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# ARBITRATION AGREEMENTS IN CONTRACTS ESTABLISHING SECURITY INTERESTS – A MOLDOVAN LAW PERSPECTIVE**

***Summary***

Moldova is a Model Law jurisdiction in statute, but it still has work to do to become a fully Model Law complaint jurisdiction in practice. Still, the availability of and friendliness to arbitration ensures a legal framework favourable to international trade, and especially to international lending to the Moldovan economy. A key factor is the recognition of asymmetric dispute resolution agreements in loan agreements and in supporting security agreements.

**Keywords:** UNCITRAL Model Law, enforcement of security interest, mortgage, asymmetrical dispute resolution agreement, unilateral litigation clause.

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# ARBITRAŽNI SPORAZUMI U UGOVORIMA KOJIMA SE USPOSTAVLJAJU BEZBEDNOSNI INTERESI – – PERSPEKTIVA MOLDAVSKOG ZAKONA

***Sažetak***

U kontekstu arbitraže, Moldavija je država model zakona, kako u smislu zakonskog okvira, tako i u praksi. Dostupnost i otvorenost prema arbitraži obezbeđuje pravni okvir povoljan za međunarodnu trgovinu, a posebno za međunarodno kreditiranje moldavske ekonomije. Ključni faktor je priznavanje asimetričnih sporazuma o rešavanju sporova u ugovorima o zajmu i u podršci sporazumima o bezbednosti.

**Ključne reči:** UNCITRAL model zakona, sprovođenje interesa bezbednosti, hipoteka, asimetrični sporazum o rešavanju sporova, jednostrana parnična klauzula.

## 1. Moldova – a Model Law Country

Since 2008, Moldova has introduced two arbitration laws: one (Moldovan Law on Arbitration) governing local arbitration proceedings, and the other (Moldovan Law on International Commercial Arbitration), as its name suggests, dealing with international commercial arbitration. In our opinion, this policy choice was unfortunate, as the two laws largely overlap, with the distinction that the Law on International Commercial Arbitration is more permissive. This concern is shared by other commentators (EBRD & IDLO, 2021, p. 11). The advantage of these two laws is that they largely follow the 2006 UNCITRAL Model Law on International Commercial Arbitration (Model Law).

The repeated justice sector reforms have attempted with modest success to promote arbitration to decongest the judiciary system and keep litigants farther away from certain courts that were perceived as lacking in integrity or specialised expertise. Nonetheless, most local companies remain hesitant to include arbitration agreements in their commercial contracts (Gutu, 2012, p. 13). The reasons for this hesitancy include unfamiliarity with arbitration as opposed to the clarity and accessibility of judicial proceedings, and a perception of high costs (especially due to media reports about investment arbitration costs incurred by the government). Another disincentive is the requirement for a court of law to issue a writ of execution before an award may be enforced by a bailiff (Article 11(e), Moldovan

Enforcement Code). This protracts the contract enforcement process, raising the risk of enforcement denied by the local court. An important exception to that is that consent awards are writs of execution without any further formalities (*ex legem*).

Recently, some local courts have claimed, based on a doubtful interpretation of the new Moldovan Stamp Duty Law, that an *ad valorem* stamp duty is applicable to a request for recognition and enforcement of a foreign arbitral award (*S. C. Pa & Co International SRL v. IS Administrația de Stat a Drumurilor*, Case 2-5/24; 2-24026129-02-2-06032024-1, 2024). This interpretation leads to a "double taxation" of arbitration claimants (firstly, as part of arbitration proceedings and, secondly, as part of the writ of execution proceedings) and can, of course, dampen the appetite for arbitration. We hope and expect the upper standing courts to establish a pro-arbitration interpretation, excluding this double taxation.

This complex legislative landscape and the sometimes unsatisfactory application of the arbitration laws are the reasons why the local arbitration community in partnership with the Moldovan Ministry of Justice are developing a new draft arbitration law (Ministry of Justice, 2024). From a design perspective, it is supposed to merge the two existing laws into a single new law, transpose the provisions of the Model Law to the letter (as opposed to the paraphrasing, which is sometimes used in the two current laws), but also take over some modern policy choices from select jurisdictions, such as Germany, Switzerland and the United Kingdom. From a practical perspective, the drafters are taking into account the flawed manner in which the local courts understand the principles of the Model Law and ways to limit the discretion of the local courts to come up with surprising applications of these principles. For example, in one case, an arbitrator declined their jurisdiction because the arbitration agreement provided for a sole arbitrator tribunal to be appointed by the claimant alone, and the arbitrator felt that this violated the underlying principle of party equality in the formation of the tribunal. Nevertheless, the court of appeals, relying on the freedom of contract, overturned this award on jurisdiction and ordered that such type of tribunal be formed (*Rikipal SRL v. Fruktdimcov SRL*, Case 2-14869/20, 2019).

In another example, the Moldovan Supreme Court of Justice had to deal with the recognition and enforcement of an arbitral award rendered in London under the LCIA between two airlines, for rent and damages under a lease contract containing the arbitration agreement (*Just-Us AIR SRL and EFS European Financial Services AG vs CA AIR Moldova SRL*, Case 2r-398/2022; 2-21156372-01-2r-28072022, 2022). The court denied recognition of the award based on Article 476(1)(a) of the Moldovan Code of Civil Procedure implementing Article V(1)(a) of the New York Convention (see Art. V(1)(a), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958). The court denied the submission of the claimant that the matter of whether the respondent had the power to enter into the lease contract was governed by

their substantive law, i.e., Romanian law, and not Moldovan law, as the law governing the capacity to contract of the respondent. The court relied on the special rule applicable to state enterprises (respondent was, at the time of the contract, a state enterprise), which required contracts above a certain threshold to be approved by the founder of the enterprise. Such an approval was absent in respect of the lease contract although the threshold was met. Therefore, the court held that the lease contract was invalid and, consequently, the arbitration agreement was invalid as well.

Such an approach, of course, violates the separability principle contained in Art. 16(1) of the Model Law,[1] Art. 16(1) of the Moldovan Law on International Commercial Arbitration, as confirmed by the Supreme Court in its explanatory decision on arbitration (Explanatory Decision of the Moldovan Supreme Court on Arbitration Matters, 2015), i.e., even if the lease contract were invalid due to incapacity of the respondent, there is no special capacity requirement for arbitration agreements for state enterprises or companies in general under Moldovan law.

In addition, we express doubt if the underlying issue was really one of capacity, or if it was, in fact, a matter relating to the respondent's powers to be bound to a lease contract and to an arbitration agreement. In any event, it is arguable whether the respondent was even allowed to invoke its own incapacity. As it was observed in commentary to Article V(1)(a) of the New York Convention, "[i]n practice, it has often occurred that a State or a state-controlled entity or organization has claimed that pursuant to its own law it lacked capacity to enter into the arbitration agreement. Such a defence is hardly ever accepted and often is regarded as a demonstration of contradictory behaviour contrary to good faith by first accepting an arbitration agreement and then attempting to avoid it by reference to one's own law. Contrary to what may be the case for natural persons lacking capacity (such as minors or mentally infirm persons), a State or state-controlled entity comprehends the nature and consequences of its transactions and it would be abusive if it could rely on its own law to subsequently assert that it is not responsible for such transactions." (Wolff, 2012, pp. 284-285, para. 103).

These examples should not be taken as a criticism of the overall case law of the Moldovan courts. In *OOO BelgorhimpromEnergo vs SATI Moldavskaia GRES*, the Supreme Court held that the underlying New York Convention principles include the principle of the presumption of validity of the award and of the arbitration

[1] It reads: "(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause." (Art. 16(1), UNCITRAL Model Law on International Commercial Arbitration).

agreement, and the principle of interpretation of the New York Convention in favour of the legal effectiveness of foreign arbitral awards (*OOO BelgorhimpromEnergo vs SATI Moldavskaia GRES*, Case r. 2r-570/23; 2-23058026-01-2r-13122023, 2024). The court thus granted the request for recognition and enforcement of the Russian arbitral award in Moldova.

As a reaction to this state of affairs, the drafters intend to propose that the new law should specify that those of its provisions that adopt the Model Law should be interpreted and applied in light of the established interpretation of the Model Law, especially the UNCITRAL Secretariat Commentary.

## 2. Arbitration as International Finance Facilitator

The legal recognition of arbitration agreements plays an important role of facilitating the provision of finance by international lenders to the Moldovan government or Moldovan companies. This is especially the author's experience, as transaction counsel with multilateral development banks, such as the European Bank for Reconstruction and Development (EBRD), or the Black Sea Trade and Development Bank (BSTDB), or international organizations such as the International Finance Corporation (IFC), a member of the World Bank Group. Following their lead, international commercial banks provide finance to Moldovan projects in a similar fashion.

The loan agreements and other transaction documentation are, from our experience of over 20 years as transaction local counsel, in a majority of cases governed by English law. This documentation typically contains asymmetrical dispute resolution clauses or agreements (further referred to as "asymmetrical agreements"). Based on the taxonomy developed by Papadima (2021, p. 545), asymmetrical dispute resolution clauses can be divided into two major categories: (i) bilateral arbitration clause with a unilateral option to litigate (also called "unilateral litigation clause") and (ii) bilateral litigation clause with a unilateral option to arbitrate (also called "unilateral arbitration clause").

The version that is mostly encountered in international transactions in Moldova is the bilateral arbitration clause with a unilateral option to litigate. Its default dispute resolution mechanism is arbitration under the UNCITRAL, LCIA or ICC Arbitration Rules, but the lender reserves the right to enforce its rights in the Moldovan courts or any other courts of competent jurisdiction (further referred to as the "optional limb")[2].

[2] A typical wording would be: "*(a) Any dispute, controversy or claim arising out of or relating to (1) this Agreement, (2) the breach, termination or invalidity hereof or (3) any non-contractual obligations*

Consequently, as opposed to the lender's full rights, the borrower may initiate a legal claim in arbitration only, and is restricted from initiating a court proceeding. It is this optional limb that renders the dispute resolution agreement asymmetrical, or the litigation limb is unilateral.

This diverse range of legal avenues to enforce rights is an important consideration for lenders that loan money to borrowers of foreign jurisdictions. It allows the lender to choose the best legal path for enforcement not at the early, contracting stage, but at the latest – contract enforcement stage. Years can pass between these stages, and while at the date of the loan agreement, litigation in the borrower's jurisdiction appeared to be the faster enforcement option, at the time when the lender decides to enforce, it will receive a legal advice that litigation in that jurisdiction would be unfavourable (e.g. doubtful integrity of the local judicial system; higher stamp duties; duration of judicial proceedings). Or, while at the date of the loan agreement, litigating in lender's jurisdiction seemed to be most cost-effective and predictable, there are signs that the borrower's jurisdiction will not necessarily recognize a foreign judgement, but the enforcement of a foreign arbitral award would be more predictably secured by the fact that the New York Convention applies in the borrower's jurisdiction.

This rationale has been summarized in English law in the Mauritius Commercial Bank case where the High Court quoted Professor Fentiman in his article in the Cambridge Law Journal entitled "Universal jurisdiction agreements in Europe":

"Such unilaterally non-exclusive clauses are ubiquitous in the financial markets. They ensure that creditors can always litigate in a debtor's home court, or where its assets are located. They also contribute to the readiness of banks to provide finance, and reduce the cost of such finance to debtors, by minimizing the risk that a debtor's obligations will be unenforceable. Such agreements are valid in English law... Indeed, despite their asymmetric, optional character, it is difficult to conceive how their validity could be impugned or what policy might justify doing so..." (*Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd*., Case EWHC 1328 (Comm), 2013, para. 42).

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*arising out of or in connection with this Agreement shall be settled by arbitration in accordance with the UNCITRAL Rules. There shall be one arbitrator and the appointing authority shall be the LCIA (London Court of International Arbitration). The seat and place of arbitration shall be London, England, and the English language shall be used throughout the arbitral proceedings.*

*(b) Notwithstanding paragraph (a) above, this Agreement and the other agreements contemplated hereby may, at the option of the Lender, be enforced by the Lender in any courts having jurisdiction. For the benefit of the Lender, the Borrower hereby irrevocably submits to the non-exclusive jurisdiction of the courts of England with respect to any dispute, controversy or claim arising out of or relating to this Agreement or any other Financing Agreement, or the breach, termination or invalidity hereof or thereof. Nothing herein shall affect the right of the Lender to commence legal actions or proceedings against the Borrower in any manner authorised by the laws of any relevant jurisdiction.*"

The approach is slightly different in respect to the instruments securing these loans in the Moldovan market. Local security agreements include (i) mortgage agreements[3] providing for proprietary (*jus in rem*) security over real estate, movable property or intangible assets, and (ii) guarantee agreements providing for personal security (*jus in personam*) by third party guarantors. These are usually governed by local law as they need to satisfy various local law formalities applicable to the establishment of such security rights, such as registration of the mortgage in the land registry book. However, the same asymmetrical agreement is contained in all these security agreements. Disputes in connection with personal or proprietary security interests and agreements giving rise to them are arbitrable under Moldovan law, as the law does not specifically exclude their arbitrability.

## 3. Treatment of Asymmetrical Agreements

As reported by Papadima (2019, pp. 37-72; 2021, pp. 552-619), asymmetrical agreements are not welcome and recognized as valid in all researched jurisdictions: Australia, Hong Kong, Italy, Portugal, Singapore, Spain, and United Kingdom are comfortable with asymmetry; Bulgaria, China, India, Poland, Romania, Russia, and Turkey are uncomfortable with asymmetry, while in France, Germany (Bälz & Stompfe, 2017, p. 157), and the United Stated of America the jury is still out. In France, Racine (2016, p. 216) has expressed a favourable view for the validity of asymmetric agreements in French law: "Their validity must not be doubted. Freedom of contract allows the parties to shape their agreement as they wish. They are therefore entitled to create options, including the judges called upon to resolve their disputes. […] Their efficacy depends however on their drafting. Clarity must exist in respect of the option, its branches, and its beneficiaries."

In this paper, we submit that asymmetrical agreements are valid under Moldovan law. To support this conclusion, we will rely on Moldovan case-law and we will also verify the extent to which the core legal arguments of the "uncomfortable with asymmetry" jurisdictions have a basis in Moldovan law. In addition, Moldovan arbitration scholars do not include asymmetrical agreements in the cases of pathological arbitration agreements; while they mention them as problematic, in light of international case law, they appear to approve of such agreements (Băieșu, 2023, pp. 34-35).

Since Moldovan arbitration law is based on the Model Law, it lacks a specific provision dealing with the validity of asymmetric agreements. Moldova prides itself

[3] "Mortgage" is taken here not only as a security over immovable property, but a registered security over either immovable property or movable property. The latter is called "pledge" (*gaj*, in Romanian language) in the Moldovan Civil Code.

on freedom of contract.[4] So, our starting point is that Moldovan law contains no specific prohibition of an asymmetrical agreement.

The cases available for research show that the Moldovan courts are open to asymmetrical agreements contained in security agreements either when the courts are asked to enforce the security in lieu of resort to arbitration or when a third party challenges the enforcement made in the courts in lieu of resort to arbitration. There are no known cases where an arbitral award would be denied recognition and enforcement because it was based on an asymmetrical agreement.

The Moldovan practice shows that the optional litigation limb of the asymmetrical agreement (resorting, at the option of the Lender, to a court) is interpreted broadly so as to allow enforcement of the mortgage not only via a court action, but also by its direct submission to a bailiff for out-of-court enforcement. This out-of-court enforcement option is available under Moldovan law because mortgage agreements are allowed to contain a writ of execution clause,[5] while mortgage agreements establishing a security over movable property (tangible or intangible) are by operation of law (*ex legem*) writs of execution (Article 11, Moldovan Enforcement Code). An issue could arise if, in the optional litigation limb, the submission to a court also implied the submission to the out-of-court authorities competent to conduct enforcement of such writs of execution. The broad interpretation currently adopted, which we support, recognizes the jurisdiction of out-of-court authorities. This is first explained by the parties' intent to allow the lender the broadest array possible of remedies to realize the security and collect the debt. Secondly, bailiffs are subject to the supervision by the courts (e.g. their orders can be annulled by the courts upon a challenge by an interested party), and consequently a reference to the local courts should be taken as an implied reference to the authorities that carry out justice-related functions.

For the sake of clarity, mortgage agreements specify that the lender may resort to in-court or out-of-court enforcement to the extent allowed by the law governing the enforcement procedure.

Among other decisions, we rely here on *Case 25-10/2021* resolved by the Straseni District Court (Case 25-10/2021, 2021). The court had to consider whether a mortgagee holding a mortgage over shares in a company has properly enforced the mortgage by means of an out-of-court procedure via a bailiff, notwithstanding that the mortgage agreements contained an asymmetrical agreement: the default dispute resolution mechanism was arbitration, and the mortgagee alone could resort

[4] Article 993 of the Moldovan Civil Code introduces strong rules and presumptions that the Books of the Civil Code and other private law acts contain merely default rules, which the contracting parties may derogate from.

[5] "Formula executorie" in Romanian.

to the local courts to enforce its rights. In spite of several arguments about illegality of the enforcement raised by the plaintiff (a third party to the mortgage agreement), the court upheld the lawfulness of such an enforcement and did not raise any *ex officio* concerns about the jurisdiction of the bailiff or of the court.

The above considerations relate to what Papadima classifies as a bilateral arbitration clause with a unilateral option to litigate. However, Moldovan case law indicates that the second type of asymmetrical agreements, i.e., bilateral litigation clause with a unilateral option to arbitrate, are also not invalid merely because of the asymmetry feature.

In 2020-2021, the Moldovan courts had to deal with a wave of requests for enforcement of domestic arbitral awards obtained by a non-banking credit organization that lent money to consumers. These awards were based on a bilateral litigation clause with a unilateral option to arbitrate: any disputes under the loan agreement were to be resolved by the Moldovan courts; but, upon the request of the claimant (and not necessarily the lender), any dispute under the loan agreement was to be resolved by arbitration under the rules of the Association of Liquidators and Administrators (or ALARM). The Chisinau Court of Appeals, as the court of final instance in such matters, denied enforcement of such awards on two grounds. In some judgments, the court looked at the merits of the case and found that the sole arbitrator had failed to act *ex officio* and restrict certain claims of the claimant insofar as they violated the rights of the respondent who was a consumer, e.g. the sole arbitrator awarded to the claimant both penalties and default interest. Thus, the award was denied jurisdiction because it violated the fundamental consumer protection principle under Moldovan law (*Super Credit SRL vs IS*, Case 2-20114155-02-2r-09032021, 2021; *Super Credit SRL vs MM*, Case 2r-2991/20; 2-20140886-02-2r-24122020, 2021). This is indeed in line with the directives given by the Moldovan Supreme Court of Justice in their Advisory Opinion No. 106. It states: "[t]he determination that an arbitral award concerning a consumer which gave effect to contractual obligations arising from unfair terms will represent a legal ground for the court, as provided in paragraph (2) of Article 485 of the Civil Procedure Code, to refuse the issue of an enforcement order for the arbitral award, as the arbitral award violates the fundamental principles of the legislation of the Republic of Moldova." (Advisory Opinion of the Moldovan Supreme Court on Enforcement Matters, 2019).

In the above cases, while the Chisinau Court of Appeals acknowledged the asymmetrical nature of the dispute resolution clause, it did not invalidate the arbitration agreement because it was asymmetrical; it employed none of the frequent objections it relied on in other jurisdictions (see *infra* section 4), although it had full legal authority to do so under procedural law. Some other judgments of the same court

went further and invalidated the arbitration limb contained in the asymmetrical agreement. They did so by relying on the law of unfair terms in consumer contracts, and specifically Article 1077(1)(16) of the Moldovan Civil Code (*Super Credit SRL vs IG*, Case 2r-2884/20; 2-20132150-02-2r-15122020, 2021): a term imposing arbitration as the exclusive method of dispute resolution in a consumer contract is unfair if the term has not been individually negotiated. We appreciate, however, that the court has not taken time to reason why the asymmetrical agreement provides for arbitration as the exclusive method when in fact arbitration is only the optional limb of this agreement. Nonetheless, it is not the asymmetric feature of the agreement that served as a reason to invalidate it, but the fact that it is unfair for these other reasons. In other words, in the eyes of the court, even a symmetric arbitration agreement is unfair when it is not individually negotiated with a consumer.

## 4. Frequent Objections Used in Other Jurisdictions to Cast a Shadow over Asymmetric Agreements

Reports of case law from various jurisdictions unfavourable to asymmetrical agreements allow us to identify the following frequent objections that lead to their invalidity or inadmissibility: ambiguity; lack of mutuality; potestativity; and procedural inequality. Since Moldovan law does not require consideration for a contract to be valid, we will not analyse the objection of lack of mutuality.

### *4.1. Ambiguity*

In a puritan view of arbitration, if the parties wish to submit to arbitration, they should do so clearly, unequivocally and waive the court jurisdiction over the merits of the dispute. The failure to satisfy this requirement usually classifies the arbitration agreement as pathological (Florescu, 2020, p. 47; Born, 2021, § 5[D][1] and [D][5]; Blackaby *et al*., 2023, § 2.220-2.222; Băieșu, 2023, p. 34) and has been used by some courts in Romania and Turkey. In France, El Ahdab & Mainguy (2021, p. 808) have expressed the view that asymmetric agreements should not pose validity questions as long as the choice afforded to one of the parties is objectively determinable, and not discretionary.

We note that a consequence of asymmetric agreements is that both arbitration and litigation is available to a party. This alternance does not affect the clear consent to arbitrate that both parties have given. This applies *a fortiori* to a bilateral arbitration clause with a unilateral option to litigate, because arbitration was set by the parties as the default dispute resolution mechanism. One private law

development trend is the creation of multiple routes or procedures to enforce the same rights. Even in the absence of an arbitration agreement, in a mortgage agreement, the mortgagee would have, under Moldovan law, three routes: out-of-court enforcement via a bailiff if the mortgage agreement amounts to a writ of execution; expedited ordinance procedure; and the general civil procedure. In addition, when considering debt collection, a mortgagee has the option to file an action for collection of the secured debt (a personal action) or an action for enforcement of the mortgage (a proprietary action; *actio hypothecaria*) (Cazac, 2023, p. 175). In the meanwhile, the borrower or the mortgagor have only the general civil procedure available, for instance in an action to annul the mortgage agreement or to seek damages for the wrongful realization of the security. This is because they do not hold a mortgage and because their principal interest is not debt collection, as opposed to the lender or the mortgagee. We thus conclude that asymmetry of procedural routes is normal in modern private law. Asymmetrical agreements encompass the idea that the different nature of the parties' interest justifies a different level of protection of that interest. They also take account of the different risks the parties are exposed to.

### *4.2. Potestativity*

The objection that asymmetrical agreements are potestative, and hence invalid, has been used in French and Bulgarian case law. "The term 'potestative' refers to the fact that the fulfilment of the agreement is dependent upon an event which one of the parties has the power to make happen or prevent from happening, or, in other words, the event is entirely within the power of only one party to the contract" (Papadima, 2021, p. 549). As of 1 March 2019, the prohibition of potestative conditions has been excluded from the Moldovan Civil Code.[6] This was part of the policy choice to render Moldovan contract law more predictable and strengthen the validity of contracts and party autonomy. To the contrary, Moldovan law is open to discretions that shape a contractual relationship, such as unilateral options to create or prolong a contractual relationship, unilateral rights to amend or terminate a contractual relationship for cause or at will. It matters little if the discretion is exercised by the creditor or the debtor of a specific legal relationship. Discretionary rights are a foundation stone of the new Moldovan law of trusts contained in the Civil Code. The most important legal restriction to observe when shaping the terms of a contract with discretionary rights is contained in the law of unfair terms (Cazac, 2020, pp. 91-110).

[6] Former Article 235(2) of the Civil Code was in force between 12 June 2002 and 28 February 2019 and stated: "A condition whose occurrence or non-occurrence depends on the will of the parties to the juridical act is null and void. A juridical act concluded under such a condition is void."

### *4.3. Procedural equality*

Asymmetrical agreements have been denied recognition in Russian case law (Draguiev, 2014, p. 30; Papadima, 2021, p. 581) based on the idea that a bilateral arbitration clause with a unilateral option to litigate violated the equality of arms principle stated in Article 18 of Russian Federation Law on International Commercial Arbitration, a verbatim adoption of Article 18 of the Model Law. We see no basis for applying that logic in Moldovan law. To the contrary, we join the opinion of Papadima (2021, p. 624) that Article 18 of the Model Law, "which gives effect to the principle of equality in arbitration, should be interpreted to apply only to treatment and conduct during arbitral proceedings, as indicated by the title of the chapter within which it is placed: 'Conduct of Arbitral Proceedings'".

A further objection raised by the Russian court was violation of Article 6 ECHR (right to a fair trial and access to justice). This reasoning appears to misconstrue the idea behind Article 6. In a better view, the English High Court upheld the validity of the asymmetrical agreement, providing a rebuttal to such a reasoning:

"Moreover I would not have acceded to Mr Forbes Smith's argument that the clause is invalid even if it bore the construction for which he contends. If, improbably, the true intention of the parties expressed in the clause is that MCB should be entitled to insist on suing or being sued anywhere in the world, that is the contractual bargain to which the court should give effect. The public policy to which that was said to be inimical was "equal access to justice" as reflected in Article 6 of the ECHR (Art. 6, European Convention on Human Rights, 1950). But Article 6 is directed to access to justice within the forum chosen by the parties, not to choice of forum. No forum was identified in which the Defendants' access to justice would be unequal to that of MCB merely because MCB had the option of choosing the forum." (*Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd.*, Case EWHC 1328 (Comm), 2013, para. 43).

Further, the ECHR case law shows a compatibility between arbitration and Art. 6 (*Transado - Transportes Fluviais Do Sado, S.A. v. Portugal*, Application No. 35943/02, 2003). The European Court held that, in jurisdictions where this human rights convention applies, a waiver of a person's right to have his or her case heard by a court or tribunal is frequently encountered in civil matters, notably in the shape of arbitration clauses in contracts. The waiver, which has undeniable advantages for the individual concerned, as well as for the administration of justice, does not in principle offend against the ECHR (*Deweer v. Belgium*, Application No. 6903/75, 1980, § 49; *Pastore v. Italy*, Application No. 46483/99, 1999). The parties to a case are free to decide that the ordinary courts are not required to deal with certain disputes potentially arising from the performance of a contract. In accepting an arbitration

clause, the parties voluntarily waive certain rights enshrined in the ECHR (*Eiffage S.A. and Others v. Switzerland*, Application No. 1742/05, 2009; *Tabbane v. Switzerland*, Application No. 41069/12, 2016, § 27).

We conclude that asymmetry in the choice of forum should not be taken as inequality of arms in an ongoing legal proceeding (be it litigation or arbitration). What matters is that, whatever valid choice binds the parties to the dispute, the procedure abides by the ECHR standards.

## 5. Extension of the Arbitration Agreement in the Loan Agreement to the Security Provider

An issue that has been dealt with in international arbitration practice but has yet to be raised in the Moldovan courts is whether an arbitration agreement contained in the loan agreement between the lender and the borrower may be extended to non-signatories, i.e., the third-party security providers. The usual practice in Moldova is that third-party providers of personal or proprietary security enter into a separate security agreement with the lender. Of course, the best practice is to include in the security agreement the same arbitration agreement as that contained in the loan agreement. The fact that this best practice is so closely followed explains the absence of any case law on the matter.

We submit that, as held in French law (El Ahdab & Mainguy, 2021, p. 431), under Moldovan law an arbitration agreement contained in the loan agreement should not be extended to non-signatory security providers, even if a suretyship is an accessory personal security interest and its validity is dependent on the validity of the loan agreement. Here, the fundamental requirement of consent to arbitrate excludes such an extension. This extension can be accepted, however, when it is proven that the parties to the security agreement intended for the arbitration agreement contained in the loan agreement to act as an umbrella clause for all security documents, usually by way of some term that incorporates it into the security agreement or otherwise shows that the loan agreement is a framework agreement in relation to the security document.

Still, the fact that an extension is excluded does not deprive the award obtained by the lender against the borrower of its opposability against the security provider in terms of confirming the amount of debt owed to the lender. And, vice versa, if the security provider is allowed to raise defences against the lender based on the lender-borrower relationship, such defences should remain available even if that relationship is subject to arbitration, while the lender-security provider relationship is not.

## 6. Conclusion

Moldova is a Model Law jurisdiction in statute, but it still has work to do to become a fully Model Law compliant jurisdiction in practice. We trust that the efforts of the arbitration community and the local authorities in improving and clarifying the existing law will serve as an impetus to improve the application of the Model Law and its spirit by local courts.

The availability of and friendliness to arbitration ensures a legal framework favourable to international trade, and especially to international lending to the Moldovan economy. A key factor is the recognition of asymmetric dispute resolution agreements in loan agreements and in supporting security agreements. All the signs exist in case law, practice and academic writings that such asymmetric agreements must be given effect to in the Moldovan jurisdiction.

## References

Băieșu, A. 2023. Clauzele arbitrale patologice: probleme și soluții. *Studia Universitatis Moldaviae*, 3(163), pp. 30-38. Available at: http://doi.org/10.59295/sum3(163)2023_04, 12. 9. 2024.

Bälz, K. & Stompfe, Ph. 2017. Asymmetrische Streitbeilegungsklauseln in internationalen Wirtschaftsverträgen: Zulässigkeit, Grenzen, Gestaltungsmöglichkeiten. *Zeitschrift für Schiedsverfahren - German Arbitration Journal*, 15(4), pp. 157-164.

Blackaby, N., Partasides, C., Redfern, A. & Hunter, M. 2023. *Redfern and Hunter on International Arbitration*. 7th ed. Oxford: OUP. https://doi.org/10.1093/law/9780192869906.001.0001

Born, G. B. 2021. *International Commercial Arbitration*. 3rd ed. Alphen aan den Rijn: Kluwer Law International.

Cazac, O. 2020. Unfair Terms under the Moldovan Civil Code. *Analele Universității din București (AUB), Seria Drept*, Anul XVIII, pp. 91-110. https://www.doi.org/10.31178/AUBD.2020.07

Cazac, O. 2023. Aspecte de drept material și procedural privind valorificarea bunului grevat de garanție reală: prețul comercial rezonabil și opoziția la vânzare. *Revista Română de Drept Privat*, 3, pp. 172-201.

Draguiev, D. 2014. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. *Journal of International Arbitration*, 31(1), pp. 19-45. https://doi.org/10.54648/JOIA2014002

El Ahdab, J. & Mainguy, D. 2021. *Droit de l'arbitrage: Théorie et pratique*. Paris: LexisNexis.

Florescu, C. I. 2020. Perspective practice privind clauzele arbitrale unilaterale. In: Radulescu, A. (ed.), *Rolul Curții Constituționale și al Înaltei Curți de Casație și Justiție în configurarea dreptului românesc după intrarea în vigoare a noilor coduri*, Universul Juridic, pp. 39-49.

Papadima R. 2019. Asymmetrical Arbitration Clauses: Global Overview. *Revista Română de Arbitraj*, 4, pp. 37-72.

Papadima R. 2021. The Uncertain Fate of Asymmetrical Dispute Resolution Clauses in Arbitration Around the Globe: To Be or Not To Be (Symmetrical), *Mississippi Law Journal*, 40 (3), pp. 541-631. Available at: https://mississippilawjournal.org/wp-content/uploads/2022/02/Papadima_Macro_Final_Update.pdf, 12. 9. 2024.

Racine, J.-B. 2016. *Droit de l'arbitrage*. Paris: Presses Universitaires de France (P.U.F.)

Wolff, R. (ed.). 2012. *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary*. Munich: C.H. Beck/Hart Publishing/Nomos.

### *Internet Sources*

EBRD & IDLO. 2021. *Assessment of Arbitration Law and Practice in Moldova. 20 October 2021*. EBRD Technical Cooperation Project: Moldova - Commercial Mediation and Arbitration (Phase IV). Available at: https://justice.gov.md/sites/default/files/document/attachments/eng_ebrd_idlo_assessment_report_clean.pdf, 12. 9. 2024.

Gutu Z. 2012. *Study II. Consolidation of the Legal Framework on Arbitration in the Republic of Moldova (Studiul II. Consolidarea cadrului legal privind arbitrajul în Republica Moldova)*, Ministry of Justice of the Republic of Moldova. Available at: https://www.undp.org/ro/moldova/publications/studii-privind-functionarea-institutiei-arbitrajului-republica-moldova, 12. 9. 2024.

Ministry of Justice. 2024. *Ministry of Justice has Kicked-Off Efforts to Improve the Legal Framework for Arbitration (Ministerul Justiției a dat start activității de îmbunătățire a cadrului normativ în materie de arbitraj*). Available at: https://www.justice.gov.md/ro/content/ministerul-justitiei-dat-start-activitatii-de-imbunatatire-cadrului-normativ-materie-de, 12. 9. 2024.

### *Legal Sources and Case Law*

Advisory Opinion of the Moldovan Supreme Court on Enforcement Matters, 2019. The Advisory Opinion No. 106 of the Supreme Court of Justice of the Republic of Moldova regarding the grounds for refusing to issue an enforcement order for an arbitral award under paragraph (2) of Article 485 of the Civil Procedure Code of 28 June 2019 (*Opinie consultativă nr. 106 cu privire la temeiul refuzului de a elibera titlul de executare silită a hotărârii arbitrale, prevăzut de alineatul (2) din articolul 485 Cod de procedură civilă*). Available at: http://jurisprudenta.csj.md/search_rec_csj.php?id=163, 12. 9. 2024.

Case 25-10/2021. 2021. Order of the Straseni District Court, Calarasi Office of 9 December 2021 (Case 25-10/2021; 2-21045746-48-25-29032021), upheld by the Decision of the Civil, Commercial and Administrative Chamber of the Chisinau Court of Appeals of 11 July 2022 (Case 2r-315/22; 2-21045746-02-25r-24012022), 12. 9. 2024.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 10 June 1958. United Nations Treaty Series, vol. 330, p. 3. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22, 12. 9. 2024.

*Deweer v. Belgium*. 1980. Judgment of the European Court of Human Rights of 27 February 1980 (Application No. 6903/75).

Eiffage S. A. and Others v. Switzerland. 2009. Decision of the European Court of Human Rights of 15 September 2009 (Application No. 1742/05).

Explanatory Decision of the Moldovan Supreme Court on Arbitration Matters, 2015. The Decision No. 2 of the Plenum of the Supreme Court of Justice of the Republic of Moldova regarding the application by the courts of legal provisions in resolving certain issues in the examination of disputes where the parties have concluded an arbitration agreement of 30 March 2015. (*Hotărârea Plenului Curții Supreme de Justiție a Republicii Moldova cu privire la aplicarea de către instanțele de judecată a prevederilor legale la soluționarea unor chestiuni în cadrul examinării litigiilor în care părțile au încheiat convenția de arbitraj*). Buletinul Curții Supreme de Justiție a Republicii Moldova, 6, p. 4 – Available at: https://jurisprudenta.csj.md/search_hot_expl.php?id=287, 12. 9. 2024.

European Convention on Human Rights of 4 November 1950 (ECHR). European Treaty Series, No. 5. Available at: https://www.echr.coe.int/documents/convention_eng.pdf, 12. 9. 2024.

*Just-Us AIR SRL and EFS European Financial Services AG vs CA AIR Moldova SRL*. 2022. Decision of the Civil, Commercial and Administrative Chamber of the Moldovan Supreme Court of Justice of 28 September 2022. (Case 2r-398/2022; 2-21156372-01-2r-28072022). Available at: https://jurisprudenta.csj.md/search_col_civil.php?id=68627, 12. 9. 2024.

*Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd*., 2013. Judgment of the High Court of Justice, Queen's Bench Division, Commercial Court of 14 May 2013. (Case EWHC 1328 (Comm)).

Moldovan Civil Code (*Codul civil*), 2002-06-06, No. 1107 – Available at: https://www.legis.md/cautare/getResults?doc_id=112573&lang=ro, (12 September 2024).

Moldovan Law on International Commercial Arbitration (*Legea cu privire la arbitrajul comercial international*), 2008-02-22, Nr. 24 – Available at: https://www.legis.md/cautare/getResults?doc_id=110184&lang=ro, 12. 9. 2024.

Moldovan Enforcement Code (*Codul de executare al Republicii Moldova*), 2004-12-12, No. 443 - Available at: https://www.legis.md/cautare/getResults?doc_id=144723&lang=ro#, 12. 9. 2024.

*OOO BelgorhimpromEnergo vs SATI Moldavskaia GRES*. 2024. Decision of the Civil, Commercial and Administrative Chamber of the Moldovan Supreme Court of Justice of 23 July 2024. (Case r. 2r-570/23; 2-23058026-01-2r-13122023). Available at: https://jurisprudenta.csj.md/search_col_civil.php?id=75573, 12. 9. 2024.

*Pastore v. Italy*, 1999. Decision of the European Court of Human Rights of 15 December 1999 (Application No. 46483/99).

*Rikipal SRL v Fruktdimcov SRL*. 2019. Order to Set Aside the Arbitral Award of the Chisinau District Court, Centre Office of 27 November 2019 (Case 2-14869/20). Available at: https://jc.instante.justice.md/ro/pigd_integration/pdf/a0e7d533-27b8-45fd-8074-e74333b49fb5, 12. 9. 2024.

*S. C. Pa & Co International SRL v. IS Administrația de Stat a Drumurilor*. 2024. Order of the Civil, Commercial and Administrative Chamber of the Chisinau Court of Appeals of 30 April 2024. (Case 2-5/24; 2-24026129-02-2-06032024-1). Available at: https://cac.instante.justice.md/ro/pigd_integration/pdf/51e75ce7-565d-410c-b691-6d875bf31c9e, 12. 9. 2024.

*Super Credit SRL vs IG*. 2021. Decision of the Civil, Commercial, and Administrative Chamber of the Chisinau Court of Appeals of 16 January 2021 (Case 2r-2884/20; 2-20132150-02-2r-15122020). Available at: https://cac.instante.justice.md/ro/pigd_integration/pdf/cb907b22-dd50-4cd6-8d3e-9ad6d666334b, 12. 9. 2024.

*Super Credit SRL vs IS*. 2021. Decision of the Civil, Commercial, and Administrative Chamber of the Chisinau Court of Appeals of 22 April 2021 (Case 2-20114155-02-2r-09032021). Available at: https://cac.instante.justice.md/ro/pigd_integration/pdf/73580159-c57d-4dd3-ab71-35430d01bf30, 12. 9. 2024.

*Super Credit SRL vs MM*. 2021. Decision of the Civil, Commercial, and Administrative Chamber of the Chisinau Court of Appeals of 16 February 2021 (Case 2r-2991/20; 2-20140886-02-2r-24122020). Available at: https://cac.instante.justice.md/ro/pigd_integration/pdf/9d9adf13-86fc-47d9-a42e-5f69cc8c3478, 12. 9. 2024.

*Tabbane v. Switzerland*, 2016. Decision of the European Court of Human Rights of 1 March 2016 (Application No. 41069/12).

*Transado - Transportes Fluviais Do Sado, S.A. v. Portugal*, 2003. Decision of the European Court of Human Rights of 16 December 2003 (Application No. 35943/02).

UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006 (Model Law). United Nations General Assembly Resolution 40/72 of 11 December 1985. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration, 12. 9. 2024.