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Moldovan Supreme Court: Execution of Enforcement Title Falls Outside the Scope of the New York Convention

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On 26 May 2021, the [Supreme Court of the Republic of Moldova](#) (the “**Supreme Court**”) decided that the procedure for execution of an enforcement title, after recognition and enforcement of a foreign arbitral award, falls outside the scope of the New York Convention. Instead, it is subject to municipal law.

Factual Background

The request for recognition and enforcement of the foreign arbitral award on the territory of the Republic of Moldova was submitted by a limited liability company incorporated in Ukraine (the “**Claimant**”) against a private individual (Ukrainian citizen) (the “**Respondent**”). The award was issued by the arbitral tribunal in the arbitration administered by the Permanent Court of Arbitration at the Public Organization of Ukraine “Union of Investors of Ukraine” based in Kiev (the “**Arbitral Institution**”).

The dispute arose out of a guarantee contract concluded between the parties. According to the contract, settlement of any disputes arising from the implementation of the contract or in connection with it falls within the jurisdiction of the Arbitral Institution.

On 12 March 2020, the arbitral tribunal issued Decision no. 06/20 awarding the Claimant approximately 75 million EUR (the “**Arbitral Award**”). The Claimant initiated proceedings for the recognition and enforcement of the Arbitral Award, including on the territory of the Republic of Moldova. The Claimant sought to freeze and then to levy execution in Moldova against the Respondent’s shares held in a Moldovan company (the “**Company**”).

The main issue discussed before the Supreme Court was whether the New York Convention applies to the execution phase, and where are the boundaries between the recognition and enforcement of foreign arbitral awards, and the execution of those awards against assets. In this context, the Supreme Court also analysed whether the Moldovan legislation and the New York Convention require the creditor to first levy execution against the bank accounts, the movable or immovable property and then the shares in the company.

Respondent's Arguments

The Respondent argued that the Claimant could not seek execution against the shares held by him in the Company in the first instance. He argued that the Claimant had to, under Art. 90 of the Moldovan Enforcement Code, successively execute the Arbitral Award against funds, settlement accounts, movable / immovable assets he had in Ukraine, and only then it could seek seizure of and execution against shares in Moldova.

Moreover, the Respondent maintained that the Claimant might pursue recognition and enforcement of the Arbitral Award in Moldova, only after presenting indisputable evidence confirming the impossibility of its execution on the territory of Ukraine.

Supreme Court's Findings

The Supreme Court emphasized that Art. 3 of the New York Convention and Art. 475³ of the Moldovan Code of Civil Procedure, contain rules on the recognition of a foreign arbitral award and the granting of its execution on the territory of Moldova. This involves ascertaining the enforceability of the foreign arbitral award and authorizing its enforcement. Accordingly, the examination of the application for recognition and enforcement does not imply any evaluation of the subsequent execution, the latter falling under the jurisdiction of the bailiff acting in accordance with the provisions of the Moldovan Enforcement Code.

Moreover, the provisions of Art. 475¹ of the Moldovan Code of Civil Procedure, do not require the award creditor to first apply for recognition and enforcement in another jurisdiction prior to initiating proceedings in Moldova.

The execution against the debtor's assets is governed by Art. 90 of the Moldovan Enforcement Code. It provides that the sequence of the execution may be established by a mutual agreement of the parties to the enforcement procedure. If the parties have not agreed, the sequence of the execution against assets is determined by the creditor and the bailiff, according to the following order:

- first of all, the debtor's personal assets will be pursued free of collateral or mortgage and funds;
- secondly, the debtor's assets will be pursued, which are in common ownership in shares or in debasement, free of pledge or mortgage;
- thirdly, the pledged or mortgaged goods will be pursued;
- lastly, the real estate in which the debtor resides will be pursued.

In the Supreme Court's opinion, the notion of enforcement in Art. 1(3) of the New York Convention has the exclusive meaning of the procedure of "recognition and enforcement". This consists in the procedure of the assessment of the conditions of international regularity, provided in Art. 476 of the Code of Civil Procedure, regarding the invoked arbitral award. However, the execution procedure, based on an executory title issued by the State Court (i.e. Moldovan court) where the enforcement is recognized, shall be performed under the conditions of the Enforcement Code. Therefore, the Respondent's argument that, as a shareholder of the Company, he cannot from the beginning be financially liable with the amount of the share capital, until his assets from the state where it resides are pursued, was irrelevant. This is because the Respondent's argument

refers to the enforcement procedure in which the debtor's assets can be pursued. However, the subject matter of the Claimant's request concerned the phase after the approval of the enforcement procedure in accordance with the Enforcement Code of the Republic of Moldova. Therefore, the execution against the assets, based on a foreign arbitral award, is performed at the stage where the arbitral award was already recognized, and the judgement recognizing the foreign arbitral award was already issued.

Concluding Remarks

Although the Supreme Court's decision may be unsurprising for international arbitration community, it is one of the first decisions in Moldova clarifying the aspects related to recognition and enforcement of foreign arbitral awards, and the execution against the debtor's assets. This decision seems to clarify the boundaries between the applicability of the New York Convention and the internal norms applicable to recognition and enforcement of foreign arbitral awards, and the execution against the assets based on such awards. Thus, the Supreme Court clarified that, once a creditor identified the debtor's assets in Moldova, it should be aware that the New York Convention is applicable to the procedure of recognition of the arbitral award, and the "approval for enforcement" (*încuviințarea executării*) only, and not to the execution procedure itself. According to the Supreme Court, once the competent national court issued the judgement recognizing and approving the enforcement of a foreign arbitral award, and that judgement remained final and irrevocable, the procedure for execution of the debtor's assets is entirely governed by domestic law (i.e. Enforcement Code).

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