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The Scrutiny of an Award: The Bulgarian Arbitral Institutions' Perspective

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One of the main and well known advantages of arbitration is the speed of the proceedings. In order to enhance their timeliness and efficiency, the Rules of some arbitral institutions (e.g. Art. 33 of the ICC Rules) provide for the so called “*scrutiny of the award*” – a procedure of formal examination of the draft award carried out before it is signed by the arbitrators, and the parties are notified of it. The idea behind such procedure is “*to maximize the legal effectiveness of an award by identifying any defects that could be used in an attempt to have it set aside at the place of the arbitration or resist its enforcement elsewhere*” (Fry, Greenberg and Mazza – The Secretariat’s Guide to ICC Arbitration, p. 327). It can also contribute to the timely resolution of the dispute, as it can prevent factual errors (typing errors, errors in calculations), or the omission of parts of the dispositive in the final version of the award. This will save time and money for the parties, as there would be no need to apply for the correction, supplementation or interpretation of the award.

Despite the growing number of arbitral institutions in Bulgaria in recent years, scrutiny of the award has not been introduced in their rules. One notable exception is Art. 37, Para. 4 of the Rules of the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry (Court of Arbitration at the BCCI). This provision, however, regulates the scrutiny of the final arbitration award **only** in cases where it is drafted by arbitrators not included in the lists of arbitrators of the Court of Arbitration at BCCI, which is possible only in international arbitration. According to Art. 6, Para. 3, 3rd sentence of the Statute of the Court of Arbitration at the BCCI, the lists of arbitrators on domestic and international cases are mandatory for Bulgarian companies, while for foreign companies, including companies with prevailing foreign participation, the lists of arbitrators are only recommendable. According to Art. 14, Para. 2 of the Rules of the Court of Arbitration at the BCCI, in disputes where one party is a foreign person or a local company with prevailing foreign participation, this party may appoint a foreign citizen for an arbitrator outside the list of foreign arbitrators. Under the same conditions, an arbitrator not included in the list of foreign arbitrators may be elected as a presiding arbitrator.

In such cases, the President of the Court shall appoint a committee of three arbitrators to check whether the rendered final award corresponds to the formal requirements of the Bulgarian International Commercial Arbitration Act and the Rules of the Court of Arbitration at the BCCI. The committee shall report in writing within three days from the submission of the award to the Secretariat by the Arbitral Tribunal. The Arbitral Tribunal is bound to take into account the recommendations and correct the indicated formal shortcomings of the award.

Despite the fact that this is a step in the right direction for the implementation of the scrutiny of an award, the fact that such scrutiny is conducted only when the appointed arbitrators are not included in the lists of arbitrators of the Court of Arbitration at BCCI is rather an exception. Foreign parties most likely will appoint an experienced and renowned arbitrator who is included in the lists of arbitrators. As a result, Art. 37, Para. 4 of the Rules of the Court of Arbitration at the BCCI has little practical significance in comparison to the huge number of cases where this rule is not applicable.

Considering the current situation, the Rules of Arbitration of the Court of Arbitration at the Confederation of Employers and Industrialists in Bulgaria (KRIB Court of Arbitration), adopted in September 2014, deserve special attention when discussing the scrutiny of the award in Bulgaria as well.

Art. 38 of the Rules of the KRIB Court of Arbitration regulates the procedure for the scrutiny of the award. According to this provision, before signing the award, the Arbitral Tribunal shall send it to the Secretariat in a draft form. The Secretariat shall submit the draft for scrutiny to a Commission of the Arbitration Panel in accordance with the Statutes of the KRIB Court of Arbitration. The Commission of the Arbitration Panel is entitled to make recommendations with regard to the formal requirements of the award. In addition, without prejudice to the Arbitral Tribunal's decision-making power, it may also underline certain matters of procedural or substantive nature. The Arbitration Panel shall give the Arbitral Tribunal a time limit to consider its recommendations and remarks, and submit the draft of the reviewed arbitral award for a new scrutiny. No arbitral award may be made by the Arbitral Tribunal before it has been approved with regard to its form following the procedure described above.

A few points should be noted with regard to Art. 38 of the Rules of the KRIB Court of Arbitration. First of all, the scrutiny of the award is applicable to all cases resolved by the KRIB Court of Arbitration, irrespective of whether the arbitrators are included in the list of arbitrators or not, or whether the dispute is domestic or international. This means that the scrutiny of the award under the Rules of the KRIB Court of Arbitration shall have more significant implication on resolving disputes in comparison to the scrutiny procedure under the Rules of the Court of Arbitration at BCCI.

Second, according to Art. 10, Para. 3 of the Statutes of the KRIB Court of Arbitration, the decision of each Commission of the Arbitration Panel shall be taken unanimously. In addition, Art. 10, Para. 1 of the Statutes of the KRIB Court of Arbitration provides for the rule that the members of the Commissions shall be impermanent – the members shall be determined according to a timetable on a rotational basis. If a unanimous decision cannot be made, the matter shall be considered by the next Commission according to the timetable (Art. 10, Para. 3, 2nd sentence of the Statutes of the KRIB Court of Arbitration). If the next Commission of the Arbitration Panel cannot take a unanimous decision on this matter, the latter shall be referred to the Arbitration Council of the KRIB Court of Arbitration. The procedure generally follows the scrutiny process under the ICC Rules, where if a consensus cannot be reached by the members during the Court's weekly committee session that scrutinises the award, it shall be submitted "*to one of the Court's upcoming plenary sessions*" (Fry, Greenberg and Mazza – *The Secretariat's Guide to ICC Arbitration*, p. 334). The said provisions in the Rules of the KRIB Court of Arbitration guarantee the independent and impartial scrutiny of the award. At the same time, the participation of the Arbitration Council in the procedure ensures that there will be no obstacles to the timely scrutiny when a unanimous decision could not be reached by the Commissions of the Arbitration Panel.

Third, the scope of the scrutiny under Art. 38 of the Rules of the KRIB Court of Arbitration also covers some matters of procedural and substantive legal nature. In the ICC's practice, such matters include awards with *infra petita*, *ultra petita*, the examination of whether reasons for all decisions are presented, whether the costs and interests are addressed, whether calculations are correctly made, etc. (procedural matters), and whether there are inadequacies in the reasoning, inconstancies between the reasons and the dispositive sections, whether the mandatory *lex arbitri* is observed, etc. (substantive matters) (Fry, Greenberg and Mazza – The Secretariat's Guide to ICC Arbitration, p. 335).

The resolution in Art. 38 of the Rules of the KRIB Court of Arbitration highlights the role of the scrutiny of the award as an important instrument for mitigating the risk of setting aside or denying the enforcement of the award. It is much more convenient for the parties (or at least for the party whose claims are well founded) to have any possible defects of the award rectified at this early stage rather than being involved in proceedings for setting aside/denying enforcement of the award later. Moreover, the wording of Art. 38 of the Rules of the KRIB Court of Arbitration explicitly states that the scrutiny may result in underlining procedural or substantive legal matters, but **without prejudice to the Arbitral Tribunal's decision-making power**. Drawing the Arbitral Tribunal's attention to such matters, but letting the arbitrators render the final form of their award is an important guarantee for the liberty of decision.

In conclusion, considering the fact that the KRIB Court of Arbitration was established in the autumn of 2014, it is still to be assessed in the future whether and to what extent the scrutiny of the award will influence KRIB Court of Arbitration's practice and the arbitration in Bulgaria. Nevertheless, the scrutiny of the award contributes to the efficiency of the proceedings – after all, every effort to ensure a valid and enforceable award should be evaluated positively.

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