Recognition and Enforcement of International Arbitral Awards in Albania. Current hallenges to the Albanian Domestic Law

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Abstract

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is described as the most successful treaty in private international law. For more than half a century this document has contributed to the protection of incomparable values of free trade. In this way it served well also to the interests of human society, providing a valuable contribution to the world economic development. Legal instruments of recognition and enforcement of foreign arbitral awards in the Republic of Albania do not justify the rightful place of arbitration mechanism in resolving international commercial disputes. The domestic normative framework that governs the enforcement of such awards is not fully sufficient. Albania has ratified the New York Convention more than 40 years after its entry into force, but that's not enough. In fact, the enforcement of arbitral awards which resolve international commercial disputes is facing with the lack of a modern legal framework and an unconsolidated jurisprudence. Since last 15 years, the New York Convention is part of Albanian legal order, but its implementation is not appropriate. Mostly this is due to the lack of approaching process of the Albanian legislation to the international standards in this field. Adoption and implementation of legal instruments in accordance with the international legal framework, for the recognition and enforcement of foreign arbitral awards, will be a good service to the integration process of the Albanian economy.

Keywords: arbitration, convention, enforcement, award, disputes, international.

Introduction

International arbitration and its values in the global economy.

In recent years, globalization has brought the spirit of breaking down cultural and social barriers between people and particularly has accelerated communication and economic cooperation between states. In this context, legal issues regulating these relations can not remain within national frameworks but have received more and more an international prospective. A clear example of this context is the international commercial arbitration. The great increase of the international trade and companies investment in foreign countries is associated with the tendency to transform the international commercial arbitration into a mechanism used increasingly to settle disputes arising from these relationships.

What is international arbitration?

International arbitration is a consensual way or means by which international disputes can be definitively resolved, pursuant to the parties' agreement, by independent and non-governmental decision-makers, which produce a final decision, legally binding and enforceable through national courts[1].

There is a principle in the heart of this method, which has been described by Mr.MMichel Gaudet[2], honorary president of the International Court of Arbitration at ICC: **"The purpose of arbitration is not to provide from the relevant law a decision against parties involved in the dispute, but to clarify, together with the parties, what should be done in a given situation, to achieve justice in collaboration".** The arbitration method creates understanding between the parties to the dispute, without leaving trace of intolerable bitterness behind[3]. Above all International Arbitration avoids the difficulties and uncertainties created eventually by the submission to the jurisdiction of the court of another country.

[1] Gary B.Born, *International Commercial Arbitration in the United States: Commentary and Materials* (The Netherlands: Kluwer law and Taxation Publishers, 1994), p.1.

[2] Former Chairman of the ICC International Court of Arbitration.

[3] International Arbitration and National Courts: The Never Ending Story. A.J.van den Berg, Permanent Court of Arbitration. International Bureau, International Council for Commercial Arbitration. Kluwer Law International, 2001.

Unease at playing in the other side's home court begins in childhood. For international business lawyers, it never goes away. Global deal makers are very wary of the home court advantage, harboring mistrust of each other's legal systems, where the rules are unfamiliar and the results are at best unpredictable and at worst actively hostile.

When the parties come from different political systems, there also is mistrust of the underlying substantive law; mistrust of the procedural fairness of the forum where that law is to be invoked; and mistrust of the enforceability of judicial or arbitral decisions.

As a transnational tool for dealing with conflict, international arbitration is a way to create trust between foreign entities and their local business partners, even in the face of vastly different legal systems and laws. Arbitration is a way to resolve disputes according to internationally accepted norms, promising a fair process. In other words, it avoids either side's home court[1].

The popularity of arbitration as e means for resolving international commercial disputes has increased significantly over dhe past several decades[2]. Number of cases resolved, for example from the the world's leading international arbitral institution – the International Chamber of Commerce[3] – is large enough to justify the statement that actually judicial system has a worthy opponent.

New York Convention[4], a success of private international law.

Although arbitration is consensual, the enforcement of the arbitral awards is not. Nothing worries the parties on dispute more than discovering, after a long and costly procedural "battle", that the arbitrator's decision can not be applied. Parties want money and not a piece of paper stating the fact that they are right. Perception for the applicability of the decision is likely to influence the decision of a businessman to choose arbitration or court jurisdiction to resolve his dispute and also the decision to determine the place of arbitration. It can even influence the decision to fund or to make business.

An empirical study of why parties choose international arbitration to resolve disputes found that the two most significant reasons were (1) the neutrality of the forum (that is, being able to stay out of the other party's court) and (2) the likelihood of obtaining enforcement, by virtue of the New York Convention[5].

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York, 10 June 1958 (hereinafter the New York Convention), is described by an eminent personality of the field **- Albert Jan van den Berg**[6] - as the most successful treaty on private international law. It is being applied today in 145 countries worldwide, becoming part of the their national legal framework[7]. This Convention has been defined as the "super-oil for the complex machine" (international commercial arbitration), which has made the explosion of global trade possible over the last fifty years.[8]. In

[1] How International Arbitration Bridges Global Markets in Transition Economies, CPR Institute for Dispute Resolution VOL.22 NO.9 October 2004, by Lucy V. Katz.

[2] Gary B.Born, *International Commercial Arbitration in the United States: Commentary and Materials* (The Netherlands: Kluwer law and Taxation Publishers, 1994), p.7.

[3] Court of *Arbitration* of *International Chamber* of *Commerce* - is renowned for its unmatched experience and expertise in international commercial dispute resolution. Established in 1923 as ICC's arbitration body, the International Court of Arbitration pioneered international commercial arbitration as it is known today, initiating and leading the movement that culminated in the adoption of the New York Convention, the most important multilateral treaty on international arbitration.

[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards - was prepared and opened for signature on 10 June 1958 by the United Nations Conference on International Commercial Arbitration, convened in accordance with resolution 604 (XXI), of the Economic and Social Council of the United Nations adopted on 3 May 1956. The Conference met at the Headquarters of the United Nations in New York from 20 May to 10 June 1958.

[5] The Principles and Practice of International Commercial Arbitration; Margaret L.Moses 2008, Cambridge University Press, f.3.

[6] **Albert Jan van den Berg**, Brussels, Belgium. President, Netherlands Arbitration Institute, Rotterdam. Professor at law (arbitration), Erasmus University, Rotterdam. General Editor, Yearbook: Commercial Arbitration.

[7] Website - http://untreaty.un.org/cod/avl/ha/crefaa/crefaa.html.

[8] The Review of International Arbitral Awards, editor.E.Gaillard; V.V.Veeder "Is There a Need to Revise the New York Convention?" (Keynote Speech, IAI Forum, Dijon, 2008), p.185, par.4

short, the New York Convention directly affects the lives of billions of people around the world, every minute of every day, in both seen and still more unseen ways[1].

Impact of the New York Convention on the development of international commercial arbitration has been phenomenal, consolidating the two basic pillars of the regulatory framework in this field. First it ensured the mandatory implementation of any foreign arbitration award in the member States of the Convention. Second, the Convention fundamentally altered the relationship between arbitration agreements and jurisdiction of ordinary national courts, because the contracting states agreed that valid arbitration agreements constitute a sufficient legal reason for the ordinary courts to declare their lack of competence in favor of arbitration[2].

These two important pillars give to arbitration the value of a serious institute which provides non-judicial resolution of commercial disputes. So the New York Convention is probably the main reason why arbitration is the most preferred method for resolving international business disputes. The increasing number of Convention signatory countries has affected the international trade development and has attracted foreign investment.

I. The mechanism established by the New York Convention

1. Historical factors determining the birth of the Convention.

After the second world war, the countries need for economic development affected the expansion of international trade. International arbitration at that time was regarded as a successful means for resolving disputes in this field. But the effectiveness of this mechanism had been put in question, because of the difficulties raised in connection with enforcement of arbitral awards in different countries.

The rapid growth of international trade would increase more and more the requirement for prompt and effective resolution of related disputes. But the system established under the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards no longer corresponded to the these requirements. Consequently, the conclusion of a new Convention on more liberal terms than the Geneva Convention of 1927 was generally regarded as the most urgent task in the field of international commercial arbitration[3].

The initiative to replace the Geneva treaties came from the International Chamber of Commerce (ICC)[4], which issued a preliminary draft convention in 1953. The ICC's initiative was taken over by the United Nations Economic and Social Council[5].

The Convention was prepared and opened for signature on 10 June 1958 by the United Nations Conference on International Commercial Arbitration, which met at the Headquarters of the United Nations in New York. At the end of the conference, after 4 years of effort[6], the New York Convention[7] was born. It would spell the end of the Geneva Convention and the start of a new spirit of international commercial arbitration.

2. Features of the New York Convention.

[1] The Review of International Arbitral Awards, editor.E.Gaillard; V.V.Veeder "Is There a Need to Revise the New York Convention?" (Keynote Speech, IAI Forum, Dijon, 2008), p.186; par.1.

[2] New York Convention, art.II (3) - *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration…..*

[3] Memorandum by the UN Secretary General: "Recognition and enforcement of foreign arbitral awards" – document of the United Nations Economic and Social Council, no. E/2840, 22 march 1956, p.3, par.5.

[4] The International Chamber of Commerce (ICC) is the largest, most representative business organization in the world. Its hundreds of thousands of member companies in over 130 countries have interests spanning every sector of private enterprise. It was founded in 1919 to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital. The organization's international secretariat was established in Paris and the ICC's International Court of Arbitration was created in 1923.

[5] The Report of the "ad hoc" Committee on the Enforcement of International Arbitral Awards – document of the United Nations Economic and Social Council, no. E/2704, E/AC.42/4/Rev.1, p.1, par.1,2.

[6] The "Ad hoc" Committee on the Enforcement of International Arbitral Awards, was set up on April 6, 1954.

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards - New York, 10 june 1958. Entry into force: 7 june 1959, in accordance with article XII. Registration: 7 june 1959, no. 4739. Status: signatories: 24. parties: 146. text: United Nations Treaty Series, vol.330, p.3.

2.1. Convention's field of application.

The Convention's title and its first article refer to the recognition and enforcement of "foreign arbitral awards" arising out of differences between persons, whether physical or legal[1]. Which arbitral awards are to be considered as "foreign", and hence which fall under the Convention's field of application, is defined in Article I of the Convention.

Paragraph 1 of Article I contains two definitions for a foreign award. The first definition, set forth in the first sentence of paragraph1, is an award made in the territory of a State other than the State where recognition and enforcement are sought. The second sentence of the paragraph also provides that it applies to the recognition and enforcement of an arbitral award which is not considered as a domestic award in the State where recognition and enforcement are sought (second sentence). With this second definition of "foreign arbitral awards", the convention drafters took the view that parties can agree to arbitrate in one country under the arbitration law of another country.

In this way the Convention makes the award nationality or national associations of the parties to the award immaterial for the purposes of its implementation[2]. This is because arbitration awards will be recognized and enforced regardless of the country where the award was made and the nationality of the parties in dispute.

2.2. Convention obligations to a contracting state (a state who has adopted the Convention)

a. Recognition and enforcement of foreign arbitral awards

Any country that accepts the Convention (it means any state that has signed, ratified or accede to the Convention after the entry into force), is legally obliged, under international law principles (inter alias, the principle of pacta sunt servanda), to recognize and enforce all kinds of arbitration awards that in terms of the Convention are considered as "foreign arbitral awards".

The Convention also provides limits for this obligation, because when signing, ratifying or acceding to the Convention any state has the right to two reservation[3]: **Reciprocity reservation** and **Commercial reservation**. The first reservation permits contracting States not to be bound to apply the Convention to awards made in a State that does not accept the Convention. The second reservation permits a State to reserve the applicability of the Convention only to differences arising out of legal relationships, which are considered as *commercial* under the national law of the State making such reservation.

b. Recognition of international arbitration agreement

The second obligation for any state accepting the Convention lies in the recognition of written arbitration agreement. Under the provisions of the Convention we can use this definition: "An arbitration agreement is an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration[4].

The same sense to the arbitration agreement is drawn from the UNCITRAL Model Law[5]. This definition confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("*compromis*") or a future dispute ("*clause compromissoire*")[6].

c. Exclusion of jurisdiction of the National Court

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art.I, par.1..
[2] The United Kingdom comments on the draft Convention on the Recognition and Enforcement of International Arbitral Awards - document of the United Nations Economic and Social Council, no.E/2822, Add.4, 3 April 1956, p.3, par.2
[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art.I, par.3.
[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art.II, par.1.
[5] UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (United Nations documents No.A/40/17 and No.A/61/17, annex I), art.7, par.1: "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".
[6] Explanatory note by the UNCITRAL Secretariat on the model law on International Commercial Arbitration, p.28, par.19.

The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed[1]. This important clause repeats the guarantee given by the first paragraph of article 2 of the Convention to the legal value of the expressed willpower of the disputing parties for submittion to arbitration. This willpower exclude the jurisdiction of a national court to resolve the dispute between the parties, forcing olso the court to address this dispute in the arbitration forum selected.

d. Not applying differential procedures in the effective implementation of awards.

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 awards[2]. A state that has adopted the Convention should treat equally and not differently, in terms of procedural bureaucracy, the recognition and enforcement of domestic arbitral awards against foreign ones.

3. Grounds for refusal of enforcement of an arbitral award.

Article IV is set up to facilitate enforcement by requiring a minimum of conditions to be fulfilled by the party seeking enforcement of a Convention award[3]. That party has only to supply the duly authenticated original award and the original arbitration agreement, or duly certified copies thereof[4]. By meeting these conditions, the party seeking enforcement produces *prima facie* evidence[5] entitling it to obtain enforcement of the award on oll contracting states of Convention. It is then up to the other party to prove that enforcement should not be granted on the basis of the grounds enumerated exhaustively in the subsequent Article V(1). It should be emphasized that the conditions mentioned in Article IV are the only conditions with which the party seeking enforcement of a Convention award has to comply.

Article V, which is divided into two paragraphs, includes the grounds for refusal of enforcement of an arbitral award. The first paragraph lists the refusal grounds which are to be proven by the respondent (the party against which enforcement of the award is sought)[6]. That party has the burden of proving that one or some of these grounds exists in the present case. This exhaustive list of grounds for refusal is as follows:

-Lack of a valid arbitration agreement (Article V(1)(a))[7];
-Violation of due process (Article V(1)(b))[8];
-Excess of the arbitral tribunal's authority (Article V(1)(c))[9];
-Irregularity in the composition of the arbitral tribunal or arbitral procedure (Article V(1)(d))[10];

-The award "has not yet become binding", the award "has been set aside", or the award "has been suspended" (Article V(1)(e))[11].

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art.II, par.3.
[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art.III, second sentence.
[3] Albert Jan van den Berg – "The New York Convention of 1958:An Overview".
[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art.IV, par.1.
[5] *prima facie* evidence - evidence that is sufficient to raise a presumption of fact or to establish the fact in question unless rebutted.
[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art.V, par.1.
[7] The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
[8] The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
[9] The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.
[10] The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.
[11] The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The second paragraph of Article V, which concerns violation of public policy under the law of the forum, lists the grounds on which a court may refuse enforcement on its own motion (ex officio)[1]. This second group of grounds for refusal is as follows:

a. Arbitrability (article V(2)(a)). This clause permits a court to refuse enforcement of an award on its own motion if the subject matter of the difference is not capable of settlement by arbitration under its law. The non-arbitrability is generally regarded as forming part of the general concept of public policy and thereby the non-arbitrable subject matters differ from country to country[2].

b. Other cases of public policy (article V(2)(b)). This clause allows a court to refuse enforcement of an award on its own motion if the enforcement of the award would be contrary to the public policy of the country where the enforcement is sought. There are a number of diverse cases in which the question of public policy was raised. Cases that are regularly (but almost always unsuccessfully) invoked in practice are the following: *Due process (the parties have an equal opportunity to be heard); Procedure (Irregularities in the arbitral procedure); Impartiality (The arbitrator's impartiality); Reasons (the award must contain the reasons on which the arbitral decision is based).*

The overall scheme of Articles IV-VI is the facilitation of the enforcement of the award. The scheme reflects a "pro-enforcement bias" as certain courts have said. This is also the manner in which Articles IV-VI are generally interpreted by the courts[3].

The main features of the grounds for refusal of enforcement of an award under Article V are the following:

-The first main feature is that the grounds for refusal of enforcement mentioned above, are exhaustive. Enforcement may be refused "only if" the party against whom the award is invoked is able to prove one of the grounds listed in Article V(1) or if the court finds that the enforcement of the award would violate its national or international public policy (Article V(2)).

-The second feature of the grounds for refusal of enforcement, which follows from the first feature, is that the court before which the enforcement of a Convention award is sought, may not review the merits of the award because a mistake in fact or law by the arbitral tribunal is not included in the list of grounds for refusal enumerated in Article V.

-The third main feature is that the party against which enforcement of the award is sought has the burden of proving the grounds for refusal of enforcement listed in the first paragraph.

-Finally, it is arguable that in a case where a ground for refusal of enforcement is present, the enforcement court nevertheless has a residual discretionary power to grant enforcement in those cases in which the violation is *de minimis*.

These main features are almost unanimously affirmed by the courts[4].

II. New York Convention *versus* Albanian legislation on Recognition and Enforcement of Foreign Arbitral Awards

1. Legal instruments that provide recognition and enforcement of a foreign arbitral award in Albania.

Recognition and enforcement of foreign arbitral awards in the Republic of Albania is regulated by two legal instruments: provisions of the New York Convention and the Code of Civil Procedure.

The albanian parliament has approved the accession of the Republic of Albania in this Convention by law no.8688 dated 09.11.2000 "On accession of the Republic of Albania in the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards". Based on the Constitution of the Republic of Albania[5], the provisions of the New York Convention after ratification by law have become part of the internal legal system of our country. They are applied directly and prevail over national laws that disagree with them. So the provisions of the New York Convention prevail, in case of conflict, over the provisions of the Code of Civil Procedure, in terms of legal regulations applying for recognition and enforcement of foreign arbitral awards.

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art.V, par.2.
[2] Albert Jan van den Berg – "The New York Convention of 1958:An Overview".
[3] Albert Jan van den Berg – "The New York Convention of 1958:An Overview".
[4] Albert Jan van den Berg – "The New York Convention of 1958:An Overview".
[5] The Constitution of the Republic of Albania, art.116 (1); art.122(2).

The second instrument that regulates the recognition of foreign arbitral awards is the National Law. The provisions relevant to arbitration are found in the "Code of Civil Procedure of the Republic of Albania"[1] (the "CCP"). Part II, Title IV ("Arbitration", art. 400 – 439) is a special title in the Albanian CCP regulating arbitration. The provisions of Title IV are applicable to arbitration procedures when: (i) the participants in the case have their place of residence in Albania and (ii) when the place of arbitration is within the territory of Albania[2]. The arbitration chapter of the CCP focuses on the procedures for domestic arbitration and fails to provide rules of arbitral proceedings and court proceedings related to international arbitration. The CCP states that rules on international arbitration shall be established by a separate law[3] - a law which still has to be adopted in Albania.

Other important provisions in the field of international arbitration are contained in Title III, Chapter IX, regulating recognition and enforcement of foreign arbitral awards in Albania. These provisions treat recognition of foreign arbitral awards as a ***special judgment*** regulated by this Code[4]. The judicial decisions of the courts of foreign states and final awards of a foreign arbitration are recognized and enforced in the Republic of Albania according to the same rules, under the terms provided in CCP[5].

Within the framework of recognition of foreign arbitral awards, the provisions of the Code of Civil Procedure take a dual character, containing both material and procedural legal norms. Material norms are the ones providing for the circumstances in which foreign awards may or may not be recognized and enforced in Albania. Whereas procedural norms are those that provide the procedure for recognition and granting power to a foreign award, and those that provide the competence of the judicial authorities for recognition and the form of the recognition judicial decision[6].

2. The provisions of the domestic law that do not meet the requirements of the New York Convention (analytical overview).

In general, the CCP provision that legal arrangements for the recognition of foreign state courts decisions will apply equally for recognition of foreign arbitral awards is not adequate. Especially the grounds for refusal of enforcement of a foreign court decision shouldn't be equally applied to refuse the enforcement of a foreign arbitral award.

It is true that the legal effects of foreign arbitral awards are the same as those of final decisions of foreign ordinary courts, but the processes providing these two kind of decisions have very distinct features. An important feature that distinguishes them, is the profoundly public character of ordinary courts proceedings on the one hand and the private nature of arbitration processes on the other. Likewise, the exclusive right of the agreement between the parties in dispute to determine the jurisdiction of an arbitral forum, or the parties' right to select the arbitrators are other distinguishing features of the arbitration versus judicial process.

The aforesaid distinguishing features between these two processes, justify the necessity for approval of **distinct criteria** for recognition and enforcement, which means **different grounds** for refusal of enforcement, for each kind of decisions - judicial decisions or arbitral awards.

For example, one of the grounds for refusal of enforcement of an arbitral award, provided by the New York Convention but not included on the grounds listed by the CCP of Albania[7] is: *The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*[8]. It is understandable that such a ground for refusal of enforcement can not be anticipated from the provisions of the CCP, as long as this code provides the same grounds for refusal of enforcement of arbitral awards with those of judicial decisions.

Moreover, considering the approximation of national law with the New York Convention requirements, the provisions of the Code of Civil Procedure pose some problems, which deserve to be analyzed.

[1] Law No.8116, dated 29 March 1996, as amended.
[2] Code of Civil Procedure of Albania, art.400
[3] Code of Civil Procedure of Albania, art.439
[4] Code of Civil Procedure of Albania, Part II, Title III, Chapter IX "Recognition of judgments of foreign states", art.393 – 399.
[5] Code of Civil Procedure of Albania, art.399.
[6] Civil Procedure, the first edition, Alban Brati, Dudaj Editions 2008, p.413, paragraph 4.
[7] *See infra p.13*: The grounds for refusal of enforcement of an arbitral award, according to the CCP provisions.
[8] Article V(1)(d) of the New York Convention.

a. The first problem occurs with the content of Article 399 of the Code of Civil Procedure, which does not clearly explain whether the application of the provisions of chapter "On recognition of decisions of courts of foreign countries"[1] will also be applied to foreign arbitral awards respecting strictly the provisions of this Chapter, or only to the extent that the content of these provisions does not fall in contradiction with the features of an arbitral process (application according to the *"mutatis mutandis"* principle).

b. The second problem - the excess of "obstacles" of the Code of Civil Procedure for the recognition and enforcement of a foreign arbitral award.

Recognition of a foreign arbitral award represents the judicial procedure for verifying the legal requirements, through which the arbitral award is been given the legal power to be enforceable on the albanian territory[2]. In fact the Code of Civil Procedure do not expressly provide the conditions for the recognition of a foreign arbitral award, but on the contrary it provides the conditions that are considered as "barriers" for recognition, known as the "grounds" for refusal of enforcement. It is understood that in any other circumstance not included in the framework of these legal restrictions, foreign arbitral award can and should be given executive powers.

Specifically, a foreign arbitral award is not been given effect (that means it is not recognized and enforced) in the Republic of Albania, on the circumstances or under the following conditions:

i) *When, under provisions in force in the Republic of Albania, the dispute concerned by the decision (award) might not be in the competence of the court of arbitration of the state that has issued the decision (award)*[3].

ii) *When the lawsuit and the summons have not been notified to the defendant in absence on the default and orderly time, to give him the opportunity to be defended.*[4] (the principle of due and equal process to the parties).

iii) *When, between those same parties for the same subject and the same reason, a different decision has been given by the Albanian court.*[5] (the "res judicata" principle).

iv. *When the foreign arbitral award has became final in contradiction with the law under which the award was made.*[6].

v. *When the foreign arbitral award is not in accordance with basic principles of the Albanian legislation*[7]. (the "public policy" principle).

vi) *When the Albanian court is examining a lawsuit that is filed before the foreign arbitral award has became final.*[8]. **This legal ground seems redundant in the group of grounds which may justify the refusal to enforce a foreign award, arguing as follow:**

First of all, such a provision laid down on the article 394/(4) of CCP to prevent the recognition of foreign arbitral awards exceeds the conditions known as the grounds for refusing the recognition and enforcement of a foreign arbitral award, provided by the New York Convention[9].

Secondly, such a final obstacle to the recognition of the award, provided by the CCP, falls in contradiction with the obligations imposed by the ratification of the New York Convention, specifically with the obligation to exclude the jurisdiction of a national court when it is seized of an action in a matter in respect of which the parties have made an arbitral agreement[10]. In implementing this obligation, the Albanian court if it's examining a lawsuit (action), should declare the lack

[1] Code of Civil Procedure of Albania, Part II, Title III, Chapter IX, art.393 – 399.
[2] Civil Procedure, the first edition, Alban Brati, Dudaj Editions 2008, p.414, paragraph 2.
[3] Code of Civil Procedure of Albania, art.394, par.1.
[4] Code of Civil Procedure of Albania, art.394, par.2.
[5] Code of Civil Procedure of Albania, art.394, par.3.
[6] Code of Civil Procedure of Albania, art.394, par.5.
[7] Code of Civil Procedure of Albania, art.394, par.6.
[8] Code of Civil Procedure of Albania, art.394, par.4.
[9] New York Convention, art.5.
[10] New York Convention, art.2, par.3 "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

of jurisdiction when there is an arbitral agreement between the parties. The submittion of the arbitration agreement by an interested party should be enough for the court to declare the lack of jurisdiction.

In these circumstances, the fact that the Albanian court is examining a lawsuit in a matter in respect of which the parties have made an arbitral agreement, means that this court is acting in the lack of jurisdiction and this fact should not prevent the recognition and enforcement of an foreign arbitral award, as currently provided from the article 394/(4) of CCP.

Thirdly, the provision of article 394/(4) reopens the issue of verification of competence or incompetence of the arbitration forum. As already mentioned, the Code of Civil Procedure makes a specific prediction about the competence of the arbitral forum, when it provides as an "barrier" to recognition of foreign arbitral award the fact that *the dispute concerned by the award might not be in the competence* of the court of arbitration that has issued the award (CCP, art.394(1))[1]. The confirmation of the validity of the arbitration forum competence implies indirect proof of incompetence of the Albanian court to examine a lawsuit over the dispute. It seems that we are dealing with the same ground for refusal of enforcement, as provided from the article 394(1), but repeated in another form in the provision of article 394(4).

Fourthly, the refusal of enforcement of an arbitral award due to the submittion of a lawsuit in an albanian court, before the moment of time that the award has became final, as provided by the article.394 (4), may be used intentionally as an artificial barrier to the enforcement of an award from the party against whom it is invoked. This party may file a lawsuit in an Albanian court deliberately to refuse later the enforcement of the foreign arbitral award issued over the dispute, in our country. This would be contrary to the spirit of the New York Convention, whose aim is to facilitate the conditions for recognition and enforcement of foreign arbitral awards.

c. The third problem – the burden of proof.

Provisions of the CCP does not predict **who** has the burden of proving to the court of appeal that one or more legal grounds of refusal, mentioned above, are met. In fact, article 397 of CCP stipulates that "the court of appeal examines whether the present award applied for enforcement does not contain provisions that conflict with article 394". In general interpretation of this provision, the court of appeal may examine the existence of the grounds of refusal on its own motion (*ex officio*), without request of the interested party.

Whereas the New York Convention is very clear at this point, when stipulates the obligation of the party against whom the award is invoked: *first* **to make a request for refusal** of the arbitral award applied for enforcement and *second* **to submitt evidences to the competent authority to prove the grounds of refusal**[2]. There are only two grounds on which a court may refuse enforcement on its own motion. These two grounds for refusal of enforcement are limitatively listed in the second paragraph of Article V, which concerns violation of public policy under the law of the forum[3].

d. The 4th problem – The Code of Civil Procedure does not provide for submission of the arbitration agreement as a condition for recognition and enforcement of foreign arbitral awards.

According to the CCP provisions, the formal request for recognition and enforcement of a foreign arbitral award should be attached to **some documents**, in order to be considered regular. Specifically the following documents are required to be submitted: (a) copy of the foreign arbitral award, which is subject of the application for enforcement; (b) certificate of the arbitral forum, which issued the award to certify that this award has become final; (c) power of attorney, if the application is filed by a representative of the interested party[4]. These documents are required to be duly translated and authenticated.

As above, the provisions of the Code of Civil Procedure do not require as a condition the submission of "arbitration agreement" by the party applying for recognition and enforcement of the award. Such a prediction does not comply with the provisions of the New York Convention[5], where the application for enforcement of the award is provided to be accompanied by the "arbitration agreement". This written arbitration agreement, under the Convention, should be submitted

[1] *See supra p.13*, Code of Civil Procedure of Albania, art.394, par.1.
[2] Article V(1) of the Convention: *Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:….*
[3] Article V(2) of the Convention: Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ….
[4] Code of Civil Procedure of Albania, art.396.
[5] New York Convention, art.IV(1)(b).

along with the foreign arbitral award, subject of the application for enforcement, otherwise the formal request for enforcement is not considered regular.

3. Consideration of application for recognition and enforcement by the court of appeals.

The court of appeals does not review the merits of the case, therefore does not examine how the dispute between the parties is resolved through the foreign arbitral award. The court of appeals simply controls whether the award submitted contains elements that, according to the law, are considered legal obstacles (barriers) for the enforcement of foreign arbitral awards[1]. At this point the provision of the CCP is consistent with the predictions of the New York Convention.

CONCLUSIONS AND RECOMMENDATIONS

Concluding Reflections

Regardless that the Republic of Albania has ratified the New York Convention, the recognition and enforcement of international arbitral awards in Albania is being carried out through a non-contemporary national legal framework.

a. A group of provisions of the Albanian Code of Civil Procedure governs the recognition and enforcement of foreign (international) arbitral awards for reference of the recognition of the foreign state courts decisions. The national law does not provide a direct adjustment for the recognition and enforcement of foreign arbitral awards. The complete conformity of the grounds for refusal of enforcement of these two different categories of decisions (judicial decisions and arbitral awards) can not be considered the best choice.

b. The provisions of the CCP are not fully in accordance with the provisions of the New York Convention, regarding the recognition and enforcement of foreign arbitral awards. These discrepancies, which may create obstacles to judicial procedures for enforcing foreign arbitral awards in practice, are mentioned briefly as follow.

-The New York Convention clearly provides to the interested party the **right to refuse** the enforcement of a foreign arbitral award, but also the **burden of proving** the grounds for refusal. Provisions of the CCP does not make such a prediction and consequently the court of appeals **on its own initiative** (without request of the interested party), controls whether foreign arbitral award contains elements that constitute the legal grounds for refusing its enforcement.

-The provisions of the CCP do not require the submission of "arbitration agreement" from the party concerned, as a validity condition of the request for enforcement, in contrast to the New York Convention which provide as mandatory the presentation of "arbitration agreement" in order that the request for recognition and enforcement to be acceptable by the competent authority.

-The article 394 of CCP provides a legal ground for refusal of the enforcement of a foreign arbitral award, which not only exceeds those provided by the New York Convention but also may become an obstacle in practice to implement the spirit of the Convention[2].

Recommendations.

Albanian legislation needs to be updated, aiming the approach to the contemporary spirit and principles of international legal framework. In this regard, the legal regulation of recognition and enforcement of foreign arbitral awards by the provisions of a special law, would be a good option. A hypothetical law, for example "On arbitration" or "On commercial arbitration", could be the proper act to consolidate the legal framework, regulating both the internal and international procedures of arbitration[3]. In this way the obligation that derives from the article 439 of Albanian Code of Civil Procedure will be fulfilled[4].

[1] Code of Civil Procedure of Albania, art.397.

[2] *See suppra* the explanation of the ground for refusal, provided by Article 394(4) of Albanian CCP – *a foreign arbitral award can not be enforced in the Republic of Albania, when the Albanian court is examining a lawsuit that is filed before the foreign arbitral award has became final.*

[3] The International Comparative Legal Guide "On the international arbitration 2008", ed.Global Legal Group Ltd. London, with the contribution of "Kalo & Associates, Attorneys at Law", p.86, par.14.1.

[4] *See suppra* p.10.

A good option would have been to make part of domestic law the UNCITRAL Model Law provisions, which on one side do not conflict with the provisions of the New York Convention and in turn improve the recognition procedures of international arbitration awards[1]. A similar pattern which can be applied to reference is the Arbitration Act - English Law of Arbitration - which in its third section regulates the recognition and enforcement of foreign arbitral awards[2].

Another possible version of a contemporary regulation of the recognition and enforcement of foreign arbitral awards is to amend the provisions of the Albanian Code of Civil Procedure. For analogy, our domestic law might be referred to the provisions of the Italian Code of Civil Procedure, which directly govern the international arbitration[3] and the recognition of foreign arbitral awards in Italy[4].

For Albania, the adoption of a special law on arbitration, or the amendment of the provisions of CCP, is becoming a necessity in the present conditions when the Albanian economy is increasingly oriented towards her integration, putting on the spotlight the expansion of trade relations, particularly international ones. To meet the needs of a more open economy, its actors (businesses and individuals) naturally will be looking for more effective legal instruments of conflict resolution. At this point, special attention should be paid by the domestic law to those legal instruments that serve to the recognition and enforcement of foreign arbitral awards.

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[1] Let's mention here the provision of the UNCITRAL Model Law for clarifying the form of arbitration agreement - Article 7, option I and II of the UNCITRAL Model Law.
[2] Arbitration Act 1996, art.100-104.
[3] **Italian Code of Civil Procedure** (Codice di Procedura Civile - Dei procedimenti speciali - Parte 2), Chapter VI **(dell'Arbitrato Internazionale), art. 832 – 838.**
[4] **Italian Code of Civil Procedure**, Chapter VII **(dei Lodi Stranieri), art. 839, 840.**

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