

HM&H

Country Report

on the Public Policy Exception in the New York Convention

Albania

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Contributed by:

Shpati Hoxha – shpati.hoxha@hmh.al

Dorant Ekmekçiu – dorant.ekmekciu@hmh.al

Table of Contents

INTRODUCTION	3
PART 1	4
I. NATIONAL FRAMEWORK	4
II. RATIFICATION OF THE NEW YORK CONVENTION	5
III. NEW DRAFT LAW ON ARBITRATION.....	5
IV. DEFINITION OF PUBLIC POLICY.....	6
A. Absence of statutory definition of public policy	6
B. Uniform definition of public policy in the context of arbitration (setting aside v. enforcement)?.....	6
C. Distinction between “domestic” and “international” (or “transnational”) public policy?	7
D. Courts’ definitions of public policy as a ground for refusal of enforcement of foreign awards.	7
E. Level of inconsistency with public policy and of review of the award	7
PART II	8
I. CONCRETE MANIFESTATIONS OF PUBLIC POLICY	8
A. Substantive public policy	9
B. Procedural public policy	9
CONCLUSIONS.....	9
CASE LAW CATALOGUE	10

INTRODUCTION

This report has been prepared in connection with the wider project of the IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, on the Public Policy Exception in the New York Convention.

It summarizes the national law provisions that govern the recognition and enforcement of arbitral awards in the Albanian jurisdiction, with a focus on the definition and application of the public policy exception referred to by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”).

This report is divided in two parts. The first part first explains the legal framework for the recognition and enforcement of international arbitration awards in the Albanian jurisdiction. This part then discusses the notion of public policy applied by Albanian courts in dealing with matters related to the recognition and enforcement of international arbitration awards. Here we also discuss and explain the approach of the Albanian courts regarding specific categories of public policy rules¹.

The second part of this report is a catalogue of concrete situations where the enforcement of an award was resisted due to an (alleged) violation of public policy. As the number of such decisions is limited, this report includes a general explanation on how Albanian courts generally define public policy.

The Albanian legislation distinguishes between domestic and international arbitration procedures. This report does not discuss the recognition and enforcement of domestic arbitration awards.

¹ E.g. international public policy rules.

PART 1

I. NATIONAL FRAMEWORK

The domestic law provisions governing the recognition and enforcement of international arbitration awards are contained in the Albanian Civil Procedure Code (the “**ACPC**”). The ACPC used to regulate both domestic² and international arbitration procedures³. Law no. 8812, dated 17.05.2001 has repealed provisions governing international arbitration.

Now the ACPC provides that provisions governing international arbitration shall be contained in a separate law. Article 399 of the ACPC (which is still in force) further provides that the procedure for the recognition and enforcement of decisions of courts of foreign jurisdictions shall apply also for the recognition and enforcement of international arbitration awards.

To date the Parliament has not approved a law governing international arbitration⁴.

Chapter IX, Title III of the Second Part of the ACPC, articles from 393 to 399 contains the reference provisions for the recognition and enforcement in Albania of decisions of courts of foreign jurisdictions. As mentioned, the recognition and enforcement procedures for foreign court decision are also applicable with respect to international arbitration awards.

Under article 394 of the ACPC, the decision of courts of foreign jurisdictions⁵ are not recognized and enforced in the Republic of Albania, if:

- (a) according to the Albania law, the foreign court was not competent for that matter; or
- (b) the claim and the claim notice has not been properly and timely notified to the absent defendant, to allow its defence; or
- (c) the Albanian courts have already issued a diverging decision between the same parties, in relation to the same matter, having the same scope; or
- (d) the Albanian courts are hearing a claim, which has been filed prior to the date upon which the foreign court decision⁶ became final; or
- (e) the foreign court decision⁷ became final contrary to the law governing it;
- (f) the foreign court decision⁸ is not compliant with the fundamental principles of the Albanian legislation;

The ACPC further provides that if specific agreements exist between the Republic of Albania and foreign countries, than the terms of the international agreement shall apply regarding the recognition and enforcement of decisions of courts of that country.

² Chapters I to V of Title IV of Part II of the ACPC, articles from 400 to 438 – as mentioned above, this report does not discuss the recognition and enforcement of domestic arbitration awards.

³ Chapter VI of Title IV of Part II of the ACPC, articles from 439 to 441.

⁴ The Ministry of Justice has circulated a draft law on arbitration governing both domestic and international arbitration – provisions of this draft law shall be briefly discuss in Paragraph III below.

⁵ Pursuant to article 399, *mutatis mutandis* also for international arbitration awards.

⁶ *mutatis mutandis* also for international arbitration awards.

⁷ *mutatis mutandis* also for international arbitration awards.

⁸ *mutatis mutandis* also for international arbitration awards.

II. RATIFICATION OF THE NEW YORK CONVENTION

Under article 122 of the Albanian Constitution, any international agreement ratified by law becomes part of the domestic legislation upon its publication in the Official Gazette of the Republic of Albania. International agreements ratified by law are immediately applicable, unless the agreement is a non-self-executing, in which case an execution law shall be necessary.

Article 122 of the Albanian Constitution further provides that in case of conflicts between the provisions of the domestic laws, and those of ratified international agreements, the provisions of the latter shall prevail.

The Republic of Albania has ratified⁹ the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, therefore self-executing provisions of the New York Convention have become part of the domestic legislation in Albania. Moreover, in case of conflict, provisions of the New York Convention shall prevail with respect to provisions of the domestic law¹⁰.

III. NEW DRAFT LAW ON ARBITRATION

In 2013, the Albania Parliament has passed Law 122/2013, reforming part of the ACPC. According to articles 30 and 49 of Law 122/2013, the ACPC provisions governing domestic arbitration shall be repealed, effective following to the approval of a new law on arbitration. Article 49 of Law 122/2013 charges the Council of Ministers to prepare and draft law governing domestic and international arbitration, and submit it to the Parliament for approval within 3 months of the effective date of Law 122/2013.

With Law 160/2013, the Parliament amended the text of the transitory provisions of article 49 of Law 122/2013. The new text of said article does not contain references to the term for the approval of the draft law on domestic and international arbitration, and implicitly causes article 30 of Law 122/2013 repealing ACPC provisions on domestic arbitration, to become immediately effective.

As mentioned above, following to the approval of Law 122/2013, the Ministry of Justice has circulated with the legal community a draft law on domestic and international arbitration. This draft law contains articulated provisions on the “public policy” exception.

The grounds for refusal of the recognition and enforcement of arbitration awards are contained in article 84¹¹ of the draft law.

According to this article, the recognition or enforcement of an award, regardless of the State in which it was issued, may be refused only for the following reasons:

⁹ Law no. 8688, dated 9.11.2000, published in the official gazette of the Republic of Albania no. 38, November 2000.

¹⁰ The Albanian High Court has already identified a conflict between article 4 of the New York Convention and article 396 of the ACPC, regarding the documents to be submitted to the national court for purposes of the recognition and enforcement of international arbitration awards. The High Court has ruled in decision no. 00-2014 – 1350 dated 24.04.2014 that a the original arbitration agreement or a duly certified copy thereof, must be submitted to the Albanian courts, even if this is not specifically required by article 396 of the ACPC.

¹¹ The text of this article substantially replicates the grounds for refusal of the recognition and enforcement of international arbitration awards, contained in article V and VI of the New York Convention.

- a) at the request of the party against whom it is invoked, only if that party submits evidence to the court before which the recognition and enforcement is sought, that:
 - i) one of the parties to the arbitration agreement were under some incapacity, or the said agreement is not valid under the law to which the parties have submitted it or, failing any indication thereon, under the law of the country where the award was made; or
 - ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings; or
 - iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - iv) the composition of the arbitral tribunal or the arbitral procedure were not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - v) the award has not yet become binding on the parties, or has been set aside or suspended by the competent court of the country in which, or under the law of which, that award was made.

The Tirana Court of Appeal shall determine if:

- i) the matter in dispute cannot be settled by arbitration according to the Albanian legislation; or
- ii) recognition or enforcement of the award would be contrary to the public policy of the Republic of Albania.

Decisions of the Court of Appeal are final according to this law and a recourse to the Supreme Court shall not be allowed.

If an application to set aside or suspend an arbitration award is submitted to a competent court pursuant to subparagraph v) to the letter a) above, the latter, if it considers it proper, may adjourn the decision and on the application of the party claiming enforcement of the award, may also order the other party to give suitable security.

IV. DEFINITION OF PUBLIC POLICY

A. Absence of statutory definition of public policy

As described in the above paragraphs, there is no statutory definition of “public policy” in the Albanian legislation.

Article 394 of the ACPC considers that the recognition and enforcement of foreign court decisions (*mutatis mutandis* international arbitration awards) if it is not compliant with the fundamental principles of the Albanian legislation.

Also the new draft law on arbitration fails to provide a statutory definition; it just refers to “*public policy of the Republic of Albania*”.

B. Uniform definition of public policy in the context of arbitration (setting aside v. enforcement)?

There is no uniform definition of “public policy” in the context of arbitration for setting aside v. enforcement of international arbitration awards.

As the current Albanian law provisions governing the recognition and enforcement of decisions of foreign courts apply by extension also for international arbitration awards, the concept of setting aside international arbitration awards is not available. As Albanian courts are not empowered to set aside decisions of foreign courts, but only refuse enforcement, the same also applies with respect to international arbitration awards.

However, as mentioned above, the new draft law on arbitration aims to introduce the concept of setting aside the international arbitration awards for contrariety with the public policy of the Republic of Albania”.

C. Distinction between “domestic” and “international” (or “transnational”) public policy?

As described in the above paragraphs, the current provisions of the ACPC as well as of the new draft law on arbitration refer to either “*the fundamental principles of the Albanian legislation*” or “*public policy of the Republic of Albania*”.

Therefore, Albanian courts would not be required to take into consideration “*international*” or “*transnational*” public policy, unless such public policies are part of binding international law provisions¹² according to the Albanian Constitution.

D. Courts’ definitions of public policy as a ground for refusal of enforcement of foreign awards.

The general concept that Albania courts have with respect to the term “*the fundamental principles of the Albanian legislation*” contained in article 394 of the ACPC, is that the:

“*orders contained in a decision of a court of a foreign jurisdiction must not conflict with the laws of the Republic of Albania. The rules applied by the foreign court under the foreign law are not relevant. What is relevant is that the effects of the recognition and enforcement of the foreign decision must not conflict only with basic principles, such as jurisdiction, competence, court independence, equality in front to the law, access to justice, adversarial proceedings etc., but also with other the principles of the Albanian material law, which would be relevant for the case.*”¹³

E. Level of inconsistency with public policy and of review of the award

The level of inconsistency with public policy for the review of the awards would be conflict with fundamental principles of the specific piece of Albanian legislation relevant to the matter at dispute, and not only with those general principles inspiring the Albanian legal system.

¹² As mentioned above, international agreements ratified by law become part of the internal legislation. Moreover, according to article 5 and 6 of the Albanian Constitution, Albania applies international law that is binding upon it (*ius cogens*), and acts of international organizations to which Albania has delegated state powers for specific issues on the basis of international agreements.

¹³ Decision no. 342 dated 27.10.2009 of the Albanian Supreme Court.

PART II

I. CONCRETE MANIFESTATIONS OF PUBLIC POLICY

The number of cases as well as the relevant areas with respect to which the recognition and enforcement of foreign judgments¹⁴ is sought, relates to the degree of the social and economic integration as well as to the interactions that citizens and business of a country have with the rest of the world.

In recent decades, Albania has faced different migration waves of its citizens, mainly to neighbouring countries, such as Italy and Greece, but also to other western countries, such as Germany, UK, USA etc. Moreover, as Albania is economically weak, the substantial majority of the cases of recognition and enforcement of foreign judgments relate to family matters (such as divorce, adoptions etc.), while only a minor part relates to business transactions.

Additional with respect to business transactions, the number of cases of recognition and enforcement of foreign court decisions is still higher than with the number of cases of recognition and enforcement of international arbitration awards.

As such, concrete manifestations of public policy exception that we have encountered, mostly refers to adoption matters.

Under Albanian law, adoption is only available underage person¹⁵. As such, Albanian courts have developed a constant approach that any foreign court decision providing for the adoption of a person that is 18 years or older¹⁶, should not be recognised and enforced in Albania, as its effects would conflict with the principles of the Albanian material law relevant for the case, which would be the Family Code.

With respect to business transactions, we have encountered very few cases where the public policy exception has been raised by Albanian courts.

One concrete manifestation of the public policy exception we have encountered in relation to business transactions referred to a case for the recognition and enforcement of an international arbitration award dated 1993¹⁷. The public policy argument used by the court in this case was that when the dispute arose, the Albanian legislation did not recognise the resolution of disputes through international arbitration, but only through Albanian courts. The case was finally dismissed on procedural grounds.

Another manifestation of the public policy exception in business transactions, was encountered with respect to the request for recognition and enforcement of an international arbitration award in relation to a dispute between shareholders, following to the liquidation procedures of a joint venture company¹⁸. The argument used by the Court of Appeal for the refusal of the recognition and enforcement of the arbitral award, between others, included the public policy exception that disputes related to the liquidation procedures of an Albanian company were to be settled by the Albanian courts under the Albanian company law.

¹⁴ Being foreign court decisions or international arbitration awards.

¹⁵ Being less than 18 years old.

¹⁶ Usually from Italian courts, where according to Italian law the adoption is not limited to underage persons.

¹⁷ Case Iliria Srl against the Council of Ministers of the Republic of Albania.

¹⁸ Tirana Court of Appeal decision no. 82, dated 7.9.2007 - I.C.M.A. s.r.l AGRI. BEN S.A.S against the Albanian Ministry of Agriculture.

From the background of the case, it however appears that the dispute did not relate to actual liquidation procedures of the company, but instead to the breach of shareholder duties, which thereafter caused financial losses and the inability to conduct the common business.

The Supreme Court overruled¹⁹ the Court of Appeal decision refusing to recognize the arbitral award on procedural grounds. The Supreme Court failed to discuss the public policy exception argument for this case. The matter was then returned to the Court of Appeal, which finally refused to recognize the arbitral award on procedural grounds.

It must be noted that both the above cases the defendant was a body the Albanian government, and the possibility that the public policy exception was improperly used by the courts to protect the interest of the State should not be excluded.

A. Substantive public policy

As noted above, the public policy exception has been raised by Albanian courts with respect to principles of the Albanian material law, which would be relevant for the case (i.e. specifically adoption matters).

The Albanian courts have however not fully clarified the “*effect doctrine*” developed for family matters is to be implemented in case of business transactions allowing the choice of governing law. More specifically if it would be contrary to public policy to recognise and enforce in Albania an international arbitration award with respect to valid contractual obligations under the chosen governing law, which would however be incompatible with the Albanian contract law.

B. Procedural public policy

As noted above, the public policy exception has been raised by Albanian courts with respect to procedural matters – i.e. exclusive competence of Albania courts to deal with the dispute.

CONCLUSIONS

- 1) The Albanian law does not define “public policy” with respect to the recognition and enforcement of international arbitration awards.
- 2) The Albanian law does not currently provide for the possibility to set aside international arbitration awards; courts can only refuse the recognition and enforcement of international arbitration awards.
- 3) “Public policy” must be a policy of the Republic of Albania; “international” and/or “transnational” policies will not be considered, unless such policies have been incorporated in the Albanian legislation.
- 4) The level of inconsistency with public policy for the review of the awards would be conflict with fundamental principles of the specific piece of Albanian legislation relevant to the matter at dispute, and not only with those general principles inspiring the Albanian legal system.
- 5) Both “substantive” and “procedural” public policy will be relevant.

¹⁹ Decision no. 6, dated 1.6.2011 I.C.M.A. s.r.l AGRI. BEN S.A.S against the Albanian Ministry of Agriculture.

CASE LAW CATALOGUE

Identification of the decision	Summary of the public policy argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
Civil Section of the Supreme Court Decision no. 222 dated 10/02/2005	Incompatibility with the fundamental principles of the Albanian legislation	X		X	No
Tirana Court of Appeal Decision no. 82 dated 07/09/2007	Incompatibility with the fundamental principles of the Albanian legislation		X	X	No
Tirana Court of Appeal Decision no. 35 dated 31/03/2009	Incompatibility with the fundamental principles of the Albanian legislation		X		No
Joint Sections of the Supreme Court Decision no. 6 dated 01/06/2011	Procedural breach - local procedural statute		X	X	No
Civil Section of the Supreme Court (Chamber of Council) Decision no. 869 dated 14/12/2012	Procedural statute - there are no grounds for recourse		X	X	No
Constitutional Court	Supreme Court decision not properly reasoned		X	X	No

Decision no. 31 dated 10/07/2013					
Civil Section of the Supreme Court (Chamber of Council) Decisions no. 2018 dated 04/10/2013	Procedural statue - there are no grounds for recourse		X	X	No
Tirana Court of Appeal Decision no. 17 dated 30/01/2014	Procedural breach - local procedural statue		X	X	No
Civil Section of the Supreme Court Decision no. 175 dated 24/04/2014	Procedural breach - local procedural statue		X	X	No
Civil Section of the Supreme Court Decision no. 362 dated 06/06/2014	Procedural breach - local procedural statue		X	X	No