Recognition and Enforcement of Foreign Arbitral Awards in Russia and Former USSR States

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Edited by

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Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: international-sales@wolterskluwer.com
Website: lrus.wolterskluwer.com

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-3290-5

e-Book: ISBN 978-94-035-3291-2
web-PDF: ISBN 978-94-035-3292-9

Printed in the United Kingdom.

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4.10

Moldova: Recognition and Enforcement of Foreign Arbitral Awards

Cristina Martin

On July 10, 1998,[1] the Republic of Moldova signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Pursuant to Article I(3) of the Convention, the Republic of Moldova has made a reservation on reciprocity: "[T]he Convention will be applied by the Republic of Moldova on the basis of reciprocity only in respect to those arbitration awards that are issued on the territory of the other Member State of the Convention." That reservation is quite common and has been made by more than two-thirds of the contracting states of the Convention.[2] At the same time, the Republic of Moldova did not make a reservation that the Convention shall apply only in relation to the legal relationships of commercial nature, leaving this to the national courts.

Although there is no clear provision in the Convention, several states, including Tajikistan, Bosnia and Herzegovina, Malta, Croatia, Montenegro, Serbia and the Republic of Moldova, have indicated that the Convention shall not apply retroactively: "[T]he Convention shall be applied by the Republic of Moldova only to the arbitral awards that have been issued as of the date the Convention came into force for the Republic of Moldova."

In this context, it is interesting to review the case law from the period prior to the date the Convention entered into force. Thus, according to the Decision of the Plenum of the Supreme Justice Court of the Republic of Moldova No. 4-2r/a-41/2000 of September 11, 2000, the decision of the first instance, according to which the foreign

1. Decision of the Parliament of the Republic of Moldova N 87-XIV on accession to the Convention on Recognition and enforcement of foreign arbitral awards as of 10 July 1998 //Official Gazette of the Republic of Moldova No. 71/471, dated July 30, 1998.
2. UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, p. 35.

arbitral award was recognized, was upheld, even though it was made one month before the Convention entered into force in the Republic of Moldova.[3] In its decisions, the Supreme Justice Court referred to the Declaration of Independence of the Republic of Moldova, which accepted the application of the Soviet law until the new laws are adopted and unless it does not contradict the Declaration of Independence. Because the USSR was a contracting state to the Convention since August 10, 1961, the Supreme Justice Court upheld the decisions of the lower courts to recognize and enforce the foreign arbitral award.[4]

Being one of the most widely recognized conventions in the commercial field, the contracting states have been granted the freedom to adopt their national norms in the spirit of the Convention. The Republic of Moldova has committed to respect and implement the undertaken responsibilities, in accordance with the principle of *pacta sunt servanda*, and faithfully translated them into national legislation, thereby contributing to the creation of a common zone of treatment and effectiveness of arbitral awards within the international community, providing a certain level of uniformization and predictability, thus creating favorable conditions for the development of commercial and socio-economic relations between states.

Domestic legislation on the recognition and enforcement of foreign arbitral awards comprises:

- CPC.[5]
- Enforcement Code.[6]
- Law on ICA[7].

Without dwelling on the existing legislative framework, the Republic of Moldova has included in the Strategy on Moldova's Justice Sector Reform for 2011-2016,[8] a provision to establish/improve the mechanisms of recognition and enforcement of the arbitral awards, thus promoting better mechanisms for the recognition and enforcement of foreign arbitral awards.

In view of the uniformization of the practice of application of the legislation on recognition and enforcement of foreign arbitral awards by the national courts, the Plenum of the Supreme Court of Justice of the Republic of Moldova has issued an

3. Decision of the Plenum of the Supreme Justice Court of the Republic of Moldova No. 4-2r/a-41/2000, dated September 11, 2000.
4. Lazar Diana, Eficacitatea internationala a sentintelor arbitrale straine in sistemul conventiei de la New-York din 1958, p. 123.
5. Civil Procedure Code No. 225-XV dated May 30, 2003/ Official Gazette of the Republic of Moldova Nos. 111-115 as of June 12, 2003.
6. Enforcement Code No. 443-XV dated December 24, 2004/ Official Gazette of the Republic of Moldova Nos. 34-35 as of March 3, 2005; re-published / Official Gazette of the Republic of Moldova No. 214-220 as of November 5, 2010.
7. Law on International Commercial Arbitration No. 24-XVI as of February 22, 2008 / Official Gazette of the Republic of Moldova No. 88-89 as of May 20, 2008.
8. Law on approval of the Strategy on the Reform in Justice Sector for 2011-2016 No. 231 as of November 21, 2011 / Official Gazette of the Republic of Moldova Nos. 1-6 as of January 6, 2012.

explanatory decision.[9] According to this decision, the following principles and rules should be considered at the interpretation of the Convention:

- a principle of presumption of the effectiveness of an arbitration award and an arbitration agreement;
- a principle of interpretation in the Convention in favor of foreign arbitral awards;
- a principle of prohibition to consider the merits of the dispute stipulated in the arbitral award;
- a principle of restrictive interpretation of the grounds of refusal to recognize and enforce foreign arbitral awards and issuance of the decision on refusal to recognize their enforcement only in exceptional cases;
- a rule of application of the most favorable legislation to the international effectiveness of arbitral awards;
- burden of proof is on the side of the defendant.

Arbitration Agreement

Article II of the Convention regulates the recognition and enforcement of arbitration agreements and requires the contracting states to recognize and enforce written arbitration agreements. Arbitration agreements are of particular importance because they become a source of jurisdiction for arbitral tribunals, and any defects in them may also serve as a reason for refusing to recognize or refuse the underlying awards. From a practical point of view, an arbitration agreement is the first filter to establish the arbitrability of a dispute. The exact wording of the arbitration agreement determines the destiny of the arbitral dispute.

The Law on ICA dedicates Chapter II (Articles 7-9) to the arbitration agreement, giving the following definition of an arbitration agreement: "The agreement by which the parties refer to arbitration all or certain disputes that arise or may arise between them in connection with a certain contractual or non-contractual legal relationship."

According to Article 7 of the Law on ICA, an arbitration agreement can be concluded in the form of an arbitration clause in a contract or a form of a separate agreement.

It is widely accepted that arbitration agreement is separable from the main agreement:

- the termination of the main contract does not affect the validity of the arbitration clause;
- the law applicable to the arbitration clause may differ from the law applicable to the main contract.

9. Decision of the Plenum of the Supreme Court of Justice No. 9 of December 9, 2013 on the practice of applying by the courts of the legislation on recognition and enforcement of the foreign judicial and arbitral awards / Official Journal of the Supreme Court of Justice of the Republic of Moldova, 2014, Nos. 1-2, p. 16.

Same as the Convention, the Law on ICA requires a written form of the arbitration agreement. However, the Law on ICA expands the interpretation of what written form is. Thus, while the Convention is limited to explaining that the term "agreement in writing" shall include an arbitration clause in a contract or an arbitration agreement, *signed* by the parties or contained in an exchange of letters or telegrams. The Law on ICA states that in order for an arbitration agreement to be considered concluded in writing, it has to be concluded in any form, regardless whether the arbitration clause or agreement is made orally, by convincing actions or by other means.

Moreover, the Law on ICA explains that an *e-mail* corresponds to the requirement that the arbitration clause shall be in written form, if the information contained in it is available for use in subsequent references. In this case, an electronic message is any message made by the parties by communication of information, and the communication of information is the information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to exchanging electronic information, via e-mail, telegram, telex or telecopy.

National legislation also clarifies that an arbitration agreement is considered to be concluded in writing if it consists of exchanging an arbitration statement and the opposition to this in which one of the parties claims to have an arbitration agreement and the other party does not object to it.

Pursuant to Moldovan law, a defect relating to the form of the arbitration agreement can be corrected during the arbitration procedure by submitting a statement of defense, if no later than the submission of the statement of defense, a comment on this fault is not provided. Thus, participation in the arbitration procedure without objecting the competence of the arbitration court is considered to be a confirmation of the consent of the parties to the arbitration procedure.

With regard to disputes which may be resolved in the arbitration procedure (arbitrability), irrespective of whether the arbitration is domestic or international, in the absence of provisions in this sense in the Convention, the national courts decide whether a particular matter can be settled in arbitration, by referencing to either the law applicable to the arbitration agreement or its own legislation. In this sense, the Law on ICA does not contain any clarifying provisions, indicating generally that the following may be transferred to the ICA by an agreement of the parties:

(a) disputes arising from contractual and other legal relations resulting from execution of the international agreements and performing an activity in relation to an agreement with a foreign element, if at least one of the parties is located outside of the Republic of Moldova;
(b) disputes arising between enterprises with foreign capital and international organizations and associations established in the territory of the Republic of Moldova, disputes between their participants, as well as disputes between them and other subjects of the Republic of Moldova.

As for the law applicable to the arbitration agreement, although it is not directly regulated by domestic law, its choice is subject to the autonomy of the parties, which derives from Article V(1)(a) of the Convention.

Article 8 of the Law on ICA duplicates the provisions of the Convention that the court shall, at the request of either party, refer the parties to arbitration if it establishes that there is a valid and enforceable agreement between the parties to arbitrate. The Law on CIA however provides that:

(a) the request shall be made not later than the first opposition on the merits of the dispute; and
(b) the court also has the right to leave the application without consideration.

However, in the case where the foreseen claim is submitted, the arbitration procedure may be initiated or continued, and an arbitral award may be issued as long as the issue on the jurisdiction is resolved in the court.

As for the invalidity of the arbitration agreement, the Law on ICA does not contain any rules on invalidity of the arbitration agreement. In general terms, the following criteria are considered to verify the validity of the arbitration agreement:

(i) the legal capacity of the parties (this is determined in accordance with the law to which the parties have subordinated the agreement, or, otherwise, in accordance with the legislation of the country in which the award is issued); and
(ii) compliance with formal and material requirements (existence and validity of consent, the legal object and compliance with the form requirements).

Despite the fact that the Moldovan jurisprudence on the invalidity of the arbitration agreement is not plentiful (most of the cases relate to the incapacity of the parties, in relation to the authorized representatives of the legal entities), the tendency to apply the principle *in favor executionis* is still undoubted.

In this context, it is important to emphasize that the question of the validity of an arbitration clause or arbitration agreement, along with the question of its competence, is decided by the arbitration court according to the Law on ICA. Thus, among other things, the Law on ICA recognizes the doctrine of *kompetenz-kompetenz*, as well as the principle of autonomy of the arbitration agreement.

Recognition and Enforcement of Foreign Arbitral Awards

The procedure for recognition and enforcement of foreign awards, the so-called *exequatur* procedure, takes place in several stages. Due to the credibility of the arbitral court chosen by the parties to resolve the dispute, arbitral awards (including foreign ones) are generally executed on a voluntary basis. It is only in the case that one party refuses to execute the award that the other may appeal to the competent authority, which is usually a court vested with the power to recognize and enforce the decision.

The national procedural rules on the recognition and enforcement of foreign arbitral awards are listed in the Law on ICA (Article 38) and in the CPC (Chapter XVII, Articles 475-476). These provisions are subject to the requirement of compliance with the provisions established by Articles III-IV of the Convention, which stipulate for the obligations of the Member States to recognize the foreign arbitral awards (Article III),

as well as the requirement for the documents submitted by the claimant with a request for recognition and enforcement of the arbitral award (Article IV).

The CPC clarifies which arbitral awards are considered to be foreign. Consequently, the arbitral award is considered to be foreign if:

(a) it is issued in the territory of a country other than the Republic of Moldova; or
(b) it is issued in the territory of Republic of Moldova with application of a foreign law to the arbitration procedure.

An application for the recognition and enforcement of a foreign arbitral award shall be submitted with the District Court of Appeal at the place of temporary or permanent residence of the party against whom the foreign arbitral award is directed (in the case where this party does not have a temporary or permanent residence in the Republic of Moldova (including cases where the residence is in another country), or the place of temporary or permanent residence is unknown—at the location of the property).

A party filing the application, may request:

(a) the recognition and enforcement of the arbitral award; or
(b) only the recognition of the foreign arbitral award with reference to claim preclusion, without the right to further enforce the recognized arbitral award.

As a result, it may be concluded that the procedure for recognition of the award is regulated with the aim of recognition of the validity of the award, which means that the validity and the binding nature of the arbitral award are not fully recognized in the Republic of Moldova. This approach does not comply with the provisions of the Convention, as Article III of the Convention expressly states that Member States will "recognize arbitral awards as binding."

An application for the recognition and enforcement of a foreign arbitral award shall contain:

(a) the name of the applicant or his representative (if the application is submitted by the representative) and their temporary or permanent place of residence;
(b) the name or title of the party against whom the foreign award is directed and the place of temporary or permanent residence;
(c) the date on which the foreign arbitral award is to be enforced by the parties.

Having implemented the requirements stipulated by the Convention, the national rules establish that the following are to be attached to the application for recognition and enforcement of a foreign arbitral award:

(a) the original arbitral award or a copy certified by the arbitral tribunal; and
(b) the original arbitration agreement or a certified copy.

Additionally, the CPC provides that the party (upon request) shall submit an affidavit on whether the arbitral award has already been enforced and to what extent it has been enforced.

The CPC sets the requirements for the form of the documents,[10] namely, the documents shall be certified with an apostille if they originate from states that have signed the Hague Convention, or legalized if originating from other states.[11] All documents shall be translated into the state language, and the translation must be notarized. The application is subject to a state fee of MDL 100.

In case the application and the enclosed documents do not meet the legal formal requirements, the court refuses to accept the application for consideration, informing the applicant and giving reasonable time to correct the deficiencies.

Since the Convention does not provide any time limit for filing the application for recognition and enforcement of an arbitral award, it is up to the discretion of each state to regulate this matter. The term established by the CPC is three years from the day when the foreign arbitral award became binding in accordance with the legislation of the state in which the arbitral proceedings took place, with the possibility of restoring the term in accordance with the general procedure.

The application review procedure is regulated only by the national legislation (Article 475 of the CPC). An important feature is the obligation of the court, which is considering the application for recognition and enforcement of a foreign arbitral award, to inform the Ministry of Justice immediately, and if the case concerns a licensed financial institution, the National Bank of Moldova is also to be informed, with the transfer of relevant copies. The absence of the representative of the Ministry of Justice and, if necessary, the National Bank of Moldova, called in the manner prescribed by law, does not preclude the consideration of the case. The provisions of Article 475^2 of the CPC establishing the mandatory participation of the Ministry of Justice and, if the case may be, the National Bank of Moldova are significantly different from the provisions established by the national legislation of other countries, where the procedure for recognition and enforcement of a foreign arbitral award is considered to be consistent between the parties (inter parties). Considering the obligation undertaken by the Republic of Moldova in accordance with Article III of the Convention, as well as the legal consequences of the absence of a representative of the named institutions, this rule should most likely be reviewed in view of its removal, being qualified as excessive regulation.

No legal timeframe for considering applications for recognition and enforcement of foreign arbitral awards is regulated by the legislation of the Republic of Moldova

After hearing the explanations of the parties and examining the evidence presented, the court makes a determination. On the basis of a foreign arbitral award and the decision taken, the court issues a writ execution, which serves as the basis for

10. Article 475^1 (4) CPC.
11. These documents are exempt from legalization or apostille if these come from the state with which the Republic of Moldova has signed a treaty that does not provide for legalization or apostille.

the commencement of enforcement proceedings in accordance with the Enforcement Code of the Republic of Moldova.

Refusal to Recognize and Enforce a Foreign Arbitral Award

The grounds for the refusal to recognize and enforce a foreign arbitral award, provided for in Article V of the Convection, were established in Article 475, paragraph (2) and Article 476 of the CPC.

Unfortunately, the amendments of the CPC of August 14, 2015 excluded the full recognition of the biding nature of a foreign arbitral award. For this reason, the law establishes a judicial review of compliance with procedural aspects, which may be noted in the grounds for refusal.

The grounds for refusal can be conditionally divided into two categories: those that shall be presented and provided by the party in respect of whom the execution of the decision is sought; and those established by the court—ex officio.

The grounds that must be provided by the debtor are the following:

(a) one of the parties to the arbitration agreement did not have full legal capacity or the arbitration agreement is invalid under the law governing the arbitration or, in the absence of its establishment, in accordance with the law of the country in which the decision was issued; or
(b) the party against which the decision was made was not duly notified of the appointment of an arbitrator or of the arbitral proceedings, or for other reasons was unable to defend its rights before the tribunal; or
(c) the award does not concern a dispute covered by the arbitration agreement or does not fall within the terms of the arbitration agreement, or contains provisions on issues that go beyond the scope of the arbitration agreement; or
(d) the composition of the arbitral tribunal or the arbitration procedure was inconsistent with the parties' agreement or, in the absence of such an agreement, was inconsistent with the law of the country in which the arbitration was conducted; or
(e) the arbitral award has not become binding on the parties or has been set aside, or its enforcement has been suspended by the court or a competent authority of the country in which or according to whose law the award was issued.

The court is also entitled ex officio to refuse to recognize and enforce a foreign arbitral award if it determines that:

(a) the dispute is not arbitrable under the legislation of the Republic of Moldova; or
(b) the recognition or authorization of the enforcement of the arbitral award is to be contrary to the fundamental principles of the public order of the Republic of Moldova.

Thus, it becomes clear that the court cannot begin to reexamine the case on its merits and the grounds for refusal must be applied exhaustively and interpreted narrowly.

At the same time, according to Article 476, paragraphs (3)–(5) of the CPC, if the defendant did not refer to these circumstances during his participation in the arbitration, he loses the right to demand the application of these grounds. In accordance with Article 476, paragraph (6) of the CPC "[…] in the event that decisions on matters covered by the arbitration agreement can be separated from those not covered by the arbitration agreement, a part of the foreign arbitral award containing decisions on issues covered by the arbitration agreement may be recognized and executed." The New York Convention attributes this provision to the basis referred to in Article V, paragraph 1, let. (c) of the Convention. However, under the CPC, this rule is established in a separate paragraph, which leads to its applicability to all grounds for refusal, including those that may be made by the court ex officio.

Unfortunately, it is impossible to analyze and describe the judicial practice in the Republic of Moldova on the recognition and enforcement of foreign arbitral awards, as there is no public source that would publish the relevant decisions of the court, and the latest statistics date back to 2012.[12]

Setting Aside of the Arbitral Awards

The cancellation of the arbitral awards is governed by Article 37 of the Law on ICA *Application for cancellation as an exceptional means of contesting an arbitral award,* as well as by Chapter XLIII of the CPC *Proceedings on cases of contesting decisions of arbitration courts*. Also, the courts with regard to applications for the cancellation of arbitral awards are guided by the Ruling of the Plenary of the Supreme Court of Justice of the Republic of Moldova on the application by the courts of legal provisions regarding the consideration of certain issues in the process of resolving disputes, in the event the parties enter into an arbitration agreement.[13]

An arbitral award issued in the territory of the Republic of Moldova may be challenged in court only by submitting an application for annulment of the arbitral award, in strict accordance with the provisions of Article 37 of the Law on ICA and Chapter XLIII of the CPC.

An application to overturn the arbitration award shall be submitted by the party that disputes the decision or by its representative. According to the CPC, this application is examined within a time frame of one month.

It is considered that the application for cancellation is not a tool to appeal the decision on the merits but is a procedural tool aimed to overturn the arbitral award in

12. Zinaida Gutu, Studiul privind funcţionarea instituţiei arbitrajului în Republica Moldova // http://justice.gov.md/public/files/file/reforma_sectorul_justitiei/pilon5/Studiul_regelementarera_si_aplicarea_mecanismului_de_recunoastere_si_executare_a_hotaririi_arbitrale_straine_in_RM-UNDP_Project-2012.pdf.
13. The Ruling of the Plenary of the Supreme Judicial Chamber of the RM No. 2 of March 30, 2015 on the application of legal provisions by the courts regarding the consideration of certain issues in the dispute resolution process, in the case of the parties concluding an arbitration agreement /Official Journal of the Supreme Court of Justice of the Republic of Moldova, 2015, No. 6, p. 4.

the order of judicial control. The application for cancellation differs from the appeal by its subject, grounds, and the purpose pursued.

An arbitral award can be set aside by the court only if:

(a) the party submitting the application for the cancellation of the decision will provide evidence that:
   - one of the parties to the arbitration agreement did not have full legal capacity or the arbitration agreement is not valid according to the law applied by the choice of the parties, and if there is no indication of such a law, according to the legislation of the Republic of Moldova;
   - the party was not duly notified of the appointment of an arbitrator or of the proceedings before the arbitral tribunal, or for other reasonable reasons was unable to defend its rights before the tribunal;
   - the award does not concern a dispute covered by the arbitration agreement or does not fall within the terms of the arbitration agreement or contains provisions on issues that go beyond the scope of the arbitration agreement. However, if decisions on matters submitted to arbitration can be separated from the extraneous issues, only the part of the award that contains decisions on matters not submitted to arbitration may be set aside;
   - the composition of the arbitral tribunal or the arbitration procedure was inconsistent with the parties' agreement.

(b) the court will establish that:
   - under the legislation of the Republic of Moldova, the subject of the dispute cannot be resolved through an arbitration procedure;
   - the arbitral award is contrary to the public order of the Republic of Moldova.

The provision of the CPC on the deadline for canceling the arbitral awards was excluded. However, according to the Moldovan Law on Arbitration,[14] the term shall be three months from the date of receipt of the arbitral awards by the party submitting the application.

The court may, if considers it necessary and, if requested by one of the parties, postpone the consideration of the issue regarding the cancellation of the arbitral award for a certain period of time in order to provide the arbitral tribunal with the opportunity to resume the arbitration procedure or take other actions that, in the opinion of the arbitral tribunal, will eliminate the grounds for the cancellation of the arbitral award.

When considering the application, the court should consider that the application for canceling the arbitral award is grounded on the formal reasons for applying the arbitration agreement and observing the arbitration procedure and should not refer to the manner of judgment of the case on the merits by the arbitral tribunal.

14. Law on Arbitration No. 23, dated February 22, 2008 // Official Gazette of Republic of Moldova No. 88-89 dated May 20, 2008.

In this sense, the court is not entitled to:

- review the correctness of the application of the substantial law;
- investigate evidence considered in arbitration;
- analyze the circumstances of the case;
- change the arbitral award.

During the trial, the court, on the basis of the evidence provided by the parties, may find that there is or there is not any legal basis for canceling the award.

The court decides on the application to cancel the arbitral award by issuing a decision on the full or partial cancellation of the arbitral award or on the refusal to cancel it, which can be appealed in order of cassation.

Another feature of this procedure is that the principle on *non bis in idem* does not apply. Thus, the full or partial annulment of the arbitral award does not prevent the parties from seeking arbitration to resolve the dispute, except when the dispute cannot be subject to arbitration, or to file a claim for litigation, or to resolve the dispute through mediation. The cancellation of the award is aimed at eliminating serious violations and other possible errors.