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THE NATIONALITY OF THE ARBITRAL SENTENCE IN INTERNATIONAL ARBITRATION

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Abstract

In the case of international disputes resolved by means of arbitration, the cross-border effects of the awards are essential for the parties. At first glance, these awards are assimilated to the national court judgements of the state where they were pronounced and are considered foreign court judgements in any other state. Nevertheless, in some cases, the links between the arbitral procedures and the place of pronouncement of the awards are weak or even non-existent, which raises serios doubts over the ability of this specific place to determine the nationality of the arbitral award. The described circumstance is the premise of the present scientific approach, which aims

to deepen the analysis of the criteria for determining the nationality of an arbitral award (by a Romanian court), with implications on its cross-border effects, as well as on the procedures that could lead to its dissolution. From a methodological point of view, the research aims, successively, to inventory the applicable legal instruments, to delineate the solutions offered by them, in order to, finally, by overlapping them, provide a comprehensive theory on the determination of the nationality of an arbitral award.

Keywords

Arbitral Award, Nationality, Recognition, Enforcement, New York Convention, International Arbitration

1. The Purpose of the Scientific Approach

For the purposes of the research, the internationality of arbitration is related to the presence, in what regards the legal relationship in dispute, of at least one element of foreignness. This particularity leads to the conclusion of the arbitration by an award which may be enforceable (also) on the territory of a country other than the one where it was rendered (e.g. if the debtor has enforceable assets in a foreign country or if, in another country, the losing party would try to have the situation reviewed through a new judicial procedure).

Under these circumstances, at least the following two legitimate questions arise:

- Can an arbitral award rendered abroad be enforced in Romania?
- Can an appeal be lodged in Romania against an arbitral award rendered in a foreign country?

In order to answer the above questions, the starting point is to determine the nationality of the arbitral award, since:

- A Romanian award can be enforced and set aside in Romania, whereas
- A foreign award may be enforced in Romania only after a procedure for recognition and enforceability has been completed, but no appeal for its annulment is available to the person concerned in Romania.

2. Possible Criteria for Determining the Nationality of an Arbitral Award

As a matter of principle, two criteria can be used (cumulatively or alternatively) in order to qualify an arbitration award as foreign:

The first criterion is an objective one (concrete, of geographical nature), respectively that the award was pronounced in another State than the one where recognition /enforcement is sought.

The second criterion is a subjective (abstract) one, as it provides that the award must not be regarded as national on the territory of the State where recognition/ enforcement is sought. This criterion takes into account the presence, in the content of the award, of sufficient elements of foreignness not to be considered as national, in other words, to deny the national character deriving from the place of arbitration (Sălăgean, 2001, p. 208, Fouchard et. al., 1996, p. 981). The criterion is particularly relevant in ad-hoc arbitration, where the place of arbitration becomes unidentifiable because of the possibility for arbitrators to communicate with each other remotely (Prescure Crișan, 2010, p. 171, Roș, 2000, pp. 536-537). Although the literature cited addresses the subjective criterion only from the perspective of the possibility that an arbitral award pronounced in the State in which the party seeks recognition/enforcement may be qualified as foreign because of the elements of foreignness it presents, we consider that this criterion may also be relevant in a situation where the place of rendrence of the arbitral award was abroad but does not present relevant elements of foreignness (other than the place of rendering). If, in the first situation, the subjective criterion may lead to a widening of the scope of foreign arbitral awards that ~~can~~ are eligible to be recognised and enforced, in the second, the same criterion narrows that scope by qualifying those awards as national in the State addressed.

3. Legal Instruments Applicable to the Establishment of the Nationality of an Arbitral Award

Romania's status as a European Union Member State entails the priority application of the legal acts adopted at its level. However, the fundamental European legal instrument adopted in matter of recognition / enforcement of judgments, "Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351 of 20 December 2012)", is not applicable, as Article 1(2) (d) excludes arbitration entirely from its scope. The solution is justified by the wide acceptance of the "Convention on the Recognition and Enforcement of Foreign Arbitration awards", adopted in New York on 10 June 1958 (referred in below as NYC1958), drawn up by the United Nations Commission on International Trade Law

(UNCITRAL), both globally and at the level of the European Union (163 States, including all the European Union Member States, are parties to that Convention), and by its long application.

Therefore, the main regulation applicable in Romania, in the matter in question, is the NYC1958, ratified by Romania by Decree no. 186/1961 (published in the Of. J. no. 19/25.07.1961). The legal regime established by the NYC1958 is generally applicable "to the recognition / enforcement of arbitral awards" rendered in other Contracting States. According to the reservation made by Romania under Article I (3) of the NYC1958, it is also applicable to arbitral awards pronounced in non-contracting States, but "only on the basis of reciprocity established by agreement between the parties".

Secondly, provisions on the effects of foreign arbitral awards in Romania are contained in Book VII of "Law no. 134/2010 on the Code of Civil Procedure" (republished in the of. J. no. 247 of 10 April 2015).

The relationship between the NYC1958 and the provisions of the RCCP is highlighted by the following legal provisions:

- Article VII of the NYC1958, according to which its provisions "shall not deprive any interested party of the right which it may have to avail itself of an arbitral award in the manner and to the extent permitted by the law or treaties of the country in which the award is invoked";
- Article 1065 of the RCCP, according to which "the provisions of this book (Book VII, "International Civil Suit" - n.n.) shall apply to private law proceedings with foreign elements in so far as the international treaties to which Romania is a party, the law of the European Union or special laws do not provide otherwise".

The legal provisions cited allow the conclusion to be drawn that the more favourable law (*mitior lex*) applies, i.e. that normative act (the NYC1958 or the RCCP) which provides for easier conditions for the party seeking to obtain the recognition / enforcement of the arbitral award. In foreign doctrine, it is even argued that it is possible to combine the two sets of rules in order to obtain the most favourable result (Fouchard et. al., 1996, pp. 155-156, van den Berg, 1981, pp 81-83; to the contrary, Deleanu Deleanu, 2005, pp. 485-486, Kroke, 2010, p. 448). In practice, however, the grounds for refusing recognition enforcement laid down by the two sets of rules are currently similar, with the Articles 1125 and 1129 of the RCCP taking over the solution provided in the Article V of the NYC1958.

4. Determination of the Nationality of the Arbitral Award under the RCCP

According to Article 1124 RCCP, "foreign arbitral awards are any domestic or international arbitral awards rendered in a foreign state which are not considered national awards in Romania".

The qualification as "foreign" can be acquired by an arbitration award, according to the cited legal provision, if the following conditions are met cumulatively (Stănescu in Ciobanu et. al., 2016, p. 1767 et seq.):

(a) it is rendered in a foreign State.

This is the first criterion. As it can be observed, if an arbitration award is rendered in Romania, it cannot be qualified as foreign, even if relevant elements of foreignness would suggest such a qualification. These are the reasons we can refer to it as a geographical criterion.

Hence, if an arbitration award is rendered in Romania, for example, settling a dispute between parties based abroad, arising from a contract concluded in another country and which was to be performed entirely abroad, this award will under no circumstances be considered a foreign award. In this situation, the existence of the aforementioned elements of foreignness leads to the arbitration through which the dispute is settled was of international nature (according to Art. 1111 para. (1) RCCP) which entails the application of the provisions of Chapter I, "International Arbitral Proceedings", of Book VII (Title IV) of the RCCP, but the arbitral award rendered would have to be qualified as a national award (according to Art. 1124 RCCP);

(b) is not considered national in Romania.

The use of the geographical criterion presented above is not sufficient in order to reach a conclusion over the arbitration award nationality, and more specifically to conclude over the foreign character of this award. It is a necessary analysis, but we must go further than that, and regard the second condition, which emphasises this exact fact.

Thus, as has been pointed out in the literature, an arbitral award will be considered national or foreign depending on the elements of connection it has with the place where it was rendered (Păncescu in Boroi et al., 2016, p. 1056). It is thus possible that, in a dispute without an element of foreignness, through the choice made by the parties in what concerns the place of arbitration, this dispute could be settled in a foreign country, possibility that Art. 569 RCCP does not prohibit. In such a case, we consider that the arbitral award must be considered national. On the other hand, the existence of additional elements of foreignness, such as the arbitral award being

rendered according to foreign procedural rules or by foreign arbitrators, may contribute to its qualification as a foreign award.

5. Determination of the Arbitration Award's Nationality under the NYC1958

In contrast to the national regulation, according to NYC1958 (Article I para. 1), the two conditions are alternative: "This Convention shall apply to the recognition / enforcement of arbitral awards made in the territory of a State other than the State where the recognition / enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition / enforcement are sought" (see also Martinez, 1990, p. 491, Kroke et. al., 2010, p. 434, van den Berg, 1981, p. 295, Poudret Besson, 2007, p. 827).

The legal text cited allows, as a matter of principle, a judgment delivered on Romanian territory to be classified as foreign and, consequently, to be subject to the recognition / enforcement steps governed by that Convention. In practice, however, such a possibility is excluded, since the NYC1958 refers to the law of the State where the exequatur is sought, and under Romanian law, in order for an arbitration award not to be considered national, it is necessary for it to be rendered abroad (Article 1124 RCCP)

6. Conclusions

From the combined analysis of the provisions of the NYC1958 and the RCCP, the following conclusions can be drawn:

If the place of rendrence of an arbitration award is in Romania, then will always have Romanian nationality, so it will not be necessary, in any case, to go through a procedure for recognition / enforcement in Romania. Furthermore, the party dissatisfied with the award may bring an action for annulment against it before the Romanian courts, under the conditions provided for in the RCCP. On the other hand, with regard to arbitration awards pronounced abroad, the conclusions are more nuanced and depend on the existence or not of relevant connecting factors between the award and the place where it was rendered. Clearly, the absence of any other elements of foreignness outside the place where the award was rendered determines its qualification as national. Conversely, the existence of elements, additional to the place of rendrence of the respective award, that establish a specific link to this place, may contribute to its qualification as a foreign arbitral award (e.g. foreign nationality of the arbitrators or of some of them, application

of the arbitration rules of the place of the award, etc.). The foreign nationality of the arbitral award (and not the place of its delivery abroad) will determine the need to go through a procedure for its recognition or, where appropriate, for its enforcement if its enforcement in Romania is desired. Accordingly, the jurisdiction to settle a possible action for annulment of the foreign arbitral award will not belong to the Romanian jurisdiction, but to that of the State on whose territory the award was pronounced.

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