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Bulgaria Reforms Arbitration Law by Imposing More Control and Restrictions

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Background

Bulgarian arbitration law has been an area of rare developments. It is incorporated in the International Commercial Arbitration Act ("ICAA"), adopted in 1988 as almost a direct translation of the UNCITRAL Model Law on International Commercial Arbitration in its 1985 version. The only major reform of ICAA was its extension to arbitrations between entirely domestic parties by amendment from 1993. Hence, despite its name, the ICAA regulates both domestic and international arbitrations. Apart from this, the ICAA used to provide for a fairly liberal procedure with very little state interference.

Non-arbitrability of consumer disputes

However, there has been a recent backlash to arbitration mainly because arbitration, due to its flexibility, has become to be seen as a tool for conduct of unfair practices. Some newly established institutions have started handling predominantly consumer disputes where the claimant was a major services provider (heating, electricity, water, etc.). This spawned various debatable practices such as dubious service of documents to respondents and questionable qualification of arbitrators, as such institutions listed largely unknown persons.

The recent amendments adopted by the Bulgarian Parliament purport to avert such suspicious practices by a wide legislative brush: all consumer disputes are excluded from the scope of arbitrability under Article 19 of the Civil Procedure Code. All pending disputes between commercial entities and consumers should be discontinued.

Amended grounds for state court scrutiny of awards

The ICAA used to designate the Sofia City Court as the single state court having jurisdiction to issue writs of execution for the purpose of commencement of enforcement of arbitral awards. The amended law introduces a new jurisdictional criterion: the competent state district court is the court at the domicile or at the seat of the award-debtor. More importantly, now the ICAA empowers the district court to investigate whether the arbitral award is null and void or not. If the award has been rendered under a non-arbitrable dispute, the state court should not issue a writ of execution on its basis. In practice, this has significant consequences. First, the law puts forward a new instrument for state scrutiny over arbitral awards and, indirectly, on the work of arbitrators. Issuance of writs

of execution would not only be a formalistic exercise, but it may lead to the result that the long-chased arbitral award is futile just because the relevant state court considers that the arbitral tribunal erred on its own jurisdiction. Although this does not, formally, impair the kompetenz-kompetenz principle, the amended ICAA builds up a second tier test for arbitral awards on the gateway to enforcement, which, if not passed, may make efforts of award-creditors bitter and lost.

Furthermore, the grounds for setting aside under the ICAA were amended, too. As the ICAA used to reflect the 1985 UNCITRAL Model Law, it featured public policy as on of the grounds for setting aside of arbitral awards. It has been an often argued, but seldom granted, basis for setting aside of awards. However, the wide and undefined scope of the concept of public policy has rendered it as a final resort for the aggrieved parties. This has also spawned uncertainty as to what precisely provides for the content of public policy in case of awards rendered by domestic tribunals. The recent amendment of the ICAA removes public policy as ground for setting aside of awards. It is worth noting that, following this legislative change, international (foreign) awards could be resisted enforcement for reasons of violation of public policy only on the basis of the New York Convention, as the ICAA will no longer feature this specific ground. More importantly, if a tribunal is seated in Bulgaria and renders an award which would not be subject to enforcement via the New York Convention due to being a domestic award, the parties would not be able to resort to public policy arguments. Therefore, it seems that the legislative amendment has been quite focused on protecting domestic arbitrations but has lost sight on those with international dimensions.

Governmental control over arbitrators

The ICAA used to feature almost no specific requirements regarding arbitrators. This liberal regime is now changed as the amended law requires: university education, lack of criminal convictions, at least 8 years of professional experience as well as high moral qualities. The law certainly purports to prevent low qualified arbitrators from being appointed, but also clearly restricts freedom of choice, which has always been the backbone of arbitration. Moreover, the Ministry of Justice is now empowered to exercise a form of control over arbitration institutions. The inspectors at the Ministry of Justice are entitled to scrutinize the work of arbitration institutions and provide compulsory instructions to achieve compliance with the law. Arbitrators handling consumer disputes in breach of the prohibition on these cases will be subject to pecuniary sanctions.

Conclusion

The indicated powers of control and scrutiny introduced in Bulgaria are in vague terms and it is not clear whether these will be exercised to full extent. However, the amendment of the ICAA seems to be a clear example of a sway from the liberal regime of almost no state involvement towards a more intrusive one, where both the judiciary and the executive have some, direct or indirect, means to influence arbitration proceedings in Bulgaria.

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