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Is it possible to have an Emergency Arbitrator in Bulgaria?

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Nowadays rational businessmen seek rational solutions. That is why a growing number of companies worldwide choose arbitration as a dispute resolution method rather than litigation, when handling complex commercial disputes. The benefits of arbitration in comparison to litigation are well known: speed of proceedings, competence of arbitrators, simplified enforcement procedure, lower costs (at least in Bulgaria), etc.

In order to meet the needs of the business in cases where urgent interim relief is requested, many arbitral institutions have introduced the so called “Emergency Arbitrator Provisions”.¹ The idea behind the Emergency Arbitrator (EA) is to enable the parties to be granted provisional measures in cases where the urgency for such measures is so high that the constitution² of the arbitral tribunal cannot be awaited. However, the EA raises many questions: How does the EA relate to the arbitral tribunal; Is the EA decision (irrespective of whether it is in the form of award or order) regarding the interim measures final or is it subject to appeal; Are the emergency measures granted by the EA enforceable, etc. In the following lines we will examine the compatibility of the EA with the Bulgarian legislation and try to provide an answer to the question whether it is possible to have an EA in Bulgaria or not.

First of all, in order to estimate whether the EA is compatible with the Bulgarian legislation, it is important to explain what is understood under “interim relief” according to the Bulgarian legislation, and which are the competent bodies having the powers to grant it.

The rules for granting interim relief in civil court proceedings are contained in Part Four of the Civil Procedure Code (CPC), entitled “Security Proceedings”

¹ Such are: The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), The International Chamber of Commerce International Court of Arbitration (ICC Court of Arbitration), The London Court of International Arbitration (LCIA), The International Centre for Dispute Resolution (ICDR), The China International Economic and Trade Arbitration Commission (CIETAC) etc.

² Regarding the constitution of the arbitral tribunal, it is important to highlight that many rules of Bulgarian arbitral institutions do not provide for filing a request for arbitration in comparison with the rules of foreign arbitral institutions, such as the ICC. The arbitral proceedings in Bulgaria are initiated by submission of a statement of claim. See e.g. Art. 4 of [the Rules of the Arbitration Court of the Bulgarian Chamber of Commerce and Industry](#), Art. 9 of [the Rules of Arbitration of Confederation of Employers and Industrialists in Bulgaria \(KRIB\)](#), etc.

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(Art. 389 – Art. 403 of the CPC). The interim relief in arbitration proceedings is regulated by the International Commercial Arbitration Act (ICAA). According to §3 of the Transitional and Final Provisions of the ICAA, the Act is applicable not only to international arbitration, but also to domestic arbitration (between parties with residence or seat in the Republic of Bulgaria). Rules regarding the provisional measures are contained in Art. 9, Art. 10 and Art. 21 of the ICAA. The rules of the arbitral institutions also contain provisions for regulation of the interim relief.

There is no legal definition of the term “interim relief”³. Indicative list of the security measures that may be imposed in civil proceedings can be found in Art. 397, Para. 1, item 1-3 of the CPC. According to this provision, security measures are: the imposition of an injunction on an immovable property, the attachment of movables and receivables of the debtor, and other appropriate measures determined by the court, including a suspension of the operation of a motor vehicle, and a stay of the enforcement proceedings. The theory of law defines the security measure as the protection and sanction in which the security of the claim consists⁴. There are two main groups of security measures according to the security need:

- (i) security measures that ensure the future implementation of unjustifiably denied right; and
- (ii) security measures that obstruct the implementation of the unjustifiably claimed right⁵.

According to Art. 389, Para. 1 of the CPC, during any stage of the proceedings prior to the conclusion of the trial in the appellate review proceedings, the claimant may approach the court before which the case is pending with a request for granting a security of the claim that has already been filed. The security can be granted to secure all types of claims (Art. 389, Para. 2 of the CPC). According to Art. 390 of the CPC, security of the future claim may be requested, even before the claim is filed, by the generically competent court exercising jurisdiction due to the permanent address of the claimant or due to the location of the immovable property that is to serve as security. These provisions show that there are two types of security that may be granted – security of a future claim and security of a claim that has already been filed.

At the same time, state courts are not the only competent bodies that may grant interim relief. According to Art. 21 of the ICAA, unless otherwise agreed by the

³ The terms interim relief, provisional relief, provisional measures, interim measures, security and security measures shall be used as synonyms.

⁴ Zhivko Stalev, Aneliya Mingova, Ognyan Stamboliev, Valentina Popova, Ruzha Ivanova – Bulgarian Civil Procedure Law, 9th edition, Ciela, p. 1218.

⁵ Ibid, стр. 1219.

parties, the arbitral tribunal may, at the request of either party, oblige the other party to undertake the appropriate measures to guarantee the claimant's rights. Upon approval of such measures, the arbitral tribunal may set up a monetary guarantee to be presented by the claimant. This means that arbitral tribunals are also competent to grant provisional relief.

There is one important difference between the interim relief granted by state courts and that granted by arbitral tribunals. The interim measures granted by state courts are enforceable and could affect the rights of third parties. According to Art. 400 of the CPC, bailiffs and the Registry Office are competent with regard to the implementation of the security measures. At the same time, as evident from the wording of Art. 21 of the ICAA, the interim relief granted by the arbitral tribunal has effect only *inter partes* („*may...oblige the other party to undertake the appropriate measures*“). The interim measures granted by arbitral tribunals do not affect the rights of third parties⁶.

The fact that the interim measures granted by the arbitral tribunal are binding only for the parties is confirmed by the rules of many arbitral institutions in Bulgaria. Art. 28 of [the Rules of the Arbitration Court of the Bulgarian Chamber of Commerce and Industry](#) stipulates the following: Unless otherwise agreed by the parties, the claimant may request the arbitral tribunal to impose on the defendant appropriate measures to secure the claimant's rights. The applicant shall indicate the specific measure or measures *which may not affect third parties*. If the arbitral tribunal grants the requested measures, it may set security that the applicant shall pay. According to Art. 34 of [the Rules of Arbitration of Confederation of Employers and Industrialists in Bulgaria \(KRIB\)](#), if otherwise agreed by the parties, the claimant may request the arbitral tribunal to impose on the defendant appropriate measures to secure the claimant's rights in the claim, whereas the claimant pays the fee for this request as specified in the tariff (of the arbitral institution). The applicant shall indicate the specific measures *that may not affect third parties*.

The theory of law⁷ explains this with the contractual nature of arbitration, where consent is the cornerstone for the competence of arbitral tribunals. The latter have competence to cause legal consequences only to the parties that are bound by the arbitration agreement and cannot affect third parties. If the parties in arbitral proceedings are seeking for interim relief, they should file a request with the state courts (Art. 9 and Art. 10 of the ICAA).

As a result, if any of the arbitral institutions in Bulgaria decides to introduce the EA in their rules, the EA shall have competence to grant interim relief that has legal effect only between the parties. The interim

⁶ See e.g. Arbitral Award from 14.10.2005 on International Arbitration Case No. 17/2005 of the Arbitration Court of the Bulgarian Chamber of Commerce and Industry.

⁷ Zhivko Stalev, Anelya Mingova, Ognyan Stamboliev., Valentina Popova, Ruzha Ivanova, – Bulgarian Civil Procedure Law, 9th edition, Ciela, p. 820.

relief granted by the EA could not be enforced in Bulgaria, as it is not legally binding for third parties (including for the competent enforcement bodies).

The second important question regarding the possible implementation of EA provisions in Bulgaria is what would be the threshold for granting interim relief by the EA – should it be the same as it is for arbitral tribunals and for state courts or should it be different.

The ICAA and the rules of the arbitral institutions in Bulgaria are silent on the matter what threshold arbitral tribunals shall examine in order to grant interim measures. As a result, the assessment of arbitrators whether to grant interim relief when Bulgarian law is *lex arbitri* is based on the threshold that Bulgarian state courts examine in civil proceedings. According to the court practice⁸, this threshold includes the following cumulative requirements:

- (i) the claim shall be admissible;
- (ii) the claim shall be well-founded – supported by convincing written evidence (Art. 391, Para. 1, item 1 of the CPC);
- (iii) the proposed interim measure shall be appropriate and imposable;
and
- (iv) the claimant/applicant shall have legal interest from the interim relief – this means that in the absence of the interim relief, it will be impossible or difficult for the claimant to realise the rights under the judgment (Art. 391, Para. 1 of the CPC).

In comparative perspective, the rules containing provisions for the EA do not specify the threshold for obtaining interim relief from the EA:

- Art. 1, Para. 3 of [Appendix V of the ICC Rules](#) determines that the application (for EA) “*shall contain the following information: ... c) description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration; d) a statement of the Emergency Measures sought; e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal*”;

⁸ See e.g. Court Ruling No. 20 447 of 23/10/2013, civil case No. 10693/2013, VI Panel of the Sofia City Court; Court Ruling No. 1620 of 23.01.2014, civil case No. 741/2014 I Panel Sofia City Court; Court Ruling No. 62 of 05.01.2015, case No. 14466/2014, Sofia City Court; Court Ruling No. 3192 of 08.11.2013, case No. 3422/2013, VII Panel of District Court – Plovdiv etc. (all of the quoted rulings are final and cannot be subject to appeal).

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- Art. 2 of Appendix II of [the SCC Rules](#) provides for the following: “*An application for the appointment of an Emergency Arbitrator shall include: ... (ii) a summary of the dispute; (iii) a statement of the interim relief sought and the reasons therefor...*”;
 - According to Art. 9.5. of [the LCIA Rules](#), “*the application shall set out, together with all relevant documentation: (i) the specific grounds for requiring, as an emergency, the appointment of an Emergency Arbitrator; and (ii) the specific claim, with reasons, for emergency relief*”.

This means that the assessment whether to grant interim relief or not should be made by the EA. The rules of arbitral institutions regarding the provisional measures granted by arbitral tribunals, the UNCITRAL Model Law (UNCITRAL ML) and the arbitration practice⁹ can serve as guidelines for determining what should be the threshold for the EA. Art. 17A of [the UNCTIRAL ML](#) determines the following conditions for granting interim measures:

- (i) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (ii) reasonable possibility that the requesting party will succeed on the merits of the claim.

It is evident that the threshold under Art. 17A of the UNCITRAL ML is similar to the threshold under the Bulgarian CPC. First, the requirements of harm which is not adequately reparable by an award of damages and of urgency correspond to the interest from the security measures (the eventual impossibility or difficulty for the claimant to realise the rights under the judgment, which matter cannot await the decision on the merits). Second, the requirement that the harm that is likely to affect the claimant (applicant) should substantially outweigh the harm that is likely to affect the other party (if the measures are not granted) corresponds to the requirement that the proposed interim measure shall be appropriate and imposable. Third, the requirement of the reasonable possibility to succeed on the merits of the claim corresponds to the requirement of an admissible and well-founded claim.

⁹ The arbitral tribunals in the predominant international arbitration practice examine the same requirements as the requirements under Art. 17A of the UNCITRAL ML, including also the requirement for “urgency” (see e.g. ICC Case No. 10596, 2000; Born, Gary – International Arbitration: Cases and Materials, 2nd Edition, Kluwer Law International, 2015 p. 889). For that reason in the present analysis only the requirements under Art. 17A of the UNCITRAL ML shall be examined.

Therefore, if the EA provisions are introduced in Bulgaria, the model of the arbitral institutions such as ICC, SCC, LCIA etc. should be followed. This means that the ICAA and the rules of the Bulgarian arbitral institutions should not set specific threshold for granting provisional measures by the EA. The EA could make an assessment based on the principles set out in the CPC and the arbitration practice. The fact that the requirements under the CPC pretty much correspond to the standards set by the UNCITRAL ML and the international arbitration practice proves that such solution shall be in accordance with the international arbitration practice.

The third question regarding the possible implementation of EA provisions in Bulgaria is what would be the relation between the EA and the arbitral tribunal, and whether the arbitral tribunal shall have competence to revoke the actions of the EA.

This question has a relatively simple answer, which can be found in the very nature of the EA. The idea behind the EA is to grant so urgent interim relief that cannot await the constitution of the tribunal. As a result, when the arbitral tribunal has been constituted, it should have the full control over the arbitral proceedings. This means that the tribunal should be competent to assess:

- (i) Whether the threshold for provisional measures was observed;
- (ii) Whether the EA had competence to grant provisional measures;
- (iii) In case the EA granted provisional measures – whether they should be maintained or modified;
- (iv) In case the EA granted unjustified provisional measures – how to restore the *status quo*, respectively whether to revoke the measures with effect *ex nunc* or *ex tunc* etc.

Considering the fact that the possible measures granted by the EA would not be enforceable, in our opinion it is exactly the arbitral tribunal, rather than state courts that shall be competent to maintain or revoke such measures. The reasons are the following: since the parties have given their consent to arbitration, they have also agreed to subordinate their behaviour to the decisions of the arbitrators (including regarding provisional measures). Therefore, the matter whether the EA granted justified interim relief shall be decided by the same dispute resolution method chosen by the parties – by arbitration. In addition, as it was stated above, the interim relief would not affect third parties. Therefore, there is no need for intervention by state courts to protect the rights of third parties. As a result, the arbitral tribunal should be the competent body to deal with all the matters arising out of or in connection with the EA proceedings.

In Conclusion, the EA proceedings in arbitration offer the parties additional opportunities to obtain provisional measures in cases where urgency is decisive. The fact that more and more arbitral institutions worldwide choose to include EA provisions in their rules proves the efficiency of the EA. Considering that interim relief granted by arbitral tribunals is not enforceable in Bulgaria, arbitral institutions should seriously consider the option to include EA provisions in their rules, as the interim relief granted by the EA shall have the same legal effect as the interim measures granted by arbitral tribunals. The inclusion of EA proceedings in the rules of arbitral institutions would be a step in the right direction to turn Bulgaria into a more arbitration friendly jurisdiction that attracts more rational businessmen.