

## RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS IN ALBANIA

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**ABSTRACT:** *This paper aims at providing an analysis of the Albanian legislation and jurisprudence on the recognition and enforcement of foreign judgments and arbitral awards in Albania. Such an analysis is especially relevant in the current situation of the development of Albania and in this crucial moment of its European integration process and the implementation of the Stabilization and Association Agreement with the European Union. The analysis is composed of three parts, starting with the definition of the foreign judgments and arbitral awards as enforceable orders. Also, apart from the Albanian legislation, the analysis includes the legislation of other European countries, as well as the impact in its domestic legislation of different international treaties on the recognition and enforcement of foreign judgments and arbitral awards. The paper is enriched with the analysis of the Albanian jurisprudence, among others by including the unifying judgments of the Joint Benches of the Supreme Court, because of their special leading role for the courts in Albania. Further, the analysis continues with the detailed procedure of the recognition and enforcement of foreign judgments and arbitral awards in Albania, ending with the conclusions.*

**KEYWORDS:** Arbitration, Court, Enforcement, Judgment, Legislation, Recognition.

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### INTRODUCTION

Definition of the foreign judgments and arbitral awards as enforceable orders

The object of the rules on the effect of foreign decisions consists on setting the criteria upon which a foreign judgment can possess the efficacy of an instrument of proof, the authority of a *res judicata* and enforceability. The issue of the effects of foreign judgments includes a delicate approach: on the one hand, the idea of the respect for the earned rights requires that the person who has a court judgment in his favor must be granted without any obstacles the recognition of the judgment in a foreign country, but on the other hand, this judgment cannot be binding on the judges of a foreign country, because of the ever presence in this field of the issue of sovereignty, as well as the divergences that can exist between the policies and values of different countries.<sup>1</sup>

In this regard, different countries have adopted different models. For example, in France, a foreign court judgment can have a binding effect only through the relevant procedure that takes place in the court of first instance, excluding only some effects of these judgments, which are recognized without necessarily following this procedure. Here it can be mentioned the effects of charging orders issued in foreign countries, which are declared as applicable by a French court. In any case, when the issue of the recognition of a foreign judgment or arbitral award

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<sup>1</sup> Daniel Gutmann, "Private international law", Edition VI, Papyrus Publishing, 2009, p. 358.

arises, the relevant decision must have a judicial character, meaning that this recognition is followed by the procedure of its enforcement.<sup>2</sup>

In the Civil Procedure Code (CPC) of the Republic of Albania,<sup>3</sup> it is stated that the jurisdiction of Albanian courts includes all the civil disputes and all other disputes that are stipulated in this Code.<sup>4</sup> Also, it is stated that the jurisdiction of the Albanian courts cannot be transferred to a foreign jurisdiction through an agreement, certain exceptions notwithstanding,<sup>5</sup> and that Albanian courts cannot dismiss or suspend the adjudication of a dispute, when this dispute or another case related to this, it is being adjudicated by a foreign court.<sup>6</sup> In this latter case, the enforceable judgment will be that judgment that is the first to become binding.

The Court of Cassation in France has taken the stance in its case law that any intervention of a judge that brings effects on persons or property, rights or obligations, constitutes a judgment, for which the procedure of recognition and enforcement must be undertaken. Only decisions issued by the authorities that possess judicial powers in France can undergo such procedures. This holds true also for the arbitral awards.

There exist different systems: there are those that provide for a simple control on a foreign judgment, by the judge of the procedure for the recognition and attributing enforceability to the foreign judgment, and there are others that conduct a review of the foreign judgment based on a new assessment of the appropriateness of the judgment and the evaluation of fact and law. Certainly, for a more intensive international development, a not-so-strict control of a foreign judgment is preferable. It is important to be noted that just as it is stipulated in Article 26 of the Brussels Convention "*On jurisdiction and the enforcement of judgments in civil and commercial matters*",<sup>7</sup> a judgment given in a state party shall be recognized in the other state parties without any special procedure being required, which shows that it exists a big difference between the recognition and the enforcement of a foreign judgment.

All civil judgments issued by the Albanian courts that include obligations, are considered as enforceable orders and are enforced through the coercive power of the state, represented by the bailiff.<sup>8</sup>

Apart from the judgments of the Albanian courts, enforceable orders are considered also the judgments of foreign courts and foreign arbitral awards.<sup>9</sup> The latter are converted into enforceable orders only after they have been recognized and have become binding by the Albanian court of appeal.<sup>10</sup>

In contrast with the judgments of foreign courts and foreign arbitral awards, judgments of supranational courts, such as the European Court of Justice (ECJ) in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg are not enforceable orders, in the civil procedural meaning, and cannot be directly enforced by the bailiff service.

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<sup>2</sup> Ibid., p. 360.

<sup>3</sup> Approved by law nr. 8116, date 29.03.1996.

<sup>4</sup> Article 36/1 of the Civil Procedure Code (CPC).

<sup>5</sup> Article 37/2 of CPC.

<sup>6</sup> Article 38 of CPC.

<sup>7</sup> Brussels Convention was adopted on 27 September 1968, but entered into force for the first six contracting states: Belgium, West Germany, France, Italy, Luxembourg, and The Netherlands, on 1 February 1973.

<sup>8</sup> Article 510(2)/a and 511(1) of CPC.

<sup>9</sup> Article 510(2)/c and 511(1)/b of CPC.

<sup>10</sup> Article 510(2)/c in relation to articles 394, 395, 398 and 399 of CPC.

Thus, as far as the ECJ is concerned, for as long as Albania is not a member of the European Union (EU), it is not under its jurisdiction. For the EU member states, the Brussels Convention is the most important legal act, in this regard. This convention, being complementary to the Treaty of Rome, which founded the European Economic Community (EEC), is not directly applicable, according to the direct applicability doctrine, stipulated in Article 189 of this treaty.<sup>11</sup> Under these circumstances, member states of the EEC (now EU), must undertake the necessary measures according to their domestic legislation, in order to ratify and implement the Brussels Convention.

The Brussels Convention has been considered as the founder of the European law of procedure<sup>12</sup> and as a dual convention, because it deals simultaneously with matters of jurisdiction, as well as with the recognition and enforcement of foreign judgments. These two aspects, jurisdiction and enforcement, are not disconnected from each other. The aim of this convention is the facilitation of the formalities for the reciprocal recognition and enforcement of the court judgments, through the simplification of non-contradictory procedures.

Being that the Brussels Convention was open only to the EU member states, other European states, like those that were members of the European Free Trade Association (EFTA), which could not benefit from the open system founded by the convention for the jurisdiction and enforcement, even though they had relatively free access to the European markets, adopted the Lugano Convention "*On jurisdiction and the enforcement of judgments in civil and commercial matters*" on 16 September 1988, which is parallel to the Brussels Convention. Differences between the texts reflect only the interpretations that ECJ had made to the Brussels Convention during the 20 years of its existence.<sup>13</sup>

The Brussels and Lugano conventions have been considered as regional instruments, but still, there is no single international regulation that would include a universal settlement on this issue. Perhaps this is so, because of the efforts to deal with the issues of recognition and enforcement, together with the issue of jurisdiction.<sup>14</sup>

A different situation exists in the case law of the ECtHR, which oversees the respect for fundamental human rights and freedoms, guaranteed by the European Convention of Human Rights (ECHR),<sup>15</sup> adopted by the Council of Europe, to which Albania is a party. This is so, because with the adoption of the Constitution of 1998, currently in force, regarding the position and the obligation to respect international law, Albania moved from the dualist system, that was present in the Main Constitutional Provisions of 1991, to the actual monist system, according to which the international agreements ratified by law are part of the domestic legal order.<sup>16</sup> Not only this, but they enjoy superiority over the domestic laws that are not compatible with them.<sup>17</sup> In this regard, ECHR is not only part of the domestic legislation of Albania, but

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<sup>11</sup> Robert C. Reuland, "*The recognition of judgments in the European Community: The twenty-fifth anniversary of the Brussels Convention*", Michigan Journal of International Law, Summer, 1993, p. 590.

<sup>12</sup> Christian Kohler, "*Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original Contracting States*", 34 International and Comparative Law Quarterly, 1985, p. 563.

<sup>13</sup> Yoav Oestreicher, "*We're on a road to nowhere - reasons for the continuing failure to regulate recognition and enforcement of foreign judgments*", International Lawyer, Spring 2008, p. 5.

<sup>14</sup> Ibid.

<sup>15</sup> Article 19 of ECHR.

<sup>16</sup> Article 122(1) of the Constitution.

<sup>17</sup> Articles 122(2) and 116(1) of the Constitution.

the same holds true for its case law, regarding what the ECtHR has ruled on the content of its articles.

Nevertheless, differently from the judgments of the foreign courts or arbitral awards, in the cases of the judgments of the ECtHR, it is the states themselves, the so-called “High Contracting Parties”, that undertake their enforcement, a process that is supervised by the Committee of the Ministers of the Council of Europe.<sup>18</sup> So, even in this case, we are not dealing with an enforceable order *strictu sensu*, in the formal meaning given to it by the CPC.

When dealing with the enforcement of the ECtHR judgment, where the debtor is always the defendant state, it is understood that individual and general measures must be taken.<sup>19</sup> Thus, the state must firstly enforce the individual measures for the applicant, which means providing redress for the injustice committed, reinstating the *status quo ante*, the situation that existed before the infringement, through the compensation of material and moral damages. As for the general measures, those consist on amendments to the unsuitable legislation, enactment of new legislation, or changing a certain problematic administrative or judicial procedure.

In practice, many member states of the Council of Europe, given the fact that ECtHR judgments are not enforceable orders, have defined the status of such judgments in their procedural legislations, by affording them for example the nature of a cause for reviewing the decisions of the domestic authorities, etc.

Regarding the judgments of the foreign courts, article 398 of the CPC stipulates that they are enforced in the Republic of Albania only through a judgment of a court of appeal, which through the recognition process makes them enforceable, which are afterwards enforced according to the provisions of the CPC on the compulsory enforcement. The same procedure is followed for the awards of foreign arbitration. So, for these judgments to constitute enforceable orders and to be enforced by the bailiff service, the court of appeal must firstly rule on them, and if this court makes the formal recognition of these judgments, then issues the enforcing order.

The acts that constitute enforceable orders are stipulated in article 510 of the CPC, where among others, it is stated that judgments of foreign courts and awards of foreign arbitration that are given enforcing power according to the provisions of this Code, are deemed as enforceable orders. However, just as for the domestic court judgments and arbitral awards, the enforcing order that paves the way for the compulsory enforcement can be issued only for those final court judgments which are rulings on liability lawsuits, those that include in their dispositive orders obligating one or both litigating parties. So, not every final judgment constitutes an enforceable order, meaning that can be subject to compulsory enforcement.

The obligation stipulated in these judgments must be: a) *conclusive*, which means that it must have become final, a fact that is verified by the court of appeal that recognizes the foreign court judgment or the arbitral award; b) *complete*, when the obligation is demandable, precise and

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<sup>18</sup> Article 46 of the ECHR.

<sup>19</sup> Enkeledi Hajro, “Titujt ekzekutivë në procedurën civile and titujt ekzekutivë në kuptimin e ligjit të posaçëm. Praktika e GJEDNj lidhur me mosekzekutimin e detyrimeve të shtetit ndaj individëve. Detyrimet që burojnë prej vendimeve gjyqësore”, (Executable orders in the civil procedure and the executable orders in the meaning of the specific law. ECtHR case law relevant to the non-enforcement of state obligations towards the individuals. Obligations deriving from judgments.) Training Session of the School of Magistrates, 2009, p. 27.

specified; c) *unconditional*, when its enforcement is not tied to a deadline, a proviso, or to any other restrictions.

In this latter case of the unconditional obligation or the unrestricted obligation, it must be taken into account that when there exist such restrictions the compulsory enforcement will begin only the restrictions have ceased to exist. As enforcing, unconditional judgments are considered those that are related to the obligation of a party to pay a certain monetary sum, to hand over an object, to demolish a construction, to pay the sustenance, etc.

### **Procedure of recognition and bestowing enforceability to the foreign court judgments or the arbitral awards, in the territory of Albania.**

In the meaning of Article 399 of the CPC, the procedure followed for the recognition and bestowing enforceability to a foreign court judgment is also relevant for the foreign arbitral awards. In Article 393 of this Code it is stipulated that when for this purpose a special agreement has been reached between the Republic of Albania and the other state, the provisions of the agreement are applied. In the absence of such an agreement, in Article 394 there are stipulated the obstacles for which a foreign court judgment or an arbitral award can neither be recognized, nor can be bestowed enforceability.

Also, in the absence of an agreement, the application to bestow enforceability to the judgment is presented to the court of appeal.<sup>20</sup> Notwithstanding the fact that the Code does not stipulate to which court of appeal, referring to its article 49,<sup>21</sup> it must be the court of appeal of the jurisdiction where the judgment will be enforced, i.e. where the immovable property is situated or its major part, or where the action or omission will be committed.<sup>22</sup>

To the application to bestow enforceability to the foreign court judgment or the arbitral award must be attached: a) copy of the decision that must be enforced, legalized by the consular section of the Embassy of the Republic of Albania in the issuing country, or accompanied by the Apostille Seal, according to the The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, and its translation in the Albanian language, legalized by the notary public; b) the relevant certification that the decision has become final; c) power of attorney, in case the application is submitted by the representative of the interested party.<sup>23</sup> Here it must be emphasized that in the spirit of the Brussels and Lugano conventions, and taking into consideration the obstacle for the recognition of the judgment that has derived from a court proceeding *in absentia* of the debtor party, as it is stipulated in Article 394(1)/b of the CPC, when the court proceedings have taken place *in absentia* of this party, copies of acts of proper and timely notifications to the party must be attached to the application for the recognition and bestowing enforceability to the foreign judgment.

Many courts consider the right to a fair trial as part of the public order, and for this reason, the proper notification of the litigating party is of utmost importance, as far as the manner, the

<sup>20</sup> Article 395(1) of the CPC.

<sup>21</sup> Article 49 of the CPC stipulates: "*Lawsuits that request the enforcement on objects, are filed in the court of the place where they are situated, or the major part of their value. Lawsuits that request the enforceability of certain actions or omissions, are filed in the court of the place where such an obligation must be fulfilled.*"

<sup>22</sup> Flutura Kola and Silvana Çinari, "*Zgjidhjet alternative të mosmarrëveshjeve*" (Alternative dispute resolution), Albas, 2015, p. 331.

<sup>23</sup> Article 396 of the CPC.



exact name of the litigant, the exact address, the necessary time to prepare for the trial and the defence are concerned, according to the principle of contradictoriness.

It has been accepted by the majority of legislations that the party that pretends the impossibility of representing the case, must prove that this impossibility has deeply affected the final judgment, the existence of a causal link between them.<sup>24</sup> The fact that a party refuses to participate in a judicial or arbitration procedure does not constitute a reason for the refusal of the recognition and enforcement of a certain judgment or award, issued in accordance with a fair trial process.

Even though the court of appeal does not judge on the merits of the case,<sup>25</sup> apart from the case when the lawsuit and the notification for the court hearing have not been served properly and on time to the defendant *in absentia*, in order to offer him the possibility to defend himself, the court decides on the non-recognition and non-enforcement of the foreign judgment, in cases when: a) according to the legal provisions in the Republic of Albania, the dispute may not fall under the competence of the court of the state that has issued the judgment. This includes the awards issued in cases that according to the Albanian legislation cannot be resolved through arbitration, such as those related to family matters, consumer protection, bankruptcy, insurance, tax, etc; b) a different judgment has been issued by an Albanian court, between the same parties, with the same object and cause, i.e. it has become final, within the meaning of Article 451/a of CPC; c) an Albanian court is actually adjudicating on a lawsuit that was initiated prior to the foreign court judgment becoming final; d) it has been considered as final, contrary to its legislation; e) does not comply with the fundamental principles of the Albanian legislation, the so called 'public order' clause.<sup>26</sup> In this latter case, public order norms will be considered those norms that the society of a certain country regards as indisputable, for historical or political reasons. Here it must be emphasized that not every compulsory legal norm is part of the public order. Only the infringement of those compulsory norms, which are simultaneously fundamental principles of law, that openly breach the fundamental political, social, and economic interests, can constitute a reason for the refusal of the enforcement of a foreign court judgment or arbitral award.

In Albania, there is a consolidated case law, even though not unified, relevant to the refusal of the recognition of foreign court judgments that have permitted the adoption of Albanian adults. In one of its judgments, the Court of Appeal of Tirana, among others, stated that *"...From the judicial enquiry it resulted that with the Judgment nr. 5399/2014, date 19/03/2014 of the Court of First Instance of Thessaloniki, Greece, which has become final on 14.04.2014, the applicant E. B. has been declared as an adopted child of the Greek citizen N.P. From the acts attached to the request for the recognition of the foreign court civil judgment, it results that the applicant, the Albanian citizen E.B., who has been allowed to be adopted according to this judgment, was born on 25.06.1987, being thus over 18 years old at the time of the adoption, which is contrary to the compulsory provisions of the Albanian law, the so-called public order provisions, more precisely articles 240, 241, 246, 247, 252, 254, 257 of the Family Code, which do not allow adoptions over this age. Not only this, but it has not even been followed the compulsory procedure through the Albanian Adoption Committee. In the view of the Court of*

<sup>24</sup> Flutura Kola and Silvana Çinari, "Zgjidhjet alternative të mosmarrëveshjeve" (Alternative dispute resolution), Albas, 2015, p. 347.

<sup>25</sup> In Article 397(1) of the CPC it is stipulated that: "The court of appeal does not enquire on the merits of the case, but only enquires if the judgment contains any provisions that are contrary to Article 394."

<sup>26</sup> Article 394 of the CPC.

*Appeal, when the provisions that stipulate regulations aiming at protecting the best interests of the child are compulsory, then, they are part of the public order, within the meaning of article 394/dh of the CPC, which triggers the refusal of the recognition in the case under adjudication...*<sup>27</sup> Thus, it can be said that the refusal of the recognition of a foreign court judgment because of the public order clause is a matter to be decided on a case by case basis by the adjudicating court, based on the above mentioned criteria.

If the court of appeal has recognized the foreign court judgment or the arbitral award, whose enforcement requires following the enforcement procedures, then the court of appeal issues the enforcement order.<sup>28</sup>

Albania has ratified the New York Convention,<sup>29</sup> the Geneva Convention,<sup>30</sup> and the Washington Convention.<sup>31</sup> International arbitration is still unregulated by a specific law in Albania, but it is regulated precisely through these conventions, and through Bilateral Agreements, such as those with Greece, Turkey and Czechoslovakia (now the Czech Republic).<sup>32</sup>

The New York Convention remains the most important act for the recognition and enforcement of international arbitral awards. The self-executing character of the conventions is confirmed by the Unifying Civil Judgment of the Joint Benches of the Supreme Court, according to which: *"...the Joint Benches note that according to Article 122 of the Constitution, being an international agreement to which the Republic of Albania is a party, the provisions of the New York Convention prevail over the regulations of the Code of Civil Procedure and are directly applicable by the courts of appeal that adjudicate requests for the recognition of a foreign arbitral award."*<sup>33</sup>

Article VII(1)(2) of the New York Convention stipulates that *"The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."*, by solving thus any possible contradictions or discrepancies in this regard. Thus, the New York Convention ensures only the implementation of the minimum standards on the recognition of foreign arbitral awards. Not only this, but this provision, considered as the *"more favorable right provision"*, entails the aim of the New York Convention for the simplification, up to the removal of the procedures of recognition or enforcement of the international arbitral award.

Just as the French courts, the Albanian courts can apply *ex officio* the more favorable right provision, since they base their judgments in the principle *iura novit curia*, just as it is

<sup>27</sup> Judgment nr. 31, date 04.03.2015.

<sup>28</sup> Article 511(1)/b of the CPC.

<sup>29</sup> "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", date 7 June 1959, has been ratified by Albania without any reservations, through law nr. 8688, date 09.11.2000, published in the Official Gazette nr. 38, year 2000, p. 1836, and entered into force on 27.06.2001.

<sup>30</sup> "European Convention on Arbitration", date 21 April 1961, has been ratified through law nr. 8687, date 09.11.2000 published in the Official Gazette nr. 38, p. 1829, and entered into force on 27.06.2001.

<sup>31</sup> "Convention on the Settlement of Investment Disputes between States and Nationals of Other States", Washington 1965 (ICSID), ratified by Albania in 1991.

<sup>32</sup> Ratified through the law nr. 7760, date 14.10.1999.

<sup>33</sup> Unifying Civil Judgment of the Joint Benches of the Supreme Court. nr. 6, date 01.06.2011, par.28.1.

stipulated in the Unifying Judgment of the Joint Benches of the Supreme Court. nr.3, date 29.03.2012.<sup>34</sup>

As far as the court tax that must be paid in the case of an application for the recognition of a judgment, even though the Supreme Court has not explicitly dealt with it in its Unifying Judgment of the Joint Benches nr.6, date 01.06.2011, that must be equal to that which is paid for the appeal to a domestic arbitral award or to the application for the recognition of a foreign court judgment.<sup>35</sup> This is so, because it is not the case of a judgment on the merits of the case, but simply a check on the formal aspects of the foreign court judgment or arbitral award.

By the analysis of the content of the provision of Article 5 of the New York Convention, it can be derived that the substantial legal conditions for granting or dismissing an application for the recognition of a foreign arbitral award, in their major part are in essence the same, or in accordance with those stipulated in Article 394 of the CPC. But, on the other side, both, Article 396 of the CPC and the provision of Article 4 of the New York Convention, stipulate the need for the respect of some formal-procedural conditions, whose fulfillment must be preliminary enquired by the court of appeal, so, before the beginning of the court proceedings for the verification of the existence or not, of any legal impediments for the recognition of the foreign judgment, which are stipulated in the provision of Article 394 of the CPC, or Article 5 of the New York Convention.

If the application for the recognition and enforcement of the foreign court judgment does not meet these formal criteria and these are not met (fulfilled) by the applicant according to the civil-procedural rules on filing a lawsuit, then it is not necessary for the court to continue further with the adjudication of the case, concerning the enquiry on the existence or not, of the legal impediments on the recognition of the foreign court judgment, stipulated in Article 394 of the CPC, i.e., to reach a final judgment on the granting or dismissing an application for the recognition of the foreign court judgment.

As mentioned above, regarding the civil-procedural norms applicable in the special judgment on the recognition of the foreign court judgments and arbitral awards, the Joint Benches of the Supreme Court have reached the conclusion that the enquiry and adjudication of the application for the for the recognition of the foreign court judgment must go through two phases.<sup>36</sup>

In the first phase, the court of appeal verifies the fulfillment of the formal-procedural criteria, the criteria that are related to the formal filing of the application, with the effect of admitting the application to adjudicate on giving enforcing power to the foreign court judgment. These conditions and rules are stipulated in Article 395 and Article 396 of the CPC. As for the foreign arbitral awards, the Albanian court must refer to the more specific conditions and rules stipulated in Article 4 of the New York Convention, or in other international agreements, specifically applicable in the case being adjudicated.

Since it is dealing with a case that it has the characteristics of a case being adjudicated in a court of first instance, just as any court of first instance, the court of appeal applies the procedural rules regarding the verification of the respect for the formal regulations on filing the application for the recognition of the foreign court judgment. If there are any deficiencies or

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<sup>34</sup> Flutura Kola and Silvana Çinari, “Zgjidhjet alternative të mosmarrëveshjeve” (*Alternative dispute resolution*), Albas, 2015, p. 327.

<sup>35</sup> Ibid., p. 333.

<sup>36</sup> Unifying Civil Judgment of the Joint Benches of the Supreme Court nr. 6, date 01.06.2011.



discrepancies, the court of appeal sets a reasonable time-frame for the applicant to remedy them, otherwise, it returns the application and the other acts without further action. These verifications are conducted by the court of appeal upon the filing of the application, or in the framework of the preliminary actions, *proprio motu*, or upon the request of the parties.

Thus, in this phase of the process, just as it is acted upon the other applications in the courts of first instance, the court of appeal cannot dismiss the application with the reasoning that it has deficiencies or discrepancies, because the formal conditions to rule on the “merits” have not yet been met. The granting or dismissing the application for the recognition of the foreign court judgment is done in the second phase of the judgment, depending only on the verification of the existence of any legal impediments or prohibitions that are stipulated by law, for the recognition of that judgment

In the second phase, when the application to attribute enforcing power to a foreign court judgment or arbitral award fulfills the formal-procedural criteria to furnish it to the court, the court of appeal sets the hearing in which the object of the adjudication will only be the existence or not, of any of the legal impediments or prohibitions that are stipulated in Article 394 of the CPC, Article 5 of the New York Convention, or any other specific provision for this purpose, stipulated in the law, or in any other international agreement.

As far as the litigating parties are concerned, the Joint Benches of the Supreme Court have noted that the provisions of the CPC do not contain any specific regulation. Nevertheless, the court of appeal must ensure that even in this kind of adjudication the respect for the principle of contradictoriness must be guaranteed, relevant to the aim, objective, and the extent of this judgment.<sup>37</sup> This is firstly ensured through guaranteeing the right to participate and to be heard by the court, for the litigating parties: the applicant that requests the recognition and enforcement of the foreign court judgment, and the party that is the debtor, upon which obligations are bestowed by the foreign court judgment.

But, differently from the CPC, regarding the recognition of the foreign arbitral awards, in the provisions of the New York Convention are stipulated obligatory regulations that ensure that the appropriate litigating parties participate in the adjudication. According to these provisions, it is clear that in this judgment, must be called to participate not only the applicant, i.e. the creditor, but also the debtor, the party upon which obligations are bestowed by the foreign arbitral award.

Also, the New York Convention in its Article 4, as far as the acts that must be attached to the application for the recognition of the foreign arbitral awards are concerned, stipulates similar rules and conditions to those stipulated in Article 396 of the CPC. But, Article 4 of the Convention, in paragraph “b” of point 1, stipulates a specific and important condition, according to which the applicant has the obligation to attach to the application for the recognition of the foreign arbitral award the original or the certified copy of the written arbitration agreement between the litigating parties, for the resolution of the dispute under adjudication. In the Civil Procedure Code such a preliminary condition is not explicitly stated for the admissibility of the application to bestow enforcing power to the foreign arbitral award. But, in respect of Article 122 of the Constitution, it prevails and it is directly applicable the regulation stipulated in the international agreement, the above mentioned specific provision, paragraph “b”, point 1 of Article 4 of the New York Convention. In this regard, the court of

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<sup>37</sup> Unifying Civil Judgment of the Joint Benches of the Supreme Court nr. 6, datë 01.06.2011.

appeal, even *proprio motu*, without calling the debtor, without his presence, or without hearing the debtor, has the power, indeed the legal obligation, to verify if the application for the recognition of the foreign arbitral award is complete, containing attached all the acts that are specifically stipulated in Article 396 of the CPC.<sup>38</sup>

In the case of the recognition of the foreign arbitral award, when there is no other international agreement providing otherwise, the application filed to the Albanian court of appeal must also fulfill all the criteria stipulated in Article 4 of the New York Convention. Even though the state of the applicant may not be a party to this convention, the court of appeal, on its part, in the absence of the other specific normative regulations, must comply with the standards and the criteria stipulated by this convention. While it is true that the court of appeal does not really adjudicate on the merits of the foreign award, in any case, it has the right and the imperative obligation to verify among others, if there has been a written arbitration agreement between the parties, between the creditor and the debtor, which on the one hand constitutes the foundation upon which the foreign court of arbitration has exercised its jurisdiction, and on the other hand, has the consequence of the lack of the Albanian jurisdiction to adjudicate on the merits of this dispute. This is a fundamental condition stipulated in paragraph “a” of Article 394 of the CPC and in points 1 and 2 of Article 4 of the New York Convention.

If between the disputing parties there has been no agreement or a written, specific arbitration clause, then there is no jurisdiction of the foreign court of arbitration, either. It is a primary legal obligation for the court of appeal to verify if the Albanian courts themselves, as part of the exercise of the Albanian state authority and sovereignty, do have jurisdiction to solve the dispute, or if the parties have properly selected the jurisdiction of a foreign court, or arbitration. This verification, the court of appeal is obliged to carry out, regardless of the evaluation of this jurisdictional moment by the foreign court of arbitration itself, whose decision is being sought to be bestowed enforcing power by the Albanian court of appeal. Every country is sovereign, and it can relinquish its court jurisdiction only if the agreement between the parties to choose the foreign jurisdiction has been expressed in a written form, it has been composed according to the law, and it is not forbidden by the legislation of that state. The application for recognition is also dismissed in the cases when the court of appeal ascertains that in the arbitration agreement it has not been singled out that precise foreign court of arbitration, whose decision is being sought to be recognized.

On the other hand, the New York Convention explicitly and imperatively, in its Article 5 stipulates that it is the obligation of the debtor, that has the burden of proof, to furnish to the court the evidence and arguments on the existence of the legal impediments, based on which the court must dismiss the application for the recognition of the award of the foreign court of arbitration. In this regard, in point 1 of Article 5 of this Convention it is stipulated that: “*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:...*”. Thus, in the proper meaning and implementation of this international provision, the debtor has the obligation and the burden of proof to furnish to the court that in the present case we are dealing with one of the cases of the legal impediments for the recognition of the foreign arbitral award. From this normative regulation, as a consequence, it can be concluded that this right and obligation, the debtor may exercise and fulfill, only by being a party to the process where the application of the creditor for the recognition of the judgment of the foreign court is being sought.

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<sup>38</sup> Ibid.

According to Article 394 of the CPC, the court of appeal does not bestow enforcing power to the foreign court judgment even in the case when in the adjudication of the application it is proved that it exists one of the legal impediments stipulated in paragraphs “a”, “d” and “dh” of the article: *a) according to the provisions in force in the Republic of Albania, the dispute cannot fall in the competence of the court of the state that has issued the award; d) it has become final contrary to its legislation; dh) it does not comply with the principles of the Albanian legislation.* In these three cases, the parties to the process can furnish evidence and legal arguments. However, considering their principled, procedural and jurisdictional nature, and since they are issues that are related only to the implementation of the law, the court of appeal remains with the legal obligation to enquire and ascertain, even *proprio motu*, the existence or not, of these legal impediments.

The New York Convention, in its paragraph 2 of Article 5, enlists two more specific legal impediments, to bestow enforcing power to the foreign arbitral award, in essence, of the same aim and nature with paragraphs “a”, “d” and “dh” of Article 394 of the CPC. Here, it is important to note that the refusal of the recognition of the foreign court judgment or arbitral award can, and must happen also in the cases when the court of appeal, *proprio motu*, meaning not only in the cases when it is requested by the parties, ascertain the existence of one of the impediments stipulated in Article 394 of the CPC.

The court of appeal must reason, clearly and exhaustively, on the factual circumstances that will be admitted as proved, and on the existence or not of any concrete legal prohibition or impediment, of those stipulated in Article 394 of the CPC and Article 5 of the New York Convention, by concluding and ruling on the granting or dismissing the application for bestowing enforcing power to the foreign court judgment or arbitral award.

## CONCLUSIONS

Judgments and arbitral awards of foreign courts are not enforceable in Albania, without prior recognition and bestowing enforcing power by the court of appeal of the territorial jurisdiction where the enforcement will take place. As for the recognition of the foreign arbitral awards, the most important convention is the New York Convention, to which Albania is a party. It has become part of the domestic legal order of Albania, since with the Constitution of 1998 currently in force, the country has adopted the monist system, as far as the place and the obligation to respect international law are concerned.

The Supreme Court of the Republic of Albania has unified the case law regarding the procedure for the recognition of the foreign court judgments and arbitral awards. This judgment, even though not a judgment on the merits, is carried out in two phases. In its case law, the Supreme Court has consolidated its stance that the court of appeal dealing with the application for the recognition of the foreign court judgment or the arbitral award, must and should ascertain *proprio motu* if there are any legal impediments that preclude the recognition, even in cases where there is no request by the interested party.

In the present conditions of the actual development of Albania and in the current moment of the integration process of the country, it becomes especially important the recognition and enforcement of the foreign court judgments and arbitral awards. The Albanian judiciary has an important role to play in this regard.

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