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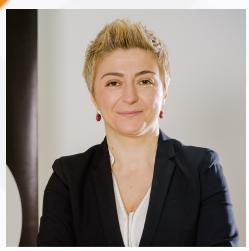

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# PUBLIC POLICY: THE RECOGNITION AND ENFORCEMENT OF THE ARBITRATION AWARD IN ALBANIA

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Arbitration has undoubtedly been recognized as one of the most effective alternative dispute resolution methods in contemporary international business, mainly because of the many intrinsic advantages it possesses over judicial adjudication of disputes. Globalization of the economy and the increase of cross-border commercial activities have created an optimal environment for arbitration to flourish as a tool in the hands of companies, businesses, and investors, who increasingly demand swift, confidential, and enforceable decisions rendered by expert judges while simultaneously dodging the procedural hurdles inherent to ordinary judicial procedures.

While the theoretical advantages of international arbitration are undeniable, ambiguous obstacles to the enforceability of arbitration awards can compromise their practical viability. These obstacles mainly arise due to the involvement of national courts in the arbitration process. Generally, arbitrations are regulated by national law; hence their enforceability has a close relationship, both statutory and procedural, to national courts.[1] As such, arbitration awards need to survive certain legally established conditions to be successfully enforced. These conditions generally reflect the grounds for rejection of enforcement set out in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter referred to as the 'New York Convention'). The latter's provisions have been implemented in the national legislation of most countries that are signatory to the New York Convention and the UNCITRAL Model.[2]

Of particular importance for the scope of this article is Article V(2)(b) of the New York Convention, enshrining public policy as a ground for challenging the enforcement of an international arbitral award. While the provision attempts at endowing national courts with the necessary "checks and balances" power over the arbitration process[3], it concurrently permits potential inconsistencies and uncertainty regarding the finality of an arbitral award. Public policy is a fluid concept, changing through time and location. Its notoriety stems precisely from the difficulty in pinpointing the essence of such a concept, given that a unified, authoritative definition is unlikely to be promulgated. As such, the interpretation and subsequent application of the public policy exception are entirely dependent upon the state's laws in which enforcement of the arbitral award is sought and on the particular judge/court exercising their interpretative authority provided by such laws.[4]

However, despite the looming uncertainty surrounding the notion, public policy has been narrowly interpreted by developed arbitral jurisdictions. Generally, arbitration-friendly jurisdictions pose greater importance on business facilitation and thus on efficient enforcement of adjudications resulting from alternative dispute resolution mechanisms. This pro-enforcement attitude towards arbitral awards has usually been considered a stand-alone element of public policy itself. Hence, two seminal cases from the USA can serve as a good illustrative tool for showcasing a pro-enforcement attitude. These cases are *Scherk v Alberto-Culver Co*[5] and Parsons & Whittemore[6]. In rendering its judgment in the first case, the Court held that not enforcing the arbitration agreement at *hand "would reflect a parochial concept that all disputes must be resolved under our laws and in our courts,"* while the judgment of the latter case can be regarded as a step further from the reasoning in the first case, whereby the judges held that rejection of the enforcement of a foreign arbitral award on the ground of public policy could only occur *"where enforcement would violate the forum state's most basic notions of morality and justice."* As per the Court in both cases, doing otherwise would seriously undermine the utility of the New York Convention.

However, as theory has predicted and practice has shown, wider and more lenient interpretations of the public policy exception are not uncommon. While a looser interpretation of the concept poses some threats to the international arbitration's utility, it must be noted that not all enforcement rejections based on public policy grounds are wrong or detrimental *per se*. One such instance is best described by the case of *Soleimany v Soleimany*[7], whereby the British Court ruled against the enforcement of the arbitral award given that the contract whereby the clause was contained was based on tax evasion, and as such, was contrary to the public policy of the UK where the enforceability of the award was sought. Ultimately, however, as stated above, interpretation and subsequent implementation will depend on many factors, potentially also outside the ambit of the law.

Against this theoretical backdrop, we now turn to a snapshot of the Albanian legislative framework regarding arbitration, both in relation to domestic situations as well as the international scenario. Domestic use of arbitration continues to be an uncommon venue for resolving disputes in Albania. The vast majority of disputes arising in a domestic scenario are addressed and eventually resolved through the deployment of classical judicial mechanisms, which in turn are particularly slow and subject to frequent reformations. This can, in turn, be interpreted as one of the main reasons contributing to the poor legal framework governing domestic arbitration in Albania, which is subsequently accompanied by a lacking offering regarding arbitration services by chambers and/or arbitration institutions in Albania.[8]

Until recently, Albania relied on the Code of Civil Procedure rules, and more specifically on Articles 400 to 438 of the latter, to govern the domestic arbitration procedure. However, as part of the Code amendments, the Chapter on arbitration, where the above-mentioned Articles were contained, was repealed. Still, the repeal becomes effective at the moment the new law on arbitration is enacted.[9] While the new law

on arbitration has not yet been approved by the Albanian Legislator, a draft of the law has been put forward for consideration. Despite domestic arbitration still being possible in practice, there is a regulatory framework vacuum, at least until the new law on arbitration will be enacted. The content of these regulatory instruments, i.e., the new draft law, is, however, broadly similar in that they deal with the substantive and procedural rules on the form, creation, validity, enforcement, appeal, and lifecycle of an arbitration agreement. One important departure from previous formulations on the matter, however, is the explicit acknowledgment of public policy as a ground for refusal of enforcement in Article 59(g) of the new draft law, which states that arbitral awards can be declared invalid when the decision is contrary to the "*public order*" in the Republic of Albania. Previously, reference was made to "*basic principles of Albanian law*" as a ground of refusal for the enforcement of the arbitral award. While both formulations have been interpreted *mutatis mutandis*, as will be illustrated shortly, the new formulation is akin to a language that better resembles the wording used in the New York Convention on the matter at hand.

In contrast to the current situation of domestic arbitration, Albania provides a well-established system of recognition and enforcement of foreign arbitral awards. Through the enactment of Law No. 8688 dated 9.11.2000, the Parliament of Albania has ratified the New York Convention. Before that, legal regulation of enforcement of foreign arbitral awards was provided by provisions of the Code of Civil Procedure, which are in essence very similar to the provisions of the New York Convention. These provisions, contained in Articles 393-399 of the Code of Civil Procedure, remain applicable in instances where the arbitration seat is in a country that is not a member of the New York Convention.

Accordingly, the procedure for the recognition and enforcement of the international arbitral award is initiated by filing a request to the appropriate Albanian Court of Appeal. The application for enforcement should conform to certain procedural requirements contained in article IV of the New York Convention or Article 394 of the Code of Civil Procedure. In turn, the competent Court of Appeal does not evaluate the case on its merits but rather ensures that the procedural requirements have been fulfilled.[10] Only after this phase can the Court rule on the admissibility of the request, thereby refusing the enforcement if one of the provisions of Article V, or the substantive provisions of Article 394, are proved to exist.[11] In this regard, Article V(2)(b) permits the refusal of the enforcement of the foreign arbitral award if the latter contradicts the public policy of Albania. This evaluation is not based on the suitability of the particular procedural or substantive norm applied by the arbitration forum but rather on the effect the award would have on the Albanian public policy and its compatibility to the basic principles of Albanian Law.[12] Evidently, similarly to domestic situations, reference is made to two terms in this regard, i.e., to public policy on the one hand and the *basic principles of Albanian law*[13] on the other. While the terms are not necessarily concurrent at a prima facie glance, their practical meaning has been brought closer through judicial

interpretation. In this regard, the Court of Appeal of Tirana, while arguing why the international arbitral award under consideration was indeed valid and thus enforceable in Albania, provided a short interpretation of the public policy concept.[14] Accordingly, as per the Court, a clear-cut definition of public policy cannot be found in Albanian law. Consequently, this provision of the New York Convention is to be interpreted in harmony with Article 394(dh) of the Code of Civil Procedure. According to the Court, these principles embody the common values shared by society, upon which the rule of law is founded and guaranteed.[15]

The latter case is one of the few instances where Albanian courts have purported to interpret and apply the public policy concept in their judicial reasoning regarding the enforcement of foreign arbitral awards. Even though the definition of the concept at hand is still up for interpretation and not conclusive, courts rarely have, if ever, refused execution of an otherwise procedurally valid arbitration award solely based on public policy considerations. This, in turn, entails that Albania has proven to be an arbitration-friendly jurisdiction, showcasing a pro-enforcement attitude of international arbitral awards when considered in light of the public policy consideration.

In summary, arbitration remains an unpopular option for local dispute resolution in Albania, partly because of the lack of regulatory and legal framework. Nonetheless, the opposite is true in relation to international arbitration, whereby the legal framework is present, and court practice has shown a pro-enforcement attitude by rarely denying, if ever, the enforceability of procedurally valid arbitration awards merely because of public policy considerations.

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[1]Sameer Sattar, enforcement of arbitral awards and public policy: Same concept, different approach? pg. 2.
[2]Ibid, pg. 3
[3]A. Tweeddale & K. Tweeddale, Arbitration of Commercial Disputes: International and English Law and Practice, (2005), at para. 7.84
[4]Id. at 1, pg. 4.
[5]Scherk v Alberto-Culver Co 417 US 506 (1974).
[6]Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du papier (RAKTA) 508 F.2d 969, 975 (2d Cir. 1974).
[7]Soleimany v Soleimany, QB 785 (SC 1999).
[8]Alban Abaz Brati, Procedura Civile, Botimi i Pare, (bot. Dudaj), 2008, pg 81.
[9]See Article 30, read in conjunction with Article 49 of Law No. 122/2013 dated 18.04.2013 "On some additions and amendments to Law No. 8116, dated 29.3.1996 'The Code of Civil Procedure of the Republic of Albania, as amended'".
[10]Unifying Decision of the Supreme Court No. 6, dated 01.06.2011, para. 31.2 – 31.4.
[11]Ibid. para. 31.5.; see also Article 397 Code of Civil Procedure of the Republic of Albania, as amended.
[12]Id. at 8, pg. 415.
[13]See Article 394(dh) Code of Civil Procedure of the Republic of Albania, as amended.
[14]See Decision No. 30-2017-1875, on 05/08/2017 of the Court of Appeal of Tirana.
[15]Ibid. pg. 9.