

The present paper analyzes the applicability of the data protection rules towards commercial arbitration. This topic became especially relevant in the context of the adoption of the new data protection framework of the European Union, namely the General Data Protection Regulation (GDPR). GDPR imposes significant requirements for organizations engaged in data processing activities. The purpose of this is to support the main actors in commercial arbitration towards ensuring compliance with the data protection legislation. In five chapters the author (i) examines the role of the arbitrators, arbitral institutions, appointing authorities and other key participants in the arbitration proceedings from a data protection perspective; (ii) analyzes the various types of personal data and the possible legal grounds for their processing in arbitration; (iii) focuses on the data subjects' rights under GDPR and their possible limitations in arbitration; (iv) describes the data governance obligations of data controllers in arbitration; (v) explores the future of arbitration and the possible usage of artificial intelligence. The book also contains a Model Privacy Policy for Arbitral Institutions.

Data Protection. Arbitration. GDPR



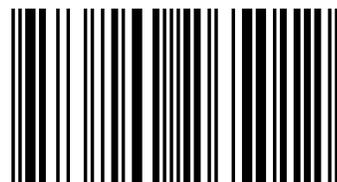
Martin Zahariev

Data Protection in Commercial Arbitration: In the Light of GDPR



Martin Zahariev is a lawyer at Dimitrov, Petrov & Co. – one of the leading Bulgarian law firms, and an expert at the Law and Internet Foundation. University lecturer on regime of information and basics of law, he obtained PhD at the University of Library Studies and Information Technologies, Sofia with dissertation on automated profiling and GDPR.

FOR AUTHOR USE



978-620-0-26501-2

Zahariev

LAP
LAMBERT
Academic Publishing

Martin Zahariev

Data Protection in Commercial Arbitration: In the Light of GDPR

FOR AUTHOR USE ONLY

FOR AUTHOR USE ONLY

Martin Zahariev

**Data Protection in Commercial
Arbitration: In the Light of GDPR**

FOR AUTHOR USE ONLY

LAP LAMBERT Academic Publishing

Imprint

Any brand names and product names mentioned in this book are subject to trademark, brand or patent protection and are trademarks or registered trademarks of their respective holders. The use of brand names, product names, common names, trade names, product descriptions etc. even without a particular marking in this work is in no way to be construed to mean that such names may be regarded as unrestricted in respect of trademark and brand protection legislation and could thus be used by anyone.

Cover image: www.ingimage.com

Publisher:

LAP LAMBERT Academic Publishing

is a trademark of

International Book Market Service Ltd., member of OmniScriptum Publishing Group

17 Meldrum Street, Beau Bassin 71504, Mauritius

Printed at: see last page

ISBN: 978-620-0-26501-2

Copyright © Martin Zahariev

Copyright © 2019 International Book Market Service Ltd., member of
OmniScriptum Publishing Group

FOR AUTHOR USE ONLY

DATA PROTECTION
IN
COMMERCIAL ARBITRATION

In the Light of GDPR

Martin Zahariev

To those who believed in me.

Sincere gratitude to Prof. Dr. George G. Dimitrov and Assoc. Prof. Dr. Daniela Ilieva for all their support and guidance in my academic and professional career.

I wish to thank Prof. Niko Härting and Prof. Veselin Tselkov, D.Sc. for their academic reviews.

ANNOTATION

The present paper analyzes the applicability of the data protection rules towards commercial arbitration. This topic became especially relevant in the context of the adoption of the new data protection framework of the European Union, namely the General Data Protection Regulation (GDPR). GDPR imposes significant requirements for organizations engaged in data processing activities. The purpose of this is to support the main actors in commercial arbitration towards ensuring compliance with the data protection legislation.

Chapter 1 examines the role of the arbitrators, arbitral institutions, appointing authorities and other key participants in the arbitration proceedings from a data protection perspective. Chapter 2 focuses on the various types of personal data (trivial personal data, special categories of personal data, data regarding criminal convictions and offences) and the possible legal grounds on which these categories personal data can be processed in the arbitration. In Chapter 3 the subject of analysis are the rights of the data subjects under GDPR and the possible limitations that might be necessary in order to achieve the normal course of arbitration proceedings. Chapter 4 is devoted to the data governance obligations under GDPR – from the Privacy by Default and by Design principle to accountability requirements like record-keeping, appointing a data protection officer, conducting data protection impact assessment, etc. Special attention is paid to the relations with third parties – processors, supervisory authority in arbitration and transfers of personal data outside the EU. The last Chapter (No. 5) looks behind the curtain of the future and explores the data protection considerations of introducing solely automated arbitration proceedings – such

proceedings where the dispute is resolved without any human involvement but with the use of algorithms. It could be concluded that commercial arbitration is not excluded from the EU data protection requirements. At the same time, only by facing properly the new regulatory and technological challenges would arbitration remain an attractive alternative to state court litigation and by GDPR compliance it could achieve competitive advantage.

FOR AUTHOR USE ONLY

CONTENTS

ANNOTATION	3
CONTENTS	5
LIST OF ABBREVIATIONS.....	11
ACADEMIC REVIEW FROM PROF. NIKO HÄRTING	15
ACADEMIC REVIEW FROM PROF. DR. GEORGE DIMITROV	19
ACADEMIC REVIEW FROM PROF. VESELIN TSELKOV, DSC.	25
FOREWORD	31
Why Data Protection?	31
Why Arbitration?	33
Scope and Limitations of the Analysis.....	37
CHAPTER 1. WHO IS WHO IN COMMERCIAL ARBITRATION FROM A DATA PROTECTION PERSPECTIVE?	39
1.1. Legal Framework	39
1.1.1. Legal Regime of Commercial Arbitration	39
1.1.2. Legal Regime of Data Protection	47
1.2. The Role of the Main Actors in Arbitration from Data Protection Perspective.....	60
1.2.1. Arbitrators and Arbitral Tribunals.....	61
1.2.2. Arbitral Institutions	72
1.2.3. The Parties	78
1.2.4. Appointing Authorities	79

1.3. The Role of the Other Actors in Arbitration from a Data Protection Perspective	81
1.3.1. The Parties’ Counsels	81
1.3.2. Experts	84
CHAPTER 2. LEGAL GROUNDS FOR PROCESSING OF PERSONAL DATA IN COMMERCIAL ARBITRATION	87
2.1. Processing of “Trivial” Personal Data	89
2.1.1. Which Personal Data Are “Trivial”?	89
2.1.2. Legal Grounds for Processing Personal “Trivial” Personal Data in Commercial Arbitration	91
2.2. Processing of “Sensitive” Personal Data	96
2.2.1. Which Personal Data Are “Sensitive”?	96
2.2.2. Legal Grounds For Processing “Sensitive” Personal Data in Commercial Arbitration	100
2.3. Processing of Personal Data Relating to Criminal Convictions and Offences	107
2.3.1. Which Personal Data “Relate to Criminal Convictions and Offences”?	107
2.3.2. Legal Grounds for Processing Personal Data Relating to Criminal Convictions and Offenses in Commercial Arbitration	109
CHAPTER 3. DATA SUBJECTS’ RIGHTS IN THE CONTEXT OF COMMERCIAL ARBITRATION	113
3.1. Rights of the Data Subjects under GDPR	114

3.1.1. Right of Information	114
3.1.2. Right of Access by the Data Subject	120
3.1.3. Right to Rectification	122
3.1.4. Right to Erasure (“Right to Be Forgotten”)	124
3.1.5. Right to Restriction of Processing.....	128
3.1.6. Notification Obligation regarding Rectification or Erasure of Personal data or Restriction of Processing	131
3.1.7. Right to Data Portability	133
3.1.8. Right to Object.....	137
3.1.9. Automated Individual Decision-Making, including Profiling..	140
3.2. Exercising the Rights – Possible Limitations in Commercial Arbitrations	144
CHAPTER 4. DATA GOVERNANCE OBLIGATIONS IN COMMERCIAL ARBITRATION.....	149
4.1. Privacy by Design and by Default.....	149
4.1.1. Privacy by Design	150
4.1.2. Privacy by Default	151
4.2. Relations with Processors	152
4.2.1. What is a Data Processor?.....	152
4.2.2. Typical Data Processors in the Context of Commercial Arbitration.....	155
4.3. Keeping Records of Processing Activities	159

4.3.1. Who Has an Obligation to Keep Records	159
4.3.2. Content of the Records.....	166
4.3.2.1. Mandatory Content.....	168
4.3.2.2. Additional Content.....	175
4.4. Security	176
4.4.1. Appropriate Technical and Organizational Measures to Ensure Security in Commercial Arbitration.....	176
4.4.2. Personal Data Breaches. Notification and Communication Obligation.....	183
4.5. Data Protection Impact Assessment.....	184
4.6. Appointing a Data Protection Officer.....	187
4.6.1. Who Has an Obligation to Appoint a Data Protection Officer?.....	187
4.6.2. Position of the Data Protection Officer	194
4.6.3. Tasks of the Data Protection Officer	198
4.7. Codes of Conduct and Certifications – Possible Application in Commercial Arbitration	200
4.7.1. Codes of Conduct.....	200
4.7.2. Certification	203
4.8. Transfer of Personal Data to Third Countries or International Organizations	205
4.8.1. General Overview.....	205

4.8.2. Possible Solutions for the Transfer of Personal Data to Third Countries in Commercial Arbitration.....	206
4.9. Who Should Act as Supervisory Authority in Commercial Arbitration?.....	214
4.9.1. The Role of the Supervisory Authority in Data Protection Regime.....	214
4.9.2. Ensuring Independence of the Judiciary	215
CHAPTER 5. THE FUTURE OF COMMERCIAL ARBITRATION – ARTIFICIAL INTELLIGENCE AND OTHER CHALLENGES.....	223
5.1. Algorithms as Arbitrators	224
5.1.1. Possible Application of AI in Dispute Resolution.....	224
5.1.2. Main Advantages of AI Serving as Arbitrator	225
5.2. AI Arbitration in the Light of the Automated Individual Decision Making under GDPR	228
5.2.1. What is Automated Individual Decision-Making?.....	228
5.2.2. General Prohibition of Art. 22(1) of GDPR	230
5.2.3. Exceptions from the Prohibition under Art. 22(2) of GDPR and Possible Applications in Commercial Arbitration	231
5.2.4. Appropriate Safeguards for the Data Subjects	234
CONCLUSION.....	237
ANNEX I – MODEL PRIVACY POLICY FOR ARBITRAL INSTITUTIONS	239
INDEX.....	261

REFERENCES265
LEGAL SOURCES AND OTHER ACTS279

FOR AUTHOR USE ONLY

LIST OF ABBREVIATIONS

ADM	Automated decision-making
ADR	Alternative dispute resolution
AI	Artificial intelligence
BCCI Rules	The Rules of the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry from 2017
BCR	Binding corporate rules under Art. 47 of GDPR
BIA Rules	The Rules of the Arbitration Court at the Bulgarian Industrial Association
CC	Code of conduct
Directive Directive	95/46/the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
DPA	Data processing agreement
DPAH	The Data Protection Act of Hesse
DPIA	Data protection impact assessment
DPO	Data protection officer
ECHR	The European Convention of Human Rights
EDPB	The European Data Protection Board
EU	The European Union

GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
ICAA	The Bulgarian International Commercial Arbitration Act
ICC	The International Chamber of Commerce
ICCPR	The International Covenant on Civil and Political Rights of 1966
ICC Rules	The Rules of Arbitration of the International Chamber of Commerce
ICT	Information and communication technologies
ISP	Internet service provider
KRIB Rules	The Rules of Arbitration of the Arbitration Court at the Confederation of Employers and Industrialists in Bulgaria
LCIA Rules	The London Court of International Arbitration Rules
NY Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
PDB	Personal data breach
PDPA	The Bulgarian Personal Data Protection Act

SA	Supervisory authority under GDPR
SCC Rules	The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce
SG	State Gazette
SJC	The Supreme Judicial Council of the Republic of Bulgaria
TOM	Technical and organizational measures
UDHR	The Universal Declaration of Human Rights of 1948
UNCITRAL ML	The UNCITRAL Model Law on International Commercial Arbitration of 1985
VIAC Rules	The Rules of Arbitration and Mediation of Vienna International Arbitral Centre
WP29	The Article 29 Working Party
WWI	The First World War
WWII	The Second World War

FOR AUTHOR USE ONLY

ACADEMIC REVIEW FROM PROF. NIKO HÄRTING

Martin Zahariev: Data Protection in Commercial Arbitration: In the Light of GDPR

The GDPR comes in many shades, and the new European rules on privacy and data protection affect many spheres of commercial, social and private life. In his paper on “Data Protection in Commercial Arbitration: In the Light of GDPR”, Martin Zahariev analyses the impact of the GDPR on commercial arbitration. The paper is both academically profound and written from a very hands-on, practical perspective so that academics and scholars as well as practitioners can greatly benefit from the paper. Arbitrators and other professionals who may be worried about GDPR compliance issues will find precise answers to their questions in this monograph.

The first chapter of Zahariev’s work introduces the players in a comprehensive “who is who” of arbitration. The focus is very much on control: When arbitrators are in control of personal data, are they joint controllers within the meaning of Art. 26 GDPR or is their control separate so that there is no need of a joint controller agreement? Zahariev argues that Art. 26 GDPR is not applicable. Yet, he advises arbitrators to draft and sign agreements on the processing of personal data in order to document compliance with the GDPR.

The second chapter is about Art. 6, 9 and 10 GDPR, about personal data that Zahariev labels as “trivial” as well as about sensitive data. In a particularly

convincing part of the paper, Zahariev demonstrates that consent will rarely be the answer when the question of legal grounds is raised. Instead, arbitration will need to rely on contract and legitimate interests. Add in the legal claims exemption in Art. 9 (2) (f) GDPR, and the GDPR will not prove to be a major obstacle in commercial arbitration. The only remaining black box may be Art. 10 GDPR which leaves rules on personal data relating to criminal convictions and offences to the EU member states.

Chapter 3 focusses on data subject rights, showing that arbitrators need to be prepared for access, rectification and erasure requests, and giving very practical help by providing – in annex 1 - a “model privacy policy for arbitral institutions”.

The fourth chapter reads like a comprehensive GDPR compliance handbook for arbitrators as it covers a wide range of issues from privacy by design and default and data processing agreements to records of processing activities, data security issues (“TOMs”), breach notifications, codes of conduct and the intricate rules on the transfer of personal data to third countries. There is hardly a GDPR question that a commercial arbitrator is unlikely to find an answer to in this chapter. Zahariev’s approach is pan-European. His paper is not on the Bulgarian perspective (although Zahariev pays attention to Bulgarian GDPR academic work). Instead, arbitrators from all the EU member states will be able to find guidance in Zahariev’s paper.

In chapter 5, Zahariev dares a glance into the future. Building on his analysis of Art. 22 GDPR in chapter 3, Zahariev asks the fascinating question what restrictions Art. 22 GDPR may impose once arbitration becomes fully

automated. Zahariev argues that there will always be a chance of human intervention so that Art. 22 GDPR will not be an unsurmountable hurdle for full automation. Time will, however, tell if Art. 22 GDPR will ever become an issue in commercial arbitration as nobody knows how many years, decades or generations it will take until the necessary technology will be in place.

All in all, the monograph can be highly recommended as it is groundbreaking on the interface of procedural rules on arbitration and the new European rules protecting privacy and personal data.

Berlin, June 17th, 2019

Prof. Niko Härting

Rechtsanwalt

FOR AUTHOR USE ONLY

FOR AUTHOR USE ONLY

ACADEMIC REVIEW FROM PROF. DR. GEORGE DIMITROV

Privacy protection turned to be a challenge to the society when the information and communication technologies have emerged and have become part of every person's everyday life. A whole set of new generation pan-European rules have been recently enforced, particularly the EU General Data Protection regulation (GDPR). The protection of personal data regulated in a uniform manner particularly affected the business relations where the dynamics in the relations between the market agents is intense. When disputes arise between the market agents, the most common way of resolving those proves to be the commercial arbitration. The latter, which is normally considered an agreement-based law-enforcement procedure, has faced the GDPR protective shield of rules, which comes to protect the personal life of the persons. Where are the boundaries between the commercial arbitration and the protection of personal data? To what extend the personal data may be processed by the arbitrators and other experts involved in the procedure? What kind of personal data may be revealed? Are the arbitrators considered processors? What is the extent of the due care with respect to processing personal data?

The monograph of Dr. Martin Zahariev proves to be the first in-depth scientific research, which sheds light on these issues and tries to give well-grounded answers to the so difficult questions which the arbitration faces with respect to GDPR. The challenges for creating such a book are quite serious, since they

require interdisciplinary approach by combining legal practical knowledge from both areas of arbitration and data protection.

In Chapter I the author examines the roles of the actors involved in data processing in commercial arbitration. This chapter reveals great theoretical value. The author carefully examines the definitions of “data controller”, “data processor” and “joint controllers”, as well as the nature of the processing conducted in arbitration in order to precisely determine the roles and responsibilities of the key players. The author demonstrates deep knowledge regarding the historical evolution of the concept of personal data and the legal foundations of this fundamental right, as well as regarding the legal framework of commercial arbitration.

Chapter II analyses an important practical implication – the author clearly designates the various regimes of data protection and differentiates among the legal grounds that could be applied in commercial arbitration for processing the different types of personal data – trivial, sensitive data and data regarding criminal convictions and offenses. Dr. Zahariev gives clear examples of how any of these types of data could be relevant and processed within an arbitration case. The researcher convincingly proves that consent could have only occasional role, suggesting other more stable and suitable legal grounds, which, if properly applied, would ensure the normal and fair conduct of the arbitration proceedings and prevent potential abuses with procedural and data protection rights.

In Chapter III the researcher examines in detail one of the key introductions made by the GDPR, particularly the enhanced rights of the data subjects. In line

with the entire style of the monograph, the author again not merely paraphrases the GDPR provisions that regulate these rights, but goes far beyond in his analysis and proposes specific solutions on how the data subjects' rights could effectively be applied in arbitration procedure and, more important, sets the borderline in terms of exercising data protection rights by paying specific attention to the restrictions and limitations of these rights in the context of commercial arbitration.

Chapter IV deals with the various data protection obligations imposed by GDPR. The voluminous number and complexity of theoretical and practical legal issues have undoubtedly resulted in creating the largest chapter of the monograph. As an important practical contribution should be mentioned the proposed content of records of processing activities under Art. 30 of GDPR - mandatory and voluntary, called by the author "additional" content. The record keeping obligation is one of the most challenging in practice and encounters misunderstanding among the stakeholders having an obligation to maintain such. Therefore, the specific examples made by Dr. Zahariev could serve as a solid basis for data controllers in arbitration in order to comply with this obligation.

Chapter V also has an important practical value as far as the author elaborates and proposes a model for future fully automated arbitration, i.e. arbitration conducted through artificial intelligence (AI) and without any meaningful human intervention. Dr. Zahariev proposes particular measures, which need to be tackled from GDPR perspective in order to ensure the application of AI in dispute resolution. The humanist position of the author is worth applauding - he claims that humans and their unique perception of world and emotional

intelligence could never be fully and adequately replaced by the machines and that AI arbitration could only perform a supporting role, being ultimately subject to human review.

The most important practical contribution of the monograph without any doubt proves to be Annex I Model of privacy policy under Art. 13 and 14 of GDPR that could be used for arbitral instructions. The result of Dr. Zahariev's work is a complex and precise document that could be used with minor adjustments by any arbitration institution which needs to comply with GDPR.

In conclusion, the presented monograph represents a deep scientific research based on the author's theoretical and practical knowledge, based on well-grounded proofs from various sources - decisions, statements, guidelines and opinions of the supervisory authorities and the Art. 29 Working Party (now European Data Protection Board). As a result a profound scientific work on European level is created by a young and ambitious scholar who has the rare advantage to combine the scientific career with the practical experience as a lawyer, thus being able to propose working solutions for the those practicing in the area of commercial arbitration. The monograph is a complete product holding a detailed and comprehensive analysis on a specific scientific problem with great relevance, as well as with significant theoretical and practical importance.

GDPR affects all spheres of human life and commercial arbitration is not an exception. The arbitration community should be able to face the new challenges posed by GDPR in order to remain an attractive option for the business to resolve its disputes. This book could serve as a very useful tool for achieving

GDPR compliance in the practice of arbitrators, arbitration institutions, counsels, etc.

Sofia, July 04, 2019

Prof. Dr. George Dimitrov

University of Library Studies and Information Technologies

FOR AUTHOR USE ONLY

FOR AUTHOR USE ONLY

ACADEMIC REVIEW FROM PROF. VESELIN TSELKOV, DSC.

*To the monograph “Data Protection in Commercial Arbitration: In the Light
of GDPR”*

Author Dr. Martin Zahariev

From May 25, 2018, Regulation (EC) 2016/679 applies in the countries of the European Union. The full name of Regulation (EC) 2016/679 is Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/ EC (General Data Protection Regulation, GDPR). The General Data Protection Regulation is a development of the legal framework that requires a much stricter protection of personal information. For a breach in its protection, sanctions are enormous for the scale and capabilities of most data controllers. The General Regulation also changes the philosophy of personal data protection, namely:

- Consideration is given to protecting the data subject's (physical) rights and not organizational and technical protection measures;
- The data security issue is exclusively attributable to the data controller.

The new European data protection legal framework significantly affects many aspects of society's life. In his monograph "Data Protection in Commercial Arbitration: In the Light of GDPR", Martin Zahariev examines how GDPR affects commercial arbitration. The work has an academic style but is also written in practical and easily understandable way so that both scholars and arbitrators as well as other practitioners engaged in arbitration will find profound answers to their GDPR compliance issues in this monograph.

The monograph "Data Protection in Commercial Arbitration: In the Light of GDPR" consists of foreword, five chapters, a conclusion, and one Annex.

The foreword answers the two main questions:

- Why Data Protection?
- Why Arbitration?

The "Scope" and the "Limitations of Analysis" are also defined in the foreword.

Chapter 1, "Who is who in Commercial Arbitration from Data Protection Perspective", examines the data protection roles of the key players actively involved in commercial arbitration. This is especially important, as their capacity (data controllers, data processors and joint controllers) will pre-determine their data protection responsibilities. This part presents the development of the legal framework in both perspectives - Commercial Arbitration and Data Protection. Chapter 1 examines the role of the arbitrators, arbitral institutions, appointing authorities and other key participants in the arbitration proceedings from a data protection perspective. The author shows a good knowledge of the historical development of data protection legal framework and gives his view of their application in arbitration.

In Chapter 2, M. Zahariev examines the different types of personal data - trivial personal data, special categories of personal data, data regarding criminal convictions and offences, and the necessary measures for their protection. The author examines and presents the legal basis for the processing of various types of personal data in the process of commercial arbitration. Dr. Zahariev convincingly shows how any of these types of personal data could be processed in commercial arbitration. The author defends the position that consent should not be the leading ground for data processing in commercial arbitration, suggesting other more appropriate legal grounds in order to ensure the fair trial during the arbitration proceedings and to limit the risk from potential abuses with procedural and data protection rights.

In Chapter 3, the subject of analysis are the rights of the data subjects under GDPR and the possible limitations that might be necessary in order to achieve the normal course of arbitration proceedings. The researcher does not repeat verbatim requirements of GDPR but gives the author's interpretation and his own point of view of the realization of the rights of the citizens in the arbitration process. Dr. Zahariev also gives specific solutions to how data subjects' rights could be implemented in arbitration procedures in the context of the specific conditions of arbitration.

Chapter 4 is devoted to the obligation to manage data in accordance with the requirements of the GDPR. The content of this section is extremely varied and covers the issues of:

- Privacy by Design and by Default;
- Relations with Processors;

- Keeping Records of Processing Activities;
- Security;
- Data Protection Impact Assessment
- Appointing a Data Protection Officer;
- Codes of Conduct and Certifications – Possible Application in Commercial Arbitration;
- Transfer of Personal Data to Third Countries or International Organizations;
- Who Should Act as Supervisory Authority in Commercial Arbitration?

The author's position and the practical applications of the requirements are scientific and practical contributions of Dr. Zahariev. The more important of these are - typical Data Processors in the context of commercial arbitration, the various keeping-records scenarios, content of the records, the role, position and tasks of the DPO and possible application of Codes of Conduct and Certifications in commercial arbitration.

The last part (Chapter 5) is devoted to the future of arbitration in the light of the rapid development of new information technologies. The author answers the main questions - how the technologies will be applied in arbitration and what the challenges of data protection are. Analyses and discussions about benefits and challenges are clearly needed. At the same time, only by facing properly the new regulatory and technological challenges would arbitration remain an attractive alternative to state court litigation and by GDPR compliance, it could achieve competitive advantage.

A very important part of the monograph is a Model of Privacy Policy for Arbitral Institutions (Annex 1). The goal of the model is to illustrate how an arbitral institution should address the public and inform the individuals regarding the processing activities, which it conducts in relation to the arbitration services it provides.

In conclusion, this monograph presents the author's extensive knowledge of the subject, interesting research and author's reading of it and characterizes Dr. Martin Zahariev as a complete researcher. The present monograph is an interesting reading for not only specialists, students and professionals, but also for a wider range of readers and can serve as a basis for future scientific research.

Sofia, July 22th, 2019

Professor Veselin Tselkov, D.Sc.

*Member of the Board of Commission for Personal Data Protection
State University of Library Studies and Information Technologies*

FOR AUTHOR USE ONLY

FOREWORD

Why Data Protection?

Nowadays the importance of *speed and efficiency* predetermines the way modern society lives. Both ordinary citizens and the business hectically seek various ways for optimizing the everyday processes by ensuring that things happen faster without that being at the expense of quality.

Probably the most influential ally of humanity in the struggle to achieve speed and efficiency is the information and communication technologies (ICT). ICT together with the global network Internet enable the creation, processing, storage and instant transmission of previously unthinkable amounts of information worldwide¹.

The development of ICT inevitably creates new challenges and even threats before the fundamental rights and freedoms. One of those challenges is to find the right balance between the possibilities to create and exchange information, on the one hand, and to respect the private life of the individuals, on the other. Since the end of the 19th century, where the concept of “*the right to be let alone*”² was developed, the law and technology have undergone substantial development. As a result, a completely new legal regime has emerged – *the*

¹ More on ICT as a part of our social reality see **Dimitrov, G.**, Information and Communication Technologies Law. Vol. I. Civil Law Aspects. Electronic documents and electronic signatures. E-Commerce. Intellectual Property Protection in ICT. Consumer Protection, Sofia, Law and Internet Foundation, pp. 27-30.

² **Warren, S. D., Brandeis, L. D.**, The Right to Privacy. // *Harvard Law Review*, 1890, Vol. 4, No. 5, pp. 193-220.

regime of personal data protection, whose latest manifestation is the European Union (EU) General Data Protection Regulation (GDPR).

The personal data protection regime influences all significant spheres of public life, because every single aspect of human activity requires the involvement of people who need to be identified, i.e. whose data need to be somehow processed. Our society is not a mechanical set of anonymous persons. We live in a society of individuals, where the individualism is one of the core values, where everybody is unique and has the opportunity to freely decide how to develop him/her self, where everybody aims to distinguish themselves with knowledge, skills, preferences, attitudes, etc. Numerous public and private actors need to process information on a daily basis about us so that the business, the state and the society, in general, can function properly – our personal data is being processed when we pay our taxes and social security contributions, when we receive our salary, when we establish a company, when we buy goods or services or when we use the ICT to communicate with each other or even to seek information in search engines like Google and Bing. These merely illustrative examples show why it is normal to request, exchange and eventually process personal data.

When speaking about personal data protection regime, it is important to refute a common misbelief – that personal data need to remain “secret” and not to be exchanged. As Prof. George Dimitrov correctly highlights, this misunderstanding is caused probably by the name of the term used to indicate this legal regime – “personal data *protection*”. The purpose of the data protection legislation is not to keep personal data in secret, but rather to create

special rules for personal data collection, processing, and provision to other parties in order to ensure the protection of the citizen's personal sphere³.

As already mentioned, GDPR and the data protection legislation in general aim to create a standard set of rules ensuring the proper use of personal data in all areas of everyday life where its processing is necessary. One of these areas is *dispute resolution*. When a dispute between two or more parties arises – from the moment of its arising towards its final resolution and eventual voluntary performance/forced execution of the contested rights and obligation, a lot of personal data is exchanged, created and otherwise processed by various actors – the parties, their legal advisors, the dispute resolution body, the execution authority (e.g. bailiff), etc. The present paper aims to analyze this process from personal data perspective by focusing on the most popular alternative dispute resolution mechanism (ADR) – *arbitration*.

Why Arbitration?

Arbitration is a relatively well-examined matter in terms of its civil procedural aspects⁴. As the delayed justice could often be equaled or compared to denial of justice, society seeks alternative mechanisms to the often too slow and too formalistic national court systems. In that respect, arbitration offers an attractive

³ Prof. Dimitrov gives as example the name of the legislative act that regulates data protection in Bulgaria – “Personal Data Protection Act”. His reasoning, however, is applicable towards the term “data protection” in general. See **Dimitrov, G.**, About the application of the Personal Data Protection Act towards Lawyers. // *Lawyer Review*, 2010, Booklet No. 3, pp. 3 – 6;

⁴ There are numerous authors examining arbitration as a dispute resolution mechanism. See e.g. **Gaillard, E., Savage, J.**, Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, the Hague, 1999, **Born, G.**, International Arbitration: Cases and Materials, Kluwer Law International, 2011. In Bulgaria the most detailed analysis of arbitration has been made by Prof. Zhivko Stalev in **Stalev, Zh.**, Arbitration on Private Disputes, Sofia, Ciela, 1997.

alternative to litigation. The advantages of arbitration as a form of ADR in comparison to the state court system are well-known, and for the purposes of the present analysis, without claims of exhaustiveness, the following would be emphasized:

- (i) *Fostering transparency and trust*: in arbitration, the parties are enabled to play an active part in the constitution of the dispute resolution body by appointing arbitrators, whereas in state courts the leading principle is “random assignment of cases”⁵. Since in arbitration the parties have the possibility to appoint as arbitrator somebody with the necessary reputation, i.e. somebody they entrust with the responsibility to fairly hear and resolve their case, the process of allocation of the case is more transparent and the parties would have more trust in the proceedings. In the end, all these factors would ultimately increase the chances that the losing party complies voluntarily with the final act resolving the dispute;
- (ii) *Specialization in the dispute matter*: in arbitration, the parties can appoint as arbitrator a person with expert knowledge in the area of the dispute (not necessary with legal background), whereas in state courts the judges are not only randomly selected, but are often not specialized in a given area and need to resolve various types of

⁵ In Bulgaria this principle is proclaimed in Art. 9(1) of the Judiciary Power Act, which reads as follows: “The allocation of cases and files in the bodies of the judiciary shall be carried out on the principle of random selection by electronic assignment according to the order of their receipt.” About the concept of the “neutral” assignment of cases” as mitigating the risk of having deliberate allocation of one or more judges to a judicial panel in order to achieve a given outcome (so called “panel packing”) see **Butler., P.**, The Assignment of Cases to Judges. // *New Zealand Journal of Public and International Law*, Vol. 1, Number 1, November 2003, New Zealand Centre for Public Law and contributions, pp. 83-113. The author makes a comparative analysis of the rules in New Zealand, Germany and USA aiming to achieve this “neutral” assignment of cases.

disputes on a daily basis (e.g. disputes related to contract law, property law, commercial law, family and inheritance law, etc.). Thus, unlike arbitrators, in the general scenario, the judges are deprived of the opportunity to achieve a higher degree of specialization in a given matter. This ultimately could influence the quality of the proceedings and the final dispute resolution act, especially in complex disputes which require a real in-debt knowledge in the dispute matter (e.g. you cannot reasonably expect an expert in construction to be able to resolve a dispute in the area of intellectual property, banking transactions, contract law, etc. with the same quality as construction disputes);

- (iii) *Speed*: in arbitration there is only one instance before which the parties are heard compared to the multiple instances of the state court system (often two or three different courts could be involved in one and the same case). Without any doubt this feature of arbitration shortens the time necessary to obtain a final act resolving the dispute which saves time, money and resources of the involved parties;
- (iv) *Predictability of the enforcement*: the arbitral award could be enforced in various jurisdictions under the terms of a widely accepted and recognized international instrument such as the New York Convention of 1958 (NY Convention) and enforcement could be denied only on limited grounds listed in the NY Convention (which do not concern the dispute on its substance). At the same time, in the area of enforcing state court decisions, the lack of such unified tool (especially in the context of relations with parties located outside EU)

creates uncertainty and could even deprive the winning party of the opportunity to effectively exert its rights.

Thus, because of its many advantages, arbitration arises as a serious candidate to replace litigation as a key tool to ensure speed and efficiency in the area of dispute resolution. That is why more and more people and businesses opt for arbitration rather than litigation. In order to continue to be an attractive alternative to the state court system, arbitration needs to remain flexible and to be able to respond to the challenges imposed by the development of ICT⁶, including having the arbitration proceedings conducted in data protection compliant manner. This is only possible after an examination of the roles of the various actors involved in arbitration, the types of data they collect, why they collect it, on what legal grounds they process such data and what other requirements the data protection regime imposes towards processing of personal data in arbitration.

⁶ A very interesting survey on the interaction between ICT and arbitration, namely the extent to which arbitration practitioners are familiar with and inclined to use various ICT solutions in their practice can be found in **Piers, M., Aschauer, Ch.**, Survey on the Present Use of ICT in International Arbitration, Chapter 1 in *Arbitration in the Digital Age. The Brave New World of Arbitration*, Piers, M., Aschauer, Ch. (eds.) Cambridge University Press, 2018, pp. 40-56. The authors conclude that the arbitration practitioners “were integrating new technologies into their practices, but rather in spontaneous and reactive ways” and are “rather hesitant” to explore the opportunities provided by the new technologies. Thus, according to them the full potential of ICT in arbitration is still not reached. The fact that the arbitration community slowly realizes the opportunities provided by ICT is another indication why the analysis of the present paper, namely the data protection implications of commercial arbitration, need to be properly explored and understood so the data protection requirements can be implemented in practice.

Scope and Limitations of the Analysis

The present analysis aims to review the application data protection regime towards arbitration as a dispute resolution mechanism. Within the scope of the analysis falls only arbitration *as an ADR mechanism*. Other types of ADR mechanisms such as negotiations, conciliation, mediation, dispute adjudication, ADR bodies for consideration of consumer disputes⁷ or dispute committees for consideration of domain name disputes⁸, etc. are excluded of the present paper. The focus of the review is only *commercial* arbitration, i.e. arbitration used as a mechanism for resolving disputes arising out of commercial legal relations. Other types of arbitration such as investment arbitration are also not part of the analysis, although a significant part of the research could be applied by analogy in the field of investment arbitration as well.

This paper is not intended to be national specific, but rather to examine commercial arbitration from a general EU data protection perspective, in particular from the perspective of the new GDPR rules. At the same time, given the fact that the author is a practicing lawyer in Bulgaria, the text may contain multiple references to Bulgarian legislation and court and administrative

⁷ In Bulgaria such exist under the Consumer Protection Act – see Art. 181a-185 which transposes the rules of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

⁸ In Bulgaria such exist under the TERMS AND CONDITIONS FOR DOMAIN NAME REGISTRATION AND SUPPORT IN THE .BG ZONE AND THE SUB-ZONES (Version 4.9. - updated on May 23, 2018), adopted by REGISTER.BG Ltd. – see in particular Art. 11 “Disputes”, URL: <<https://www.register.bg/user/static/rules/en/index.html#11>> (last accessed 12.11.2018). The Dispute Committee merely makes a recommendation (i.e. does not resolve the dispute with a final act) about the domain name dispute and later, based on this recommendation, the Registry issues a final decision on the dispute. Thus, the role of this Dispute Committee cannot be qualified as arbitration in the exact sense of the word.

practice. The Bulgarian arbitration legislation widely resembles the 1985 UNCITRAL Model Law of International Commercial Arbitration (UNCITRAL ML), thus the conclusions could be applied by analogy in various jurisdictions where the legislation in the area of commercial arbitration is based on the UNCITRAL ML.

This paper may serve as a basis for future research in the field of data protection, arbitration and ADR, automated data processing, etc. and can be used by legal practitioners, arbitrators, members of arbitral institutions, computer specialists, students and all those interested in the personal data protection and dispute resolution mechanisms.

The analysis is in accordance with the legislation in force as of 01.03.2019.

FOR AUTHOR USE ONLY