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Contemporary Issues

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CHAPTER 6

Arbitrability of Construction Contracts Entered into with Public Authorities: The Bulgarian Perspective

Metodi Baykushev & Martin Zahariev

§6.01 INTRODUCTION

The topic about the arbitrability of construction contracts entered into with public authorities is becoming increasingly relevant in the countries of Central and Eastern Europe (CEE). In order to attract the leading construction companies to participate in major public construction projects, the public authorities acting as employers need to ensure that appropriate safeguards are in place to govern the arising contractual relationship. This also includes having a reliable mechanism for dispute resolution in the respective construction contracts.

Considering the specifics of the construction contract with public authority, namely that:

- the employer is part of the system of state authorities;
- the contractor is a private company, possibly a foreign one (or consortium of such companies);
- the construction works are carried out in the state of the employer;
- none of the parties is interested in either any continuous interruption of the construction works or in lengthy proceedings before multiple court instances, as these would cost time and money and could even cause disruption of the entire project which may have further negative financial, reputational, political, etc. consequences;
- it is quite reasonable that the existence of an arbitration clause in the construction contract could be considered as a serious factor triggering major construction companies to enter into such contracts when operating in CEE.

Taking into account these considerations, the present chapter focuses on the concept of ‘arbitrability’ in the context of construction disputes arising out of contracts with public authorities from a Bulgarian law perspective. What disputes are arbitrable under Bulgarian law? Are construction disputes with public authorities arbitrable and, if yes, are there any special rules that would apply so that the dispute becomes eligible for resolution by arbitration? What is the recent court practice on these issues? The answer to these and other questions related to the arbitrability of construction disputes with public authorities can be found in the analysis below.

§6.02 NOTION AND TYPES OF ARBITRABILITY AND THE GENERAL RULE OF THE BULGARIAN CIVIL PROCEDURE CODE

Arbitrability answers the ‘simple question of what types of issues can and cannot be submitted to arbitration’.¹

The notion of arbitrability is traditionally examined in the doctrine² from two perspectives:

- (1) subjective arbitrability (also known as arbitrability *rationae personae*) – the capability of given individuals or entities to refer their dispute to arbitration and to have disputes referred against them before arbitration;
- (2) objective arbitrability (also known as arbitrability *rationae materiae*) – the capability of a given dispute to be resolved through arbitration.

[A] Subjective Arbitrability

The matter regarding subjective arbitrability is usually raised in the context of disputes where one of the parties is a public authority or a similar public entity. Some legal systems introduce explicit prohibitions for public entities to submit disputes where they are party to arbitration (e.g., France and Belgium³), whereas others require specific prior authorization or similar procedure to be followed by the public entity in order to validly refer the dispute to arbitration (e.g., Iran, where approval by the Council of Ministers and notification to the Parliament for foreign disputes and approval by the Parliament for important domestic disputes are required, and Syria⁴).

1. Lew, J.D.M., Mistelis, L.A., Kröll, S.M., *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 187.

2. *See, e.g.*, Gaillard, E., Savage, J., Fouchard, Gaillard, *Goldman on International Commercial Arbitration*, Kluwer Law International, the Hague, 1999, pp. 312 et seq.

3. *Id.*, p. 314.

4. *Id.*, p. 315. *See also* Khatami, B., Salimi, M., *Iran: Litigation & Dispute Resolution 2019*, <https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/iran> (last accessed 19 Aug. 2019) and Cheng, T.-H., Entchev, I., *State Incapacity and Sovereign Immunity in International Arbitration*, *Singapore Academy of Law Journal* (2014) SAclJ 26, p. 950, <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal>

Such restrictions are currently not introduced in Bulgarian arbitration law. As Zhivko Stalev clarifies, ‘for the admissibility of A[rbitration] and of the A[rbitration] A[greement] it is irrelevant who is a party to the dispute. Therefore, parties to the A[rbitration] A[greement] could be both natural persons and legal entities. It is irrelevant whether they have the quality of merchant or not (Art. 19(1) of the C[ivil] P[rocedure] C[ode]). A party to the dispute can be the state and state institutions, both domestic as well as foreign (Art. 3 of the I[nternational] C[ommercial] A[rbitration] A[ct]’.⁵

This has not always been the case in the Bulgarian arbitration legislation. Before 2001, by virtue of the imperative rule of §3(1) of the Transitional and Final Provisions of the Bulgarian International Commercial Arbitration Act (‘ICAA’) domestic disputes where the state or state institution were a party to, were explicitly excluded from arbitration. Such public entities were entitled to participate only in international arbitration. Following the arbitration reform of 17 April 2001, the prohibition was revoked, and public entities were entitled to submit both domestic and foreign disputes to arbitration. The said revocation meant that the practical importance of defining a given public entity as state institution ceased to exist, and it could reasonably be concluded that state and state institutions could validly participate in both foreign and domestic arbitrations.⁶ As Zhivko Stalev explains, currently ‘the number of [arbitration] cases initiated upon A[rbitration] A[greement] where one of the parties is a municipality, Ministry or other state institution, is growing’.⁷

[B] Objective Arbitrability

Contrary to the subjective arbitrability, objective arbitrability is not interested in who the parties to the dispute are. For its purposes, it is completely irrelevant whether parties to the dispute are the state, state-owned entities, private companies or natural persons. The objective arbitrability determines which disputes can be resolved through arbitration and which cannot, based on the criterion of the *subject matter* of the dispute.

Arbitration is an exception from state court jurisdiction under civil (private) disputes, and as a result, arbitration could only have as a subject only the resolution of *private* disputes.⁸ Therefore, public disputes (e.g., matters regarding administrative violations, the validity of the administrative act, etc.) cannot be resolved through

-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1047/Citation/JournalsOnlinePDF (last accessed 20 Aug. 2019).

5. Stalev, Zh., Bulgarian Civil Procedure Law, IX revised and supplemented edition (in co-authorship with Mingova, A., Stamboliev, O., Popova, V. and Ivanova, R.), Ciela, Sofia, 2012, p. 800.

6. Ivanova, R., The Arbitration Competence in the Practice of the AC with BCCI, *Collection in memoriam of Prof. Dr. Zhivko Stalev*, Ciela, Sofi, 2009, pp. 189–190.

7. Stalev, Zh., Bulgarian Civil Procedure Law, p. 800.

8. Stalev, Zh., *Arbitration on Private Disputes*, Ciela, Sofia, 1997, pp. 64–65.

arbitration.⁹ This view is widely accepted in Bulgarian court practice as well. According to the Bulgarian Supreme Court, ‘Arbitration for challenging the validity of acts issued by the respective public authorities or persons to whom the state has, by virtue of a statutory provision, entrusted the performance of certain functions and has provided for certain procedures for the issue and challenge of their acts, is inadmissible.’¹⁰ Another clear example of objectively non-arbitrable disputes is criminal law matters which, due to their sensitive nature, are left to the jurisdiction of state courts only.¹¹

Moreover, *not every* private dispute can be resolved through arbitration, as arbitration can be used to resolve only disputes where the state has explicitly waived the exclusive (and default) jurisdiction of its courts. In most jurisdictions, the legislator uses a negative approach to determine the scope of the arbitrable disputes, i.e., exhaustively defines which types of disputes *cannot* be validly referred to and resolved by arbitration. This means that all the other types of disputes are as a rule considered arbitrable.

In Bulgarian law, the provision regulating the objective arbitrability of disputes is Article 19(1) of the Civil Procedure Code (‘CPC’), which reads as follows:

The parties to a property dispute may agree that it shall be decided by an arbitral tribunal, unless such a dispute has as its subject matter any rights in rem or possession of a corporeal immovable, maintenance obligations or rights under an employment relationship, or is a dispute where one of the parties is a consumer within the meaning of § 13, item 1 of the Additional Provisions of the Consumer Protection Act.

The analysis of the said provision shows that the following elements establish the objective arbitrability under Bulgarian law.

[1] *Positive Preconditions*

These preconditions need to be *cumulatively* present so that the respective matter can be validly submitted to and subsequently resolved by arbitration. These are discussed as follows.

[a] *Dispute*

The legal dispute is qualified in Bulgarian legal doctrine as ‘externally objected contradiction (inconsistency) of the legal convictions (statements) of the parties to the legal relationship regarding its origin, content and existence’.¹² There are two forms of

9. *Ibid.*, p. 65. The author quotes Decision No. 2 of 92 where arbitration agreement regarding the validity of arbitration agreement was declared invalid.

10. Decision No. 5 of 07 Feb. 2018 under commercial Case No. 2660/2017 of the Supreme Court of Cassation, I Commercial Chamber, available in Bulgarian at <http://domino.vks.bg/bcap/scc/webdata.nsf/vCourtActsByCase/EDA5DD73BD8E4B5BC225822D0041ECF4> (last accessed 19 Aug. 2019).

11. Lew, J.D.M., Mistelis, L.A., Kröll, S.M., *supra*, p. 187.

12. Stalev, Zh., Bulgarian Civil Procedure Law, p. 26.

the legal dispute: (1) unjustified denial of existing right; and (2) unjustified claim of non-existing right.¹³ The presence of either of these two forms is the first step to satisfying the test of objective arbitrability.

[b] *Property Nature of the Dispute*

As mentioned above, not every private dispute could be resolved through arbitration. Article 19(1) of the CPC clearly reads that, in order to be arbitrable, the dispute needs to have *property* nature. In other words, the dispute needs to concern rights which can be evaluated in money.¹⁴ Thus, disputes regarding non-pecuniary (non-property) rights such as the right of the name, the right to life, the right to privacy, right to honour, dignity and reputation cannot be submitted to arbitration. Divorce proceedings also cannot be carried out before arbitration; neither can the claims for the establishment of maternal and paternal origin (kinship) be carried out.¹⁵ According to the Bulgarian court practice, non-pecuniary disputes in cases which, by virtue of an express provision, may be initiated only by the prosecutor or cases where a prosecutor needs to participate in the proceedings cannot be subject to arbitration.¹⁶ At the same time, if a non-pecuniary right is violated (e.g., right to reputation), such is subject to pecuniary indemnification and the dispute regarding the claim for compensation would be of property nature and would eventually be theoretically arbitrable.¹⁷

[2] *Negative Preconditions*

These preconditions describe in a negative manner in which disputes are arbitrable. In other words, any property dispute satisfies the objective arbitrability test, unless it is

13. *Id.*, p. 27.

14. Stalev, Zh., Arbitration on Private Disputes, p. 65.

15. Decision No. 10 of 31 May 2018 under commercial Case No. 1861/2017 of the Supreme Court of Cassation, I Commercial Chamber, available in Bulgarian at <http://domino.vks.bg/bcap/scc/webdata.nsf/vCourtActsByCase/766A416269F80D9DC225829E0030A495> (last accessed 19 Aug. 2019).

16. Decision No. 48 of 28 Mar. 2014 under commercial Case No. 3350/2013 of the Supreme Court of Cassation, available in Bulgarian at <http://domino.vks.bg/bcap/scc/webdata.nsf/vCourtActsByCase/4A82306692381B98C2257CA9002FD1A6> (last accessed 19 Aug. 2019).

17. Of course, certain practical problems in such a case could arise, in particular as to how to conclude a valid arbitration agreement when the damages arise out of a tort and not out of a contract. It seems unlikely that the claimant and the respondent will conclude a written arbitration agreement after the dispute has already arisen. Thus, in theory the rule of Article 7(3) of the ICAA could be applied, namely after the claimant files a claim before arbitration, the respondent could: (i) in writing or by an application noted in the minutes of the arbitration hearing agree the dispute to be considered by the arbitration tribunal; or (ii) take part in the arbitration by filing a written response, producing evidence, lodging a counterclaim or appearing in an arbitration hearing without challenging the jurisdiction of arbitration tribunal. In such a case, it is considered by law that there is a valid arbitration agreement. This seems a rather theoretical scenario, but still there is no legal obstacle to have such disputes resolved by arbitration, i.e., they are arbitrable. The principle possibility to have property disputes arising out of a tort resolved by arbitration is also supported in Bulgarian legal doctrine – see, e.g., Museva, B. Is the Party Autonomy in Tort Admissible according to the Bulgarian International Private Law?, *Modern Law Magazine, Issue 6/2003*, Sibi, Sofia, pp. 97–98.

one of those explicitly listed in Article 19(1) of the CPC. Each of these disputes is excluded from the scope of arbitrable disputes via imperative rule. They are as follows.

[a] *Rights in Rem or Possession of a Corporeal Immovable (Real Estate)*

Disputes regarding these rights or regarding the possession of real estate as a factual situation remain within the exclusive competence of state courts. It is irrelevant whether the respective corporeal immovable is located in Bulgaria or abroad.¹⁸ Any dispute regarding the rights in rem or possession of such should be submitted to the respective state court. It is important to highlight that only the rights in rem of a corporeal immovable are objectively non-arbitrable. Disputes regarding rights in rem over movable property, however, are arbitrable and ‘arbitration agreement for arbitration on disputes for rights in rem over movable property is valid and justifies the competence of the arbitration chosen by the parties’.¹⁹

In addition, the Bulgarian arbitration practice has constantly made a clear distinction between disputes for providing the possession of corporeal immovable on the basis of the contractual relationship (e.g., rental agreement) or on the basis of exercising the right of ownership or other rights in rem. The first group of disputes is considered arbitrable since the claim for receiving the possession of the corporeal immovable is based on a contractual right (relative right in personam) rather than on an ownership right (absolute right in rem).²⁰ On the contrary, the second group cannot be submitted to arbitration as the very nature of the dispute is based on claims derived out of rights in rem (ownership or similar).

[b] *Personal Maintenance Obligations*

Taking into account the very strong non-material aspects involved in such cases, the Bulgarian legislator’s decision to exclude them from the scope of arbitration seems reasonable. It should be noted that the personal maintenance includes not only such due for raising children but also maintenance due to the spouse, former spouse and other close relatives listed in the Family Code.²¹

[c] *Rights under an Employment Relationship*

The rationale behind excluding the rights under employment relationship from the scope of the arbitrable disputes is rooted in the economically unequal position of the parties. The employer, as playing a dominant role in the stage of the recruitment and the conclusion of the employment contract, could easily introduce arbitration clauses under ‘take it or leave it’ conditions. The employee willing to enter into employment

18. Stalev, Zh., *Bulgarian Civil Procedure Law*, p. 799.

19. Ivanova, R., *supra*, p. 187.

20. See Ivanova, R., *supra*, p. 188 and the quoted arbitration practice.

21. See Art. 141.

relationship – given the significant importance of the labour remuneration for his/her normal existence – would in such a case be forced to consent to arbitration chosen by the employer. This may jeopardize the party autonomy and the freedom of will concepts and is the reason why disputes regarding employment relationships are non-arbitrable.

For the sake of clarity, it must be acknowledged that only disputes related to the *employment* relationship are non-arbitrable. Disputes arising out of contracts for the provision of services (the so-called in Bulgaria civil contracts) could be validly submitted to arbitration. This is the case, e.g., with contracts for management of the legal entities which according to Bulgarian law and court practice are not employment but civil contracts²² and an arbitration clause therein validly establishes the competence of the arbitral tribunal before which the dispute has been submitted for consideration.²³

[d] *Consumer Disputes*

The latest amendments to Bulgarian legislation regulating arbitration made in 2017 explicitly excluded consumer disputes from the scope of arbitration. Similar to the scenario with disputes arising out of employment relationships, this legislative approach pursues protection objectives.²⁴ The consumer²⁵ is, without any doubt, more vulnerable from an economic perspective. This is the reason why it is considered as unjustified to allow merchants such as monopoly companies, public service providers, fast loan companies or similar to pre-determine the forum for resolving any disputes with the consumer via the inclusion of arbitration clauses in non-negotiable standard form contracts, general terms, bilateral protocols²⁶ or similar instruments.

It is worth noting that that the wording used in Article 19(1) of the CPC deviates from the legislative approach when regulating the other exceptions (*see* §6.02[B][2][a]–[c] above). While most of the exceptions are described by means of their subject matter, the consumer disputes are excluded by describing one of the parties thereto – ‘dispute where one of the parties is a consumer within the meaning of § 13, item 1 of the Additional Provisions of the Consumer Protection Act’. This wording implies subjective rather than objective arbitrability. At the same time, the court

22. An analysis of the Bulgarian court practice that denies the possibility to conclude employment agreement with managers of limited liability companies can be found in Zahariev, M., Todorova, Z., *Is it Possible to Conclude and Employment Contract with the Manager of Limited Liability Company?*, *Trud I Pravo Magazine, Issue 3/2018*, pp. 33–42.

23. *See* Ivanova, R., *supra*, p. 189 and the quoted arbitration practice.

24. More on the protective nature of the reform can be read in the Motives to the Bill for Amendment and Supplement to the Civil Procedure Code, available on the website of the National Assembly, <https://www.parliament.bg/bills/43/654-01-84.pdf> (last accessed 30 Apr. 2019).

25. Legal definition of consumer is contained in § 13, item 1 of the Additional Provisions of the Consumer Protection Act which provides as follows: ‘A “consumer” is any natural person who acquires goods or uses services for purposes that do not fall within the sphere of his or her commercial or professional activity, and any natural person who, as a party to a contract under the Consumer Protection Act, acts outside his or her commercial or professional activity.’

26. *See* the Motives to the Bill for Amendment and Supplement to the Civil Procedure Code, p. 5.

practice has established the notion of ‘consumer disputes’ as those being excluded from arbitration, which corresponds to the objective approach in Article 19(1) of the CPC.²⁷ In view of the above, from a systematic point of view, it seems justified to examine the arbitrability towards disputes with consumers from an objective rather than a subjective perspective.

The non-arbitrability of consumer disputes was further supported with explicit amendments to the Consumer Protection Act (the CPA). It declared as invalid any clause in a contract between a merchant and a consumer providing for arbitration as a dispute resolution mechanism (outside the scope of the alternative dispute resolution mechanisms provided for in the CPA).²⁸ Furthermore, all pending arbitration proceedings concerning disputes between commercial entities and consumers should be terminated.²⁹

[C] Conclusions Derived from the General Rule of the CPC

As evident from the analysis above, the general rule of Article 19(1) of the CPC does not in any way exclude construction contracts from the scope of arbitration, nor it contains any specific restrictions for having public authorities as parties to the arbitration. Even if a natural person (e.g., a sole trader) enters into such a contract, the dispute arising therefrom would still be arbitrable, because the natural person will be acting in a professional capacity and not in the capacity of the consumer within the meaning of the CPA.

However, the general rule of the CPC is not the only one having relation to the issues of arbitrability under the Bulgarian legislation. Additional limitations to the broad scope of arbitrable disputes are introduced both in special laws that might apply to construction disputes entered into with public authorities (e.g., concession contracts) and in the court practice. These matters are discussed below as (§6.03) limitations introduced in *lex specialis* and (§6.03) limitations introduced in court practice, respectively.

§6.03 LIMITATIONS INTRODUCED IN LEX SPECIALIS: ARBITRABILITY OF DISPUTES ARISING OUT OF CONCESSION CONTRACTS

The Bulgarian Concession Act (‘ConcA’) regulates the public-private partnership where an economic operator carries out construction or provides services upon

27. See, e.g., Decision No. 10 of 31 May 2018 under commercial Case No. 1861/2017 of the Supreme Court of Cassation, I Commercial Chamber, available in Bulgarian at <http://domino.vks.bg/bcap/scc/webdata.nsf/vCourtActsByCase/766A416269F80D9DC225829E0030A495> (last accessed 19 Aug. 2019). Decision No. 13 of 21 Feb. 2018 Г. under commercial Case No. 2541/2017 of the Supreme Court of Cassation, I Commercial Chamber, available in Bulgarian at <http://domino.vks.bg/bcap/scc/webdata.nsf/vCourtActsByCase/BCE2E4484E19ABF8C225823B004A70A9> (last accessed 19 Aug 2019) and others.

28. Article 3(4) of the CPA.

29. § 6(2) of the Transitional and Final Provisions of the Act for Amendment and Supplement to the Civil Procedure Code.

assignment of a public body through construction works concession or a service concession (Article 1(1)). Article 7(1) of the ConCA defines the construction works concession as a ‘public-private partnership where a public body assigns the performance of construction works to an economic operator against which the public body grants the economic operator the right to operate the site while taking the operational risk’.

The types of construction works are listed in Article 7(2), items 1–3 of the ConCA and include the following:

- the performance or the simultaneous design and performance of a construction works; or
- the performance or the simultaneous design and performance of the construction and installation works and activities specified in Appendix 1 through which an existing construction is being reconstructed, reorganized, restored or major repairs are being performed; or
- the performance of construction and installation works for carrying out ongoing repairs and maintenance of an existing construction in operational suitability.

The ConCA distinguishes between two types of concessions – concessions *with* cross-border interest and concessions *without* cross-border interest.

According to Article 11(1) of the ConCA, construction works concession and service concession value of which is *higher* than the value determined via regulation of the European Commission adopted on the basis of Article 9 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the Award of Concession Contracts are concessions with cross-border interest. The ones with a value below that threshold (‘European Threshold’) are considered without cross-border interest (Article 11(2) of ConCA). Up-to-date information for any changes in the European Threshold is contained on the website of the National Concession Register.³⁰

The aforementioned distinction of concessions introduced in the ConCA³¹ has direct practical implications on arbitrability arising out of such concession contracts. According to the latest amendments introduced in March 2019 in Article 154(2) of the ConCA, ‘[d]isputes concerning the conclusion, performance, amendment and termination of a concession contract shall be decided by the court under the rules of the Civil Procedure Code, except in the cases under para. 3’. Article 154(3) of the ConCA provides that ‘[w]ith the concession agreement for a concession with cross-border interest, the parties may agree that all or certain disputes should be resolved by an arbitral tribunal’.

The interpretation of the above provisions clearly indicates that the Bulgarian legislator has included disputes arising out of concessions with cross-border interest in the scope of the objectively arbitrable disputes. Hence, *per argumentum a contrario*,

30. Available at the following <https://nkr.government.bg/> (last accessed 30 Apr. 2019).

31. Promulgated in SG, Issue 25 of 26 Mar. 2019.

disputes arising out of concessions without cross-border interest are non-arbitrable. Such a distinction seems unreasonable and discriminatory.

The Motives to the said amendments do not provide clear reasoning why such a distinction in terms of arbitrability is established in the ConCA.³² The Motives merely establish that ‘the purpose of the proposal is to precise the wording by eliminating the possibilities for contradictory interpretation. With the amendments, it becomes unambiguously clear that the parties to a concession contract with cross-border interest could provide the resolution of disputes arising out of the contract to be conducted by the arbitral tribunal.’³³

The wording of the same provision prior to the amendments reads as follows: ‘[d]isputes concerning the conclusion, performance, amendment and termination of a concession contract shall be decided by the court under the rules of the Civil Procedure Code’. This provision was ambiguous, because (at least) two contradictory interpretations were possible. First, the provision introduced the exclusive jurisdiction of state courts, because the procedure of the CPC regulates the proceedings before state courts. Second, that the provision entitled the parties to submit their dispute either to state courts or to arbitration, because the CPC introduces, among the proceedings for state court litigation, the concept of arbitrability (Article 19(1) – *supra* §6.03). Thus, in order to avoid potential misunderstandings, the legislator explicitly amended the wording of the said rule.

The present version of the provision clearly constitutes an explicit limitation to the objective arbitrability of disputes arising out of construction contracts for concession entered into with public authorities without cross-border interest.

As noted above, this legislative solution does not seem reasoned enough. Depriving parties of the possibility to refer their disputes to arbitration based on the value of the contract does not seem justified enough from a legal and economic perspective. Introducing limitations to arbitrability is generally substantiated with arguments such as public policy and enhanced control over the allocation of public resources. However, such logic may eventually justify the exclusion of disputes arising out of concessions with cross-border interest from the scope of the arbitrable disputes and not vice versa. Currently, disputes arising out of concessions with potentially higher value (i.e., exceeding the European Threshold) could be submitted both to arbitration and to state courts, whereas such arising out of concessions with a lower value (i.e., below the European Threshold) are subject to the exclusive state court jurisdiction.

On the other hand, the option to agree on arbitration as a dispute resolution mechanism gives the contractors certain comfort that their potential disputes with state authorities would be resolved by an independent tribunal which is not part of the Bulgarian state bodies system and is not in any way connected with it. Therefore, the

32. The Motives to the Bill for Amendment and Supplement to the Concession Act are available on the website of the National Assembly, <https://www.parliament.bg/bills/44/902-01-10.pdf> (last accessed 30 Apr. 2019).

33. See the Motives to the Bill for Amendment and Supplement to the Concession Act, p. 5.

arbitrability of construction disputes could be seen as a key factor contributing to a fair trial.

In the light of the above, it is advisable, *de lege ferenda*, to abolish this economically discriminatory approach and to return the disputes arising out of any type of concession contracts within the scope of the objective arbitrability. Arguments in favour of such a solution could be found in the Bulgarian Public Procurement Act currently in force where no such restrictions towards the principle arbitrability of disputes arising out of contracts for public procurements are contained. Additional arguments could be found in the old ConcA³⁴ repealed by the new ConcA. The old ConcA did not contain similar distinction in terms of arbitrability of disputes arising out of concession contracts. It allowed the parties to agree in the concession contract on the terms and conditions for dispute resolution without making any difference between the value and or the nationality/residence of the parties to the concession agreement under the old ConcA.³⁵ In other words, all disputes arising out of concession contracts were arbitrable. The sooner these amendments are introduced, the better, since at present they to some extent even undermine the image of Bulgaria as arbitration friendly jurisdiction and cannot be justified by the protection of any vital public interest.

§6.04 LIMITATIONS INTRODUCED IN COURT PRACTICE

Bulgarian court practice in the past two years has also developed an interesting approach when interpreting the concept of arbitrability. In particular, the Bulgarian Supreme Court of Cassation rendered two decisions related to setting aside of arbitral awards that are particularly noteworthy in this regard. These decisions further supplement the concept of arbitrability in general and need to be taken into account when discussing the arbitrability of disputes arising out of contracts with public authorities. The said decisions deal with [A] the arbitrability of disputes related to the amendment of a privatization contract due to hardship (commercial frustration) and [B] the arbitrability of disputes for adapting/amending the contract to newly arisen circumstances.

[A] ***KG Maritime Shipping v. the Bulgarian Privatization and Post-Privatization Control Agency and the Arbitrability of Disputes Related to Amendment of a Privatization Contract due to Hardship (Commercial Frustration)***

The first decision – Supreme Court of Cassation Decision No. 189 of 09 November 2017 under commercial Case No. 1675/2017, I Commercial Chamber³⁶ – was rendered in order to resolve the following dispute.

34. Promulgated in SG, Issue 36 of 02 May 2006; in force as of 01 Jul. 2006, repealed SG, Issue 96 of 01 Dec. 2017, in force as of 03 Jan. 2018.

35. Ivanova, R., *supra*, p. 190.

36. Available in Bulgarian at <http://domino.vks.bg/bcap/scc/webdata.nsf/vCourtActsByCase/C4461825FCCE6D05C22581D3003EC2FD> (last accessed 19 Aug. 2019).

In August 2008 the Bulgarian Privatization and Post-Privatization Control Agency (the Privatization Agency) entered into a contract with KG Maritime Shipping (the Buyer), a Bulgarian private company, for the privatization sale of 70% Navigation Maritime Bulgare (NAVIBULGAR), a company that prior to the privatization was the biggest State Ship Owning Company.³⁷ The contract provided for an obligation for the Buyer to maintain an average annual total vessel tonnage of not less than 1,300,000 DWT, including through subsidiaries, for a period of ten years after closing. The contract contained an arbitration clause, according to which the arbitral tribunal with the Bulgarian Chamber of Commerce and Industry was empowered to consider all disputes or disagreements arising out of or in connection with the privatization contract.³⁸ The Buyer filed a claim before the arbitration tribunal for amendment of the privatization contract due to hardship (commercial frustration) requesting the reduction of the annual vessel tonnage maintenance obligation to 880,000 DWT. The claim was based on Article 307 of the Bulgarian Commercial Act ('Comma'), which reads as follows: 'The court may, at the request of one of the parties, amend or terminate the contract in whole or in part when there are circumstances that the parties could not and were not obliged to foresee, and the preservation of the contract is contrary to fairness and good faith.'

The tribunal found that it was competent to consider the case because the privatization contract explicitly provided for a general jurisdiction of the tribunal to resolve 'any disputes arising out of or related to the contract ...'. The tribunal further found the claim well founded, as it decided that the preconditions of Article 307 of the Comma were present and ultimately amended the privatization contract due to hardship (commercial frustration), thus substantially decreasing the Buyer's obligations.

The Privatization Agency then filed a claim for setting aside the domestic award before the Bulgarian Supreme Court of Cassation based on Article 47(1), item 5, the first proposal of the ICAA, namely that the award deals with a dispute not contemplated by the arbitration agreement. The main argument of the Privatization Agency was that the disputes under Article 307 of the Comma cannot be resolved by arbitration, because any dispute regarding amendments in the contract could not arise at all due to the legal prohibition of Article 32(5) of the Privatization and Post-Privatization Control Act ('PPPA'), according to which it was not possible to renegotiate the obligations undertaken under the privatization contracts, including under the preceding and revoked privatization act, except in the cases provided by the PPPA. Thus, the position of the Privatization Agency was that ultimately the claim under Article 307 of the Comma should be referred solely to state courts and not to arbitration.

With Decision No. 189 of 09 November 2017 under commercial Case No. 1675/2017 the Supreme Court of Cassation set aside the arbitral award and returned the case for new consideration to the tribunal with the following main arguments:

37. See the company's website, <http://www.navbul.com/en/company/profile/index.php> (last accessed 12 Jun. 2019).

38. Note that the exact wording of the clause is unknown as it was not quoted in the court decision.

- An arbitration agreement may deal only with rights that may be freely disposed of by the parties and which the parties could resolve by settlement.
- If the parties could not exercise certain right because of some legal restrictions, such right could not be subject to an arbitration agreement.
- Article 32(5) of the PPPA prohibited the parties to renegotiate or amend the terms of a privatization contract; thus, any disputes regarding such renegotiation were beyond the power of the parties to dispose of therewith.
- Amending the contract (including due to hardship) through arbitration contradicted the legal prohibition, and therefore the tribunal had gone beyond the scope of the arbitration agreement.

Important conclusions could be drawn from this decision in terms of arbitrability of disputes with public authorities (including construction ones).³⁹ Not only Article 19 of the CPC and the special provisions of the Bulgarian legislation (such as the ConcA) limit the scope of the objective arbitrability. The interpretation of the state courts given in case of law on specific regulations such as the PPPA could further exclude certain types of disputes from the powers of the parties to include these in the arbitration agreement. Thus, if a private company has entered into privatization contract with the Privatization Agency and as part of the contractual obligations it has undertaken to complete certain construction works related to the subject of the privatization, it should be aware that disputes related to commercial frustration and subsequent adaptation of the contract due to hardship, irrespective what the parties have agreed, are not arbitrable and should be referred to state courts.

[B] *Inekon Group Czech Republic v. Sofia Municipality and the Arbitrability of Disputes for Adapting/Amending the Contract to Newly Arisen Circumstances*

The second decision – Supreme Court of Cassation Decision No. 171 of 22 January 2018 under commercial Case No. 1791/2016, II Commercial Chamber⁴⁰ – was rendered in order to resolve the following dispute:

In 2006, the Czech company Inekon Group a.s. (Inekon) concluded a public procurement contract for the rehabilitation of eighteen tramway coaches with the Sofia

39. A critical analysis of the reasoning of this decision can be found in Mingova, A., Stamboliev, O., *Is the Arbitration Competent to Consider Disputes for Commercial Frustration under Privatization Contracts?*, 14 Nov. 2017, <http://gramada.org/%d0%ba%d0%be%d0%bc%d0%bf%d0%b5%d1%82%d0%b5%d0%bd%d1%82%d0%b5%d0%bd-%d0%bb%d0%b8-%d0%b5-%d0%b0%d1%80%d0%b1%d0%b8%d1%82%d1%80%d0%b0%d0%b6%d1%8a%d1%82-%d0%b4%d0%b0-%d1%80%d0%b0%d0%b7%d0%b3%d0%bb%d0%b5/> (last accessed 18 Jun. 2019). The authors criticize the Supreme Court of Cassation's approach which allowed for disputes arising out of the same contract to be distinguished as either arbitrable or non-arbitrable. According to the authors, such a distinction would create a great deal of uncertainty when agreeing on arbitration, namely as to whether really 'all disputes arising out of the contract' as the arbitration clauses typically for, would indeed fall within the arbitration's competence.

40. Available in Bulgarian at <http://domino.vks.bg/bcap/scc/webdata.nsf/vCourtActsByCase/8339EB68F94DE2B5C225821D0037F0A3> (last accessed 19 Aug. 2019).

Municipality. The place of performance of the contract was later changed, and as a result, Inekon filed several claims against the Sofia Municipality with an approx. joint value of EUR 4 million, claiming that it incurred additional costs related to the change. The General Terms of the contract contained a complex dispute resolution mechanism clause, requiring the parties to seek the assistance of conciliator first, and then, if the conciliator does not render a decision within twenty-eight days of the referral of the dispute to it or if within twenty-eight days of the conciliator's decision a party informs the opposite party about its disagreement therewith, the dispute could be referred to arbitration. The dispute was considered by ad hoc arbitration.

The tribunal found that it has jurisdiction as Addendum No. 2 to the underlying contract provided a mechanism for amending the contract by increasing the price with certain additional costs. Addendum No. 2 was an integral part of the main contract, and the latter provided for a general jurisdiction of the tribunal to resolve 'any disputes arising out of or related to the contract'. The tribunal qualified the claims as claims for adaptation of the contract to newly arisen circumstances under Article 300 of the CommA. The said rule provides as follows: 'When the parties agree in the event of certain circumstances to supplement the contract and cannot reach an agreement upon their occurrence, each of them may ask the court to do so. When ruling, the court shall comply with the purpose of the contract, with the rest of its content and with the commercial custom.' The tribunal rendered its award in favour of Inekon.

The Sofia Municipality filed a claim for setting the award aside before the Bulgarian Supreme Court of Cassation, *inter alia*, claiming that the award contains decisions on matters beyond the scope of the dispute (Article 47(1), item 5, Second proposal of the ICAA). With Decision No. 171 of 22 January 2018 under commercial Case No. 1791/2016 the Supreme Court of Cassation set aside the arbitral award on the above-described ground and returned the case for new consideration to the tribunal with the following main arguments:

- The general jurisdiction of the tribunal did not include the power to adapt/amend the contract to new circumstances.
- This was in accordance with Article 1(2) of the Bulgarian ICAA which stated: 'The international commercial arbitration resolves civil property disputes arising out of foreign trade relations as well as disputes about filling gaps in a contract or its adaptation to newly arisen circumstances if the domicile or registered office of at least one of the parties is not in the Republic of Bulgaria.'
- The dispute about adaptation to newly arisen circumstances was not a civil property dispute but was qualified by the Supreme Court of Cassation as an *economic* one. Thus, the general jurisdiction derived out of the standard wording in the arbitration clause 'all disputes arising out of ...' covered only property disputes and in order to be arbitrable, the dispute for adaptation must be explicitly included in the arbitration agreement by the parties.
- As an additional (subsidiary) argument, the court also stated that Article 43 of the old Public Procurement Act ('PPA (revoked)') – under which the underlying contract was concluded – provided for prohibition of subsequent amendment of the procurement contract, unless one of the exceptional conditions

explicitly listed in Article 43(2) of the PPA (revoked) was present. Any amendment, including by means of adaptation that was not based on any of these exceptions would be invalid due to this prohibition. The change of the place of performance was not among the exceptions entitling the parties to amend the contract. Therefore, the parties did not have the power to make such an amendment, and as a result, they could not contractually dispose of this matter and agree to refer it to arbitration. In other words, with additional reasoning similar to those of *KG Maritime Shipping v. the Privatization Agency* case (and with an explicit reference to this decision made by the Supreme Court of Cassation in the reasoning), the arbitrability of disputes for adaptation to newly arisen circumstances leading to additional costs for one of the parties under public procurement contract was denied.

Two important conclusions could be derived from this decision in terms of arbitrability: First, the competence of the tribunal to adapt the contract to newly arisen circumstances must be explicitly provided for in the arbitration agreement. The general jurisdiction of the tribunal according to the Bulgarian Supreme Court of Cassation covers only matters related to existence, validity, performance and termination of the contract and does not automatically empower the tribunal to adapt the contract. Second, if a special regulation prohibits the amendment of a given contract, the parties cannot agree to include such a matter in the arbitration agreement. In other words, the line of interpretation started with the decision *KG Maritime Shipping v. the Privatization Agency* was reaffirmed in the *Inekon v. the Sofia Municipality* case and could be reasonably expected to be followed by the Bulgarian courts in future as well.

§6.05 CONCLUSION

The scope of arbitrable disputes under Bulgarian legislation in the past two years has been quite dynamic. On the one hand, the general rule of Article 19 of the CPC which regulates the arbitrable disputes under Bulgarian law does not contain any restrictions in terms of arbitrability of construction disputes with public authorities and only prohibits the referral of disputes with consumers to arbitration. This creates a deceptive feeling that the parties have broad discretion to agree on arbitration in construction contracts, including such with public authorities. On the other hand, restrictions on arbitrability are imposed either by special legislation (such as the rule of Article 154(2) and (3) of the ConCA) or by the court practice (*KG Maritime Shipping v. the Privatization Agency* case and *Inekon v. the Sofia Municipality* case). Adaptation of contract to newly arisen circumstances is in general possible by the arbitral tribunal, but the parties must explicitly agree on it in the arbitration clause. However, by virtue of certain special legislation such as the rules regulating public procurement (especially under the PPA (revoked)), privatization or concession, even if the parties have explicitly agreed on certain matters to be resolved by arbitration, may subsequently prove to be non-arbitrable.

Such legislative restrictions and the increasingly conservative approach in terms of interpretation of arbitrability applied by state courts, however, undermine the legal

certainty and ultimately affect the reputation of Bulgaria as an arbitration friendly jurisdiction, one of the first European countries to adopt arbitration legislation based on the UNCITRAL Model Law. While the restriction of arbitrability regarding consumer disputes could be justified with protective purposes, there is no economic and legal logic to restrict the possibility for the private companies to agree with public authorities on having their disputes (including construction ones) resolved by arbitration. One of the most attractive aspects of arbitration is the fact that the parties are in control of the proceedings and refer their disputes to professionals chosen by them and ultimately *trusted* by them. If a private company, especially a foreign one, is obliged to resolve its disputes with Bulgarian public authorities *only* before Bulgarian courts (which are public authorities as well), then, certainly, this private company will feel less and less comfortable to operate in Bulgaria. The conclusion is that, in the subsequent years, it is advisable that both Bulgarian legislation and Bulgarian courts override their restrictive approach and provide the private companies with broad discretion to agree on arbitration. This would certainly be a guarantee for attracting new investors and players in the field of construction, which would be beneficial for society as a whole.