



## ORIGINAL PAPER

# Material Conditions for the Recognition and Execution of Foreign Arbitration Decisions Based on the Legislation of the Republic of Northern Macedonia

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### Abstract:

The essential elements of arbitration that make the decision binding and enforceable are the arbitrator's obligation to resolve the dispute, based on the jurisdiction given to it through the arbitration agreement or the arbitration clause, as well as the basic contract of the parties where their rights and obligations are defined, which are disputable as a result of non-fulfillment. Since the main interest of the parties is to resolve the dispute fairly and as soon as possible, the settlement of the dispute through arbitration, as a more flexible judicial instrument, would help the parties to continue to exercise their activity without being damaged in material and formal aspect. In this regard, it is not enough for the dispute to be resolved by the relevant institution, but the decision must be enforced for the dispute to be resolved. Therefore, when it comes to implementing decisions of foreign arbitration, recognition is required, and it needs to meet the material and formal conditions provided in the national norms. This paper deals with the material conditions that must be met following the Law on Arbitration of the Republic of Northern Macedonia.

**Keywords:** *International Disputes; Arbitration; Recognition; Enforcement of Foreign Arbitral Decisions; Material Conditions, etc.*

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### Introduction

Arbitration should be determined by reference to the two constituent elements that commentators and courts recognise almost unanimously.

Firstly, the arbitrators task is to resolve the dispute. Secondly, the source of this judicial role is the contract: the power of arbitrators to settle a dispute comes from the parties' common intention.

In his way, arbitration includes both the judicial and contractual elements (Gaillard, Savage, 1999: 11; Fazlia, Shabani, 2019: 42.)

The correlation between the judicial element and the contracting element results in a binding decision on both parties. However, through specific national norms, each state, in particular, provides the conditions for the recognition and enforcement of a foreign arbitration.

In particular, the Arbitration Act says that the provisions of the New York Convention (Article 37 (3) of the Arbitration Act) shall apply to the recognition and enforcement of foreign arbitration.

The New York Convention provides these material conditions for the recognition and enforcement of foreign arbitration, which according to the definition of the Law on Arbitration, applies to the recognition and enforcement of foreign arbitration in Northern Macedonia (Article V of the Convention of New York):

- Recognition and enforcement of the decision may be refused at the request of the party against whom they are directed, only if that party makes a request to the competent authority where recognition and execution are sought, proving that:

a) The parties to the agreement [...], were unable to act, or the agreement in question was not valid under the law to which the parties are subject, or lacks anything under the law of the country where the decision was given,

b) The party against whom the decision is given has not been duly notified of the appointment of the arbitrator or the arbitral proceedings or has been unable to present its case;

c) The decision addresses an unforeseen dispute in the arbitration agreement or does not form part of the arbitration clause or contains decisions on matters beyond the scope of the arbitration. However, some arbitration decisions may be distinguished from non-arbitration decisions, and that part of the decision which contains arbitration issues may be recognized and enforced,

d) The composition of the arbitral tribunal or the arbitral proceedings were not according to the agreement of the parties, or such an agreement is missing, respectively is not following the law of the country where it took place; or

e) The decision is not binding on the parties; it has been annulled or suspended by the competent body in the country in which the decision was given.

-Recognition and enforcement of an arbitration decision may be refused if the competent authority of the country where recognition and enforcement are sought finds that:

a) The subject matter of the dispute can not be settled by arbitration under the law of that country,

b) Recognition or enforcement of the decision would be contrary to the public order of that country.

The analysis of the conditions above highlights the possibility of dividing the material conditions into general and specific ones (which the court takes care of *ex officio*).

### **1. Material conditions**

If we look on Article V of the New York Convention, we can see that the material (merit) conditions refer to the reasonableness of the request for recognition (and enforcement) of the foreign arbitration. The New York Convention defines them as "reasons in which the recognition and enforcement of a foreign arbitral award may be refused" or, in other words, as "obstacles to recognition" ( Kamilovska Z. T, 2015: 302).

From the definition, it can be seen that each State with the norms of their country provides special material conditions that a foreign arbitration decision must meet in order for it to be recognized and applied.

Down are mentioned the material conditions that may affect the invalidity of the arbitration decision.

#### **a) Invalidity of the arbitration agreement**

The enforcement of the arbitration agreement is a condition for establishing the jurisdiction of international commercial arbitration and, at the same time, a condition for the derogation of the jurisdiction of the domestic courts for resolving the factual dispute ( Stanivuković M., 1998: 310). It can be seen from this that the enforcement of the arbitration agreement is the essential condition without which the decision of an arbitration tribunal cannot be reviewed, which has no establishment basis.

The agreement's validity may be affected by the incompetence of the parties and the form of its conclusion. A considerable number of cases based on the invalid arbitration agreement have been settled in the implementation phase of the agreement under Article II (3) of the New York Convention, but it turns out that the number of those who fail later in the implementation phase of the decision is not so low ( Fazlia M.D et al, 2019: 252).

#### **Q15. Lack of parties ability to enter into an arbitration agreement**

The lack of parties ability to enter into an arbitration agreement fulfills the fundamental precondition for resolving the dispute through arbitration - subjective arbitrariness or suitability of the party.

As the most sensitive issue when it comes to the ability of the parties to enter into an arbitration agreement (Article V (1) (a) of the New York Convention), it is the case when the State is a party, and that's when the dilemma is often raised: is it right for the State to be a contracting party to the arbitration agreement or not? If we refer to the New York Convention, which states that civilians and legal persons can appear as parties (Article I (1) of the New York Convention), we can see that the State is not explicitly mentioned as a party. However, it is generally accepted that this definition of the Convention, as to who may appear as a party, applies to arbitration agreements and decisions in which the State is a party, if in case, they are the result of a trade relationship, in the broadest sense of the word ( Contini P., 1969: 294).

#### **Q16. Lack of arbitration agreement form**

Regardless of the form in which the arbitration agreement is concluded, its purpose is to formalise the parties' consent that the arbitration jurisdiction will resolve their dispute. Also, most international and national norms foresee the written form of the arbitration agreement to be considered valid. Through the written form, the protective function is achieved, which protects the contracting parties from fast decision-making, frivolity, and other lacks of will; respectively, it ensures that the party who entered into the arbitration agreement is aware that with it, it gives up from the the regular courts of the country (PerovićJ., 2002: 192, Fazlia M. D et al, 2019: 253). Therefore, failure to

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meet the formal requirement that the arbitration agreement should be in writing represents a condition for refusing recognition and enforcing a foreign arbitration decision (Article V (1) (a) of the New York Convention).

The classic case of non-compliance with the requirement form is one in which, after entering into the contract, the seller sends the sales certificate containing the arbitration clause, but the buyer does not return or accept the receipt of this document in writing. In such a case, the arbitration clause does not exist in the contract signed by the parties nor in the exchange between them.

### b) Violation of the principle of hearing the parties

Under the New York Convention, a violation of the principle of a parties hearing as a basis for non-recognition and enforcement of the decision involves the obligation to give the parties an equal opportunity to defend their position and not to deny either party any eventual right for protection, in which case that party may not consider the decision imposed as fair and has evidence to prove otherwise. The infringement in question is caused if the party against whom the decision has been brought has not been duly notified of the appointment of arbitration, or the arbitration proceedings, or has been unable to present its case (Article V (1) (b) of the New York Convention).

What creates the dilemma is: Based on which right will the eventual violation of the principle of hearing the parties be assessed? It is generally recognized that in a State where recognition and enforcement of foreign arbitration decisions are sought, an objection is usually submitted by the party who must enforce it. Therefore, it is very logical that the law of the court (*lex fori*) is the one that will be competent to assess the objection for the violation of the principle of hearing the party based on its non-recognition (Fazlia M. D, et al, 2019: 254).

### c) Exceeding the powers of the arbitral tribunal

Of particular importance is the definition of the disputed issue in the arbitration agreement or the precise definition of the rights and obligations of the parties in the basic agreement where the arbitration clause is included. The Convention provides that a foreign arbitration decision shall not be recognized or enforced if the decision is granted in a dispute not provided in the arbitration agreement, or is not included in the arbitration clause, or contains provisions that exceed the limits of the arbitration agreement or clause.

It is further provided that, if the provisions of the decision, which refer to matters subject to arbitration, may be separated from the provisions which refer to issues that are not subject to arbitration, the part of the arbitration decision which contains the provisions for issues which are subject to arbitration may be recognized and enforced (Article V (1) (c) of the New York Convention). As a result, any violation of the jurisdiction by the arbitration tribunal represents the basis for non-recognition and non-enforcement of the foreign arbitration decisions, because there is no legal basis for establishing the arbitral jurisdiction to review and approve the decision for one or more adjudicated cases.

### d) Irregular establishment of the arbitral tribunal

Regarding the improper establishment of the arbitration tribunal or the violation of the proceeding rules, the Convention provides that the recognition and enforcement of a foreign arbitration decision will be refused if the party objects to its recognition and enforcement and proves that the establishment of the arbitration tribunal or the arbitration proceedings has not been according to the arbitration agreement they entered into, or if such agreement does not exist, respectively, if it has not been following the

law of the State in which the arbitration was conducted (Article V (1) (d) of the New York Convention).

e) Non-binding decision, annulled or suspended

Under the fifth condition for recognition and enforcement of a foreign arbitration decision, the burden of proof lies in the parties, and the decision is not binding on the parties or has been annulled or suspended by the competent authority in the State where the legislation under which the decision was enacted (Article V (1) (e) of the New York Convention). Accordingly, there are two grounds for not recognizing and enforcing a foreign arbitral award:

- Non-existence of binding character of the arbitral award for the parties;
- Annulment or suspension of the arbitral award in the State in which it was rendered.

The cases where enforcement has been refused are rare, because the court has considered that the arbitral award has not been made binding following Article V (1) (e) of the New York Convention.

f) **Material conditions for which the court acts ex officio**

The Convention foresees certain cases where the court of the country, seeks the recognition and enforcement of foreign arbitration decisions, and it has the right to act ex officio and to refuse recognition and enforcement of that decision, even if that court certifies that, under the law of that State, the dispute is not suitable for settlement by arbitration and whether the decision of that dispute is against the public order of that State (Article V (2)) of the New York Convention). Thus, the two material conditions for which the domestic court has the right to act based on official duty are:

- Inadequacy of the challenging case for arbitration;
- Violation of public order.

The suitability of the dispute for arbitration and public order, even though it is part of academic and scientific debates, in the practice of arbitration quite rarely causes rejection of the enforcement of the decision.

### **Conclusion**

The purpose of the parties submitting to resolve their dispute with arbitration is to have a meritorious decision on the disputed issue, and the same decision to be implemented by the parties. Thus, from the beginning of the arbitration agreement, the parties are informed of the cooperative element and their complete confidence in the arbitration and the decision that the same arbitration tribunal will take. Otherwise, the parties would be reluctant to enter into an arbitration contract. However, once the arbitration tribunal has ruled on the dispute, the question arises about the legality of that decision in the State where the party will apply the ruling. Therefore, an arbitration decision in order to have the same legal effect as a domestic court's decision must first be recognized in the State where its enforcement is sought.

Recognition and enforcement of foreign arbitration decisions in each State are realized by fulfilling certain special conditions that arise and must produce specific action in the State where its recognition and enforcement are required. By describing the special conditions for recognizing and implementing foreign decisions, the State protects its interests.

The conditions for the recognition and enforcement of foreign decisions represent a kind of control for all foreign decisions so that they do not contradict the country's norms, especially when foreign court's decisions are equal in terms of legality with the decisions issued by the domestic courts. That is why each State, in particular,

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provides conditions for the recognition and enforcement of foreign arbitration decisions, even though most states are signatory states and have ratified the New York Convention. This, however, has not affected the overall unity of all states in terms of recognizing and enforcing foreign arbitration decisions.

International commercial arbitration is a very flexible judicial instrument for resolving disputes, so the states must harmonize the national legislation with the New York Convention, which could contribute to facilitating the functioning of this institution in general, but also adjusting the material conditions for the recognition and enforcement of foreign arbitral awards in particular.

In terms of conditions for the recognition and enforcement of foreign judgments, the International Trade Law of the Republic of Northern Macedonia directly refers to the norms of the New York Convention. But in general, it should be emphasized that despite the relief and flexibility offered by this judicial instrument, in the Republic of Northern Macedonia, they still find little use of it because of the lack of promotion by the State, which further monopolizes the judiciary.

The Macedonian Law on International Commercial Arbitration upholds the main criteria of subjective eligibility from international sources of arbitration law, with which harmonization enables easier access of the parties to the contracting of the arbitration agreement.

By limiting the autonomy of the parties' will to a defined set of disputes for which the exclusive right to national courts and national law is reserved, the national system is protected from the recognition and enforcement of foreign arbitral awards, which will violate the public order of the country.

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