



universität
wien

MASTER-THESIS

Titel der Master-Thesis

„The Albanian Arbitration and International Arbitration
A comparative study“

verfasst von

Vjosana Neziri

angestrebter akademischer Grad
Master of Laws (LL.M.)

Wien, 2015

Universitätslehrgang:

Studienkennzahl lt. Studienblatt:

Betreut von:

ULG Europäisches und Internationales Wirtschaftsrecht

A992 548

Mag. Dr. Christian Koller



universität
wien

MASTER THESIS

Title of the Master Thesis

„The Albanian Arbitration and International Arbitration
A comparative study“

Author

Vjosana Neziri

expected academic degree

Master of Laws (LL.M.)

Vienna, 2015

Postgraduate Program:

Program Code:

Supervisor:

European and International Business Law

A 992 548

Mag. Dr. Christian Koller

“The courts ...should not be the places where resolution of disputes begins. They should be the place where the disputes end after alternative methods of resolving disputes have been considered and tried”

-Sandra Day O'Connor

Statement of Authorship

I hereby certify that this master thesis has been composed by myself, and describes my own work, unless otherwise acknowledged in the text. All references and verbatim extracts have been quoted, and all sources of information have been specifically acknowledged. This master thesis has not been accepted in any previous application for a degree.

Acknowledgments

I would like to first thank them, to whom I dedicate this work and every accomplishment I have achieved in my life, my family. My mother, my father and my brother I thank you from the heart for having always pushed me to be a better person, to make education a priority and for supporting me in good and in bad times.

I also would like to thank my supervisor, Dr. Christian Koller for his support and patience during my work.

Table of Contents

Acknowledgments.....	5
Abstract.....	Error! Bookmark not defined.
Abbreviations.....	8
Introduction.....	9
Methodology.....	10
PART I.....	12
1. ARBITRATION, HISTORY AND EVOLUTION.....	12
1.1 Definition.....	12
1.2 History and evolution.....	16
1.3 International agreements on arbitration.....	20
1.3.1 New York Convention of 1958.....	21
1.3.2 United Nations Commission on International Trade Law (UNCITRAL).....	24
1.3.3 European Convention on International Commercial Arbitration of 1961.....	27
1.3.4 Other Treaties Relevant to International Arbitration.....	28
1.4 Theories on arbitration.....	30
1.4.1 Philosophical theories that influenced arbitration.....	30
1.4.2 Arbitration Theories.....	31
1.4.2.5 Conclusion.....	36
1.5 Arbitration and globalization.....	36
1.6 Advantages of Arbitration over Litigation.....	37
1.7 Data Regarding the Increase in the Use of Arbitration.....	39
1.8 Conclusion.....	41
PART II.....	42
2. HISTORY AND EVOLUTION OF THE ALBANIAN ARBITRATION.....	42
2.1 Albanian Chamber of Commerce history.....	42
2.2 Albanian arbitration history.....	44
2.3 Marini Case.....	46
2.3.1 State Arbitration Proceedings.....	46
2.3.2 Proceedings regarding the validity of the Arbitration Award (Marini case).....	49
2.4 Current arbitration regime in Albania – rules and procedures.....	49
2.5 International Arbitration under Albanian legislation.....	57

2.6 ARBITRATION CASES.....	58
2.6.1 “Sky Petroleum Company” versus Albanian Government Case.....	58
2.6.2 “Burimi Srl” and “Eagle Games sh.a” versus Republic of Albania ..	Error! Bookmark not defined.
(ICSID CASE NO. ARB/11/18)	Error! Bookmark not defined.
2.6.3 Tradex Hellas S.A. (Greece) vs. Republic of Albania Case.....	61
2. 7 Conclusion of cases.....	67
PART III	69
ALBANIAN LAW ON ARBITRATION versus UNCITRAL MODEL LAW	69
3. Comparison of Model Law versus Albanian Law	69
3.1 The scope of application.....	69
3.2 The arbitration agreement between the parties	70
3.3 Setting the number of arbitrators	71
3.4 Organizing the arbitral tribunal based on court decision.....	72
3.5 The jurisdiction of arbitral tribunal	72
3.6 The application of substantive law	74
3.7 The arbitral award	75
3.8 Rules about recourse to arbitration decision	76
3.9 Recognition and implementation of arbitral awards	79
PART IV	81
4. Findings, Conclusions and Recomendations	81
4.1 Summary of findings.....	81
4.2 Findings and Conclusions	81
4.3 Recomendations.....	83
References:.....	84

Abbreviations

ICC	International Chamber of Commerce
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006 and revisions made in 2010)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
Washington Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement of Investment Disputes (Washington, 1965)
CCP	Code of Civil Procedure of the Republic of Albania
ICSID	International Centre for Settlement of Investment Disputes
SIAC	Singapore International Arbitration Centre
DIAC	Dubai International Arbitration Centre

Introduction

Along with the emergence of human society have born the disputes and conflicts in society and among people. Solution is dependent on the extent and intensity of conflict or dispute. This solution can be without mediation or with mediation of a third party. The more complex human relationships in society the more complicated become disagreements or conflicts as well.

Through arbitration, a neutral third party assumes the resolution of a conflict across a well-defined procedure. In this function, many countries have developed rules and laws, as well as international agreements are designed to regulate the procedure of arbitration in national and international level. Currently in the international arena there are some institutions that govern the arbitration proceedings and assist in resolving disputes arising between the parties. The ICC (the International Chamber of Commerce) could be mentioned as well as many others in Vienna, Britain etc. These institutions may appoint arbitrators, define rules and procedures, ensure impartiality of arbitrators and monitor procedures, but they are not executive or enforcement body of these rules or procedures.

These institutions have many points in common, but they also have differences between them. In this thesis I will make a comparison between the UNCITRAL Model Law and the Albanian institution of arbitration. I will analyze the fulfillment of their objectives, their rules of arbitration as well as their participation in resolving disputes or conflicts in the international arena.

Also I will try to analyze the globalization of the economy and its connection with international arbitration, international and Albanian arbitration history, theories, laws and main agreements on arbitration.

I have divided my thesis into four main parts: 1) Arbitration, history and evolution; 2) Albanian Arbitration Law: Where does it stand; 3) Albanian Arbitration vs. UNCITRAL Model Law (Comparison); 4) Findings and conclusions.

I would like to emphasize that while working to develop this thesis I found a plentiful bibliography about arbitration, but I have not found sources about comparing Albanian arbitration and international arbitration. This has been a gap and challenge for me, which I hope this thesis could give a promising starting point.

Methodology

The methodology used in this thesis is based on a careful study, research and generalization of the conclusions drawn. More specifically are analyzed various international instruments governing international arbitration procedure in resolving disputes between parties. Also it is analyzed the legal and arbitration methodology used in Albania, mainly after World War II until nowadays.

In my thesis I used the comparative method, especially when it comes to international arbitration methodology and to that used in Albania.

Another method, used in this thesis is the historical method. Applying this method consists in describing the history of the development of international and domestic arbitration, noting the evolution of this methodology in terms of resolution of disputes between parties.

To achieve quality research and to identify the research facility thesis I attempted to use the case study method, analyzing the most distinguished arbitral cases.

Using these methods has enabled the achievement of qualitative research and the identification of the research object of the thesis.

PART I

1. ARBITRATION, HISTORY AND EVOLUTION

In this chapter I will take into consideration the history and definition of arbitration by different authors and analysis of some of the most important rules in resolving disputes as an alternative manner and method. Knowing the history of arbitration shall make possible to understand better its importance and the current situation.

1.1 Definition

Etymology of the word arbitration comes from the Latin “arbitrates” which means decided, judged.¹

Definition of arbitration turns out that it is not an easy task because there is no a common or agreed theory which deal with this topic. But let's have a look on the opinions of various authors about the definition of arbitration. After I'll make a summary and define arbitration with my words, I'll proceed to arbitration on the international scene.

The concept of arbitration lies in the fact of having a third party who will judge a dispute. Rene David describes in this way the resolution of a dispute by a third party not involved and no interest in the dispute between the two parties:

“Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators –who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement”.²

¹ Dictionary.com.” arbitrate” in Online Etymology Dictionary. Source location: Douglas Harper Historian . <http://dictionary.reference.com/browse/arbitrate>. Accessed: May 08, 2015.

² Rene David, *Arbitration in international trade*, Springer, 1985(1st edition), page 5.

It is important to emphasize that the arbitration and arbitrators or judges, do not belong to bodies or institutions, but come from an agreement between the parties involved in the dispute. Third party, who decides about the resolution of the dispute, must be impartial.

Edward Brunet in his book "Arbitration Law in America - A Critical Assessment" defines arbitration as follows:

“...there is an agreement between two or more persons to submit an existing or future dispute to the persons (arbitrators) who are chosen by the parties. The power of the arbitrators to act depends upon the scope of the agreement”³.

It is noted that the essential characteristic of arbitration is the fact that the decision is compulsorily admitted by the parties and there is no appeal. In this way the dispute is resolved fairly quickly, compared with judicial method. And, arbitration works when the parties involved in the conflict agree to use this kind of method. Author Richard Garnet notes that arbitration is based on the consensus of the parties involved in the conflict: “A fundamental aspect of arbitration is that it is based on consent”⁴.

According to him, the parties involved in the dispute should be free to choose the way of solving the problem. As have the right to choose arbitration as a method of solving their problem, just have the right to leave this method when they are convinced that can not solve their problem.

³ Edward Brunet, *Arbitration Law in America - A critical assessment*, 2006 (1st edition), p. 31, New York, Cambridge.

⁴Richard Garnett, *International commercial arbitration*, p.3, 2000, Dobbs Ferry, Oceana publications.

As mentioned above, one of the features of arbitration is that the decision can not be appealed. However, sometimes arbitrary decisions can be appealed to state courts. Author Steven Bennett highlights this possibility in his book "Arbitration: Essential Concepts": "An arbitrator or panel of arbitrators conducts an information-gathering process, which may include document exchange, briefing and testimony of witnesses. The arbitrator's decision is generally binding on the parties, subject to limited review by a court on motion to confirm or vacate the arbitration award"⁵.

It is pertinent to note that while the parties are free to choose the method of arbitration, they can determine the arbitration proceedings in their case and also decide that the outcome of the arbitration decision be seen by a court. However, this method is not very widespread in cases of conflict resolution by arbitration. Usually, the decision rendered by the arbitrator is final and enforceable for all parties involved. So, in that sense, arbitration is an unofficial procedure and as such, if the decision taken is not binding to the parties, then turns out to be unsuccessful and not efficient.

Exactly the same thing is stressed by author Albert Fiadjoe noting that arbitration is a consensual nature, represents freedom in choosing the procedure but the decision is undisputed by the parties: "The arbitral process is consensual, based on an agreement between the parties. The parties have procedural freedom. This means that the parties may organize their proceedings as they like and may choose an adversarial or inquisitorial procedure as they like, or a mixture of the two....An arbitral award is binding upon the parties"⁶.

⁵ Steven Bennet, *Arbitration: essential concepts*, page 4, 5; 2002, New York, ALM publishing.

⁶ Albert Fiadjoe; *Alternative Dispute Resolution: a developing world perspective*, p.73; 2004, London, UK, Cavendish publishing limited.

In summary, I can say that arbitration is an alternative method of dispute resolution in which the parties agree to be judged by a third impartial party (a group of persons or a person, as appropriate). The decision taken in this case is final and binding on the parties. Parties are free to choose arbitration proceedings, setting the rules of operation of arbitration. Featured rules can be international laws or regulations made specifically for arbitration proceedings or special laws of a particular state about arbitration.

International agreements on arbitration do not define it, simply regulate its operation, with the exception of "the Model Law of the United Nations Commission for International Trade Law.

According to the arbitration proceedings the parties may belong to different states or may belong to the same state and arbitration proceedings can be conducted in another state. It may well be that the parties and the arbitrators belong to the same state, while the subject of the dispute to be in another state. When all these happen, then is called international arbitration.

Geography and place of residence of the parties involved in an arbitration procedure also determine whether it is international or not. Author Richard Garnett defines the factors to be called an international arbitration or not: "In deciding whether a transaction should be seen as international, attention needs to be given to the particular features, whether pertaining to geography, residence of ownership, which will determine that character"⁷.

⁷Richard Garnett, Richard; *International commercial arbitration, page 8, 2000*; Dobbs Ferry, NY, Oceana publications.

Currently, international arbitration method is widespread throughout the world as an alternative dispute resolution. This is noted by the author Yasuhei Taniguchi: “Presently, a system of arbitration is found everywhere side by side with litigation and conciliation (negotiation/mediation). But the way it is used seems to vary considerably from country to country. In North America, for example, it is widely used for settling contract disputes in industrial relations (labor arbitration). In many countries, a variety of construction disputes are dealt with by arbitration”⁸.

It is worth mentioning that in the past, international arbitration has been used primarily by states to resolve their differences, whereas nowadays mostly used by companies. International arbitration which includes companies is called international commercial arbitration. About this kind of arbitration I will talk in my thesis.

1.2 History and evolution

The idea or concept of arbitration is as old as mankind. Although at that time was not in the form that is nowadays, it served for centuries to resolve disputes between the parties. There are many historical evidence that prove archaic forms of arbitration used in the Balkans and Ancient Rome.

In order to resolve disputes between parties, the Greek poleise⁹ build and processed arbitral institution. Following the Peace Treaty signed between

⁸ Taniguchi, Yasuhei, Is there a growing international arbitration culture? An observation from Asia. ICCA Congr. Ser. 8, 1988.

⁹ “A polis (plural: *poleis*) was the typical structure of a community in the ancient Greek world. A polis consisted of an urban centre, often fortified and with a sacred centre built on a natural acropolis or harbour, which controlled a surrounding territory (*chora*) of land. The term polis has, therefore, been translated as ‘city-state’ as there was typically only one city and because an individual polis was independent from other poleis in terms of political, judicial, legal, religious and social institutions and practices, each polis was in effect a state. Like a state, each polis was also involved in international affairs, both with other *poleis* and non-Greek states in the areas of trade, political alliances and wars” - (Mark Cartwright

Athens and Sparta in 446 BC and 431 BC envisaged the arbitration as a means of settling disputes between them.

To illustrate that, I'll introduce an excerpts from the speech of Pericles held in Athens Peoples Assembly, understanding that even at that time arbitration was a method of resolving disputes:

“Now it was clear before that Lacedaemon entertained designs against us; it is still clearer now. The treaty provides that we shall mutually submit our differences to legal settlement, and that we shall meanwhile each keep what we have. Yet the Lacedaemonians never yet made us any such offer, never yet would accept from us any such offer; on the contrary, they wish complaints to be settled by war instead of by negotiation; and in the end we find them here dropping the tone of expostulation and adopting that of command”.¹⁰

Arbitral awards in Greek poleise was written in bronze or marble tiles and preserved in special temples. Usually, as arbitrators were appointed political personalities and prominent thinkers. Among the personalities appointed as a judge of a court of arbitration, is the Philip of Macedon.

In ancient Greek, the arbitrators have enjoyed special status. Before the arbitration hearing, they had to swear. Thus, for example, has remained preserved the text of the oath of an arbitrator from Delphi, where among other things it says: "All matters relating to payments and limits of Apollos, I will settle under my conviction, which is the best answer to the truth, and, in no way I will approve decisions because of favoritism, friendship or enmity... But, if I swear falsely, then Artemis, Apollo, Leto

published on 06 June 2013, Ancient History Enciklopedia, <http://www.ancient.eu/Polis/>, last visited on 9th of March, 2015)

¹⁰ Thucydides, I.139-146, Pericles' last speech before the outbreak of the Peloponnesian War, Translated and printed by “Albtipografia”, Tirana, 2008, page 70

and all other gods, let them stop my salvation, let them not allow that neither I, nor my race, to enjoy having children, fruit crops or property and let deprive me for life from all that possess"¹¹

Even in the Bible there is a paragraph that mentions a certain kind of arbitration. In the Bible is given the conflict between Jacob and Laban and how the agreement on the solution was: "Now that you have ransacked all my things, have you found a single object taken from your belongings? If so, produce it here before your kinsmen and mine, and let them decide between us two".¹² Both these persons believed a third party solution to their conflict.

Later on, mediation and arbitration were the most common forms used to solve various disagreements between Byzantium and any other state. Persons, who were designated as arbitrators, usually were emperors, lawyers, and, as in Byzantium the church was playing a dominant role within the state, as an arbitrator was appointed even the Pope.

In the Arab Caliphate, the same as in Byzantium, mediation and arbitration will be among the most common forms of international dispute resolution.

According to Arab sources, in XI century, as negotiators or mediators usually were appointed persons selected from the ranks of the nobility of the court or among the mullahs, the people of the Islamic faith¹³.

Barbarian kingdoms, located in the former territories of the Western Roman Empire, will continue to follow the Roman tradition. States which were formed in these territories where today is France, Germany,

¹¹ H. Kuçi, A. Bilalli, A (2006). *Origins and historical development of private international law*, University of Prishtina, Prishtina, page 24-25.

¹² Bible, Chapter XXXI

¹³ Bujar Ahmedi "Peaceful resolution of international disputes" Tirana 2013, p.26

Neitherland, Belgium, England, will be countries that will have strong disagreements between them. Disputes, usually involved the land borders, as these countries have never managed sustainable borders between them. Disputes arising between them, usually brought wars between nations living in these countries. However, in some cases, disputes between them resolved through negotiation, mediation and arbitration. Similarly, as in Ancient Greece and Rome, the Barbarian Kingdoms, persons elected as negotiators, mediators and arbitrators came from scholars and famous people¹⁴.

Even during the period of developed feudalism, in resolving disputes that arise between European countries, the Pope and religious dignitaries, cardinals, bishops, will be appointed as arbitrators. In the thirteenth century, the French king Louis IX, which was proclaimed by the church as a holy figure, was selected to mediate in the settlement of international disputes. Thus, in 1270, before he died, he mediated a truce of five years between the three republics of Venice, Genoa and Pisa¹⁵.

During the Middle Ages arbitration gained importance as a preferred method of dispute resolution. States began to weaken, while the lords empowered and established their own rules. During this period, the Catholic Church played the role of arbitrators, not being completely neutral in conflicts that arose. Usually bishops appointed as arbitrators gave awards in favor of the feudal lords.

Another known example in the settlement of disputes by arbitration was Pope Alexander VI mediation (Rodrigo Borgia), in achieving the signing of the Treaty of Tordesillas by the parties in June 3, 1494, which avoided

¹⁴ Petrit Nathanaïli "Marredhënie të ndërkombëtare nga origjina deri më sot – International relations from the origin until today", Tirana 2009, p.85

¹⁵ Nathanaïli, P (2009). *Marrëdhëniet ndërkombëtare nga origjina deri më sot*. Filara, Tirana, p. 84-85.

the conflict that arose from new geographical discoveries between Spain and Portugal.¹⁶

During the Napoleonic era the use of arbitration was reduced because the French emperor imposed the use of the courts to impose his will and power. Napoleon couldn't accept the fact that someone other than him can solve conflicts and disputes.

When we come to the 19th century we see again that the arbitration gained ground as an alternative method to resolve disputes and conflicts. Since this century, many legal systems around the world began to officially recognize arbitration as an effective method to resolve conflicts¹⁷.

With the Congress of Vienna of 1815¹⁸, the settling disputes between parties peacefully will have a new dimension. After the Congress of Vienna, many related treaties between states envisaged arbitration as a means of settling disputes.

So, the Congress of Vienna inspired different states to resolve their disputes through negotiation, mediation and arbitration.

1.3 International agreements on arbitration

Currently there are many agreements and documents governing international arbitration. But most important are: "New York Convention of 1958" and "the United Nations Commission on International Trade Law (UNCITRAL) Rules from 1985".

¹⁶ Nathanaili, P (2009). *Marrëdhëniet ndërkombëtare nga origjina deri më sot*. Filara, Tirana, p. 86.

¹⁷ Petrit Nathanaili "Marredheniet nderkombetare nga orgjina deri me sot – International relations from the origin until today", Tirana 2009, p.86

¹⁸ The Congress of Vienna was a conference of ambassadors of European states chaired by Austrian statesman Klemens Wenzel von Metternich, and held in Vienna from September 1814 to June 1815. The objective of the Congress was to provide a long-term peace plan for Europe by settling critical issues arising from the French Revolutionary Wars and the Napoleonic Wars.

As in any international agreement, even in arbitration, states are free to participate or not. If a state does not participate in such an agreement, then the decisions taken on the basis of this agreement are not recognized by the state and therefore the parties operating in this particular country are not covered by agreements governing international arbitration. Agreements that I will analyze below codified rules of arbitration, which in fact existed long ago, this because the states are the only body that can impose execution of arbitral awards.

Signatories to these documents are treated equally.

The success of international arbitration requires that most countries of the world to recognize international agreements and to implement them in the same way. This is necessary due to the fact that states are the only ones who can enforce the arbitral awards. Even if states recognize these decisions, they still are sovereign as they sign these agreements in their interest. On the other hand no state is obliged to sign.

1.3.1 New York Convention of 1958¹⁹

This is the most important document about the use and enforcement of international arbitration and although there are years that are signed, it remains the most significant international legal document adopted. The document was drafted by the UN and encourages states to recognize and enforce international arbitral decisions even if the procedure is implemented in another state. The agreement entered into force in 1959 and was ratified by Albania on 27 June 2001²⁰. As of January 2015 the Convention has been ratified by 154 countries²¹, including 151 out of 193 UN member states and three other countries such as the Cook

¹⁹ UN Conference on International Commercial Arbitration: “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, United Nations – 1958, XXII-1, October 2004

²⁰ Law No. 8688 “On ratification of New York Convention” (Ligj Nr.8688, për aderimin e Republikës së Shqipërisë në “Konventën për njohjen dhe ekzekutimin e vendimeve të huaja të arbitrazhit”)

²¹ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on 23 March, 2015)

Islands, the Holy See and the State of Palestine. The Convention also applies in territories controlled by the British Empire (British Crown Dependencies), Overseas Territories, Overseas Departments, Unincorporated Territories and other territories controlled by sovereign states.

With the entry into force of this Agreement was abrogated the Geneva Protocol of Arbitration Clauses of 1923 and the Geneva Convention of Execution of Foreign Arbitral Awards of 1927²².

In New York Convention signatory states pledge to recognize arbitral awards made in another signatory country to this Convention. Consequently, the arbitration award obtained in a state that has not signed the Convention are not recognized and enforced by a state that has signed it.

Another requirement of the application of this Convention is legal and commercial relationship, which means that the Convention applies only to legal relationships related to trade and commercial. To enforce an arbitral award, the Convention requires only two main documents: the original decision and the arbitration agreement between the parties in original text or certified copy.

Under the agreement, an arbitration awards can not be recognized²³ and enforced at the request of the party against whom it is invoked, only if that party submits to the competent authority where the recognition and enforcement is sought, proof that:

-“The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

²² Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, United Nations – 1958, Article 7 (2)

²³Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, United Nations – 1958, Article 5

- The party against whom 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;
- The award deals with a difference 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;
- 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;
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- The subject matter of the difference is not capable of settlement by arbitration under the law of that country;
- The recognition or enforcement of the award would be contrary to the public policy of that country”.²⁴.

All these mentioned above are reasons to not recognize and enforce an arbitral award. Best in this case is to analyze these reasons before starting an arbitration procedure. The reasons that have to do with the approach of the procedure correctly or not are excluded. In connection with the last reason, this is a topic or issue that may be controversial because many countries view differently by others, or may be a matter of culture and perception. What could be a public interest in a country, does not necessarily have to be in another one. In many countries it is considered against public policy) where a decision is contrary to basic

²⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, United Nations – 1958, Article 5 (http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf)

notions of morality and justice and the ethics perceived by public of this country.

Conclusion:

Despite these limitations, we can say with certainty that this agreement (1958 Convention) is still a basic and important document in terms of rules, recognition and enforcement of an international award.

1.3.2 United Nations Commission on International Trade Law (UNCITRAL)

UNCITRAL is created on the basis of Resolution 2205 of the UN General Assembly on 17 December 1966. Since that time this document has played a significant role in the modernization and harmonization of international trade law (trade) promoting legal instruments adopted in this field.

The UNCITRAL Model Law on International Commercial Arbitration²⁵ was drafted by UNCITRAL and adopted on 21 June 1985 in Vienna and aims to eliminate differences or discrepancies in international regulations. In 2006 was amended. This model law is not binding, but states are free to include part of this document in their national legislation. It should be noted that there is a difference between “the UNCITRAL *Model Law* on International Commercial Arbitration (1985)” and “the UNCITRAL *Arbitration Rules*”. The difference consists on the fact that the Model Law is directed at States, while the Arbitration Rules are directed at potential (or actual) parties to a dispute.”²⁶

²⁵ UNCITRAL Model Law on International Commercial Arbitration, Printed in Austria, May 2006, United Nations publication, Sales No. E.95.V.18, ISBN 92-1-133498-5

²⁶ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html (last visited on 8th of May, 2015)
“The UNCITRAL Model Law provides a pattern that law-makers in national governments can adopt as part of their domestic legislation on arbitration. The UNCITRAL Arbitration Rules, on the other hand, are selected by parties either as part of their contract, or after a dispute arises, to govern the conduct of an arbitration intended to resolve a dispute or disputes between themselves. Put simply, the Model Law is directed at States, while the Arbitration Rules are directed at potential (or actual) parties to a dispute.”

From 1985 onwards many states have developed their own laws about arbitration based on the UNCITRAL model law. Even after the amendment of this model in 2006, several states have reflected these amendments in their national legislation.

It is mentioned in this document that this legal model is applicable to any kind of international arbitration matters. The other thing that stands out in this legal model is an attempt to define the terms on which countries may have different definitions such as arbitration, commercial relationships and what makes them international. The definition of these terms, as I pointed out above, is a good thing, but on the other hand limits the application of this model, as if the procedure used in a case does not conform to the definition, the decision is not recognized and applied by the parties. This thing is not found in other norms or rules of international law, such as for example the New York Convention and the ICSID (the International Centre for Settlement of Investment Disputes).

The New York Convention governs the recognition and enforcement of international arbitral decisions, while UNCITRAL model law regulates the entire process and arbitration proceedings. This latest is more conducive to a fair process and procedure. For example, if first document says that the party against whom the claim is made must be notified for the start of the procedure, the UNCITRAL model law notes that defendant not only should be notified about the start of the procedure, but also should create equal conditions in the process.

In the amendment of 2006, were taken into consideration technological developments to help the procedure. So for example, in the original legal model was indicated that the arbitration agreement and any other documents about the process should be in written form. In the

amendment of 2006 it was surpassed by stressing that any kind of electronic communication is acceptable.²⁷

In Articles 12, 13, 14 and 15 is described the appointment procedure and the mode of action if an arbitrator does not show impartiality. If an arbitrator is not a lawyer, it can be ordinary person who deals with his business (other than law), so there is a possibility that he could behave unprofessionally.

If one of the parties involved in the arbitration process have reservations about an arbitrator regarding impartiality must make a written appeal to the arbitration court by clarifying the position held by the arbitrator in the arbitration proceedings and decision making. If the arbitration court finds complaint appropriate, has the right to appoint a new arbitrator. It is important that arbitrator must not be countryman of the parties involved, in order to have no bias in judgment²⁸.

Article 17 is about interim measures that can be used by arbitrator, which can preserve the asset in question, but can result in unfair measure at the end of process.

“The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure”.²⁹

The original version of UNCITRAL Model Law 1985 didn't contain any provision on recognition and enforcement of arbitral interim measures. With amendments made on 2006, the most innovative aspects was the extension to all provisional measures irrespective of the place of the origin, which is intended to overcome the difficulties experienced with regard to the transnational circulation of the measures. The amended text also provides new grounds for refusal, in addition to those applying

²⁷ UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, Page 4, article 7, paragraph 4, UNITED NATIONS Vienna, 2008

²⁸ UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, Page 6, article 11, paragraph 5, UNITED NATIONS Vienna, 2008

²⁹ UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, article 17, United Nations Vienna, 2008.

to awards, which are mandatory and do not allow the judges any discretion³⁰.

Article 35 is about the recognition and enforcement of a decision, which is binding, regardless of the country where the judgment was made in the arbitration.

In conclusion, I can say that the UNCITRAL model law, amended in 2006 is a document suitable to resolve international commercial disputes in our days and will continue to be a good model for the internal arbitration laws of different countries.

1.3.3 European Convention on International Commercial Arbitration of 1961³¹

Was signed in Geneva on 21 April 1961 and aims to regulate arbitration in Europe and complement the New York Convention. This agreement is limited for use only in Europe in the regional framework of the UN Economic Commission for Europe to promote European trade.

Before signing this agreement, European countries had different practices in relation to arbitration, more pronounced this between eastern and western countries³² of the old continent. To eliminate these differences was agreed between the parties to the convention in question. European Convention addresses to important issues that are not addressed by New York Convention: the reasoning of the award and the recognition of an award set aside. According to that, arbitrator is

³⁰ Interim Measures in International Commercial Arbitration,, Association for International Arbitration, Maklu Publishers 2007, p.24, ISBN 978-90-466-0144-0

³¹ European Convention on International Commercial Arbitration. Geneva, 21 April 1961.

³² Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, Comparative International Commercial Arbitration, page 22, Published by Kluwer Law International, ISBN 90 411 15684

obligated to explain the reasoning of the award, unless the parties agree to the contrary³³.

This rule is included also in the 1985 UNCITRAL model law.³⁴

This convention has been successful in promoting international arbitration in European countries.³⁵

1.3.4 Other Treaties Relevant to International Arbitration

In addition to the agreements mentioned above, there are also other international agreements governing international arbitration, which will be mentioned briefly in this study. When we talk about international arbitration, we can not leave without mentioning two international agreements which regulated arbitration: 1) The Geneva Protocol on Arbitration Clauses of 1923 and 2) the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. Prior to adoption of the Geneva Protocol, arbitration was regulated only by national legislation of the states. To solve the problems of international arbitration that had arisen, League of Nations decided to draft and adopts the Geneva Protocol. But later, it was observed that this protocol would not be successful if not adopted a mechanism for the recognition and enforcement of arbitral awards. For this purpose it has been approved Geneva Convention of 1927 in recognition and enforcement of international arbitral awards.

³³ European Convention on International Commercial Arbitration. Geneva , 21 April 1961, Article VIII, paragraph (a), p.7 (https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf), last visited on 8th of May, 2015

³⁴ UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, Article 31, paragraph 2, page 18, UNCITRAL Secretariat, Vienna International Centre, (<http://www.uncitral.org>)

³⁵ Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration, page 139, Published by Kluwer Law International, ISBN 90411 10259

Both of these important agreements ceased to be in force after the adoption of the New York Convention in 1958³⁶.

Another important agreement in the field of international arbitration is also "the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States³⁷". The Convention was initiated by the International Bank for Reconstruction and Development (the World Bank - IBRD) and was signed on March 18, 1965 in Washington D.C.

To ensure the implementation of this Convention was created a special body, the International Centre for Settlement of Investment Dispute (ICSID).

The purpose of the International Bank for Reconstruction and Development was to solve disputes in international investments with the aim to promote the growth of these investments. Until 25 July 2012 convention was recognized by 158 countries³⁸, which shows the great interest of the states in this document. The uniqueness of this document is that it is recognized by a large number of small countries in Asia, Africa, Central and Eastern Europe, where some are not even a party to the New York Convention and the UNCITRAL model law.

This has happened because these countries want to attract foreign investors, who had to be guaranteed in resolving disputes that may arise during their investment in these countries. So, one of the requirements of investors in these countries was the introduction and signing of this agreement.

³⁶ "The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention", New York Convention, Article VII, paragraph 2.

³⁷ ICSID CONVENTION, REGULATIONS AND RULES, International Centre for Settlement of Investment Disputes

³⁸ <http://cil.nus.edu.sg/1965/1965-convention-on-the-settlement-of-investment-disputes-between-states-and-nationals-of-other-states-2/>

From its launch to 31 December 2013, the ICSID has registered 459 dispute cases under the 1965 ICSID Convention and the 1978 Additional Facility Rules.

I can mention some other documents governing international arbitration such as: the United Nations Convention on the Carriage of Goods by Sea (1978) and the UNCITRAL Model Law on International Commercial Conciliation (2002).

1.4 Theories on arbitration

Theories of arbitration are seen in different ways by various scholars. Scholars can be divided into two major categories: one category that deals with philosophical theories that have influenced the development of arbitration, and another group that separates arbitration in different classifications. I will briefly give the theories of both these groups and in the end I'll make a summary of them.

1.4.1 Philosophical theories that influenced arbitration

Known philosophical theories that have influenced the development of arbitration are liberalism and neoliberalism. Liberalism is the view that equality and liberty of the individual must form the basis of political and social system. The way to achieve this is the rule of law, limited power of politicians and respect for private property³⁹.

Neoliberalism⁴⁰ is a philosophical theory that supports economic freedom, liberalization of the economy, free trade, reduce government

³⁹ http://www.liberal-international.org/editorial.asp?ia_id=535

⁴⁰ "Neoliberalism represents a set of ideas that caught on from the mid to late 1970s, and are famously associated with the economic policies introduced by Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States following their elections in 1979 and 1981. The 'neo' part of neoliberalism indicates that there is something new about it, suggesting that it is an updated version of older ideas about 'liberal economics' which has long argued that markets should be free from intervention by the state. In its

budget expenditures and increase the role of private sector in the economy.⁴¹

Nowadays this term represents the policies and economic reforms in the elimination of price controls, capital market liberalization and reduction of trade barriers and reducing the influence of the state in the economy through privatization. These ideas were supported by economic institutions, which were interested in the reforms suggested by the neo-liberalists. In fact, these institutions, like IMF, ICC and WTO (World Trade Organization) assisted in the implementation of some of the ideas expressed by liberals and neo-liberals.

The essence of arbitration is the freedom of the parties to appoint an arbitrator to resolve their dispute under a given procedure. Also the parties have the right to settle their dispute or complaint through a procedure fair and equitable. Under the rules of the Albanian and international arbitration, both parties have equal opportunities during the trial proceedings in arbitration. This somehow reflects the individual's right to equality and equal opportunity under the theory of liberalism. When parties choose arbitration as an alternative method to resolve their conflict, they actually use the fundamental human right about how to solve their problem, while the other side is also treated equally.

The establishments of international organizations that implement arbitration such as ICDR are reflection and implementation in practice of liberal ideas and liberalism.

1.4.2 Arbitration Theories

simplest version, it reads: markets good, government bad." (Campbell Jones, Martin Parker, Rene Ten Bos (2005). *For Business Ethics*. [Routledge](#). ISBN 0415311357. page 100)

⁴¹ Taylor C. Boas, Jordan Gans-Morse (June 2009). "Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan". *Studies in Comparative International Development* »

In legal doctrine there are four theories of the legal nature of international commercial arbitration; 1) **the contractual theory** (contracting character of arbitration), 2) **the jurisdictional theory** (judicial functioning of arbitration), 3) **the mixed or hybrid theory** (arbitration as *sui generis* institution, which in itself includes contractual elements and the judicial elements), 4) **autonomous theory** (arbitration as new legal phenomenon, namely an institution with autonomous or semi-autonomous character).⁴²

Depending on theory which prevails in practice or in legislation of different countries is created specific legal consequences, not only with respect to the jurisdiction of the arbitration agreement, but also to the recognition and enforcement of arbitral awards.

1.4.2.1 The contractual theory

Representatives of contracting theory of arbitration argue based on the fact that formation, function and manner of placing an international commercial arbitration exclusively are based on the achievement of an agreement between the parties with their free will. According to the contract or agreement reached by the parties to the dispute, the arbitrator or arbitrators are authorized to exercise the application of substantive and procedural law⁴³.

About the procedure of recognition and enforcement of a foreign arbitral award, according to the contracting theory, there may not be an obstacle to grant the enforcement concessions made in the proceedings before the arbitration, such as: deficiencies in the wording of the arbitration

⁴² Rubllien Devichi (J), L'arbitrage nature juridique. Droit interne et droit international prive, Paris, L.G.D.J, 1965, p. 365.

⁴³René David, L'arbitrage dans le commerce international, Paris, Economica, 1982, p.10

agreement and incomplete arbitral tribunal which rendered the award, if the deficiencies are not *lex contractus* nature.⁴⁴

1.4.2.2 The jurisdictional theory

Followers of judicial theory, namely procedural theory of the legal nature of international commercial arbitration, argue that the main purpose of arbitration is to resolve the dispute. In this case, the arbitrators decide and make decisions like judges. So, according to this theory, arbitration acts as a state court applying the rules of procedure, the presentation of evidence, the exclusion of the arbitrator for not being impartial⁴⁵, etc.

Arbitration, only in exceptional cases does not act like a court, but it is still obliged to adhere to some basic principles of civil procedure. Also, on the resolution of disputes, arbitration applies substantive law according to rules of private international law⁴⁶.

According to this theory, the fact that arbitration is formed and functions only by the will of the parties is not significant, as the court may decide on the basis of agreement prerogative as well. In addition, arbitration would not be competent if the subject of the dispute is the exclusive jurisdiction of the native or foreign state court. In favor of this theory also they note that the activity of arbitration and its decisions are subject to judicial control like the court of highest instance to the court of first

⁴⁴ Prof. Asllan Bilalli, Zgjidhja e Kontesteve Afariste nëpërmjet Arbitrazheve Tregtare Ndërkombëtare, “E drejta – Law”-Journal for Juridical and Social Issues, XXXV - no.3-4 – 2011, page 15, University of Prishtina School of Law.

⁴⁵ Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman On International Commercial Arbitration*, Kluwer Law International, 1999. p. 11-16

⁴⁶ Prof. Asllan Bilalli, Zgjidhja e Kontesteve Afariste nëpërmjet Arbitrazheve Tregtare Ndërkombëtare, “E drejta – Law”-Journal for Juridical and Social Issues, XXXV - no.3-4 – 2011, page 15, University of Prishtina School of Law.

instance. Finally, arbitration decisions are binding so as judicial decisions.⁴⁷

1.4.2.3 The mixed or hybrid theory

The third theory followers of hybrid theory support their theory based on a compromise for substantive and procedural elements of the competence of the arbitration contract. According to this theory arbitration is seen as a reality, while international commercial arbitration as a *sui generis* institution. Proponents of this theory do care not to minimize the importance of contracting elements and make efforts by measuring the impact and importance to make the distribution of application of specific rules of private international law to individually defined elements. Proponents of this theory point out that the international commercial arbitration can not be treated as contractual relationship or as procedural institutions, for a reason that since the preliminary stages, before the formation of arbitration and during the operation until decision is taken, distinguishes from other institutions in respect of contract law and procedural law.⁴⁸

The first difference is because in the contracting of competences of arbitral is not assigned the rights and duties of the parties, nor given a concrete decision. Therefore, although in essence the formation of arbitration and authorization of arbitrators is made by the free will of the parties, harmonization of this will differ significantly from the contractual right of material. By setting the jurisdiction of the court, is assigned only local competence namely international one, and eventually is determined the application of the law of the country. Parties having no impact on the proceedings before the court, in appointing the judge who will resolve the dispute and they may not affect the actions taken in the proceedings if

⁴⁷ Ibid. at page 16.

⁴⁸ Julian D. M. Lew, *Applicable Law in International Commercial Arbitration*, New York, Oceana publications, 1978, p. 57

they are regulated by imperative provisions. However, the implementation of the provisions outlined above to international commercial arbitration is not important because in them can affect the willingness of the parties, so that arbitration is not obliged to apply the procedural rules of a particular state.

The second difference is in the fact that arbitration can take decisions without application of the specific legal rules or legal principles. Such decisions in state court proceedings may be cause to the abolition, or to change the decision by the high court. Inaccuracies in arbitration proceedings can not be cause for cancellation of the award, while it is reasonable cause for cancellation or modification of the state court decision.

The third difference is that the goals of arbitration also distinguish by contracting goals and the goals of judicial resolution of the dispute. While the purpose of the contract is voluntary fulfillment of mutual obligations, for which the contracting parties have common interest in contracting arbitration competences, the common interest consists in the fact that the dispute to resolved by arbitration and not by the court. Understanding the legal nature of arbitration, according to this theory, we may see the legal consequences that differ from previous theories.

Regarding the arbitration clause, the proponents of this theory suggest that its omnipotence over concrete issues should be evaluated according to the *lex fori*, respectively *lex nationalis* if it comes to the authorization of such agreement, while with regard to its legal effects should dominate the right applied to the contract.

1.4.2.4 Autonomous theory

Autonomous theory of the legal nature of arbitration emerged from the second half of the twentieth century, under which arbitration represents

a qualitative phenomenon in terms of autonomous character. The character of arbitration can be determined objectively ascertained only by his activity and purpose. According to the creators of this theory, to enable expansion of arbitration and still to remain inside the box, we should accept that the nature of arbitration is not contractual, nor jurisdictional (procedural), nor hybrid but is autonomous.⁴⁹

1.4.2.5 Conclusion

In conclusion, I think that the arbitration is about two elements of the same conception of the legal nature of it, and when unnecessary we separate them problems are created. Both features and functions of commercial arbitration, contractual and jurisdictional must be included in the definition of this institution and adequately highlighted. Among the many theories and definitions about arbitration, I support the opinion that it is an “elected court” by the agreement of the parties which give consent to the arbitration award to be binding and executed voluntarily or through the court decision.

1.5 Arbitration and globalization

It is understood that at the time of globalization, arbitration has become even more important. International agreements governing the arbitration are signed and recognized by a growing number of states. Parallel to these developments, the number of cases solved by arbitration is increased.

The global economy has experienced many problems in recent years such as the banking crisis, the recession in major economies, extraordinary measures taken by many central banks to prevent diving deeper into

⁴⁹ Jacqueline Rubellin-Devichi, J. Vincent, *L'arbitrage; Nature juridique; Droit interne et droit international privé*, Paris 1965, p. 366

crisis, the upset of commodity and energy markets and continuous rebalancing of the global economy to developing countries.

No discussion that all these have left trace on global economy, but failed to stop the growth of cross-border economic activity, a key indicator on trends in international arbitration disputes, that has occurred over the past years.

1.6 Advantages of Arbitration over Litigation

According to Christian Bühring – Uhle the most important advantage of arbitration over litigation is the neutrality of the forum and possibility to avoid being subjected to the jurisdiction of the home court of one of the parties and superiority of its legal framework.⁵⁰

International agreements on arbitration have enabled the recognition and enforcement of decisions by most countries in the world. Given that, nowadays it is equally easy to be recognized and enforced an arbitration decision in the international arena as it can be recognized and implemented the decision of a state court. If we experience a problem in the recognition and enforcement of an award, the same could happen with a state court decision, so the state court will not solve the problem quickly or better.

Another advantage is cost and speed⁵¹. Arbitration has a much lower cost than a judicial process in a state court. Similarly, in term of the time, an arbitration process takes less time than in a court. Consequently, the cost in this case is smaller. The speed of solving a

⁵⁰ Christian Bühring – Uhle, A survey on arbitration and settlement in international business disputes – advantages of arbitration, page 31; Towards a Science of International Arbitration: Collected Empirical Research; Published by Kluwer Law International 2005, ISBN 90 411 2329 9

⁵¹ Harry T. Edwards, Advantages of arbitration over litigation: Reflections of a judge; Arbitration 1982; conduct of the hearing: proceedings of the thirty-fifth annual meeting, National Academy of Arbitrators, Washington, D.C., May 25-28, 1982, Volume 35, Part 1982, page 23 (<http://www.naarb.org/proceedings/pdfs/1982-16.pdf>, last visited on 9th of May 2015)

problem in arbitration is greater than in a court that requires lengthy bureaucratic procedures.

“...the real cost savings in arbitration lies in the likelihood that an arbitrator will be less inclined than a judge to entertain extensive discovery and motions practice, both of which frequently drive the fees and costs of litigation. Thus, when there is a concern that the cost of discovery might outstrip the value of the case, arbitration may be a better alternative”.⁵²

Another advantage of arbitration to state court is the fact that the parties may choose arbitrators, venue⁵³ of arbitration and rules that will apply during the arbitration proceedings. It is also possible to settle the legislation that best fits the issue instead of facing an inappropriate law to the dispute resolution.

Another advantage is the privacy⁵⁴. This is very important for companies involved in such a procedure, because publicity may disturb them and their reputation. In a public court this can not be ensured, since the whole process and the trial is open to the public. “The publicity that flows from court litigation may be unwanted, particularly by defendants and counterclaim-defendants who see the airing of claims against them as damaging to their reputations...while litigation is public, ADR processes are not. Arbitrations and mediations are held in private offices and conference rooms. This is a key reason that parties choose to use them”⁵⁵

⁵² Alan Freeman, *Litigation: Arbitration v. litigation*, April 19, 2012 (<http://www.insidecounsel.com/2012/04/19/litigation-arbitration-v-litigation> , last visited on 9th of May, 2015)

⁵³ Catherine Swee Kian Tay, *Resolving Disputes by Arbitration: What You Need to Know*, page 18, Singapore University Press 1998, ISBN 9971-69-219-8

⁵⁴ *Ibid.* at page 19

⁵⁵ Donald L. Carper and John B. LaRocco, What parties might be giving up and gaining when deciding not to litigate: A Comparison of Litigation, Arbitration and Mediation, 2008, *Dispute Resolution Journal*, 48-61.

1.7 Data Regarding the Increase in the Use of Arbitration

Research and data show that arbitration is gaining more importance in the international arena as one of the most efficient methods to resolve disputes in international trade.

Table below shows us the history of case filings since 2000 for some of centres such as ICC (International Chamber of Commerce, ICSID (International Centre for Settlement of Investment Disputes), SIAC (Singapore International Arbitration Centre and DIAC (Dubai International Arbitration Centre).

New arbitration case filings, 2000 to 2013:⁵⁶

International arbitration cases only (excluding domestic cases)															
Institution	Country	2000	2002	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
ISCID		12	14	19	31	27	27	23	37	21	25	26	38	50	40
AAA+ICDR	US	510	649	672	646	614	580	586	621	703	800	888	994	996	1165
BAC	China	11	20	19	33	30	53	53	37	59	72	32	38	26	N/A
CETAC	China	543	562	468	422	461	427	442	429	548	560	418	470	331	N/A
DIS	Germany	N/A	N/A	N/A	N/A	N/A	N/A	16	30	22	41	43	55	30	N/A
ICC	France	541	566	593	580	561	521	593	599	663	817	793	796	759	767
KCAB	South Korea	40	65	47	38	46	53	47	59	47	78	52	77	85	N/A
LCIA	UK	87	71	88	104	87	118	133	137	215	272	246	224	265	290
SCC	Sweden	66	68	50	77	45	53	64	81	74	96	91	96	92	86
SIAC	Singapore	37	39	34	23	39	29	47	55	71	114	140	109	89	127
Subtotal		1847	2054	1990	1954	1910	1861	2004	2085	2423	2875	2729	2897	2723	N/A
SCCAM	Switzerland	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	52	79	71	66	69	50
VIAC	Austria	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	60	68	75	70	56
Total international		1847	2054	1990	1954	1910	1861	2004	2085	2475	3014	2868	3038	2862	N/A
International & domestic arbitration cases															
DIAC	UAE	N/A	N/A	N/A	N/A	N/A	N/A	N/A	77	100	292	431	440	379	310
HCIAC	China	298	307	320	287	280	281	394	448	602	429	291	275	293	263
Grand total		2145	2361	2310	2241	2190	2142	2398	2610	3177	3735	3590	3753	3534	N/A

Nationality of parties involved in arbitration cases, 2013:⁵⁷

⁵⁶ <http://globalarbitrationreview.com/reviews/67/sections/232/chapters/2683/trends-international-arbitration-new-world-order/>

⁵⁷ <http://globalarbitrationreview.com/reviews/67/sections/232/chapters/2683/trends-international-arbitration-new-world-order/>

Institution	Africa	Asia/Pacific	Americas	Europe	Other
ISCID	26%	8%	40%	26%	0%
ICC	8%	24%	23%	45%	0%
LCIA	12%	26%	21%	37%	4%
SCC	1%	15%	2%	82%	0%
SIAC	3%	67%	14%	15%	0%
SCCAM	0%	10%	3%	73%	15%

These data shows that the process of recovery in the global economy does not led to reduce filings and on the other hand, it is difficult to interpret this trend.

Globalization has advanced at a tremendous pace over the past years. Parallel to this is increased the number of disputes to be resolved by arbitration. This is largely driven by the internationalization of the economy and the increasing complexity of economic activity. Rebalancing the global economy towards emerging economies in general and particularly in the Asia-Pacific region has coincided with the growth of arbitration institutions in these regions.

The increase use of arbitration as a dispute resolution method is also illustrated by the findings of a research project undertaken by Queen Mary University of London. The first part of the research in 2006 was undertaken to show the general trends in dispute resolution. The last serie of survey was conducted in 2012 focused on current and preferred practice in the Arbitral process⁵⁸.

⁵⁸ <http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf> (last visited on 10th of May, 2015)
<http://arbitrationpractices.whitecase.com/files/Uploads/Documents/Arbitration/Executive-Summary-Queen-Mary-University-London-International-Arbitration-Survey-2012-update.pdf> (last visited on 10th of May, 2015)

Besides unforeseen global political and economic developments, is expected that this trend in international commercial arbitration continue in the near future.

1. 8 Conclusion

At the end of the analysis of this Part, I can conclude that the arbitration will continue to be a preferred method for resolving disputes between the parties, compared to a trial in a state court. This is because the procedure is simpler, less costly and saves time. Another reason is the fact that state courts in different countries apply different standards in resolving disputes that arise between the parties. The data shows that the arbitration will continue to be a preferred method of dispute resolution in the future.

PART II

2. HISTORY AND EVOLUTION OF THE ALBANIAN ARBITRATION

Before talking about the procedure of formation of the court of arbitration and proceedings, it is appropriate to place a brief description of the history of arbitration in Albania.

2.1 Albanian Chamber of Commerce history

Before World War I we have data showing the creation of Chambers of Commerce in several cities in Albania, as in: Tirana, Shkodra and Berat. The first documentary evidence of the Chamber of Commerce of Tirana appears in 1897⁵⁹ in a document that belongs to that time quoted by Professor Krsito Frashëri in his book "Tirana 1937".

However, it is thought that the chambers of commerce in the Albanian territories have existed before, but are not supported by documents. Along with the foundation of Chambers of Commerce have been existed arbitration rules to resolve disputes between the parties as well. In 1924, by the Decision of the Council of Ministers No. 144, March 25, Chambers of Commerce that would newly be created will be depending on the Ministry of Finance.

With the adoption of the Law No. 56, dated 14 March 1929 "On the Establishment of the Chambers of Economy", Chambers were declared as "mediator between the government on one side and farmers, industrial

⁵⁹ Prof. Kristo Frashëri, "Tirana 1937", p.71

and commercial on the other and dependent on and regulated by the Ministry of National Economy"⁶⁰.

After World War II, when the Communists came in power in Albania, Chamber of Commerce came under reorganization preferring the communist model. Chamber of Commerce of Albania was established in 1958, which would maintain relations with many Chambers of Commerce of other countries.

During the years 1958-1990, the Chamber of Commerce, legally and officially was known as a "social organization to give a further impetus to the development and strengthening commercial links with other countries, the development and technical progress in the field of productions for export and propagating the achievements of our country", in the practice was nothing less than an institution or enterprise, part of the state administration. This was clearly reflected in the composition of its members, the Chamber of Commerce was a union of economic enterprises created by the state, which represented its interests in foreign affairs, according to the various branches of the economy. As it was stated in its establishment decision, the Chamber of Commerce aim was "to foster Albania's economic relations with the foreign countries".

2.1.1 Tirana Chamber of Commerce and Industry

Nowdays, the Tirana Chamber of Commerce and Industry is the main Chamber of Commerce in Albania and the legal representative of business interests of Tirana.

The Chamber has established cooperation with a number of chambers of commerce in the other countries. Moreover, it is member in organizations such as the ICC, ASCAME, BSEC and the Vienna Economic Forum.

⁶⁰ Law No. 56, dated 14 March 1929 "On the Establishment of the Chambers of Economy"

Tirana Chamber of Commerce and Industry aims to promote Albanian business in Albania and abroad, and serve as a mediator between businesses and institutions.

2.2 Albanian arbitration history

In the history of the Albanian society consensus models of conflict resolution, although they have not had this level of actual institutionalization, cannot be considered completely new. So, the consensus policies in resolving disputes between the parties are not a present without past or a present without theoretical and practical perspectives. On the law implemented in Albania, whether in the customary, religious or positive, we find numerous traditional examples of enforcement of models and methods of dispute resolution.

So we can mention the customary institutions⁶¹ such as assembly which played a special role on resolving disputes between parties. The role of these customary institutions occasionally is borrowed by the state law up to our days.

Village and neighborhood courts, also known as social courts⁶² established since 1968, and even recognized as an integral part of the judicial system, judged cases of "little importance". The aim of this kind of courts was to make all efforts to resolve the dispute between the parties in conflict. The same can be said about arbitration. In this regard Albania has a considerable experience mainly due to State Arbitration⁶³.

⁶¹ Edith Durham, *"Brennga e Balkkanit dhe vepra të tjera për Shqipërinë dhe shqiptarët"*, Tirana 1990, p. 117-118

⁶² Law No. 7383, dated 08.05.1990 "On Social Courts", published on Official Journal No. 3, date 14.05.1990

⁶³ Regulation on State Arbitration, dated 28.02.1968, based on Article 2 of Decree No.4359, date 16.01.1968; (<http://www.qbz.gov.al/doc.jsp?doc=docs/Rregullore%20Nr%20%20Dat%C3%AB%2028-02-1968.htm>, last visited on 10th of May, 2015)

After World War II, the state arbitration⁶⁴ was established under Law no. 443, dated 02.7.1947 "On resolving property disputes by state arbitration". Title of the law does not fully respond to its content, because besides state arbitration was recognized in fact so called "voluntary arbitration" as well. State arbitration was established as integral part of Sub-prefectures, the ministries and the government, which was the higher level arbitration. When resolving disputes between state companies arbitration was called "Obligatory arbitration".

When resolves disputes between state legal persons on the one hand and natural persons or private entities on the other hand, the arbitration was called "voluntary arbitration".

This law was replaced by Law no. 728, dated 16.08.1949 "On the State Arbitration". But this law was amended as well until it was repealed by Law no. 1872, dated 07.5.1954 "On the State Arbitration".

Under this law, the Council of Ministers adopted the Regulation no. 180, dated 17.07.1954 "On the resolution of disputes by the State Arbitration".

In 1972, based on Law no. 5009, dated 10.11.1972, "On State Arbitration" and subsequent amendments, state arbitration resumed the activity because the state courts were unable to cover multiple resolving disputes between parties.

The abovementioned law was replaced by the law no.7424, dated 11.14.1990 "On the State Arbitration". Pursuant to this law, the Council of Ministers adopted the decision no. 26, dated 01.04.1991 "On approval of the Regulation for matters of state arbitration". These documents are the latest normative acts of state arbitration. After the decree of the President of the Republic no. 682, dated 11.04.1993 "For the dissolution of the state arbitration" the State Arbitration in Albania ceased

⁶⁴ Law no. 443, dated 02.7.1947 "On resolving property disputes by state arbitration"

functioning. Among the most popular disputes and last one resolved by State Arbitration after 1990 was the Marini case.

In December 2002, was created and functioned until 2009 a permanent arbitration forum at the Chamber of Commerce Tirana, Albanian Center for Mediation and Commercial Arbitration "MEDART"⁶⁵ as an independent private institution, established with the support of the World Bank⁶⁶. This center, during its operation, managed only a small number of cases and, despite its purpose, no significant results achieved in promoting the alternative dispute resolution by arbitration. One of the main reasons was that companies and businesses generally are characterized by a lack of confidence in the justice system.

2.3 Marini Case

2.3.1 State Arbitration Proceedings⁶⁷

a. In 1991 in Tirana (Albania) was created a joint-venture company known as "Marini-Albplastik" with joint owners: a) Mr Vlash Marini, Albanian and American citizenship and b) the Albanian Government. The company "Marin-Albplastik" mainly was producing plastic products. The

⁶⁵<http://www.kluwerarbitration.com/CommonUI/organization.aspx?jurisdiction=Albania&organization=Albanian+Commercial+Mediation+and+Arbitration+Center&text-type=Rules> (last visited on 10th of May, 2015)

⁶⁶ <http://adrresources.com/adr-institutions/83/Albanian-Commercial-Mediation-and-Arbitration-Center-MEDART> (last visited on 10th of May, 2015)

⁶⁷ State arbitration proceeding is a term used for arbitration in Albania at the time of Communist rule. At this time arbitration was organized and controlled by state, the same as the state courts. To illustrate this, below I will give a portion of the contents of the Parliament Decree No.5009, dated 11.10.1972 "On State Arbitration":

Article 1 - State Arbitration has a duty to resolve all property disputes that enter its power, protect socialist legality in favor of implementation of the state plan and contracts, strengthening financial discipline, to increase personal responsibility of managers and other employees in connection with the execution of the contractual and extra contractual obligations, as well as the fulfillment of other economic tasks, guided in all its activities the fundamental principles of economic policy of the communist party, as well as legal provisions issued by the competent authorities.

Article 2 - State arbitration will be established on:

- a) The Council of Ministers of the People's Republic of Albania;
- b) Ministries and other central institutions, appointed by the Council of Ministers;
- c) Executive committees of the district councils.

Article 3 - State arbitration consists of chairman, his deputy and a number of arbitrators appointed by the state bodies. State Arbitration of the Council of Ministers gives mandatory instructions for all state arbitration bodies and controls their operations and practice.

Article 4 - State bodies exercises control over the activity of state arbitration

act of foundation of the company dated 11.03.1991 was formalized by the Council of Ministers Decision dated 23.04.1991 and the company was registered as such in the National Commercial Register.

b. Worth of the Company assets was estimated approximately 12,497 Euros, previously owned by state company "Mandimpeks". Investment of the partner of Mr. Marini consisted in the amount of 834,098 Euros. The parties had the 50% of company share.

c. On 30 May 1991, in accordance with the obligations of the foundation act of the company, Mr. Marini signed a contract on behalf of the "Marin-Albplastik" company with the Italian company "Edil-Plastic" to buy new manufacturing technology, paying the first installment of 173,000 Euros.

d. At the moment when the factory was equipped with new technology to 60%, Albanian government demanded the termination of activity of the company and asked Mr. Vlash Marini to suggest new terms of cooperation. The person in question opposed the decision of the government. On the other hand, the Albanian government by decision dated 3 April 1993 of the Council of Ministers unilaterally canceled previous decision of 23 April 1991 on foundation of "Marin-Albplastik" kompani.

e. Some time after the decision of the government, Mr. Marini filed a claim to the State Arbitration Commission (Arbitrazhi i Shtetit), which at that time was the competent national arbitration body to resolve disputes between the parties.

f. State Arbitration Commission on May 7, 1993 supported the validity of the foundation act of the "Marin-Albplastik" company and ordered the government to pay to Mr. Marini 341,000 Euro for profit loss as a result

of the termination of the activity of the company during the year 1992 and 569 Euros as bank interest on 173,000 Euros investment. State Arbitration Commission did not take into consideration the request of Mr. Marini to be reimbursed for his share of investment on the grounds that this investment was part of the company's assets.

g. Albanian State appealed against the arbitration award to the Plenary State Arbitration Commission (*Mbledhja e Përgjithshme e Arbitrave të Arbitrazhit Shtetëror*). Plenary State Arbitration Commission on July 7, 1993 decided to order the Albanian government to comply with its obligation to continue the activity of the company and confirmed the award given by State Arbitration Commission regarding the compensation of Mr. Marini. In the same time Plenary State Arbitration Commission ordered the State Arbitration Commission to recalculate the profit loss.

h. State Arbitration Commission based on the decision and the instructions given by the Plenary State Arbitration Commission on November 5, 1993 decided to order the Albanian government to pay to Mr. Marini amount of 217,286 Euro for profit loss in 1992.

i. Following this decision, in 1993 the bailiff institution froze the assets of the company (Albanian government share) and paid to Mr. Marini amount of 217,286 Euro for profit loss in 1992.

j. Once the Albanian government refused to implement the decision of the State Commission of Arbitration dated July 7, 1993, Mr. Marini appealed to the Constitutional Court on this issue. In a decision dated 8 November 1995 the Constitutional Court concluded that Mr. Marini was deprived of his constitutional rights and ordered the implementation of the decision of the Plenary State Arbitration Commission.

k. The Albanian government enforced the decision of the Plenary State Arbitration Commission only after two years from receipt of the decision of the Constitutional Court⁶⁸.

2.3.2 Proceedings regarding the validity of the Arbitration Award (Marini case)

a. The Albanian government in capacity of co-partner of Mr. Marini in the "Marini-Albplastik" company filed suit to the Court of Tirana District for the cancellation of the Arbitration Award dated November 5, 1993 with the argument that this institution has ceased to exist on 4 November 1993. Albanian government also asked the Court of Tirana District to cancel the freeze of assets possessed by government in "Marini-Albplastik" company.

b. Tirana District Court on November 27, 1996 decided not to accept the Albanian government lawsuit and affirmed the state arbitration award. The Albanian government appealed to the Court of Appeals of Tirana, but the latter upheld the decision of the State Commission of Arbitration as well⁶⁹.

2.4 Current arbitration regime in Albania – rules and procedures

Arbitration in Albania is regulated under the law "Code of Civil Procedure" (CCP) and based on this law, I will explain how is organized and conducted the arbitration proceedings in Albania⁷⁰.

⁶⁸ Marini Case, Përmbledhje e vendimeve të Gjykatës Europiane për të drejtat e njeriut kundër Shqipërisë, Botim i Qendrës së Publikimeve Zyrtare, Published by Official Publication Centre, Tirana 2010, page 128, ISBN 978 – 99928 –01– 002 – 5

<http://www.qbz.gov.al/botime/permbledhese/Permbledhje%20e%20vendimeve%20te%20Gjykates%20Europiane%20per%20te%20Drejtat%20e%20Njeriut.pdf> (last visited on 10th of May, 2015)

⁶⁹ Ibid. at page 128, paragraph 18 (Marini Case, Published by Official Publication Centre, Tirana 2010, ISBN 978 – 99928 –01– 002 – 5)

⁷⁰ Kodi i Procedurës Civile i Republikës së Shqipërisë, Tirana 2011, p.144-158, ISBN 978-9928-01-019-3

a. According to the Albanian legal sources "arbitration" is also called "elected Court" to distinguish it from the state court. Arbitration is the court chosen by the parties, that the parties will entrust the review and resolution of a dispute between them, instead of the state court of the judicial system. The agreement for the adjudication of arbitration procedure may be related to disputes that may arise in the future from an existing relationship, or after the dispute has arisen. Furthermore, the agreement for the adjudication by arbitration procedure can be achieved even after the case is filed for judgment by the state court and the judgement process has started. Based on article 406 of the CCP, in this case the minutes of the hearing will be signed by the court and the parties involved or their representatives, reflecting the agreement reached as well. The agreement of the parties to resolve the dispute by arbitration is either a specific legal/procedural agreement or part of the main legal agreement material as a compromise clause. Provisions of CCP on arbitration proceedings are valid where the parties reside in the Republic of Albania, or one party carries out its activities outside the territory of the Republic of Albania. But, in both cases the place of arbitration proceedings must be in the territory of Albania.

b. Article 402/1 of CCP states that it is the arbitration competence to resolve property related disputes between parties agreed, without limitation that what would be the parties, natural and juridical persons, state or organizations controlled by state. State or state bodies can not challenge the competence of arbitration; in other words, can not claim the right not to be party to an arbitration procedure⁷¹.

⁷¹ Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, ISBN:978-9928-01-019-3, Article 402, second paragraph, p.144

c. In the following articles, CCP states that the agreement of the parties to resolve the dispute by arbitration must be made in writing as part of the main agreement or a written document that refers to the main agreement, provided that constitute written proof. Failure to respect this provision brings the invalidation of the condition or agreement to resolve the dispute by arbitration⁷². Also, the agreement of the parties to resolve the dispute by arbitration is void if fails to determine the number of arbitrators and the way of appointment. The agreement to be valid is required to mention the object of the dispute, if this dispute has arisen. The parties may freely agree on the number of arbitrators who will form the arbitral tribunal and the manner of their appointment. However, when the parties do not agree on whether the number and mode of appointment of arbitrators, when they give consent, arbitral tribunal is formed by one or more arbitrators assigned by the state court. In this case, the number of arbitrators must be odd. If the parties do not have consent to the appointment and selection of arbitrators by the state court, the case can not be filed on arbitration institutions.⁷³

d. Article 407 of CCP states that an arbitrator can only be a natural person. The legal person, when charged, is authorized only to organize arbitration procedure. For example, a public or private legal person is entrusted by the parties to appoint arbitrators.⁷⁴ From the moment that the arbitrator or arbitrators are appointed under the provisions of CCP, the parties have the right to express their concerns about the impartiality of arbitrators (if this is a case). When the arbitrator/ arbitrators do not meet the terms of agreement of the parties or their concerns about the impartiality are correct, then the arbitrator in question is excluded from the proceedings. Reasons for exclusion of the arbitrator may be known

⁷²Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, ISBN:978-9928-01-019-3, Article 404, first paragraph, p.145

⁷³Ibidem, Article 405, p.146

⁷⁴Ibidem, Article 407, p.146

even after his appointment⁷⁵. Parties have the right to define themselves independently rejection procedure of an arbitrator. The party that opposes the arbitrator must "make him disclose the reasons for the objection to his appointment within 10 days of receipt of notice of appointment. When the arbitrator does not withdraw from the mission and it is not prescribed certain exclusion procedure in agreement between parties or this procedure does not provide the solution, the arbitration court decides without participation of the arbitrator to whom the exemption is requested. When this does not resolve the request for exemption, then decision should be taken by the first instance state court within 15 days after the case is filed.⁷⁶ If an arbitrator for one reason or another is unable to fulfill his duties, then his mandate as arbitrator ceases automatically or parties agree to terminate its mission as an arbitrator. In these cases he / she will be replaced following the same rules as for appointing arbitrators.⁷⁷

e. When the arbitrators appointed by the parties makes an even number, for example 2 + 2, the arbitration court will be supplemented by an arbitrator appointed by agreement of the parties and if the agreement is not reached, will decide the arbitration court itself. If the arbitration court fails to appoint the additional arbitrator, then will decide the state Courte of First Instance. The appointment of the arbitrator shall be made in any case within 15 days.⁷⁸ In Article 412 is well defined the procedure of formation of the arbitral tribunal when a natural or legal person is charged by the parties to organize the arbitration. When the parties do not accept the choise made by person in charge of organizing the arbitration, then he requests from each party to appoint its arbitrator.⁷⁹

⁷⁵ Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Article 408, p.147

⁷⁶Ibidem, Article 409, p.147

⁷⁷Ibidem, Article 410, p.148

⁷⁸Ibidem, Article 411, p. 148

⁷⁹Ibidem, Article 412, p. 148

The mission of the arbitrators continues for as long as is set in the agreement of the parties and when these have not given term, this mission lasts only 6 months from the date of appointment. The duration of the mission can be extended on request of one or both parties and the court of arbitration, by the president of the court of first instance for a time he deems fit.⁸⁰

f. Dispute proceedings is within the jurisdiction of the arbitral tribunal appointed by agreement and cannot "be sent to another jurisdiction for trial, or in other words, parallel proceedings can not be initiated. In the event that sent the latter must declare non-competence.⁸¹ If sent for trial to another jurisdiction, then this jurisdiction should declare non-competence of resolving the dispute.⁸²

g. Arbitration proceedings starts from the moment of its creation. When parties appoint arbitrators by their agreement, this activity is called that begins from the moment when one of the parties appoint the arbitrator or arbitrators charged with carrying out the mission. Procedure of the Arbitration may be determined by the parties themselves, by accepting the rules of procedure referring to an arbitration procedural rules that they have chosen. When the parties have not made this adjustment, arbitral tribunal determines themselves by referring regulation of one of arbitration model. Whatever the regulation of working procedure, the arbitration tribunal is obliged to respect the principles of the process, such as equality of the parties and the right to be heard in a process. In

⁸⁰Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Article 413, p. 148-149

⁸¹Ibidem, Article 414, p. 149

⁸²Ibidem, Article 414, p. 149

its own initiative or at the request of the parties decide on jurisdiction and the validity of the arbitration agreement⁸³.

h. The Court of Arbitration at the request of one or the other party can decide the measures to secure the lawsuit, with the exception of cases where there is an agreement to the contrary between the parties. When the parties have not been expressed themselves on this issue, the arbitration court applies the rules of CCP to secure the lawsuit, but it can not enforce these measures. When not implemented voluntarily by the other party, the arbitration court can address it to the competent court to decide.⁸⁴

In the agreement, the parties may designate the place of arbitration proceedings. When there is no place determined in this agreement, then the arbitration court decide on the place of arbitration. When this is impossible, then place of arbitration will be residence or center of the defendant.⁸⁵

i. When one or the other party does not appear at a hearing without any justifiable reason, the trial proceeds in absentia.⁸⁶ However, this provision is not concerned how it will operate arbitral tribunal when either party fails to appear without good cause. In this case, I think that arbitral tribunal will act according to the general rules of CCP, which is the termination of the case. Appointed arbitrator is bound to continue its mission until the end. He could not give up the trial or abstain, unless the reasons provided in section 408 of CCP. In such cases he or she will be replaced as set forth in this code.⁸⁷

⁸³ Ibid. at page 150, Article 417 (This article can be applied even if the parties to the conflict have no jurisdictional objection)

⁸⁴ Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Article 418, p.150

⁸⁵ Ibidem, Article 419, p.151

⁸⁶ Ibidem, Article 422, p.152

⁸⁷ Ibidem, Article 422-423, p.152

j. In the arbitration tribunal the parties may submit evidence in writing and can relate to the documents and other evidentiary materials. The claimant can add or reduce the scope of dispute or change its legal reason to end the judicial inquiry, unless the agreement of the parties or the court rules otherwise provided. Should be considered the fact that in no case shall not be infringed the principle of free access to evidence. Unlike the state court, the court of arbitration operates itself for evidence and when facing difficulties to obtain information or documents from an institution, then the court of first instance can be addressed to resolve this issue according to the CCP provisions. Once the necessary evidences are provided, the judicial investigation is closed and the arbitrator or arbitrators fix the date of the final discussions. During its work, the Court of Arbitration applies Albanian legislation.⁸⁸

k. The decision by the arbitral tribunal is taken on bases of majority and signed by all arbitrators. The arbitrator or arbitrators remained in the minority have the right to submit a written opinion. The final decision consists of three parts:

a) the first part or introduction, stating the composition of the panel of arbitrators, date and place of issuance of the decision (award), the identity and residence of the parties, their representatives and subject of dispute;

b) the second or descriptive reasoning of the decision (award), indicating the legal relationship of the parties, the cause of the dispute, the presentations made by parties (the hearing), the court's conclusion, evidence relied on and the legal basis of the accepted dispute resolution;

c) The third part of the executive part of the decision (award), which shows concisely acceptance or the rejection of the claim in the order form, showing the obligation of the defendant if the claim is accepted,

⁸⁸Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Article 427, p.153

and the right of appeal against the decision (award) based on Article 434 of CCP.

The arbitration tribunal has the right to interpret its final decision, correct misstatements, and fill it for the plaintiff requests which are not expressed, provided that these requests are not about main issues. Interpretation, correction of errors and completion of the decision is made by the same composition of arbitrators, except when they can not meet with the same composition.⁸⁹

1. Although the parties in the agreement to solve the dispute by arbitration have provided the waiver of appeal against the decision, the decision can be appealed to the Court of Appeal only for these reasons:

- a) The arbitral tribunal is not formed on a regular basis;
- b) Its decision on the competence or non-competence to solve the dispute is unfair;
- c) the decision has exceeded demand for which has been invested or is not expressed to one of the main requirements of the claim;
- d) does not respect the equality of the parties and their right to be heard in a procedure based on the principle of contradiction;
- d) The decision is contrary to public order of the Republic of Albania.

These are 5 reasons explicitly specified in Article 434 of CCP. The interested party can not exercise the right of appeal for any other reason. The deadline for appeals to the Court of Appeal is 30 days from the date of the decision announced whether parties attend or not on the day of its promulgation.⁹⁰ The Court of Appeal considers the case in the second degree under the general rules. When invalidate or change the decision of the arbitral tribunal, the Court of Appeal judge the case on its own

⁸⁹Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Article 431, p.155

⁹⁰Ibidem, Article 435, p.156

merits, but always within the limits assigned to arbitral tribunal.⁹¹ Against the decision of the Court of Appeal is not allowed recourse to the High Court. But the interested party may write a request to the Constitutional Court when pretend to be an irregular legal process.⁹² The award of the court of arbitration is executed under order of execution issued by the state court of first instance.

Although there exists Civil Procedure Code that regulates the activity of the court of arbitration in Albania, to date no action has been taken to ensure its performance. Perhaps for that has impacted negatively the fact that after the adoption of the Code of Civil Procedure is not adopted the law "On the implementation of the Code of Civil Procedure". In general, legislative practice has waived drafting and adoption of such laws as unnecessary. I think it would be beneficial to return to the earlier practice. A good example for this is the law for the implementation of the Code of Civil Procedure, 1958.

2.5 International Arbitration under Albanian legislation

Initially, the activity of international arbitration was regulated under provisions of CCP⁹³. In Article 439 was given the definition of the international arbitration as follows: "...it is called international an arbitration which is related to the interests of the international trade". It pursues that the parties must be foreigners or at least one of them must be foreigner and headquartered outside the Republic of Albania; must have an arbitration agreement between the parties, including appointment of arbitrators and their mode of appointment, referring to an arbitration regulation. The arbitrator or arbitrators are selected in our country and the applicable law for the formation of the arbitral tribunal is the Albanian law or the law of another country. When the parties

⁹¹Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Article 436, p. 157

⁹² Constitution of the Republic of Albania, Articles 42.1, 42.2, paragraph "f"

⁹³Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Chapter VI, Articles 439-441, p.158

encounter difficulties in its formation, the interested party can address the court of first instance of Tirana for this purpose, unless the parties agree otherwise to solve this problem.⁹⁴ Also, the Article 441 of the CCP provides that the court of international arbitration resolves the dispute in accordance with the legislation that the parties have stipulated in the agreement and when there is not such a solution, implements rules and regulations it deems appropriate. But it must also take into account the rules and customs of the trade.⁹⁵ With recent amendments of CCP⁹⁶, are revoked three provisions related to international arbitration (Articles 439-441), mentioning that this issue will be regulated by a specific law⁹⁷.

2.6 ARBITRATION CASES

2.6.1 “Sky Petroleum Company” versus Albanian Government Case⁹⁸

2.6.1.1 The parties:

The American company "Sky Petroleum" and the Albanian government on June 24, 2010 signed the agreement for the Division of Production on Exploration, Development and Production of Fuels in Albania in Blocks 4, 5 and Dumre ("The Contract"), which was ratified by the Council of Ministers on 24 November 2010.

2.6.1.2 Dispute between parties:

⁹⁴Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Article 439, p.158

⁹⁵Ibidem, Article 441, p.158

⁹⁶Law no. 8812, dated 17.5.2001

⁹⁷This law has not yet been adopted (author's note)

⁹⁸Sky Petroleum Inc v Ministry of Economy, Trade, and Energy of Albania and National Agency of Natural Resources of Albania, Order and preliminary injunction, Case No A-12-CA-023-SS, IIC 530 (2012), International Arbitration Case Law, School of International Arbitration, Queen Mary, University of London, Case report by Ana Carolina Simoes e Silva

<https://sites.google.com/a/internationalarbitrationcaselaw.com/www/cases/skypetroleumincvministryofeconomytradeenergyofalbanianaturalresourcesofalbania/initialinjunctionbyanacarolinasilva>;
(last visited on 10th of May, 2015)

On 22 July 2011 the Albanian National Authority of Natural Resources (ANANR) unilaterally decided to terminate the contract claiming that the other party has not fulfilled its contractual obligations and has not submitted the bank guarantee within the legal deadline of 90 days from the beginning of activity.

2.6.1.3 Complaint filing:

Sky Petroleum Company not agreeing with the termination of the contract by the Albanian government filed a complaint to the Arbitration Tribunal in accordance with Article 21 of the Agreement.

2.6.1.4 Complain content:

Sky Petroleum Company claimed that the government of Albania has unilaterally terminated the agreement, and, moreover, was included in the list of its assets the oil exploration areas that are technically known as Block 4, Block 5 and Dumre, to be sold to another company called "Albpetrol". The company "Sky Petroleum" demanded compensation from the Albanian government in the amount \$ 1 billion for unilateral termination of the contract.

2.6.1.5 Proceedings before arbitration:

-On the other hand, the American company Sky Petroleum filed suit in the US Court for the Western District of Texas and in March 2012, and this Court decided⁹⁹ to freeze the assets in question until the final award be made by arbitration.

⁹⁹ <http://www.italaw.com/sites/default/files/case-documents/ita0794.pdf> (last visited on 17th of February, 2015), ORDER AND PRELIMINARY INJUNCTION, THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION, Case 1:12-cv-00023-SS, Document 20, Filed 01/20/12, Page 1 of 10

-The Albanian government appealed the decision of the Court of Texas in Tirana Court of Appeals, which decided¹⁰⁰ not to recognize the US court decision as ungrounded.

2.6.1.6 Panel of arbitrators:

Arbitral tribunal to judge the case consisted of Bernard Hanotiau (Belgian arbitrator), Jeffrey Grüder (British arbitrator) and Andreas Rud (Swiss arbitrator).

Sky Petroleum claimed that it had exclusive rights to oil-bearing area in question, about 5000 kilometers of land in central and southern Albania, and the Albanian government's claims for not complying with the contractual obligations were false.

2.6.1.7 Applicable Arbitration Rules:

UNCITRAL (1976)

2.6.1.8 Arbitration award:

On 7 May 2013 the Arbitration Tribunal ruled that the Albanian government had valid grounds to settle the Agreement. More specifically, the arbitration tribunal ruled that: 1) the National Agency of Natural Resources has given notice of contract termination to the "Sky Petroleum" Company on July 22, 2011, due to failure of the company to submit a regular bank guarantee and 2) the contract was duly completed on 17 November 2011.

The Albanian government was entitled to be refunded for all expenses of the process, such as lawyers' expenses, experts, etc., amounting to 382.774 Euros to be paid by "Sky Petroleum" company.

Conclusion:

With this decision, the Albanian government has officially opened the way to initiate the concession of oil-bearing areas in question.

¹⁰⁰ http://www.italaw.com/sites/default/files/case-documents/italaw1093_1.pdf (last visited on 17th of February, 2015); Tirana Court of Appeals Decision No. 32/1010, dated 01.03.2012

2.6.3 Tradex Hellas S.A. (Greece) vs. Republic of Albania Case¹⁰¹

The Arbitral Tribunal: Prof. Dr. Karl-Heinz Böckstiegel, President; Mr. Fred F. Fielding, Esquire, Arbitrator; Prof. Andrea Giardina, Arbitrator

2.6.3.1 *History and facts*

a. On 10 January 1992, Tradex (Greek company) and T.B. Torovica (Albanian state owned company) signed a 10 year agreement for the establishment of a joint venture between them.

T.B. Torovica entered into this agreement as the owner of agricultural land in 1170 ha in Lezha (Torovica village), Albania. The object of the joint venture was the commercial and agricultural use of the land by cultivating fruits and vegetables.

b. The agreement became official on March 7, 1992 by registering it in Albanian administrative bodies.

c. In accordance with the agreement, Tradex began investing in the amount of US \$ 786.343

d. Tradex claimed that the following measures of Albanian government had made it impossible to continue the work of the joint company, considering these measures as acts of unilateral termination of the contract (agreement). Tradex claims were:

-in August 1992 15% of the land that owned joint venture company was given villagers in use (140 ha)

-in December 1992 by villagers was not allowed entry to the farm of the company workers

-at the end of 1992 and beginning the year of 1993 Tradex asked the Albanian government to intervene to save investment, but on the other hand Tradex was forced to hand over 140 hectares of land that owned.

¹⁰¹ <http://www.italaw.com/sites/default/files/case-documents/ita0871.pdf> (last visited on 10th of May, 2015)

http://www.italaw.com/documents/tradex_jurisdiction.pdf (last visited on 10th of May, 2015)

e. In these circumstances, Tradex and T.B. Torovica agreed to terminate the contract and start company liquidation, which ended on 16.12.1993.

f. According to the Tradex, company had suffered losses estimated market value of US \$ 2,023,907 asking the Albanian government to pay:

a) the market value of investment made by Tradex in the amount of \$ 2,023,907;

b) bank interest on that amount starting from December 1, 1992 and,

c) fees and legal expenses made by Tradex, according to calculations that will be made later.

e. Albania presented facts that refute the claim of the Tradex company, as follows:

a) the company T.B. Torovica under Albanian law enjoyed the status of a legal company,

b) the land was not included in the foundation capital of the joint company (Tradex had contributed to the share capital with machinery, chemicals, seeds, while the contribution of T.B. Torovica consisted also in agriculture machinery, buildings, finished products and other assets);

c) under the contract signed by both parties and the authorization for the joint company registration, disputes that could arise in relation to land would be resolved under Albanian law;

d) the agreement signed by both parties states that the land owner is the company T.B. Torovica (Article 15);

e) under the contract, any dispute that can arise will be resolved by international arbitration through the ICC and Swiss law as the applicable law in these cases.

f. In connection with the liquidation of the joint company, the Albanian government explained that the termination of the contract ended on

December 16, 1993 and based on the report of the liquidation, the company was worth ALL 6,175,599.05, the amount which would be distributed 67% to Tradex and 33% to the T.B. Torovica, based on Article 5 of the 1992 agreement between the two parties. The last meeting between the partner companies was made on 2 March 1994 and Tradex Company expressed no complaint against the company T.B. Torovica or Albanian government.

2.6.3.2 The legal basis for the decision

-Before the tribunal begin with assessing the facts and disputes between parties had to establish the legal basis on which would be based on the proceedings.

-Arbitration Tribunal concluded that the only law applicable to this case was Albanian law no. 7764 of 2 November 1993 on “foreign investment”. This was consistent with Article 42 (1) of ISCID Convention under which “the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable“. The Tribunal also used the international law regarding the interpretation of terms used in the Albanian Law of 1993.

The Albanian Law 1993 seemed that only Articles 2, 4 and 5 of this law can be considered to solve the dispute regarding the complaint made by Tradex for expropriation and damage compensation.

In Article 4 of the Law provides for expropriation and nationalization, which should not be made in any case, unless it is in the public interest determined by law and not made in discriminatory manner. In the latter case compensation was immediate and adequate. But Tradex was not complaining about nationalization. Article 5 of the Law provides compensation in case of expropriation or nationalization.

Since the parties had disagreements about factual aspects of this case, the tribunal had to take decisions based on evidence, therefore, the parties should base their claims on evidence and prove them before the tribunal.

Conditions for claiming compensation from Tradex are given in Sections 4 and 5 of the Albanian law of 1993. In these articles is confirmed the general principle of international procedure, where the claimant should support his claims on evidence and convince the tribunal on the authenticity of these proofs. Given this, the tribunal concluded that Tradex had insufficient evidence to support his claims about compensation required pursuant to Albanian law conditions.

On the other hand, the Tribunal had to determine the procedure for the presentation of evidence applicable to this case, to rely on whether a evidence was considered to support the claim or not. In connection with this, tribunal referred to Articles 33 and 37 of the ISCID Rules of Arbitration.

Both sides were against the evidence presented by the other party, claiming that the witnesses were not independent of the party had called them as witnesses.

After determining the procedure of presentation of evidence, the Tribunal determined the elements of the claim filed by Tradex and that should be supported by sufficient evidence or proves.

The first condition that must fulfill the claim of Tradex was to be qualified as a foreign investment. This was required as a precondition of

Article 8 of the Albanian law of 1993 which noted that in order to obtain compensation, must a foreign investment has been made.

It was clear to the Tribunal that the claim to be considered, Tradex had to fulfill the requirement that a foreign investment has been made.

2.6.3.3 Expropriation

Pursuant to Article 4 and 5 of the Albanian law of 1993 is provided that no compensation will take place without having expropriation occurred. Since the Albanian side rejects the claim of expropriation, Tradex in turn was not able to provide evidence that there has been expropriation.

Expropriation on the other hand is also a condition for the jurisdiction of the arbitral tribunal. Thus, the Tribunal had to explain in detail this issue. For this reason, the tribunal had to clarify the fact that if there has been expropriation, whether it was legal or illegal one?

Under Article 4 of the Albanian law of 1993 expropriation is illegal when it is not done in the public interest, is made on a discriminatory basis and is not in accordance with legal procedure prescribed by law. Tradex did claim none of these conditions, but merely claimed that it has not received compensation for expropriation, based only on the fourth condition of Article 4 of the Albanian law that provides for a quick and fair compensation.

2.6.3.4 Compensation

Tradex claimed compensation, but on the other hand had to be considered the fact that in the end of the dissolution process of the joint venture, part of the assets of the company were returned to Tradex.

2.6.3.5 Tradex investment

Since Tradex was the only complainant, the only investment made by the latter itself was relevant. It is an undeniable fact that the joint venture

company Tradex and Torovica is a legal entity under Albanian law, based on Article 1, paragraph 2 of the Agreement between parties. Accordingly, if Tradex investment is covered by the Albanian Law 1993, then any joint investment made by Joint Venture Company can not be considered foreign investment.

For the same reason, the joint venture is not identical with the Albanian state and, therefore, any measure taken by the joint venture itself can not be attributed to the Albanian government, and thus does not qualify as an expropriation. In case Tradex accuses her partner, the company T.B. Torovica that has caused the damage, the tribunal was based on Article 16 of the agreement between parties stating that such disputes should be resolved through the International Chamber of Commerce in Paris under its regulations.

After examining the investment made by Tradex, the tribunal concluded that the investment in kind made by Tradex was in the amount of US \$ 432.803

On the other hand Tradex had accepted the fact that the value of assets recovered following the dissolution of the joint venture company was in the amount of US \$ 352.187. Thus, this amount had to be taken away from the initial amount of investment of Tradex.

In connection with the investment in payment, Tradex claimed that had made investments in different countries in favor of the joint venture company. But, based on the Albanian law of 1993, these investments to be qualified as such should be made within the territory of the Republic of Albania.

The Tribunal concluded that the investment in kind of Tradex was in the amount of US \$ 432.803. The value of the assets returned to the Tradex

was in the amount of US \$ 352.187. The difference of US \$ 80.616 should be considered further as could be subject to compensation.

2.6.3.6 General Conclusion

The Tribunal concluded that the Tradex had not been able to prove that there has been expropriation of foreign investment. If there has not been expropriation, then no room for jurisdiction under Article 8 and compensation under Article 4 of the Albanian law of 1993.

2.6.3.7 Decision

- the claim made by Tradex is rejected
- Each Party shall cover its own costs in the Case
- the cost of the arbitration will be covered equally by both parties.¹⁰²

2.7 Conclusion of cases

What compels these companies to "travel" to foreign countries and to approach international arbitration? I think there are several reasons for that and I'll try to mention some of them. The main reason has to do with the fact that the Albanian justice system still has many problems, resulting on doubt about the awards. On the other hand, there are still gaps and legal obstacles on that issue.

I think that, despite the existence of regulatory framework that enables the creation of a permanent court or "ad hoc" arbitration, since the approval by Parliament of the law "Code of Civil Procedure" no. 8116, dated 03.22.1996, as amended, in Albania still there is not a consolidated practice for alternative dispute resolution by arbitration.

¹⁰²AWARD in the Arbitration ARB/94/2 of the International Centre for Settlement of Investment Disputes (ICSID) Tradex Hellas S.A. (Greece) represented by Mr. E. Koronis Counsel: Prof. L. Georgakopoulos vs. Republic of Albania represented by the Ministry of Agriculture and Food, *Date of dispatch to the parties: April 29, 1999.*

Under the Code of Civil Procedure, only can be resolved by arbitration any dispute on property issue arising from a property relationship.

From December 2002 until 2009, in Albania was established a permanent arbitration forum (the Albanian Center MEDART Trade Arbitration and Mediation) attached to the Chamber of Commerce of Tirana, as a private and independent institution, supported by World Bank.

The center, during its modest operation, managed only a small number of cases and, despite its purpose, no significant results achieved in promoting the alternative dispute resolution by arbitration. One of the main reasons was that companies and Albanian businesses in general, for wellknown reasons, are characterized by a clear lack of confidence in justice system in general and the justice of the state courts in particular.

Consequently, the chances that these businesses or individuals might believe on a private court to be able to provide justice are small, which it is hardly provided by state courts.

Another factor has to do with the level of economic development. Arbitration is a private process, which resolves disputes between parties through an arbitral procedure agreed by parties themselves, therefore, is very costly. Albanian businesses have seen as a more luxurious solution or as an excessive expense to pay for the investment of a private court.

Even the absence of entities that could promote dispute resolution by arbitration, is another factor that affected the delay of development of this institution in Albania. Likewise, the absence of institutions that train professional arbitrators and permanent arbitration forums attached to the chambers of commerce is another reason to be added.

PART III

ALBANIAN LAW ON ARBITRATION versus UNCITRAL MODEL LAW

3. Comparison of Model Law versus Albanian Law

3.1 The scope of application

In the first article is clearly defined what the Model Law includes and what is the field of application where states that it applies to the sphere of international commercial arbitration. The term “commercial” means a broad range of activities with commercial nature, without limiting whether contractual or not.¹⁰³

If we look at the Albanian legislation¹⁰⁴ regulating arbitration, appears a different picture where the scope of application is well defined but limited only to disputes arising between the parties with respect to property (property complaint or complaint that come from property relationship).

In Article 42 of the CCP term "property relationship" gives the impression that is created sufficient flexibility regarding the scope of application of the law, but Article 403 of the CCP narrows the field of application of the law stating that the dispute between parties arises as a result of property

¹⁰³ Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

¹⁰⁴Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, article 402, p.144 "Material jurisdiction": *Any property claim or demand arising from a property relationship may be subject to an arbitration proceeding.*

relation must have **a contract** that governs the relationship between them.¹⁰⁵

Compared with the UNCITRAL Model Law, the Albanian law presents a problem for the arbitrability of the non-contractual disputes

It applies to property disputes only, (not commercial disputes) arising between parties which must have contractual¹⁰⁶ relationship. UNCITRAL Model Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States. In explanation note of First Article of Model Law (Chapter I, General Provisions, Article 1, Scope of application) the term “commercial” have a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not¹⁰⁷. In that way, UNCITRAL Model Law . On the other hand, does not restrict disputes that may arise between the parties to be contractual necessarily, while for the Albanian Law this is a precondition¹⁰⁸.

3.2 The arbitration agreement between the parties

Amended UNCITRAL Model Law, compared with the original one, creates significant flexibility regarding the manner and form of the arbitration agreement stating that the agreement could be in any form, provided that the content of the agreement is recorded¹⁰⁹.

Model Law proposes two approaches in relation to the arbitration agreement, leaving to the choice of the states to include the most

¹⁰⁵ Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, article 403, p.145 "Arbitration agreement": *Can be judged by arbitration procedure only if there is an agreement between the parties, by which they agree to submit to arbitration disputes which have arisen or may arise out of a contract between them.*

¹⁰⁶ Ibid. at page 145 (article 403)

¹⁰⁷ UNCITRAL Model Law, As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006), Chapter I. General Provisions, *Article 1, page 1.*

¹⁰⁸ Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, article 403, p.145

¹⁰⁹ UNCITRAL Model Law, As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006), Chapter II. Arbitration Agreement, *Article 7, paragraph 3, page 4.*

appropriate version to their domestic law. Both approaches proposed by the Model Law are contemporary and create sufficient flexibility.

Under Albanian law on arbitration, when the parties have a dispute and they choose arbitration to resolve it, to start the arbitration proceedings the parties on their own free will must have an agreement between them. Further, the Albanian law also defines the criteria when an arbitration agreement is invalid. In Article 404 of the CCP clearly is stated that the agreement is considered invalid if the parties do not have an agreement in written form. In other words, the Albanian law adheres to the old conservative form and does not reflect amendments made in international arbitration legal framework to be modernized and updated.

3.3 Setting the number of arbitrators

Under the Model Law, if the parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of three arbitrators¹¹⁰.

While under Albanian law, if the parties fail to specify the number of arbitrators, then based on the prior consent of the parties, the arbitral tribunal will be formed by the court consisting by one or more arbitrators.¹¹¹

But in this case Albanian law does not specify the time limit within which the parties must appoint arbitrators and form arbitral tribunals, for the reason that it was left up to the parties to determine that time in the arbitration agreement between them. While under the UNCITRAL

¹¹⁰ Article 10 of UNCITRAL Model Law - "Number of arbitrators": (1) The parties are free to determine the number of arbitrators. (2) Failing such determination, the number of arbitrators shall be three.

¹¹¹Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Article 405, p.146: *Parties may agree independently on the number of arbitrators in an arbitration tribunal and the manner of their appointment. In case of disagreement between the parties and with their prior consent, the arbitral tribunal is formed by one or more arbitrators defined by the court.*

Model Law there is limitation in time within which parties must agree on the number of arbitrators and assign them. If this time is exceeded, then either party has the right to ask the court to intervene.

3.4 Organizing the arbitral tribunal based on court decision

UNCITRAL Model Law has a number of articles that regulates the manner of appointment of an arbitrator, challenge, termination of the mandate of an arbitrator and the way of his replacement¹¹².

Also delineate freedom of choice by the parties of the procedure and rules to be followed, as well as assistance that can give the state court or competent authorities if the parties fail to appoint arbitrators and terminate their mandate. The decision of the state court or competent authority in this case is not appealable¹¹³.

On the other hand, the Albanian law on arbitration accepts state court intervention in cases prescribed by law when the parties fail to form the arbitral tribunal.

State court intervention is provided in the case when the parties fail to challenge and end the mandate of an arbitrator. Article 409 of the CCP stipulates that if the arbitrator required to terminate the mandate not leave voluntarily or it is not provided in the agreement, the arbitral tribunal shall proceed without the arbitrator in question. If no solution can be found with the latter then decides state court of first instance not later than 15 days from the submission of the issue for judgment.

3.5 The jurisdiction of arbitral tribunal

UNCITRAL Model Law in Article 16 sets out two important principles with respect to the arbitration clause, which are "KOMPETENZ-KOMPETENZ" and "Separability".

¹¹² UNCITRAL Model Law, Chapter III "Composition of arbitral tribunal"

¹¹³ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No.E.08.V.4., Part II, para 23, 24

Even Albanian law on arbitration is based on the principle of "KOMPETENZ-KOMPETENZ". In Article 417 of the Code of Civil Procedure (CCP) is determined that the arbitral tribunal decides at the beginning of the procedure on its own jurisdiction, including the validity of the arbitration agreement between the parties. The judgment of the validity of the agreement at the beginning of the procedure is important because if it is not done, can later lead to invalidation of all proceedings. But on the other hand, Albanian Law does not recognize the other principle of autonomy of the arbitration which is "Separability" principle.

According to Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, "*Separability* means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause"¹¹⁴. In contrary, the Albanian Law does not provide the autonomy of the arbitration clause from other terms of the main contract, not recognizing at all the principle of "Separability".

Based on the UNCITRAL Model Law state court can intervene for the recognition and enforcement of an interim measure issued by the arbitral tribunal¹¹⁵.

The court also has the right to refuse recognition and enforcement of an interim measure at the request of a party to which this measure was taken. Refusal might happen if fulfilled the legal requirements for such a thing, but in any case should not review the substance of the interim measure¹¹⁶.

¹¹⁴ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No.E.08.V.4., Part II, paragraph 25 (4. Jurisdiction of arbitral tribunal (a) Competence to rule on own jurisdiction), page 30

¹¹⁵ UNCITRAL Model law, Article 17/H "Recognition and enforcement" - (1) *An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued.*

¹¹⁶ *Ibidem*, Article 17/I "Grounds for refusing recognition or enforcement"

On the other hand the court is entitled itself to order an interim measure. In this case the court should enjoy the same power to grant interim measure in relation to international arbitration procedure and should exercise this power in accordance with its procedures¹¹⁷.

In this case, the arbitration agreement does not prevent the court to exercise such authority¹¹⁸.

In the case of the Albanian law on arbitration state court intervenes only in connection with the enforcing interim measures issued by the arbitral tribunal. So, if the arbitral tribunal has issued an interim measure and the party against whom it is given this measure does not implement voluntarily, the law provides for the intervention of the state court to enforce this measure.¹¹⁹

On the other hand, the Albanian law does not grant power to the state court to issue an interim measure, as it grant to the arbitral tribunal. In other words this means that if the parties have an arbitration agreement between them, none of them can submit a request to the state court for issuing an interim measures. It is understood that the Albanian law addresses the issue completely different compared to other foreign jurisdictions. This creates imbalances between the state court and the arbitral tribunal in relation to the rights that should enjoy the parties to the conflict.

3.6 The application of substantive law

UNCITRAL Model Law in Article 28¹²⁰ leaves space to the parties in the conflict to choose the legal rules to resolve the dispute between them.

¹¹⁷ UNCITRAL Model law, Article 17/J “Court-ordered interim measures”

¹¹⁸ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; United Nations Publication Sales No.E.08.V.4., Part II, para 30

¹¹⁹ Article 418 of Albanian CCP

¹²⁰ UNCITRAL model law, article 28

Every law of a particular state chosen by the parties to resolve the conflict between them is regarded as substantive law. Arbitral tribunal settles the dispute on the basis of this law, not based on private international law. In case the parties to the conflict did not determine this, then the arbitral tribunal shall apply national law determined by the conflict of law rules applicable on this issue.

Albanian law on arbitration does not address the issue of substantive law and if the parties do not reach an agreement on this issue, then this can be solved based on the principles of the domestic legal framework such as the Constitution and the CCP.

In the case where the parties to the dispute are Albanian citizens or resident in Albania, then the Albanian legislation applies as substantive law.¹²¹

In the case where the object of dispute between the parties is not subject to the Albanian law, then the substantive law is determined based on law No. 3920, dated 21.11.1964 "On civil rights of foreigners and enforcement of foreign law"¹²².

3.7 The arbitral award

UNCITRAL model law, in articles 29-31 defines the rules and the way the arbitral award can be made.

¹²¹ Albania is a state party to the Hague Conference on private international law, ratified in 2002, through the law No. 8867, dated 14.03.2002 "On accession of the Republic of Albania in the statute of the Hague Conference on Private International Law". However, there is a gap in the Albanian legislation regarding the issue of substantive law. In case of failing an agreement of the parties to this matter, then this issue could be solved by applying the principles of Albanian legislation, such as the Constitution, Civil Code, and Code of Civil Procedure. Based on that, could be two solutions, which differ from each other, such as: 1) if the parties have not agreed on substantive law and they are citizens or domiciled in Albania, then Albanian law will be as reference for substantive law; 2) if parties or the contract (or transaction) are not subject to Albanian law, then *conflict of laws* principle prevails, defined by Law No. 3920, dated 21.11.1964 "On the foreigner civil rights and foreign law enforcement".

¹²² Law No. 3920, dated 11.21.1964, "On civil rights of foreigners and enforcement of foreign law"

When the arbitral tribunal consists of more than one arbitrator, the arbitral award shall be signed by the majority of the arbitrators. If any arbitrator refuses to sign, then it should be stated in the award.

In the arbitration decision should mention the place of arbitration for the purpose of legal procedure, but in fact the decision can be taken either by telephone or correspondence from various countries.

The arbitral award shall be in writing and indicating the date and unless the parties agree otherwise, the grounds on which the decision is based.

Under Albanian law¹²³ arbitral award will be taken by a majority vote of the arbitrators and has the same effect as if taken by an absolute majority of the votes of the arbitrators. The arbitrators who disagree with the decision have the right to submit in writing their opinion.

The arbitration award shall include the names of arbitrators, date and place of arbitration, the identity of the parties to the dispute, their place of residence and the subject of dispute. The decision of the arbitration shall state clearly all complaints of the parties and accepted settlement reasons.

3.8 Rules about recourse to arbitration decision

According to the UNCITRAL Model Law may be only one type of recourse against an arbitral award by applying for setting aside within three months of receipt of the arbitral award¹²⁴. In Article 34/2 are given the reasons why an arbitral award may be set aside and these reasons are divided into two categories: reasons which must be proven by one party to the dispute (a. lack of capacity of the parties to conclude an arbitration agreement; b. lack of a valid arbitration agreement; c. lack of notice of appointment of an arbitrator or of the arbitral proceedings or

¹²³Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, articles 429-430, p.154

¹²⁴ UNCITRAL Model Law, article 34

inability of a party to present its case; d. the award deals with matters not covered by the submission to arbitration; e. the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law) and reasons which are within the competence of the arbitral tribunal (a) non-arbitrability of the subject-matter of the dispute; b) violation of public policy.

Even Albanian law defines arbitration procedure of appeal against the arbitration award. Recourse may be addressed to the state court within 30 days from the moment that the arbitration award is made and when at least one of the following conditions is met:

- a) The arbitral tribunal is not formed on a regular basis;
- b) Its decision on the competence or non-competence to solve the dispute is unfair;
- c) The decision has exceeded demand for which has been invested or is not expressed to one of the main requirements of the claim;
- d) Not respecting the equality of the parties and their right to be heard in a procedure based on the principle of contradiction;
- d) The decision is contrary to public order of the Republic of Albania.

The appeal court must verify the fulfillment of at least one of the above criteria to accept recourse. If the court finds irrelevant recourse, meaning that no one of the above criteria is fulfilled, then leaves the decision of the arbitration in force. Up to this point the Albanian law on arbitration, in connection with recourse, is similar to the UNCITRAL Model Law.

Code of Civil Procedure (CCP) exceeds the UNCITRAL Model Law because if the court finds a violation under the above mentioned conditions, the

court of appeal may revoke or modify the arbitration award¹²⁵. In this instance the court considers the case within the limits of agreement between the parties to the dispute and the mandate of the arbitral tribunal.¹²⁶

In case the appeal court cancels or changes the decision of the arbitration, the parties involved in the dispute have no right to appeal the decision of the court of appeal.¹²⁷ When two parties involved in the dispute between them, have agreed to settle their dispute through arbitration based on the Albanian law on arbitration, they should keep in consideration the fact that in a certain point, their case may perhaps go for judgment in state court, or otherwise, shall take into account the fact to accept the decision of the arbitration without recourse.

Another deficiency of the Albanian law on arbitration is that the recourse is provided only in relation to domestic arbitration awards and not to the international arbitration awards. The right of appeal against an international arbitration award is a legal vacuum in Albania because it is not yet adopted a special law on international arbitration¹²⁸.

The problem for recourse against international arbitration awards lies not in the fact that there is no legal ground for this. Albania is party to the European Convention on International Commercial Arbitration and according to the constitution this instrument now is part of Albanian legal framework, which means that the recurs against international

¹²⁵ According to the article 436 of the Code of Civil Procedure, the court of appeal undoes or changes the arbitral award, deciding on the merits of the dispute and within the limits of the mission assigned to the arbitral tribunal by the arbitration agreement. In other words, in that case, the court of appeals act as an arbitral tribunal, undermining the legitimate expressed willingness of the parties to stay away from the state court and to settle their dispute privately through arbitration.

¹²⁶Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, article 436, p.157

¹²⁷ Article 437 of the CCP

¹²⁸Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Article 439, p.158

arbitral award is possible¹²⁹. But in the fact there is no procedural law within Albanian legal framework to specify how and where to make such recourse.

3.9 Recognition and implementation of arbitral awards

UNCITRAL Model Law, article 35 states that *“An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36”*. Article 36 states the reasons for refusal of recognition and enforcement of an award which are similar to the reasons given in Article 5 of the New York Convention.

Albanian law on arbitration has defined the recognition and enforcement of aboriginal arbitral awards stating that "The award of the court of arbitration is executed under order of execution issued by the state court of first instance"¹³⁰. For this purpose, the original copy of the award and a copy of the agreement between parties shall be submitted to the court by the interested party or by the arbitrator / arbitrators. If the court of first instance refuses to give such an order, it must give reasons for that refusal and within 10 days this position of the court can be appealed.

Recognition and enforcement of international arbitral awards is regulated by two legal instruments which are the New York Convention and the Albanian Code of Civil Procedure.

Albania has ratified the New York Convention by Law no. 8688 dated 09.11.2000 "On Accession of the Republic of Albania in the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" and

¹²⁹ European Convention on International Commercial Arbitration, article IX.

¹³⁰ Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, article 432, 433, p.155

based on the Constitution of Albania¹³¹ the provisions of this Convention are an integral part of the Albanian legislation.

These provisions prevail over any and every other provision of the domestic legislation which is contrary with it. So in the case of the recognition and enforcement of international arbitration New York Convention is fully applicable in Albania and prevails over domestic law which contradicts with it¹³².

The second legal instrument mentioned above is the Civil Procedure Code of Albania¹³³ which has a special section regarding the recognition of foreign court awards. So, in other words, in Albania, based on this law, are recognized in the same way as foreign court awards as well as awards of international arbitration¹³⁴.

With this law are granted material legal norms and procedural legal norms of recognition and enforcement of a judgment of a foreign court or international arbitration award. Material legal norms set conditions when it can be or not recognized and enforced an award of a foreign court. Procedural legal norms set the procedure for recognition and enforcement of a judgment of a foreign court.

I support the idea that the law should clearly divide these two categories of awards, the awards of foreign courts and international arbitration awards defining specific material legal norms for both categories of awards.

¹³¹ The Constitution of the Republic of Albania, art.116 (1); art. 122 (2)

¹³² Ibidem, articles 116 (paragraph 1), 121, 122 (paragraph 2), 123 and 124

¹³³ Code of Civil Procedure of the Republic of Albania, official publication, Tirana, 2011, Part II, Title III, Chapter IX "Recognition of judgments of Foreign States", art. 393-399, p.141-143

¹³⁴ Ibidem, Article 399, p.143

PART IV

4. Findings, Conclusions and Recommendations

4.1 Summary of findings

The growth and expansion of international trade and investment has necessitated the improvement and modernization of national and international arbitration mechanisms for resolving disputes that may arise between the parties in that context. Global and regional organizations have given their contribution to the improvement and modernization of these arbitration mechanisms and they offered possibility of adoption of such models by the States concerned.

Albania falls into that category of countries that should improve and modernize the law on national and international arbitration, using best examples and models in this field.

In this thesis I have tried to explain the Albanian law of arbitration in the context of international arbitration institutions and where the law stands in relation to the UNCITRAL Model Law.

Comparative method chosen in that study aimed to identify gaps in Albanian national law and also recommend possible improvements.

4.2 Findings and Conclusions

At the conclusion of this study I can say that the Albanian arbitration as an alternative method for resolving disputes between the parties is not preferable because the Albanian law governing arbitration does not comply with contemporary trends and developments in this field.

Problems and findings with respect to what I explained above can be summarized as follows:

1. Albanian law on arbitration is conservative in terms of the arbitration agreement between the parties to the dispute requesting that this agreement be only in written and not in other forms, as it offers the UNCITRAL Model Law.

2. Albanian law on arbitration, in most of its provisions, does not regulate international arbitration procedures, focusing only on domestic arbitration. Code of Civil Procedure as amended provides that must be adopted a special law to regulate the procedure in international arbitration.

In regards to that I think there should be only one law governing the arbitration of domestic and international arbitration. Use of certain laws in this area makes it more complicated and less attractive to the parties in dispute to choose Albanian arbitration to resolve them. The legal vacuum could be illustrated in the fact that the Albanian legislation allows challenging an international arbitral award, but there is no law to regulate the procedure of how and where to place the appeal.

3. The Albanian law on arbitration covers a limited range of disputes that may arise between the parties, being limited to property disputes arising on the basis of an existing contract between parties with respect to property and ownership relations.

I think that the Albanian law on arbitration should use the term “commercial” to extend the range of disputes that can be settled by arbitration and not limited to property disputes and contractual relations between the parties.

4. Albanian law on arbitration is based on the principle of "KOMPETENZ-KOMPETENZ" but does not recognize the other principle of autonomy of the arbitration which is "Separability" principle.

5. Albanian arbitration law creates enough space for state court to intervene in the cancellation or change of the award, which is not favored by the parties involved in the dispute, as they preferred arbitration as an alternative method for resolving their dispute and not the state court. This can be one of the reasons that make the parties involved in the dispute to not choose Albanian arbitration to resolve their dispute, taking into consideration the current problems of the state's judicial system in Albania.

4.3 Recommendations

In conclusion, it is necessary that the Albanian law on arbitration to be a single law governing domestic and international arbitration and being fully integrated with the UNCITRAL Model Law, which currently offers all the requirements and needs of the Albanian law to be improved and modernized.

The update and modernization of the Albanian law on arbitration by adopting the UNCITRAL Model Law provisions, as necessary, will make the Albanian arbitration contemporary and acceptable by the parties to resolve disputes between them. In turn this will affect foreign investments in Albania and the expansion of international trade relations, having direct impact on the economic development of the country.

References:

1. Code of Civil Procedure of Republic of Albania, Official Publications, Tirana, 2011, ISBN 978-9928-01-019-3.
2. Constitution of the Republic of Albania
3. Darling, S., & Caushi, A. (2008). The International Comparative Legal Guide “On the international arbitration 2008”, A practical insight to cross-border International Arbitration work; Global Legal Group Ltd. London, with the contribution of “Kalo & Associates, Attorneys at Law”.
4. Decision of Court of Appeal of Tirana no.106 dated 08.11.2007 La Petrolifera Italo-Rumena S.p.A. and La Petrolifera Italo-Albanese Sh.A. vs. Republic of Albania.
5. Decision of Court of Appeal of Tirana no.122 dated 14.12.2010 Rohde Nielsen A/S vs. Ministry of Transport and Telecommunications of Republic of Albania.
6. Decision of Court of Appeal of Tirana, no. 32/1010 dated 01.03.2012 Sky Petroleum INC vs. Republic of Albania.
7. Law no.8688 dated 09.11.2000 "On accession of the Republic of Albania in the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards"
8. UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, published by UNITED NATIONS - Vienna, 2008, United Nations Publication, Sales No. E.08.V.4, ISBN 978-92-1-133773-0
9. UN Conference on International Commercial Arbitration: “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, United Nations – 1958, XXII-1, October 2004
10. Vendim i KM nr.420, datë 8.6.2011 Për ekzekutimin e vendimit të Gjykatës Ndërkombëtare të Arbitrazhit nr.14869/AVHJEM, për çështjen “Rohde Nielsen vs Ministria e Punëve Publike dhe Transportit”.
11. Code of Civil Procedure of the Republic of Albania. (Law no. 8116, 29 Mars1996, as amended).
12. Law No. 10 385, dated 24.2.2011. Mediation in Dispute Resolution. Republic of Albania.
13. Law No. 17. 7764, dated 02.11.1993 "On foreign investments".

14. Law no. 8687, dated 9.11.2000 "On accession of the Republic of Albania in the "European Convention on International Commercial Arbitration".
15. Special Meeting of Plenipotentiaries for the Purpose of Negotiating and Signing a European Convention on International Commercial Arbitration, Final Act, United Nations – 1961 (European Convention on International Commercial Arbitration. Geneva, 21 April 1961), file name: Ch_XXII_2, volume: Vol-2, Chapter XXII-Commercial Arbitration
22. Gary B. Born, International commercial arbitration - second edition, April 2014, ISBN 9041152199
23. UNCITRAL Model Law on International Commercial Arbitration, Printed in Austria, May 2006, United Nations publication, Sales No. E.95.V.18, ISBN 92-1-133498-5
24. Piero Bernardini, L'arbitrato commerciale internazionale (Milano: Giuffrè, 2000). ISBN: 8814079595.
25. Redfern, A., Hunter, M., Blackaby, N., & Partasides, C. (2004). Law and Practice of International Commercial Arbitration
26. R. Devichi, Joquette, L'arbitrage nature juridique. Droit interne et droit international privé, Paris 1965
27. Prof. Kristo Frashëri, "Tirana 1937",
28. Julian D.M. Lew, Applicable Law in International Commercial Arbitration, New York: Oceana Publications, 1978
29. David, Rene, Arbitration *in international trade*, Springer, 1985 (first edition), ISBN: 906544 1646
30. Edward Brunet, Richard E. Speidel, Jean E. Sternlight, Stephen H. Ware, Arbitration Law in America – a critical Assessment, 2012, ISBN: 9781107406117
31. Steven C. Bennett, Arbitration: Essential Concepts, ALM Publishing, 2002, ISBN: 0970597088
32. Albert Fiadjoe; Alternative Dispute Resolution: A developing world perspective, 2004, Cavendish publishing Limited, London, ISBN: 1-85941-912-7.
33. Taniguchi, Yasuhei, Is there a growing international arbitration culture? An observation from Asia. ICCA Congress, Series no. 8, International arbitration

Conference, 10 - 12 OCTOBER 1996, International Dispute Resolution: Towards An International Arbitration Culture.

34. Redfern, A., Hunter, M., Blackaby, N., Partasides, C., *Law and Practice of International Commercial Arbitration*, 4th edition, London, Sweet & Maxwell, 2004

35. Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman On international Commercial Arbitration*, Kluwer Law International, 1999, ISBN : 9789041110251

36. Julian D. M. Lew, *Applicable Law in International Commercial Arbitration*, New York, Oceana publications, 1978

Abstract

Im Verlauf der Menschheitsgeschichte ist das Schiedsrecht erfolgreich als Alternativmethode zur Beilegung von Streitigkeiten zwischen Parteien eingesetzt worden.

Heutzutage wird ein Schiedsverfahren bei Streitigkeiten im Zusammenhang mit dem Handel und dem internationalen Geschäft, als eine der häufigsten Methoden zur Lösung solcher Streitigkeiten eingesetzt. In dieser Arbeit werde ich einige der Gesetze und die wichtigsten internationalen Abkommen zur Beilegung solcher Streitigkeiten, wie die New Yorker Konvention (New Yorker Übereinkommen) und das UNCITRAL Modellrecht (UNCITRAL Modellgesetz), analysieren. Das Thema der vorliegenden Arbeit ist die Schiedsrechtsgrundlage in Albanien und der Vergleich zwischen dem UNCITRAL Modellgesetz und dem albanischen Schiedsrecht.

Nach der Analyse und dem Vergleich, werde ich am Ende eine Zusammenfassung der Ergebnisse und Vorschläge machen, wie diese Regeln effektiver zu gestalten sind und welche Vorteile eine Einführung des UNCITRAL Modellgesetzes als gemeinsame Rechtsgrundlage zur nationalen und internationalen Streitbeilegung zwischen den Parteien hätte.

Abstract

Throughout human history, arbitration has been used quite successfully as an alternative method for resolving disputes between parties.

Nowadays, arbitration is used in disputes arising in connection with trade and international business as one of the common methods for resolving these disputes. In this thesis I will analyze some of the laws and the most important international agreements governing the settlement of such disputes such as the New York Convention (New York Convention) and the UNCITRAL Model Law (UNCITRAL Model Law). The object of this thesis will be the arbitration legal basis in Albania, and comparison between UNCITRAL Model Law and Albanian arbitration Law.

In the end, after analysis and comparison I'll make a summary of findings and suggestions how to make these rules more effective and what would be the benefits of adopting UNCITRAL Model Law as a common legal basis for national and international dispute resolution between parties.

