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RECOGNITION AND ENFORCEMENT OF THE ARBITRAL AWARDS

PhD Abstract

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Iaşi, 2014

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Key words: *international trade, arbitration agreement, international arbitration agreement, arbitral tribunal, arbitral award, foreign arbitral award, national law, the Romanian Code of Civil Procedure, Convention of New York in 1958, European Convention on International Commercial Arbitration of 1961 at Geneva, UNCITRAL Model Law, recognition and enforcement of arbitral awards, the grounds for refusing recognition or enforcement.*

Based on the Convention of New York in 1958, arbitration has become a real and efficient alternative to the state justice, with its own regulations and with its own existence. The importance granted today to arbitration, as private justice, is widespread in many European jurisdiction and not only.

The modern base of arbitration is represented by the Codes of Civil Procedure from the beginning of the 19th century, dominated by the liberal spirit of the French revolution. Article 1 of the Decree of 16-24 August 1790 is significant: "*Arbitration is the most reasonable way to solve the disputes between citizens, and the law-makers cannot adopt any provision tending to diminish the effectiveness of the agreement*". The French Code of Civil Procedure of 24 April 1806 established a distinct title for arbitration, which remained unchanged until the decrees of 14 May 1980 and of 12 May 1981, the regulations being then introduced in the new Code of Procedure.

Beginning with the 20th century, arbitration has become the favoured form for solving litigations deriving from international trade operations. Due to its generalization and importance, the institution of arbitration is regulated by national laws and international agreements, both bilateral and multilateral.

The importance and efficacy of arbitration in the international commercial relationships were acknowledged through the Final Act of the Conference on Security and Cooperation in Europe signed at Helsinki on 1 August 1975 which specifies that "*Arbitration is an appropriate means of settling… promptly and equitably the disputes which may arise from the commercial transactions relating to goods and services and contracts for industrial cooperation",* recommending "*… the organizations, enterprises and firms in their countries, to include, where appropriate, arbitration clauses in commercial contracts and industrial cooperation, or in special agreements"*. The General Assembly of the United Nation Organization recommends, at its turn, in the preamble of Resolution no. 31/98 of 15 December 1976, through which it was adopted the Regulation of arbitration elaborated by the United Nations Commission for

International Commercial Law, its spread and application as wide as possible all over the world, acknowledging therefore the usefulness of arbitration as a method of solving the disputes emerged from the international commercial relationships. Also, the regional economic commissions of the United Nation Organization issued facultative regulations for the ad-hoc arbitration.

The efficacy of arbitration in the international trade relationships is explained by its advantages in comparison with the common law jurisdictions. Here are only two arguments concerning the preference for such a justice, in confront with the state justice: the conservatism and a high degree of immobility of the latter. In the case of the state justice no party can choose the judge. The choice of the arbitrators allows the parties to select the judges (arbitrators) they trust, due to their competence, knowledge or professional fame.

One of the most important advantages of this institution is confidentiality, arbitration answering the parties' wish not to make public the disputes they solve. The fact that there is an alternative to the state justice has also positive aspects, the traders preferring instead of complicated and narrow common law procedure a more flexible procedure, able to satisfy successfully the real needs of the parties.

If the judges are obliged to apply law in all the cases, the arbitrators, with the written agreement of the parties can judged the dispute also in equity, *ex aequo et bono*, according to their reasoning.

Even if the international commercial relationships need a uniform law and a uniform jurisdiction for solving the disputes, these are still ideal. The international arbitration answers partly these requirements by the possibility offered to the parties to choose the law or the system of law that should regulate both their contract and the ways of solving the possible disputes.

The system of the international arbitration is established both in the national legislations and in the international conventions. In Romania, the increase of the role of arbitration was felt in the business environment after the '90s and the interest for solving the disputes by arbitration gained field in comparison with the state justice. Also, the number of the civil cases with foreign elements arose. The mission of the arbitration regulation from the perspective of the Romania's current economic realities and EU membership has become extremely important. In this context emerged the new regulation of arbitration in relation to the similar regulations in other states of the European Union, as included in the new Code of Civil Procedure.

CHAPTER I

GENERAL CONSIDERATIONS ON INTERNATIONAL ARBITRATION

In a brief formulation, arbitration represents a form of private justice within which the dispute resolution is eluded from the common law jurisdictions. In a longer formulation, arbitration is the institution within which arbitrators – private individuals designated by parties solve the disputes entrusted to them by the parties' agreement. The parties entrust one or more private individuals to solve a legal dispute, eluding that litigation from the competence of the courts.

Arbitration is a form of justice adapted especially to the traders' disputes and used mainly in the business people environment.

Conceptually, international arbitration represents a form of arbitration that contains an extraneity element, determined by the national law.

The criteria of the international character of arbitration are analyzed differently in doctrine and jurisprudence.

A first theory sustained the idea that the international character of this private jurisdiction is sufficient so that arbitration gains international dimension and the internationality of the arbitration institution was based on its foreign aspect. The main elements taken into account to highlight the national or foreign character of the jurisdiction were the law governing the arbitration and the place of arbitration, more exactly the place where the arbitral award is given.

If it is discussed the contractual component of arbitration, it prevails the law guiding the arbitration. In exchange, if the stress lies upon the jurisdictional component of arbitration, it is taken into account especially the place the arbitral award is given.

Another theory considered that the international character of arbitration derives from the internationality of the arbitration institution, grounded on its autonomy from the national structures. For example, some authors considered that the international requirements are met by the Court of Arbitration of the International Chamber of Commerce in Paris and by the International Centre for Settlement of Investment Disputes, an institution in compliance with the provisions of the Convention of Washington in 1965.

According to a third theory, the international character of arbitration is given by the international dimension of the dispute. Within this theory the intrinsic elements of the dispute prevail, being taken into account the legal and economic criteria. Most of the authors in our doctrine share this theory.

Currently, it is founded on the provisions of art. 1 para. 1 lett. a) of the European Convention on International Commercial Arbitration concluded at Geneva in 1961, as well as on the provisions of art. 1.110 in the Romanian Code of Civil Procedure.

There are numerous institutions of arbitration competent to judge both the domestic and the international disputes. The fact that and institution of arbitration is international does not influence the internal or international character of arbitration. The internationality of an arbitration institution will not transmit this character to the dispute to be solved.

In essence, the relationships of international commercial law are defined as regards their international character by the means of two criteria: a subjective and an objective one.

According to the subjective criterion, the natural or legal individuals should have their common residence or headquarters in different contracting states.

According to the objective criterion, the goods, the service or any other good that represents the object of the legal relationship should be in international transit, i.e. in the execution of that legal relationship the good should cross at least a frontier.

The two criteria are in principle alternative. While the subjective criterion is established by the United Nations Convention on Contracts for the International Sale of Goods, concluded at Vienna in 1980, the objective criterion is adopted usually in the international agreements in the field of transport.

The provisions of the Convention of Geneva in 1961 impose a double criterion, the legal criteria being cumulated with the economic ones. The provisions of the Convention are applied to the arbitration agreements concluded for solving the disputes emerged or that will emerge from "*activities of international trade* between natural or legal individuals *with common residence or headquarters in different contracting states*".

The two criteria of internationality are not limitative. Within each law system are specified the extraneity elements that have relevance as elements of internationality. That is why it is considered *lato sensu* that are international the legal relationships that include an extraneity element that can lead, as regards that legal relationship, to a conflict of laws on the territory.

Consequently, even if in some hypotheses the economic criteria can generate incertitude, the legal criteria are not sufficient to fully justify the specificity of international arbitration.

In conclusion, starting from the definition of the domestic arbitration it can be considered that international arbitration represents a private jurisdiction carried out on the base and according to arbitration agreement, to the extent allowed by law for solving a dispute emerged from a legal relationship that presents sufficient relevance within international trade.

The concept of international arbitration is regulated in the Romanian legislation in the provisions of the Convention of Geneva in 1961 and of UNCITRAL Model Law.

In compliance with art. 1.110 para. (1) in the Code of Civil Procedure, an arbitral dispute carried out in Romania is considered international if it emerged from a private law relationship with an extraneity element. The provisions concerning the international arbitration included in Chapter I of Title IV of Book VII (art. 1.110 – 1.122) are applied to any international arbitration if the headquarters of the arbitral institution is in Romania and at least one of the parties did not have at the moment of the conclusion of the

arbitration agreement the common residence or headquarters in Romania, if the parties did not exclude through the arbitration agreement or after its conclusion – but only in writing – their application. The location of the arbitral institution is established by the parties or by the arbitral institution chosen by the parties, or in absence, by the arbitrators.

The provisions of para. (2) in art. 1.110 establish the condition that at least one of the parties should not have at the moment of the conclusion of the arbitration agreement the common residence or headquarters in Romania. This condition should be fulfilled only at the moment of the conclusion of the arbitration agreement; later the party can the common residence or headquarters in Romania. Other extraneity elements of the arbitration agreement can be retained on the occasion of the nomination of the arbitrators, of the choice of certain procedural aspects or of the location of the arbitration institution.

From the provisions of para. (3) it results that the international arbitration disputes can be solved in Romania through the both forms of arbitration: ad-hoc or institutional.

Convention of Geneva in 1961 refers the organization of the arbitration, the arbitration procedure, the law applicable to the substance of the dispute, the grounds and the set aside of the arbitral awards. By eliminating some of the difficulties generated by the variety of national provisions, the stipulations of the Convention facilitate the access to the international commercial arbitration.

According to art. I, par. 2, lett. b) of the Convention, arbitration represents a modality to solve the disputes by arbitrators designated for certain cases (ad-hoc arbitration) or by permanent institutions of arbitration. Within it, on the grounds of the parties' will, an institution with private character is organized and entitled to solve a certain dispute through a binding decision.

The preamble of UNCITRAL rules, adopted by UNO General Assembly at 15 December 1976 establishes the internationality of arbitration in relation to the international commercial relationships: "*Acknowledging the value of arbitration as a method of solving the disputes deriving from international commercial relationships (...)*". As it can be noticed, the international nature of arbitration is given by the international nature of the dispute and the international nature of the dispute is given by the international nature of the commercial relationships.

The definition of the international arbitration provided by the Convention of Geneva is taken over by UNCITRAL Model Law referring to the international commercial arbitration elaborated by the United Nations Commission on International Trade Law, 21 June 1985.

In compliance with para. (3) of art. 1 entitled "*Scope of application*", as it was adopted in 1985, by UNCITRAL Model Law, arbitration has an international character under the following circumstances:

- the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- one of the following places is situated outside the State in which the parties have their places of business: either the place of arbitration if determined in, or pursuant to, the arbitration agreement or any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The content of the notion of "*headquarters*" is explined in art. 1 para. 4 in UNCITRAL Model Law. If a contracting party has more headquarters, it will be taken into account that with the tightest connection to the arbitration agreement. If the same contracting party does not have a headquarters, the international character of arbitration will be established by referring to the common residence.

Thus, article I defines the aim of applying the Model Law by reference to the notion of "*international commercial arbitration*" and stipulates a comprehensive definition of the terms "*international*" and "*commercial*". This article extensively acknowledges the freedom of the parties to subject a dispute to the legal regime established according to the Model Law. Moreover, as regards the provisions in art. I in UNCITRAL Model Law a vast jurisprudence has been developed.

The defining characters of arbitration are internationality and arbitrability.

The international character imposes the previous definition of a national arbitration, because only in relation to this any other arbitration can be considered "foreign" or "international". The national arbitration regards a legal relationship whose elements are related to only one state. In the situation in which one of this elements concern a system of foreign law, the arbitration is no longer national, but becomes "international". What confers the arbitration an international character is first of all the nature of the disputed legal relationship; if this legal relationship has an international character, then also the arbitration that is required to solve the dispute is an international arbitration. The international character of the arbitration can be seen also from other perspective, that of the organization, of the structure, of the composition and of the functioning of the arbitration institution. In this context, the only institution that presents a real international character is the Court of Arbitration of the International Chamber of Commerce in Paris.

The arbitral character results from the fact that the parties agree to submit their dispute to private people, who, having the capacity of arbitrators, are entitled to decide on the claims invoked by the parties. Unlike the courts, the arbitration involves the previous agreement of the interested parties, expressed in a compromise or a compromissory clause, included in the contract concluded between parties. Thus, the power of the arbitrators to judge derives from the agreement of the parties, having contractual origin, even if in practice the arbitration covers a jurisdictional character which is more and more institutional**.**

The international arbitration is individualized through a double aspect, contractual and jurisdictional. According to the adopted conception, it is admitted that arbitration has a contractual or jurisdictional or eclectic nature.

The jurisdictional thesis sustains that the state, which has the legislative and jurisdictional monopoly, authorizes the parties, in certain matters, to return to arbitration, so that the arbitration represents a delegated form of justice, exercised by people that do not have the capacity of state employees.

In conformity with the contractual thesis, arbitration represents a totality of legal acts, of contractual nature. Within the limits of the law, the parties have the possibility to organize the dispute resolution by arbitrators. The powers of the arbitrators and their jurisdictional competence result from the agreement of the litigating parties, their agreement having normative value. The confidence that the parties have in arbitration is

explained through its contractual character, the parties having the freedom to establish the procedural conditions, the arbitration institution and the competent law.

Each of the two theses has been subject to criticism due to the unilateralism on the nature of arbitration. The eclectic conception admits that arbitration is governed in principle by the law applicable to the arbitration agreement, but with some corrective measures deriving from its jurisdictional side that entitles the incidence of the law of the forum.

Arbitration presents more jurisdictional forms. The criteria used in their classification consist of the following: the place of dispute resolution, the organizational structure, the powers conferred to the arbitrators, their material and territorial competence.

Thus, according to the place of dispute resolution:

The international arbitration regards a dispute resulted from a relationship of international private law or of international commercial law.

The arbitration of internal law refers to a juridical relationship without foreign elements.

According to the organizational structure:

Ad-hoc or occasional arbitration is an arbitration organized by parties for solving a certain dispute, out of a permanent institution of arbitration. The existence of the ad-hoc arbitration ends with the cause resolution, having a limited duration.

The institutional arbitration is a form of the arbitration whose existence does not depend on the duration of a certain dispute and which involves the exercise of the jurisdictional attributions uninterruptedly, being organized in an institutional framework by law, and having a permanent character.

According to the powers conferred to the arbitrators to solve the dispute:

Arbitration in law or *in jure* is done according to the law, like the courts do. The arbitrators will decide on a dispute, applying the corresponding norms. This form of jurisdiction represents the arbitration of common law in the matter.

Arbitration in equity or *ex aequitate* is done according to the judgment of the arbitrators. Through derogation from the common arbitration, the arbitrators decide on the base of the principles of equity, taking into account the requirements of the international commerce.

According to their material competence there are: *arbitrations with general competence* in the matter of commercial disputes and *arbitrations with specialized competence* in categories determined by disputes.

According to their territorial competence, arbitrations are divided in *bilateral arbitrations*, *regional arbitrations* and *international arbitrations*.

In the matter of arbitration, several conventions were signed at the international or regional level, whose effect is to establish the elements necessary for the validity of the arbitration agreement at the international level, the limits within they operate and the effects they produce until the end of the arbitration procedure and the execution of the sentence.

The first multilateral agreements were signed within the Society of Nations, such as the Protocol of Geneva in 1923 and the Convention of Geneva in 1927.

While the Protocol of 1923 aimed only at the enforcement of the arbitral awards in the state on whose territory they where made (domestic arbitral awards), Convention of Geneva in 1927 went further, stipulating that an arbitral award has to be acknowledged as

mandatory for the parties and that will be enforced at the international level under certain conditions.

The Protocol of Geneva in 1923 and the Convention of Geneva in 1927 have nowadays more historical interest than practical applicability.

The next important convention for the arbitration matters was the Convention of New York in 1958, referring to the recognition and enforcement of the foreign arbitral awards. The Convention was adopted on 10 June 1958 and came into force on 7 June 1959. The Convention was ratified by Romania in 1961, and currently is applicable in over 150 states.

Art. I para. (3) allows the states adhering to the Convention to make to reservations, i.e. reciprocity and commerciality reservations. Romania adhered to the Convention with these two reservations.

The European Convention on International Commercial Arbitration concluded at Geneva on 21 April 1961 aims at regulating the issues regarding the implementation and functioning of the commercial arbitration deriving from the contracts concluded between partners in the European countries, especially between Eastern Europe and Western Europe.

The European Convention does not refer expressly to the conditions and procedure of recognition, letting these aspects to be regulated by the Convention of New York.

Another international act of reference is represented by The Convention of Washington in 1965 on the Settlement of Investment Disputes between States and Nationals of Other States. This convention has as a main goal the foundation of mechanisms of conciliation and international arbitration in the matter of investments and establishing some rules applicable to conciliation and arbitration. Through the Convention of Washington it was created the International Centre for Settlement of Investment Disputes – ICSID.

Convention of Moscow of 26 May 1972 regulates the international effects of the awards made by the arbitration institutions, as well as their conditions and their enforcement. The Convention provides for the arbitral awards the national regime in the required state, in the matter of forced execution, eliminating thus the exequatur procedure, preliminary to the forced execution. The measures of enforcement are carried out according to the common law in the respective state, the convention regulating also the refusal of forced execution.

On 17 June 1976, the Convention of Panama entered in force, aiming at establishing a regulation of a regional framework meant to encourage the return to arbitration for the solving the disputes in commercial matters.

The most recent set of rules in the field is promoted by the United Nations Commission on International Trade Law (UNCITRAL). The Commission was founded by the General Assembly of the United Nations in December 1966 with the aim of ensuring "the progressive harmonization and unification of the legislation of the international trade".

The General Assembly of the United Nations, through the Resolution no. 31/98 grouped UNCITRAL Rules of Arbitration. As a preamble to UNCITRAL Rules of Arbitration, the General Assembly recommends the use of the rules of arbitration of UNO Commission on International Trade Law in solving the disputes arising in the text of the international trade relationship, mainly referring to the rules of arbitration in the

commercial contracts and requires the general secretariat to arrange the largest possible distribution of these rules of arbitration.

Organizing a form of facultative arbitration, UNCITRAL was adopted with the aim of ensuring the viability and the efficacy of this procedure. UNCITRAL rules of arbitration procedure were adopted and published in their final form by UNO General Assembly through the resolution of 15 December 1976, being meant for ad-hoc arbitration. The rules are acknowledged as one of the most important international instruments of contractual nature in the field of arbitration.

UNCITRAL Model Law for the international trade arbitration was adopted by UNCITRAL at 21 June 1985, playing an important role in the harmonization and improvement of the national laws. The Model Law covers all the steps of the arbitration proceedings from the arbitration agreement to the recognition and enforcement of the award and reflects a worldwide consensus on the major principles and elements of the international trade arbitration. This is accepted by the states of all regions and by various legal or economic systems all over the world.

The institution of arbitration is legally established in our law system, in the content of Book IV in the Code of Civil Procedure, called *About arbitration* (art. 541-621) in the content of Book VII *The international civil process*, Title IV *International arbitration and the effects of the foreign arbitration decisions*. The structure of Book IV of the new regulation includes seven Titles: *General provisions* (Title I), *Arbitration agreement* (Title II), *The arbitration tribunal* (Title III), *Arbitration procedure* (Title IV), *Setting aside the arbitral awards* (Title V), *Enforcement of the arbitration award* (Title VI), *Institutional arbitration* (Title VII). As regards the last title (VII), this was introduced through the new Code of Civil Procedure, as it did not exist in the old regulation.

In the case of the international arbitration, the common law provisions in the matter of the arbitration are completed by some specific provisions included in art. 1.122 Code of Civil Procedure, referring to Book IV.

The provisions of the Code of Civil Procedure are completed with the norms of the Law of the Chambers of Commerce in Romania, no. 335/2007. Art. 29 of the law stipulates the organization and functions, by the National Chamber of The Court of International Commercial Arbitration, permanent institution of arbitration and without legal personality. Art. 4 lett. I) indicates the express attribution of the chambers of the counties to organize the activity of solving the commercial and civil disputes through mediation and ad-hoc and institutional arbitration.

The activity of the Court of Arbitration is carried out according to the conditions of the Regulation of organization, and to the Rules of arbitration procedure.

CHAPTER II

MAIN REGULATIONS APPLICABLE TO THE ARBITRATION AGREEMENT

The arbitration agreement represents the main condition of arbitration, being considered to be the "cornerstone" of arbitration. Its conclusion represents the preliminary condition of the organization of arbitration, of the valid entrustment of the arbitral tribunal with the resolution of the dispute.

The Romanian law-maker does not define the arbitration agreement, but only stipulates its forms, its content and effects.

The Romanian Code of Civil Procedure dedicates to the arbitration agreement articles 548 – 554, found in Title II entitled *Arbitration agreement* in Book IV *About arbitration* which refers to the domestic arbitration and article 1.112 in Title IV *International arbitration and the effects of the foreign arbitral awards*, in Book VII *International Civil Trial*, referring to the international arbitration.

The Romanian law regulates expressly the two forms of the arbitration agreement, which is also defined expressly. Thus, according to art. 549 para. (1), the arbitration agreement can be concluded under the form of a compromissory clause, written in the main contract or established in a separate agreement, to which the main contract refers, or under the form of agreement. In compliance with the provisions of para. (2), which did not exist in the old code, the existence of the arbitration agreement can also result from the written agreement of the parties made in front of the arbitral tribunal.

The difference between the compromissory clause and compromise aims at the timeliness of the dispute. Thus the compromissory clause, also called arbitration clause, is an agreement previous to any dispute between parties, unlike the compromise that has as object already existing disputes.

The rules of arbitration procedure of The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania stipulate in art. 8 the two forms of the arbitration agreement: the compromissory clause and the compromise. Besides them, para. (6) in art. 8 also stipulates another type of arbitration agreement – the implicit arbitration agreement – consisting of the claimant's referral application and of the respondent's acceptance that this application should be solved by the Court of Arbitration. We consider that the respondent's acceptance can also be tacit, resulting from procedural documents such as: nomination of arbitrators, filing the first statement of defence in which is not invoked the lack of competence of the arbitral tribunal or other similar documents.

As regards the form of the elaboration of the arbitration agreement, both the old and the current Code of Civil Procedure and the Rules of arbitration procedure of

The Court of International Commercial Arbitration stipulate the obligatoriness of its existence in writing, under the sanction of nullity.

Para. (2) of art. 549 stipulates that, the existence of the arbitration agreement can also result from the written agreement of the parties in front of the arbitral tribunal and para. (6) of the Rules of arbitral procedure of The Court of International Commercial Arbitration state the following: the arbitration agreement can result also from the claimant's referral application and from the respondent's acceptance of this referral to be solved by the Court of Arbitration. The written form requirement is fulfilled through the referral application, which represents a written offer to solve the dispute by arbitration, followed by its acceptance through the first statement of defence or given in default, by recording it in the memorandum.

A novel stipulation that was received under certain conditions is included in art. 548 para. (2) in the Code of Civil Procedure. Thus, the mandatory requirement that an arbitration agreement be done in writing in front of a public notary is stipulated in the above mentioned article: in the case in which the arbitration agreement refers to a dispute connected to the transfer of the property right and/or constitution of another real right over immovable property, the agreement has to be concluded in an authenticated form at the public notary, otherwise it becomes null and void. If the requirement is not fulfilled, the arbitration agreement is null and void, and for the law it has never existed.

We consider that, in this case, the authenticated form is excessive, taking into account the fact that by the arbitration agreement the real rights are not changed or constituted, which is to be written in the real estate register, according to art. 1244 in the Civil Code: „*Except for the cases stipulated by law, there have to be concluded as an authenticated document, under the sanction of becoming null and void, the agreements that change or constitute real rights, which are going to be written in the real estate register*".

Consequently, it would be useful as a *de lege ferenda* proposal, the abrogation of the provisions of art. 548 para. (2), as there is no reason to preserve them. We should not forget that the UNCITRAL Rules of arbitration, which were reviewed and entered in force in 2010, eliminated, from the provisions of art. I(1), the obligatoriness of the conclusion of the arbitration agreement in written form.

The idea to give up the written arbitration agreement becomes more and more known at the international level, the oral form of the agreement gaining field. In this regard, the provisions of art. 548 para. (2) are excessive and unjustified and in contradiction with the international provisions in the field.

The mandatory requirement that an arbitration agreement should be done "*in written form*" is expressly included in art. 1.112 in Chapter I *International arbitral trial*, in Title IV *International arbitration and the effects of the foreign arbitral awards*.

According to para. (1) of art. 1.112, the arbitration agreement is concluded validly in a written form, through facsimile, telegram, telex, telecopy, electronic mail or any other means of communication that allows establishing its evidence in a text.

The Rules of arbitration procedure of the International Court of Arbitration, stipulates in art. 8 para. (1) the obligatoriness of concluding the arbitration agreement in a written form.

The principle of the autonomy of the compromissory clause is stated in art. 550 para. (2) and in art. 1.112 para. (3) of the Code of civil procedure.

This principle is reiterated within the rules of procedure of many institution of arbitration, being considered by some tribunals a *lex mercatoria*.

The independence of the compromissory clause from the contract that included it is a functional one, in the sense that its efficacy is not influenced by the timeliness of the contract of international commerce.

Yet, the compromissory clause is relatively autonomous from the contract in which it was inserted, because it cannot be conceived in the absence of the reference to the contract.

As regards the law applicable to the arbitration agreement, as in the case of other contracts the parties are free, on the grounds of *lex voluntatis* to choose the law governing the arbitration agreement.

Historically speaking, the condition of the written form is due in great part to the Convention of New York in 1958. Art. II para. 2 establishes that *"written agreement" means a compromissory clause inserted in a contract, or an arbitration agreement signed by the parties, or included in an exchange of letters or telegrams*".

The Convention of New York in 1958 does not regulate the issue of the autonomy of the compromissory clause from the contract that included it, only establishing in art. V para. 1 lett. a) that the law chosen by the parties govern the arbitration agreement, and in the absence of the parties'choice it is applied the law of the state where the award was made.

The notion of "arbitration agreement" imposed in the international regulations regarding arbitration, beginning with the adoption of the European Convention on International Commercial Arbitration on 21 April 1961, which defines also arbitration in art. I pt. 2 lett. b) as "*the regulation of the disputes not only by the arbitrators named for determined cases (ad-hoc arbitration), but also by permanent institution of arbitration*".

The condition of the written form is stipulated not only by the Convention of New York but also by the Convention of Geneva in 1961. Thus, according to art. I pt. 2 lett. a) of the Convention of Geneva, "arbitration agreement" means "*either a compromissory clause inserted in a contract, or an arbitration agreement signed by the parties, or included in an exchange of letters, telegrams or communications by telex, and, in the relationships between states whose laws do not require the written form for an arbitration agreement, any agreement concluded in the forms allowed by these laws*".

Convention of Geneva, as well as the Convention of New York in 1958, do not refer to the autonomy of the compromissory clause but establish in art. V para. 3, the rule according to which "*the arbitrator whose competence is challenged should not give up the trial; he has the right to decide on his own competence and on the existence or the valabilității of the arbitration agreement or of the contract which this agreement is part of*". This text reveals that the issue of the valabilității of the contract of international commerce does not influence the competence of the arbitral tribunal to make a decision, because the grounds for appreciating the arbitrators' competence are different from the elements that are examined in connection with the validity of the main contract. The compromissory clause is however relatively autonomous from the contract that included it, because it cannot be conceived in the absence of a reference to the contract.

Convention of Geneva and the Convention of New York distinguish in art. VI para. 2 and IX para. 1 lett. a) between the law governing the parties' capacity to arbitration and the law applicable to the other substantial requirements.

According to art. VI para. 2 of the Convention of Geneva, the judge who received the application has the right not to recognize the arbitration agreement if, in compliance with the forum law, the dispute is not susceptible of arbitration.

In conformity with para. 2 lett. a) in art. VI, in the case when there are applied the provisions of the Convention of Geneva, the arbitration agreement is subject to *lex voluntatis*.

If the parties did not specify the law applicable to the arbitration agreement, it will be governed, according to art. VI para. 2 lett. b) by the law of the country in which the arbitral award will be pronounced.

The technical evolution led to new means of communication, which generated at the international level an evolution of the legislation as regards the written form. A working group of the UN Commission proceeded to the review of the definition of the written form of the arbitration agreement in UNCITRAL Model Law. Starting with 2006 UNCITRAL Model Law was modified and article 7 referring to the written form was adopted in two variants.

In the first variant, which was partially taken over in the Romanian legislation too, it is established the necessity of concluding the agreement in writing and there are provided certain circumstances in which the arbitration agreement is considered written. In para. (4) of art. VII it is defined the term of "*electronic communications*": "any communication done by the parties through data messages", and *"data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy").*

The term of "communication" represents in the view of UNCITRAL Model Law, "*any communication*" and not "*an exchange*", as it is specified in the Romanian Code of Civil Procedure, which establishes that the written form is fulfilled if the proceedings to arbitration were established through exchange of correspondence. Art. II para. (2) in the Convention of New York din 1958 specified that "*The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*".

In 2006 UNICITRAL Commission decided that UNCITRAL Rules of arbitration must be reviewed in order to correspond to the changes in the arbitral practice in the last years.

The reviewed form was discussed and adopted in the final formula by UNCITRAL Commission during the 43rd session which took place between 21 June – 9 July 2010 in New York. UNCITRAL Rules of arbitration as they were reviewed in compliance with 15 August 2010.

The original version of art. 1 (1) established that the parties should have agreed upon referring their dispute to arbitration *in writing*, in conformity with UNCITRAL Rules of arbitration. This requirement was eliminated by art. 1 (1) in the reviewed form.

The courts occasionally applied art. VII in UNCITRAL Model Law, taking into account the conventions that stipulate arbitration in a foreign jurisdiction.

The principles that regulate the arbitration agreement and the substantial requirements in the courts are presented expressly in the provisions of art. 554 in the Code of Civil Procedure.

The court that receives a referral application whose subject matter is in an arbitration agreement will judge and will make the award according to its competence id all the parties or each party of the arbitration agreement requires it. If the parties of the arbitration agreement subject their dispute to a permanent institution of arbitration, the court will refer the parties to that institution. If the parties chose the ad-hoc arbitration the court will seize the legal procedures. The court will not refer the parties to arbitration if the arbitration agreement is null and void, inoperative or incapable of being performed, or if the defendant did not fulfill correctly the nomination procedure of the arbitrator. Any aspect regarding the probable competence of the court or of the arbitral tribunal will be examined by the higher court.

In compliance with para. (3) of art. II of the Convention of New York in 1958, the court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement, will refer the parties to arbitration, at the application in this regard of one of them, if it is not revealed that the agreement is null and void, inoperative or incapable of being performed.

Para. (1), (2) şi (3) of art. VI of the Convention of Geneva in 1961 stipulate that the exception based on the existence of an arbitration agreement and submitted to the court seized by either party of the arbitration agreement, shall be presented, under penalty of estoppel, by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seized regards this plea as one of procedure or of substance.

These provisions are included also in the provisions of art. 8 in UNCITRAL Model Law, a wide jurisprudence being developed on their base.

According to art. 542 para. (1), persons with full capacity of exercise can solve their disputes by arbitration, except for those regarding the civil status, the capacity of individuals, the inheritance divisions, the family relationships, as well as the rights the parties cannot exercise. State and the public authorities have the capacity to conclude arbitration agreements only if they are authorized by law or by international conventions to which Romania is a member. The legal persons of public law that have in their activity field also economic activities have the capacity of concluding arbitration agreements unless the law and their foundation or organization act stipulated otherwise (para. 2 and 3).

The provisions of art. 542 regulate the subject-matter of arbitration in the domestic arbitration and the provisions of art. 1.111 regarding the arbitrability of the dispute regulate the international arbitration.

Thus, according to 1.111 para. (2), if one of the parties of the arbitration agreement is a state, a state enterprise or a state-controlled organization, this party cannot invoke its right to challenge the arbitrability of a dispute or its capacity to be part of the arbitral proceedings.

The capacity of the state and of the public authorities to conclude arbitration agreement is also stipulated in art. 9 in the Rules of arbitration procedure of the Court of Arbitration attached to the Chamber of Commerce and Industry of Romania. The two paragraphs of art. 9 reproduce the provisions of para. (1) and (2) in art. 542 in the Code of Civil Procedure.

These aspects are regulated in the Convention of Geneva in 1961 in art. II.

CHAPTER III

MAKING OF AWARD AND TERMINATION OF THE ARBITRAL PROCEEDINGS. SETTING ASIDE AN ARBITRAL AWARD

In the domestic arbitration the principles that regulate aspects regarding the dispute resolution are expressly mentioned in art. 601 in the Code of Civil Procedure.

The arbitral tribunal solves the dispute on the grounds of the leading contract and of the applicable rules of law, according to the provisions of art. 5 in the Code of Civil Procedure. The arbitral tribunal can solve the dispute in equity (*ex aequo et bono*) only if the parties decided expressly to confer it such powers.

In the international arbitration the principles that regulate these aspects are expressly specified in art. 1.119 in the Romanian arbitration law. The parties have the freedom to establish the law applicable to the substance of the dispute. In the absence of such an agreement the arbitral tribunal will apply the law considered more appropriate.

In all the cases the arbitral tribunal will take into account the commercial usages and the professional rules, according to para. (1) in art. 1.119 in the Code of Civil Procedure.

The arbitral tribunal will have the role of *amiable compositeur* only if the parties agreed to confer it this power.

The provisions of art. VII (1) entitles *The applicable law* in the Convention of Geneva stipulate that the parties are free to choose the law that the arbitrators have to apply to the substance of the dispute. In the absence of the stipulation of the applicable law, the arbitrators will apply the law designated by the conflicting norm that they consider the most appropriate in the case. In both cases the arbitrators will take into account the contract stipulations and the commercial usages. The arbitrators will make decisions as *amiable compositeur* if this is the parties' will and if the law that regulates the arbitration will allow it.

Thus, according to art. VII in the Convention of Geneva, in the case in which the parties did not indicate the law that the arbitrators have to apply to the substance of the dispute, they will apply the law designated by the appropriate conflicting norm. The Convention of Geneva applies both to institutional and to ad-hoc arbitration.

According to the provisions in art. 28 "*Rules applicable to substance of dispute*" in Model UNCITRAL Model Law, the arbitral tribunal will decide on the dispute according to the law chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of the state and not to its conflict of laws rules. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the

parties have expressly authorized it to do so. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

As concerns the provisions of art. 28 there is much case law regarding the following aspects: the agreement of the parties on the law the tribunal will apply on the substance of the dispute, the power of the arbitral tribunal to decide *ex aequo et bono* and to take into account the terms of the contract and the commercial usages.

According to art. 567 in the Code of Civil Procedure, if the parties did not stipulate otherwise, the arbitral tribunal has to make its decision in term of maximum 6 months since its constitution, otherwise arbitration becomes null and void.

The arbitral tribunal can decide, for solid grounds, the extension of the term, only once, with maximum 3 months. The term extended by the tribunal under these circumstances cannot exceed 9 months. It must be specified that the term is lawfully extended when a party (natural person) dies. But also in this case the extension cannot go beyond 9 months.

In the international arbitration the duration of the terms established in Book IV is double.

In the domestic arbitration, the principles that regulate the aspects regarding the deliberation, pronunciation, the form and the content of the award are stipulated in art. 602-603, 605-607, 614-615 in the Code of Civil Procedure.

In all the cases, before the pronunciation of an award, the members of the panel will secretly deliberate, in the modality established in the arbitration agreement or, in the absence of such an agreement, in the modality foreseen by the arbitral tribunal.

The arbitral tribunal will make an award either immediately after deliberations or in compliance with a deadline. The pronunciation can be postponed with maximum 21 days, under the condition of compliance with the established term of arbitration, according to art. 567. The arbitral award will be done in writing and will include the elements stipulated in art. 602 in the Code of Civil Procedure. The arbitral award communicated to the parties is final and binding.

According to provisions art. 603 para. (3) (before the last amendment brought by Law no. 138/2014, which completed the article), in the case in which the arbitral award refers to a dispute regarding the transfer of the property right and/or the constitution of another real right on an immovable good, the arbitral award will be presented to the court or to the public notary, to obtain a court order or, according to the case, a document authenticated by the notary. Law no. 138/2014, which entered in force on 19.10.2014, completed the provisions of art. 603 para. (3) and added at their end the following: "*If the arbitral award is executed forcely, the verifications stipulated in the current paragraph shall be done by the court, according to the enforcement order*". Through this text, the law-maker establishes the competence of the courts to verify the arbitral awards which are executed forcely according to the enforcement order.

Law no. 138/2014 stipulates that there are enforceable titles the enforcement orders stipulated by art. 633 in the Code of Civil Procedure, the provisory enforcement orders, the final enforcement orders, as well as other orders or facsimiles which, in conformity with the law, can be enforced. In accordance with art. 633, there are enforcement orders: the orders made in appeal, if the law does not stipulate otherwise,

and the orders in the first instance, without appeal, or those on which the aprties agreed to directly exercise the recourse.

The new normative act states that can be enforced the arbitral awards accompanied by an enforcement order, even if they are attacked with the action for annulment, as well as other decisions of the institutions with jurisdictional attributions remained final, as a consequence that they have not been attacked in the competent court, if accompanied by an enforcement order.

After article 640 in the Code of Civil Procedure, Law no. 138/2014 introduces a new article, 640^1, entitled "*Enforceemnt order*", which stipulates that the enforceable titles, others than the the enforcement orders, can be enforced only if there is an enforcement order. The application for the enforcement order is solved in the court in which circumscription the creditor or the debtor has the residence or the headquarters, or if the case, in the council chamber by default. If the residence or the headquarters of the creditor is abroad, the creditor will be able to request the enforcement order also from the court in the circumscription where his chosen residence is.

Through the amendments brought to Law no. 138/2014, the law-maker restricted the area of the attributions of enforcement institution, to the resolution of the appeal against enforcement and to the the resolution of the incidents occurred during the forced execution (each case having its exceptions) and established the appeal, as a means of appeal. According to art. 655, as it was modified, the executor agrees upon the forced execution, by termination, without summoning the parties. The motivation of the termination will be done in maximum 7 days since the pronunciation.

As a consequence of these modifications, the attributions of the court regarding the approval of the applications for forced execution are taken over by the executors.

The arbitral award represents an enforceable title and, after the enforcement order, is executed forcely exactly like a court order. The request of the enforcement order is solved by the court in which circumscription arbitration took place, according to the new provisions of Law no. 138/2014. Once obtained the enforcement order, the arbitral award will be able to represent a ground for the record in the real estate register of the real rights on which the arbitral tribunal pronounced, in conformity with art. 888 in the Civil Code, as through the enforcement order it ganis the value of authenticated act.

As regards the provisions of art. 603 para. (3) in the Code of Civil Procedure, as a *de lege ferenda* proposal, we consider that it would be useful their abrogation and modification of art. 888 in the Civil Code, by adding the arbitral awards as a ground for adding the arbitral awards as a ground for the records in the real estate register.

There is no reason for which an arbitral award, refering to a dispute on the transfer of the property right and/or the constitution of another real right on an immovable good, shall be presented to the court or to the public notary in order to obtain an order or a notarized document. This provision of the Code of Civil Procedure unfortunately demonstrates the lack of confidence of the law-maker in arbitration and in its capacity to solve legally and final the disputes between the participants of the civil circuit.

A domestic arbitral award is pronounced by a court recognized by the state, so that this is the case of a private jurisdiction, which is recognized implicitly by a public court. Thus, we consider that it is not necessary the investment of the arbitral awards, with enforceable title. Hence, as a *de lege ferenda proposal*, we consider that it would be useful the modification of art. 615 in the following formula: "*The arbitral award*

represents an enforceable title and is executed forcely, like a court order". And according to the provisions in the Code of Civil Procedure, the court orders are not invested with enforcement formula.

If it is considered that this procedure is however useful, we propose that the enforcement order should be of the competence of the president of the court of arbitration, or of the president of the Chamber of Commerce and Industry of Romania in the case of the institutional arbitration. In the case of ad-hoc arbitration, as this does not function as a permanent institution recognized as such by *lex fori*, we consider that it should be competent for releasing enforcement orders, the president of the court that would be competent to judge the dispute in the absence of the arbitration agreement or the president of the competent court at the place of arbitration (this on the base of the principle *locus regit actum* and considering the fact that releasing of the enforcement order is a procedural issue, not of substance).

In the international arbitration the principle that regulates the above mentioned aspects are expressly stipulated in art. 1.120 in the Code of Civil Procedure. The enforcement of the arbitral awards will be based on the provisions of the Romanian law and on the Convention of New York in 1958.

Convention of New York in 1958 does not define the notion of arbitral award but specifies that there must be taken into account not only the awards made by the arbitrators nominated for certain cases, but also those made by permanent institutions of arbitration chosen by the parties. Consequently, the notion of arbitral award is going to be established according to the legal provisions legal in the required state, without being ignored the elements of reference retained within this convention.

As concerns the foreign character of the arbitral awards, two criteria are applied: a leading one and a subsidiary one. Thus, the foreign arbitral awards are those given on the territory of another state, different from that where it is required the recognition and enforcement of the awards, as well as the arbitral awards that are not considered as national awards in the state where it is required their recognition and enforcement.

According to the provisions of art. III in the Convention of New York, each of the contracting states will recognize the authority of an arbitral award and will grant the enforcement of these awards according to the rules of procedure in force on the territory where the award is relied upon.

The notion of "enforcement" in art. III has the exclusive meaning of the procedure of verification of the conditions of international regularity of the award and of the foreign tribunal that made it. The text refers to the procedure of preliminary control, called *exequatur*, not to the enforcement in the required state.

In the content of the Convention of New York, the conditions that must be fulfilled in the country in which the award is relied upon are regulated according to art V, without being made a difference between the recognition and the enforcement of the award.

The provisions of art. VIII "*Motivation of the award*" in the Convention of Geneva in 1961 establish that it is considered that the parties agreed that the arbitral award be motivated, except for the case when: the parties expressly declared that the awards should not be motivated or subject to an arbitral procedure within which it is not the custom to motivate the award and to the extent to which, in this case, the parties or one of them do not require expressly before the end of the debates or, if there were no debates, before the pronunciation of the award, that the award should be motivated.

According to the provisions of art. 29 "*Decision-making by panel of arbitrators*" in UNCITRAL Model Law, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

As regards art. 30, 31 and 32 in the UNCITRAL Model Law there are many case laws.

The principles that regulate the aspects concerning the clarification, completion and amendment of the arbitral award, the separate order are expressly specified in art. 594, art. 608 – art. 613 in the Code of Civil Procedure.

Arbitration is not made up of a system in the classical sense, comprising a judgement of first instance, followed by one or more means of appeal. This system can also presents errors or omissions, and some of them can harm the public policy, the morality or the imperative provisions of the law. That is why it is necessary that there is a control on the arbitral awards.

According to provisions art. 608 para. (1) in the Code of Civil Procedure, against the arbitral awards can be exercised only the setting aside action, and not other actions, respectively means of appeal. The parties cannot renounce through the arbitration agreement to the right to introduce the action for annulment against the arbitral awards. The renounciation at this right can be done only after the pronunciation of the arbitral awards.

The action for annulment can be introduced at the Court of Appeal in term of a month since the date of the communication of the arbitral awards. If the procedure of the forced execution was started, the Court of Appeal will be able to adjourn, at the request of the interested party, the enforcement of the arbitral awards. The decisions of the Court of Appeal pronounced according to para. (3) of art. 613 in the Code of Civil Procedure, are subject to recourse. The solutions that can be chosen by the Court of Appeal can be either of accepting or rejecting the action for annulment. If the action is accepted, the court will set aside the arbitral award, regardless of the reason for annulment. Thus, in the absence of the arbitrable character of the dispute, of an arbitration agreement, and of the pronunciation of the award over the established term led the case to be sent to the competent court to be solved, regardless the will of the parties. For other reasons, the court can retain the case to be judged or can refer it to the arbitral tribunal, if at least one of the parties expresses his will in this regard. Moreover, if the case remains to be judged by the Court of Appeal, this can act as an arbitral tribunal, rejudging in equity. The awards pronounced by the Court of Appeal are final.

In the context of the recognition and enforcement of the foreign arbitral awards, art. VI of the Convention of New York in 1958 establishes the following: If the application for the setting aside of the award has been made to the competent authority, the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

According to the provisions of art. IX in Convention of Geneva in 1961, setting aside in one of the contracting states of an arbitral award falling under the Convention will represent a reason for refusing the recognition or enforcement in another contracting state, if this setting aside was pronounced in the state in which, or according to whose

law, the award was made and this for one of the limitative reasons stipulated by the Convention.

According to the provisions of art. 34 in UNCITRAL Model Law, the legal recourse against an arbitral award can be done only by setting aside in conformity with para. (2) and (3) of the same article. Para. (2) stipulates the cases in which an arbitral award can be set aside. As concerns the provisions of this article, there are numerous case laws.

CHAPTER IV

GENERAL PROVISIONS REGARDING THE RECOGNITION AND THE ENFORCEMENT OF THE FOREIGN ARBITRAL AWARDS

The principles that regulate the recognition and the enforcement of the arbitral awards are expressly specified in art. 1.123-1.132 in the Code of Civil Procedure. According to art. 1.123, the *foreign arbitral awards* are *any arbitral awards of domestic or international arbitration made in a foreign state and which are not considered national awards in Romania*. In comparison with the previous regulation (the former art. 370 in the Code of Civil Procedure of 1865) it was added the specification that the domestic or international awards are aimed at.

The Romanian court, according to the elements of the case, has to establish the national or the foreign character of an arbitral award. Thus, at the verification of the condition that the arbitral award be pronounced in a state different from that of recognition, it must be done the distinction between the location of the arbitration institution and the place where the arbitration took place, respectively where the arbitrators signed the arbitral award.

An award is considered national or foreign according to the elements of connection to the place where it was pronounced (the parties' residence, the law applicable to the arbitration, etc.).

According to art. 1.110 in the Code of Civil Procedure, an arbitration dispute that takes place in Romania is considered international if it emerged from a private law relationship with a foreign element.

If the foreign arbitral awards will not be voluntarily enforced, they will be enforced in Romania according to the Romanian law and to the international conventions to which Romania adhered or ratified.

The most important international multilateral Convention is UNO Convention on the recognition and enforcement of the foreign arbitral awards, adopted at New York on 10 June 1958.

For certain matters, the recognition and the enforcement of the awards are regulated by The European Convention on International Commercial Arbitration concluded at Geneva on 21 April 1961, respectively by the Convention of Washington on the Settlement of Investment Disputes between States and Nationals of Other States, concluded at Washington on 18 March 1965.

On the basis of an application addressed to the tribunal in whose circumscription there is the residence or the headquarters of the party against which is made the arbitral award, any arbitral award is recognized and can be enforced in Romania if its subject-matter can be solved by arbitration and if the arbitral award does not contain provisions contrary to the public policy of the Romanian international private law.

In the case of impossibility of establishing the tribunal (stipulated in para. (1) of art. 1.125 in the Code of Civil Procedure) the competence belongs to the Bucharest Tribunal.

The request for the recognition of the foreign arbitral award can be done in the view of capitalizing the *res judicata* effects not only in the context of the so-called procedure of "*recognition of the foreign arbitral award*", but also in the context of any other procedure not necessarily connected to the recognition of such awards. In compliance of the provisions art. 1.126 para. (2), the recognition of a foreign arbitral award can be required also incidentally.

In conformity with art. 1.127 para. (1) the request must be accompanied by the arbitral award and the arbitration agreement in original or in copy, subject to the superlegalization, under the conditions stipulated in art. 1.092.

If the documents attached to the request are not in Romanian, the party will have to submit also their translation into Romanian, certified accordingly.

The recognition or the enforcement of the foreign arbitral award can be rejected by the tribunal if the party against which the arbitral award is invoked demonstares the existence of one of the following circumstances stipulated in art. 1.128 in the Romanian Code of Civil Procedure:

a) the parties did not have the capacity to conclude an arbitration agreement in conformity with the law applicable to each of them, established according to the law of the state where the arbitral award was made;
b) the arbitration agreement was not valid according to the law the parties subjected it or, in the absence of specifications in this regard, according to the law of the state where the arbitral award was made;
c) that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took;
e) the arbitral award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Yet, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized or enforced;
f) the 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, that award was made.

The recognition or the enforcement of the foreign arbitral award can be also rejected if the tribunal considers that the dispute cannot be solved by arbitration according to the Romanian law or that such a request of recognition/enforcement would be contrary to the public order according to the Romanian international private law.

The tribunal can adjourn the judgement of the recognition or the enforcement of the foreign arbitral awards if its setting aside or adjournment is required by the competent

authority in the state in which it was pronounced or in the state under the law of which that award was made. Thus, it is avoided the pronunciation of an arbitral award that cannot be fulfilled or whose enforcement cannot be revoked.

In the context of recognition and enforcement of the foreign arbitral awards, art. I (3) of the Convention of New York din 1958 stipulates that any state will be able that on a reciprocity base to declare that it will apply the Convention only to the recognition and enforcement of the awards pronounced on the territory of another contracting state. In conformity with art. III in the Convention, the contracting states will recognize the authority of the arbitral awards and will grant enforcement to these awards in compliance with the rules of procedure in force on the territory where the awards are relied upon. For the recognition or the enforcement of the arbitral awards to which the Convention applies, there will not be imposed more onerous conditions, nor much higher fees than those that are imposed for the recognition or the enforcement of the national arbitral awards.

Art. IV of the Convention stipulates the documents that should be submitted by the party applying for recognition and enforcement:

a) The duly authenticated original award or a duly certified copy;

b) The original agreement or a duly certified copy.

If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents. According to para. (2), "*the translation shall be certified by an official or sworn translator or by diplomatic or consular agent*".

Art. V indicates the reasons for refusing the recognition and enforcement of the arbitral awards.

Thus, the recognition and enforcement of the arbitral award will not be refused, at the request of the party against whom it is invoked, if the party furnishes to the competent authority of the state where the recognition and enforcement are requested:

a) that the parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made; or

b) that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized or enforced; or

d) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was nut in accordance with the law of the country where the arbitration took place; or

e) that the 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, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that:

a) in conformity with the law of that country the subject matter of the difference is not capable of settlement by arbitration; or

b) that the recognition and enforcement of the arbitral award would be contrary to the public policy of that country.

UNCITRAL Model Law stipulates in the provisions of art. 17 H, adopted in 2006, the conditions for the recognition of the interim measures, and in art. 17 I, the grounds for refusing the recognition or the enforcement. Art. 35 refers to the recognition and enforcement of the arbitral awards, and art. 36 to the grounds for refusing the recognition or the enforcement. These articles led to numerous case laws.

CHAPTER V

GENERAL PROVISIONS REGARDING THE CONVENTION OF NEW YORK IN 1958

The roots of the Convention of New York are to be found at the beginning of the 20th century. At that time arbitration was acknowledged as an effective method for solving the international disputes.

The idea of an international agreement able to unify the laws in the field of arbitration emerged at the International Congress of Chambers of Commerce at Paris in June 1914. In the years following WWI this idea was taken over by the newly founded International Chamber of Commerce.

At the ICC Congress at Rome in 1923 it was stressed the importance for the practice of the international commercial arbitration that the validity of the arbitral clauses in the international contracts should be complied with. It was expressed the support for the actions of the League of Nations that had required to the member states whose legislations or practices were contrary to the arbitration agreements between traders to take measures to encourage the inclusion of such agreements in the international contracts and to ensure the protection of the parties that wanted to achieve this goal.

The Congress of Rome adopted a resolution that stipulated that ICC recommendation, based on the previous resolutions, was that one or more international conventions should be negotiated as soon as possible, involving as many states as possible, especially those with a strong economy. Such conventions were meant to force the enacting states to recognize and to grant compulsory character to the clauses in the international commercial contracts.

ICC recommendation came into force and six month later the Assembly of the League of Nations at Geneva approved the Protocol on arbitration clauses. The Protocol came into force on 28 July 1924 and it was ratified by many commercial nations dominant in Europe, the main exceptions being the United States of America and USSR. With eight articles, this Protocol made the enacting states recognise the validity of the arbitration agreements regarding present or future disputes between parties belonging to various enacting states. The Protocol included also short provisions regarding the arbitration procedures and the enforcement of the awards. According to its provisions, the enforcement of the awards was compulsory, but only for the state in which the award was pronounced. The Protocol did not refer to the enforcement of the foreign arbitral awards.

At ICC recommendation, the Economic Committee of the League began to work for the elaboration of a supplement of the Protocol in 1924. On 26 September 1927, The Convention for the Enforcement of the Foreign Arbitral Awards was approved by the

Assembly of the League of Nations at Geneva and entered in force on 25 July 1929. The list of the states that ratified the Convention was similar to that attached to the Protocol in 1923, USA and USSR being again absent.

The Convention in 1927 at Geneva obliged the enacting states to recognize as mandatory and to enforce any arbitral award given in compliance with the recognized arbitration conventions acknowledged in conformity with the Protocol regarding the Arbitral Clauses in 1923.

The Convention subjected the recognition/enforcement of the arbitral awards to more conditions:

1. That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
2. That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;
3. That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
4. That the award has become final in the country in which it has been made;
5. That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon;
6. That the award has been annulled in the country in which it was made;
7. That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
8. That the award should have been made according to the mandate conferred to the arbitrators – [i.e. neither *ultra* nor *plus petita*];
9. That there should be no any other reason stipulated by the law governing the arbitration procedure that would entitle a party to challenge the validity of the award in court.

To demonstrate that the award satisfy these conditions, the party relying upon an award or claiming its enforcement must supply not only a copy of the award, but any other evidence to prove that the award has become final in the state where it was made and that certain aspects from those above mentioned have been covered.

Although the Protocol in Geneva in 1923 and the Convention of Geneva in 1927 were described as a huge success, they had their limits and contained only vague provisions due to the political circumstances in which they were elaborated and to the difficulty to obtain the agreement between the involved states.

ICC proceeded to drawing up a *preliminary draft Convention*", contains 10 articles. ICC text limited the application the Convention to the commercial disputes and abandoned the principle of reciprocity established by the Protocol and Convention of Geneva, in which the dispute had to be between parties belonging to the enacting states. ICC subjected the draft Convention to the UNO Economic and Social Council that took it over with the view of ending the work begun with the League of Nations with the Protocol and the Convention of Geneva. After receiving the ICC draft, the UNO Economic and Social Council decided to form an ad-hoc Committee to study the problem

of enforcing the international arbitral awards and to propose a draft of Convention if necessary. This Committee was composed of representatives of eight countries with special qualification in the field: Australia, Belgium, Ecuador, Egypt, India, Sweden, Great Britain and The Soviet Union. The Committee decided to prepare a new convention. Using ICC draft as a work base, the Committee made more important changes. Consequently, it was decided the organization of a conference at UNO headquarters in New York, in the view of adopting a convention on this regard.

The Convention of New York came into force on 7 June 1959. According to art. XII of the Convention, the enacting states were bound by the convention at the date of its entry in force, on 7 June 1959 or 90 days after the date of deposit of the instrument of ratification or accession.

Romania adhered to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, adopted at New York, on 10 June 1958, by Decree no. 186, published in The Official Journal no. 19 on 24 July 1961, under the following conditions:

- Romania made a reciprocity reservation as regards the awards pronounced in the non-contracting states. In such cases, Romania will apply the Convention according to the reciprocity established through agreement between Romania and the non-contracting state.
- Romania made a commerciality reservation as regards the commercial relationships. The Convention of New York of 1958 will be applied in Romania only on the disputes emerging from the legal relationships, contractual or not, and which are considered commercial according to its national laws.

In order to establish if an arbitral award or an agreement falls under the Convention, a court should find if it is qualified as an arbitration agreement or arbitral award. In the text of the Convention, there is no definition of the term of *arbitral award*.

The courts adopted two different methods to establish the meaning of the terms *award* and *agreement*. Either they choose the autonomous interpretation or refer to the national law using the method of the conflicts of law.

As regards the autonomous interpretation: the first step consists of establishing if the pending trial is qualified as *arbitration*, while the second step consists of checking if the award is qualified as *arbitral award*.

In the situation in which, without using the autonomous method, a court prefers to refer to the national law, this will begin by establishing which national law will govern the definition of arbitral award. In other words, it will be used the method of conflict of laws. It could apply either the own national law (*lex fori*) or the law governing the arbitration (*lex arbitri*). The latter will be in general the law of the location of arbitration and less frequently the law chosen by the parties to govern the arbitration (not to be mistaken for the contract between the parties and the law applicable to it).

Art. II (1) of the Convention of New York establishes that it is applied to the agreements in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

The use of the words *which have arisen or which may arise* indicate the fact that the Convention covers both the arbitral clauses contained in the contracts and the possible future disputes, as well as the agreements referring to the resolution by arbitration of the existing disputes. According to art. II (1), the arbitration agreement has to refer to a specific legal relationship. This requirement is certainly fulfilled in an arbitral clause in contract regarding the dispute emerged from that contract. *Per a contrario*, the condition would not be fulfilled if the parties subjected to arbitration any existent or future dispute on any possible aspect.

Article I (1) of the Convention defines the field of application (the area of territorial competence) of the Convention of New York as regards the arbitral awards. The Convention deals only with the recognition and enforcement of the foreign and non-domestic arbitral awards.

According to the provisions of the Convention of New York, there are two types of foreign arbitral awards, i.e.: arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought. The reason for this difference of interpretation consists of the status of the foreign arbitral awards (domestic or foreign), from the perspective of various doctrines and of some different approaches of the national laws.

The Convention of New York does not define its objective of application as regards the arbitration agreements. Yet, it is well established that this Convention does not govern the recognition of the arbitration agreements. It is also accepted the fact that this Convention is applicable if the future arbitral award will be considered foreign or non-domestic according to art. 1 (1).

As regards the conditions established in art. I (3), the Convention applies to all the foreign or international arbitration agreements and to all the foreign or non-domestic awards. However, the contracting states can make two conditions regarding the application of the Convention. According to the reciprocity reservation, the contracting states can declare that they will apply the Convention only for the recognition/enforcement of the awards made on the territory of another contracting state. In conformity with the commerciality reservation, the contracting states can declare that they will apply the Convention only to the differences emerged from legal relationships, whether contractual or not, which are considered commercial according to the national law of the state making this declaration. In order to solve the conflict that might arise between the provisions of the Convention of New York and of the national law, the Convention of New York proposes an original solution. This dispute must be always solved in the favour of the provisions more favourable to the recognition and enforcement of the arbitral award. The source of this solution is found in article VII of the Convention, which, in para. 1 refers to the relationship between the Convention and the national laws of the forum and other international treaties with legal effect on the state where the enforcement is aimed at. The judge cannot reject such an exequatur request when his national law authorizes him to accept it or when he is authorized through the provisions more favourable that the Convention of New York, even if his national law is opposed.

In case of conflict between the two international conventions, the classical solution is to apply that which is either the most recent or the most special. In the matter of international arbitration, there is however another rule, that of the maximum efficacy.

The conventional norm that will prevail will always be the most advantageous, by its content, for the recognition of the validity of the arbitration and for the enforcement of the award. The first part of article VII stipulates that the Convention does not affect the validity of other international treaties as regards the recognition and enforcement. The second part of the same article stipulates that the parties have the right to request the recognition/enforcement of an award according either to the Convention of New York, or to other treaty or national law, whatever they consider more favourable. The principle of the more favourable law derives from the classical norms of international law regarding the treaties in conflict (*lex posterior* and *lex specialis*). In conformity with this principle, the most favourable prevails.

As regards the relationship between the Convention of New York and the national law of the state requesting the enforcement, three situations can be distinguished:

- the Convention of New York and the national law contain both provisions concerning the same aspects. In this case the provisions of the Convention prevail, except for the case in which the national law is more favourable;
- the Convention of New York does not contain any provisions regarding this issue. In this situation the court will apply the national law;
- the Convention of New York refers explicitly to the national law. In this case, the court has to apply the national law up to the limit allowed by the Convention.

Non-application or the incorrect application of the Convention of New York involves in principle the international responsibility of the states. Any breach of the state obligations assumed according to the Convention can represent under certain circumstances, a breach of a multilateral or bilateral treaty. Anyway, the awards will not be affected by these breaches.

Although the Convention of New York does not have a clause regarding the dispute resolution, this is an international treaty which creates obligations for the contracting states according to the international legislation. Thus, the contracting states the recognition/enforcement of the foreign arbitral awards and the recognition of the arbitration agreements. When one of the parties requests either the recognition of the arbitration agreement or the recognition/enforcement of an arbitral awards, falling under the Convention, a contracting state has to apply the Convention of New York. This does not impose stricter procedural rules or more rigid substantial conditions for the recognition/enforcement, and where the Convention does not specify the rules of procedure, the state does not impose more onerous procedural conditions than those governing the domestic awards. In the contracting states, the main institutions with the duty to apply the Convention of New York are the courts (tribunals, courts of justice). In the international legislation, the documents of the tribunals are regarded as acts of the state itself. Thus, if a tribunal does not apply, misapply or gives serious reasons fro refusing the application of the Convention, the forum state engages international responsibility.

According to the circumstances, a breach of the obligation of recognition/enforcement of the arbitration agreements/awards can lead to the breach of another treaty. It could be the case of the European Convention on Human Rights and especially of its first Protocol and as the recent events showed, the treaties of investment, through which the states guarantees the foreign investors, among other protections, the fact that will receive

an equitable and just treatment and they will not make the object of expropriations (with certain exceptions).

An award is not affected by the refusal of a state to recognize/enforce that award by the breach of the Convention of New York. The award is binding only on the territory of the state on which it was pronounced. The party that wins has the right to request the award enforcement in other states.

CHAPTER VI

RECOGNITION AND ENFORCEMENT OF THE ARBITRAL AWARDS ACCORDING TO THE CONVENTION OF NEW YORK IN 1958

Art. I (1) define the field of application of the Convention of New York. The Convention deals with the aspects regarding the recognition and enforcement of the foreign and non-domestic arbitral awards. It is not applied to the recognition and enforcement of the domestic awards.

The Convention does not contain similar provisions in relation to the *arbitration agreements*. Yet, it is established that the Convention is applied only to the foreign or international arbitration agreements.

The application of the Convention is however limited through the two conditions established through article I, para. 3: reciprocity reservation and commerciality reservation. Romania ahered to the Convention with the two conditions.

The first condition involves the fact that in Romania can be recognized and enforced on the basis of the Convention only those foreign arbitral awards which are pronounced in disputes emerging from the commercial relationships, whether contractual or not, which are considered commercial according to the national law of Romania. In 1961, when Romania adhered to the Convention, the Commercial Code was in force. At the entry in force of the current Civil Code the Commercial Code was expressly abrogated by art. 230 in Law no. 71/2011 for the enforcement of Law no. 287/2009 regarding the Civil Code. In the doctrine it was considered that also after the entry in force of the current Civil Code on 1 October 2011, the notion of trader was preserved. The legal regime of the acts belongs however – from the perspective of the civil legislation – to the professionals.

As regards the situation of the notion of commercial acts and facts, these are not regulated anymore after the abrogation of the Commercial Code. The new regulation discusses only the acts and facts of the professionals, a larger category, including also the traders. The new Civil Code does not include an enumeration of some facts or acts equivalent to the objective commercial acts, previously regulated by the Commercial Code. Thus, the single criterion according to which the commercial legal relationships could be defined from the perspective of the current Civil Code would be the subjective one, respectively the legal relationships emerged from the traders' acts and facts. Romania clearly consented to the adhesion to the Convention of New York, even if with the condition of applying it only to the disputes emerging form commercial legal relationships. The modification of the domestic legislation cannot affect implicitly this consent, but only explicitly. Thus, a modification of the condition of Romania, according to the new internal regulations, would seem useful, but there would be some difficulties

in its application both from the perspective of the domestic law and of the international public law. The intention of Romania at the date of adopting the Convention was to give legal effects to the Convention, but as regards the disputes emerging from the commercial legal relationships. The Convention of New York allows making conditions as regards the commercial legal relationships, but not as concerns any category of legal relationships. That is why, according to some authors, "*mentioning the commercial legal relationships in the condition of Romania to the Convention is going to be interpreted, in the context of the current legislation, as referring exclusively to the legal relationships between traders. In other words, independently from the evolution of the doctrine as concerns the distinction between commercial law and civil law, it will be preserved a definition of the commercial legal relationship, in the context of applying the condition of Romania to the Convention, but only circumscribed to the definition of the field of application of the Convention. This definition of the commercial legal relationships can be done, in considering the current legislative framework, exclusively from the subjective perspective, i.e. referring to the participants to this relationship, with the elimination from the definition of the objective element connected to the commercial facts, whose enumeration is not found any more in the Romanian legislation in force*".

Consequently, taking into account the difficult of defining the commercial legal relationships from the perspective of the current legislation, following the unification of the private law, we propose *de lege ferenda* that it would be useful the express modification of the conditions of Romania to the Convention of New York, in the sense of renunciation to the condition referring to the application of the Convention only to the disputes emerging from commercial legal relationships.

The second condition is the reciprocity reservation. The reciprocity reservation establishes a restriction in the application of the Convention of New York, authorizing the states applying it to recognize and to enforce only the arbitral awards made by other state that signed the Convention. When the states adopt the Convention on the basis of reciprocity, they commit to enforce only the awards of the Convention with the exclusion of the awards pronounced in the non-contracting states.

As Romania adhered to the Convention, with the reciprocity reservation, the Romanian judge has the obligation to verify if the condition is met before recognizing to a foreign arbitral award the legal effects on the Romanian territory.

Art. II (1) of the Convention of New York defines the arbitration agreement and its main parameters and obliges the contracting states, particularly the law-maker and their courts to recognize such an agreement. Art. II (2) defines and tries to harmonize an important requirement for arbitration agreement, i.e. that of being done *in writing*. Art. II (3) obliges the courts in the contracting states to take into account the signalled aspect of arbitration if these aspects are covered by a valid arbitration agreement.

Art. II, like the rest of the convention, is addressed to the contracting states and their courts not to the arbitral tribunals. In most of the cases, however, the arbitral tribunals will take into account the requirements of art. II, to ensure the recognition and enforcement in all the contracting states.

Article III of the Convention of New York allows each member state to recognise and to enforce the arbitral awards in conformity with its own rules of procedure, on the condition of complying with the requirements of articles IV and V. These provisions establish that the member states have the duty not to impose more difficult conditions or

much higher fees, in comparison with those imposed for the recognition/enforcement of the national arbitral awards.

The conditions stipulated in article III are strictly procedural and do not refer to the reasons for refusing or opposing the exequatur which are settled exhaustively by article V. the rules of procedure stipulated in article III regard the formalities applicable or the exequatur request, the establishment of the competent authority to authorize the recognition or the rules that prescribe a certain term for obtaining exequatur.

The Convention of New York does not have a limitation period for the requirement of recognition and enforcement of the foreign arbitral awards. In most of the states in which are applied the provisions of the Convention, there is no limitation period for the application of such requirements. In the states with different procedures, one for the recognition and one for the enforcement, if for the application for the recognition is not stipulated a limitation period, the request for enforcement is affected by such a limitation period, varying between 3 months and 30 years. The most frequent terms are of 3, 6 and 10 years.

Article IV of the Convention of New York in 1958 contains the formalities that have to be met when it is made an application for the recognition/enforcement of arbitral awards. This article stipulates the probative documents that have to be submitted by the party requesting the recognition/enforcement.

Art. IV (1) requires the party aiming at the enforcement to present the original award, duly authenticated or a copy of the original, which should meet the conditions for its authenticity. The term "*award*" is not defined by the Convention of New York.

Another requirement of art. IV is that the claimant should present the arbitration agreement, either in original or in copy certified accordingly. In conformity with art. II (2) which defines an agreement, even a contract containing an arbitral clause, an arbitration agreement signed by the parties, or included in an exchange of letters or telegrams has to be submitted to the court. A telecopy (even if it is not specified in art. II because this technique did not exist in 1958) was considered equal to a telex.

The Convention of New York does not define what is required for authentication or certification. This led to a certain uncertainty and to conflicting decisions of the courts. The term *authentication* essentially means a confirmation that the award is real (original) and was given by arbitrators. This usually requires a confirmation of the fact that the signatures of the arbitrators are authentic, as it derives from the discussions of the delegates to the drawing-up of the Convention of New York to know if the agreement should be subject to a similar request.

A copy is considered certified if an authority (for example notary) "*swears*" that it is a real copy of the original. To give such a confirmation, the person that certifies has to see the original. The Convention of New York does not specify which law governs certification. As it obviously derives from the drawing-ups of the convention the delegates intended to allow the states to enforce the option to allow certification either under the law of the country where the award was given or under the law of the court for the enforcement.

Art. V of the Convention establishes imitatively the cases in which can be refused the recognition and enforcement of the arbitral awards. Art. V mentions two different types of reasons: those at pt. 1 have to be invoked by the defendant, while the reasons at pt. 2 must be taken into account by the court *ex officio*. There is the possibility of an overlapping

of these two categories. Most of the reasons stipulated in art. V (1) can in principle represent also procedural violations of the public policy, in conformity with art. V(2)(b).

The two reasons for the recognition or enforcement of an arbitral award according to art. V(1)(a) are the incapacity of one or both parties and the invalidity of the agreement to which art. II refers, i.e. the arbitration agreement.

In conformity with art. V(1)(a) the incapacity of any party represents a ground for refusing the recognition /enforcement of the award. The capacity concerns the quality of the person to enter contracts or to be subject to arbitration, by party being understood a natural, legal person, a government or a public entity (aspect called also subjective arbitrability).

According to the second reason stipulated by art. V(1)(a) a foreign arbitral award cannot be recognized/enforced if there is no valid arbitration agreement. This observation plays an important role in practice. The validity of the arbitration agreement according to art. V(1)(a) has to be analyzed separately from the validity of the leading contract. This doctrine of the separability is found in many countries of common law and civil law and it is applied under the Convention of New York. According to this principle, the termination of the leading contract does not represent *ex ipso* the termination of the arbitration agreement.

In conformity with the provisions of art. V (1)(b), the recognition and enforcement of the awards can be refused if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrators or of the arbitration proceedings or was otherwise unable to present his case.

The third reason is stipulated in art. V (1) (c) of the Convention of New York: the award refers to a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized or enforced.

Art. V(1)(c) applies when there is a valid arbitration agreement, but beyond the competence of the arbitral tribunal. It is based on the principle that the arbitral tribunal derives its authority from the parties' consent and it is entitled not to exercise more power than the parties' agreement allows. This article does not deal with the validity of the arbitration agreement, discussed in art. II and art. V(1)(a). Moreover, it is applied to those cases in which there is a valid arbitration agreement but the tribunal decided on issues not stipulated in the arbitration agreement.

The recognition and enforcement of an award can be refused according to art. V(1)(d) if the composition of the arbitral tribunal or the arbitration procedure were not in accordance with the *agreement* of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. The reason mentioned in art. V(1)(d) interferes with those in art. V(1)(b) and (2)(b) because the lack of the correct notification (a reason according to art. V(1)(b) can break *the agreement* of the parties or the applicable law and even the public policy). In conformity with art. V(1)(d) the court has to analyze first *the agreement of the parties*. The court should verify the law of the country where the arbitration took place if the parties did not reach an agreement as regards the relevant issues. In compliance with art. V(1)(d) the parties' autonomy has priority over the law of the place of arbitration. In practice, art. V(1)(d)

was rarely invoked successfully in courts for the enforcement because in general the parties agree on the composition of the arbitral tribunal and because usually the tribunal enjoy a large freedom in choosing the arbitral procedure. Moreover, the courts established that the party invoking a breach of the law, such as the lack of the proper notification, has the duty to demonstrate this thing.

In conformity with the provisions art. V (1) (e), the recognition and enforcement of the award will not be refused, at the request of the party against whom the award is invoked, unless he proves in front of the competent authority of the state where the recognition and enforcement are requested that the 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, that award was made.

Art. V(1)(e) establishes three different reasons that allow the court to refuse this thing: the arbitral award has not yet become binding on the parties, the award has been set aside by a competent authority of the country in which, or under the law of which, that award was made, or it has been suspended. The court and the authors confirmed almost unanimously that through the use of the term *binding* in art. V(1)(e) of the Convention of New York, it was meant the elimination of the request of the double exequatur.

Art. V(2) of the Convention of New York deals with two different aspects. The first is the arbitrability and the second is the violation of the public policy. While the concept of pubic policy may also include arbitrability, historical reasons led the makers of the Convention to deal with arbitrability separately.

Many countries of civil law consider an arbitral clause if the parties have the capacity to exercise their rights and to reach an agreement. The countries following this line are France, Italy, Jordan and Egypt.

Art. V(2) (a) clearly specifies that the enforcement of an arbitral awards can be refused if its object is not arbitrable according to the laws of the state for the enforcement. The aspect of arbitrability reaches specific national interests of a state in allowing or not the arbitration in the case of certain disputes. If such a dispute is not considered arbitrable according to the law of the place of arbitration, the courts of that place can either set aside the award or refuse the recognition of an arbitration agreement in conformity with art. II(3) of the Convention of New York.

In compliance with the recommendations in the field, the public policy should include: a) fundamental principles of justice and morality that a state wants to protect; b) rules created to protect essential interests on the social, political or commercial level of the state; c) the duty to comply with the obligations assumed towards another state (obligations in the international law) or towards international organizations. Convention of Geneva contained a clause regarding the public policy in art. 1. The clause regarding "*public policy*" included in the Convention of New York does not contain a reference to the "*law principles*" as Convention of Geneva did. This reference was intentionally abandoned and the proposal of Brazilian delegation to introduce it was negatively voted.

It is important to notice that under art. V(2) "*recognition or enforcement of the award*" to violate the public policy. The court does not have to establish if the whole award violates the public policy, but has to analyze if the enforcement would produce a result breaking the public policy.

Art. VI of the Convention stipulates that if the set aside or the suspension of the award is requested to the competent authority aimed at article V, para. I, lett. e, the

authority in front of which the award is invoked can, if considers appropriate, to adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Art. VII (1) of the Convention allows the interested party to base its exequatur request on the provisions of the laws of the state where the recognition and enforcement of the foreign arbitral awards are aimed at. Art. VII (2) establishes that the Protocol of Geneva in 1923 regarding the arbitration clauses and the Convention of Geneva in 1927 for the enforcement of the foreign arbitral awards will stop producing effects between the contracting states since the day and to the extent to which these states will be bound by the Convention.

In conclusion, we consider that the procedure implemented by the Romanian law as regards the recognition and enforcement of the foreign arbitral awards is more complicated that the procedure established by the Convention of New York.

Thus, while the Convention of New York introduces only one set of conditions that the requests for the recognition and enforcement of the arbitral awards must comply with, establishing at the same time similar conditions for refusing to approve the requests for the recognition and enforcement, the Romanian Code of Civil Procedure introduces two separate procedures, one for the recognition and one for the enforcement of the foreign arbitral awards. According to this Code, the party has to request first of all the recognition of the foreign arbitral award, and once the award is recognized and it has the authority of a judged thing (*res iudicata*), in the absence of a volunteer enforcement, the parties have to request the executor, the approval of the forced execution, after the arbitral award received the enforcement order. The procedure of the recognition and enforcement has a litigation character, the parties are summoned, and the award can be attacked only by appeal.

We consider that it will be useful in the future to find a solution in the view of the unification of the two procedures stipulated by the Romanian law and renouncing at the current dualism.

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