

Arbitration proceedings under international regime an overview on the Albanian legislation

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Abstract

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.

Through this paper, highlighting the main features of international commercial arbitration will be presented a comparative overview between international legal framework and domestic provisions of the Albanian legislation, governing the arbitration proceedings. In this way, will be presented the problematic issues which are addressed by the domestic legal framework in this area, as well as the necessity for eventual changes. Adoption and implementation of legal instruments, which provide contemporary improvements of arbitration institute, in accordance with the international legal framework, will be a good service to the integration process of the Albanian economy.

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JEL Classification: K41, K33

Introduction

The international arbitration advantages in an open trade

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 courts². It can also be defined as a process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law³. Whereas the international

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² Gary B. Born, *International Commercial Arbitration in the United States: Commentary and Materials*, The Netherlands: Kluwer law and Taxation Publishers, 1994, p. 1.

³ Halsbury's Laws of England (Butterworths, 4th edition, 1991) para 601, 332.

commercial arbitration is a means by which the disputes arising out of **international commerce** are settled pursuant to the voluntary agreement of the disputing parties, through a process which is different from the judicial process of a national court. The object is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

Arbitration is only an alternative to litigation and it does not replace the judicial machinery in all aspects, rather it co-exists with it.⁴ There is a principle in the heart of this method, which has been described by Mr. Michel Gaudet⁵, 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 behind⁶.

Above all International Arbitration avoids the difficulties and uncertainties created eventually by the submission to the jurisdiction of the court of another country. When the parties come from different political or legal systems, there 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 and just process following widely understood due process norms⁷.

The popularity of arbitration as a means for resolving international commercial disputes has increased significantly over the past several decades⁸. Number of cases resolved, for example from the world's leading international arbitral institution – the International Chamber of Commerce (ICC)⁹ – is large enough to justify the statement that actually judicial system has a worthy opponent.

⁴ Angualia Daniel, *The role of domestic courts in International Commercial Arbitration*, p. 5. (the document is available online at: <http://www.ssrn.com/abstract=1674760>).

⁵ Former Chairman of the ICC International Court of Arbitration.

⁶ A. J. van den Berg, *International Arbitration and National Courts: The Never Ending Story*. Permanent Court of Arbitration. International Bureau, International Council for Commercial Arbitration. Kluwer Law International, 2001.

⁷ Lucy V. Katz, *How International Arbitration Bridges Global Markets in Transition Economies*, "CPR Institute for Dispute Resolution", vol. 22, no. 9, October 2004.

⁸ Gary B. Born, *International Commercial Arbitration in the United States: Commentary and Materials*, The Netherlands: Kluwer law and Taxation Publishers, 1994, p. 7.

⁹ The International Court of Arbitration was established in 1923 as ICC's arbitration body.

I. The legal discipline of international commercial arbitration

The important role that international commercial arbitration has had in practice has also required the necessity to adapt the legal discipline and to make it much more uniform on universal level. Many public and private organizations have not stopped efforts to harmonize the arbitration rules, in particular those of international commercial arbitration, which with no doubt is today one of the areas with the most harmonized legal regime in the global plan and this applies to all aspects of its regulation.

Among the most significant contributions in this regard are the documents prepared by UNCITRAL - United Nations Commission on International Trade Law - in order to harmonize the rules of arbitration application. So, one of the most important steps was the New York Convention (1958) on the recognition and enforcement of foreign arbitration awards. It is worth mentioning also the Arbitration Rules adopted in 1976 by the Commission on international trade law (UNCITRAL) which contains a detailed discipline of arbitration proceedings.

But the most important act that establishes the organic legal discipline of international commercial arbitration is the UNCITRAL Model law¹⁰ (hereinafter "Model law").

The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice¹¹. As a preamble of the model law serves the Resolution adopted by the General Assembly which recognize the value of arbitration as a method of settling disputes arising in international commercial relations. The General Assembly is also convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations¹².

The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws. It was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international

¹⁰ The UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 and was amended on 7 July 2006.

¹¹ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No. E.08.V.4, Part II, par. 2.

¹² The General Assembly Resolution 40/72 (11 December 1985) on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL).

cases¹³. That's why the General Assembly recommended that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice¹⁴.

II. Albanian legal framework governing the arbitration

Albanian legislation recognizes and regulates the "arbitration institute". The provisions relevant to arbitration are found in a special title of the Code of Civil Procedure¹⁵ (CCP) of the Republic of Albania. For the purposes of this law, arbitration is a special institute of civil procedural law for settling **property disputes** outside of judicial activity. It represents the will of the parties to a rapid and fair solution of these disputes, by entrusting the mission to one or more persons who organize and develop judgment adhering to the limits of the charged mission. The settling of the property disputes through arbitration enables the avoidance of a significant part of the judicial proceedings.

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 Albania¹⁶. 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 (art. 439), a law which still has to be adopted in Albania.

This obligation is not fulfilled since no special law on international arbitration has been approved. But the effect of this provision (article 439) is to issue the international arbitration outside influence of the regulation of articles 400-438 of the Civil Procedure Code.

The provisions of articles 400-438 regulate all concepts pertaining to arbitration, as will be addressed below, for example the matters relating to the arbitration agreement, the arbitral forum choice, the law applicable to the arbitration agreement, the arbitration procedures, the civil court interventions in an arbitral process, the granting and enforcement of the arbitration awards etc.

Other important provisions in the field of international arbitration are contained in Title III, Chapter IX of CCP, governing recognition and enforcement of foreign arbitral awards in Albania.

¹³ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No. E.08.V.4., Part II, par. 3.5.

¹⁴ The General Assembly Resolution 40/72 of 11 December 1985.

¹⁵ Law No. 8116, dated 29 March 1996, as amended, Part II, Title IV "Arbitration", art. 400-439.

¹⁶ Code of Civil Procedure of Albania, art. 400

Part of the Albanian legal framework governing the arbitration are also the Convention "On the recognition and enforcement of foreign arbitral awards"¹⁷, otherwise known as the New York Convention, the most important multilateral treaty on international arbitration and the European Convention on Arbitration, also known as the Geneva Convention¹⁸.

Domestic arbitration and international arbitration under Albanian law

As regards the distinction between domestic and international arbitration, the Albanian legislation distinguishes these two institutes by the provision of article 400 of the Code of Civil Procedure. This article, using subjective criteria, determines that the provisions on internal arbitration (art. 400-438 of CCP) shall apply to an arbitration procedure only if the two following conditions are met:

- (a) when participants in the process (the parties) are domiciled or residing in the Republic of Albania *and*
- (b) when the seat of the arbitration procedure is located in the Albanian territory.

Formulated only with these two criteria, the above provision (art. 400 of CCP) considers and regulates under the same legal regime the arbitration procedures as following:

(i) For disputes arising from contracts that are **subject to Albanian law**, but also from contracts that are **subject to a foreign state law or international law**, provided that the two above criteria (residence/domicile of the parties and the place of the arbitration procedure) be simultaneously fulfilled.

(ii) For disputes arising between the **parties with Albanian citizenship** and also between the **parties with mixed citizenship**, provided that the two above criteria (residence/domicile of the parties and the place of the arbitration procedure) be simultaneously fulfilled.

It's clear that the intention of the Albanian legislator has been to govern the international arbitration by a special law, different from the provisions of the Code of Civil Procedure on Arbitration. The Chapter VI of Title IV of the CCP, entitled "International Arbitration", contains only one provision (article 439), which states that "*the international arbitration is regulated by a special law*". Two other provisions of this chapter (article 440 and 441), on the definition of the procedure of international arbitration and on the applicable law, have been repealed.

¹⁷ 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 and entered into force on 7 June 1959. This convention has been effective in Albania since its ratification by the Albanian Parliament by law No. 8688, dated 9.11.2000.

¹⁸ The Geneva Convention was drafted by the UN Economic Commission for Europe, was signed in Geneva on 21 April 1961 and was entered into force on 7 January 1964. This convention has been effective in Albania since its ratification by the Albanian Parliament by law No. 8687, dated 9.11.2000.

Currently, the objective to regulate the international arbitration by a special law is not fulfilled because no special law for this purpose has been approved.

However, one of the differences that currently exist between **domestic arbitration** and **International arbitration** concerns the recognition and enforcement of arbitral awards. The recognition and enforcement of domestic arbitral awards is governed under the articles 432-438 of the Code of Civil Procedure, whereas the recognition and enforcement of foreign arbitral awards is governed under the articles 393-399 of the CCP.

III. Procedural aspects of the international arbitration regime versus Albanian domestic legal framework

1. The scope of application of the arbitration regulatory framework

As its title provides, the article 1 of the Model Law defines the scope of application of this law by reference to the notion of “international commercial arbitration”. As regards the two terms “international” and “commercial”, the international regime seeks to give them an **expanded interpretation**. So, according to the model law, the term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature. The UNCITRAL Model Law (the footnote to article 1/1¹⁹) in fact provides an illustrative and open-ended list of relationships that might be described as **commercial** in nature, whether **contractual or not**.

The situation does not appear the same in the Albanian legislation, which tends to narrow the area where the arbitration extends the effects, allowing its application only on property disputes arising from a contract between the parties. Thus, regarding to the arbitrability of the disputes, the Albanian CCP (article 402) states that may be subject to arbitration “any **property claim** or demand arising from a **property relationship**”²⁰. The seemingly “broad spectrum” of property relations is immediately narrowed by the provision of article 403, which states that the parties may enter into an agreement to submit to arbitration only those disputes arising from a **contract** between them²¹. In addition, according to the Albanian legislation, the disputes in some areas of public or social nature can not be resolved

¹⁹ Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

²⁰ Albanian CCP, article 402 "Material jurisdiction": *Any property claim or demand arising from a property relationship may be subject to an arbitration proceeding.*

²¹ Albanian CCP, article 403 "Arbitration agreement": *Can be judged by arbitration procedure only if there is an agreement between the parties, by which they agree to submit to arbitration disputes which have arisen or may arise out of a contract between them.*

by arbitration. For example, the marital, tax or competition disputes can not be submitted to arbitration.

So, compared with the international law, the Albanian law presents a problem for the arbitrability of the non-contractual disputes. The international documents do not provide any different treatment for the arbitrability of contractual and non-contractual disputes. So, as mentioned above, the model law states that the term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether **contractual or not**.

2. The ability of the parties to submit to arbitration

Among the facilities offered by arbitration, particularly the international arbitration, is that it is perceived as a more neutral judgment forum where one of the parties to the conflict is a state authority. There are few barriers to the ability of the state bodies to submit to arbitration. The application of international conventions has a significant impact on reducing these barriers. In this context, the article II of European Convention of Arbitration²² presumes the liability of public companies to be submitted to arbitration procedure²³. The same article, in the second paragraph recognizes the right of signatory states to make reservations in this respect in order to reflect their domestic legislation restrictions on the ability of these entities to submit to arbitration²⁴.

The Albanian law excludes such restrictions. The article 402(2) of the Code of Civil Procedure clearly provides that the state or a company or an organization controlled by the state can not refuse to be submitted to arbitration²⁵. So the domestic law prohibits these entities to claim such a special immunity from the arbitration jurisdiction.

3. Definition and form of arbitration agreement

The original Model Law version (1985)²⁶ of the provision on the form of arbitration agreement closely followed the New York Convention²⁷, which requires that an arbitration agreement be in writing. In the amended version, the Commission adopted two options, which reflect two different approaches. The first approach follows the New York Convention in requiring the written form of the

²² The European Convention on International Commercial Arbitration of 1961, done at Geneva, April 21, 1961; United Nations Treaty Series, vol. 484, p. 364, No. 7041.

²³ Article II (2) of The European Convention: *...legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements.*

²⁴ Article II (2) of The European Convention: *On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration.*

²⁵ Article 402(2) of CCP: *When one party is the state or a company or an organization controlled by him, it can not claim the right not to be a party to an arbitration procedure.*

²⁶ Article 7 of the UNCITRAL model law.

²⁷ Article II (2) of the New York Convention.

arbitration agreement but recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. The second approach defines the arbitration agreement in a manner that omits any form requirement. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

In this way, the UNCITRAL Model Law provisions, through both its options leaves to the free choice of states the form of the arbitration agreement: (a) the written form version, but in a broader sense or (b) the free form version. A further step in the modernization of the concept of the *arbitration agreement form* has made the European Convention of Arbitration, which sets free the form of this agreement depending on what the domestic laws of states, to whom the disputing parties belong, provide on the form of arbitration agreement²⁸.

Under the provisions of the albanian Code of Civil Procedure, an arbitration forum may have the jurisdiction to resolve the dispute only if it is met the necessary condition of the expression of the will of the parties through an arbitration agreement²⁹. So, the domestic legal framework establishes that there can be no arbitration procedure without an agreement or compromise between the parties, because the arbitration judgment is established solely on the basis of the will of the parties on dispute.

Albanian legislation makes no distinction regarding the effect of the arbitration *clause* or arbitration *agreement*. Therefore the legal regime of the domestic Albanian legislation should be understood that extends its effects in the same manner on the arbitration clause and on the special arbitration agreement.

The domestic law governing the arbitration agreement defines also the criteria of a valid agreement. According to the domestic law, this is done by showing cases when the arbitration agreement is invalid. Among others the article 404 of CCP provides the invalidity of the agreement due to the lack of a **written** form³⁰. So at this point, regarding to the form of arbitration agreement, the Albanian domestic legal framework is a conservative one that does not embrace the

²⁸ European Convention on International Commercial Arbitration, article I(2)(a): *the term: "arbitration agreement" shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws.*

²⁹ Albanian CCP, article 403 "Arbitration agreement": *Can be judged by arbitration procedure only if there is an agreement between the parties, by which they agree to submit to arbitration disputes which have arisen or may arise out of a contract between them.*

³⁰ Albanian Code of Civil Procedure, Article 404(1): *It's to be considered invalid any provision for adjudication of the dispute by arbitration, when it is not reflected in writing exactly in the main agreement of the parties or in a written document that refers to, such as a telegram, telex and any other means which is considered as documentary evidence.*

contemporary spirit proposed by international regime of arbitration represented by the Model law and the European Convention of Arbitration.

According to Albanian law, the number of arbitrators and the method of their appointment is a condition for the validity of the arbitration agreement. The Code of Civil Procedure states that the arbitration agreement is invalid if it does not provide the manner of appointment of the arbitrator or arbitrators³¹. At the same point of view, article 4 of the European Arbitration Convention establishes the obligation of the parties to appoint arbitrators and the manner of their appointment if the parties do not meet in time this obligation.

UNCITRAL Model Law suggests that in case of lack of appointment of the arbitrators by the parties, the arbitral court will be composed of three arbitrators³², while the Albanian law provides that if the parties do not agree on this issue, it will be decided by the court which appoints one or more arbitrators in odd number³³.

According to Albanian law, the full and correct definition of the object of the dispute is also a condition for the validity of the arbitration agreement. As provided by the Code of Civil Procedure (article 404) the arbitration agreement is invalid if it does not provide the object of the dispute, when it is effectively raised. It means that in case that a dispute is effectively raised and the parties refer to arbitration to settle it, the compromise of the parties should clearly identify the scope of the dispute which will be settled. Such an expressive provision finds no place in the international arbitration normative framework, but here the unclear definition of the object of dispute may constitute a ground for a court not to recognize the arbitration agreement³⁴ and also a ground for setting aside an arbitral award³⁵.

The full and correct definition of the object of the dispute has to do with the extent of contractual relations submitted to arbitration. Parties may decide that only a part of disputes in relation to their contract to be submitted to arbitration, or that all disputes in connection with the main contract between the parties are subject to arbitration.

³¹ Albanian Code of Civil Procedure, Article 404(2): *The agreement of the parties is invalid if it does not provide the manner of appointment of the arbitrator or arbitrators, as well as the object of the dispute, when it is effectively raised.*

³² Article 10 of UNCITRAL Model Law - "Number of arbitrators": (1) *The parties are free to determine the number of arbitrators. (2) Failing such determination, the number of arbitrators shall be three.*

³³ Albanian Code of Civil Procedure, Article 405: *Parties may agree independently on the number of arbitrators in an arbitration tribunal and the manner of their appointment. In case of disagreement between the parties and with their prior consent, the arbitral tribunal is formed by one or more arbitrators defined by the court.*

³⁴ UNCITRAL Model Law, article 8(1): *A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

³⁵ UNCITRAL Model Law, article 34(2)(a)(iii): *An arbitral award may be set aside by the court only if the party making the application furnishes proof that: the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration,....*

4. The courts assistance on the composition of arbitral tribunal

UNCITRAL Model Law contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator³⁶. First, the Model Law recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue and as result difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, the Model Law provide for assistance by courts or other competent authorities³⁷. In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set and decisions rendered by courts or other authorities on such matters are not appealable³⁸.

According to the Albanian CPC, on the establishment of the arbitration forum the intervention of the court is accepted in cases where the parties fail to reach an agreement to cover all issues. Let's mention two of these cases:

a. Regarding the determination of the number of arbitrators, parties may agree independently on the number of arbitrators in an arbitration tribunal and the manner of their appointment. In case of disagreement between the parties and with their prior consent, the arbitral tribunal is formed by one or more arbitrators defined by the court that is the court of first instance³⁹.

Albanian Code of Civil Procedure does not set the time within which a party must appoint its arbitrator or arbitrators, because time is left to be determined by the parties to the agreement between them for the arbitration procedure. While according to the international arbitration regime (eg. UNCITRAL Model Law⁴⁰ or European Convention of Arbitration⁴¹) it is set a time limit within which the parties

³⁶ UNCITRAL Model Law, Chapter III "Composition of arbitral tribunal".

³⁷ UNCITRAL Model Law, articles 11, 13, 14.

³⁸ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No.E.08.V.4., Part II, par. 23, 24.

³⁹ See *supra*: Albanian Code of Civil Procedure, Article 405.

⁴⁰ UNCITRAL Model Law, articles 11(3)(a) - *in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority....;*

⁴¹ European Convention on International Commercial Arbitration, article IV(2): *Where the parties have agreed to submit any disputes to an ad hoc arbitration, and where within thirty days of the notification of the request for arbitration to the respondent one of the parties fails to appoint his arbitrator, the latter shall, unless otherwise provided, be appointed at the request of the other party by the.....*

must have determined the number of arbitrators and must have appointed them. In case of non-compliance of this period either party may request the intervention of the court.

b. The court intervention is envisaged in the case of failing of the parties agreement to challenge and exclude the arbitrator. Code of Civil Procedure (article 409) provides that if an arbitrator, for which the exemption is requested, does not withdraw from the mission or the procedure established by the parties gives no solution to this challenge, it is *the arbitration forum* who sets the issue without the participation of the challenged arbitrator. When even the latter gives no solutions on the arbitrator challenge, the request will be decided by the court of first instance, not later than 15 days from the day of submission for adjudication of the dispute.

5. Jurisdiction of arbitral tribunal

International arbitration legal framework has handled very well the issue of jurisdiction of the arbitration forum and the review of disputes regarding to. UNCITRAL Model Law⁴² has adopted the two important principles of “*Kompetenz-Kompetenz*” and of “*Separability*” or autonomy of the arbitration clause. “*Kompetenz-Kompetenz*” means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. *Separability* means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause⁴³.

At the same prospective, the domestic legal framework of Albania governs the autonomy of arbitral tribunal to rule on its own jurisdiction, recognizing this way the principle of “*Kompetenz-Kompetenz*”. Code of Civil Procedure⁴⁴ provides that at the beginning of its activity the arbitration tribunal, ex officio or at the request of the parties, decides on its jurisdiction, including the issue of validity of the arbitration agreement. When the arbitral tribunal decides that the arbitration agreement is invalid, is to be considered that it has completed its mission. The implementation of such a principle at the beginning of tribunal activity is advantageous in practice, because the verification of competence and validity of the arbitral agreement in a non-due time, may lead to the invalidation of procedural actions done up to that moment by the arbitration forum. But the domestic law does not provide the autonomy of the arbitration clause from other terms of the main contract, not recognizing at all the principle of “*Separability*”.

⁴² UNCITRAL Model Law, articles 16(1).

⁴³ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No.E.08.V.4., Part II, par. 25.

⁴⁴ Albanian Code of Civil Procedure, article 417

Another deficiency of the Albanian domestic law provisions is the non-determination of a judicial review on the competence of the arbitral tribunal to decide on its own jurisdiction. While, according to the international arbitration legal framework, this competence is subject to court control. UNCITRAL Model Law⁴⁵ provides that if the arbitral tribunal rules, as a preliminary question, that it has jurisdiction, the court control is allowed immediately in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court⁴⁶. However Albanian domestic law, as well as international regime, accepts the judicial review of the arbitral tribunal decision on its own jurisdiction, but this review is available only in setting aside proceedings or in enforcement proceedings of arbitral awards.

International legal regime of arbitration, regarding the interim measures in arbitration proceedings, provides for the intervention of the court twice.

a) First, according to the UNCITRAL Model Law, the state court intervenes to recognize and enforce an interim Measure issued by an arbitral tribunal⁴⁷. It is understood that during this process the court has discretion to refuse recognition and enforcement of an interim measure at the request of the party against whom it is invoked or on its own motion (*ex officio*). The court may refuse the recognition and enforcement only if the legal grounds for refusing are satisfied and in any case it shall not undertake a review of the substance of the interim measure⁴⁸.

b) Second, the court may also intervene directly issuing the court-ordered interim measures. In this case, a court shall have the same power of issuing an interim measure in relation to arbitration proceedings and it shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration⁴⁹. In this way, the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and the party to such an arbitration agreement is free to approach the court with a request to order interim measures⁵⁰.

⁴⁵ UNCITRAL Model Law, article 16(3): *The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits.*

⁴⁶ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No.E.08.V.4., Part II, par. 25.

⁴⁷ UNCITRAL Model law, Article 17/H "Recognition and enforcement" - (I) *An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued,....*

⁴⁸ UNCITRAL Model law, Article 17/I "Grounds for refusing recognition or enforcement".

⁴⁹ UNCITRAL Model law, Article 17/J "Court-ordered interim measures".

⁵⁰ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No.E.08.V.4., Part II, par. 30.

According to the Albanian national legislation, regarding interim measures issued by the arbitral tribunal, the state court intervenes only for their enforcement. For example, the court is required to enforce the security measure to a law-suit issued by an arbitral forum, if the party against whom the interim measure is given, does not voluntarily implement it⁵¹. It is understood that in this case the intervention of the state court is required only to the forceful execution of the interim measure issued by the arbitral tribunal, but not to the reviewing of the substance of this measure.

Meanwhile, albanian domestic law does not provide that a state court has the same power, as well as an arbitral tribunal, to issue an interim measure. In this way, according to the domestic law, if there is an arbitration agreement between the parties, none of them can file a request to a state court to order interim measures.

6. The applicable law to the substance of dispute

In standard way, all types of contracts contain provisions that indicate which is the legislation that governs the contract. This provision is considered an expression of the will of the parties, and is used as a *substantive law* from the arbitral tribunal to adjudicate the conflict between them.

UNCITRAL Model law⁵² deals with the determination of the rules of law governing the substance of the dispute. The arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. Any designation of the law of a given State shall be construed as directly referring to the substantive law and consequently a dispute shall be adjudicated directly by the law of that State and not by the application of its *conflict of laws* rules, known as the Private International Law. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the national law determined by the conflict-of-laws rules that it considers applicable.

Referring to the Albanian legislation, the Code of Civil Procedure does not address in particular the issue of substantive law, therefore its definition, failing an agreement of the parties to this matter, would be determined by the principles of the Albanian domestic legal framework (the Constitution, Civil Code, CCP, etc).

Based on these principles, there are two cases and two different solutions:

- *first*, if the parties have not chosen the applicable substantive law, for disputes on contracts where the parties are Albanian citizens or domiciled in Albania will be implemented as substantive law the Albanian legislation.

- *second*, if the contract or its elements, the parties, or the transaction itself are not all subject to the Albanian law, the substantive law shall be determined by the *conflict of laws* principles which, according to Albanian legislation, are defined by the law "On the foreigners civil rights and foreign law enforcement"⁵³.

⁵¹ Albanian Code of Civil Procedure, article 418.

⁵² UNCITRAL Model law, article 28.

⁵³ Law No. 3920, dated 21.11.1964.

7. Making of final arbitral award

The Model Law provides rules on the making of the award⁵⁴:

➤ When the arbitral tribunal consists of more than one arbitrator, any award shall be made and signed by a majority of the arbitrators. Regarding signing of the arbitral award, the reason for any omitted signature must be stated. The Model Law neither requires nor prohibits “dissenting opinions”.

➤ The award shall state the legal “place of arbitration” and shall be deemed to have been made at that place for procedural legal effects. But *de facto* the making of the award may be completed at various places, by telephone or correspondence.

➤ The arbitral award must be in writing. It must state its date and also the reasons on which it is based, unless the parties have agreed otherwise.

According to the Albanian domestic law⁵⁵, the arbitral tribunal's decision (the arbitral award) is issued by majority vote. In the same way as provided by the Model law, the award signed by a majority of arbitrators shall have the same effect as if it were signed by all arbitrators of arbitral tribunal. The arbitrators, who have an opposite opinion with the majority, have the right to submit in writing their dissenting opinions.

The arbitral award shall include the composition of the panel of arbitrators, the date and place of arbitration, the parties' identity, their residence or center and the subject of dispute. The award should clearly state on all claims of the parties and also must provide the reasons of the accepted solutions.

8. Recourse against award

The Model Law allows only one type of recourse against an arbitral award and provides uniform grounds upon which recourse may be made. The sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award⁵⁶.

The same law lists exhaustively the **grounds** on which an award may be set aside⁵⁷, which are exactly the same as those for refusing recognition and enforcement of arbitral awards, provided by the New York Convention⁵⁸. These grounds are set out in two categories: grounds which are to be proven by one party⁵⁹ and grounds that a court may consider of its own initiative⁶⁰.

⁵⁴ UNCITRAL Model law, articles 29-31.

⁵⁵ Albanian Code of Civil Procedure, article 429-430.

⁵⁶ UNCITRAL Model law, article 34.

⁵⁷ UNCITRAL Model law, article 34(2).

⁵⁸ Article V of the New York Convention (1958).

⁵⁹ *a) lack of capacity of the parties to conclude an arbitration agreement; b) lack of a valid arbitration agreement; c) lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; d) the award deals with matters not covered by the submission to arbitration; e) the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law.*

Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement⁶¹ of arbitral awards, a practical difference should be noted. An application for setting aside may only be made to a court in the State where the award was rendered whereas an application for refusing enforcement might be made to the competent court of the State where the enforcement of award is sought⁶².

Similarly, the Albanian domestic legislation governs the procedure of appeal against the arbitral award. The reasons which could serve as legal grounds to appeal are of procedural nature and are provided in a similar substantially manner from international conventions. Under the provisions of the Code of Civil Procedure⁶³, an arbitral award may be appealed to the court of appeal (within 30 days) only when one or more of the following conditions are met:

- a) *Arbitral tribunal has been composed based on an irregular procedure;*
- b) *Arbitral tribunal has improperly declared its competence or non-competence to adjudicate the dispute;*
- c) *Arbitral Tribunal in its award has exceeded the claims for which it has been invested or has not stated on one of the main lawsuit claims;*
- d) *The arbitral proceedings did not guarantee the parties equality and their right to be heard and to debate in the arbitral tribunal.*
- e) *The arbitral award is contrary to public policy (public order) of the Republic of Albania.*

The court of appeal must verify the existence of any of the cases anticipated above when the appeal is accepted (as, the irregular composition of the tribunal, incompetence etc.). If none of such violations has been verified, the court does not consider the case on the merits and leaves the arbitral award in force. Up to here the domestic legislation provisions are harmonized with those of international regime.

But the Code of Civil Procedure exceeds the provisions of the Model Law when it states that if any of the above violations is found and verified, the court of appeal undo or changes the arbitral award. In these cases the court of appeal decides on the merits of the dispute within the limits of the mission assigned to the arbitral tribunal by the arbitration agreement⁶⁴. Such a provision of Albanian Code, in my opinion, undermines the legitimate expressed willingness of the parties to stay away from the state court door and to settle their dispute privately through arbitration.

⁶⁰ a) *non-arbitrability of the subject-matter of the dispute;* b) *violation of public policy.*

⁶¹ Grounds for refusing recognition or enforcement of an arbitral award are set out in article 36(1) of Model Law.

⁶² New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V (1) *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:.....*

⁶³ Albanian Code of Civil Procedure, article 434.

⁶⁴ Albanian Code of Civil Procedure, article 436.

Furthermore, in this sense, the situation is aggravated by the *impossibility of filing recourse* clause⁶⁵, which provides that the recourse against the Court of Appeal decision to the Supreme Court is not allowed. So, according to the Albanian national legislation, if two parties will agree to choose the alternative method of arbitration to settle a dispute, they should bear in mind the possibility that, despite their will, this dispute may fall in the hands of state judges in order to be finally adjudicated.

An ambiguous moment expressed in domestic law provisions deals with the Albanian competent authority to which an appeal against an international arbitration award may be addressed. Albanian legislation governs the procedure of appeal for domestic arbitration awards, but not for those of international arbitration. UNCITRAL Model Law suggests that the procedural law of each country should determine the court where an appeal against the arbitral award can be submitted⁶⁶. But actually, due to a legal gap, the issue of appeal against a foreign arbitration award is not regulated in Albania because of the lack of a specific law on international arbitration (article 439 of CCP).

Moreover, the accession of Albania to the European Arbitration Convention makes this instrument part of the Albanian legal framework, allowing the possibility of recourse against foreign arbitral awards based on provisions of this convention⁶⁷. Thus, in Albania does exist a full legal ground which provides the reasons for challenging an international arbitral award. But while there is a legal basis for recourse, there are no procedural means to implement it because the competent authority, where these appeals should be directed, has not been yet formally designated.

9. Recognition and enforcement of awards

The Model Law provisions⁶⁸ reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention⁶⁹. By modeling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that

⁶⁵ Albanian Code of Civil Procedure, article 437.

⁶⁶ UNCITRAL Model Law, article 6 “Court or other authority for certain functions of arbitration assistance and supervision”.

⁶⁷ European Convention on International Commercial Arbitration, article IX.

⁶⁸ UNCITRAL Model Law, article 35 “*An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36*”.

⁶⁹ The grounds for refusing recognition or enforcement of an arbitral award, provided by the article 36 of UNCITRAL Model Law are just the same as those provided by the article V of the New York Convention.

successful Convention⁷⁰.

The enforcement of domestic and foreign arbitral awards is provided in Albania as follows:

a. A domestic arbitral award is final regarding the adjudicated dispute and may be enforced under an execution injunction issued by the state court of first instance. For such purpose, the original award and a copy of the arbitration agreement is filed on the secretariat of this court by one of the arbitrators or by the interested party. The court decision which refuses to issue the execution injunction must be justified and certainly may be subject of recourse in the Court of Appeal within 10 days from the day following the announcement⁷¹.

b. 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 the New York Convention⁷² and consequently, based on Constitution⁷³, the provisions of this Convention have become part of national legal system. 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.

- The second instrument that governs the recognition of foreign arbitral awards is the National Law. Albanian Code of Civil Procedure includes some important provisions regarding to this issue, which treat recognition of foreign arbitral awards as a *special judgment*⁷⁴. 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 (art. 399).

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 decision⁷⁵.

⁷⁰ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No.E.08.V.4., Part II, par. 49, 51.

⁷¹ Albanian Code of Civil Procedure, article 432, 433.

⁷² 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".

⁷³ The Constitution of the Republic of Albania, art.116 (1); art. 122(2).

⁷⁴ Code of Civil Procedure of Albania, Part II, Title III, Chapter IX "Recognition of judgments of foreign states", art. 393-399.

⁷⁵ Alban Brati, *Civil Procedure, the first edition*, Dudaj Editions 2008, p. 413, paragraph 4.

In my opinion, 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 (*this topic should be the subject of a more detailed study*).

Conclusions

The growing expansion of international trade and investment require the active presence of International Commercial Arbitration, to resolve disputes, which are a very essential part of the market and international trade. Some states are not very attracted by international arbitration, what is easily evidenced by the low level of modernization of the relevant legislation and the lack of consolidation of judicial practice. Albania is a similar country.

This article attempts to introduce a general framework of Albanian domestic legislation which governs the arbitration field. The comparative analysis of domestic law with international legal regime has aimed at identifying the specific highlights of procedural institute of arbitration. Such an analysis revealed a very important conclusion that, in Albania, the adjudication and resolution of commercial disputes through alternative method of arbitration is not very attractive, among other, for the reason that the domestic legal framework is not supportive to arbitration.

The main problems identified are summarized as follows:

- Albanian legislation focuses on the procedures for domestic arbitration and fails to provide rules of arbitral proceedings and court proceedings related to international arbitration. It is required as a legal commitment by the Code of Civil Procedure, that international arbitration to be governed by a separate law, but this important law is not yet enacted in Albania. This legal vacuum leads to paradoxical situations. For example, Albanian legislation provides a full legal ground for challenging an international arbitral award, but there are no procedural means to implement it because the competent authority, where recourse should be directed, has not been yet formally designated by a specific law.

- Albanian domestic law tends to narrow the area where the arbitration extends the effects, allowing its application only on property disputes arising from a **contract** between the parties. This provision is not in harmony with the international legal regime, which does not provide any different treatment for the arbitrability of contractual and non-contractual disputes. Instead, the model law states that the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether **contractual or not**.

- The domestic law does not recognize the principle of "Separability" which means, according to the Model Law, that an *arbitration clause* shall be treated as an agreement independent of the other terms of the contract. It does not

also provide the judicial review on the competence of the arbitral tribunal to decide on its own jurisdiction.

▪ Code of Civil Procedure provides that, when the courts of appeal undo or changes the arbitral award, it decides on the merits of the dispute. Such a provision overcomes the free will of the parties to settle their dispute privately through arbitration. This can be considered an obstacle to the parties' orientation toward arbitration method, because in any case they should bear in mind the possibility that, despite their will, at the end the dispute may be adjudicated in a state court.

In conclusion, there is a necessity to sensitize the legislature in order to harmonize and approach the domestic legal framework with international contemporary spirit in the arbitration field. It will be an important step to put to the deserved place the arbitration method of resolving commercial disputes. Such improvement would serve better on business relations and, as consequence, to the economic integration of Albania.

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