

THE EFFECTS OF FOREIGN ARBITRAL AWARDS

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ABSTRACT:*The arbitration has an international character, if it arises from a legal relationship with a foreign element.
The foreign arbitral award is any award rendered in a domestic or international arbitration in a foreign State and not considered a national decision in Romania.
The article reviews the effectiveness of a foreign arbitration award, namely the recognition and enforcement of such a ruling in Romania.
The foreign arbitral award, rendered by a competent arbitral tribunal, benefits in Romania from a probative force in respect of the facts it ascertains.*

KEYWORDS: *foreign arbitral award; recognition; execution; probative force*
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1. PRELIMINARIES

Arbitration is an alternative jurisdiction with a private character. According to Article 1111 of Civil Proc. Code, an arbitral dispute in Romania is considered international if it arises from a private law relation with a foreign element.

In essence, international trade law relations are defined in terms of their international character by means of two criteria: a "subjective" criterion, and another of "objective" nature. According to the subjective criterion, the parties of the legal relationship, legal or natural, must have their registered office, their domicile or habitual residence in different States. According to the objective criterion, it is necessary that the commodity, the service, or any other good that is the subject of the legal relationship, to be in an international circuit, that is, the good crosses at least one border in the execution of that legal relationship. (Deleanu, 2013)

In order to be international, an arbitral dispute must meet the condition that at least one of the parties did not have their domicile or habitual residence at the time of the conclusion of the arbitration agreement, respectively, their registered office in Romania. The defendant must not be domiciled or have the registered office Romania. Moreover, both parties can be in the same situation. Consequently, international arbitration is accessible for both natural and legal persons. (Păncescu, 2013)

After taking of evidence, the arbitral tribunal renders the award, which may settle the dispute in its entirety or partially, unless otherwise stated in the arbitration agreement.

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The arbitral award is enforceable and binding upon communication to the parties.

2. THE EFFECTS OF FOREIGN ARBITRAL AWARDS

For an arbitral award to be considered foreign, two conditions must be fulfilled:

1. the arbitral award, whether domestic or international, must be rendered in a foreign State, other than Romania.
2. that arbitral award is not considered a domestic judgment in Romania.

The Romanian court determines the domestic or foreign character of an arbitral award after the analysing the case elements. Therefore, in verifying the condition that the arbitral award was rendered in a foreign State, other than the State of recognition, it must be distinguished between the seat of the arbitral tribunal and the place where the arbitration took place, respectively, where the arbitrators have signed the arbitration award. A judgment is considered domestic or foreign, according to the link with the place where it was rendered (the domicile of the parties, the governing law, etc.). (Păncescu, 2013)

Both ad-hoc and institutionalized arbitration awards are included in the foreign arbitral awards category.

A foreign arbitral award is effective if it is recognized in Romania. In order to be recognized, it must meet 2 conditions, one positive, and one negative:

1. its object can be settled in Romania through an arbitration, which means an arbitral dispute. Such a requirement is assessed according the law of the court requested to grant recognition or enforcement (Leş, 2013)
2. It should not contain provisions contrary to the public order of Romanian private international law.

The incompatibility with the Romanian international private law public order is assessed by considering, in particular, the level of the link between the case and the Romanian legal order and the gravity of the effect thus produced. (Păncescu, 2013)

After recognition, the foreign arbitral award may be enforced.

The jurisdiction to settle requests for recognition and enforcement of foreign arbitral awards lies with the courts of the State in which they are intended to have effect. (Păncescu, 2013)

The court having jurisdiction to settle the application for recognition and enforcement of the foreign arbitral award is the tribunal. The tribunal where the domicile or, where appropriate, the registered office of the person to whom that award is opposed has territorial jurisdiction. Thereby, the general rule of domestic law, provided by Article 107 Civil Proc. Code is applied in the international process, the court is where the defendant is domiciled or has the registered office.

If, however, the court cannot be established in this manner, the Bucharest District Court has jurisdiction.

In the absence of a text which expressly indicating the specifications of the request, we consider that we should refer to the provisions of Article 194 Civil Proc. Code, which provides the content of the application, evidently, considering the specificity of the application for recognition and enforcement of foreign arbitral awards.

The objects of the application can be the recognition of the foreign arbitral award, to obtain the authority of a final decision, and the enforcement on Romanian territory, if not

fulfilled voluntarily. Nothing prevents the claimant to also request, through the same application, the recognition and the enforcement of the foreign arbitral award.

Moreover, the recognition of a foreign arbitral award may be requested incidentally.

The prescription of the right to attain enforcement is interrupted during the settlement of the application for recognition of the foreign arbitral award. This is a natural effect, because until the recognition of the award, the enforcement cannot be carried out.

Once the application has been filed, the arbitration award and the arbitration agreement, either in original copy or simple copy, while subject of over-legalization, must be attached. The over-legalization exemption is allowed under the law, an international treaty to which Romania is a party or on the basis of reciprocity.

If these documents are not in the Romanian language, the applicant must also submit their certified translation into Romanian.

Before proceeding with the analysis of the reasons for refusal provided by Article 1129 Civil Proc. Code, it is important to note that the legal regime established by the Romanian Civil Procedure Code is complemented by the international instruments in the field. In this context, we consider that it is necessary to analyse the relationship established between the two categories of provisions in the field, namely the domestic provisions on the one hand and those contained in the international treaties, on the other.

In Romania, national courts cannot apply the text of arbitration treaties except by virtue of the legislation adopted to implement them at national level. If case-law developed when applying an international convention can be qualified as a source of public international law under Article 38, par. (1), let. d) of the Statute of the International Court of Justice, explaining the manner in which the provisions of the treaty are interpreted, a Romanian court is not bound by foreign case-law, no matter how relevant or useful it would be to the case. The case-law concerning the arbitration agreements is not binding under Article 20 of the Romanian Constitution, this also being the case of case-law concerning the European Court of Human Rights.

However, we cannot ignore that one of the stated and confirmed objective of the New York Convention, for example, is to ensure the development of international arbitration by creating the premises for a higher effectiveness of the arbitral tribunal. As a signatory State to this treaty, Romania has undertaken to execute the treaty in a correct and faithful manner. The case-law developed when applying the Convention can explain the application of this treaty, respectively to clarify the manner in which to interpret the Convention. As such, as a signatory State, Romania should act to ensure the correct application of the treaty, including considering the case-law developed in the application thereof. Therefore, we note that although the Romanian judge has no obligation to consider and assess the case-law developed in the application of the international treaties to which Romania is a party, in the context in which the case-law is not a source of law, the Romanian State has the obligation to ensure the correct application of the Convention, including from the case-law perspective. As a consequence, we appreciate the prudent approach of the national judge to consider similar cases, even in other jurisdictions, to correctly and consistently apply the incidental provisions on conventional matters, since, by virtue of the role he performs, he acts as an agent of the State.

On the other hand, UNCITRAL Model Law is not an international convention, meaning the provisions of the Vienna Convention on the Law of Treaties are not applicable to it. Under the technical legal aspect, the Model Law is a *soft law* instrument.

In other words, it is an instrument designed to become at one point a source of public international law, but which, at the time of adoption, does not receive the necessary recognition for States to be conventionally committed, nor it meets the conditions of *usus* and *opinio juris* to become mandatory as a legal custom. The Model Law was prepared and adopted with the declared and confirmed purpose of establishing an international standard on the international arbitration process regulation. Thus, although it is not a source of international law, Model Law has been implemented in 78 States and 109 jurisdictions, thus achieving the aim pursued by the Commission. However, there is no official act pertaining to the Romanian State recognizing and implementing the Model Law as such, although the provisions of the Civil Procedure Code are inspired by its content. The same can be argued about the Rules of Procedure of the Court of Arbitration attached to the Chamber of Commerce and Industry of Romania. As such, the Model Law was designed to be a benchmark for national legislative bodies, a standard that would lead to a harmonization of legislation in the field. Under these circumstances, the Romanian judge lacks a legal basis which would entitle him to apply the provisions of the Model Law.

3. CASES OF REFUSAL TO RECOGNIZE OR EXECUTE THE FOREIGN ARBITRAL AWARD

According to Article 1129 Civil Proc. Code, the recognition or enforcement of the foreign arbitral award is rejected by the District Court if the party faced with an award against it proves the existence of one of the following:

- a) the parties did not have the capacity to conclude the arbitral agreement in accordance with the law applicable to each of them, established under the law of the State where the award was rendered;
- b) the arbitration agreement was not valid under the law established by the parties, or if the law was not established, under the law of the State where the arbitral award was rendered;
- c) the party faced with an award against it was not been properly informed about the appointment of arbitrators or the arbitral proceedings or was been unable to use its own defence in the arbitral proceedings;
- d) the establishment of the arbitral tribunal or the arbitration procedure was not in accordance with the parties' agreement or, in the absence of an agreement, with the law of the place where the arbitration took place;
- e) the judgment concerns an unforeseen dispute in the arbitral agreement or outside the limits set by the arbitral agreement or contains provisions that exceed the terms of the arbitral agreement. However, if the provisions of the judgment which concern matters subject to arbitration can be separated from those on issues not subject to arbitration, the former may be recognized and declared enforceable;
- (f) the arbitration award has not yet become binding to the parties or has been set aside or suspended by a competent authority in the State it was rendered or under the law of the State.

An analysis of the judicial practice on the *exequatur* procedure, judged in accordance with the provisions of the current Civil Procedure Code, revealed a reluctance of the national judge to perform an explicit analysis of the grounds of refusal invoked by the

defendants. Almost all awards identified with this subject followed a predefined pattern where the first court judge made referred to the following:

(i) The applicable legal framework, referring to the provisions of Decree no. 186/1961 and the provisions of Article 1129 Civil Proc. Code.

(ii) Verification of the admissibility conditions provided by Article 1127 Civil Proc. Code, respectively if the arbitration award and the arbitration agreement, in original or in a legalized copy are attached to the application, as well as if the documents are translated if they are not in Romanian.

(iii) The application of Article 1124 Civil Proc. Code, respectively, whether the dispute forming the subject of the arbitration award can be settled through arbitration in Romania and *ex officio*, if there are provisions that breach public order of Romanian private international law.

(iv) The mechanical rendering of the reasons for refusing recognition and/or execution of the foreign arbitral awards provided in Article 1129 Civil Proc. Code, proceeding to an analysis of the possible grounds for refusal invoked by the defendant (aspect identified in almost all awards).

The recitals of courts are often succinct, lacking a thorough or extensive analysis of the grounds for refusal, the arguments often representing a paraphrasing of the defendant's invoked legal basis as a ground for refusal.

However, we have identified a number of solutions in judicial practice that have deviated from the template described in the preceding ones, solutions that we will continue to address:

- THE PARTIES DID NOT HAVE THE CAPACITY TO CONCLUDE THE ARBITRATION AGREEMENT IN ACCORDANCE WITH THE LAW APPLICABLE TO THEM, ESTABLISHED UNDER THE LAW OF THE STATE WHERE THE JUDGMENT WAS RENDERED;

This ground for refusal is designed to reiterate the ground provided in Article V, par. (1), let. a) of the New York Convention, but unfortunately, the wording of the legal text is not as clear as the text from which it was inspired. Moreover, it seems to limit the scope of the Convention's ground. The New York Convention is explicit in showing that, in order to determine the civil capacity to conclude the arbitration agreement, the judge examining this ground for refusal must firstly assess the law applicable to the person who concluded the agreement and secondly, the law under which the award was rendered. The wording of Article 1129, let. a), Civil Proc. Code, completely disregards the ground for refusal on ineffectiveness of the arbitration agreement. This legal mismatch is covered under the legal technical aspect by the application of Decree 186/1961 which faithfully implemented the New York Convention and which is applicable as *lex specialis*.

In our research, we identified a single award where the national court carried out a thorough analysis of this ground for refusal of enforcement.

Thus, in the case referred to¹, the defendant argued that "the parties to the agreement referred in Article 1, pt. I, thesis I of the Contract, could not enter in agreement, and on the other hand, that written agreement is not valid under the law chosen by the parties or by the law of the State where the award was rendered." The reasoning revealed a breach

¹Bucharest Court of Appeal, civil decision no. 182/19.03.2014, available online at the following link <http://rolii.ro/hotarari/58ac310ee49009503f00258f>.

of the capacity of use specialty principle of the legal persons, provided by Article 34 of Decree no. 31/1954² (currently abrogated by Article 230 of Law no. 71/2011, on June 13, 2011) by the foreign arbitration court. According to par. 1 of this article, "the legal entity may have only those rights which correspond to its purpose, established by law, the act of establishment or the statute", and according to par. 2 "any legal act that is not performed to achieve this purpose is null". In fact, the claimant's supplying company was not authorized to carry out trade with the goods which were the object of the contract.

In analysing the ground for refusal, the state court held that, in fact, the defendant alleges a breach of the capacity of use specialty principle of the supplier who is a third party other than those who were parties to the arbitration dispute. As a result, the examination of the observance of the capacity of use specialty principle with respect to a legal person other than the parties to the arbitration dispute is irrelevant and consequently cannot be taken into account for breach of this principle and for this reason the provisions of Article 168 par. 2 of Law no. 105/1992³ (currently abrogated by Article 83 of Law no. 76/2012 on February 15, 2013) regarding the breach of public order of Romanian private international law or the provisions of Article V, pt. 2 let. b of the New York Convention.

What is noteworthy, however, is the attention of the first court in the investigation of the grounds for refusal, which tend to bring the merits of the case into question.

The Court held expressly that *in that context the Romanian court cannot proceed to the examination on the merits or modification of the foreign arbitration award*. Furthermore, it showed that the appellant's allegations cannot be questioned or analysed in the sense that it is a substitute sale and tends to change the contractual relations between the parties to the arbitration dispute⁴.

2. THE ARBITRATION AGREEMENT WAS NOT VALID UNDER THE LAW ESTABLISHED BY THE PARTIES, OR IF THE LAW WAS NOT ESTABLISHED, UNDER THE LAW OF THE STATE WHERE THE ARBITRAL AWARD WAS RENDERED;

The second ground for refusing to recognize and enforce a foreign arbitration award is in fact a transposition of the ground provided in Article 5, pt. 1 let. a of the New York Convention. Thus, the Romanian legislator divided the ground provided by the New York Convention into two distinct cases, provided by Article 1129, par. (1) and par. (2) Civil Proc. Code

The national judge called ruling this ground for refusal shall investigate the formal and substantive conditions provided by the law established by the parties to the agreement.

For example, if the law applicable to the arbitration agreement is the Romanian law, the judge will verify the conditions of Article 548 Civil Proc. Code As a condition of form, the written form of the agreement will be verified, under the fundamental nullity sanction (Păncescu, 2016). We also note the need to conclude the arbitration agreement in a notarial authentic form in the circumstances when a dispute concerning the transfer of the right of ownership and/or the constitution of another real right over a real estate is contemplated. As far as the substantive conditions are concerned, we appreciate that these are the same as any civil act: capacity, consent, cause of action. However, we state that, in

²Decree no. 31 of 30 January 1954 regarding natural and legal persons, published in the Official Bulletin no. 8 of 30/01/1954.

³Law no. 105 of September 22, 1992, regarding the regulation of the relations of private international law, published in the Official Gazette of Romania, Part I, no. 245 of 01/10/1992.

⁴*Ibid.*

our opinion, the condition of the capacity to conclude the arbitration agreement shall be analysed if a defence is formulated under Article 1129, let. b) Civil Proc. Code.

In practice, we identified a solution⁵ where an enforcement defence based on the provisions of Article 1129 (b) of the Civil Procedure Code was examined, namely the fact that there was no valid arbitration agreement between the parties, referring to the provisions of Article 20.6 of the Special Conditions of the agreement at issue. In fact, it was argued that the equivocal nature of the arbitration agreement allowing both the referral of an arbitral tribunal or a common law court, determined the invalidity of the arbitration clause and consequently the ground for refusal provided by Article 1129, let. b) Civil Proc. Code.

Thus, the court held that, in essence, the respondent reasoned its application on the fact that, according to the arbitration agreement, the parties chose to submit their case to the International Court of Arbitration attached to the Chamber of Commerce and Industry of Romania, which would conflict with the clause on the application of ICC rules but also with the fact that the dispute deriving from the parties' agreement is an administrative dispute, determining the administrative court as competent.

With respect to the first claim, the national court held as unfounded the defence formulated as "the compromise clause contained in sub-clause 20.6 of the Special Conditions of the Agreement is clear as to how to establish the arbitral tribunal and the establishment of a procedure specific to the International Chamber of Commerce, in a particular situation, that of the disputes with the foreign contract partners, is not in contradiction with the appointment of the arbitrators by the Chamber of Commerce and Industry of Romania. Moreover, in the case-law of the High Court of Cassation and Justice of Romania (decision no. 318 of 11 February 2016 issued by Civil Section I⁶) has stated in a recent case that the compromise clause, which is obviously deficient, is not null and will be interpreted according to the general rules for the interpretation of the contracts."

In considering the ground for refusal from the perspective of the second claim formulated by the respondent, the court held that Law no. 554/2004 of the administrative disputes, entered into force after the conclusion of the will agreement in the case and consequently cannot be retroactive, and dismissed the defence as unfounded.

The case above mentioned is relevant in the light of the grounds which may be invoked in support of a defence on the ground of Article 1129, let. b) Civil Proc. Code

3. THE PARTY FACED WITH AN AWARD AGAINST IT WAS NOT BEEN PROPERLY INFORMED ABOUT THE APPOINTMENT OF ARBITRATORS OR THE ARBITRAL PROCEEDINGS OR WAS BEEN UNABLE TO USE ITS OWN DEFENCE IN THE ARBITRAL PROCEEDINGS;

The provisions of Article 1129 let. c) Civil Proc. Code follow *ad literam* the provisions of the Convention contained in Article 5, par. (1), let. b). As a result, the ground for refusal becomes incident when the defendant could not use his means of defence because the application for arbitration or the term of debates were not communicated in due time or at all. The prejudice to the party is presumed in this

⁵Constanta Court of Appeal, Civil Decision no. 348/2016, available online at the following link: <http://rolii.ro/hotarari/589a2cffe490098436000446>.

⁶ Solution available online at the following link: <https://legeaz.net/spete-civil-iccj-2016/decision-318-2016>

situation. At any time after the establishment of the tribunal and the first term of trial, the party concerned is obliged to prove the impossibility of supporting its defence.

As regards the observance of the right to defence, it must be noted that this notion must be understood in a broad sense, in the sense of the rules of civil procedure, supplemented by the case-law of the ECHR. It is irrelevant in the light of this ground for refusal whether the party concerned has formulated a remedy against the arbitral award in the jurisdiction of the State in which the dispute has been brought before arbitration.

In a solution⁷ which raised the issue of insufficient defence in the arbitration proceedings of the party, it was argued that the lack of a sufficient response in the recitals of the award concerning the defence invoked by the claimant is in fact a circumstance which is included in the ground of refusal provided by Article 1129, let. c) Civil Proc. Code.

The Court of Appeal has firmly held that the respondents' defence, although founded, cannot be included in exceptional situation provided in Article 1128 let. c Civil Proc. Code, allowing the refusal to recognize the foreign award on Romanian territory.

In fact, the Court ascertained that the first court confused the denial of the right of defence - the lack of the party's ability to be heard in the arbitration litigation (either because it did not know the existence of the dispute or for any other reason) and the alleged limitation of that right by granting a limited time which would not have allowed exhaustive conclusions to be drawn on a new application by the claimant, a request which consider the taking of evidence, but merely a new claim in relation to the evidence already administered in the case.

However, this situation cannot be equated with that envisaged by the provisions of Article 1128 let. c Civil Proc. Code, which is limited to the lack of expression of the defendant's opinion in the arbitration process, either because it was not informed about the arbitration procedure or because, for other reasons, it would have been impossible to be present.

Although we appreciate the correct substantive solution of the court in relation to the state of fact inferred brought before the court, we consider that the recitals set out *obiter dictum* on the scope of the ground for refusal of the arbitration award under Article 1129, let. c) Civil Proc. Code, restricted the application of the article. We appreciate that the interested party may invoke under Article 1129, let. c) Civil Proc. Code, any irregularity in the arbitration process that may affect the right to defence as enshrined and developed by the ECHR case-law.

In a novel case, in which the position of the defendant company administrator was questioned, the company entered into insolvency proceedings, the quality of the representative was discussed and, implicitly, the breach of public order of private international law, the court considered the defence as unfounded. We consider that the defendant erroneously founded his defence on the ground concerning the breach of public order in Romanian private law, as the defendant allegedly misinformed the company representative and participated in the arbitration by a representative who did not justify his quality.

⁷Bucharest Court of Appeal, decision no. 663/2014 accessible online at the following link: <http://www.rolii.ro/hotarari/589fe637e49009483e001170>.

Thus, the defendant invoked the breach of Romanian law, namely Law 85/2006⁸ which provides in Article 36 that, from the date of initiation of the insolvency proceedings, all judicial or extrajudicial actions for the execution of claims on the debtor or his property are lawfully suspended. At the same time, the defendant argued that the arbitration award was made in breach of the procedure of summoning the defendant-debtor by the court administrator and the fact that the exclusive jurisdiction of the Romanian courts, the only ones which could settle the claims of the creditors, was breached.

The court ascertained that the defence was unfounded, noting that the defendant had entered into insolvency after the initiation of the arbitral proceedings, the effects of initiating the insolvency proceedings on arbitration being governed by the law of the State where the arbitration took place.

Consequently, according to Article 4 par. 2 let. f) of the EC Regulation no. 1346 on Insolvency Proceedings "The law of the State of the opening of those proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure." It determines in particular: "(...) f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending"; and Article 15 of the same Regulation provides: "The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending."

So, being an arbitration process already initiated at the date of the opening of insolvency proceedings, a process conducted in an EU Member State, the effects of the insolvency proceedings are governed by the law of that State, the provisions of Article 36 of Law no. 85/2006 are not applicable, so that from this perspective there is no breach of the public order of Romanian private international law.

At the same time, the defendant's claim on the rendering of the arbitral award was also unfounded, in breach of the summoning procedure of the debtor as a judicial administrator, since the content of the arbitral award and the documents submitted to the file showed that the defendant was informed about the arbitral proceedings, making use of its own defence in the arbitration proceedings where it was represented by a conventional representative, requesting the taking of evidence and drawing conclusions on the merits of the dispute.

For the reasons set out above, the first court found the application for recognition and enforcement of the award admissible.

We consider that the judgement can be questionable from a series of points of view. First of all, the court was required to make a correct classification of the ground for refusal. In essence, the issue of the breach of public order of Romanian private international law did not arise, however, a problem of legal representation and participation in the arbitration proceedings, which fall within the ground of refusal provided by Article 1129, let. c) Civil Proc. Code. Secondly, the power of representation must be analysed from the point of view of the place of arbitration and not from the

⁸ Law no. 85/2014 on insolvency and insolvency prevention procedures, published in the Official Gazette of Romania, Part I, no. 359 of 21 April 2006, was repealed by Law no. 85/2014 on insolvency and insolvency prevention procedures, published in the Official Gazette of Romania, Part I, no. 466 of June 25, 2014.

perspective of domestic law. However, the national court did not make such an analysis. As such, we question the legality of the award.

4. THE ESTABLISHMENT OF THE ARBITRAL TRIBUNAL OR THE ARBITRAL PROCEEDINGS WAS NOT IN ACCORDANCE WITH THE AGREEMENT OF THE PARTIES OR, IN THE ABSENCE THEREOF, OF THE LAW OF THE PLACE OF ARBITRATION;

The establishment of the arbitral tribunal involves a series of issues ranging from the nature of the arbitration to the number, qualifications and requirements that arbitrators must fulfil to be part of the arbitral tribunal.

As an example, concerning the appointment of arbitrators, we note that the Romanian legislation observes the principle of voluntary arbitration, showing *expressis verbis* in Article 558 Civil Proc. Code, applicable in virtue of Article 1123, Civil Proc. Code in international arbitration, that arbitrators are appointed according to the arbitration agreement. In this context, we consider that the parties need to give special consideration to the drafting of the arbitration clause, as the speed of the process largely depends on the efficiency of the arbitral tribunal establishment. We prefer that the parties determine the procedure to be followed when one of the parties decides to start the arbitration proceedings either by a reference rule (in the case of institutionalized arbitration, the designation of the institution being sufficient) or extensively. Such an approach would grant the parties greater control over the initiation of the arbitration proceedings, would allow appointing of arbitrators, supporting the dispute arbitrability. At the same time, it keeps the parties from any difficulties in the *exequatur* proceeding.

Naturally, the ground for refusal provided in this paragraph concerns not only the procedure for the establishment of the arbitral tribunal but also the arbitration proceeding.

Although it is not expressly stated in the ground for refusal, we consider that the assessment of an arbitration procedure or arbitral tribunal constitution breaches must be subsumed to the analysis of the prejudice caused by the alleged breach, such as the reasoning applied in the case of relative nullity. It should be noted that the purpose of arbitration is to obtain a final arbitration award, the effectiveness of which is ensured and pursued by the New York Convention. As such, the refusal to execute must appear as a final remedy, justified in exceptional circumstances likely to cause significant prejudice to the party opposing execution and being the cause of a material or procedural error of judgement. In this context, we appreciate that the courts called upon to assess the ground of refusal provided in Article 1129, let. d) Civil Proc. Code, must consider the condition of prejudice to the party that founds its defence on that ground, respectively to analyse the importance of the prejudice.

We consider relevant and further analyse the civil decision no. 348/2016 of the Constanța Court of Appeal⁹, where the court held that the ground of appeal of the respondent was founded, based on the provisions of Article 1129, par. (1), let. d) Civil Proc. Code, stating the following: *the arbitral award rendered by the International Court of Arbitration attached to the International Chamber of Commerce on June 11th 2012 (...) is a foreign arbitration award, the effects of which are governed by international arbitration conventions (...) the constitution of the arbitral tribunal presupposes, in this case, the determination of the real will of the parties to the agreement, by interpreting the*

⁹ Constanta Court of Appeal, Civil Decision no. 348/16.06.2016 of file no. 2378/121/2015, a solution available online on the platform [www.rolii.ro](http://rolii.ro), at the following link: <http://rolii.ro/hotărâri/589a2cffe490098436000446>.

contract according to the provisions of Article 977 Civil Proc. Code. (...) the defendant's main defence in the interpretation of the said contractual clause concerns the determination of the true will of the parties in the drafting of their arbitration agreement, in the light of the fact that this clause 20.6 of the Special Conditions of the Contract represents a mutually agreed modification to the arbitration clause in the General Terms of the Building and Engineering Works contract designed by the FIDIR beneficiary first edition 1999. Thus, the works contract concluded on October 4th 2004 (...) is based on the FIDIC-type international agreement, the first edition of 1999, containing the General Conditions and which is part of the agreement producing legal consequences. By the Special Conditions of the Contract, the parties amended Clause 20.6 of the FIDIC General Conditions. The most important modification of clause 20.6 of the General Conditions by the special conditions is represented by the way of appointing the arbitrators, in sub-clause 20.6 of the Special Conditions of the Contract, expressly specifying in the paragraph which contains the general rule of the arbitration dispute settlement that - the arbitrator will be appointed by the Romanian Chamber of Commerce. The positioning of this express statement in the text, main idea on arbitration sub-clause, the subsequent enumeration of the specific ways of resolving disputes after the phrase - unless otherwise decided by both parties - that the parties provided that - completely deletes sub-clause 20.6 and is replaced by: "...", followed by the principle established in dispute settlement, plus the fact that the most important amendment is that relating to the constitution of the arbitral tribunal, are elements which lead to the clear conclusion that the true will of the parties, the cause of this sub-clause in the Special Conditions of the Contract, was that the arbitrators be appointed by the Romanian Chamber of Commerce.

Although the Court of Appeal's analysis is pertinent and relevant for the purpose of identifying the arbitration clause in order to be able to retain the incidence of the ground for refusal provided by Article 1129, par. (1), let. d) Civil Proc. Code, we appreciate that the defendant in the *exequatur* proceedings should have challenged the jurisdiction of the arbitral tribunal which issued the judgment whose enforcement is required. In the recitals of the judgment, the appeal court takes as a subsidiary argument this circumstance, stating: *the appellant's claim that the appointment of an arbitrator, following a request made by the Secretariat of the International Court of Arbitration attached to the International Chamber of Commerce in the address of June 23rd 2006, AFDJ did not accept that the arbitral tribunal be constituted by CIC, the matter being invoked immediately after the communication of the confirmation as arbitrator of the assistant professor dr. J van Dunne. The exception to the jurisdiction of the CIC Arbitral Tribunal was invoked in that reply, which was also supported during the course of the procedure.*¹⁰

Although we share the conclusion of the court of appeal, we cannot fully agree on the technique used to reach this solution. We appreciate that both matters referred by the court of appeal and those presented in what preceded are constituted in conditions that have to be fulfilled cumulatively in order to retain the reason for refusal from Article 1129, par. (1), let. d) Civil Proc. Code, respectively concerning the establishment of the arbitral tribunal contrary to the will of the parties.

¹⁰ Constanta Court of Appeal, Civil Decision no. 348/16.06.2016 of file no. 2378/121/2015, a solution available online on the platform [www.rolii.ro](http://rolii.ro), at the following link: <http://rolii.ro/hotărâri/589a2cffe490098436000446>.

We affirm this for the following reasons. *First*, in terms of identifying the true will of the parties, it is necessary to investigate the arbitration clause from the perspective of the material law governing the contract so that the court can conclude on the true will of the parties. The court will not verify the validity of the clause, but will only investigate whether the procedure has been followed and notify the agreed entity in the arbitration clause to conduct the arbitration proceeding. When this aspect is established, if the court finds that the procedure for establishing the tribunal agreed by the parties was not followed, it is necessary to verify whether the party whose will has been breached has challenged the jurisdiction of the entity notified with the arbitration dispute. In the absence of such a challenge, based on the fundamental principles of arbitration and in particular on the voluntary nature of the procedure, the defendant's participation in the arbitral proceedings would, in our view, constitute a derogation from the original arbitration clause. Such a procedural conduct would, in our view, deprive the party concerned of invoking the ground for refusal laid down by Article 1129, let. d) Civil Proc. Code.

5. THE JUDGMENT CONCERNS AN UNFORESEEN DISPUTE IN THE ARBITRAL AGREEMENT OR OUTSIDE THE LIMITS SET BY THE ARBITRAL AGREEMENT OR CONTAINS PROVISIONS THAT GO BEYOND THE TERMS OF THE ARBITRAL AGREEMENT. HOWEVER, IF THE PROVISIONS OF THE JUDGMENT WHICH CONCERN MATTERS SUBJECT TO ARBITRATION CAN BE SEPARATED FROM THOSE ON ISSUES NOT SUBJECT TO ARBITRATION, THE FORMER MAY BE RECOGNIZED AND DECLARED ENFORCEABLE;

The fifth ground for refusing to recognize and enforce a foreign arbitration award is circumscribed to the ground of refusal provided by Article 4 of the New York Convention and is a consequence of the following premises: the arbitral award has settled a dispute not agreed by the parties through compromise or the provisions of the compromise clause, or the provisions of the compromise or the compromise clause have been exceeded. If there is a possibility that the provisions of the arbitration award related to the issues subject to arbitration are separated from the issues that are not subject to arbitration, there is the possibility of recognizing and allowing the partial enforcement of the first category of provisions.

The reason does not identify with the one regulated in Article 1125 Civil Proc. Code, according to which the recognition and/or execution of the judgment are possible only if the subject of the dispute is arbitrable according to the national legislation. In particular, compliance with the subject of the arbitration clause is verified. We consider that this ground of refusal is not dependent on the proof of a prejudice by the party invoking it.

We have not identified in the national practice investigated a case in which the defendant invoked the ground for refusal provided by Article 1129, let. e) Civil Proc. Code.

6. THE ARBITRAL AWARD HAS NOT YET BECOME BINDING FOR THE PARTIES OR HAS BEEN SET ASIDE OR SUSPENDED BY A COMPETENT AUTHORITY IN THE STATE WHERE OR UNDER THE LAW OF WHICH IT WAS RENDERED.

An aspect that needs clarifications are the notions of *binding decision* in comparison with the notion of *final decision*. This distinction was made exemplary in a case, where, by checking the compulsory nature condition of the arbitral award whose recognition is

sought, the Bucharest Court of Appeal¹¹ held that *the condition of the respondent invoked, that the decision is final, is among the conditions an arbitral award must meet. Both the New York Convention and the Civil Procedure Code provide that the arbitration award must be binding, not final (a term which does not have the same meaning in national law to constitute a criterion for assessing the lawfulness of the judgment); so, there is no need to prove that no action has been brought against the decision.*

In practice¹², we have identified that the parties have often attempted to delay the execution of an arbitration award in Romania by drawing an exception to enforcement on the grounds of the non-binding nature of the arbitral award from the point of view of lodging an application for setting aside in the State where the judgement was rendered. This defence has been rightly rejected by the national courts, that there is no legal basis for a solution to reject the application for recognition or enforcement of the foreign arbitration award on the ground that an application for setting aside has been lodged. It should be noted that the application for setting aside procedure is an extraordinary appeal to the arbitration award, which does not suspend *ex officio* the enforceability or final nature of the arbitral award.

7. BREACH OF PUBLIC ORDER OF ROMANIAN PRIVATE INTERNATIONAL LAW

The private international law order is a specific notion of legal relations with the foreign element. Violation of public order in Romanian private international law may entail: lack of application of those effects of a foreign law which, in accordance with the rules of private international law, is applicable in the present case, to the extent that these effects contradict the fundamental principles of the law of the forum, as the case may be, the refusal to recognize and/or grant the enforcement of a foreign judgment on the territory of the State where they are requested (hypothesis provided by Article 1124 Civil Proc. Code).

Within the scope of the notion of public order of Romanian private international law, as circumscribed by the Civil Code, in Book VII - "Provisions of private international law", the following are included:

- the fundamental principles of national law and European Union law, such as
- fundamental human rights as governed by the European Convention on Human Rights.

In a case solution, the issue of the breach of public order of private international law has arisen from the point of view of observing the principle *res judicata*.¹³ In the present case, it was argued that by recognizing and enforcing the arbitral award, to order the defendant to transfer land to the claimant, would breach public order of international private law, since the arbitration tribunal's decision on the first subsidiary claim of the reconciliation application, filed by the completing application, breached the authority of a final decision of a judgment rendered in a dispute over that land.

¹¹ Bucharest Court of Appeal, Decision no. 822/18.05.2016 of file no. 14138/3/2014, a solution available online on the platform www.rolii.ro, at the following link: <http://rolii.ro/hotarari/58bd1ea9e490096020000218>

¹² Bucharest District Court, Civil Sentence no. 53/S/16.03.2018, available online at the following link <http://www.rolii.ro/hotarari/5aadd8b4e49009940e000041>.

¹³ Bucharest District Court, Civil Section VI, sentence no. 7226/16.12.2013, available online at the following link: <http://rolii.ro/hotarari/587b9ad1e49009dc34003f51>

It was noted that according to Article 2564 par. 2 Civil Code, in the public order of Romanian private international law, the fundamental principles of European Union law are included.

In its consistent case-law, the Court of Justice of the European Union has underlined the importance of the authority of a final decision principle both within the legal order of the European Union and in the national legal order of the Member States. It can be considered that the authority of a final decision is a fundamental principle of both Romanian law and European Union law, so it is part of the public order of Romanian private international law.

In another case in which the national court was called upon to rule on the incidence of the ground for refusal provided by Article 1125 Civil Proc. Cod¹⁴ it was noted that the manner in which the arbitral tribunal resolved the merits of the case exceeds the analysis of the state court, which has the right to analyse only if the formal conditions provided by the law for the admission of the application are fulfilled. The analysis of the facts and the manner in which the evidence was handled, as well as the parties' claims are not a matter of public policy. The public policy ground can only be accepted if the recognition of a judgment rendered in another Member State would unacceptably infringe the legal order of the requested State in so far as it would undermine a fundamental principle.

Judgment of the application for recognition or enforcement of the foreign arbitration award

One of the procedural incidents that may arise before the court of recognition and enforcement is the suspension of the trial. If requested from the competent authority of the State where it was pronounced or under the law of the State where the judgment was rendered, this incident may determine the setting aside or suspension of the foreign arbitration award.

Suspension is optional and the court decides whether or not to take this step. However, if the application for suspension is granted, the tribunal may, at the request of the party requesting the recognition and enforcement of the foreign arbitration award, order the lodging of a bail by the other party.

In the absence of express provisions, we consider that the provisions of Article 1057 Civil Proc. Code on bail are applicable. The maximum limit of the bail, unless the law provides otherwise, is no more than 20% of the value of the object of the claim, and in the case of applications with objects that cannot be assigned a monetary value, it cannot exceed the amount of 10.000 lei. (Roşu, 2018)

In principle, the request for recognition or enforcement of the foreign arbitration award shall be settled with the summoning of the parties, in accordance with the provisions of the common law. By way of exception, the application may be resolved without the parties being summoned, if it is clear from the judgment that the defendant agreed to uphold the action.

In the verification of the foreign arbitration award, the Romanian court is limited to verifying some formal aspects. In this respect, the foreign arbitral award rendered by a competent arbitral tribunal shall benefit in Romania from a probative force in respect of the facts which it finds.

¹⁴Bucharest District Court, Civil Section VI, sentence no. 3446/05.10.2017, available online on the platform [www.rolii.ro](http://rolii.ro), at the following link <http://rolii.ro/hotarari/59fbde92e49009841700008a>.

Also, the arbitral tribunal cannot review the arbitral award on the merits of the dispute. Foreign arbitral awards benefit from the trust of the Romanian recognition court regarding the manner of settling the dispute. (Păncescu, 2013)

Regardless of whether the application is upheld or rejected, the court will render a judgment, which, at first court, shall be a sentence. Against the sentence, the dissatisfied party can only promote the appeal, which will be solved according to Article 96 pct. 2 Civil Proc. Code, by the court of appeal.

4. CONCLUSIONS

By the manner in which the Romanian legislator has regulated the recognition of the foreign arbitration award, facilitates its enforcement in an optimal and predictable, desirable term, which must be found not only in the judgments but also in the arbitral trials.

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