ENFORCING ARBITRAL AWARDS IN ROMANIA - ALWAYS A CHALLENGE

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Abstract

Securing a favourable award from a foreign or domestic arbitral court proves to be in many cases only half the battle. As a rule, Romanian law and courts acknowledge the final, binding and enforceable nature of arbitration awards and state the principle that arbitration awards shall be freely implemented by parties. However, there are instances where the unsuccessful party does not voluntarily perform the obligations arising from the arbitral award. In these cases, before incurring legal expenses on formal enforcement procedures, it is worth attempting several informal or indirect means of persuading the other party to honour its duties. If the opposing party still refuses to comply with the award, one may resort to an ordinary enforcement procedure. In Romania, enforcement procedures may be conducted by judicial executors only after the arbitral award is rendered enforceable by a domestic court of law. As in most developed states, the vast majority of Romanian courts have enforced both domestic and foreign arbitral awards. Although there are certain instances when arbitral awards have been denied enforcement, these are the exception rather than the rule because under Romanian law the right of refusal to comply with the arbitral award shall be exerted only through an action of annulment for limited reasons.

Keywords: *arbitral award, enforcement of arbitral awards, final and binding, annulment of arbitral awards, enforcement procedure1*.

1. Introduction

Obtaining an arbitral award may not immediately end the dispute between parties. Even if this is rather an exception than the rule, there are instances when the losing party refuses to comply with the award promptly and voluntarily. In this hypothesis, several steps need to be made in order to enforce the arbitral award in the state of execution. These steps may vary from one country to another because each national legal system has its own requirements when it comes to enforcement procedures concerning domestic or foreign arbitral awards. Also, rendering an arbitral award enforceable in the state of execution may require compliance with certain mandatory procedural laws applicable at the seat of arbitration. This article briefly examines the issue of enforcing arbitral awards in Romania, with reference to relevant provisions from international regulations and other systems of law, as well. This topic is not fresh, being already analysed in many respects by Romanian scholars and tackled in several books, scientific papers and conferences. However, the enforcement of arbitral awards recently returned to the public's attention after the massive amendments to the Romanian Code of Civil Procedure in force, in October 2014, and the recent European Commission intervention regarding the implementation of the Arbitral award obtained in the *Micula v. Romania* case[1].

In Romania, the final, binding and enforceable nature of arbitration awards is recognised by law, courts and legal literature. However, even if, as a principle, the enforcement procedure does not allow for a substantive re-examination of the award, parties shall undertake an additional common procedure in order to enforce the arbitral award. The right to refusal to comply with the obligations set forth in the arbitral award shall be exerted only through an action of annulment for limited reasons.

As regards the recognition and enforcement of foreign arbitral awards, Romanian courts have usually denied arguments challenging their correctness. Still, the recent Arbitral Award in the *Micula v. Romania* case, which is currently under assessment by the European Commission for potential incompatibility with the internal market, may change this trend.

Therefore, due to their rising importance in the current law environment, this paper deals mostly with the legal basis and jurisprudence concerning the enforcement of foreign arbitral awards in Romania. The article addresses in particular the denial of enforcement of foreign arbitral awards, as well as the annulment of arbitral awards by Romanian courts.

2. Preliminary Step towards Enforcement: Recognition of Arbitral Awards in Romania

As a rule, recognition is prior to enforcement and it represents the official confirmation that the respective arbitral award is authentic, final and binding. Upon recognition, the award may be rendered enforceable by a domestic court of law.

Romanian law and courts generally recognize arbitral awards, whether international or domestic, and

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[1] The European Commission notification regarding the implementation of Arbitral award *Micula v. Romania* of 11 December 2013, published in the Official Journal of the European Union C 393/27 from 07.11.2014.

acknowledge their final, binding and enforceable nature if certain requirements are met.

In accordance with Article 1124 of the Romanian Code of Civil Procedure[2], any foreign arbitral award is recognised and may be enforced in Romania if ***(a)*** the dispute settled through arbitration may be resolved by Romanian arbitration courts and ***(b)*** the arbitral award is not contrary to public order. This legal provision refers to foreign arbitral awards[3], but domestic awards also need to comply with these rules.

These legal requirements are not only particular for the Romanian law system, but are also encountered in Article V paragraph (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, also known as the *"New York Convention"*), ratified by Romania[4]. Article V states that *"recognition and enforcement of an arbitral award may (...) be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country."* The European Convention on International Commercial Arbitration (1961), also ratified by Romania[5], has a more detailed approach, by indicating the governing law of the arbitration agreement. However, it envisages slightly the same legal requirements: according to Article VI paragraph (2) of the Convention, "*in taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions: (a) under the law to which the parties have subjected their arbitration agreement; (b) failing any indication thereon, under the law of the country in which the award is to be made; (c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute. The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration."*

In Romania, each recognition procedure begins with the examination of the arbitration agreement. More specifically, the competent court[6] examines whether parties have clearly incorporated a valid arbitration clause into their contract.

According to a widely used definition, an "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not[7].

2.1. The Validity of an Arbitration Agreement

There are several requirements regarding the validity of an arbitration agreement provided by national and international regulations and highlighted in the legal literature and law cases. Although these conditions may vary from one country to another, they generally refer to ***(a)*** the need for writing; ***(b)*** a defined legal relationship between parties; ***(c)*** the *"arbitrability"* of the dispute settled through arbitration and ***(d)*** the relationship of the arbitration clause with the contract into which it is incorporated[8].

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[2] Law no. 134/2010 regarding the Code of Civil Procedure, published in the Romanian Official Journal no. 545/2012. The current Code of Civil Procedure is in force from February 15th 2013 and replaced the former Code of 1865.

[3] According to Article 1123 of the Romanian Code of Civil Procedure, foreign arbitral awards means any foreign arbitral awards issued in both domestic or international disputes taking place in a foreign state and which are not considered in Romania as domestic arbitral awards.

[4] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded under the auspices of the United Nations Conference on International Commercial Arbitration held in 1958, in New York. Currently, there are 154 parties to the New York Convention. Romania ratified the Convention in 1961, by State Council Decree no. 186 issued on July 24th 1961.

[5] The European Convention on International Commercial Arbitration was concluded in Geneva, on 21 April 1961. Romania ratified this Convention by State Council Decree no. 281/1963, published in the Official Journal no. 12 issued on June 25th 1963.

[6] In accordance with Article 1125 paragraph (1) of the Romanian Code of Civil Procedure, the competent court is the tribunal located in the area where the losing party has its domicile or headquarters.

[7] This definition was provided by Article 7 of the UNCITRAL Model Law on International Commercial Arbitration from 1985, as revised in 2006. The Romanian Code of Civil Procedure (Articles 550-551) defines two forms of arbitration agreements, namely: *"clauza compromisorie"*, in English -*"compromissory clause"* or *"arbitration clause"*, under which the parties agree to submit all future disputes to arbitration and *"compromis"*, sometimes termed in English *"special agreement"*or *"agreement as to arbitration"*, under which parties agree to submit a current litigation to arbitration. Slightly similar legal definitions to the ones presented above are provided by the United Kingdom Arbitration Act of 1996 (Section 6), French Code of Civil Procedure (Article 1442), German Code of Civil Procedure (Section 1029), Dutch Code of Civil Procedure (Article 1020) etc. They are also compatible with the Italian law (see Articles 806-808 of the Italian Code of Civil Procedure), Spanish law (see Article 9 of the Spanish Law no. 60/2003 – *"Ley de Arbitraje"*) and other European legislations.

[8] For a detailed analysis on this matter, see Alan Redfern *et al.*, *Redfern and Hunter on International Arbitration* (New York: Oxford University Press, 2009), 89-106.

(a) Romanian law[9] requires that an arbitration agreement shall be in writing, in line with other international[10] and national[11] regulations.

The arbitration agreement shall be incorporated either into a document signed by parties, or in letters, telefax copies, telegrams, electronic mail or other forms of exchanging messages between parties, which ensure proof of the respective agreement by supporting documents. Also, the reference in a contract to any documents containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract[12]. Therefore, predetermined arbitration clauses may be incorporated entirely or partially by parties into their contract *per relationem*.

When the agreement refers to a litigation concerning the transfer or establishment of an ownership right on immovable property, the written arbitration agreement shall be authenticated by a public notary[13].

Romanian courts clearly state that unwritten arbitration agreements are not valid[14].

(b) In order to be valid, an arbitration agreement shall envisage litigation arising from a "defined legal relationship" between parties, whether contractual or not[15]. Parties shall unequivocally state their intention to settle their disputes by arbitration in their agreement.

In case of a contractual relationship, all claims shall refer to the respective contract. More specifically, the dispute submitted to arbitration shall generally refer to contractual liability or be closely related to the parties' agreement, thus being governed by the law of the contract.

In the hypothesis of a tort liability, the dispute submitted to arbitration shall have a "close enough relationship" with the agreement concluded between parties[16].

(c) The dispute governed by the arbitration agreement shall be capable of settlement by arbitration[17].

Determining whether a particular litigation may be resolved by an arbitral tribunal is significantly important when it comes to recognition of foreign arbitral awards.

The issue of *"arbitrability"* may be viewed from two perspectives - subjective (*ratione personae*) and objective (*ratione materiae*)[18]. *Ratione personae*, national regulations usually forbid certain natural and legal persons (mostly states and public authorities) to submit their disputes to arbitration. *Ratione materiae*, there are particular types of disputes which are not capable of being resolved through a private dispute resolution mechanism such as arbitration.

If the recognition of the arbitral award is sought in Romania, the Romanian Code of Civil Procedure clearly determines the disputes that may be settled by domestic and international arbitration. According to Article 542 of the Romanian Code of Civil Procedure, any dispute may be resolved through arbitration, unless it is related to matters involving the civil status of the natural person, the capacity of both natural and legal persons, mandatory provisions regarding the inheritance law and family law and, respectively, inalienable rights.

Consequently, as a rule, commercial disputes may be resolved by arbitration[19].

Public authorities that carry out economic activities may also conclude arbitration agreements, unless stated otherwise by law or their constitutive or organizational documents[20]. In other words, public entities have the capacity to enter into valid arbitration agreements only if they are empowered by national or international regulations[21].

Furthermore, pursuant to Article 1111 of the Romanian Code of Civil Procedure, any patrimonial dispute may be settled through arbitration if it is related

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[9] See Article 548 paragraph (1) of the Romanian Code of Civil Procedure and Article 8 paragraph (1) of the Rules of Arbitration Procedure of the Romanian Court of International Commercial Arbitration, as amended on June 5th 2014.

[10] See, for example, Article 7 of UNCITRAL Model Law on International Commercial Arbitration, as originally adopted, in 1985; Article II of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Article I, paragraph 2 of the 1961 Geneva Convention on International Commercial Arbitration.

[11] See, for example, Section 5 of the United Kingdom Arbitration Act (1996), Article 1443 of the French Code of Civil Procedure, Section 1031 paragraph (1) of the German Code of Civil Procedure, Article 1021 of the Dutch Code of Civil Procedure, Article 9 paragraph (3) of the Spanish Law no. 60/2003, Articles 807-808 of the Italian Code of Civil Procedure etc.

[12] See Article 7 paragraph (6) Option I of the 2006 UNICTRAL Model Law on International Commercial Arbitration. This interpretation is also valid under Romanian legislation.

[13] See Article 548 paragraph (2) of the Romanian Code of Civil Procedure.

[14] See, for example, Înalta Curte de Casație și Justiție (*The High Court of Justice*), Decision no. 1201/March 21st 2008, available in http://www.legalis.ro/ database.

[15] See Redfern *et al.*, *Redfern and Hunter on International Arbitration*, 93-94.

[16] See Viorel Roș, *Arbitrajul comercial internațional (International Commercial Arbitration)* (Bucharest: Monitorul Oficial, 2000), 124.

[17] For a detailed presentation on this issue, see Emmanuel Gaillard and John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Beijing: Citic Publishing House, 2004), 312-359.

[18] Emmanuel Gaillard and John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 312-313.

[19] See Curtea Supremă de Justiție (The Supreme Court of Justice), Decision no 319/1999, published in Viorel Roș, *Arbitrajul comercial internațional (International Commercial Arbitration)*, 125.

[20] If the complainant, public authority, does not have a legal authorization to conclude an arbitration agreement, the respective clause is null and void. See the Romanian Court of International Commercial Arbitration, Arbitral Decision no. 177/July 4th 2006, published in Marin Voicu, *Arbitrajul comercial. Jurisprudență adnotată și comentată 2004-2014 (Commercial Arbitration. Case Law with Commentaries)*, (Bucharest: Universul Juridic Publishing House, 2014), 170.

[21] *E.g.* Article II paragraph (1) of the 1961 Geneva Convention on International Commercial Arbitration.

to rights which are not inalienable[22] and the law of the place where the arbitration court is located does not provide for a national court to have exclusive competence on the respective legal issue.

Consequently, as a rule, Romanian legislation allows for a dispute which involves an economic interest to be submitted to arbitration, unless it concerns inalienable rights or other exceptions expressly provided by law.

(d) The validity of the arbitration clause partially depends on the validity of the contract into which it is incorporated.

The arbitration agreement is, in principle, autonomous from the main contract[23]. According to Article 550 paragraph (2) of the Romanian Code of Civil Procedure, *"the validity of an arbitration clause is independent of the validity of the contract into which it is incorporated"*[24].

Therefore, the arbitration agreement is unaffected by the status of the main contract[25]. In other words, the fact that a contract is declared null and void by an ordinary court does not entail *ipso jure* the validity of the arbitration agreement[26]. However, parties which have concluded the main contract and, implicitly the arbitration clause shall have legal capacity to enter into the respective contract[27] and give their valid consent to submit disputes which may arise between them to an arbitral court[28].

2.2. The Binding Effects of the Arbitration Agreement

A valid arbitration agreement incorporated into a contract (*per relationem*) becomes part of the respective contract. Consequently, according to Article 1270 of the Romanian Civil Code[29], which states the principle of the binding force of contracts (*pacta sunt servanda*), there is a binding commitment by the parties to refer to arbitration.

The principle of the binding force of the arbitration agreement is clearly specified in Articles 552 and 553 of the Romanian Code of Civil Procedure. Therefore, when parties have validly agreed to resort to arbitration, national courts do not have jurisdiction to decide upon the substance of the present or future disputes covered by the respective arbitration agreement.

Domestic courts acknowledged the autonomy and binding force of arbitration agreements[30]. It was held that the validity of the arbitration clause is independent of the validity of the contract into which it was incorporated and Romanian law does not provide for requirements of "subsequent validation of the arbitration clause"[31].

International jurisprudence also recognizes the binding nature of the arbitration agreement. It has been considered that if *"parties concluded an arbitration agreement, emphasizing that resort to arbitration, although conditional, was mandatory in that nothing could be interpreted as giving the parties a choice between arbitration and litigation"*[32].

A valid arbitration agreement, thus binding for parties, has two main effects, namely: ***(a)*** it compels the parties to solve all *"arbitrable"* present or future litigation by arbitration and ***(b)*** it prevents the parties from seeking resolution for the respective litigation through domestic courts[33].

Romanian and international courts generally recognised the validity of arbitration agreements (by frequently applying the *in favorem validitatis*

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[22] Disputes which concern inalienable rights shall not be settled by means of arbitration. See Curtea Supremă de Justiţie (*The Supreme Court of Justice*), Decision no. 537/1998, published in Corneliu Turianu and Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence)* (Bucharest: C.H. Beck Publishing House, 2008), 26.

[23] The international jurisprudence is also in favour of the autonomy of the arbitration clause in relation to the main contract. See, for instance, the ICC International Court of Arbitration, *Meniccuci v. Mahieux* case, Decision from December 13th 1975, extract published in Jean-François Lachaume, *Jurisprudence Française Relative au Droit International (Année 1975) - French Jurisprudence on International Law (Year 1975)*, in Annuaire francais de droit international, vol. 22, 1976, 887.

[24] For a detailed presentation on the autonomy of the arbitration agreement under Romanian law, see Raluca Dinu, *Aspecte teoretice şi practice privind formarea şi autonomia convenţiei arbitrale (Practical Aspects Regarding the Formation and Autonomy of the Arbitration Agreement)*, in Revista Română de Arbitraj (Romanian Journal of Arbitration), vol. 15, no. 3/2010, 39-58.

[25] Emmanuel Gaillard and John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 209-217.

[26] See Radu Bogdan Bobei, *Commercial Arbitration. Elementary Handbook on Scholarly Pragmatism* (Bucharest: C.H. Beck Publishing House, 2014), 38.

[27] See Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1452/2007, published in Corneliu Turianu and Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence),* 21.

[28] For further information, see Alan Redfern *et al.*, *Redfern and Hunter on International Arbitration*, 95-106; Emmanuel Gaillard and John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 242-312.

[29] Law no. 287/2009 regarding the Civil Code, published in the Romanian Official Journal no. 505/2011.

[30] See, for instance, Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania - C.C.I.R., Arbitral award no. 92/2009, published in Vanda Anamaria Vlasov, *Arbitrajul comercial. Jurisprudenţă arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Jurisprudence)* (Bucharest: Hamangiu Publishing House, 2010), 3.

[31] Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania - C.C.I.R., Arbitral award no. 49/2007, published in Vanda Anamaria Vlasov, *Arbitrajul comercial. Jurisprudenţă arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Jurisprudence)*, 7-8.

[32] See *Ho Fat Sing t/a Famous Design Engineering Co. v. Hop Tai Construction Co. Ltd*., District Court, Hong Kong Special Administrative Region of China, 23 December 2008, extract published in Radu Bogdan Bobei, *Commercial Arbitration. Elementary Handbook on Scholarly Pragmatism*, 43.

[33] See Article 10 of the Rules of Arbitration Procedure of the Romanian Court of International Commercial Arbitration, as amended on June 5th 2014, and Articles 552-553 of the Romanian Code of Civil Procedure.

principle) and their binding effects. It was held[34] that when an ordinary court recognises the validity of an arbitration clause, the litigation arising from non-compliance with the contractual duties shall be submitted to the competent arbitration tribunal because the domestic court is not competent to settle the respective dispute. The Romanian Supreme Court of Justice considered that by concluding an arbitration agreement which stated that all disputes shall be settled by a specific arbitration court, parties committed to remove the competence of national courts concerning litigations covered by the respective agreement[35].

In another case, a national court declined its competence in favour of an arbitration court designated by parties through their agreement[36].

Therefore, the binding effects of arbitration agreements are widely recognised by law and jurisprudence.

2.3. The Final and Binding Nature of Arbitral Awards

Romanian law recognises the final and binding nature of arbitral awards, whether domestic or international, and states the principle that the arbitral award shall be voluntarily implemented by parties.

According to Article 74 paragraph (1) of the Rules of the Romanian Court of International Arbitration, *"the arbitral award is final and binding"* and *"it shall be voluntarily implemented by the party in default, promptly or within the period indicated in the award"*. This perspective is shared by the Romanian Code of Civil Procedure which states that *"the arbitral award is final and binding"* (Article 606) and becomes *"enforceable and binding since it is communicated to parties"* (Article 1120 paragraph (3)). The arbitral award may only be cancelled by means of setting aside, based on one of the reasons expressly provided by the Romanian Code of Civil Procedure (see *infra*, Section 3.4).

Romanian legal literature acknowledged the final and binding nature of arbitral awards even under the 1865 Code of Civil Procedure. It was emphasized[37] that when decisions are made by jurisdictional authorities such as an arbitral tribunal, they are governed by similar principles to the ones applicable to court decisions. Therefore, an award is not only final, but also a binding decision.

The making of the arbitral award has a number of immediate effects: it prevents the parties from seeking justice in ordinary courts; it is *res judicata* with regard to the respective dispute; it is enforceable; it may be used as evidence in other courts[38]; it terminates the arbitrators' jurisdiction over the dispute which they have resolved and it marks the point in time since the award should be voluntarily performed by the parties[39]. *Res judicata* of the arbitral award may be raised in both ordinary and arbitration courts[40].

The final and binding nature of arbitral awards is widely recognised in other domestic and international regulations, as well.

A detailed reference to the final and binding nature is provided by the Arbitration Rules of the International Chamber of Commerce from Paris (*I.C.C. Paris*), which state, in Article 34 paragraph (6), that *"every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made"*.

Also, the uniform UNCITRAL Arbitration Rules, as amended in 2013, clearly stipulate that *"the award shall be made in writing and shall be final and binding on the parties. The parties shall undertake to carry out all awards without delay"* (Article 34, paragraph 2).

Furthermore, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that *"each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon"* (Article III).

The arbitration laws from other European countries generally recognise the *res judicata* nature of the arbitral award[41]. Consequently, in other countries

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[34] The ICC International Court of Arbitration, *Sté Italiban v. Sté Lux Air* case, Decision from November 14th 1975, extract published in Jean-François Lachaume, *Jurisprudence Française Relative au Droit International (Année 1975) - French Jurisprudence on International Law (Year 1975)*, in Annuaire francais de droit international, vol. 22, 1976, 888.

[35] See Curtea Supremă de Justiţie (Supreme Court of Justice), Decision no. 392/1997, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence)*, 28.

[36] Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania - C.C.I.R., Arbitral award no. 39/2008, published in Vanda Anamaria Vlasov, *Arbitrajul comercial. Jurisprudenţă arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Jurisprudence)*, 1-2.

[37] Savelly Zilberstein, Viorel Mihai Ciobanu, *Tratat de executare silită (Treaty on Judicial enforcement)* (Bucharest: Lumina Lex Publishing House, 2001), 269.

[38] See Ion Deleanu, Sergiu Deleanu, *Arbitrajul intern şi internaţional (Domestic and International Arbitration)* (Bucharest: Rosetti Publishing House, 2005), 265-266; Radu Bogdan Bobei, *Arbitrajul intern şi internaţional Texte. Comentarii. Mentalităţi (Domestic and International Arbitration. Texts. Comments. Mentalities)* (Bucharest: C.H. Beck Publishing House, 2013), 170-173 and Gabriel Mihai, *Arbitrajul internaţional şi efectele hotărârilor arbitrale străine (International Arbitration and the Effects of Foreign Arbitration Awards)* (Bucharest: Universul Juridic Publishing House, 2013), 155-156.

[39] Redfern *et al.*, *Redfern and Hunter on International Arbitration*, 775.

[40] Viorel Roş, *Arbitrajul comercial internaţional (International Commercial Arbitration)*, 505.

[41] *E.g.* Section 58 of the United Kingdom Arbitration Act of 1996; Article 1484 of the French Civil Code; Article 1055 of the German Code of Civil Procedure; Article 824-bis of the Italian Code of Civil Procedure; Article 43 of the Spanish Law no. 60/2003 – *"Ley de Arbitraje"*; Article 1059 of the Dutch Code of Civil Procedure; Article 896 of the Greek Code of Civil Procedure *etc.*

as well, a claimant cannot bring the same claims in a different arbitration or court proceedings[42].

This outcome is legitimate because, as emphasized by the legal literature[43], *"one of the fundamental objectives of international arbitration is to provide a final, binding resolution of the parties' dispute. (...) If parties are not bound by the results of the awards made against them – either dismissing or upholding their claims or declaring their conduct wrongful or lawful – then those awards do not achieve their intended purpose and are of limited practical value"*[44].

Regarding this aspect, a leading decision pronounced by the United States Court of Appeals acknowledged the fact that *"extensive judicial review frustrates the basic purpose of arbitration which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings"*[45]. Consequently, *"the sanctity of res judicata attached to the final decision of an international tribunal"* (author's note: ordinary or arbitration court, international or domestic) became *"an essential and settled rule of international law"*[46].

Romanian courts constantly share this perspective. It was held that arbitral awards are enforceable just like any other ordinary judicial decision[47], final and binding between parties[48]. They also become *res judicata* with regard to the dispute settled by arbitration[49] and are duly recognised in Romania when all mandatory requirements concerning the validity of the arbitration agreements and arbitral proceedings provided by the Romanian law and the international conventions ratified by Romania are met[50]. Last but not least, Romanian courts established the fact that, as a principle, the recognition and enforcement procedure does not allow for a substantive re-examination of the award[51].

3. The Enforcement of Arbitral Awards in Romania

3.1. The Easiest Way to Enforce an Arbitral Award – Convince the Losing Party to Comply with the Award

Before granting permission for enforcement in the ordinary courts of law, the party who wins in an arbitration trial shall consider persuading the losing party to voluntarily perform its duties arising from the arbitral award.

The enforcement procedure is not mandatory and, before incurring legal expenses on formal enforcement procedures, it is worth trying to convince the party in default to promptly comply with the arbitral award.

The losing party may be determined to fulfil its duties by exerting commercial pressure, threatening to cease trading, negotiating a reduction in the size of the award in order to avoid the legal costs of enforcement action or applying reputational pressure. The threat of enforcement action may be sometimes enough to encourage voluntary payment[52].

A cost/benefit analysis for enforcement against informal means is always appropriate in order to ensure that the most effective steps are taken.

However, in many cases the losing party asks for a new trial. In this hypothesis, the party who won the arbitration shall file an application to render the arbitral award enforceable.

3.2. The Enforcement Procedure in Romania. Reasons for Denying Enforcement

In Romania, the enforcement procedure constitutes the second stage in civil proceedings and is the only legal way to oblige the losing party, by using the coercive force of the state, to comply with the arbitral award.

As evidenced above, arbitral awards are final and binding. However, parties need to undertake an additional common procedure in order to enforce them in Romania. Thus, the party seeking enforcement shall

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[42] Stuart Dutson *et al*., *International Arbitration. A Practical Guide* (London: Globe Business Publishing Ltd., 2012), 201.

[43] Gary B. Born, *International Arbitration. Cases and Materials* (The Hague Wolters Kluwer Publishing House, 2011), 1047.

[44] For a slightly similar perspective, also see Maria Tzavela, *The binding nature of the arbitral award (res judicata) under Greek Law*, published in Mihai Şandru, Andrei Săvescu (coord.), *Forţa juridică a hotărârilor arbitrale (The binding nature of arbitral awards)* (Bucharest: University Publishing House, 2012), 139-143.

[45] See U.S. Court of Appeals, Second Circuit, Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (December 23rd 1974), published in Gary B. Born, *International Arbitration. Cases and Materials*, 1129-1130.

[46] The Trail Smelter Arbitration Case (U.S. v. Canada), Awards of 16 April 1938 and 11 March 1941, published in Gary B. Born, *International Arbitration. Cases and Materials*, 1047.

[47] *E.g.* Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1031/March 26th 2009, published in Buletinul Casaţiei no. 3/2009 (Bucharest: C.H. Beck Publishing House), 55-56.

[48] See, *e.g.* Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 436/February 7th 2008; Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1778/May 23rd 2008; Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 282/January 25th 2011, published in Buletinul Casaţiei no. 10/2011 *etc.* The previous mentioned decisions are available in Legalis Database.

[49] See, *e.g.* Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1110/March 15th 2011, published in Buletinul Casaţiei no. 1/2012; Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 4130/December 14th 2011 *etc.* These decisions are available in Legalis Database.

[50] See, *e.g.* Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1778/May 23rd 2008, available on http://www.newyorkconvention1958.org/ (Consulted on March 10th 2015).

[51] See Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 3181/2009, published in *Jurisprudenţa Secţiei comerciale pe anul 2009 (Commercial Jurisprudence - 2009)* (Bucharest: Hamangiu Publishing House, 2010), 213-216.

[52] Stuart Dutson *et al*., *International Arbitration. A Practical Guide*, 203.

file an application at the courthouse located in the area of the debtor's or creditor's domicile or headquarters. If the creditor's domicile or headquarters is located in a foreign country, he may file the application at the courthouse located in the area of his chosen residence (see Article 640[1] Romanian Code of Civil Procedure). The relevant arbitral award and arbitration agreement shall be attached in original or certified copy to the application[53]. The procedure for rendering the arbitral awards enforceable is charged with RON 20 (see Article 10 of Government Emergency Ordinance no. 80/2013 on court fees[54]).

Problems arise when the arbitral award or agreement are made in a language other than Romanian. In this case, the party applying for enforcement of the award shall produce a certified translation of these documents into Romanian. However, foreign arbitral awards and agreements shall be "overlegalised" by both competent public authorities and diplomatic or consular agents from the country where the respective documents were issued (see Article 1092 of the Romanian Code of Civil Procedure). In a controversial case[55], a Romanian court refused to enforce an arbitral award because the document was not authenticated by the International Chamber of Commerce from Paris Secretariat, the French Ministry of Justice, the French Ministry for Foreign Affairs and the Romanian Consulate from Paris.

The court which is competent to solve the application examines the validity of the arbitral award in the council room, without summoning the parties.

Recognition or enforcement of foreign arbitral awards may be refused only for limited reasons, respectively if the party against whom it is invoked proves that ***(a)*** the parties to the arbitration agreement were incapable pursuant to the law where the arbitral award was rendered; ***(b)*** the arbitration agreement was not valid under the law governing it or under the law of the country where the arbitral award was issued; ***(c)*** the party against whom the foreign arbitral award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; ***(d)*** the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; ***(e)*** the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of arbitration; ***(f)*** the foreign arbitral award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made (see Article 1128 of the Romanian Code of Civil Procedure). These rules are almost similar with the requirements provided by the 1958 New York Convention in Article V.

If the court renders the arbitral award enforceable, all enforcement procedures may be carried out by Romanian judicial executors.

Frequently, the losing party demands a substantive re-examination of the arbitral award during the enforcement procedure. However, Romanian courts of enforcement only verify the validity of arbitration agreements, arbitral proceedings and arbitral awards and do not extensively review the litigation.

As pointed out in the legal literature, *"efficient arbitration implicates a tension between the rival goals of finality and fairness. Freeing awards from judicial challenge promotes finality, while enhancing calls for some measure of court supervision. The arbitration's winner looks for finality, while the loser wants careful judicial scrutiny of doubtful decisions"*[56].

In the majority of reported decisions Romanian courts have enforced arbitral awards and promoted finality, supervising only the validity of arbitration. For instance, claims regarding the interpretation and implementation of duties arising from the arbitration award[57], alleged non-designation of the subject matter and arbitrators through an arbitral clause[58], alleged violation of the right to defend[59], substantive matter of

[53] For a detailed presentation on the reasons why the documents to be rendered enforceable shall be presented in original, see Gabriel Boroi, Carla Alexandra Anghelescu, *Verificarea înscrisului în original în cadrul procedurii de învestire cu formulă executorie (The Examination of the Original Document in the Procedure for Rendering it Enforceable)*, available online on http://www.inm-lex.ro/fisiere/d_175/Investirea%20cu%20formula%20executorie_depunerea%20originalului.pdf (Consulted on March 4th 2015).

[54] Published in the Official Journal of Romania no. 392/2013.

[55] See Tribunalul București, Decision no. 5804/October 4th 2000, extract published in Andreia Iordăchiță, *Recunoașterea și executarea sentințelor arbitrale străine: comparație între sistemul francez și cel român (Recognisal and Enforcement of Foreign Arbitral Awards: Comparison between the French and the Romanian System of Law)*, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 4/2008 (Bucharest: Rentrop&Straton Publishing House), 32-33.

[56] See William W. (Rusty) Park, *Why courts review arbitral awards*, Mealey's International Arbitration Report, v. 16, no. 11, 2001, 1-10 *apud* Arnoldo Wald, *Arbitration in Brasil*, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 4/2010 (Bucharest: Rentrop&Straton Publishing House), 47.

[57] See Înalta Curte de Casație și Justiție (The High Court of Justice), Decision no. 747/2006, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence)*, 21.

[58] See Înalta Curte de Casație și Justiție (The High Court of Justice), Decision no. 3659/2005, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence),* 22.

[59] See Înalta Curte de Casație și Justiție (The High Court of Justice), Decision no. 4393/2003, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence),* 23.

the dispute settled through arbitration[60], high amount of arbitral expenses[61] were not accepted by Romanian courts.

3.3. The Enforcement Procedures in Other European Countries

Other European countries have slightly similar rules when it comes to enforcement.

In the United Kingdom, an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgement or order of the court to the same effect (See Section 66 of the Arbitration Act from 1996).

In France, the party who seeks coercive enforcement needs to obtain an *exequatur ordinance* (fr. - *ordonnance d'exequatur*) from the competent domestic court located in the area where the arbitral award was issued (Articles 1487 and 1516 of the French Code of Civil Procedure).

In Germany, in order to render an arbitral award enforceable, parties shall file a petition for a declaration of enforceability at the higher regional court (*Oberlandesgericht, OLG*) designated in the arbitration agreement or, if no such designation was made, at the higher regional court in the district of which the venue of the arbitration proceedings is located.

If no venue for arbitration proceedings has been arranged in Germany, the higher regional court (*OLG*) shall have jurisdiction in the district of which the respondent has his registered seat or his habitual place of abode, or in which assets of the respondent are located, or in which the object being laid claim to by the request for arbitration proceedings, or affected by the measure, is located; as an alternative, the higher regional court of Berlin (Kammergericht, KG) shall have jurisdiction.

The competent court is to order a hearing for oral argument to be held if there are grounds for reversing the arbitral award. Such grounds for reversal shall not be taken into account insofar as a petition for reversal based on these grounds has been denied, in a final and binding judgment, at the time the petition for declaration of enforceability is received.

The arbitral award, or a certified copy of the same, is to be enclosed with the petition for a declaration of enforceability of an arbitration award. The certification may also be performed by the attorney retained and authorised for the court proceedings (see Section 1064 paragraph (1) of the German Code of Civil Procedure).

Under German law, the recognition and enforcement of foreign arbitral awards is governed by the 1958 Convention on the recognition and enforcement of foreign arbitral awards. The stipulations of other treaties concerning the recognition and enforcement of arbitral awards remain unaffected.

The procedures presented above resemble the ones provided by other European domestic laws such as the Italian law[62], Spanish law[63], Dutch law[64] and Greek law[65].

Consequently, not only in Romania, but also in other countries, the enforcement of arbitral awards requires the cooperation of ordinary courts. In cases where the national courts of enforcement are not supportive, international regulations such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the European Convention on International Commercial Arbitration (1961), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the Convention on the Settlement of Investment Disputes between States and Nationals of other States (concluded in Washington, in 1965) and several bilateral investment treaties provide strong protections. These international guarantees were envisaged by the international jurisprudence[66].

3.4. The Possibility of Challenging Arbitral Awards in Romania

Under the Romanian law, the right of refusal to comply with the arbitral award may be exerted through an action of annulment before the competent court within a month since the communication of the arbitral award[67] (Article 611 paragraph (1) of the Romanian Code of Civil Procedure). This legal term is

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[60] See Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 3197/2009, published in *Jurisprudenţa Secţiei comerciale pe anul 2009 (Jurisprudence of Commercial Courts)*, 225-228.

[61] See Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 4351/1998, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence),* 27.

[62] For further details, see articles 825 and 839 of the Italian Code of Civil Procedure.

[63] See Titles VIII and IX (Articles 44 – 46) of the Spanish Law no. 60/2003 – *"Ley de Arbitraje"*.

[64] See Section 4 (*Enforcement of the arbitral award*), Articles 1062 and 1063 of the Dutch Code of Civil Procedure.

[65] For further details, see articles 903-907, 918 and 919 of the Greek Code of Civil Procedure.

[66] *E.g.* see European Court of Human Rights (ECHR), Case of *Stran Greek Refineries and Stratis Andreadis v. Greece*, Application no. 13427/87, Judgement of December 9th 1994; ECHR, Case of *Regent Company v. Ukraine*, Application no. 773/03, Judgement of April 3rd 2008; International Centre for Settlement of Investment Disputes (ICSID) Case no. ARB/05/17 (*Desert Line Projects LLC v. The Republic of Yemen*), Award of February 6th 2008; ICSID Case no. ARB/05/07 (*Saipem S.p.A. v. The People's Republic of Bangladesh*), Decision on Jurisdiction and Recommendation on Provisional Measures of March 21st 2007, Award of June 30th 2009. These cases were commented by Sabine Konrad and Markus Birch, in *Non Enforcement of Arbitral Awards: Only a Pyrrhic Victory?*, published by Revista Română de Arbitraj (Romanian Arbitration Journal) no. 4/2010 (Bucharest: Rentrop&Straton Publishing House), 48-53.

[67] In the case a regulation on which the award was grounded is declared unconstitutional the legal term is of three months.

mandatory. Romanian courts often dismissed the action of annulment on grounds of lateness[68].

Romanian courts may cancel an arbitral award only for the following reasons: ***(a)*** the litigation was not capable of being settled by arbitration; ***(b)*** the tribunal resolved the dispute in the absence of an arbitration agreement or under a null and void arbitration agreement; ***(c)*** the arbitral court was not constituted in accordance with the arbitration agreement; ***(d)*** the party in default was absent during the debates before the arbitration court and the summoning procedure was not legally conducted; ***(e)*** the award was issued after the deadline of the arbitration procedure has expired, one of the parties invoked the caducity of the arbitration and both parties did not agree to continue the trial; ***(f)*** the arbitral award is beyond the scope of the arbitration agreement (*extra petita* or *ultra petita*); ***(g)*** the arbitral award does not include the sentence, reasoning, place and date when it was issued or it is not signed by all arbitrators; ***(h)*** the arbitral award violates the public order, good morals or other mandatory regulations; ***(i)*** a regulation or provision on which the arbitral award is grounded is declared unconstitutional by the Romanian Constitutional Court.

Therefore, for instance, Romanian courts may cancel arbitral awards on the following grounds: disputes concerning the status of partner in a limited liability company may not be settled by arbitration[69]; disputes referring to several legal issues, only part of them being capable of being settled by arbitration, may not be solved by arbitration courts[70]; public authorities are not allowed to conclude arbitration agreements in which they designate domestic courts of arbitration, unless expressly authorised by law[71]; the arbitration agreement is null and void, not being signed by the legal representative of the legal person[72]; the arbitration agreement was not signed by both parties[73]; the arbitration court vested to solve the litigation was changed several times during the proceedings[74]; the super arbitrator was nominated without seeking the parties' consent[75]; one of the parties was not legally summoned because the citation did not include its apartment number[76], the dispute was settled *ex aequo et bono* and the sentence is not thoroughly explained in the arbitration award[77] *etc.*

3.5. Challenging Arbitral Awards in Other European Countries

The possibility of challenging arbitral awards is also provided in other systems of law.

In the United Kingdom, arbitral awards may be challenged when the person against whom it is sought to be enforced shows that the arbitration court lacked substantive jurisdiction to make the award, on the ground of serious irregularity affecting the tribunal, the proceedings or the award[78] (Sections 67, 68 of the Arbitration Act from 1996). The court may by order confirm the award, vary the award, remit the award to the tribunal, in whole or in part, for reconsideration, set aside the award in whole or in part or declare the award to be of no effect, in whole or in part.

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[68] *E.g.* Tribunalul Bucureşti (Bucharest Tribunal), Decision no. 752 bis/1994, published in Dan Lupaşcu, *Culegere de practică judiciară a Tribunalului Bucureşti în materie comercială 1990-1998 (Bucharest Tribunal Jurisprudence in Commercial Issues)* (Bucharest: All Beck Publishing House, 1999), 45.

[69] See Curtea Supremă de Justiție (Supreme Court of Justice), Decision no. 196/1998, quoted by Viorel Roș, *Arbitrajul comercial internațional (International Commercial Arbitration)*, 457.

[70] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Sentence no. 157/May 31st 2001, published in Revista de Drept Comercial (Commercial Law Journal) no. 11/2001, 166 *apud* Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)* (Bucharest: Lumina Lex Publishing House, 2005), 45.

[71] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Sentences no. 174/November 11th 1999, 175/November 11th 1999 and 179/July 14th 2000, quoted in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 54.

[72] The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Sentence no. 10/February 15th 1995, published in Dumitru Mazilu and Daniel-Mihail Şandru, *Practică jurisdicțională și arbitrală de comerț exterior (Judicial and Arbitral Case Law of International Commerce)* (Bucharest: Lumina Lex Publishing House, 2002), 213.

[73] See Curtea de Apel București (Bucharest Court of Appeal), Decision no. 1416/October 26th 2001, published in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 58.

[74] See Curtea de Apel București (Bucharest Court of Appeal), Decision no. 235/February 11th 2004, published in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 74.

[75] See Curtea de Apel București (Bucharest Court of Appeal), Decision no. 1870/December 2nd 2003, published in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 74.

[76] See Curtea de Apel București (Bucharest Court of Appeal), Decision no. 1351/October 24th 2002, published in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 77.

[77] Înalta Curte de Casație și Justiție (The High Court of Justice), Decision no. 4180/October 25th 2012, published in Marin Voicu, *Arbitrajul commercial. Jurisprudență adnotată și comentată 2004-2014 (Commercial Arbitration. Case Law with Commentaries)*, 463-466.

[78] In accordance with Section 68, Subsection (2) of the Arbitration Act from 1996, "serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant: (a) failure by the tribunal to act fairly and impartially as between parties, adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense and comply with other general duties provided by the law; (b) the tribunal exceeding its powers, otherwise than by exceeding its substantive jurisdiction; (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; (d) failure by the tribunal to deal with all the issues that were put to it; (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; (f) uncertainty or ambiguity as to the effect of the awards; (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; (h) failure to comply with the requirements as to the form of the award; or (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

The United Kingdom also ratified the 1958 New York Convention and incorporated the requirements for recognition and enforcement of New York Convention Awards in its legislation (see Sections 100 – 104 of the 1996 Arbitration Act).

However, even in the United Kingdom, a country with a declared pro-arbitration attitude, there are problems related to the enforcement of arbitral awards. For instance, in 2009 the English Court of Appeal refused the enforcement of a New York Convention award in *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* on grounds that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made. In this case, a domestic English court contradicted an international arbitration tribunal, composed of experienced arbitrators, which considered that the arbitration agreement was valid under the French Law (the law where the award was made)[79].

In France, the party against whom the arbitral award is sought to be enforced has the possibility of challenging the respective award through an action for annulment only if ***(1)*** the arbitration court was not competent to solve the litigation, ***(2)*** it was not legally constituted or ***(3)*** did not conform to its mission; ***(4)*** the principle of contradictoriness was not observed; ***(5)*** the arbitral award is contrary to public order or ***(6)*** the arbitral award does not include the reasoning, the date when it was issued, the name of the arbitrators, their signatures or it is not held by the majority of arbitrators (Article 1492 of the French Code of Civil Procedure[80]).

The French law lists fewer grounds for cancellation than the ones provided by the Romanian law. Consequently, at least in theory, the French system of law seems to be more flexible in enforcing arbitral awards than the Romanian one.

Indeed, in practice French courts have enforced arbitral awards which, *exempli gratia*: maintained the prohibition for the franchisee to conduct similar commercial activities with other members of the franchise (limited in time and space), even if this constituted an alleged violation of the public order[81]; referred to French civil law provisions which were not raised by parties during the proceedings[82] or were challenged on grounds that the arbitration agreement was missing, if this issue was not raised during the arbitral proceedings[83].

In Germany, only a petition for reversal of the arbitration award by a court may be filed against an arbitration award.

According to Section 1059 paragraph (2) of the German Code of Civil Procedure, an arbitration award may be reversed only if: ***(a)*** the petitioner asserts, and provides reasons for his assertion, that: ***(i)*** one of the parties concluding an arbitration agreement did not have the capacity to do so pursuant to the laws that are relevant to such party personally, or that the arbitration agreement is invalid under the laws to which the parties to the dispute have subjected it, or, if the parties to the dispute have not made any determinations in this regard, that it is invalid under German law; ***(ii)*** he has not been properly notified of the appointment of an arbitral judge, or of the arbitration proceedings, or that he was unable to assert the means of challenge or defence available to him for other reasons; ***(iii)*** the arbitration award concerns a dispute not mentioned in the agreement as to arbitration, or not subject to the provisions of the arbitration clause, or that it contains decisions that are above and beyond the limits of the arbitration agreement; however, where that part of the arbitration award referring to points at issue that were subject to the arbitration proceedings can be separated from the part concerning points at issue that were not subject to the arbitration proceedings, only the latter part of the arbitration award may be reversed or ***(iv)*** the formation of the arbitral tribunal or the arbitration proceedings did not correspond to a provision of the German Code of Civil Procedure or to an admissible agreement between the parties, and that it is to be assumed that this has had an effect on the arbitration award; or ***(b)*** the court determines that: ***(i)*** the subject matter of the dispute is not eligible for arbitration under German law or ***(ii)*** the recognition or enforcement of the arbitration award will lead to a result contrary to public order.

Unless the parties to the dispute agree otherwise, the petition for reversal shall be filed with the court within a period of three months. The period begins on the day on which the petitioner has received the arbitration award.

The petition for reversal of the arbitration award may no longer be filed once a German court has declared the arbitration award to be enforceable (see Article 1059 paragraph (3) of the German Code of Civil Procedure).

Thus, the German law has a rigorous approach when it comes to cancelling arbitral awards.

The sole possibility of cancelling the arbitral awards under limited grounds is also provided by other

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[79] For a description of the case, see Gary B. Born and Timothy Lindsay, *Enforcement of International Awards in England and the New York Convention*; the article was published on *http://kluwerarbitration blog.com/* - post from August 21st 2009 (Consulted on March 7th 2015).

[80] There are some differences in case of arbitral awards issued in France (see Article 1520, French Code of Civil Procedure).

[81] See Cour de Cassation, *Varassedis c. Prodim*, Pourvoi no. 03-12.382, January 17th 2006, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 3/2009 (Bucharest: Rentrop&Straton Publishing House), 88.

[82] See Cour de Cassation, Conselho Nacional de Carregadores c. M. X et autres, Pourvoi no. 03-19.764, March 14th 2006, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 3/2009 (Bucharest: Rentrop&Straton Publishing House), 91.

[83] See Cour de Cassation, *Société Intercafco c. Société Dafci*, Pourvoi no. 03-19.054, January 31st 2006, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 3/2009 (Bucharest: Rentrop&Straton Publishing House), 88.

European systems of law such as the Italian law[84], Dutch law[85] and Greek law[86]. The Spanish law mentions the possibilities of annulling and revising arbitral awards, but only for limitative reasons[87].

4. Romania, Between Scylla and Charybdis – Notes on the Controversial Case of Micula v. Romania[88]

The recognition and enforcement of foreign arbitral awards requires the cooperation of both domestic and international institutions. Problems arise whenever different levels of authorities do not share the same attitude towards enforcement action.

Many of these kinds of situations are encountered in the European Union (*E.U.*).

As a rule, the E.U. does not interfere with the recognition and enforcement proceedings of arbitral awards within its Member States. Regulation No. 1215/2012 on the recognition and enforcement of judgements in civil and commercial matters by the Member States[89] is illustrative in relation to this aspect. In accordance with article 1 paragraph (2), the main European regulation related to enforcement issues does not apply to arbitration, so it does not directly refer to cases where domestic courts have to render decisions relating to arbitration proceedings or arbitral awards.

However, in accordance with article 12 from the Preamble, Regulation No. 1215/2012 does not prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

Even if this Regulation apparently allows the Member States to adopt their own policies on arbitration, there were several cases when European authorities strongly recommended national courts to deny enforcement of arbitral awards.

Many of the respective cases referred to arbitral awards which were contrary to mandatory European consumer laws.

For example, in *Mostaza Claro* case[90], the European Court of Justice (*E.C.J.*) held that the national court seized of an action for annulment of an arbitral award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.

In *Asturcom* case[91], the E.C.J. went even further and stated that a national court hearing an action for enforcement of an arbitral award which has become final and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task. If the arbitration clause incorporated into the contract is unfair, it is for the respective court to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause[92].

Other alleged violations of mandatory European rules were related to competition law and especially in subject matters related to state aid. In a leading case[93], The European Court of Justice stated that a national court must refuse to apply any provision likely to conflict with the Community law, including a national provision that seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid which has been found to be incompatible with the common market in a decision of the European Commission which has become final.

An interesting case concerning the alleged violation of European state aid regulations by a Member State is currently under investigation by the European Commission.

The *Micula v. Romania* case arises from Romania's introduction of certain economic incentives for the development of disfavoured regions of Romania and their subsequent revocation in the

[84] See, mostly, Articles 827 – 830 of the Italian Code of Civil Procedure.

[85] See Section 5 (*Reversal and revocation of the arbitral award*): Articles 1064 – 1068, from the Dutch Code of Civil Procedure.

[86] See, particularly, articles 897 - 901 of the Greek Code of Civil Procedure.

[87] See Title VII (Articles 40 – 43) of the Spanish Law no. 60/2003 – *"Ley de Arbitraje"*.

[88] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case no. ARB/05/20, Award of December 11th 2013, available on *http://www.italaw.com/*.

[89] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, published in the Official Journal of the European Union no. L 351/1 from 20.12.2012. It replaced Council Regulation (EC) No. 44/2001.

[90] *Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*, Case C-168/05, European Court of Justice judgement of October 26th 2006, available on *http://curia.europa.eu/*.

[91] *Asturcom Telecomunicaciones SL v. Cristina Rodriguez Nogueira*, Case C-40/08, E.C.J. Judgement of October 6th 2009, available on *http://curia.europa.eu/*.

[92] For detailed comments on the implication of this case in the context of Romanian law, see Mihai Șandru, Evelina Oprina, *Discuții privind posibilitatea anulării hotărârii arbitrale de către instanța de executare. Notă la hotărârea Asturcom (cauza C-40/08) în contextul legislației române (Debates upon the Possibility of Annulment of Arbitration Award by the Court of Enforcement. Note on Judgement Asturcom (Case C-40/08) from the Point of View of Romanian Legislation)*, in Mihai Șandru, Andrei Săvescu (coord.), *Forța juridică a hotărârilor arbitrale (The binding nature of arbitral awards)*, p. 9-43.

[93] See *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, Case C-119/05, Judgement of July 18th 2007, available on *http://curia.europa.eu/*.

context of Romania's accession to the European Union in 2007.

Specifically, in 1998, Romania enacted Emergency Government Ordinance 24/1998, which made available certain tax incentives, including customs duties exemptions to investors in certain disfavoured regions who met the requirements set out in the respective Ordinance and its implementing legislation.

Relying on those incentives and expecting that they would be maintained for a 10-year period, the claimants made substantial investments in a disfavoured region located in north-western Romania.

In order to meet the criteria for accession to the European Union, Romania needed to eliminate all forms of state aid in national legislation incompatible with the *acquis communautaire*. Therefore, in 2004, Romania revoked most of the incentives provided by Emergency Government Ordinance 24/1998, including certain facilities granted to the claimants, ending the part of the incentive program early.

The claimants, of Swedish nationality, filed a request for arbitration on grounds that Romania violated the Sweden – Romania Bilateral Investment Treaty, which is designed to protect Swedish investors from unfair or inequitable treatment by the Romanian government.

Romania's primary defence was that the respective incentives were not compatible with the European Union law and the amendment of Emergency Government Ordinance 24/1998 was to comply with European Union accession and to address the European Commission's concerns over state aid. Romania's position was strongly supported by the European Commission, which intervened in the case as *amicus curiae*, on behalf of Romania.

However, the ICSID Arbitral Court awarded the claimants and forced Romania to pay them a considerable amount of damages.

As regards the enforcement of the arbitral award, the Tribunal referred to Articles 53 and 54 of the ICSID Convention which state that the award shall be binding on the parties and each Member State shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a national court.

Following the issuance of the arbitral award, the European Commission tried to prevent Romania from honouring its payment obligations, arguing that the award is unenforceable within the European Union. The European Commission pointed out that the implementation of the arbitral award would constitute illegal state aid, which may create an economic advantage not otherwise available on the market for the claimants. Still, Romania partially enforced the award.

In May 2014, the European Commission issued a suspension injunction which enjoined Romania to immediately suspend any action which may lead to the execution or implementation of the arbitral award. The suspension injunction was directly binding for the Romanian domestic courts.

On October 1st 2014, the European Commission decided to initiate a formal investigation procedure on the case. Following the respective investigation, the European Commission concluded that compensation paid by Romania for the abolished investment aid scheme breaches EU state aid rules and the beneficiaries have to pay back all amounts already received.

However, Romania is currently between Scylla and Charybdis because the European Union is not the only authority to be considered in this case.

The role of the World Bank is not to be underestimated when enforcing ICSID arbitral awards because the International Centre for Settlement of Investment Disputes is a member of the World Bank Group[94].

The World Bank often reminded the member states where the ICSID arbitral awards were to be enforced of the importance of prompt payment. The international credit institution may also refrain from making new loans to a member country in certain extreme cases involving expropriation or external debt issues[95].

Therefore, the World Bank may pressure its member states to enforce ICSID arbitral awards.

Consequently, Romania courts have a delicate task when it comes to choosing between enforcing the arbitral award in accordance with domestic rules, ICSID regulations and the bilateral investment treaty between Romania and Sweden and, respectively, denying enforcement in order to comply with the public order of the European Union.

The *Micula case* may set a precedent on refusing the enforcement in Romania of certain arbitral awards that meet the validity requirements according to the domestic law, but are contrary to European regulations. This solution might undermine the Romanian people's trust in arbitration, as an alternative dispute resolution mechanism.

Therefore, in the future, problems related to the recognition and enforcement of arbitral awards tend to become more and more complex and controversial.

5. Conclusions

Arbitration has become an accepted dispute resolution mechanism in Romania over the last

[94] Other members of the World Bank Group are the International Bank of Reconstruction and Development, the International Finance Corporation, the International Development Association and the Multilateral Investment Guarantee Agency.

[95] See Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, paper presented at the 24th Joint Colloquium on International Arbitration held in Paris on November 16th 2007, Session on Specific Aspects of State-Party Arbitration. The article is available online in PDF version on *http://www.arbitration-icca.org/*.

decades, due to its indisputable advantages. Among its benefits is the final and binding nature of arbitral awards.

Romanian law and courts generally acknowledge the finality and enforceability of arbitration awards, whether international or domestic. However, in recent years, there were several exceptions to the rule. An important exception, which could set a precedent for denying enforcement, is the *Micula case* (presented in section 4).

This might lead to the conclusion that enforcing arbitral awards in Romania still represents a challenge, even if, at least in theory, the Romanian law is pro-arbitration.

One way of dealing with the risk of non-enforcement is to persuade the losing party to voluntarily perform its duties arising from the arbitral award. This goal could be achieved in many ways – *e.g.* by exerting commercial pressure, negotiating a reduction in the size of the award, applying reputational pressure *etc.*

However, in many cases the losing party seeks a substantial re-examination of the award before the ordinary courts. In this case, the only option remaining for the winning party is to file a request to render the arbitral award enforceable. This procedure may be costly and time-consuming, especially when you need to enforce an arbitral award issued by a foreign court of arbitration.

As a rule, Romanian courts examine the validity of arbitration agreements, proceedings and awards in order to render them enforceable. In many cases this additional procedure is a mere formality.

After granting enforcement, the right of refusal to comply with the arbitral award may be exerted only through an action of annulment for limited reasons, before the competent court and within a month since the communication of the arbitral award. The grounds for annulment are pretty diverse and may be sometimes interpretable. Nevertheless, Romanian courts have rarely cancelled arbitral awards.

Romanian regulations and case law on recognition and enforcement of arbitral awards resemble other European domestic arbitration laws and jurisprudence. Most European countries ratified international conventions meant to harmonize arbitration and court-related procedures. Also, many European systems of law recognise the final and binding nature of arbitral awards and are in favour of enforcement.

Still, national regulations are not entirely uniform when it comes to enforcement procedures and validity requirements. Future research in this field may lead to interesting results, by determining the European countries with the most favourable attitude towards arbitration.

Also, an extensive review on the European case law related to the enforcement of arbitral awards could provide valuable insights.

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