THEMIS Competition 2015

Semi-final C,

Team of the Republic of Moldova

National Institute of Justice

# Foreign Arbitral Awards Exequatur in the Republic of Moldova Risks and Benefits

---


**Trainees:**

1.Alexandru Mardari 2.Victoria Sanduta 3.Livia Mitrofan


---

**LUXEMBOURG, 9 – 12 June 2015**

# Contents

# I. Normative framework applicable to *Exequatur procedure* of foreign arbitral awards in the Republic of Moldova

## *1. General considerations*

Being a young state, the Republic of Moldova (RM) had to adopt and implement a new normative framework in a short period of time that was meant replace the old Soviet legislation. Referring to the recognition of foreign arbitral awards, we would like to point out that this institution has been easily accepted by the lawmaker, but sufficiently controversially applied by judges and litigants.

The normative framework applied currently in the RM consists of national laws and international norms. The national acts include:

- Civil Procedure Code No.225 of 30.05.2003 (*in concreto* Art. 467 – 476) which undergone substantial amendments during 2012 – 2014 period.
- Law on International Commercial Arbitration No. 24 of 22.02.2008, which has set the legal framework for international commercial arbitration and opened new possibilities for settling disputes out-of-court.
- Enforcement Code No. 443 of 24.12.2004 that was subject to some radical amendments in 2010, when the mechanism of enforcing the judgements in civil matters was substantially modified, especially due to ECtHR case-law in cases versus the Republic of Moldova.

The international normative acts in the field of recognition of court and arbitral awards are as follows:

**a) International Conventions to which the Republic of Moldova has adhered**

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10.06.1958), in force in the Republic of Moldova since 17 December 1998;
- European Convention on International Commercial Arbitration (Paris, 21.04.1961), in force in the Republic of Moldova since 05 March 1998;
- Administrative arrangement for the application of the European Convention on International Commercial Arbitration (Paris, 7.12.1962), in force in the Republic of Moldova since 05.03.1998;
- Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, concluded between Member States of the Commonwealth of Independent States (Minsk, 22.01.1993), in force in the Republic of Moldova since 26 March 1996;
- Protocol to Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of Minsk 1993, in force in the Republic of Moldova since 24.06.2003, *as well as*

**b) Bilateral treaties between the Republic of Moldova and other states (*Romania, Ukraine, Russian Federation, Turkey, Latvia, Lithuania, Azerbaijan, Czech Republic, Slovakia, and Hungary*)**

The international conventions contain, as a rule, conditions for recognising and applying the enforcement, as well as grounds for refusal to recognise and apply the enforcement of foreign arbitral awards, making reference, as a rule, to domestic procedural rules of the state where the recognition and enforcement is requested.

## *2. Definition of "foreign arbitral award"*

To correctly apply the rules that govern the procedure of recognition of foreign arbitral awards, first of all, it is necessary to identify the object of recognition, i.e. the acts that fall under the incidence of the "***foreign arbitral award***" definition.

The term "***foreign arbitral award***" is not expressly defined by the domestic legislation, although the defining elements are included in many provisions. Thus, Art.38 para. (1) of Law on International Commercial Arbitration stipulates "*arbitral award, irrespective of the country it made*". A more precise and wider definition of foreign arbitral award can be found in Art. I para. (1) and (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), which stipulates:

"*1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of disputes between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.*

*2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.*"

It should be noted that the respective Convention sets an alternative criterion to determine the "nationality" of an arbitral award: to be made in the territory of a foreign State (a positive criterion); or it should not be considered national award in the Republic of Moldova (a negative criterion). It should be mentioned that there might be international arbitral disputes, where even if the arbitral award was made

by an arbitral court in the territory of the Republic of Moldova, it will be considered a foreign award, if the applied procedural law was not the law of the Republic of Moldova, but the law of another state.[1]

The Court of the Republic of Moldova shall declare that the dispute settlement process was an arbitral process and not a mediation process, for instance. The foreign arbitral award shall settle the merits of the dispute. As a rule, foreign arbitral awards settle disputes generated by commercial relations. Although more rarely, there are arbitral awards made in disputes resulted from scientific, sportive, intellectual property, etc. relations, as well as arbitral awards made in international investment disputes between one State, as one party, and an investor from another State, from another party. A foreign arbitral award can be recognised and enforced only if it was made in a dispute resulting from relations that are possible to settle through arbitration, i.e. in accordance with the legislation of the Republic of Moldova.

According to Art.3 para. (2) of Law on Arbitration[2], the claims related to family law, claims originating from rental contracts of housing, including disputes on conclusion, validation, cancelation and qualification of such contracts, patrimony claims and rights on housing cannot be a subject of an arbitral convention.

The object of recognition and enforcement may be only foreign arbitral awards with patrimony character, which as a rule, allocate or refuse to allocate an amount of money.

## *3. Exequatur procedure of foreign arbitral awards in the Republic of Moldova*

### 3.1 Court's competence

The application is submitted to the competent court to examine the recognition and enforcement, i.e. the court[3] under which jurisdiction the enforcement shall be made[4]. If the debtor has no residency or headquarters in the Republic of Moldova or when the residence is unknown, the competent court is the court in which jurisdiction the debtor's goods under enforcement are located.

When the debtor does not have residence/housing/headquarters in the Republic of Moldova or when there are no goods of the debtor in the territory of the Republic of Moldova, there is no competent court to receive the application on recognition and enforcement. Hence, the court that receives the application shall reject it issuing a reasoned decision that can be appealed.

---

[1] Art. 1 para. (2) of Law No.24 of 22.02.2008 on International Commercial Arbitration
[2] There are 2 different laws in the Republic of Moldova: one on arbitration and another one on international arbitration.
[3] Previously until 01.12.2012, the authority was vested with the appeal courts.
[4] Art.30 of the Enforcement Code.

## 3.2. Requirements for drafting an application

The application to recognise and enforce a foreign arbitral award shall meet the legal requirements and shall have enclosed the legal acts consisting mandatorily of: original or authenticated copy of arbitral award, as well as its authorised translation into Romanian language, and the original or authenticated copy of arbitral convention and its authorised translation into Romanian language[5].

The judge will not accept an application, which does not meet the legal requirements, giving reasonable time to the applicant to eliminate the shortfalls, and if these are not eliminated, the application will be rejected.

## 3.3. Examination limits

In the process of examining the application, the court shall not re-examine/amend the merits of the foreign arbitral award. The court shall not revise/amend anything stipulated in the foreign arbitral award neither from the legal point of view of the Republic of Moldova nor from the point of view of foreign law, even in the situation when it identifies errors of applying substantive or procedural law.

The merits of the foreign arbitral award are intangible; the court that rules the recognition and enforcement cannot object that in its opinion there would be a solution preferable other than that provided for in the international arbitral award. Moreover, it is prohibited to administrate during the *exequatur* procedure additional pieces of evidence with regard to the dispute. No supervision is allowed regarding the interpretation of the facts of the dispute or its legal values given by the arbitral court in the state of origin of the judgement.

The sanction applicable by the national court, if the specific conditions or grounds are violated, is the refusal to recognise and enforce the award in the territory of the Republic of Moldova.

The court can only admit or refuse totally or partly the recognition and enforcement of foreign arbitral award. The court will be competent only to verify the existence or lack of grounds to refuse the recognition and enforcement of foreign arbitral award.

Hence, the court will study the observance of formal requirements but has no authorisation to examine the merits of the dispute settled by international arbitration.

[5] As we will see further, sometimes our national practice did not take into account these imperative norms, a fact that generated illegal judgements.

## 3.4. Grounds for refusal

According to Art. 476 para. (1) of the Civil Procedure Code of the Republic of Moldova, which is in conformity with Art. 5 pct. 1 of New York Convention of 1958, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

a) one of the parties to the arbitration convention was to a certain extent incapable, or that this Convention is illegal according to the governing law, and in the absence of such evidence that it is illegal in accordance with the legislation of the country where the award was made; or
b) the party against which the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration court; or
c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration;
d) the award contains provisions on matters beyond the scope of the arbitration Convention, but, if the provisions on matters covered by the arbitration Convention can be separated from those that are not covered, that part of the award which contains provisions on matters resulting from the arbitration convention may be recognized and enforced;
e) the composition of the arbitral authority or the arbitral procedure was 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;
f) the award has not yet become binding on the parties, or has been set aside or suspended by a competent court, of the country in which, or under the law of which, that award was made.

The circumstances invoked previously are examined by the court only at the request of the party against which the arbitration award was issued, hence, it has the burden of proof.

At the same time, the court shall mandatorily examine **ex-officio** a number of circumstances which presence will lead to the refusal to recognise a foreign arbitral award.

Thus, according to Art. 476 para. (2) of the Civil Procedure Code of the Republic of Moldova, the court may also refuse to recognise the foreign arbitral award and to enforce it, setting that the object of the dispute cannot be settled in arbitration in accordance with the legislation of the Republic of Moldova or that the recognition and enforcement of the award is in contradiction with the public order of the Republic of Moldova. As we have mentioned above, according to national legislation, a number of disputes cannot be settled in arbitration.

Besides disturbance of public order, we would like to mention the prejudice caused to the sovereignty and national security (Art. 471 para.(1) let. e) of the Civil Procedure Code of the Republic of Moldova) as grounds for refusal to recognise foreign arbitral awards.

Additionally, based on Art. 467 para. (1) of the Civil Procedure Code of the Republic of Moldova, the court will verify if the recognition and enforcement is envisaged in an international treaty or convention to which both the State of origin of the award and the Republic of Moldova are parties.

In the absence of an international treaty, the recognition of foreign arbitral award can be made based on reciprocity of effects of foreign arbitral award. The proving of reciprocity is vested with the creditor, but this can be a very complex exercise, if there is no cooperation between states based on treaties or bilateral agreements.

The national court shall also invoke the general reasons for refusing the recognition and enforcement, the violations of fundamental human rights, as they are foreseen in the Universal Declaration of Human Rights and Convention for the Protection of Human Rights, and as it results from the European Court of Human Rights case-law[6], from international law or enforcement immunity of any foreign state.

The final ruling adopted by a court from the Republic of Moldova will have the form of a motivated judgement, which allows the recognition and enforcement of a foreign arbitral award or refuses the recognition. The national judge shall justify sufficiently all the circumstances invoked by the creditor and all exceptions and objections submitted by the debtor, because the recognition of foreign arbitral award provides him with judicial power equal to a national judgement susceptible to enforcement. Moreover, if a refusal to recognise the foreign arbitral award is ruled, the judge has the obligation to rule on the legal grounds on which this solution was adopted, as well as to analyse all pieces of evidence considered when the decision of refusal was made.

The ruling to recognise and enforce a foreign arbitral award or to refuse the recognition is susceptible to appeal within 15 days from the date of issuance by the competent Court of Appeal.

## II. National jurisprudence regarding the recognition and enforcement of foreign arbitral awards in the territory of the Republic of Moldova

Pursuant a very famous case in 2011, at the request of the Supreme Council of Magistracy, an *Informative Note of the Supreme Court of Justice of the RM on examining the applications to recognise*

[6] Manolescu and Dobrescu case versus Romania and Russian Federation (60861/00) 03.03.2005.

*and enforce foreign arbitral awards by courts of appeal* has been drafted. This Informative Note confirms the modest number of about 10 proceedings initiated to recognise and enforce foreign arbitral awards in the territory of the Republic of Moldova, most of these being admitted. We will try to picture the specifics of national jurisprudence and its impact on social relations in a few examples.

## *1. Merchant Outpost Case*

On 28 April 2011, the Merchant Outpost Company, registered in Belize, submitted an application to recognise and enforce in the territory of the Republic of Moldova a foreign arbitral award made by the ad-hoc arbitration, established in accordance with UNCITRAL Arbitration Rules of 28 December 2010.

To justify the application, the creditor mentioned that on 28 December 2010, the Ad-hoc Arbitration, established in accordance with UNCITRAL Arbitration Rules, issued a decision against six companies[7] and one physical person[8] *regarding the recognition of the ownership of the Merchant Outpost Company over simple registered shares of the BC "Moldova-Agroindbank" SA amounting to 57 077 200 MDL (about 3 369 374 EURO).*

By this decision, the Ad-hoc Arbitration recognised the ownership of the creditor over the simple registered shares of the Bank, bought from debtors, and obliged the holder of the Registry of Securities to introduce into the Registry of Shareholders of the Bank corresponding amendments to change the owner of the shares and delete the debtors from the personal account and to introduce the shares of the Bank into the personal account of the creditor, charging jointly from the debtors in favour of the creditor the amount of USD 46,400 as fees. *The creditor mentioned in its application that the debtors participated in the examination of the described reason in written procedure and the arbitral award has entered into force and needs to be executed.* **By Bender Court of Appeal Judgement of 30 June 2011, the application was admitted.**

The debtors appealed the judgement of Bender Court of Appeal and requested full quashing of judgement, as being illegal. The justification of appeal was based on the fact that the judgement of first instance was made by violating the procedural law, and namely, it was ruled by violating the jurisdictional competence.[9] Besides, the court of first instance of the Republic of Moldova examined the cause *in absentia*, the debtors were not summoned legally about the place, date and time of court hearing.

[7] "Boss Payment Ltd", "Adriatic Fund B.V", "Druga d.o.o.", "Kig d.d.", "Aktiva Holdings B.V.", "Factor Banka d.d"
[8] Milena Logar, citizen of Slovenia
[9] In accordance with Art. 36 para. (1) let. e) of the Civil Procedure Code of the Republic of Moldova, at the date of submitting the application (2011), the recognition and enforcement of foreign arbitral awards of foreign economic courts and international arbitrations was vested with the Economic Court of Appeal.

The arbitral convention and foreign arbitral award were not attached to the file in original, nor as a legalised copy.

The Supreme Court of Justice examined the justified appeals, fully quashed the judgement of the Bender Court of Appeal and based on a new judgement rejected the application to recognize and enforce the foreign arbitral award in the territory of the Republic of Moldova due to the following considerations:

- **the imperative civil procedure rules with regard to jurisdictional competence were infringed[10];**
- **no debtor mentioned in the application to recognise and enforce a foreign arbitral award was summoned for the court hearing[11];**
- **to the case materials is missing the arbitral award in original or its legalised copy[12];**
- **to the case materials is missing the arbitral convention in original or its legalised copy[13].** The arbitral convention was not opposing to most debtors.

The gravity of infringements admitted by the first instance in the case of Merchant Outpost Company mentioned in the *Judgement of the Supreme Court of Justice of 14 September 2011*[14] was confirmed also in judgements of courts of the Russian Federation, which invalidated the decision of the ad-hoc arbitration of 28 December 2010[15].

## *2. JSC HORUS Case*

On 03 June 2013, JSC HORUS addressed an application to the court to recognise and enforce the foreign arbitral award of 10 March 2013 made by the arbitrator Peter C. J. Chapman, from Great Britain

---

**[10]** Bender Court of Appeal, when examining the application of Merchant Outpost Company ignored the provisions of Art.36 para. (1) let. e) of the CPC of the RM. Moreover, the application was submitted by Merchant Outpost Company to this Court of Appeal because one of the debtors had its legal address in the jurisdiction of the Bender Court of Appeal. In reality, the company never resided at that address, which is confirmed in the minutes on the findings and state of affairs, drafted by the Office of the Bailiffs.

**[11]** In this case, the appellants presented written evidence that confirms that a number of receipt notes, enclosed to the case materials as a confirmation that the legal summoning of debtors was made, were intentionally sent to wrong addresses or without indicating the complete address by the Merchant Outpost Company. *Moreover, the appellants presented incontestable pieces of evidence that confirm that the envelops sent to those addresses did not have any summons of the Bender Court of Appeal to participate in court hearing of 30 June 2011, but an invitation to a seminar organised by a law firm.*

**[12]** Thus, contrary to the aforesaid legal provisions, the court of first instance initiated the proceeding and examined on the merits the application to recognise and enforce the foreign arbitral award in the absence of the original arbitral award or its legalised copy. The copy of the so-called foreign arbitral award – ad-hoc arbitration, established in accordance with the UNCITRAL Arbitral Rules of 28 December 2010 in the case No.ARB-AH/12/10 enclosed, represents copied typed pages with three signatures, without relevant legalisation; the judgement is not translated into the official language.

**[13]** According to the copy of the commission contract by which Merchant Outpost Company authorised Boss Payment Ltd to purchase shares of BC "Moldova-Agroindbank" SA, in the Chapter "Dispute examination procedure", the parties agreed that any dispute appeared on the basis of this contract or resulting from this contract, from violating contractual obligations, cancelation or nullification shall be examined by the ad-hoc arbitration. It is important that the parties to this convention are Merchant Outpost Company and Boss Payment Ltd. In the situation when the appellants in this case: "Adriatic Fund B.V", "Factor Banka d.d.", "Druga d.o.o.", "Kig d.d.", "Venture Holding B.V." and Milena Logar were not party to that contract, and respectively, this arbitral convention, its provisions do not have incidence on their rights and obligations. Indeed, in the absence of an arbitral convention signed by appellants, and respectively, of the appellants' agreement for the ad-hoc arbitration to examine the dispute, which object are the shares of BC „Moldova-Agroindbank" SA, which they own legally, this arbitration did not have the right to make any award with regard to their rights and interests.

[14] Case file No.2r-429/11

[15] Case file No.ARB-AH/12/10.

and to collect the debt from the Ministry of Health of the Republic of Moldova as a result as failure to meet the contractual obligations[16].

*According to para.1 of the contract, in case of disputes, the right to settle the disputes shall be vested with the adjudicator Peter H.J. Chapman, Great Britain. On 10 March 2013 the adjudicator Peter H. J. Chapman admitted the application.*

**Chisinau Centre Court admitted the application** for recognition and enforcement of the foreign arbitral award issued by the arbitrator Peter C. J. Chapman, which ruled the collection of a total amount of Euro 1 068 387 and USD 726 269 from the Ministry of Health in favour of JSC HORUS**.**

The Ministry of Justice and the Ministry of Health of the Republic of Moldova appealed the abovementioned judgement. They requested the judgement to be quashed and to rule a new judgement to reject the recognition and enforcement of the foreign arbitral award.

*The main argument of the Ministry of Justice was to dispute the arbitrator quality of Peter H.J. Chapman.* The Ministry of Justice stated that the national rules define the notion of "arbitration" as an alternative way to settle the disputes both by the arbitrators appointed for each case in part (ad-hoc arbitration) and by permanent institutions of arbitration. In all situations, the law refers to one arbitrator, arbitration, award, judgement. The decision of the adjudicator, its effects, legal features that this can produce cannot be considered equivalent to the notion of arbitrator, arbitration, decision, judgement, with which the abovementioned international acts and national laws operate. The procedure of adjudication, counselling, mediation between parties is necessary to avoid an eventual dispute or an apparent arbitration. But this procedure is not similar to veritable arbitration procedures. ***Hence, based on no grounds, the Ministry of Justice invoked that the court appointed the adjudicator as arbitrator and his decision as foreign arbitral award.***

The core argument of the Ministry of Health of the Republic of Moldova was the fact that para. 6.1.2 of the Contract between two parties envisaged that the adjudicator would make a decision and forward it to both parties in written form within 28 days from the date of dispute presentation, and if the adjudicator acts as such, and within 56 days, neither the employer nor the contractor notified about their intention to begin the arbitration, the **decision becomes final and mandatory for the employer and contractor.**

According to para.6.2.1, if the employer or contractor **is not satisfied with** the decision of the adjudicator or if the adjudicator does not make a decision within 28 days with regard to the dispute, then

[16] On 17 January 2006 SA "Horus" and the Ministry of Health of the RM concluded a contract to design, manufacture, install, test and launch steam boiler-operated thermal plants, hot water thermal plants, distribution network, thermal points for heating and hot-water distribution and internal heating systems. According to the contract, the Ministry of Health committed to make a payment of 1 068 387 Euro and USD 726 269, but failed to honour this obligation.

the employer or contractor can, within 56 days, inform the other party, with an informative copy to the Adjudicator, about his intention to begin the arbitration**,** as it is stipulated below. The arbitration cannot be started without submitting such notification.

Simultaneously, para.6.2.2 and 6.2.3 state that the dispute for which an intention note was submitted to start the arbitration will be settled definitively through arbitration. The arbitration procedures will be carried on in accordance with the rules mentioned in the Special Conditions of the Contract, in Paris, France and these have to be settled in accordance with ICC Arbitration Rules by one or more appointed arbitrators.

*Therefore, the Ministry of Health affirmed that pursuant to the contractual provisions, the arbitration can be started only if the parties are not satisfied with the decision of the adjudicator or the later did not make a decision within 28 days.* ***Thus, the Ministry of Health affirmed that this contract clause makes an obvious delimitation between the arbitration and a mandatory pre-arbitration form.***

JSC HORUS requested the rejection of all appeals of the Ministry of Justice and the Ministry of Health and to maintain the judgement of the court of first instance based on the following considerations:

- *The appellants misinterpreted the definition of adjudicator-arbitrator and adjudication-arbitration thinking these are definitions totally far from the arbitration procedure.*[17]
- *The fact that the contract was drafted in a foreign language, in the opinion of the appellants, brings out interpretation issues of the used definitions*[18].

Both arbitration instances that are mentioned in convention in accordance with the definitions used by this, refers to adjudication - meaning ad-hoc arbitration and arbitration – meaning institutionalised arbitration.

JSC HORUS considered incontestable the fact that the judgement issued by Peter H. J. Chapman is a judgement made in an ad-hoc arbitration procedure, which followed all the rights of the debtor and namely, he was informed accordingly about the arbitration meeting, submitted reference, recognised the debt before the adjudicator using the expression "*the ministry is in the impossibility to pay this amount"*, the debtor had the possibility to appeal the arbitral award but he did not do this.

---

[17] It is obvious that contractual clauses that refer to dispute settlement mention two competent arbitration courts for dispute settlement: the first instance – ad-hoc arbitration: Peter H. J. Chapman - the arbitrator chosen by parties through arbitration convention and the second instance, the appeal – the International Chamber of Commerce Arbitration in Paris. *Interpretation of arbitral convention, which in this case is an international commercial contract, can present difficulties due to the existence of foreign elements that attract the incidence of several legal systems consisting of different rules of contract interpretation.*

[18] It should be mentioned here that the terms used in the contract drafted in English language ADJUDECATION and ADJUDICATOR, according to English dictionary have the synonyms ADJUDECATION=ARBITRATION, and ADJUDECATOR=ARBITRATOR, JUDGE *(is someone who presides, judges and arbitrates during a formal dispute.) JSC HORUS invoked the fact that the majority laws in civil matters such as provisions of Article 729 para.(1) of the Civil Code of the RM stipulate that the contract clauses are interpreted in the way they can produce effects, not in the way they do not produce any effects, and the poly-semantic terms shall be interpreted in the way that corresponds better with the contract's nature.*

Chisinau Court of Appeal rejected the appeals of the Ministry of Health and the Ministry of Justice as ungrounded and maintained the judgement of the court of first instance, which became enforceable in the territory of the Republic of Moldova as foreign arbitral award.

The Court has decided that the judgement submitted for recognition is within the rules stipulated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10.06.1958, as well as the requirements mentioned in articles 466 and 467 of the Civil Procedure Code. Civil, Commercial and Administrative College of Chisinau Appeal Court considered that the judgement of the first instance on recognising and enforcing the decision of the adjudicator Peter H. J. Chapman in the territory of the Republic of Moldova is well-grounded, because there are no reasons envisaged by national and international rules to refuse the enforcement of foreign arbitral award.

# III. Risks and remedies

## *1. Impact analysis of defective Exequatur*

The Exequatur of foreign arbitral awards, due to some objective and subjective factors, has pointed out to some legal deficiency, lack of prompt and efficient reaction of supervisory bodies, vulnerability of judiciary, especially with incidence on human factor. The abuses that may be caused in this field can affect directly the banking, energy security, State's property, public services, safety of foreign investors, economic development of the State and, last but not least, the credibility of the justice system.

A sensitive sector that has suffered in the Republic of Moldova, as we have mentioned above, was the banking system. The banking system represents one of the most important areas of the national economy. As a result of enforcement of foreign arbitral awards in the Republic of Moldova, four banks and an insurance company with state majority of shares were affected. As it has been mentioned above, by enforcement of a foreign arbitral award, 28% of the bank shares owned by some shareholders from the Netherlands were transferred in off-shore zones. As a result, the following effects happened:

- the ownership right of foreign investors was infringed;
- forced take-over and lost control over the bank without the will of the owner;
- influencing currency policy of the bank;
- undermining the financial activity of the bank;
- changing the management bodies without prior notification of international financial institutions – bank's creditors – which is considered by these as default cases with the right to withdraw beforehand the loaned financial resources;

- undermining the authority of the bank before depositors, who due to lack of credibility, withdrew the deposited monetary means.

Therefore, if 3 out of 14 banks active in a state are affected by defective enforcement of some foreign arbitral awards, in the conditions described above, the economic security of the country is at risk.

Another affected segment was the energy sector. There are 2 companies "Moldtranselectro" and "Moldelectrica" which are owners of energy grids in the Republic of Moldova. Thus, as a result of a decision to enforce a foreign arbitral award made by the Paris Court of Arbitration, these companies had to pay USD 47 million to a Ukrainian company. If we do report these figures to the State's budget, then a similar amount was allocated to the judiciary sector in 2013, and in terms of citizens' pension increase, this would be sufficient for a 10% increase for each pensioner in the Republic of Moldova. Moreover, it has been ascertained that in case of enforcement of these arbitral awards, the 2 companies that own the electricity grids in the Republic of Moldova had to start the insolvency procedure, which is inadmissible because it affects the energy security. Holding the status of creditor of a foreign company implies the possibility to submit the introductive application to start the insolvency procedure and take over the majority control, which ultimately, affects the end user, i.e. the citizens of the Republic of Moldova. The danger of enforcing this decision is the fact that the collection of a 14 year debt was claimed, which was not accounted, and this fact, should be ascertained by a court that examines the merits of the case, and definitely not by the court that rules with regard to the enforcement of a foreign arbitral award. In this case, the enforcement of a foreign arbitral award had the following effects:

- affects the ownership of local investors;
- incapacity of state authorities to provide effective protection to local entrepreneurs against external attacks;
- endangers the energy system;
- infringes the consumer's right by increasing the tariffs for using energy grids.

The defective approval of enforcement of foreign arbitral awards may put the State's ownership at risk. The State as debtor, owner of a block of shares of a bank or of an insurance company can lose the property, which represents a direct attack on the taxpayer.

Similar to the effects described above is the defamation of image and damaging of judiciary's credibility. The judiciary represents one of the three powers, which touches and influences all social, political, economic and cultural areas of the society. Doing justice is an exclusive competence of the courts. Respectively, an important element of justice is the trust in justice or otherwise, the power of the ruling is affected.

Having studied the essence of the effects of the foreign arbitral award enforcement, we found out that the goods that can be both in the property of companies and State's property are always attacked. The second element is the attacker, who represents a company with headquarters in another state or is a

resident of another zone. The third element is the court that legalises an illegal or *quasi*-legal action – if the attackers make use of a legislative gap. Without a court, the act is impossible to enforce. In this case, the court of the Republic of Moldova, based on some legislative gaps rules the enforcement of some foreign arbitral awards made by courts of arbitration, which in many cases do not have a legal activity basis. Hence, the involvement of the court in such formulas brings about a public resonance and leads inevitably to decreased trust of the population and foreign investor in justice. A credible justice envisages, thus, first of all, the security and stability of legal relations, stability and development of investment environment, and development of economic relations. In 2014 there was conducted a survey regarding the credibility of the justice sector and only **23%** of respondents had trust in justice.

Moreover, one of the most important impediments for any reform is the budgetary constraints. The justice is seldom the target of some major budget investments. The Republic of Moldova has a unique chance to reform the justice sector by 2016[19], thanks to the financial support, granted, first of all, by the European Union. This investment has been already diminished due to foreign donors' lack of trust in justice.

## *2. Legislative remedies*

The authorities of the Republic of Moldova, in the face of legislative gaps that have permitted to endanger the banking, energy system, have undertaken legislative measures to improve the legislation. Thus, under these circumstances, the Government of the Republic of Moldova used its attribution set in the Constitution and, namely, to assume the responsibility of the Government before the Parliament, in exceptional circumstances to adopt a law, a duty vested normally with the Parliament. This law was called the *anti-raider law*[20] by the civil society. According to this law, the Government assumed the responsibility to amend the Civil Procedure Code and namely to exclude Article 257, which provides the courts with excessive discretion margin in deciding on immediate enforcement of judgement.

Furthermore, the Law on financial institutions has been amended, which foresees expressly cases when the transfer of shares of the bank's capital has to be made exclusively with prior written permission of the National Bank. Failure to observe these requirements attracts the absolute nullification of respective transactions.

Amendments were made to the Law on Bailiffs, and according to the new amendments, the bailiffs have to provide the parties with the possibility of voluntary enforcement of decision within 15

[19] Justice Sector Reform Strategy for 2011-2016, approved by Law no. 231 of 25 November 2011.
[20] Law No. 184 of 27 August 2011 on amendment and completion of some legislative acts.

days. In this case the charges for the enforcement service will be linked only to the fee for initiating and archiving the enforcement file.

The law was adopted on 27 August 2011, and by Decision of Constitutional Court No. 28 of 22.12.2011, it has been declared unconstitutional based on the justification that according to Article 38 of the Regulation of the Parliament, the Parliament carries on its activity in plenary sessions and in meetings of standing committees. Hence, submitting the Government Decision to the Parliamentary Secretariat on assuming the responsibility in accordance with enclosed materials, without presenting this political act of assuming responsibility in plenary session, does not meet the constitutional requirements of assuming responsibility to the Parliament. The Constitutional Court has also ascertained that the Law No.184 of 27 August 2011 was adopted according to the same procedure of Government assuming the responsibility during parliamentary vacation, in no presence of the exponent of the Executive Power in the plenary session of the Parliament, determining the impossibility to submit a no-confidence motion and, implicitly, political debate to maintain or withdraw the trust granted to the Government in office. Thus, due to the violation of procedure, the law was declared unconstitutional[21].

Later, a draft law similar to that declared unconstitutional was adopted in accordance with general procedure by the Parliament[22].

These amendments were preceded by a number of legislative modifications, which have strengthened the normative framework and protected the State from other actions based on legislative deficiency.

In this sense, the **Civil Procedure Code,** which is the main law that governs the enforcement procedure of foreign arbitral awards, had been amended. Thus, in a case examined in a competent ordinary court, one of the claims refers to the acts of National Bank; the competent ordinary court issues a judgement without the right of appeal to separate the administrative claim and to transfer it to the competent court. A special procedure has been introduced in ensuring the action with regard to appealing acts issued by the National Bank of Moldova and namely, it will be requested to assure the action initiated against the acts of the National Bank of Moldova only during a court hearing with mandatory summoning of the National Bank of Moldova. Another norm has limited the competence of the court in ensuring civil action and the enforcement of National Bank of Moldova's acts regarding the withdrawal of bank's licence and measures imposed by the National Bank of Moldova in the process of bank liquidation cannot be suspended. At the same time, Article 470 of the Civil Procedure Code of the Republic of Moldova has been amended by including a new paragraph ($1^1$) with the following wording:

[21] Decision of Constitutional Court No. 28 of 22.12.2011.
[22] Law No. 5 of 15.01.12184 on amendment and completion of some legislative acts in force since 07.03.2012.

"*The court that examines the application to recognise a foreign arbitral award shall inform, compulsorily and without delay, the Ministry of Justice about such fact, and if necessary, the National Bank of Moldova, if a licensed financial institution is involved, by submitting the application and relevant documents*".

A new amendment has been introduced along with the amendments mentioned *above* by expanding the grounds for refusal to enforce foreign arbitral awards. In this regard, the court shall refuse the enforcement of foreign arbitral awards, if such rules the transfer of shares of a bank licensed in the Republic of Moldova. In this case, the recognition of an enforcement of foreign arbitral award is admitted only with the condition of submitting the permission of the National Bank to hold a substantial interest in the share capital of the bank or with the notification of the National Bank about the possibility to own shares without prior permission.

Moreover, a procedural rule has been introduced in the **Law on Administrative Litigation** and namely, the timeframe for appealing the acts of the National Bank of Moldova in administrative court (30 days) may only be exercised within 6 months from the date the act has been communicated.

In the context of extending the control of the National Bank of Moldova over the circulation of bank shares, the territorial competence of the courts has been amended, thus, the examination of applications for appealing the National Bank of Moldova acts shall be carried out only in the court where the National Bank has its head-office. The court will only examine the procedure of adopting the act and not its opportunity.

An essential modification was made in the field of restricting the access to justice. Thus, according to **Law on the National Bank of Moldova,** the National Bank acts in the field of monetary and currency policy. The safeguarding measures can be appealed only from the point of view of the adoption procedure, as well as by establishing a preliminary procedure in case of appealing the National Bank documents regarding special administration in the bank, acts of the National Bank adopted during the evaluation and supervision process of the quality of shareholders of entities supervised by the National Bank as well as measures implemented by the National Bank or by the special administrator during the special administration of the bank, which are examined by the National Bank within 5 working days.

To enhance the provisions governing the procedure, the lawmaker has made amendments to the system of enforcing the decision, set forth by the **Enforcement Code**. Thus, Art. 12 para. (1) of the Enforcement Code sets that the enforcement order is issued to the creditor by the court of first instance after the decision becomes definitive.

As an effect of decision enforcement, the **Law on Bailiffs** has been amended. In this case, there were made amendments with regard to the activity of Disciplinary Committee of the Bailiffs. According to last amendments, the Disciplinary Committee of Bailiffs was transferred under the Ministry of Justice,

although before amendments, it activated under the Association of Bailiffs. Moreover, the control of the Ministry of Justice over the activity of bailiffs has been enhanced by vesting the Ministry of Justice with supervision of the activity of bailiffs by verifying the computerised registries of enforcements, the enforcement costs calculation procedure, documents storage, use of electronic links with the registries by means of computer network, observing working hours.

In the same context, the **Law on financial institutions has been amended**. According to the new amendments, the transfer of the shares in the capital of the bank shall be made exclusively with written prior permission of the National Bank, under the sanction of absolute nullification, as it follows:

a) by transfer or other legal acts, if as a result of such transfer any person or persons jointly acting will own directly or indirectly a significant interest in the capital of the bank, as well as in the case when following the increase of such interest, the limits of 25%, 33% and 50% are met or exceeded;

b) based on definitive court decision or transactions or other legal acts carried out as a result of these decisions;

c) by transaction or other legal acts, if the transfer is made between resident persons of other countries and/or off-shore zones and/or groups of persons jointly acting, which have a person in their structure from another country and/or off-shore zone and other persons irrespective of the size of the interest that is considered the object of transaction.

At the same time, the Law on Securities Market has been abrogated and a new **Law on Capital Market** has been adopted. This Law was adopted by transposing the Directives of the European Union into the national legislation to ensure a similar protection to foreign investors and capital market as provided on the EU market.

Based on what have been mentioned above, we would like to ascertain that the Republic of Moldova set legislative remedies such as a number of guarantees to foreign investors and local market, has enhanced the power of decision and control of the National Bank of Moldova, has modified the procedure of foreign arbitral awards enforcement, and enhanced the enforcement mechanism.

## *3. Institutional and individual remedies*

As we have mentioned above, one of the causes of defective enforcement of arbitral awards, besides the legislative gaps, was human factors. To prevent eventual infringements of this kind, institutional and individual actions have been undertaken to counteract the admitted illegalities.

At the same time, institutional actions were undertaken by implementing major reforms in the judiciary. Initially, the District Economic Court has been reorganised, by limiting its material competence and the Economic Court of Appeal has been liquidated. The competence of Courts of Appeal has been

modified to include the enforcement of foreign arbitral awards. Thus, the exclusive competence to rule for enforcement of foreign arbitral awards was of Courts of Appeal until 2012. After the introduction of amendments, the enforcement of foreign arbitral awards was transferred from the court of appeal to the courts of first instance.

Thus, individual actions in this regard were carried out to prevent, fight and bring to disciplinary, criminal liability judges, who did not observe the legal provisions when ruling the enforcement of foreign arbitral awards. A judge who ruled in favour of enforcement of a foreign arbitral award based on unauthorised copies was criminally convicted for making an illegal decision to 3 years of prison with conditional suspension. As a criminal complimentary punishment, he was deprived of the right to hold public position for 5 years, which is the maximum in complimentary punishment. Moreover, another 2 judges, one who examined the merits and the other one who examined the appeal were sanctioned with reprimand by the Superior Council of Magistracy.

At the same time, a number of amendments have been made in the judiciary system, as well as a new **Law on disciplinary liability of the judges**[23]**, in force as of 01 January 2015,** has been adopted**.**

It should be mentioned that the institutional amendments were not conditioned only by the defective enforcement of foreign arbitral awards, but also, under the influence of civil society that demanded a justice sector reform with the support of external partners.

The Republic of Moldova experience in the *Exequatur* procedure of foreign arbitral awards, has determined us to point out not only the risks but also the remedies applied by our State. We hope these are sufficient, and will prove useful in time.

# IV. Conclusions

It is too soon to treat the Republic of Moldova as a success story, but we cannot underestimate the impact of approaching to the European Union on the national public institutions, thus the requirements imposed by the European bodies have had a beneficial effect on awareness of decision-makers regarding justice sector efficient management.

We cannot deny the fact that the Republic of Moldova has had the contradictory experience when legal remedies or existing omissions of these remedies contrary to the regulated purposes and good faith, were used especially to avoid the judiciary system and to reduce the guarantees of a fair trial.

[23] **Law No.178 of 25.07.2014 on Disciplinary Liability of Judges.**

Moreover, we cannot ignore the fact that the incorrect application of the exequatur of foreign arbitral awards can have an impact on the justice image, in the situation when due to lack of a uniform practice, the magistrates risk to recognize and to enforce foreign arbitral awards contrary to the imperative legal rules.

The arbitration is an efficient remedy to solve civil or commercial litigations which has the fundamental purpose to exempt the persons from the formality, complexity and length of judiciary procedures, but if inadequately used, similar to an abusive administrative mechanism, can cause more damage than benefits. We should understand that the legislative modifications made at national level have had the purpose to remedy the legislative deficiencies identified in the process of Exequatur procedure. Thus, the experience of the Republic of Moldova, previously described, shall not serve as an example for the EU member states, but to states in transition to prevent similar experience in the future.

Strengthening the trust in justice sector is a primordial task for national authorities in the situation when the trust has decreased considerably during the years, last but not least, due to some equivocal solutions provided by the national courts and made public by the affected parties. In this context, the task seems difficult, but not impossible, especially in the context of engaging all authorities in the justice sector reform process. We are confident that the benefits of the current metamorphoses will be felt in the near future, especially because the first signs are already sensed by the judiciary and litigants.

In the end, we would like to mention that the changes that took place in the national legislation have the purpose to enhance the institutional framework and to prove the commitment toward the rule of law values, especially in light of implementing the Association Agreement with the European Union.