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The International Comparative Legal Guide to:

International Arbitration 2010

A practical cross-border insight into international arbitration

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Bulgaria?

The following legal requirements for an arbitration agreement ("**AA**") are provided for by the Bulgarian law:

- The parties to the AA must have legal capacity to enter into contracts.
- The AA must refer to disputes stemming from or connected to a specific legal relationship/s. The general agreement that the parties shall submit all disputes between them to arbitration shall be null and void.
- The AA may concern disputes which may arise in future or which have already arisen.
- The AA can be related to disputes on the subject of a contract or non-contractual legal relations.
- The AA must be in writing. It is deemed to be in writing if contained in either a document signed by the parties or in the exchange of letters, telex messages, telegrams or other means of communication.
- The AA could be executed either in the form of a clause in the main contract or as a separate arbitration agreement.
- The AA is deemed concluded when the defendant, in writing or by a statement included in the minutes of the arbitration hearing, agrees that the dispute be brought to arbitration or when the defendant takes part in the arbitration proceedings without objecting to the jurisdiction of the arbitral tribunal.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Arbitration agreement should clearly state:

- scope of the arbitration jurisdiction;
- choice-of-law clause (substantive and/or conflict of law rules, if applicable);
- seat of the arbitration;
- arbitration institution, if any;
- number of arbitrators and rules for formation of the arbitral tribunal;
- procedural rules, rules of evidence; and
- special confidentiality requirements.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

In principle, national courts are not prevented from hearing a dispute with respect to which the parties have entered into an AA. However, if the defendant raises an objection that the dispute should be submitted to arbitration, the national court shall be obliged to examine the validity of the AA and terminate the case before it. Should the court finds that the AA is null and void or invalid or non-enforceable, it shall continue the examination of the case.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Bulgaria?

Arbitration proceedings in Bulgaria are governed by a special act - the International Commercial Arbitration Act ("**ICAA**"), which entered into force on 5 August 1988. Rules related to arbitration are also provided in the Bulgarian Civil Procedure Code (please see question 3.1 below).

Bulgaria is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and the European Convention on International Commercial Arbitration, as well as to the Convention on the Settlement of Investment Disputes between States and Individuals of Other States ("**Washington Convention**").

Provisions for the settlement of commercial disputes through arbitration and for recognition and enforcement of foreign arbitral awards are also included in a number of bilateral treaties to which Bulgaria is a party.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

The ICAA was initially designated to regulate only international commercial arbitration proceedings. In 1993 the Parliament passed a very important and conceptual amendment of the ICAA whereby, subject to certain exceptions, the ICAA became applicable to domestic arbitration proceedings as well. As a result, since 1993 domestic and international arbitration proceedings in Bulgaria are both governed by the ICAA, although its name remained unchanged.

As mentioned above, not all of the provisions of the ICAA are equally applicable to international and domestic arbitration proceedings. Paragraph 3 of the Transitional and Concluding

Provisions of the ICAA determines certain exceptions to the applicability of ICAA to domestic arbitration, and namely:

- the parties may not appoint as an arbitrator a person who is not a Bulgarian citizen, except for the cases where a party to the dispute is an enterprise with a prevailing foreign participation;
- both commercial and non-commercial disputes could be referred to domestic arbitration, whereas international arbitration deals only with civil monetary disputes arising out of international commercial relations; where the parties to domestic arbitration have not appointed an arbitrator/s, the latter shall be appointed by the Sofia City Court instead of the Chairman of the Bulgarian Chamber of Commerce and Industry ("**BCCI**"), who shall have competence in case of international arbitration;
- the language of domestic arbitration proceedings shall be Bulgarian; the parties are not allowed to agree upon a foreign language/s to be used in the proceeding;
- the validity and the effective execution of an arbitration agreement shall be judged on the basis of the ICAA regardless of the law which the parties might have agreed upon to be applicable to their agreement; and
- the arbitral tribunal shall decide a domestic dispute on the basis of the Bulgarian substantive law. It could apply a foreign law only in exceptional cases.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

The ICAA is based on the UNCITRAL Model Law ("**Model Law**"). The differences that are worth mentioning are the following:

- **Scope of application:** The ICAA gives a narrower definition as to which disputes shall be considered international within the meaning of the law as compared to the definition provided by the Model Law. The ICAA applies to domestic arbitration proceedings, as well as to disputes that are not of commercial character.
- **Jurisdiction of arbitral tribunal:** Under the Model Law a decision on jurisdiction of an arbitral tribunal could be appealed against separately before competent national courts, whereas according to the ICAA, the decision on jurisdiction itself is not subject to appeal. The lack of jurisdiction of an arbitral tribunal shall be a ground for setting aside of the arbitral award.
- **Interim measures and preliminary orders granted by arbitral tribunal:** Article 21 of the ICAA dealing with interim measures ordered by an arbitral tribunal is based on the 1985 wording of Article 17 of the Model Law. The new Chapter IVA of the Model Law (adopted in 2006) is not adopted in the ICAA and the new concept of interim measures and preliminary orders granted by an arbitral tribunal is not reflected by the ICAA.
- **Making an award and termination of proceedings:** Article 39 of the ICAA confers additional powers in the decision-making process to the presiding arbitrator in a panel of arbitrators. Thus, where the majority of arbitrators could not reach a decision on the case, the award shall be made by the presiding arbitrator. According to the Model Law, a presiding arbitrator may render decisions on procedural issues only.
- **Recourse against award:** In contrast to Article 34 of the Model Law, the ICAA does not provide for suspending of annulment proceedings for a certain period of time in order to give the arbitral tribunal the opportunity to take the necessary measures to rectify the grounds for the challenge of the award.
- **Recognition and enforcement of foreign arbitral award:** Unlike the Model Law, the ICAA distinguishes between domestic and foreign arbitral awards. It provides for recognition and enforcement only of foreign arbitral awards, whereas domestic arbitral awards (rendered by an arbitral tribunal in Bulgaria) are directly enforceable in the country.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Bulgaria?

There are only a few mandatory rules that apply to international arbitration in Bulgaria. These rules are designated to ensure the equality of the parties and the due process in arbitration proceedings. The mandatory rules concern existence and validity of an arbitration agreement, due notification of parties, default procedures in the appointment of arbitrators, equal treatment of parties during the proceedings, the cases of interventions by national courts, the time limits for bringing counter-claims, challenging independence and impartiality of arbitrators and raising other procedural objections.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Bulgaria? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Generally, only civil proprietary/monetary disputes, including commercial disputes, as well as disputes for filling in the gaps in a contract or its adaptation to changed circumstances, shall be considered "arbitrable". Article 19(1) of the Civil Procedure Code ("**CPC**") provides an exhaustive list of the subject matters that cannot be referred to arbitration. These are disputes involving the determination of:

- a right *in rem* or possession over immovable property;
- an obligation for providing child support and/or alimony; and
- a right stemming from an employment legal relationship. (It should be noted in this regard that collective labour disputes may be settled through mediation and/or voluntary arbitration by trade union or employer's organisations and/or by the National Institute for Reconciliation and Arbitration).

Non-monetary disputes and criminal disputes are excluded from arbitration *ab initio*. There are recent discussions on arbitrability of administrative disputes but for the time being such disputes are not arbitrable under Bulgarian law, either.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

According to Article 19 of the ICAA an arbitral tribunal could – and in fact must - rule on its jurisdiction, also in cases where its jurisdiction is challenged on the grounds of non-existence or invalidity of the arbitration agreement. The arbitral tribunal shall rule on the objection of lack of jurisdiction either by a special procedural ruling or by the arbitral award on merits. Should the arbitration tribunal decide it has no jurisdiction to sit in the case it shall terminate the proceedings. Its decision shall be final and shall not be subject to appeal before the national courts.

The ICAA prescribes strict time limits for questioning the jurisdiction of an arbitral tribunal. The objection on jurisdiction should precede any plea on merits and should be made together

with the response to the statement of claim at the latest. The objection also could be raised by a party who has nominated or participated in the nomination of arbitrators. The jurisdiction of the arbitral tribunal as to particular issue raised during the proceedings should be challenged immediately.

3.3 What is the approach of the national courts in Bulgaria towards a party who commences court proceedings in apparent breach of an arbitration agreement?

National courts shall terminate the proceedings before them where the parties have agreed to submit the dispute to arbitration and the defendant has made an objection to this effect within the time limit for submitting the response to the statement of claim (please also see question 1.4 above). The ruling for termination of the proceedings is subject to a two-instance appeal review by the national courts.

In case of termination of the proceedings due to the existence of an arbitration agreement the court shall not reimburse the state fee paid by the claimant and may order him/her to recover the costs and expenses paid by the defendant, provided that such have been effectively incurred and the defendant has made a request to this effect.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

The general rule is that it is for the arbitral tribunal to determine its own jurisdiction. A national court could address the issue only in a limited number of cases where the court is requested to rule on the validity and enforceability of an arbitration agreement, and in particular:

1) In cases in which the national court is seized by a claim which is covered by an arbitration agreement and the defendant has raised the objection that the dispute should be submitted to arbitration (please see question 3.3 above).
2) Should the validity of an arbitral award be challenged before the Supreme Court of Cassation on one or more of the grounds listed in Article 47 (1)-(3) of the ICAA, and namely:
   - the arbitration agreement has been signed by a party which lacked capacity to act at the time of conclusion of the arbitration agreement;
   - the arbitration agreement is null and void; and
   - the subject matter of the award is not arbitrable.

   Should the award be set aside on the one of the above grounds the interested party may bring an action before the competent state court but could not refer the dispute to arbitration again.
3) In cases of enforcement and recognition of a foreign arbitral award where the competent national court (which is the Sofia City Court except it is otherwise provided by a bilateral agreement) shall examine whether the arbitration agreement is valid under the applicable law.

3.5 Under what, if any, circumstances does the national law of Bulgaria allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves parties to an agreement to arbitrate?

The Bulgarian law does not provide for the possibility that an arbitral tribunal can assume jurisdiction over third parties which are not themselves parties to the arbitration agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Bulgaria and what is the typical length of such periods? Do the national courts of Bulgaria consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Limitation periods under Bulgarian law are divided into prescription periods which are considered to be a substantive law issue and preclusion periods which are a procedural law issue. Commencement of arbitration proceedings is subject to prescription periods. There are no Bulgarian law provisions which preclude parties from filing an arbitration claim and parties are not allowed to agree upon any preclusion period for submitting a dispute to arbitration in Bulgaria.

According to Bulgarian law, the general prescription period for all claims is 5 years, except if it is otherwise provided by law. Tort claims and claims for rescission of contracts are subject to 5-year prescription period. Prescription period is 3 years for claims for damages and liquidated damages from non-performed contracts and for claims for rent, interest and other periodic payments. Prescription periods start to run from the date on which the obligation became executable, e.g. from the date on which the cause of action occurred. These terms are applied by the court only upon objection raised by the defendant. In cases submitted to arbitration the running of a prescription period shall be interrupted as from the day on which the arbitration proceeding starts. According to the ICCA the arbitration proceedings start on the day on which the defendant receives the claimant's request for the dispute to be referred to arbitration, except it is otherwise agreed between the parties. If the dispute is referred to an institutional arbitration ("**CA**") the rules of that CA shall determine the opening of the arbitration proceedings, which could be the day on which the statement of claim was lodged (for example such is the case under the Rules of CA at the BCCI, as well as under the Rules of the CA at the BIA – both courts of arbitration mentioned in question 2.2. above).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

In case of international arbitration the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties, whereas any designation of the applicable law shall be construed - unless otherwise expressed - as referring to the substantive law and not to the conflict of law rules of that country. (Article 38 (1) of the ICAA). If parties have not designated any particular law to be applicable in their case the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.

In case of domestic arbitration the arbitral tribunal shall decide the dispute in accordance with the Bulgarian substantive law. It could apply a foreign law which has been chosen by the parties or determined by it according to the applicable conflict of law rules only in cases that include an international element which - according to the rules of Bulgarian international private law - would lead to the application of a foreign law.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In general, the mandatory rules that shall prevail over the rules of the law chosen by the parties are related to the arbitrability of the subject matter, public order considerations, legal capacity of the parties and requirements of equality and due process.

Although the parties are free to choose the substantive and/or procedural law and/or conflict of law rules that shall govern their relationship, they should comply with mandatory rules of Bulgarian law where either the seat of arbitration is in Bulgaria or the execution of the arbitral award shall be sought in the country. Otherwise the parties shall risk that the domestic arbitral award be set aside by the Supreme Court of Cassation or, accordingly, the foreign arbitral award be denied recognition and enforcement by the Sofia City Court.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

As a principle, the formation, validity and legality of an arbitration agreement shall be governed by the law chosen by the parties or, failing any indications thereon, by the law of the country where the award is made. However, legal capacity of the parties shall be determined in accordance with the law of the state where the party has its seat or is domiciled. In case of arbitration in Bulgaria the arbitral tribunal should also satisfy itself that the formal requirements stipulated in Article 7 of ICAA for existence of an arbitration agreement are met. Otherwise, the arbitral award could be revoked by the Supreme Court of Cassation on the grounds of Article 47 (1) of ICAA.

The assessment of whether the subject mater of the dispute is arbitrable shall be made under the law of the seat of arbitration and/or the law of the country where execution of the award shall be sought (please see question 4.2).

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Generally, selection and appointment of arbitrators is left at the free choice of the parties. However, the selection process must ensure equal treatment of the parties and the arbitrators should also fulfil the requirements for independence and impartiality and for possession of the agreed professional qualifications and expertise. According to the ICAA, only physical persons (Bulgarian or foreign citizens in case of international arbitration and Bulgarian citizens in case of domestic arbitration) could be nominated and appointed as arbitrators. The selection of arbitrators is also subject to the requirements.

Usually, arbitral institutions impose some additional restrictions to the autonomy of the parties to select arbitrators. For example, parties to domestic arbitration before the AC at the BCCI may appoint only arbitrators from the AC's list of arbitrators.

As already mentioned in question 2.2 above, in domestic arbitrations the parties can appoint as arbitrators only persons who are Bulgarian citizens, except for the cases where a party to the dispute although seated in Bulgaria is an enterprise with a prevailing foreign participation.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In such cases the arbitral tribunal shall be appointed following the procedure provided for in Article 12(2) of the ICAA:

- if the arbitral tribunal consist of three arbitrators, each party shall appoint one arbitrator, and these two arbitrators thus appointed shall appoint the presiding arbitrator;
- if a party fails to appoint an arbitrator within 30 days of receipt of a request to do so, or if the two arbitrators appointed by the parties fail to agree on the presiding arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the Chairman of the BCCI in international arbitration proceedings and by the Sofia City Court in domestic arbitration (please see our note in question 2.2 above); and
- in a case of arbitration before a sole arbitrator, if the parties are unable to agree on the arbitrator, he/she shall be appointed, upon request of each of the parties, by the authority indicated in the preceding paragraph.

Rules of arbitration institutions normally provide for a procedure for an appointment of arbitrators, which shall prevail over Article 12(2) of the ICAA. For example, according to Article 14 of the Rules of the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry ("**CA at BCCI**"), if a claimant or a respondent fail to appoint an arbitrator or the arbitrators fail to elect the presiding arbitrator, the President of the Court of Arbitration shall appoint such arbitrator or presiding arbitrator from the list of arbitrators of the Court. According to Article 27(6) of the Rules of the Court of Arbitration at the Bulgarian Industrial Association ("**CA at BIA**"), the President of the Court shall act as an appointing authority in case of failure of a party to appoint an arbitrator.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Bulgarian courts cannot intervene in the selection of arbitrators. Except for the powers of the Sofia City Court in default procedure under Article 12 (2) of the ICAA (please see above question 5.2), Bulgarian courts are not allowed to substitute the parties or in any way to intervene in the selection of arbitrators.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Bulgaria?

The independence and impartiality are crucial for the arbitration process. Although the ICAA does not set forth an express requirement that a person who is nominated or appointed as an arbitrator shall be independent and impartial, such requirement is implied in the obligation of an arbitrator to state all circumstances that may raise well-founded doubts as to his/her independence and impartiality. That obligation shall be in force after the appointment of the arbitrator and throughout the arbitration proceedings. Further the existence of any doubts in the independence and in the impartiality of an arbitrator can represent a ground for withdrawal of the arbitrator from the case, respectively for his/her challenge by the parties.

The law does not provide any particular guidelines for disclosure of potential conflicts of interest. According to Article 13 of the ICAA when a person is approached with a proposal to be nominated as an arbitrator for a dispute, the person in question shall point out all circumstances which may raise any well-grounded doubts as to his or her impartiality or independence. The arbitrator is subject to this obligation after his/her appointment as well. The Statute of the CA at the BCCI provides for an explicit requirement that arbitrators shall be independent and impartial when they perform their duties and shall not act as representatives of the parties. The Statute reiterates the provisions of the ICAA, and in addition it determines some specific actions and cases that are incompatible with the position of arbitrator, namely, that arbitrators shall not provide

verbal or written opinions or consultations as well as be attorneys in disputes under the jurisdiction of the CA at the BCCI; arbitrators, practicing in law firms, shall not accept to be elected or appointed for arbitrators on cases which any party to the case has entrusted to the firm in which they are working; arbitrators shall not be persons, barred to be arbitrators by any normative act of law, such as members of Parliament, ministers, deputy ministers, heads of state agencies, members of the Constitutional Court. An indication about what is deemed to be a conflict of interest can be found in the provision of the Rules of CA whereby doubts in the independence and impartiality of an arbitrator which may ground a challenge of an arbitrator in case the arbitrator personally, directly or indirectly is interested in the outcome of the dispute.

Similar provisions exist in the Rules of CA at the BIA.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Bulgaria? If so, do those laws or rules apply to all arbitral proceedings sited in Bulgaria?

The ICAA provides for a few mandatory procedural rules designated to guarantee the rights to equal treatment and due process of the parties. These rules deal with the time limit for bringing a counter-claim and proper communications and notifications of the parties, as well as with the service of written evidence and expert opinions to the parties.

Beyond the above provisions parties to both international and domestic arbitration are free to agree on the procedure to be followed by the arbitral tribunal. Failing such an agreement, the arbitral tribunal shall examine the case according to a procedure it finds appropriate but in any case it shall give an equal opportunity to each of the parties to defend its rights and interests.

6.2 In arbitration proceedings conducted in Bulgaria, are there any particular procedural steps that are required by law?

According to Article 23 of the ICAA, arbitral proceedings in Bulgaria start with the service of a request to arbitrate to the defendant, unless it is otherwise agreed by the parties and the claimant shall be further required to file a statement of claim within the time limit agreed by the parties or determined by the arbitral tribunal. Rules of arbitral institutions normally prescribe (e.g. CA at BCCI and CA at BIA) that arbitral proceedings commence on the date on which the statement of claim is lodged with the registry of the respective arbitral institution.

After the statement of claim is filed and served to the other party, the latter should be given the opportunity to present its response to the statement of claim within the time limit agreed by the parties or determined by the arbitral tribunal.

No further specific procedural steps are required by law for the conduct of arbitral proceedings in Bulgaria.

6.3 Are there any rules that govern the conduct of an arbitration hearing?

The Bulgarian law does not provide for any specific rules that govern the conduct of an arbitration hearing. Subject to the requirements of due process and equality of parties, the arbitral tribunal is free to organise the hearing as it sees fit. It could hold a hearing even if the parties have agreed that their case shall be decided only on the basis of written evidence and written pleas. In any case the arbitral tribunal shall be obliged to notify the parties in due course about the date of the hearing.

6.4 What powers and duties does the national law of Bulgaria impose upon arbitrators?

The Bulgarian law imposes a strong requirement that arbitrators shall be independent and impartial and shall have the necessary (or agreed by the parties) professional knowledge and experience. Arbitral tribunal must ensure that arbitration proceedings are in compliance with applicable mandatory rules and the agreement of the parties. If the parties failed to reach an agreement, the arbitrator shall conduct the proceedings in a manner it considers appropriate. In any case, the arbitral tribunal shall treat the parties with equality and each party shall be given the full opportunity to present and argue his/her case. The power conferred upon the arbitral tribunal also includes the power to determine rules of evidence, as well as admissibility, relevance and weight of any evidence. The arbitral tribunal is obliged to undertake all admissible and necessary steps to fulfil what the parties have entrusted to it - to resolve their dispute by issuing its arbitral award, unless there exist legal grounds for the termination of the proceedings.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Bulgaria and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Bulgaria?

Appearance of lawyers from other jurisdictions before Bulgarian courts is governed by the Bulgarian Bar Act. In particular, a foreign lawyer may act as defence counsel of nationals of his/her country upon a prior permission by the Chairman of the Supreme Bar Council and subject to strong reciprocity requirement.

The above restrictions are relevant only to judicial proceedings before national courts and do not apply to arbitration proceedings in Bulgaria. Parties to arbitration may be represented by a proxy of their own choice and the ICAA does not set forth any requirement as to nationality or professional capacity of the proxies. Of course, it is reasonable to expect that the proxy shall have the necessary knowledge of law and professional experience to defend the case.

6.6 To what extent are there laws or rules in Bulgaria providing for arbitrator immunity?

The Bulgarian law does not provide for arbitrator immunity. An arbitrator shall be held responsible for damages caused to the parties as a result of his/her illegal action in the course of conducting arbitration proceedings.

To the best of our knowledge, there have not been any lawsuits brought against arbitrators in Bulgaria, so far.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The Bulgarian courts shall not intervene in arbitration proceedings and could not rule on any procedural issues arising in the context of pending arbitration proceedings. Upon request by a party the national courts shall only rule on the challenge of an arbitrator or may appoint an arbitrator if parties to a non-commercial dispute fail to do so.

During the proceedings for annulment of an arbitral award and the proceedings for recognition and enforcement of a foreign arbitral

award, the national court shall review certain procedural issues related to the participation of the parties in the proceedings and composition of the arbitral tribunal. In particular, according to Article 47 (4) and (6) of the ICAA, the arbitral award shall be set aside by the Supreme Court of Cassation where:

- the party has not been duly notified of the appointment of an arbitrator or of the arbitration proceedings or for reasons beyond its control it was not in a position to participate in the proceedings; and
- the composition of the arbitral tribunal or the arbitration procedure were not in conformity with the agreement of the parties.

6.8 What is the approach of the national courts in Bulgaria towards *ex parte* procedures in the context of international arbitration?

According to Article 47 (4) of the ICAA an arbitration award shall be set aside by the Supreme Court of Cassation where the party has not been duly notified of the appointment of an arbitrator or of the arbitration proceedings or for reasons beyond its control it was not in a position to participate in the proceedings.

Also, the Sofia City Court shall refuse the recognition and enforcement of a foreign arbitral award should the party against which the award is invoked not have been given a proper notice of the appointment of the arbitration or of the arbitration proceedings or was otherwise unable to present its case.

7 Preliminary Relief and Interim Measures

7.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Under Bulgarian law unless the parties have agreed otherwise, the arbitral tribunal, acting upon request by a party, order the opposing party to undertake appropriate preliminary and/or interim measures for securing the rights of the claimant. Such measures however may not interfere with third parties' rights. In case preliminary and/or interim measures have been ordered, the arbitral tribunal may require the claimant to present a guarantee.

The arbitrator/arbitral tribunal is not entitled to seek the assistance of the court in awarding interim or preliminary security measures.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Under Bulgarian law, before or during arbitration proceedings, any of the (potential) party to the proceedings may file an application for preliminary or interim relief in front of the courts. The review of the application shall be governed by the Civil Procedure Code ("**CPC**").

National courts are competent to award preliminary or interim relief if:

- the claim is supported by convincing written evidence, or
- the claimant has provided a guarantee in an amount determined by the court.

Upon a request by a party, national courts could also grant preliminary or interim measures for securing evidence necessary for the proceedings if there is a risk that the evidence may be lost or its collection may be impeded.

The party shall have that right to file a request for preliminary or interim measures in case of arbitration in a foreign country, too.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The practice of Bulgarian courts on preliminary and interim relief is not consistent and it is difficult to make any general conclusions. We may say however that Bulgarian courts are more reluctant to grant preliminary relief than to impose interim measures.

7.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Bulgarian law does not allow for the national courts to order security for costs. The law is silent whether an arbitral tribunal could order such security.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Bulgaria?

Production of evidence in arbitration proceedings is subject to the principles of equality of the parties. Each of the party shall be given an opportunity to present its evidence and review and comment on the evidence provided by the other party and collected by the arbitral tribunal.

Provided that the equality requirement is met the parties are free to choose the applicable rules of evidence. They may agree that the case shall be decided only on the basis of written evidence and/or may exclude specific documents or materials. In the absence of agreement, the arbitral tribunal shall employ the rules of evidence which it deems appropriate and necessary.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

In principle, due to consensual nature of arbitration, the scope of the arbitral tribunal's authority to order disclosure of documents is always determined by the will of the parties. Thus, the arbitral tribunal shall be authorised to order disclosure of documents where the parties have agreed so. However, it shall have no power to require production of documents by a third party.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

According to Article 37 of the ICAA, the arbitral tribunal or a party to arbitral proceedings with the approval of the arbitral tribunal may request the competent national court to collect certain evidence that are relevant to the case. The court shall be obliged to grant the request and collect the evidence according to the provisions of the CPC.

It should be noted in this regard that the Bulgarian procedural law does not recognise a general right to disclosure. According to the CPC, each of the parties is entitled to request the court to order the other party to present a specific document which is in his/her

possession after explaining the relevance of the document to the dispute.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

Two things should be mentioned in connection with the production of witness testimony (oral or written) in arbitral proceedings in Bulgaria. First, the arbitral tribunal is not empowered to summon a witness to appear before it or to give written testimonies. The party which benefits from the witness's testimony shall bring him/her before the tribunal or shall collect and present his/her statement in writing.

It is also relevant that, by virtue of Article 37 of the ICAA, the arbitral tribunal or a party to the arbitral proceedings may request the state court to examine a witness according to the rules of the CPC. The court shall not be allowed to collect written testimonies as these are not admissible under the CPC.

Second, witnesses shall not take an oath to tell the truth in front of the arbitral tribunal. Neither shall they bear criminal liability for a false testimony.

In principle, cross-examination of witnesses is allowed in arbitration proceedings in Bulgaria. However, the parties should have agreed to cross-examination. Failing such agreement, it shall be for the arbitral tribunal to decide whether to allow cross-examination or not. The witnesses should also have consented to be cross-examined.

8.5 Under what circumstances does the law of Bulgaria treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

Bulgarian law does not provide any rules on privileged documents in an arbitral proceeding, and respectively no rules on waiver of privilege exist.

Under the Bulgarian Bar Act attorney-at-law papers, files, electronic documents, computer equipment and other carriers of information shall be privileged and confidential. Correspondence between an attorney-at-law and his or her client, irrespective of the manner it is maintained, including electronically, shall be as well privileged and confidential. Conferences between an attorney-at-law and his or her client shall not be intercepted and recorded. Any recordings, where available, shall not be used as means of evidence and shall be subject to immediate destruction.

Further, any of the parties may refuse to present a document if its content concerns his/her private or family life or the presentation would lead to defamation or self-incrimination of the party or his/her relatives.

In view of the above, privilege shall be deemed waived if a party voluntarily discloses information and/or documents that are protected as privileged with respect to that party.

Apart from the above rules and although no express legal provision stipulates it, it is widely accepted that arbitral proceedings as a whole, including all documents presented by the parties, should be treated as confidential. This steams from the confidentiality of commercial relations and disputes in principle. Because of that it is widely accepted and undisputed that any information and/or documents disclosed in arbitration proceedings shall be considered confidential, unless the parties expressly agreed otherwise or the information and/or the documents has been made public prior to and out of the context of the arbitration. The arbitrators, as well as the parties and the expert, shall not be allowed to reveal information and documents they become aware of in the course of arbitration proceedings.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award?

Arbitral award shall be in writing and shall be decided by a majority vote unless the parties have agreed otherwise. The arbitrator who dissents from the decision of the majority shall state its dissenting opinion in writing. Should a majority vote not be reached the award shall be rendered by the presiding arbitrator.

The arbitral award shall state the reasons for the decision, unless the parties agreed otherwise. It shall indicate the date and the place of arbitration and shall be signed by the arbitrators.

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

Under Bulgarian law, as from the delivery to the parties, the arbitral award shall become final, effective and obligatory to the parties and shall be subject to enforcement. No appeal proceedings are provided for in the law.

An arbitral award, however, can be challenged by means of an application for the setting aside of the award, which shall be lodged with the Supreme Court of Cassation and be resolved in one-instance court proceedings.

According to Article 47 of the ICAA, the arbitral award shall be set aside by the Supreme Court of Cassation if the applicant proves one of the following grounds:

- the party lacked legal capacity at the time of the conclusion of the arbitration agreement (Article 47 (1));
- no arbitration agreement had not been concluded or it was null and void pursuant to the applicable law chosen by the parties or in the case of absence of such a choice - pursuant to the ICAA (Article 47 (2));
- the subject matter of the dispute is not arbitrable according to the Bulgarian law or the arbitration award contradicts the public order of the Republic of Bulgaria (Article 47 (3));
- the applicant has not been duly notified of the appointment of an arbitrator or of the arbitration proceedings or for reasons beyond his/her control he/she was not able to participate in the proceedings (Article 47 (4));
- the dispute settled by the award has not been provided for in the arbitration agreement or the award resolves issues beyond the subject matter of the dispute (Article 47 (5)); and
- the composition of the arbitral tribunal or of the arbitration procedure was not complied with the agreement of the parties or - in the absence of an agreement – with the provisions of the ICAA (Article 47 (6)).

10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

Article 47 of the ICAA, which sets forth the grounds for annulment of an arbitral award (please see question 10.1 above), is a

mandatory rule and it shall not be derogated by the will of the parties. The parties are not permitted to exclude any of the grounds for the setting aside of an arbitral award provided thereby. Should such an agreement be concluded it shall be null and void.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Article 47 of the ICAA (please see question 10.1 above) provides an exhaustive list of the grounds for setting aside an arbitral award. The Supreme Court of Cassation shall be empowered to set aside an arbitral award only on one or more of the grounds prescribed thereby.

10.4 What is the procedure for appealing an arbitral award in Bulgaria?

The application for setting aside of an arbitral award shall be lodged with the Supreme Court of Cassation within three months from the date on which the award was served to the applicant. In the case of a decision for correction, interpretation or supplementation of an arbitral award, the time limit for lodging an application for annulment shall start from the date on which the decision is rendered. The Supreme Court of Cassation shall review the application according to the rules of the CPC.

The application for setting aside an award shall state the names and the addresses of the parties, the challenged arbitral award, the grounds for setting aside of the award, the request to the court and the signature of the applicant. It shall be enclosed with the relevant evidence and a document for payment of the court fee.

In case the Supreme Court of Cassation sets aside the arbitral award on any of the grounds under Article 47 (1) to (3) (please see above question 10.1), the claimant may submit the dispute to the competent national court. In cases where the arbitral award is set aside on any of the grounds under Article 47(4) to (6) (please see above question 10.1), the Supreme Court of Cassation shall send the case back to the arbitral tribunal for new examination.

The judgment of the Supreme Court of Cassation shall be final.

11 Enforcement of an Award

11.1 Has Bulgaria signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Bulgaria ratified the New York Convention in 1961, expressing the reservation of reciprocity.

The recognition and enforcement of foreign arbitral awards in Bulgaria is governed by the New York Convention of 1958 and several bilateral international agreements to which Bulgaria is a party. The procedural rules of recognition and enforcement are included into the ICAA and the Private International Law Code of Bulgaria.

11.2 Has Bulgaria signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Bulgaria is a party to the European Convention on International Arbitration of 1961, as far as it is applicable to recognition and enforcement of arbitral awards.

11.3 What is the approach of the national courts in Bulgaria towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Under Bulgarian law, any final and effective arbitral award issued by an arbitral tribunal sitting in Bulgaria is directly enforceable and when requested by the party the competent court – the Sofia City Court - shall issue a writ of execution based on that award.

For the recognition and enforcement of foreign arbitral awards an application shall be lodged with the Sofia City Court, whose competence is exclusive. The court may deny recognition and enforcement only on one or more of the grounds listed in Article V of the New York Convention, which is directly applicable into the national legal order.

Proceedings start upon an application by the party seeking recognition and enforcement. The applicant should also present an authentic original award or a duly certified copy thereof and the original arbitration agreement or certified copy thereof. All presented documents should be enclosed with a translation in Bulgarian.

The judgment of the Sofia City Court on recognition and enforcement shall be subject to appeal before the Sofia Court of Appeal and the Supreme Court of Cassation.

11.4 What is the effect of an arbitration award in terms of *res judicata* in Bulgaria? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Arbitral awards have *res judicata* in Bulgaria. Therefore issues that have been resolved by an arbitral award shall not be re-examined in other arbitration or judicial proceedings. The final arbitral award shall be binding upon the parties and the public authorities in the country. Of course, the obligation to respect the binding force of a foreign arbitral award is predetermined by the recognition of the award in Bulgaria.

12 Confidentiality

12.1 Are arbitral proceedings sited in Bulgaria confidential? What, if any, law governs confidentiality?

Arbitral proceedings in Bulgaria are confidential, unless it is otherwise agreed by the parties. There are no explicit legal provisions that set forth special requirements in this regard but confidentiality is considered to be the essence of arbitration proceedings and in fact it is usually one of the underlining reasons for the parties to refer to arbitration.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Any confidential information disclosed in arbitration proceedings shall not be used in subsequent proceedings, unless the parties have agreed otherwise. Information which was made public prior to and out of the context of arbitration shall not be subject to the above restriction.

12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Although no express legal provision exist in principle, arbitration proceedings in Bulgaria are deemed confidential. To the best of our knowledge all institutional arbitrations in their rules on procedure provide that arbitration proceedings are confidential and no third parties shall be allowed to attend arbitral hearings unless otherwise expressly agreed between the parties.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Generally, the parties are free to determine the scope of the power of an arbitral tribunal to award damages. It should be noted in this regard that the types of remedies available to the parties shall be governed by the applicable substantive law. In the cases where Bulgarian law shall apply, the arbitral tribunal shall not award punitive damages under the fear of the arbitral award being set aside on public order grounds.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Available interest is determined by the governing substantive law. Where the relationship between the parties is governed by the Bulgarian law, the maximum amount of the interest is determined by the Council of Ministers and it is equal to basic interest rate determined by the Bulgarian National Bank for the respective period, plus 10 percent.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The ICAA does not include any explicit provision on the recovery of costs and expenses in arbitration proceedings. It is for the arbitral tribunal to decide on the costs and expenses of arbitration unless the parties agree otherwise. Costs and expenses would include any costs and expenses that are incurred in connection with arbitration proceedings - arbitration fees, attorney fees, expert fees, etc.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An arbitral award may be subject to taxation. For example, damages that cover lost income or profit may be taxable.

14 Investor State Arbitrations

14.1 Has Bulgaria signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Bulgaria ratified the Washington Convention on 4 October 2000. The Convention entered into force with respect to the country on 15 May 2001 ("**Washington Convention**").

14.2 Is Bulgaria party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Bulgaria is a party to approximately 38 BITs that provide for arbitration before the ICSID, provided that the other party to the agreement is a signatory to the Washington Convention. In most of the BITs, jurisdiction of ICSID is agreed as an alternative to arbitration *ad hoc*.

Bulgaria is also a party to the Energy Charter Treaty and the Convention Establishing the Multilateral Investment Guarantee Agency.

14.3 Does Bulgaria have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Generally, BITs between Bulgaria and another country are executed either in English or in the official languages of both parties and in English as a third language. It the latter case all texts are deemed to be equally authentic but in case of divergence of interpretation, the English text shall prevail.

14.4 What is the approach of the national courts in Bulgaria towards the defence of state immunity regarding jurisdiction and execution?

Legal framework of the state immunity includes general principles of international law, 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations and bilateral consular conventions to which Bulgaria is a party, and relevant provisions of the CPC. Bulgaria is not a signatory to the European Convention on State Immunity. Neither has the country adopted a separate law on that matter.

According to Article 18 of the CPC, Bulgarian courts shall be competent to examine actions against a foreign State in the following cases:

1. where the immunity is waived;
2. under actions based on contractual relations, where the obligation is performed in the Republic of Bulgaria;
3. under actions for damages sustained as a result of a tort or delict where the harmful act was committed in the Republic of Bulgaria;
4. under actions regarding rights to succession property and vacant succession in the Republic of Bulgaria; and
5. under cases which are under the exclusive jurisdiction of the Bulgarian courts.

Points 2, 3 and 4 above shall not apply to any legal transactions and moves performed in execution of official functions of the persons or, respectively, in connection with the exercise of sovereign rights of the foreign State.

As to arbitration, the Bulgarian law does not provide for explicit regulation of a foreign state's immunity from jurisdiction in arbitration proceedings. We are of the view that such a state would be deemed to have waived its immunity from jurisdiction by signing of the arbitration agreement and it would not be allowed to raise any defence of jurisdictional immunity.

However, although we are not aware of any case law, we could not rule out the possibility of the Bulgarian courts denying recognition and enforcement under the New York Convention of a foreign arbitral award rendered against a foreign state on immunity grounds

and in view of the limited powers of the courts to review claims against foreign states.

A foreign sovereign state shall enjoy immunity from execution except in the cases expressly provided for by Article 18(1) CPC. However, execution could not be carried out with respect to certain property (e.g. premises of a diplomatic mission). In addition, although the issue is not clear, we might suggest that in enforcement proceedings a foreign state would be given the same protection as to the Bulgarian state against which compulsory enforcement of monetary awards is not allowed (articles 519 and 520 of the CPC).

By virtue of Article 54 (1) of the Washington Convention an award rendered pursuant to the Convention shall be binding and enforceable in Bulgaria as if it were a final judgment of a Bulgarian court. No recognition and enforcement proceedings shall be required for such an award. However, execution of the award shall be subject to general principles of state immunity from execution.

15 General

15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Bulgaria? Are certain disputes commonly being referred to arbitration?

For the recent years there has been certain growth in the use of arbitration - in both institutional arbitration and *ad hoc* arbitration - as a method for dispute resolution in commercial matters. This is due to the fact that arbitration proceedings are not so expensive, they are faster (one-instance) proceedings and give more flexibility as to selection of arbitrators, choice of the applicable rules of procedure and admissibility of evidence, as well as they secure confidentiality of proceedings.

There has been also a certain growth in the number of arbitration institutions in Bulgaria.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in Bulgaria, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

In March 2008 the new Bulgarian Civil Procedure Code entered into force. The CPC was drafted and passed by the Parliament for a few months to answer to the EU accession requirements rather than to provide for better regulation of civil proceedings in Bulgaria. The introduction of many new rules and the lack of relevant information hamper the efficient application of the Code. We may thus expect that more civil proceedings will be referred to arbitration tribunals in the country for final resolution.

In respect of expected changes in the law applicable to arbitration, since the ICAA is based on the UNCITRAL Model Law, it could be expected that the amendments of the latter legal instrument in 2006 could be followed by respective amendments in the Bulgarian law.

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