THE PERSONS THAT CAN BE ARBITRATORS IN NATIONAL AND INTERNATIONAL ARBITRATION

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ABSTRACT: *This study is intended to analyze the conditions that a person has to fulfil in order to become an arbitrator in national and international arbitration. Both the requirements imposed by the international conventions regarding arbitration, by national legislations and the rules of the main arbitration institutions, but also the selection criteria which can be imposed by the parties are submitted to the analysis. An important aspect regards the impartiality and independence of the arbitrators, requirement that insures the rightful solving of the litigation.*

KEY WORDS: *arbitrator, international arbitration, conditions, special requirements*.

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1.GENERAL CONDITIONS TO BE AN ARBITRATOR

The general conditions for a person to have the quality of arbitrator mainly refer to the quality of natural or legal person, to citizenship and capacity.

In international arbitration, the arbitrator can be a natural or legal person[1], as it follows from the interpretation of the dispositions of art. I paragraph 2 of the New York Convention from 1958[2], which states that arbitral awards are not only those given by arbitrators appointed for specific cases, but also those given by the permanent arbitral bodies to which the parties have resigned themselves to.

The Romanian Code of Civil Procedure from 2010, republished[3], art. 547, stipulates that any natural person can be appointed as arbitrator, as long as he/she has full capacity of exercise.

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[1] See Ioan Macovei, *Dreptul comerţului internaţional*, vol. II, Editura CH Beck, Bucureşti, 2009, p.288.

[2] Romania adhered to this convention by the Decree no. 186 from the 21st of July 1961, published in the Official Gazette no. 19 from the 24th of July 1961.

[3] Published in the Official Gazette, Part I, no. 485 from the 15th of July 2010 and republished in the Official Gazette, Part I, no. 545 from the 3rd of August 2012 in base of the Law no. 76 from 2012. The Code of Civil Procedure from 2010 will enter into force on the 1st of February 2013, in base of the OUG no. 44 from 2012, published in the Official Gazette, Part I, no. 606 from the 23rd of August 2012.

It is worth noticing the fact that the previous Romanian Code of Civil Procedure from 1856, before being modified by the Law no. 59/1993[4], stated in art. 343 paragraph 2 that any capable person, of any nationality can be an arbitrator. The legislative change has appeared as a consequence of the need to simplify the difficult procedure which involved the establishment of an arbitral court of legal persons, taking into consideration the fact that they have their own legal representatives[5].

The requirement regarding an arbitrator's need to have the quality of a natural person is not found in the provisions on international commercial arbitration from the French Code of Procedure. Therefore, it is also possible for a legal person to have the quality of arbitrator, situation in which the mission of arbitrator is to be fulfilled by its legal representatives[6]. The French law literature considers that it is not preferable to designate a legal person as an arbitrator, even if the litigation has an international character[7]. In national arbitration, the provisions of art. 1451 from the French Code of Civil Procedure state expressly that the mission of arbitrator can only be given to a natural person. In the case in which the arbitration convention designates a legal person as arbitrator, it only has the authority to organize the arbitration.

In regard to the citizenship of the arbitrators, the New York Convention, the Geneva Convention[8] and the model-law UNCITRAL[9] do not contain any restrictions. Therefore, according to art. V paragraph 1 letter d) from the New York Convention in 1958, the establishment of the arbitral court is done in accordance with the will of the parties and, only subsidiary, in accordance with the law of the country in which the arbitration took place. Also, according to the provisions of article III from the Geneva Convention, in the arbitrations that it covers, foreigners can be appointed as arbitrators. Similar provisions are also found in article 11 paragraph 1 from the model-law UNCITRAL.

The Washington Convention from 1965[10], article 39, states that the arbitrators that form the majority must be citizens of states other than the state which is party to the dispute and the state whose citizen is a party in the dispute, except for the situation in which the parties agree to appoint the sole arbitrator or each one of the court's members.

According to article 4 paragraph 2 from the Regulation on the organization and functioning of the Court of International Commercial Arbitration of the Romanian Chamber of Commerce and Industry[11], any person, Romanian citizen or foreigner who has full capacity of exercise of his/her rights can be an arbitrator.

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[4] Law no. 59/1993 for the modification of the Code of Civil Procedure, of the Code of the Family, of the Law of administrative contentious no. 29/1990 and of the Law no. 94/1992 regarding the organization and functioning of the Court of Accounts was published in the Official Gazette, Part I, no. 177 from the 26th of July 1993.

[5] See Giorgiana Dănăilă *Procedura arbitrală în litigiile comeciale interne*, Editura Universul Juridic, Bucureşti, 2006, p. 141.

[6] See Jacques Béguin, Michel Menjucq, *Droit du commerce international*, Editura Litec, Paris, 2005, p. 971.

[7] See Yves Guyon, *L'arbitrage*, Editura Economica, Paris, 1995, p. 36.

[8] The Convention of Geneva was ratified by Romania by the Law no. 50 from 1931, published in the Official Gazette, Part I, no. 71 from the 26th of March 1931.

[9] The United Nations Commission for International Commercial Law (UNCITRAL in English and CDNUCI in French) was founded in 1966 and charged by the General Assembly with the progressive harmonization and unification of the international commercial law, especially by drafting new international conventions, law models and uniform laws. UNCITRAL is formed of 36 members elected by the General Assembly, so that it represents different geographical areas of the world and the main economic and legal systems. The information was taken from the site http://www.uncitral.org.

[10] Publisher in the Official Gazette no. 56 from the 7th of June 1975.

[11] Publisher in the Official Gazette, Part I, no. 97 from the 7th of February 2012.

The Romanian Code of Civil Procedure, in its republished version from 1993, article 369^2 paragraph 2, states that only the foreign party can name arbitrators of foreign citizenship, the parties also being allowed to agree that the sole arbitrator or the umpire arbitrator was a citizen of a third state. As a consequence of the fact that the Arbitration Court's Rules of arbitral procedure are completed by the provisions of the Code of Civil Procedure, the Romanian party cannot appoint arbitrators of foreign citizenship[12].

Obviously, a restriction of this kind was considered unjustified, being criticised by the law literature[13]. Thus, although it is unlikely for the Romanian party in an arbitration to want the appointment of a foreign arbitrator, the simple fact of this right's restriction puts him on a unequal position in report to the foreign party[14].

The Romanian Code of Civil Procedure from 2010, republished, no longer contains this restriction regarding citizenship. According to article 1099 paragraph 1, the appointment, revocation and replacement of the arbitrators are done in accordance with the arbitration agreement or with the facts established by the parties after its closing and, in default, the interested party can make a request for the court from the headquarters of the arbitration to do so, the provisions of the 4th Book being applied analogically. It can be noticed that these legal provisions underline the priority of the parties' agreement on the requirements that must be fulfilled by the arbitrators.

The requirement regarding the full capacity of exercise of the rights is a measure of protection for the parties, meant to ensure the minimum guarantee of the judgement's settling.

The arbitrator must enjoy the whole ensemble of his/her civil rights, requirement which will be appreciated in report to his/her personal law[15]. As a consequence, incapables cannot have the quality of arbitrators. The justification for this requirement is given by the fact that a person who is incapable of handling his/her own affairs could not be capable of settling a litigation between other people[16]. Therefore, this rule is not intended to protect the incapable, but the parties involved in the dispute and the organization of the arbitral justice[17].

Article 4 paragraph 2 from the Regulation on the organization and functioning of the Court of International Commercial Arbitration of the Romanian Chamber of Commerce and Industry expressly states the requirement regarding the arbitrator's full capacity of exercise.

The persons who can be enlisted as arbitrators must enjoy a high moral consideration, have a recognized competence in the field of law, commerce, industry or financial and to offer the guarantee of independence in the progree of their mission, as it is stated by article 14 paragraph 1 from the Washington Convention. Also, a special importance will be given to the legal knowledge of the persons who are chosen to be on the list of arbitrators.

Also, the president will take into consideration the fact that the persons appointed to be enlisted as arbitrators are representative for the main legal systems in the world, as well as for the main forms of economic activity (article 14 paragraph 2 from the Washington Convention).

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[12] See Ioan Macovei, op. cit., p. 288.
[13] See Titus Prescure, *Curs de arbitraj comercial*, Ed. Rosetti, Bucureşti, 2005, p. 65.
[14] See Viorel Roş, *Arbitrajul comercial internaţional,* Editura Monitorul Oficial, Bucureşti, 2000,, p. 248-249.
[15] See Ioan Macovei, op. cit., p. 289.
[16] See Yves Guyon, op. cit., p. 36.
[17] See Jacques Béguin, Michel Menjucq, op. cit., p. 971.

The Regulation on the organization and functioning of the Court of International Commercial Arbitration of the Romanian Chamber of Commerce and Industry states, in article 4 paragraph 2, that the arbitrator must enjoy a perfect reputation and must have a high qualification and experience in the field of commercial law or international economic relations.

2. SPECIAL REQUIREMENTS REGARDING THE KNOWLEDGE, EXPERIENCE, QUALIFICATION AND REPUTATION OF THE ARBITRATORS

The parties may also establish other criteria for selecting the arbitrators, beside the ones expressly stipulated by the law or by arbitration regulations[18]; the criteria would fully correspond to their interests, but they must not be too rigorously established, in order not to make the selection of an arbitrator difficult[19]. When appointing the arbitrators, the principle of selection combines with the principle of election[20].

The various criteria on which the selection of arbitrators is based have also been subjected to the analysis of the law literature[21], which underlines the fact that their experience and their knowledge, their profession, their knowledge of the language in which the proceedings will develop and their availability must be taken into consideration.

One of the indisputable advantages of the arbitration is that it allows the parties to choose the persons that will decide upon their conflict, from within those that have the necessary knowledge and experience in the field which forms the object of the litigation. In this way, the inconvenient deriving from the time and effort that are necessary to explain to a judge the technical details of the matter in debate are eliminated.

In regard to the profession of the arbitrator, although it is not necessary for him/her to have legal studies, most of the parties choose a person who is a lawyer[22]. The explanation resides in the fact that arbitrators must make decisions which require legal knowledge.

The persons who are not legal experts can also bring an essential contribution to the understanding of the technical aspects of the matter in debate. Most of the times, these persons are required to bring their contribution in writing the part of the decision which refers to these aspects.

When the technical aspect is not important in the litigation, the parties will choose arbitrators who have a legal qualification, based on the fear that arbitrators who are not legal experts would not understand the rules of procedure, even being in the position to commit serious errors which could lead to the voidance of the decision23.

Divergent opinions were also expressed in regard to the appointment of an arbitrator who is a teacher[24]. According to some opinions, the best arbitrators are teachers. On the contrary, others consider that teachers have a tendency to be too theoretical, getting farther away from the factual issues. In regard to the teachers that also have practical

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[18] See Ioan Terţa, *Consideraţii privind dobândirea calităţii de arbitru în arbitrajul comercial*, în Revista de Drept Comercial, 2003, nr. 4, p. 162.
[19] See Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Editura Cambridge University Press, United States of America, p. 120.
[20] See Ioan Macovei, op. cit., p. 289.
[21] See Margaret L. Moses, op. cit., p. 118.
[22] Idem, p. 118 and the following.
[23] See Yves Guyon, op. cit, p. 39.
[24] See Margaret L. Moses, op. cit., p. 118 and the following

activities, the universally accepted opinion is that they are valuable members of the arbitral court.

The knowledge of the language in which the arbitration takes place, although it cannot be considered an indispensable requirement, still appears to be especially useful, since needing the services of an interpreter during the arbitration increases the costs and the period of the trial. In addition, the way in which arbitrators perceive the matters discussed during the debates also depends on the accuracy of the translation.

Another issue that cannot be ignored in appointing the arbitrators is their availability, having in view an intellectual availability represented by the arbitrators' capacity to communicate, to listen to the pleadings, to try to understand and to reconcile the interests of the parties[25]. In the same time, a material availability is necessary; it is represented by the time that is given for the settling of the litigation, which cannot be predicted from the beginning.

The reputation of the arbitrators in regard to their fairness and integrity represents a very important aspect. For the best development of the arbitration, the parties must fully trust the integrity and the qualities of the arbitrators.

3. THE IMPARTIALITY AND INDEPENDENCE OF THE ARBITRATORS

A delicate matter refers to the independence and impartiality of the arbitrators.

Although at a first glance the notions of 'independence' and 'impartiality' could be considered synonymous, they were distinctively interpreted in the law literature.

It was mentioned that the term 'independence' –that is especially used in the content of national laws and arbitration regulations- implies the lack of any connection, of any kind, between the parties and the arbitrators[26], such as a professional relationship or the existence of an interest from the arbitrator's part in the settling of the case. 'Impartiality' refers to the lack of any biased attitude, of any preconceived ideas regarding the litigation in judgement[27]. Impartiality is harder to evaluate, being more of a psychological matter, which can even be invoked based on the simple subjectivity of the party that holds an interest, but who has the obligation to prove objectively the lack of trust in the arbitrator[28].

Article 12 paragraph 1 from the model-law UNCITRAL states that arbitrators must immediately disclose any circumstances likely to give rise to doubts as to the impartiality or independence.

The two requirements regarding the impartiality and independence of the arbitrators are found, although not expressly stated, in most of the arbitration regulations.

The Rules of the Court of International Commercial Arbitration of the Romanian Chamber of Commerce and Industry29 state, in article 18, that arbitrators are independent and impartial in the fulfillment of their jurisdictional attributions.

In a short formulation, the provisions of article 11 paragraph 1 from the Rules of the International Court of Arbitration of the Paris International Chamber of Commerce state

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[25] See Yves Guyon, op. cit., p. 39.

[26] See Peter Muchlinski, Federico Ortino, Christoph Schreuer, *The Oxford Handbook of International Investment Law*, Editura Oxford University Press, New York, 2008, p. 807.

[27] See Peter Muchlinski, Federico Ortino, Christoph Schreuer, op. cit., p. 807.

[28] See Cristina Florescu, *Conflictul de interese în arbitrajul comercial. Independenţa şi imparţialitatea arbitrilor*, în Revista Română de Arbitraj, 2010, nr. 1, p. 27.

[29] Published in the Official Gazette, Part I, no. 97 from the 7th of February 2012.

–as a basic principle- that every arbitrator must be impartial and independent in report with the parties involved in the litigation.

The issue of the arbitrators' impartiality and independence is found in the content of these rules, having in view the beginning of the proceedings, when the arbitrator must sign a declaration of independence and to bring to the knowledge of the parties involved any situation that could affect his/her independence, but also afterwards, in the development of the proceedings, if that kind of situations would appear (article 11 paragraphs 2 and 3 from the Rules of the International Court of Arbitration of the Paris International Chamber of Commerce). The principle of impartiality and independence of the arbitrators is applicable for the arbitrators appointed by the parties, but also for those appointed by the Court, being one of the reasons that explain the international success of the Paris International Court of Arbitration's activity[30].

The Rules of the London International Court of Arbitration also state the condition of the arbitrators' impartiality and independence. Thus, article 5.2. states that all the arbitrators must be and remain throughout the proceedings impartial and independent. For this purpose, each one of them must submit to the registry of the Court a summary of his/her past and present professional activity and, also, to sign a declaration that there is no reason that could affect his/her impartiality and independence.

4. THE NUMBER OF ARBITRATORS

The arbitration court can be made up of one or more arbitrators.

Unlike the 1958 New York Convention and the 1961 Geneva Convention, which do not contain any reference to the number of arbitrators, Washington Convention stipulates that the arbitration court is made up of one arbitrator or of an odd number of arbitrators.

UNCITRAL rules establish by art. 5 that if the parties do not reach a settlement as regards the number of arbitrators (namely one or three) and if within 15 days from the moment the defendant received the arbitration claim form, this fact is not established, then there will be three arbitrators.

Regarding the number of arbitrators, the UNCITRAL Law model gives the parties the right to choose this number. If the parties haven't established the number of arbitrators, then there will be three arbitrators as article 10 of this law provides.

The arbitration rules of the International Commercial Arbitration Court attached to the International Chamber of Commerce and Industry of Romania provide in article 15, paragraph 1 that the court is made up either of a unique arbitrator, or of three arbitrators, of which one is an umpire arbitrator. Contrary to the previous regulation included in the arbitration provisions included in the Arbitration Procedure Rules of the International Commercial Arbitration Court attached to the International Chamber of Commerce and Industry of Romania from 2011[31], the present rules no longer stipulate for the possibility of the parties to nominate the arbitrators, but this is exclusively the competence of the Nomination Authority.[32] The appointment of original arbitrators and substitute arbitrators is

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[30] See Michael Bühler, Thomas H. Webster, *Handbook of ICC Arbitration*, Ed. Thomson Reuters, Londra, 2008. p. 125.

[31] Published in the Official Gazette, Part I, no. 197 of 29 March 2011, modified and amended according to the Amendment published in the Official Gazette, Part I, no. 160 of 4 March 2011.

[32] The Nomination Authority belongs to one person, member of the Arbitration Court Plenary, appointed by the Decision of the National Chamber Board for a term of office of 7 years which can be updated, as stipulated by art.

made according to their professional training, their experience and their involvement in the Court of Arbitration activity, after the revision of the file's elements that allow the evaluation of the litigation value and the complexity of the case. As regards the number of arbitrators, the arbitration court will be made up of a unique arbitrator or three arbitrators according to the value of the main claim object and the complexity of the case. The solution of having an odd number of arbitrators was accepted due to practical reasons in order to avoid the difficulties that may have arisen if the arbitration court was made up of an even number of arbitrators and their opinions were different.

Due to the lack of actual criteria, we appreciate that the formulation of the present rules that are in force allows the Nomination Authority to discretionarily appoint the arbitrators and their number.

According to article 556 of the Romanian Civil Procedure Code from 2010, republished, the parties establish if the dispute is tried by a unique arbitrator or by many arbitrators, provided their number is odd. If the parties have not established the number of arbitrators, the dispute is tried by three arbitrators, each party appointing one arbitrator and the third one, the umpire arbitrator, being nominated by the two arbitrators. If there are more claimants or more respondents, the parties that have common interests will appoint one arbitrator.

The Rules of the International Commercial Arbitration Court attached to the International Chamber of Commerce and Industry of Paris provide that the arbitration court can be made up of one or three arbitrators. If the parties do not reach an agreement as regards the number of arbitrators, the Court will nominate a single arbitrator. However the number of arbitrators will be three if the nature of the case justifies this.

The French Civil Procedure provides in art. 1451 that the arbitration court is made up of a single arbitrator or more arbitrators in an odd number. The French doctrine[33] has underlined that the choice of a unique arbitrator is a simple and effective solution that helps the procedure development. Nevertheless, the main inconvenience in the case of a unique arbitrator regards his impossibility to deeply understand all the case's elements. Therefore it is preferred for complex and important disputes not to choose a unique arbitrator.

The rules of International Arbitration of the American Arbitration Association provide that if the parties have not agreed on the number of arbitrators, a single arbitrator will be nominated, except, when due to the case complexity, the nomination of three arbitrators is required.

The Rules of Arbitration Court of Milano provide that the parties have the right to establish the number of arbitrators. In the situation in which the parties have not established the number of arbitrators, the arbitration court will be made up of a single arbitrator with the exception of the situation in which the Arbitration Council considers that it is more appropriate to have three arbitrators due to the complexity or the financial value of the object of the dispute.

The 1996 English Arbitration Act provides that the parties have the right to establish the number of arbitrators for the arbitration court, without any limitation is this respect. When the parties do not get to an agreement on the number of arbitrators, then the arbitration court will be made up of a single arbitrator (section 15 of the 1996 English Arbitration Act).

11, paragraph 2 of the Rules on the organization and the functioning of the International Commercial Arbitration Court attached to the International Chamber of Commerce and Industry of Romania.

[33] See Yves Guyon, op. cit., p. 44.

In the litigations solved before the 1996 English Arbitration Act, there is a presumption as regards the intention of the parties to nominate a single arbitrator in the situation in which the arbitration convention was ambiguous as regards the number of arbitrators.[34]

More common in practice the parties opt for one or three arbitrators. However, even such a choice can be difficult. Thus, in the case of a single arbitrator the most important advantage is represented by the reduced costs as well as by the fact that this arbitrator can take decisions much faster, without being necessary to consult with other arbitrators. [35]

However, despite these advantages, mainly in the international commercial disputes the parties prefer to choose three arbitrators, especially if big amounts of money are disputed. Even though the costs are high in this situation, the decision given by the three arbitrators will be the result of a more thorough analysis of the case as well as the result of the experience and the knowledge which a single arbitrator cannot normally have.

Rarely do the parties agree on an arbitration court made up of 5 members or even more. In the arbitrations between the states[36] there have been situations with such a big number of arbitrators. Such a choice is not wise for the commercial disputes due to several reasons. Thus, the establishment of hearings' terms is hard to be made in the cases with a large number of members, and equally difficult are the debates on providing the resolutions.

The doctrine[37] also contains the opinion that the number of arbitrators is not important but the criteria on whose basis they are selected. Using other words, this means that a good arbitrator will be able to make a good decision provided he creates a constructive relation and a real dialogue with the parties and not to limit only to hear them.

Indeed, there is no such a thing as an ideal number of arbitrators in the international commercial disputes. However, only for exceptional situations an even number, or 5 arbitrators should be established. For most situations, the parties are in the situation of choosing between one or three arbitrators. In this respect one should notice that there are situations when due to the nature of the dispute, this could be better solved by one arbitrator rather than by three arbitrators and vice-versa. [38]

One of the important advantages of the arbitration is represented by the possibility of the parties to choose their arbitrators and to establish their number, by choosing those persons that for them have a high level of reliability and professionalism. Such a possibility does not exist when the dispute is referred to be solved to the judicial courts.

Unfortunately, the present Rules of arbitration procedure of the International Commercial Arbitration Court attached to the International Chamber of Commerce and Industry of Romania have distanced from this principle by removing any role of the parties as regards the arbitrators nomination. The Nomination Authority can establish both the arbitrators and their number for the arbitration court. The new regulation is contrary to the arbitration main character and this will definitely lead to long-term negative consequences.

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[34] See Andrew Tweeddale, Keren Tweeddale, *Arbiration of commercial disputes. International and English Law and Practice*, Oxford University Press, 2007, p. 623.
[35] See Margaret L. Moses, op. cit., p. 117.
[36] See Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) of 1999 available www.itlos.com,
[37] See Mauro Rubino-Sammartano, *International Arbitration. Law and Practice*, Kluwer Law International, Holland, 2001, p. 513.
[38] See Gary B. Born, *International Commercial Arbitration*, Kluwer Law International, Holland, 2009,, p. 1359.