FOREIGN ARBITRAL AWARD UNDER THE CODE OF CIVIL PROCEDURE AND THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, ADOPTED IN NEW YORK (1958). COMPARATIVE LOOK

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Abstract

The purpose of this study is to establish the categories of arbitral awards that may be classified as foreign by reference to the provisions of the Code of Civil Procedure and the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York (1958). In carrying out this approach, we had as a starting point certain doctrinal opinions that we tried to analyze critically, in order to capture as clearly as possible the regulatory differences between the provisions of the Code of Civil Procedure and those of the New York Convention, in regarding the qualification of an arbitral award as foreign. Thus, following the analysis of the approached subject, we found that the provisions of the Code of Civil Procedure differ from the provisions of the New York Convention, regarding the qualification of an arbitral award as foreign, the domestic provisions being more favorable than the conventional ones, in terms of in the execution of arbitral awards.

Keywords: *foreign arbitral award, Code of Civil Procedure, New York Convention, recognition and enforcement of foreign arbitral awards.*

JEL Classification: K22, K41

1. Foreign arbitration award. Definitions, delimitations and connections

As a preliminary point, in order to understand the importance of the correct qualification of an arbitral award we will note that: "the distinction between Romanian national arbitral awards and foreign (or non-national) arbitral awards is relevant to define a number of procedural options:

• First of all, if it is possible to promote an action in annulment of the arbitral award before the Romanian courts, in application of the Romanian Code of Civil Procedure. Such action is possible for national arbitral awards.

• Secondly, if the procedure for recognizing the respective arbitral award on the territory of Romania is necessary or if it is sufficient to proceed with the initiation of enforcement proceedings. For a national arbitral award, it will be sufficient to initiate the enforcement procedure, without the need to go through the procedure for recognizing the arbitral award on the territory of Romania"[2].

Therefore, in the following we will aim to analyze the conditions under which an arbitral award may be considered foreign, in the light of the provisions of the New York Convention and the provisions of the Code of Civil Procedure.

Regarding the New York Convention, we note that according to art. I (1) of this International Instrument: "This Convention shall apply to the recognition and enforcement of arbitral awards rendered in the territory of a State other than that in which recognition and enforcement of judgments and results of disputes between natural or legal persons are required. It shall also apply to arbitral awards which are not regarded as national judgments in the State in which recognition and enforcement is sought."[3]

Romania acceded to the New York Convention, by Decree no. 186/1961, with the following reserves[4] (permitted by Article I (3) of the Convention): "Romania shall apply the Convention only

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[2] C. Leaua, *Sunt hotărârile arbitrale străine ICC Paris, cu locul arbitrajului în România, hotărâri arbitrale străine?* article published on 06.02.2012 on the portal www.juridice.ro.

[3] On reconciliation between the UNCITRAL model and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see C.-E. Popa Tache, *Introduction to International Investment Law*, ADJURIS – International Academic Publisher, Bucharest, 2020, p. 159, 160.

[4] For an analysis of reservations about the application of the New York Convention, see R. Miron, *Procesul arbitral internațional conform reglementărilor naționale*, University Publishing House, Bucharest, 2019, p. 206-209 and p. 230-234.

to disputes arising out of contractual or non-contractual legal relations which are considered commercial by its national law. Romania shall apply the Convention to the recognition and enforcement of judgments given in the territory of another Contracting State. With regard to judgments given in the territory of non-Contracting States, Romania shall apply the Convention only on the basis of reciprocity established by agreement between the Parties."

Without insisting on these aspects, we find that Romania has formulated both reservations allowed by art. I (3) of the New York Convention, for which reason the said Convention shall be applicable only in the case of judgments given in the territory of other Member States of the Convention and only in the case of disputes considered to be commercial by its national law, except in the case of in which the interested party would invoke more favorable provisions from the domestic legislation or from another treaty applicable to the legal report deduced to the court, as it results from art. VII of the Convention, which will be analyzed in this material.

Taking advantage of the conclusions of the ICCA Guide for the Interpretation of the New York Convention[5], we note that the aforementioned conventional text refers to two categories of arbitral awards that can be considered foreign, respectively to judgments handed down in a territory other than that in which they are requested. recognition and enforcement and to sentences that are considered non - national.

With regard to the first category of arbitral awards, the guide stated that: "all judgments given in a State other than that in which recognition and enforcement are sought in court shall fall within the scope of the Convention and shall be called foreign judgments"[6].

Regarding the second category of arbitral awards, the same guide noted that: "The Convention does not define what is meant by judgments that are considered non-domestic awards; rarely, the parties establishing that a sentence to be pronounced in respect of them shall be considered non-national"[7].

It was also noted that states are free to qualify judgments that they consider non-national and that they generally consider the following judgments to be considered non-national: "judgments handed down in accordance with the arbitral law of another state; sentences containing an element of extraneousness and national sentences"[8].

For clarity, we mention that the issue of classifying a sentence as not being national, in the sense of the convention, is raised exclusively in the hypothesis in which the sentence was pronounced on the territory of the state where its recognition and execution is requested.

We will not focus on the analysis of each category of judgments that States consider, in principle, non-national, but we will find that, always in the light of the provisions of the New York Convention, an arbitral award rendered in the territory of another State represents a foreign arbitral award, regardless of the merits of the disputed legal relations or the nationality of the parties involved in the dispute.

In domestic law, relevant, under the analyzed aspect, are the provisions of art. 1124 of the Code of Civil Procedure which provide the following: "any arbitral awards of domestic or international arbitration pronounced in a foreign state and which are not considered national decisions in Romania are foreign arbitral awards".

The doctrine[9] has shown that this legal provision "qualifies as foreign the arbitral award which cumulatively meets the following conditions:

a) is pronounced in a foreign state. The legal criterion is, therefore, a geographical one, by reference to which an arbitral award pronounced in Romania cannot be considered as foreign, even

[5] ICCA Guide for the Interpretation of the New York Convention translated into Romanian by C. Leaua, Ş. Deaconu and C. Cosma and available online at: https://www.arbitrationicca.org/media/11/59130972264406/icca_guide_nyc_romanian.pdf, consulted on 1.09. 2020.

[6] R. Miron, *op. cit*., 2019, p. 22.

[7] Ibid., p. 23.

[8] Ibid., p. 24.

[9] Ş-Al Stănescu in V.M. Ciobanu, M. Nicolae, *Noul Cod de procedură civilă comentat şi adnotat*. Vol. II. Art. 527 – 1134, Ed. Universul Juridic, Bucharest, 2016, p. 1767, 1768. For an analysis of this legal text, see also F.G. Păncescu in G. Boroi (coord.), *Noul Cod de procedură civilă, Comentariu pe articole*, vol. II, art. 527 – 1133, Ed. Hamangiu, Bucharest, 2013, p. 760.

if relevant foreign elements would suggest such a qualification. Thus, for example, an arbitral award rendered in Romania, by which a dispute has been settled between the parties with headquarters abroad, deriving from a contract concluded in a foreign state and which must be executed, in full, abroad, will not be considered, in no case, a foreign decision. In the mentioned case, the presence of the mentioned foreign elements leads to the qualification as international of the arbitration by which the dispute is resolved [according to art. 1111 para (1) of the Code of Civil Procedure], which attracts the application of the provisions of Chapter I - International Civil Procedure - of Title IV of Book VII of the Code of Civil Procedure, but as a national of the arbitral award pronounced;

b) is not considered national in Romania. The mentioned condition highlights the fact that the fulfillment of the geographical criterion specified above is necessary, but not sufficient for an arbitral award to be considered foreign".

In another opinion, expressed regarding the analysis of art. 1124 of the Code of Civil Procedure by comparison with art. I (1) of the New York Convention, on which we will focus, the following were retained: "Art. 1 point 1 of the New York Convention (1958) refers to two categories of arbitral awards. Moreover, it is logical and normal that the arbitral award - pronounced on the territory of the requesting state should not be considered national - from the perspective of the requested state, on the territory of the latter. The old Romanian legislator notified this and used - in the content of art. 370 of the Code of Civil Procedure[10] from 1865, the conjunction (with disjunctive function) "or". The new legislator used - in the content of art. 1123 of the New Code of Civil Procedure the conjunction (with copulative function) "and". By using the latter, it would result that the two criteria (positive and negative) - established in art. 1123 of the New Code of Civil Procedure applies cumulatively. According to the consequence of the logic and normality proposed above, the two criteria do not apply cumulatively. Thus, the copulative conjunction "and" reads "or". Foreign judgments are qualified either by the sentences pronounced on the territory of a foreign state, or by the arbitral awards that are not considered national on the territory of Romania"[11].

We find that the two doctrinal opinions previously set out are divergent.

In this context, we allow ourselves to disagree with the second doctrinal opinion cited, for the reasons we will present below.

More precisely, we consider that the two criteria referred to in art. 1123 of the Code of Civil Procedure they must be applied cumulatively, and there is no reason why such an interpretation cannot be accepted.

The first argument we will make is that of the clarity of the text. Since art. 1123 of the Code of Civil Procedure qualifies a judgment as foreign in the event that it is pronounced on the territory of another foreign state and if it is not considered as a national decision in Romania, the interpretation of the conjunction "and" as, in reality, "or" would radically change the meaning of the legal text, without any grounds.

More clearly, we consider that the interpretation of a legal text can be achieved, by hypothesis, only in the case of unclear legal texts, and not in the case of clear legal texts, because, otherwise, the will of the legislator would be disregarded, which cannot be allowed.

We also appreciate that the meaning of the analyzed legal text is not contrary to the logic and normative normality.

In these coordinates, we consider that the Romanian legislator understood to exclude from the category of foreign arbitral awards, the arbitral awards pronounced on the Romanian territory, regardless of the nature of the disputed legal relations.

For example, an arbitral award rendered in Romania will be considered Romanian, even if the dispute would be between two persons domiciled/established abroad, the applicable law would not be Romanian law, and the legal relations between them would have taken place, in its entirety, on the territory of a foreign state.

In the same sense, he considers that the Romanian legislator allowed the qualification of an

[10] Art. 370 of the Code of Civil Procedure of 1865 provided the following: "for the purposes of this chapter, a foreign arbitral award means a decision given on the territory of another foreign state or which is not considered a national decision in Romania".

[11] R. Bobei, *Arbitrajul intern şi international. Texte. Comentarii. Mentalităţi*, Ed. C.H. Beck, Bucharest, 2013, p. 404.

arbitral award pronounced in a foreign state as being, however, national, in certain hypotheses.

For example, we consider that such a hypothesis could be incidental if the foreign arbitral dispute took place between two Romanian persons, on the territory of a foreign state, but based on Romanian law and in accordance with Romanian procedural law.

Therefore, we consider that through this legislative option, the Romanian legislator aimed to offer a more favorable interpretation to the execution of arbitral awards than the New York Convention, the establishment of such a legal regime being allowed even by the previously indicated convention.

Thus, art. VII (1) of the New York Convention provides that: "the provisions of this Convention shall not affect the validity of multilateral or bilateral agreements concluded by Contracting States with regard to the recognition and enforcement of arbitral awards and shall not deprive any interested party of the right to - may have to avail himself of an arbitral award in the manner and to the extent permitted by the law or treaties of the country in which the judgment is invoked".

More clearly, this conventional text allows the interested party to invoke the law of a certain state, even if the New York Convention is applicable in so far as it contains the legal provisions more favorable to the recognition and enforcement of foreign arbitral awards.

Specifically, returning to the subject of this article, we consider that the provisions of the Code of Civil Procedure are more favorable than the provisions of the New York Convention, regarding the qualification of an arbitral award as foreign.

This conclusion is necessary because, as we have shown, in the light of domestic law, unlike the provisions of the New York Convention, an arbitral award handed down in Romania will not be considered, under any circumstances, as a foreign arbitral award.

Also, compared to the provisions of the New York Convention, based on the provisions of domestic law, there may be cases in which an arbitral award handed down in a foreign state is considered national, on the territory of Romania.

Both of the above situations are likely to facilitate the enforcement of arbitral awards, as the person concerned will be able to initiate, directly, the procedure of enforcement of that arbitration award, without going through the procedure of recognition and enforcement of the foreign arbitration award, provided both the New York Convention and the Code of Civil Procedure.

2. Conclusions

In conclusion, for all the above reasons, we find that the provisions of the Code of Civil Procedure differ from the provisions of the New York Convention, regarding the classification of an arbitral award as foreign, the domestic provisions being more favorable than the conventional ones, in terms of enforcement. of arbitral awards.

In these coordinates, we emphasize that there are concrete hypotheses, which have been analyzed in the material, in which, although the New York Convention would be applicable to the case brought before the court, a certain person would have the interest to invoke the legal provisions of domestic law[12], whereas those legal provisions could allow the classification of the arbitral award to be national and not foreign, as would result from the application of the conventional provisions.

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[12] The possibility of invoking the more favorable internal legal provisions is allowed, as we have shown, even by art. VII (1) of the New York Convention.

1133, Ed. Hamangiu, Bucharest, 2013.
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