempt to resist recognition or exist (in case of Article V, paragraph 2). The party against whom recognition is sought may not resist it by proving that the debt has been paid. If the declaration of enforceability is to be refused the SCC will rule that the FAA is not recognized in Bulgaria.

b) Enforcement procedure

According to Article 118 of the Code on Private International Law, foreign judgments (and foreign arbitral awards) shall be recognized – without more – by the body to which the judgment (foreign arbitral award) is submitted. There is, therefore, no special procedure for or requirement of recognition of a FFA in Bulgaria. Such recognition is presumed and need not be separately proclaimed.

A party seeking enforcement of a FAA is required to pursue a claim before the Sofia City Court. The claim shall be accompanied with the following documents: duly authenticated original award or a duly certified copy thereof certified by the Bulgarian Ministry of Foreign Affairs; certificate that the award is final and binding certified by the Bulgarian Ministry of Foreign Affairs; and an original arbitration agreement or a duly certified copy thereof. There is no time limit for filing such claim.

IV. APPENDICES AND RELEVANT INSTRUMENTS

A. National legislation (See CD ROM)

B. Major Arbitration Institutions

Names	Addresses	Websites
Arbitration Court on Commercial Disputes	Bourgas, 11A Philip Kutev Str.	www.arbitar.eu
Arbitration Court at Bulgarian Stock Exchange	Sofia 1303, 10 Tri Ushu Str.	www.bse-sofia.bg
Arbitration court at Bulgarian Industrial Association	Sofia 1000, 16-20 Alabin Str.	www.bia-bg.com/ arbitration/default.htm
Arbitration court at Bulgarian Chamber of Commerce and Industry	Sofia 1058, 9 Iskar Str., floor 2	www.bcci.bg/bulgarian/ arbitration/bg/index.html
Arbitration Court at National Business and Law Association	Varna 9002, 24 Tsar Osvoboditel Blvd.	www.lawbg.net
Arbitration Court at National Association "Legal Initiative for Local Government "	Sofia 1301, 22 Aleksandar Stamboliiski Blvd, entr. A, floor 4	www.nalilg.org

Arbitration Court at Industrial Association - Plovdiv	Plovdiv 4003, 37 Tsar Boris III Obedinitel, Palate 27	www.arbitraj.biapl.org
Bulgarian Association for Alternative Dispute Resolution	Plovdiv 4000, 152 Shesti Septemvri Str, floor 2, office 204	www.baadr.com
Sofia Arbitration Court at Association for Domestic and International Arbitrage	Sofia 1271, Ilienci, 13 Grozden Str.	Not available
Commercial Arbitration Court at National Juridical Foundation	Sofia, 22 Patriarh Evtimii Blvd., apt. 3	www.tasnuf.org
Centre for Alternative Dispute Resolution at the Union of Bulgarian Jurists	Sofia 1301, 7 Pirotska Str., floor 3	www.sub.bg/center_sporprav.htm
Arbitration Court at Public Procurement Agency	Sofia 1000, 4 Lege Str., ,	www.aop.bg

C. Cases

Sofia District Court Decision No. 53 of 7 November 2008 in civil case No. 593 / 2008, published in Apis (a software products, containing, among other data, Bulgarian law, regulations and court precedents);

Decision of 26 February 2001 in domestic arbitration case No. 54/2002, published in Apis (Valio);

BCCI International Arbitration Case 2/1994, published in Ciela (a software products, containing, among other data, Bulgarian law, regulations and court precedents);

BCCI International Arbitration Case 33/1998, published in Ciela;

BCCI International Arbitration Case 16/2006 (not published);

Resolution № 23/24.02.2009, commercial case 44/2009 Supreme Court of Cassation, Commercial Division, published in Ciela;

Court Ruling No 91 of 09 February 2009 in case 79/2009, 2 commercial panel, Supreme Court of Cassation, published on the court site www.vks.bg ;

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