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CLARIFYING ARBITRATION AGREEMENTS' VALIDITY, BUT CONFUSING ENFORCEMENT: BULGARIA'S ARBITRAL TANGO

Summary

This paper deals with recent developments in Bulgarian arbitration world, focusing on the Supreme Court of Cassation's Interpretative Ruling No, 1 of 21 February 2024, which has finally clarified two key issues: that the assignee is bound by the arbitration agreement concluded between the assignor and the debtor, and that no explicit power of attorney is required under Bulgarian law for concluding arbitration agreements. Despite this advancement, the paper highlights the ongoing uncertainty surrounding the recognition and enforcement of foreign arbitral awards, specifically regarding the formal requirements for the documents to be supplied to the Bulgarian courts. The core issue the Bulgarian courts are debating is whether the requirement in the domestic legislation for providing the court with arbitral award with notarisation of the signatures and the capacity of the arbitrators, along with a certificate that the award has entered into force, are applicable in the process of recognition and enforcement of foreign arbitral awards.

Keywords: arbitration, Bulgaria, assignment, recognition and enforcement of foreign arbitral awards.

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VALIDNOST ARBITRAŽNIH SPORAZUMA I PROBLEMI U NJIHOVOM SPROVOĐENJU: BUGARSKI ARBITRAŽNI TANGO

Sažetak

Predmet ovog rada tiče se nedavnih dešavanja u bugarskom arbitražnom svetu, sa fokusom na interpretativnu presudu Vrhovnog kasacionog suda br. 1 od 21 februara 2024, kojom su konačno razjašnjena dva ključna pitanja: da je primalac obavezan sporazumom o arbitraži zaključenim između prenosioca i dužnika, i da prema bugarskom nije potrebno specijalno punomoćje zakonu za zaključivanje sporazuma o arbitraži. Uprkos ovom napretku, Rad naglašava postojeću neizvesnost oko priznavanja i izvršenja stranih arbitražnih odluka, posebno u vezi sa formalnim uslovima za dokumente koji se dostavljaju bugarskim sudovima. Osnovno pitanje koje bugarski sudovi raspravljaju je da li se uslov za priznanje i izvršenje stranih arbitražnih odluka ogleda u podnošenju sudu arbitražne odluke sa overom potpisa arbitara, te sa potvrdom da je odluka stupila na snagu.

Ključne reči: arbitraža, Bugarska, dodelavanje, priznavanje i izvršenje stranih arbitražnih odluka.

1. Introduction

On the national level, arbitration in Bulgaria is governed by the International Commercial Arbitration Act (Bulgarian International Commercial Arbitration Act, hereinafter: ICAA), which provides the principal legislative framework for both domestic and international arbitration proceedings in the country. The ICCA is based on the UNCITRAL Model Law on International Commercial Arbitration (1985), but it does not incorporate the 2006 amendments (see: United Nations, 2006). The ICAA was enacted and promulgated in the State Gazette No. 60 on 5 August 1988. Since its adoption, the ICAA has been amended only seven times, with the most recent amendment in 2017, reflecting its relatively stable legislative framework over the years.

The 2017 revision introduced significant changes to the ICAA, addressing both procedural and substantive aspects of arbitration. One of the key changes involved additional eligibility criteria for arbitrators. Specifically, Article 11, paragraph 3 of the

ICAA now requires that an arbitrator be a competent adult citizen who has not been convicted of an intentional crime of a general nature, who holds a higher education degree, has at least eight years of professional experience, and demonstrates high moral character (see. Art. 11, para. 3, ICAA). These criteria were introduced to ensure higher standards of professionalism and integrity among arbitrators.

In addition to setting stricter standards for arbitrators, the 2017 amendments also removed the public policy violation ground for annulment of arbitral awards by the Supreme Court of Cassation. The legislature justified this by reasoning that annulment proceedings take place in the State where the arbitration is seated. Therefore, it would be inconsistent to claim that an arbitral award violates the public policy of the same state, as doing so would undermine the credibility of the Bulgarian arbitration. This particular change, however, was met with substantial criticism by Bulgarian professionals and academics, who questioned its implications for safeguarding public interest and legal certainty.

Another significant amendment in 2017 dealt with the validity of arbitration awards. The revision stipulated that arbitration awards issued in disputes over matters not subject to arbitration would be deemed null and void. This amendment shall be read in conjunction with the amendment of Article 19 of the Bulgarian Civil Procedure Code), which now includes consumer disputes in the list of non-arbitrable disputes (see: Art. 19, Bulgarian Civil Procedure Code, hereinafter: CPC). Consequently, the number of arbitration cases in the country has decreased, as consumer disputes had constituted a substantial portion of arbitration caseloads.

Despite this decline, arbitration has remained a relatively popular dispute resolution mechanism in Bulgaria, particularly for commercial disputes. The number of cases for annulment of arbitral awards could serve as an indication for the amount of arbitration proceedings in Bulgaria. According to one Bulgarian legal information system – Ciela, the number of such cases in 2024 is 139; in 2023 – 127, in 2022 – 120, and in 2021 – 138 (Ciela, 2024). Currently, there are approximately 40 active arbitration institutions operating in the country. The most prominent include the Arbitration Court at the Bulgarian Chamber of Commerce and Industry, which reportedly handles around 500 cases annually (see: Bulgarian Chamber of Commerce and Industry, 2024) the Arbitration Court at the Bulgarian Industrial Chamber; the Arbitration Court at the Association "Institute of Private International Law", etc.

These developments in Bulgarian arbitration law provide a broader context for analysing recent judicial interpretations and rulings. While legislative amendments, such as those in 2017, have sought to refine the framework for arbitration, judicial decisions have played an equally critical role in clarifying contentious issues and ensuring the system's adaptability. As will be discussed below, the Bulgarian

Supreme Court of Cassation (hereinafter: SCC) has addressed key issues concerning the validity and enforcement of arbitration agreements and awards, further shaping the arbitration landscape in Bulgaria.

The realities of the Bulgarian arbitration landscape can be aptly described using the classical metaphor of a tango: two steps forward, one step back, as the court practice strides stumble, moving in a rhythm marked by uncertainty. The Bulgarian case law regarding the fate of arbitration agreements after assignment of rights has now reached a significant milestone. After years of legal uncertainty and inconsistent rulings, the matter has been conclusively addressed by the Bulgarian SCC's Interpretative Ruling, clarifying two critical issues: firstly, that after the assignment of rights, the assignee remains bound by the arbitration agreement; and secondly, that no explicit power of attorney is required for the conclusion of an arbitration agreement. These clarifications have resolved important legal uncertainties, contributing to a more predictable arbitral framework, particularly in cases involving the assignment of contractual rights. However, this clarity comes with a caveat. While the arbitration agreement's fate is now well defined, ambiguity persists in the realm of recognition and enforcement of foreign arbitral awards – a crucial aspect of international arbitration practice. That is due to a number of recent court decisions requesting notarisation of the signatures and the capacity of the arbitrators under the award, and a specific certificate that the award has entered into force, and last, but not least – the re-opened debate about certification of those documents by the Bulgarian Ministry of Foreign Affairs. These issues will be addressed in turn in the analysis below.

8. (Un)Resolved Questions in Bulgarian Arbitration: Assignment of Rights and Proxy Authority

For a long time, two main issues had stirred the Bulgarian arbitration world, with the first one being: "What happens with the arbitration agreement in cases of assignment of rights?," and the second one: "Is an arbitration agreement incorporated in a contract valid and binding for the parties if the contract was signed by a proxy having general powers to represent one of the parties and sign contracts, without explicitly conferring authority to sign arbitration agreements?" It should be noted that the Bulgarian arbitral tribunals and doctrine have never had doubts about the affirmative answer to both these questions (Zhelyazkova, 2019, pp. 95-97). However, the practice of the Bulgarian SCC (competent under Article 47 of the ICAA) in the proceedings of setting aside arbitral awards took different views, a long time creating for legal uncertainty.

2.1. Assignment of Rights

The assignment of rights under the "main" contract typically creates room for interpretation whether the arbitration agreement is binding for the assignee. In the constant practice of the SCC, summarised for example in Judgment No. 261 of 1 August 2018 in the SCC Case No. 624/2017 (referring to Judgment No. 71 of 9 July 2015 in the SCC Case No. 3506/2014, Judgment No. 44 of 29 June 2016 in the SCC Case No. 971/2015, Judgment No. 70 of 15 June 2012 in the SCC Case No. 112/2012, Judgment No. 122 of 18 June 2013 in the SCC Case No. 920/2012),[1] it was accepted that the arbitration agreement had a relatively independent character in relation to the contract in which it was incorporated; it was subject to a separate legal regime, and was not an appurtenance to the contract in which it was incorporated. The SCC stressed that the rights and obligations of the parties under the substantive legal relationship were distinct from the rights and obligations under the arbitration agreement, and therefore, the right of a party to refer to arbitration a dispute arising out of the substantive legal relationship could not be assigned together with the rights under the legal relationship unless the counterparty had expressly agreed thereto in writing. It was understood that in the absence of an express written consent, the arbitration agreement could not be deemed to have been assigned by the assignment agreement, irrespective of whether the assignment was communicated to the debtor, and irrespective of whether the assignment of the rights under the substantive legal relationship was effective for the debtor.

For the sake of completeness, it should be noted that in Judgment No. 51 of 23 September 2013 in the SCC Case No. 610/2012, the panel sitting on this case supported the opposite view that: "Taking into account the legal characteristic of the assignment contract and the legal consequences it entails, it should be assumed that the assigned receivable passes to the new creditor with all the privileges and appurtenances, such as the agreed method of dispute resolution between the co-contractors in case of default under the contract."

In contrast to assignment of rights by virtue of contractual relations, situations of universal succession did not create controversies about the validity of the arbitration agreement. It was generally accepted in the case law that where a party was substituted in the entirety in the rights and obligations under a contract, the arbitration clause contained in that contract remained valid in the original party's relations with the substituted party (for instance Judgment No. 91 of 26 July 2019 in the SCC Case No. 251/2019; Judgment No. 46 of 8 May 2013 in the SCC Case No. 789/2012).

[1] The same was accepted in Judgment No. 46 of 21 July 2015 in the SCC case No. 3556/2014.

However, two cases of the Bulgarian SCC stirred the *status quo* in 2022:

In the first case, by virtue of an arbitral award rendered on 3 November 2021, the Arbitration Court at the Bulgarian Chamber of Commerce and Industry (hereinafter: AC at BCCI) upheld the claim filed by "Multiple Plus" EOOD against "Intercommerce 2010" EOOD for payment of electricity supplied under a sales contract. It should be noted that the said contract was concluded between "Intercommerce 2010" EOOD and "Future Energy" EOOD. The contract contained an arbitration clause empowering AC at BCCI with jurisdiction to hear disputes arising from the contract. However, "Future Energy" EOOD became insolvent. "Multiple Plus" EOOD was a creditor of "Future Energy" EOOD. In the process of cashing in the property of "Future Energy" EOOD, its receivables under the contract with "Intercommerce 2010" EOOD were awarded under Article 717з of the Bulgarian Commerce Act in favour of "Multiple Plus" EOOD (assignment in lieu of payment). To justify its jurisdiction, the majority of the arbitral tribunal correctly accepted that current situation was specific, but most closely resembled the hypothesis of universal succession since the receivables had been awarded in the insolvency proceedings. The presiding arbitrator issued dissenting opinion, arguing that the acquisition of rights under Article 717z of the Commerce Act was essentially a compulsory assignment - the debtor's claim in insolvency was transferred to the patrimony of a third party against payment of a price. Although in this hypothesis the claim passed independently of the will of the original creditor, in both cases - voluntary assignment and compulsory assignment - it passed independently of the debtor's will. It is the latter, according to the presiding arbitrator, that presupposed the application by analogy of the rulings in the SCC case law concerning succession to the arbitration clause in the case of assignment - denied accordingly.

Naturally, "Intercommerce 2010" EOOD brought a claim for setting aside the arbitral award under Article 47 (1), point 2 of the ICAA, claiming that the award had been rendered in the absence of valid arbitral agreement and essentially repeating the arguments of the dissenting opinion. By virtue of Judgment No. 50 of 14 July 2022 rendered in Case No. 36/2022, the SCC explained that both the theory and the case law accepted the binding nature of the arbitration clause in case of universal succession on the side of the creditor or the debtor, as well as by an express consent of the assignor, the assignee and the debtor. However, the SCC underlined that: "In the present hypothesis, the decree of assignment of the insolvency debtor's claim in favour of a creditor of the insolvent does not result in succession both in the rights and in the obligations under the material contract concluded between the bankrupt merchant as a creditor and its debtor." Hence, the claim for setting aside the arbitral award due to lack of valid arbitration agreement was honoured by the SCC.

It is important to note that the decision of the SCC was signed also with a dissenting opinion on the side of one of the judges regarding the jurisdiction of the arbitral tribunal. The said judge argued that the doctrine of separability of the arbitration clause from the main contract did not suffice to assume that the assignment of rights transferred only the material rights under it. Furthermore, the dissenting judge stressed that the principle *res inter alios acta* also could not support the view that the assignment did not "assign" the procedural right of the party to refer to arbitration. In support of this argument, the dissenting judge explained that there was no legal definition of what "appurtenance" to a contract meant, and there was no legal argument to exclude the arbitration clause from such concept.[2] On the contrary, the judge gave example with the right to file *actio Pauliana,* which was accepted by the General Assembly of the Commercial Department of the SCC in Interpretative Ruling No. 2 of 26 March 2021 in Interpretative Case No. 2/2019 to pass to the assignee by virtue of assignment. Hence, the dissenting judge underlined that: "With an assignment of the claim, the identity of the creditor changes, but the choice of arbitration is not made in view of the identity of the creditor, who is a party not subject to the contract, but in view of the credibility of the particular arbitration chosen and its preference, as a means of procedural remedy, over the state judicial institutions. The choice and stipulation of that arbitration, in the event of a dispute arising out of a substantive legal relationship, is the subject-matter of that procedural contract, and that subject-matter is not altered by the assignment of the claim. Except for reasons of fear of unregulated relations between the assignor and the arbitral tribunal, which do not rest on the law, a change of creditor cannot be equated with a loss of confidence in the arbitral tribunal on the part of the debtor. The change of creditor does not place the debtor in a worse position with regard to the substantive relationship, in so far as it continues to have all the objections it had to the old creditor. It should also be borne in mind that it is often the arbitration clause that determines the assignee's interest in acquiring the claim, in view of certain advantages of arbitration over judicial dispute resolution and its suitability for commercial purposes. As is shared in legal theory: arbitration agreements are not "personal covenants," but part of the economic value of the material right transferred."

In the second case, quite the opposite view was expressed in an almost identical case, namely Arbitration Case No. 23/2021 of the AC at BCCI. "Multiple Plus" EOOD filed a claim against "Agroasu" EAD for payment of electricity under a sales contract. Identically to Arbitration Case No. 17/2022, the contract contained an

[2] According to Article 99 (2) of the Bulgarian Obligations and Contracts Act, the assigned claim shall pass to the new creditor with its privileges, liens and other appurtenances, including accrued interest, unless otherwise agreed.

arbitration clause, but the receivables under the contract were acquired by "Multiple plus" EOOD in the insolvency proceedings of "Future energy" EOOD – the party to the contract with "Agroasu" EAD. In the following set aside proceedings before the SCC in Commercial Case No. 1144/2022, the court reasoned that it shared the views expressed in Judgment No. 51 of 23 September 2013 in the SCC Case No. 610/2012, and in the above quoted dissenting opinion in the SCC Case No. 36/2022, according to which, considering the legal characteristic of the assignment and the legal consequences that it entailed, it should be assumed that the assigned claim passed to the new creditor with all the privileges and appurtenances, including in particular the arbitration agreement. Consequently, by virtue of Judgment No. 50169 of 9 December 2022, the court rejected the claim for annulment of the arbitral award due to lack of a valid arbitral agreement.

These controversies have led to the president of the Bulgarian Supreme Bar Council exercising his powers under Article 125 of the Bulgarian Judicial System Act (see: Art. 125, Bulgarian Judicial System Act), namely: to suggest the General Assembly of the Commercial Department of the Bulgarian SCC to issue an interpretative ruling. According to Article 124, para. 1, Point 1 of the Bulgarian Judicial System Act, in situations of inconsistent application and interpretation of law, the General Assembly of the respective SCC department can make an interpretative ruling, which according to Article 130, para. 2 of the Bulgarian Judicial System Act shall be binding for the judicial and executive authorities, for local self-government authorities, and for all authorities that issue administrative acts. Hence, by virtue of Interpretative Ruling No. 1 of 21 February 2024 of the General Assembly of the Commercial Department of the SCC, Point 1, it was finally (and in the author's view) and correctly accepted that: "… by transferring the claim to a new creditor and by notifying the debtor of the assignment, the arbitration clause included in the substantive contract retains its effect in the event of a future dispute between the assignor and the debtor. The arbitral tribunal is therefore competent to hear disputes between them in cases where the arbitration agreement meets all the legal requirements for its validity and modalities." Any other interpretation would practically mean that a bad faith party to an arbitration agreement could easily circumvent the agreed dispute settlement method by a simple act of assignment even in favour of a related entity.

1.2. Power of Attorney

Similarly to the assignment debate, the Bulgarian legal community had struggled with an inconsistent practice on whether a general power of attorney sufficed for the conclusion of arbitration agreement, or the power of attorney needed to include explicit reference that the proxy was authorised to conclude arbitration

agreements. Naturally, such discussion arose only in set aside proceedings before the SCC where the losing party was trying to obtain an annulment of the arbitral award, by claiming, *inter alia*, that there was no valid arbitration agreement. The SCC case law on the matter was divided. Some court panels accepted that no specific power of attorney was required for the conclusion of an arbitration agreement.[3] The reasoning of the court in these cases was that situations where explicit power of attorney was required were explicitly envisaged in law. For example:

- Article 34 (2) of the Bulgarian Civil Procedure Code (hereinafter: CPC) requires explicit power of attorney for civil status claims, including matrimonial claims (see: Art. 34(2), CPC.
- Article 34 (3) of the CPC requires explicit power of attorney for the conclusion of a settlement, for the reduction, withdrawal or waiver of a claim, for the acknowledgment of the claims of the other party, for participation in a mediation procedure, for the receipt of money or other valuables, as well as for acts constituting a disposal of the subject matter of the case (see: Art. 34(3), CPC).
- Article 136 (7) of the Commerce Act requires explicit power of attorney for participating in a limited liability company's shareholders' general meeting on behalf of a shareholder etc (see: Art. 136(7), Commerce Act).

In contrast to that, neither the Bulgarian CPC, nor the ICAA contain a provision on the power of attorney for the conclusion of arbitration agreements. The court panels also relied on the findings of the General Assembly of the Civil and Commercial Department of the SCC expressed in their Interpretative Ruling No. 5 of 12 December 2016 in Interpretative Case No. 5/2014, where in the reasoning to Point 1 of the Interpretative Decision it was clarified that under the principle of freedom of contract adopted by the legislator in the general regulation of the authorisation (Arts. 36-42, Bulgarian Obligations and Contracts Act), it was necessary and sufficient that the power of attorney clearly and unequivocally, generally expressed the will of the authorising person to carry out legal transactions or actions on his behalf through his chosen attorney. Only when a legal provision expressly established certain requirements regarding the necessary content of a given type of power of attorney, it should meet these requirements. The same approach and reasoning were adopted in Judgment No. 59 of 21 April 2021, rendered in the SCC Commercial Case No. 2390/2020.

[3] The same view is expressed also in Judgment No. 193 of 21 January 2021 in Commercial Case No. 1510/2020; Judgment No. 198 of 16 November 2012 in the SCC Case No. 149/2012; Judgment No. 60 of 28 April 2015 in the SCC Case No. 3527/2014; Judgment No. 60023 of 29 June 2021 in the SCC Case No. 1407/2020; Judgment No. 2 of 15 February 2022 in the SCC Case No. 1406/2020: Judgment No. 194 of 14 January 2021 in the SCC Case No. 794/2020; Judgment No. 37 of 23 March 2021 in the SCC Case No. 795/2020.

The opposite view, namely – the need of an explicit power of attorney for the conclusion of arbitration agreements, was expressed in Judgment No. 8 of 8 February 2017 in the SCC Case No. 1706/2016, and in Judgment No. 157 of 11 January 2013 in the SCC Case No. 611/2012. The main argument in support of such thesis was that the arbitration agreement was separate from the main contract, and it did have different procedural consequences. Hence, these panels accepted that the general power of attorney did not include, *per se*, powers for the conclusion of an arbitration agreement.

The debate was finally settled by the same Interpretative Ruling No. 1 of 21 February 2024 – in Point 2. Similarly to the assignment issue, the General Assembly took an arbitration-friendly approach in line with the international practice, and by referring predominantly to the arguments in previous SCC decisions, took the view that the conclusion of an arbitration agreement did not require an explicit power of attorney. The author believes that such approach should be supported as it creates predictability and certainty for the parties, especially for companies having complex management system and operating in different markets. Practice shows that companies typically issue one general power of attorney for handling their commercial affairs, and that requiring additional explicit power of attorney is an unjustified administrative burden and sometimes practically impossible.

While the Interpretative Ruling No. 1 of 2024 has finally clarified the status of arbitration agreements in cases of assignment of rights and those established through a general power of attorney, the enforcement of arbitral awards now faces a new layer of ambiguity. Allow me to put this issue into perspective:

3. Evolving Judicial Requirements for Arbitral Award Authentication and Certification in the Enforcement Process

Briefly summarised, enforcement of foreign arbitral awards in Bulgaria is subject to Article 51(2) of the ICAA, providing that enforcement of foreign arbitral awards shall be subject to the international agreements closed by the Republic of Bulgaria. In particular, unless the international agreement to which the Republic of Bulgaria is a party provides otherwise, according to para. 3 of the same article, a claim for recognition and enforcement of a foreign arbitral award shall be filed before the Sofia City Court, and the rules of Articles 118-122 of the Code of Private International Law (hereinafter: CPIL) shall apply accordingly with the exception of the right of the debtor to make an objection that the receivables are extinguished. Article 51(2) of the ICAA essentially means that the recognition and enforcement

of a foreign arbitral award[4] most likely[5] would be subject to the rules of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by Decree No. 284 of the Presidium of the National Assembly of 8 July 1961 (Extraordinary No. 57 of 1961), Promulgated in State Gazette No. 2 of 8 January 1965 (hereinafter: New York Convention). In other words, Article III of the New York Convention, providing: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral award" shall apply (Art. III, New York Convention; see also: Born, 2021, §26.02).

In practical terms, if a foreign arbitral award is made in the territory of a Contracting State to the New York Convention, a claim for recognition and enforcement of the foreign arbitral award in Bulgaria shall be made as follows:

- A claim[6] for recognition and enforcement of the foreign arbitral award shall be filed before the Sofia City Court (Art. 51(3), ICAA);
- The requirements of Article IV of the New York Convention shall be followed (if the award was made in the territory of a Contracting State), i.e., the claim shall be accompanied by a translated and duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof, where the translation shall be certified by an official or sworn translator or by a diplomatic or consular agent. The Bulgarian doctrine accepts that the term "duly authenticated" shall be interpreted to mean certification of the signatures of the arbitrator(s) rendering the award by the respective body of the arbitral institution (in cases of institutional arbitration) or certification by

[4] In contrast to an award rendered under the auspices of a foreign arbitral institution seated abroad, but where the seat of the arbitration itself was expressly agreed to be in the territory of the Republic of Bulgaria – see Decision No. 50052 of 21 March 2024, rendered in the SCC Commercial Case No. 2031/2021.

[5] The New York Convention shall apply when the award was rendered in the territory of a Contracting State since Bulgaria has made a reciprocity reservation. In addition, with regard to awards made in the territory of non-contracting States, Bulgaria applies the Convention only to the extent to which those States grant reciprocal treatment.

[6] According to Ruling No. 200 of 17 March 2011, rendered in the SCC Private Commercial Case No. 82/2011, the claim for recognition and enforcement of the foreign arbitral award is a specific type of constitutive claim, which was considered in the light of the legal standing of the claimant to file such claim in a situation where there were open insolvency proceedings against the defendant.

competent national body, for instance a notary public, of the signatures of the arbitrators in cases of *ad hoc* arbitration (Stalev, 1997, p. 155).

- Pursuant to Article III of the New York Convention, the recognition and enforcement of such foreign arbitral award shall be made in accordance with the rules of procedure in Bulgaria, which the Bulgarian case law interprets to mean "in accordance with Article 51 (3) ICAA, (see: Zhelyazkova, 2019, p. 345) referring to Articles 118-122 CPIL.[7] However, Article 119 (2) CPIL is the one creating havoc, as it, in principle, governs recognition and enforcement of foreign state court judgments, providing that: "The claim [for recognition and enforcement] shall be accompanied by a copy of the judgment, certified by the court which delivered it, and a certificate from that court that the judgment has entered into force. These documents must be certified by the Ministry of Foreign Affairs of the Republic of Bulgaria." The Bulgarian court practice accepts that these documents shall be supplied to the court along with the claim for recognition and enforcement of the arbitral award, and these documents constitute a condition for the regularity of the claim (See: Ruling No. 79 of 25 February 2015 in the SCC Civil Case No. 7343/2014).

Three questions arise from the applicability of Article 119 (2) CPIL in the proceedings of enforcement of a foreign arbitral award:

1) Is the certificate that the arbitral award has entered into force a mandatory requirement in the process of recognition and enforcement of the award, or can it be substituted by other documents?

This is a key question as the practice shows that sometimes obtaining a certificate that the award has entered into force is burdensome and difficult to explain to the arbitral institution, especially given the clear provisions in most rules of arbitral institutions explicitly providing that the award rendered under these rules is final and binding for the parties (for instance, Article 46 of the Rules for Expedited Arbitrations of the Stockholm Chambers of Commerce Arbitration Institute; Article 31, p. 6 of the ICC Rules of Arbitration, etc.) (See: Emanuilov, 2023, pp. 100-115).

The answer to this question was summarised in the SCC in Ruling No. 79 of 25 February 2015, rendered in Civil Case No. 7343/2014, with the Civil Department accepting that: "The foreign judgment whose recognition is sought must be submitted with the application under Article 118(2) CPIL. The certificate of its entry into force is closely linked to this judgment, therefore the law requires their joint submission, and this with the certification of Ministry of Foreign Affairs. However, the certificate is an ancillary document, so in certain cases it may be replaced by

[7] It should be noted that Article 51(3) of the ICAA was introduced with the amendments to the ICAA as of 2001.

other evidence establishing beyond any doubt the fact of entry into force of the foreign judgment. This exception may apply in cases where, due to the particularities of the foreign law, the party has difficulty in producing such a certificate. The case law recognises cases in which it is accepted that the entry into force of the foreign judgment is established by the presentation of the legislation of the foreign state…"

In other words, the Bulgarian court practice, in the author's view, has interpreted this requirement *ratio legis* and correctly adopted a flexible approach rather than a formalistic one.

2) What does it mean that the award needs to be certified by the court that delivered it in terms of arbitral awards?

As elaborated above, the requirement for "duly authenticated" award in Article IV of the New York Convention was interpreted by the Bulgarian doctrine and case law as a requirement for certification of the award by the competent body of the arbitral institution or by notary public in *ad hoc* arbitrations (Stalev, 1997). However, some recent case law (see: Ruling No. 743 of 28 December 2015, rendered in the SCC Private Commercial Case No. 2415/2015) does not differentiate between these types of arbitration proceedings, interpreting Article IV of the New York Convention in conjunction with Article 51(3) ICAA, referring to Article 119 (2) CPIL, as a requirement for *a certification by a notary public of the signatures and capacity of the persons who have issued the award*. That same approach was adopted in Ruling No. 331 of 26 July 2022, rendered in the SCC Private Commercial Case No. 414/2022.

Such interpretation can be supported neither by the wording of Article IV of the New York Convention, nor by the objectives to create sufficient security for the parties and authentication of the award. Moreover, such approach is not in conformity with the requirement of Article III of the New York Convention obliging the Contracting State, in this case Bulgaria, not to impose substantially more onerous conditions on the recognition or enforcement of foreign arbitral awards than those imposed on the recognition or enforcement of domestic arbitral awards (Zhelyazkova, 2019, p. 341).

3) Must these documents always be certified by the Bulgarian Ministry of Foreign Affairs?

On the one side, according to the Bulgarian Regulation on the Legalisations, Authentications and Translations of Documents and Other Papers, the Ministry of Foreign Affairs (hereinafter: MFA) legalises only official documents, while a foreign arbitral award is considered a private document. Therefore, certification by the MFA could be done with respect to 1/ the notarisation of the arbitrators' signatures; 2/ the notarisation of copies of the award; 3/ the certificate that the award has "entered into force," and/or 4/ the translator's signature as a guarantee of the

authenticity of the judgment and the documents submitted. However, the Bulgarian court practice (summarised in Ruling No. 743 of 28 December 2015, rendered in the SCC Private Commercial Case No. 2415/2015) accepts that the requirement for certification by MFA is considered to be complied with when the documents are legalised by means of the Apostille certificate pursuant to Article 4 of the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (hereinafter: Apostille Convention) to which Bulgaria acceded on 30 April 2001. Therefore, the court accepted in the said Ruling that: " […] the certification of the copies of the foreign arbitral award and the certificate of its entry into force by the Bulgarian Ministry of Foreign Affairs in the proceedings under Art. 51 para. (3) ICAA is not always mandatory**,** as there are exceptions to the rule of Article 119(2) CPIL. In the first place, such certification is not necessary in cases where the documents referred to in Article 119(2) CPIL are subject to Apostille certification under Article 4 of the Apostille Convention. Once the documents have been apostilled, they are subject to a formal procedure at the consular section of the Ministry of Foreign Affairs, during which the signature of the sworn translator is certified. Secondly, this requirement is waived where there is a bilateral legal aid treaty between Bulgaria and the country in which the documents were issued, providing for a more lenient legalisation regime than the Convention, leading to their direct recognition in cases where the documents have an administrative seal from a court or other state institution or are certified by a notary. In this case, too, only the signature of the sworn translator is subject to certification by the MFA [Ministry of Foreign Affairs]…"

However, by virtue of Judgment No. 260095 of 7 February 2022, rendered in the of Sofia City Court's Commercial Case No. 17/2021, recognition and enforcement of a foreign arbitral award of 17 July 2019, rendered in Case No. M-39/2019 of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, was granted in the territory of the Republic of Bulgaria. By virtue of the award, Animex Ltd. was ordered to pay to Rostselmash Combine Plant of the Russian Federation certain amounts. The Sofia City Court took into account the Legal Assistance Treaty concluded between the Republic of Bulgaria and the Russian Federation, i.e., the Treaty between the People's Republic of Bulgaria and the Union of Soviet Socialist Republics on Legal Assistance in Civil, Family and Criminal Matters, Documents of 1976. Pursuant to Article 12(2) of the Legal Assistance Treaty, all documents that have been drawn up or authenticated by competent authorities in accordance with the prescribed form in the territory of one of the Contracting Parties shall be accepted in the territory of the other Contracting Party without legalisation. The Legal Assistance Treaty prevails over the CPIL rules (Article 3(1) CPIL). Therefore, the court considered that in view of

the text of Article 51(2) ICAA, providing that the recognition and enforcement of a foreign arbitral award shall be subject to the international treaties concluded by the Republic of Bulgaria, the preferential regime for the recognition of documents between the two States provided for in the Legal Assistance Treaty should apply. Consequently, the Sofia City Court accepted that if the arbitral award submitted was the original, it was sufficient to submit a certified translation without the need for legalisation or even Apostille. The Sofia first instance court decision was upheld by the Sofia Appellate Court. The defendant lodged a cassation appeal and maintained, *inter alia*, that the understanding of the court was in clear contrast with the existing court practice which established ground for cassation. This was accepted by the SCC panel of judges, and by virtue of Ruling No. 2327 of 26 August 2024, rendered in the SCC Commercial Case No. 2105/2023, the cassation appeal was granted under the question: "Is the mandatory provision of Article 119(2) CPIL applicable in proceedings for recognition and enforcement of foreign arbitral awards or does it apply only to judicial awards?"

At the time of writing this paper, the cassation case hearing has yet to be scheduled. However, the author believes that the answer to this question is clear if one considers the hierarchy of the legal acts. The rules of the New York Convention as a multilateral treaty should prevail over domestic rules, i.e., no additional requirement for notarisation of the signatures and capacity of the arbitrators should be applied in the proceedings of recognition and enforcement of foreign arbitral awards. The rules of a bilateral treaty abolishing legalisation should also exclude the necessity of legalisation by the MFA.

In any event, the SCC ruling in this case would finally bring some clarity to the process of recognition and enforcement of foreign arbitral awards, putting a stop to a long-standing debate about what must be supplied to the court in the process of enforcement of an award.

4. Conclusion

In conclusion, it can be argued that a progress has been made in Bulgarian case law, albeit in small steps. Whereas in tango the forward and backward steps contribute to a beautiful harmony, we can only hope that the backward steps in Bulgarian arbitration case law will be minimised, and that Bulgaria will remain an attractive and arbitration-friendly destination for both foreign and domestic companies.

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