

CONSIDERATIONS ON THE LEGAL FRAMEWORK OF ARBITRATION. NATIONAL AND INTERNATIONAL REGULATIONS

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ABSTRACT: *Arbitration, as an alternative jurisdiction with a private feature, displays a number of advantages that have determined the international organizations to encourage, in this way, the resolution of international commercial disputes and therefore, they promoted a number of international conventions in this regard. This study aims to analyze the legal framework of arbitration by completing a presentation of national and international regulations in this matter.*

KEYWORDS: *arbitration, regulation, legal framework, international conventions, rules of arbitration procedure.*

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The legal sources of the international commercial arbitration are characterized by diversity and continuous transformation, which has been imposed by the dynamics of foreign trade operations and an international economic cooperation (Popescu & Bârsan, 1983)

Of the conventions with a particular relevance in regulating the international commercial arbitration we will present the most important and with a topical application.

Under the auspices of the former Society of Nations, two multilateral conventions relating to arbitration were concluded in Geneva: the Protocol on Arbitration Clauses, signed at Geneva on 24 September 1923 and ratified by Romania through the Law of 21 March 1925¹ and the Convention of 26 September 1927 on the enforcement of arbitral awards. By the Protocol on Arbitration Clauses, signed on 23 September 1923, the participating States commit to recognize the validity of compromise and of the arbitration clause regarding the contracts concluded within commercial area or any other matters likely to be referred to arbitration or to be the subject of a transaction (Macovei, 2009).

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¹ Ratified by Romania by Law of 21 March 1925, published in the Official Gazette of Romania, Part I, no. 65 of 21 March 1925.

The Convention on the Execution of Foreign Arbitral Awards was signed at Geneva on 26 September 1927² being open only to participants in the Protocol of 1923. By this agreement, the contracting states undertake to acknowledge on their territory the authority of an arbitral award given under a compromise or an arbitration clause, but also its execution in accordance with the procedural rules in force in the country where it is raised (Macovei, 2009). Under the aegis of the United Nations, new conventions on arbitration were adopted, namely the New York Convention of 1958 and the Washington Convention of 1965.

The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies to recognition and enforcement of arbitral awards rendered on the territory of a State other than that where recognition and enforcement of judgments is required, resulting from disputes between individuals and legal entities. The Convention also applies to arbitral awards which are not considered domestic awards in the State where their recognition and enforcement is required.

The New York Convention provides in Article 3 that each of the Contracting States shall recognize the arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. The same text provides that for the recognition and enforcement of arbitral awards under the Convention no onerous conditions shall be imposed nor any fees and charges much higher than those imposed for the recognition and enforcement of domestic arbitral awards.

In addition to the international uniform regulation of the recognition and allowance of the enforcement of foreign arbitral awards, the New York Convention had a direct impact on the national regulations in this matter (Băcanu, 2005).

Although currently the Convention of New York has a special importance, however, only 26 of the 45 countries participating in the Conference in New York have signed the Convention before its entry into force on 7 June 1959. Subsequently, states from all around the world reconsidered their position, so that a total of 154 states have adhered to this Convention³. Romania's accession was made by Decree no. 186/1961⁴.

The European Convention on International Commercial Arbitration in Geneva in 1961 entered into force on 7 January 1964 and currently 26 states are parties to the Convention. Romania has ratified this Convention by Decree no. 281 of 25 June 1963⁵.

The aim of concluding the Convention is established by the desire to contribute to the development of European trade by removing, where possible, of certain difficulties that may impede the organization and operation of international commercial arbitration in the relationships between individuals or legal entities from different countries of Europe.

The aim of the Geneva Convention is to establish the legal regime of the foreign trade arbitration agreement and the regulation of the appropriate procedure. The Convention applies to arbitration agreements concluded for the settlement of disputes which have arisen or will arise from international trade operations between natural and legal persons habitually resident or domiciled in different Contracting States. The Convention contains

² The Convention from Geneva was ratified by Romania by Law no. 50 of 1931, published in the Official Gazette of Romania, Part I, no. 71 of 26 March 1931.

³ See <http://www.newyorkconvention.org>

⁴ Published in the Official Gazette of Romania no. 19 of 24 July 1961.

⁵ Published in the Official Gazette of Romania no. 12 of 25 June 1963.

provisions on the organization of the arbitration, the arbitration procedure, the law applicable to the merits of the dispute, motivation and cancellation of the award, by which it facilitates access to international commercial arbitration by removing some of the difficulties arising from the variety of national regulations (Macovei, 2009).

Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States was concluded on 18 March 1965 being ratified by 144 states (Costache, 2010).

Romania has ratified this Convention by the Decree of the State Council no. 62 of 1975⁶.

The Convention has a limited sphere of application, covering only the disputes relating to investments between States and natural or legal persons of other countries (Mazilu, 2011).

Also known as the ICSID Convention (Moses, 2008), the regulation created an organization to resolve differences on investments, called the International Centre for Settlement of Investment Dispute, whose headquarters is the International Bank for Reconstruction and Development. This center is considered as the most active and representative international arbitration institution devoted to resolving disputes between private investors and states. In several bilateral agreements concluded by Romania regarding the Reciprocal Promotion and Protection of Investments the idea of applying to this center to conciliation or arbitration was expressly provided under the provisions of the Convention (Prescure & Crişan, 2005).

The Inter-American Convention on the International Commercial Arbitration has been signed by 12 countries in Panama on 30 January 1975 and entered into force on 16 June 1976. Currently 17 states are parties to this Convention (Macovei, 2009).

The Inter-American Convention undertook issues, but only partially, from the approach of the European Convention and the New York Convention on Arbitration (Born, 2009).

The aim of the Convention was the settlement of a regional framework to encourage the use of arbitration to resolve disputes on trade matters (Macovei, 2009). Article 3 of the Convention provides that in the absence of an express agreement of the parties, the arbitration shall be held in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration.

The international organizations encourage international trade dispute resolution by arbitration and therefore promoted a number of international conventions. United Nations Commission on the International Trade Law drafted the UNCITRAL Arbitration Rules⁷ on 28 April 1976 and the UNCITRAL Model Law on International Commercial Arbitration on 21 June 1985.

The UNCITRAL Arbitration Rules were adopted on 28 April 1976 and provide a set of procedural rules upon which parties may agree for the conduct of arbitral proceedings

⁶ Published in the Official Gazette of Romania, no. 56 of 7 June 1975.

⁷ The United Nations Commission on the International Trade Law (UNCITRAL In English and CDNUCI in French) was founded in 1966 and assigned by the General Assembly with the progressive harmonization and unification of international trade law in particular by preparing new international conventions, model laws and uniform laws. UNCITRAL comprises 36 members elected by the General Assembly so as to represent different geographical areas of the world and the main economic and legal systems, according to <http://www.uncitral.org>.

arising from their trade relations and that can be used both in ad hoc arbitrations and institutional arbitrations.

In 2006, the Commission decided that the UNCITRAL Arbitration Rules should be reviewed in order to meet changes in arbitral practice over the last 30 years. This review was aimed at increasing the efficiency of arbitration under the arbitration rules, without affecting the structure of the text.

The UNCITRAL Arbitration Rules, in the revised form, in force since 15 August 2010, including provisions that relate to the arbitration between several people, connecting actions, a procedure for drafting objections towards the experts established by the arbitral tribunal but also revised provisions related to the replacement referees, demands for spending cuts and detailed provisions on interim measures.

UNCITRAL Model Law was adopted in 1985⁸, intended to support the reform and modernization of states in their laws on arbitral procedure so as the specific characteristics and needs of international commercial arbitration to be considered. The law regulates all the stages of the arbitral process starting with the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extension of the intervention of the national courts through the recognition and the enforcement of arbitral award. The law reflects the global consensus regarding the key issues of arbitral case-law that are supported by states from all regions and by different legal and economic systems worldwide.

The main objectives adopted by UNCITRAL in drafting this law was to limit the role of national courts, to give the will of parties the priority in setting their own rules of procedure for their trading dispute settlement, but also to secure the procedural fairness by limiting the provisions the Parties may derogate from (Florescu, 2011).

Among the domestic regulations relating to arbitration may be mentioned those contained in the Manual of Donici from 1814, Code of Caragea from 1818 and especially the Code of Calimah from 1817 (Deleanu & Deleanu, 2005).

Book IV of the Civil Procedure Code of 1865⁹ contained provisions relating to ad hoc arbitration in the contents of the Book IV entitled "On arbitrators". These provisions have been implemented up to the restoration of the communist regime, when, although not repealed, their scope was restricted to foreign trade relations (Florescu, 2011).

By Decree no. 495/1953¹⁰ an arbitration commission was established attached to the Chamber of Commerce and Industry aiming to resolve disputes arising between Romanian foreign trade organizations and their foreign partners. Subsequently the Decree no. 623 was adopted on 21 November 1973 on the organization of the Chamber of Commerce and Industry of the Socialist Republic of Romania¹¹, amended by the Decree no. 18 of 1976¹².

Since 1989, the access to private arbitration was reopened by Decree-Law no. 139/1990 regarding the chambers of commerce and industry in Romania¹³, which, in the provisions of Article 5 letter j, requires as explicit attribution of the Chamber the organization, on demand, of ad hoc arbitration.

⁸ See <http://www.uncitral.org>.

⁹ Published in Official Gazette of Romania, Part I, of 9 September 1865.

¹⁰ Published in the Official Gazette of Romania, Part I, no. 49 of 26 November 1953.

¹¹ Published in the Official Gazette of Romania, Part I, no. 184 of 22 November 1973.

¹² Published in the Official Gazette of Romania, Part I, no. 7 of 5 February 1976.

¹³ Published in Official Gazette of Romania, Part I, no. 65 of 12 May 1990.

At the same time, by Article 13 of the Legislative Decree above mentioned, the Court of International Commercial Arbitration was created, a permanent institution of arbitration as a body with no legal personality.

Law no. 335 of 2007 on Chambers of commerce¹⁴ stipulates in Article 4 section i, that one of the tasks of the County Chambers is organizing the commercial and civil dispute resolution through mediation and ad hoc and institutionalized arbitration. In accordance with Article 29, International Commercial Arbitration Court operates attached to the National Chamber.

Rules on the organization and functioning of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania¹⁵ stipulates the duties of this institution in terms of organization of the arbitration like drafting models of arbitration agreement, the promotion of arbitration activity, the unification of the rules of procedure, the evidence of practice arbitration, the evolution of the arbitration institution and the organization of alternative means for dispute settlement.

According to Article 1 of the Rules of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania, the Arbitration Court is a permanent institution of arbitration, with no legal personality, independent in the exercise of its duties. The mission of the Court of Arbitration is to promote commercial and civil arbitration, nationally and internationally, and to organize the functioning of arbitration courts and alternative methods for dispute settlement.

The Arbitration Court is made up of arbitrators acknowledged by the Management Board of the Chamber of Commerce and Industry of Romania, following the National Chamber President's proposal, formulated in consultation with the President of the Court of Arbitration. The capacity of an arbitrator is acquired after an application under this regard, if the person fulfills the requirements of the Regulations¹⁶.

The activity of the Court of Arbitration is coordinated by a board consisting of the chairman, first vice president, vice president, scientific secretary, coordinator arbitrator and 4 members, with a mandate of three years which may be renewed by the Management Board of the National Chamber, at the President's proposal. The Board is organized and operates in accordance with the Regulation of the Board of the International Commercial Arbitration Court attached the Chamber of Commerce and Industry of Romania. The Arbitration Court Plenum consists of all arbitrators included in the list of arbitrators. The Arbitration Court Plenum debates the reports on the work the Arbitration Board has carried and on the legal questions differently resolved by arbitral tribunals, in order to avoid an uneven practice.

The settlement of the dispute shall be rendered exclusively by the arbitral tribunal and conducted by the Rules of Arbitration Procedure of the Arbitration Court, under the applicable law regarding disputes.

The resources of the Arbitration Court consist of a registration fee and arbitration fee paid for provided services. These fees are set by the rules on arbitration fees and

¹⁴ Published in Official Gazette of Romania, Part I, no. 836 of 6 December 2007.

¹⁵ Published in the Official Gazette of Romania, Part I, no. 328 of 06 May 2014.

¹⁶ The Regulation was approved on 10 April 2014 in the Session XXXIV by the Leading Board of the National Chamber, according to Article 29, para. 3 of Law no. 335/2007.

charges¹⁷. The registration fee covers administrative initiation charges for the opening of the arbitration file and is of a fixed amount set by Article 1, paragraph 1 of the Rules on arbitration fees and charges, while the administrative fee is determined according to the value of the application subject. The same rules also provide the amount of the arbitrators' fees, to be determined, also depending on the value of the application subject.

The Romanian Code of Civil Procedure of 2010, republished, contains regulations on international arbitration in Title IV entitled "International arbitration and the effects of foreign arbitral awards" in Book VII entitled "The international civil trial". Subsidiarily, in so far as there are aspects of composition of the arbitral tribunal, the procedure, the arbitral award, completion, the communication and its effects, not covered by the parties in the arbitration agreement and not assigned for settlement to the arbitral tribunal, they will be resolved by applying accordingly the provisions relating to domestic arbitration.

This legislation provides a definition for the arbitration institution and defines the scope of disputes that can be resolved this way. The new Code expressly provides the opportunity for the State and of the public authorities to conclude arbitration agreements, this possibility being recognized also to legal persons of public law which have as their object of activity economic activities and the law or their articles of incorporation or organization do not provide otherwise.

Regarding the form of the arbitration agreement, the penalty of nullity is preserved from the old regulation, in terms of written form. However, it adds that the condition of written form is completed when the resort to arbitration was agreed by exchange of correspondence, whatever its form, or exchange of procedural acts.

Among the novelties brought by this normative act shall be recorded also the express enumeration of causes for the dismissal of arbitrators, the indication of a longer-term resolution for the arbitration, determining the competent court to settle the action for annulment of the arbitral award.

The regulation of a new Civil Procedure Code was imposed as a natural continuation of the reform of the Romanian judicial system, a rational consequence of the adoption of the new Civil Code¹⁸. The new normative act will replace the Civil Procedure Code of 1865, normative act that has been subjected to repeated legislative interventions in its attempt to be adapted to the constant transformations of the socio-economic environment.

The Civil Procedure Code of 2010, republished, radically changes the overall outlook on the matter, their provisions aiming to respond to current goals such as access of litigants to simple and accessible procedural forms, but also to accelerate the procedure, including in the enforcement stage. Also, the Civil Procedure Code seeks to respond to the requirements of predictability of the judicial proceedings arising from the Convention for the Protection of Human Rights and Fundamental Freedoms and implicitly those stated in the European Court of Human Rights.

Besides practical significance presented by the international commercial arbitration, the study of this institution involves the observation of the rules of arbitration institutions respectively of the legal regulations that ensure a fair, impartial and effective settlement of

¹⁷ Rules regarding the arbitration fees and charges were adopted by the Leading Board of the National Chamber in the Session XXVIII of 6 March 2013.

¹⁸ See the recitals at the Law for the implementation of Law no. 134/2010, published on <http://www.cdep.ro>.

the dispute resolution. Following this analysis, it appears that the rules have evolved over time, closely related to economic development, but also with the political system existing in different states. That is why at international level we notice a tendency of standardizing the regulations in arbitration matters.

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