
**INTERNATIONAL ARBITRATION, THE ADVANTAGES AND THE
ROLE OF THE STATE COURTES IN THE DEVELOPMENT OF THIS
INSTITUTE AN OVERVIEW ON THE ALBANIAN LEGISLATION AND
JURISPRUDENCE**

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ABSTRACT

The national legal orders are increasingly accepting the trend to consider the arbitration institute as an important mechanism to resolve disputes arising especially from trade and investment relations. Particularly, in the field of international trade, arbitration appears even more advantageous from judicial litigation because, among other things, it guarantees the neutrality of the forum. But, arbitration cannot be extended in the commercial environment of a country unless it is exposed to a friendly spirit from the domestic regulatory framework and the judicial system of that State.

The question to be faced up to every national legal order, is the degree to which the national legislation should accept the judicial intervention in arbitration. On the one hand, the arbitration shall be "free" from the court, in order to respect the will of the parties to establish an efficient procedure, but on the other hand, arbitration needs the support of national courts to ensure that the solution provided by arbitration will be effective. Considering the eminent debate on the doctrine of law, the target of this research involves precisely the features of the relationship between national courts and the arbitration process, from the viewpoint of national legislation and jurisprudence in Albania.

The methodology used by this paper combines the *literature review*, *legal analyzing* and *case studies* approaches. Through the *literature review* and *legal analyzing* approaches, this article underlines the particularities of the national law on the intervention of the state courts into the arbitration procedure. Whereas, through the *case studies* approach, the paper aims to focus on the practice of the Albanian state courts, to show if the judiciary system is supporting the arbitration or not. State courts are precisely those who, on behalf of the state, respecting the independence of the arbitration process, have simultaneously the obligation to support it. The lack of such

support will have a negative result on the arbitration instrument which will remain ineffective and consequently will be useless for the commercial relations.

Keywords: arbitration, domestic, international, court, award, law.

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I. International Arbitration - a successful mechanism in international trade, established by the will of the parties in conflict and guaranteed by the national legal orders.

There are no Laws or Conventions to specify the definition of *international arbitration*. The definition of the arbitration institute is mainly provided by the doctrine¹ whereas legislation, whether internal or international, is limited in determining the criteria that make a procedure to be qualified as *domestic* or *international arbitration*. Even the UNCITRAL model law² clarifies only the two terms *trade* and *international*³, presuming as known the definition of *arbitration*. Among the criteria, used by the model law, there is also the "will of the parties" in conflict, which has the authority to determine even the national (local) or international character of the arbitration process.

The will of the parties to consider an arbitration as *international* (despite the domestic forum) is accepted today by the internal legislation of different countries. So the Italian Code of Civil Procedure provides that the arbitration agreement may refer to another procedural arrangement of the arbitration, different from that of the institution of arbitration where the parties are addressed and in this case the arbitration agreement prevails⁴. The legal basis of such a conception of the problem is found in the recognized principle of the *autonomy of the parties*

¹ A potential definition of the international arbitration would be: a consensual mean established on the private will of the parties in conflict, through which trans-national disputes can be eventually settled, based on the agreement of the parties, from the non-governmental decision-makers, who are entitled to produce a legally binding decision and forcibly applicable for the state to which the parties belong, or one of them.

² UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985 with amendments as Adopted in 2006, United Nations document No. A / 40/17 and No. A / 61/17.

³ UNCITRAL Model Law, the interpretation of Article 1/1 of the term "commercial" and Article 1 (3) provides what are the criteria to determine the character "international" arbitration process. Arbitration is international if it is completed at least one of three conditions set out in this provision: (a) at the time of conclusion of the agreement, the arbitration parties have their places of business in different States (*subjective criteria*); or (b) one of the following places is situated outside the State in which the parties have their places of business: i-arbitration country, if it is determined in the arbitration agreement; ii-every place where must be met any major portion of the obligations of the relationship trade, or the country with which the core of the arbitral dispute is more related (*objective criteria*), or (c) the parties have agreed explicitly that the scope of the agreement is arbitral – so the trade dispute – to be linked with more than one country (trans-national).

⁴ Art. 832. (1) (Rinvio a regolamenti arbitrali): La convenzione d'arbitrato può fare un regolamento arbitrale rinvio a precostituito. Nel caso di quanto previsto nella contrasto convenzione tra di quanto previsto dal arbitrato di regolamento, convenzione la di arbitrato Preval. Se le hanno non diversamente convenuto party, as applic regolamento in vigore il al momento in cui il procedimento ha arbitrale Inizio.

will in the regulation of international trade relations, autonomy which is sanctioned by many national laws and international conventions⁵.

International arbitration is, in this way, an entirely voluntary and consensual means of resolving disputes by non-state decision-makers, which are authorized to produce a final and binding decision, which is able to find applicability across national courts⁶. Being regarded as a private process, arbitration is only an alternative of the lawsuit. Arbitration does not replace the national judicial machinery in all aspects, but it rather coexists with it.

As a matter of fact, any legal studio, today, generally suggests that a conflict, which has originated from international commercial legal relations, refers for solution in an arbitration forum and not in a state court. Why does this happen? The answer lies in the nature of international trade relation, which is "organically" characterized by speed and the need for fast solution and normally cannot wait for the long and complicated judicial process. That is why arbitration, as a trial that takes place "outside the state judicial planet"⁷ appears more attractive and a better opportunity for the international business, because:

- ✓ it does not represent the structural and administrative rigidity of the judicial system,
- ✓ it is free from most typical formalisms of the judicial system,
- ✓ it is trusted to the professionals of the sector that are involved correspondingly only for the specific category of the cases,
- ✓ it is structured within the deadlines to ensure speed in decision making (eg, 6 months, etc.) based on projections of national legislations⁸,
- ✓ it is a confidential process that holds out of the public "eye and ear", the conflicts between the parties of the international trade, to which the confidentiality is very important⁹,

⁵ European Convention "On international commercial arbitration" (Geneva Convention), 1961, article IV / 1 / b / iii - "...in this case, they (parties) shall be free inter aliato lay down the procedure to be followed by the arbitrators"; UNCITRAL model law, Article 19 "Determination of rules of procedure": "(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".

⁶ Gary Born, *International Commercial Arbitration in the United States: Commentary and Materials* (The Netherlands: Kluwer law and Taxation Publishers, 1994), p.1.

⁷ Gian Franco Borio, "L'arbitrato Commerciale Internazionale: genesi e svolgimento dell'arbitrato in Italia, l'arbitrato fra imprese di stati diversi, La decisione degli arbitri, la sua circolazione in Italia e all'estero e la sua impugnazione, le istituzioni arbitrali permanenti", Giuffrè 2003, p.106.

⁸ Eg. The RA Civil Procedure Code provides the 6 - month deadline for to the development and completion of the arbitration process, if the arbitration agreement has not defined other deadline (Article 413/1);

⁹ The parties are interested to maintain the confidentiality because from the "crash" in the process could be affected for e.g. the interests of the loan third parties related with the parties (e.g. banks.); it may be affected the product and its price, due to very negative marketing that brings the involvement in a manufacturing lawsuit; Something like that the state judicial system cannot and should not guarantee unless in very limited cases.

- ✓ it makes the parties feel important and permanent protagonists in the procedure that will lead to a final solution of the conflict, because it guarantees the parties the right to appoint arbitrators; to determine the "rules of the game"; to decide on the arbitrators time, place and language etc.
- ✓ it allows the arbitrators to apply, where appropriate and when it is received the explicit consent of the parties, the so-called "equal judgment in favor of the parties" (*ex equo et bono*)¹⁰,

But, most of all, International arbitration is a successful and effective tool in international commercial dispute resolution, for two essential reasons: (a) *neutrality and the autonomy of the forum* and (b) *the enforcement of the arbitral award* (New York Convention¹¹). These two main characteristics of international arbitration are both guaranteed by the national legal order and supervised by the domestic judicial system.

II. "De-nationalization" of international arbitration or the relationship with national legal orders?

The question that naturally can be made and discussed, taking into account the international character, is if this character implies the absence of every connection of the international arbitration with a specific national legal order? The *international* character of the arbitration does not exclude the submission of its regulation to a particular *national legal order*. Legal national competent order that will regulate some aspects of this arbitration will be just that of the country (state) in which will be held the activity of the institute of arbitration, or of the country determined on the basis of free will of the parties of a contract. Legal regulations of a national legal order would have a fundamental importance for the definition of a range of issues related to arbitration. More specifically, these legal regulations, define for the arbitration the:

- Legal conditions for signing an arbitration agreement, where included: (a) the ability of the parties to conclude an arbitration agreement; (b) the object of disputes, which can be resolved by arbitration; (c) the criteria of the form of the arbitration agreement;
- Legal conditions for the appointment / exclusion / replacement of the arbitrators;
- Legal conditions, when a national court intervenes as a support in the arbitration process;

¹⁰ "Ex equo et bono" manner permits the arbitrators to descend from the application of the provisions of the positive law, to resolve the conflict through a substantive justice rather than formal. The state judge interprets and applies only the law and the stipulated will in the contractual provisions. Meanwhile, according to the "Ex equo et bono" manner, the arbitrator contributes to fill the contractual gaps and perhaps to renegotiate the terms of the accord between the parties.

¹¹ The Convention *on the Recognition and Enforcement of Foreign Arbitral Awards*, also known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959.

- Legal conditions to appeal against the decision of the arbitration;
- Legal conditions for the recognition and enforcement of the international arbitral awards;

Different national legal orders can reach different conclusions about such aspects of the arbitration proceedings, but which are important for the effectiveness of the arbitral award. So, different national legal orders reach different conclusions as regards to the ability of the parties to conclude a compromise clause, or as regards the *arbitrability* - the nature of the dispute that can or cannot be submitted to arbitration etc.

The international character, therefore, do not excludes the national legal orders, which will be taken into consideration if for e.g. one of the parties has an interest to oppose the effect of the arbitration agreement, to annul the effects of the arbitral award, or to benefit from the recognition and enforcement of this award in a particular state. In such cases, the interested party must request the intervention of the judicial authorities of a given state (e.g. to claim the recognition of the award), and the latter will apply mandatorily the legal norms that are related to the national legal order where it is required the recognition of the arbitral award. Likewise, if the arbitrators themselves are unable to manage the process (e.g. because they cannot get the proof), yet the legal order of a given state, via a national court, will act on the request of the arbitral tribunal.

The concept of "*denationalization*" of international arbitration should not be understood as a total disconnection of the latter from any legal order, but as a natural application, **not mandatory but voluntary** of the national legal orders, for the regulation of some important moments of the life of the international arbitration institute. The private parties will to produce legal effects should be guided and supported by a foreign legal system and this system cannot be other than the state legal system. Only a relationship with the state system, which is implemented by a national court, can ensure the effectiveness of the arbitration mechanism.

III. The role of state courts in the arbitral process.

There is a debate today about the courts' intervention in the state arbitration process. What should the level of the intervention be, or to what extent the legal order must accept the intervention of the state courts in the arbitration process? That is the question.

Precisely at this point, we can say that, on the one hand, there are some national laws that do not allow at all or allow a very limited interference¹², ensuring more independent arbitration systems

¹² This *category* has been formed from the former socialist countries, where the arbitration was based on particular organisms associated with the chambers of commerce of the countries concerned. The character of these arbitration courts was such that excluded in any consideration of arbitral issues, ordinary courts of these countries. It was *as such* for example the centralized arbitration system in Albania until the end of 1993 (regulated by the Decree nr.5009 dt.10.11.1972 and later with the law no. 7424 dt.14.11.1990 "On state arbitration"), which does not allow judicial intervention in any case.

as, on the other hand, there are other domestic laws that provide a much greater control of the judicial system over the arbitration¹³. These two legal order categories are generally outdated today, since most of the developed countries legislations provide a moderate intervention of the state court. This third category of legal orders is located between the two extremes cited above and in it there are included the legislation of almost all western European countries, and those countries which have accepted the New York Convention of 1958. In these legal systems the role of the national judges takes importance in the way of the arbitral procedure to guarantee the independence of the arbitration and at the same time to support it.

The parties in conflict choose the arbitration process because they want a process which is private, confidential, out of the doors of the state court, faster, less costly and that finally solves the dispute. Their will should be respected by their legal order and the national courts, leaving the arbitration process to move independently. Meanwhile, on the other hand, the parties themselves do not need just a "piece of paper" issued as a decision by the arbitrators, but they need a powerful authority that will guarantee the execution of what the arbitrators dispose. Likewise, even the countries want to ensure that the arbitration process is fair and impartial and that it guarantees the rights and liberties of their citizens. In this way, while it is argued that the arbitration should be "free" by the courts, in order to be efficient, it is also admitted that it needs the help of the state courts, in order to be effective¹⁴.

The international doctrine recognizes three theories that explain the extent, to which state courts should intervene to the arbitral process¹⁵. According to the first theory, which justifies a great intervention level of the state court in the arbitration process, the arbitration agreement and the arbitral award are two different things, and the second (the award) is similar to the decision of a state court. According to the second theory, which attempts to minimize the intrusion of the judiciary into an arbitration process, the award is a result of the arbitration agreement, so that the arbitral award should be effective based on the "*pacta sunt servanda*" principle¹⁶. The third theory is a compromise between the two and claims that an arbitral award may be considered analogous to a court decision only when a court order is needed for its enforcement. These three

¹³ This category of national laws is a feature in Latin American countries, where the arbitrator is legally subjected to a close judicial protection, at all the stages of the arbitral proceedings (see Kalia Ardian, "E Drejta Ndërkombëtare Private", 2nd edition 2010, FLESH Publication, p.364).

¹⁴ Redfern, A, International Commercial Arbitration: Jurisdiction Denied: The Pyramid Collapse (1986) JBL 15.

¹⁵ Lew, Julian D. M., Applicable Law in International Commercial Arbitration. New York: Oceana Publications, Inc., from 1978.51 to 52.

¹⁶ *pacta sunt servanda* [Latin, "Promises must be kept/Agreements are binding"] *An expression signifying that the agreements and stipulations of the parties to a contract must be observed.*

theories are already known with the names: Jurisdiction theory; Contractual theory; Hybrid (or mixed) Theory¹⁷. In 1960, it is elaborated a fourth theory, known as "Autonomous theory".

IV. Common court functions in the arbitration process, a look at the Albanian legal framework.

Usually, the role of common state courts in relation to the arbitration, given by the tasks assigned to these courts or allowed to perform in relation to the arbitration, consists of two functions:

a. Supporting function for arbitration.

Due to this function, the ordinary state courts, as part of the state power, advance the process of arbitration, when this process for any reason remains in place. UNCITRAL model law provides that every state that adopts the model law into its domestic law, defines in the latter the competent authority that will intervene to meet several functions of the supporting or supervisory character in the arbitration process. This authority may be a court or an authority of a different nature¹⁸. In this way, the spirit of the model law allows the judicial intervention to support the function of the arbitration procedure, when the arbitrators themselves face barriers in important moments of the process.

Even the Albanian national legal order, namely the Code of Civil Procedure (CCP) provides the intervention of the Albanian national court in support of the normal continuity of the arbitration process. That is because the power vested to the arbitrator does not have the character of the state court jurisdiction¹⁹. Thus, the arbitrators cannot obligate a testimony to vow in front of them, cannot take a measure to insure the lawsuit, etc., and that's why they need the state court intervention. However, the Code provides various strict criteria to legitimize this intervention. *First* it is asked that the agreement between the parties to have failed in order to resolve the problem. **Unless** the parties cannot come to an agreement to fix or solve the problem that has arisen with the arbitration procedure, may be allowed court intervention. Thus, for example for setting the number of arbitrators, when there is no agreement between the parties, it may be made by the national courts (Article 405)²⁰. *Secondly*, the court is put into motion only on the request

¹⁷ Hong-lin Yu, "Total Separation of International Commercial Arbitration and National Court Regime", 5(2) J. Int'l Arb. 1988,148; Georgios I. ZEKOS, "Problems of Applicable Law in Commercial and Maritime Arbitration", 16(4) J. Int'l Arb. 1999,177; Gunther J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award", 18(2) J. Int'l Arb. 2001,147-148.

¹⁸ UNCITRAL Model Law, *Article 6 "Court or other authority for certain functions of arbitration assistance and supervision"*: The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.].

¹⁹ Brati, A. "Procedura Civile", 1st edition 2008, DUDAJ Publication, p.418.

²⁰ Article 405 of the Civil Procedure Code (CCP): "*In case of disagreement between the parties and with their prior consent, the arbitration court is formed by an arbitrator or more arbitrators in the odd number, set by the court*".

of the party concerned or the court of arbitration, where the latter is unable to take a decision itself. Thus the exclusion of the arbitrator may be by the national court (court of district which has territorial jurisdiction) at the request of the parties, when there is no agreement between the parties and when the arbitration court cannot decide itself (Article 409)²¹. Similarly, the completion of the arbitration court with an arbitrator, is made by the state court, when the parties do not agree and the arbitral tribunal itself cannot take a decision.²²

a.1. Support of domestic courts, in taking of evidence - Article 27 of the UNCITRAL Model Law provides that *the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of the state, assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.* This provision is applied only within the state where the arbitration is located, in accordance with the specification made by Article 1, paragraph 2, of the model law.²³

This important moment of the supporting function of the national court towards the arbitration process, is provided by the Albanian legislation. Thus the Civil Procedure Code provides the intervention of the court (on request, not *ex officio*) to take the relevant evidences for the process, or to call the witnesses and experts, when the court of arbitration is unable to execute in practice these important procedural elements²⁴.

a.2. Judicial support for temporary measures - Very interesting it is the provision of the CCP on the national court intervention in taking measures for lawsuit insurance²⁵. The measure to secure the lawsuit in the arbitration process, at the request of an interested party, is taken by the court of arbitration. The latter is hindered in obtaining the insurance measures only when the parties have expressed their will to the contrary, agreeing explicitly that in the arbitration process

²¹ Article 409 of the CCP: *"If the referee for which it is requested the exemption does not withdraw from the mission or procedure designated by the parties does not give solution to this objection, the court of arbitration decides without the participation of an arbitrator for which is sought the exclusion. When the latter does not give solutions for exemption request, decided by the court of first instance, not later than 15 days from the day of arrival for the trial of the dispute".*

²² Article 411 of the CCP: *"When the parties appoint arbitrators in even numbers, the arbitration court is supplemented by an arbitrator appointed by agreement of the parties and, in its absence, by arbitrators appointed by the parties. When these have failed to appoint an arbitrator, it is appointed by the chairman of the court of first instance".*

²³ Article 1 / (2) - The provisions of this law, with the exception of Articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, are applied only if the place of arbitration is in the territory of the state (the state that has adopted the model law).

²⁴ Article 421 of the Civil Procedure Code: *"The arbitral tribunal itself operates to obtain necessary evidence. If they encounter difficulty in getting them, such as the refusal to appear in the court of arbitration, to submit a written test or receive data from a state or private institution, these are required by the court of first instance, which operates according to the rules provided in this Code for the courts".*

²⁵ Article 418 of the Civil Procedure Code: *"The arbitration tribunal at the request of one of the parties may decide to take measures to secure the lawsuit ... If the other party does not comply with these measures voluntarily; the arbitration court is addressed the competent court, which decides according to the rules defined in this Code".*

not to be applied lawsuit security measures. The measure taken by the court of arbitration should be applied voluntarily by the party against whom the action is directed. If this last party does not voluntarily implement the measures of lawsuit security, the arbitration court is directed to the court of first instance and the latter decides according to the rules of the CCP. In this case, the state court does not judge the opportunity of the security measure, given by the arbitrators, but simply rules on its execution.

This moment appears interesting, because Albanian judicial practice serves us cases where the concerned party, despite the fact that it had an arbitration agreement with the other party, has claimed directly to the court of first instance and the competencies of the latter for the allocation of the insurance measure of the lawsuit, has been estimated as legitimate. Such is the case "*The Company "International Colliers" ltd vs. "City Park" ltd*, addressed by the Supreme Court of the Republic of Albania in the decision No. 92/2010. The company " International Colliers" Ltd (claimant) is addressed to the district court of Tirana and has claimed "*Getting the measure of securing the lawsuit ... placing the confiscation of income that benefits the defendant by the lease of the units of the commercial center City Park , with third parties*". Tirana District Court has decided: "*The proclamation of incompetence to examine the case on the grounds that the parties have concluded an arbitration agreement and, therefore, any national court cannot be competent, despite the arbitration court*"²⁶. Thus the conclusion reached by the state court was: "*....the request for insurance of the lawsuit cannot be judged by the Tirana District Court, but by the court of arbitration, referring to the Article 414/2 of the Code of Civil Procedure*".

In addition, the claimant is addressed to the High Court, which has had to give an answer to the question: **if the dispute, which stems from an arbitration agreement signed between the two parties, with their free will, can be made subject to the trial by an ordinary state court.** The High Court notes that cannot be excluded *a priori* the ordinary civil court jurisdiction from the consideration of disputes arising on the basis of the performance of a contract, pursuant to which the parties have agreed to address to an arbitral tribunal. Directing to the national court to obtain a temporary measure (an interim decision) about a conflict that belongs to the arbitral jurisdiction is not considered a violation of this legitimate jurisdiction, determined by the will of the parties, expressed in the arbitration agreement. In this way the High Court, considering that the claim of the applicant in this trial is only the measure of the lawsuit insurance and not the examination of the dispute in its merit, has disposed that the court of first instance has jurisdiction for issuing

²⁶ In the Article 16, paragraph 1 of the Contract dated on 05.01.2008, concluded between the parties, is provided: "*All the disputes, which may arise in connection with this contract and which cannot be resolved amicably between the parties will decide to be selected by the Group of the Albanian Commercial Mediation and Arbitration Center of Tirana, Albania, by three arbitrators. Their decision will be decisive for the parties. The applicable law of this contract in all the cases is the Albanian law*".

security measures and something like that does not prejudice the arbitration agreement between the parties²⁷.

It is already accepted by the international jurisprudence that the domestic courts have the power and therefore play an important role in taking temporary measures, based on the request of a party, in some limited cases, such as for example the issuance of intermediate orders, conservation measures (guarantee), etc., which are estimated by the court as fair and appropriate.²⁸ Indian Supreme Court on the case of *Olex Focas Pvt. Ltd against Skoda Export Co Ltd*²⁹ argued that the state court has jurisdiction and power to provide interim measures in appropriate matters. In this case, the provisional measure was concerned on the assurance of an ownership dispute lawsuit.

The domestic courts, thus, play an important role in supporting international commercial arbitration tribunals, solving important issues on their activity. Without the intervention of the state court in this regard, international commercial arbitration cannot be effective.

b. The control function of the arbitration.

²⁷ The Civil College of the Court, in a decision no.00-2010-425 (92), has argued that: "With regard to the applicant's request in this trial to secure the lawsuit: Law no.8687, dated on 09.11.2000 *"On accession of the Republic of Albania in European Arbitration Convention"*, Article 6, paragraph 4, expressly states: "*A request for temporary measures or security measures addressed to a judicial authority cannot be deemed incompatible with the arbitration agreement, or as a submission of the substance of the case in the court*". The UNCITRAL Arbitration Rules (United Nations Commission for International Trade Law), approved by Decision No.31 / 98 dated 15.12.1976 of the UN General Assembly, Article 26, paragraph 3, expressly says: "*A request for interim measures, addressed by any of the parties to a judicial authority shall not be deemed incompatible with the arbitration agreement, or as a waiver of that agreement*". Rules of Procedure for Arbitration of the Albanian Commercial Mediation and Commercial Arbitration "MEDART", paragraph 22/c expressly says: "*The demand for measures to secure the lawsuit that has been addressed by any of the parties to a judicial authority shall not be considered that is inconsistent with the arbitration agreement, or as a resign of that agreement*". In the analysis of the provisions cited above, the Civil Division of the Supreme Court concludes that a valid arbitration agreement does not prevent the parties to address a judicial authority, as in the case, the Tirana District Court (which is competent court), to claim "*taking the security measure of the lawsuit*". The submission of such a request cannot be considered as incompatible with the arbitration agreement, or as an examination of the merits of the case. This treatment that is done to the security measure aims the fact that the parties have the opportunity to quickly realize, and in a more effective way their rights ... the arbitration clause provided for in Article 16/1 of the contract, date 01/05/2008, connected between the parties do not expressly provides that the parties, even for the research regarded the safety measures, must necessarily be directed only to the arbitration court. In these conditions, the reference that Tirana District Court makes at the Article 414/2 of the Code of Civil Procedure by the Panel deemed wrong, because this provision regulates the jurisdiction of the arbitral tribunal on the merits of disputes that may arise between contractual parties as a result of non-compliance with the contract, and does not refer to claim type "measure of lawsuit insurance" which is a special claim that has no connection with the merits of the case. This claim can be considered by the judicial authority, and the latter is obliged to examine it in accordance with the Code of Civil Procedure (Articles 202 and following)".

²⁸ UNCITRAL Model Law, Article 9: "Arbitration agreement and interim measures by court" - *It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court, an interim measure of protection and for a court to grant such measure* ".

²⁹ AIR 2000 Delhi 161.

In the implementation of this function, ordinary state courts control specific aspects of the process. Thus, the national courts finally decide regarding issues of jurisdiction of the arbitral forum, when there is no consensus, or when parties oppose the arbitral jurisdiction. For example when the arbitrators set aside the contestation of a party regarding to the jurisdiction of the arbitral forum, then the party addresses to the state court to finally decide on this issue.

The authority of the state court to decide on the jurisdiction of arbitration is provided in the model law³⁰ as well as in the Geneva Convention³¹. In the same line, the Albanian CCP also provides the judicial control of the jurisdiction of the arbitral forum, but this control is provided indirectly (not directly). Specifically, this control is carried out in two moments: i) when a jurisdiction conflict is raised and the state court evaluates, with the request of the parties or *ex officio*, that the arbitration agreement is *obviously null*³² and ii) when the arbitral award is appealed in the state court and one of the reasons for this appeal is the wrongfully statement by the arbitration court of its own jurisdiction³³.

At this point, we should examine carefully the possible conditions when an arbitration agreement is *obviously invalid*. In my judgment, this is the case when, by the request of the parties or *ex officio*, the court finds clear infringements of the conditions of the validity of the arbitration agreement, which are:

- i) the ability of the parties to sign arbitration agreements, where should be considered especially legal criteria in case a public entity will be a party in an arbitral agreement;³⁴
- ii) legal criteria on the form of the arbitration agreement, which must be in writing;³⁵
- iii) the content of the arbitration agreement, when the conflict has arisen, in which necessarily must be provided the way of the arbitrator appointment, and the object of the dispute³⁶;

³⁰ UNCITRAL Model Law, article 16/3: "...If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal...."

³¹ European Convention "On international commercial arbitration" (Geneva Convention), 1961, article V / 3, article VI.

³² Albanian Code of Civil Procedure, article 414/2: "When the procedure of the arbitration for the examination of the dispute has not started yet, the other jurisdiction has to declare also the incompetence, despite when the arbitral agreement is clearly null."

³³ Idem, article 434 / b, "... the decision of the arbitration court may be appealed to the court of appeal only when: ... b) the arbitration court wrongfully has declared its competence or incompetence to judge the dispute".

³⁴ Idem, article 402/2: "When one of the parties is the state or a company or organization controlled by it, it cannot claim the right not to be part to an arbitration procedure".

³⁵ Idem, article 404/1: "It is useless the condition for judging of the dispute by arbitration, when it is not reflected in written form in the main agreement between the parties or with other written document that refers to it, like for example telegram, telex and any other correct tool that constitutes a written evidence".

iv) the object of the arbitration agreement, taking into consideration the legal restrictions of the arbitrability of the conflict³⁷.

b.1. The judicial review of the appeal against the arbitral award – As the most typical case of the exercise of this function, is the examination made by the state court on the legality of the arbitral award in the case of appeal against this award. The authority of the state court to review the validity (legality) of the arbitral award, as a result of a complaint filed by one of the parties, is provided by all the national legal orders and international acts. However, these national or international legal acts have taken care to limit this authority, through exhaustively determining the grounds for which an arbitral award may be annulled by a national court, at the request of the interested party³⁸.

There should be made a distinction between the *orders* and *awards* of arbitrators. The main difference between *orders* and *awards* is that orders are not usually reviewable by a prior court to the rendering of the final award, although they may be subject to review by the tribunal. Orders that are considered sufficiently final to permit judicial review, however, can in some instances be challenged in courts. In particular, orders for prehearing security have been found to be reviewable by some courts because of sufficient finality³⁹.

Also there should be a distinction between the *final award* and the *interim award*. The term “final award” is generally used to refer to the award by the tribunal that resolves all disputes between the parties⁴⁰. The term “interim award” is sometimes used synonymously with “partial award”. However, some commentators distinguish between the two by saying that partial awards refer to substantive claims, while interim awards refer to issues such as jurisdiction or applicable law. Such awards do not resolve all of the issues in dispute between the parties. The UNCITRAL Arbitration Rules, for example, provide that “in addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or

³⁶ Idem, article 404/2: “*The agreement of the parties (arbitration agreement) is invalid if it does not provide the way of appointing the arbitrator or arbitrators, and the object of the dispute, when it effectively has born*”.

³⁷ Idem, article 401/1: “*Any property allegation or claim arising from a property relationship, may be subject to an arbitration judgment*”.

³⁸ UNCITRAL Model Law, article 34: “(1) *Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article. (2) An arbitral award may be set aside by the court specified in article 6 only if:....*”; Geneva Convention, 1961, article 9; Albanian Code of Civil Procedure, article 434.

³⁹ Margaret L. Moses, “Principles and Practice of International Commercial Arbitration”, Cambridge University Press, 2008, p.179.

⁴⁰ Issuance of the *final award* terminates the duties of the tribunal, which becomes *functus officio* – without further jurisdiction. Only a *final award* is challengeable by the losing party, who may attempt to have it annulled or vacated under the laws of the seat of the arbitration.

partial awards”⁴¹. A decision designated as an “interim award,” dealing with interim relief, is generally not considered a final award enforceable under the New York Convention.

b.2. Judicial intervention for the enforcement of the arbitral award - Another aspect of the control authority that the national courts exercise over the process of arbitration is the intervention made the competent national court on recognition and enforcement of the arbitral award, if this award is not executed voluntarily by the parties. In this case, state courts guarantee the applicability of the arbitral award, because otherwise this alternative of the dispute resolution (arbitration) would not have been effective. This moment, in the case of domestic arbitration is regulated by the national legislation. For example in the case of Albania, the CCP provides that the Court of first instance to issue the *order of execution* of the arbitral award, upon the request of the parties or arbitrators⁴². Against the decision of the state court that issues this order the appeal is not allowed, whereas against the decision of the state court refusing issuing the execution order, the appeal is allowed⁴³. So, the legislator favors the support that the judicial system should guarantee for the arbitral awards, sanctioning the forced execution (by court decision) of these awards.

The recognition and enforcement of a foreign arbitral award, in a member state of the New York Convention, also marks another important moment of the state court control over the arbitration. The New York convention, Model Law, but also the domestic law provides that *recognition* of a foreign arbitral award is nothing but a process of evaluation and control of the national court over the fulfillment of the legal requirements by the award sought to be recognized . There is a universal consensus that supports the role of domestic courts on the recognition and enforcement of arbitral awards, without which arbitration would be inefficient. But on the other hand, the same consensus stays even for the fact that the state courts also protect the integrity of an arbitration process, not recognizing arbitral awards based only on well-defined grounds which are exhaustively specified in the national and international laws⁴⁴. Especially after the signing of the New York Convention, the courts generally tend to recognize and enforce an award, except in cases when procedural infringement, or public policy issues, are found⁴⁵.

A point to be underlined is that the state court decisions (whether in fulfilling the function of supporting, whether in fulfilling the function of controller) when become final, are binding on

⁴¹ UNCITRAL Arbitration Rules, article 32(1).

⁴² Albanian Code of Civil Procedure, article 432 *"The order of execution of the decision of the arbitration court": "... It is executed by force under an executive order issued by the court of first instance in the country where the judgment was rendered. For such a purpose, in the court secretary is deposed the original of the decision with a copy of the arbitration agreement, by one of the arbitrators or by an interested party."*

⁴³ Idem, article 432/3 and article 433/3.

⁴⁴ New York Convention, Article 5; Model Law, article 36; Code of Civil Procedure, Article 394.

⁴⁵ For example, in the case *Soleimany* against *Soleimany*, the English court refused to enforce an arbitral award based on public policy reason, because the contract was signed (based) on tax evasion, according to Iranian law.

the forum of arbitration and for the parties. Thus, when the state court makes a decision for expulsion of an arbitrator, the latter will be discharged regardless arbitration forum will. But if the court rejects the request of one party for expulsion, the arbitrator will continue to adjudicate the case despite of the contestation or the will of one party in the process.

V. Deepening the independence or the control of the state courts over arbitration.

Experts give different opinions about whether the parties should be allowed to voluntarily extend the state court control over the arbitration process. They respond in different way to the question: “Should parties be able to expand beyond the national arbitration grounds and the case law that have developed, or should the parties be able to eliminate or really limit judicial review, since arbitration is a creature of contract?”⁴⁶. Some of them believe that expanding the grounds for attacking arbitration awards continues the trend of making arbitration more like litigation. They expressed concern about the loss of arbitration’s finality advantages, because the appeals are going to become endless. The initial arbitration is going to be longer, the lawyers are going to be thinking about the record for appeal and the attorneys are going to be making a lot more objections during the procedures. All of this is going to add to the time and expense of the initial proceeding. Furthermore the courts’ increased involvement also removes more of the process’s confidentiality. “When you cross the line into the court system, the parties have no right to tell the courts how to do their business”⁴⁷.

Other panelists argue that offering an option of expanded review would provide protection against “bad” awards. For example, an expanded review provision would be a good provision where parties hire arbitrators for their factual subject matter expertise rather than their legal qualifications. It make sense, in that circumstance, to have an expanded judicial review so that the parties have courts and judges who can bring the legal expertise in the event the arbitrator’s got it wrong. Also the arbitrator concerns about scrutiny may enhance the quality of awards rendered by arbitrators who know those awards are going to be reviewed by the courts⁴⁸.

Conclusions

Arbitration is a private mechanism, totally established on the will of the contractual parties, which manifests very attractive features for trading conflict resolution that we cannot find in the judicial process. However, arbitration has not replaced the judicial process, but rather coexists

⁴⁶ Article “*Alternatives to the High Cost of Litigation*” - CPR Institute for Dispute Resolution - Vol.22 no.7, August 2004.

⁴⁷ *Idem*. See the opinion of panelist Charles A. Beach, who coordinates corporate litigation at ExxonMobil Corp. in Irving, Texas. See also the opinion of panelist George C. Pratt, a former New York federal district court and circuit court judge.

⁴⁸ *Idem*. See the opinion of Panelist Robert H. Smit, a partner at New York’s Simpson Thacher & Bartlett

with it. The coexistence of these two processes is important even for the need that the arbitration has to be supported by national courts.

The activity of the state courts is very important to give effect to arbitral agreement, without which there is no jurisdiction of arbitral forum, to support the arbitral process in order to overcome procedural obstacles and to forcefully execute the arbitral awards. However, national legislations and international acts have been shown careful to limit the judicial intervention within the strictly defined framework. This is done with the purpose that the arbitration mechanism to maintain the characteristics of its advantageous physiognomy towards the international trade disputes resolution, that distinguish it from the trial.

The Albanian legal order, in this context, is consistent with the provisions of the international acts. Albanian Code of Civil Procedure provides for the intervention of the state court in the arbitration process for fulfilling two functions: that of supporting and controlling towards arbitration. The supporting function is manifested in the authority of the court for appointment of the arbitrator, his replacement, supplementing the number of arbitrators, taking the evidence, call of witnesses and experts. An important aspect of this function is represented by the authority of the court to take measures to secure the lawsuit raised before an arbitration forum. National judicial jurisprudence, in this regard, has interpreted the boundaries of this authority, stating that to apply to the national court to get a temporary measure regarding a conflict which belongs to the arbitration jurisdiction, established in the arbitration agreement, is not considered a breach of this legitimate jurisdiction.

The judicial control function, according to the Civil Procedure Code, is achieved through (a) the judicial assessment of the jurisdiction of the arbitral forum, not directly as provided by international acts, but indirectly; (b) the state court control of the legality of the award, through judicial review in an appeal against such award; and (c) the state court control on the arbitration process implemented on the judicial recognition and enforcement of foreign arbitral awards. The judicial control, by the Albanian CCP, is provided limited, only for well-defined reasons and only at the request of the parties, except the judicial assessment of arbitral jurisdiction when the national courts can evaluate even *ex officio* if the arbitration agreement is *manifestly invalid*. In fact, at this point, it is necessary a judicial interpretation on the extend of the "*manifestly invalid*" term. In my opinion, this is the case where are seen clear infringements of the conditions of the arbitration agreement validity, such as the ability of the parties to sign the arbitration agreement, the legal criteria of this agreement form and content, and the arbitrability of conflict.

Through the supportive and control function is realized the aid of the state courts towards the arbitration process, which it really needs. The increasingly market expansion and international investment in Albania require active presence of international commercial arbitration, to resolve disputes, which are a very essential part of the market and international trade. There is a need to

sensitize the national courts to support the arbitration process, because without this support the international arbitration will remain ineffective.

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