

RESPONASBILITY OF ARBITRATORS

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ABSTRACT: *Whether an arbitrator may or may not be held liable has been lively discussed in the legal literature. In favor of granting immunity there have been arguments regarding the fact that arbitrators fulfill a quasi-judicial position, so that they should not become subjects of the discontent parties. At the same time, the idea that the arbitrators could be exonerated from liability gave rise to the concern that this would only encourage indifference, fraud or abuse by the use of their power. This study aims to examine the liability of arbitrators in the light of the rules contained in the international conventions relating to arbitration, in the national laws and in the rules of the main arbitral institutions.*

KEYWORDS: *arbitrator, liability, arbitral institution, the Court of International Commercial Arbitration, arbitration.*

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Arbitration has been defined as “ a special legal system, derogatory from common law” (Macovei, 2009), “ a conventional way of resolution of litigation determined by particular individuals invested by the litigant parties with legal power (Popescu, 1983).” The term arbitration consists of more components with regard to the arbitration tribunal, the proceeding and the dispute situation.

Although there is no universally accepted definition of arbitration, certain basic principles can be found in different authors’ attempts to define this notion (Tweeddale & Tweeddale Keren , 2007): the need for an arbitration agreement; the existence of a legal dispute; the settlement of a dispute by a person freely chosen by the parties (Blaise, 2002). In addition, the procedure should be legal, and the Parties agree implicitly to execute the judgment voluntarily. The Civil Procedure Code of 2010, republished¹, defines arbitration in Article 541, paragraph 1, as an alternative jurisdiction having a private feature.

The judicial nature of arbitration has been the subject of a substantial controversy. Three main points of view have been consecrated: one that entitles arbitration with a contractual character, one that allocated it with strictly jurisdictional character and one that confers a mixed judicial character to arbitration.

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According to a contractual conception arbitration represents a collection of legal documents with contractual character (Macovei, 2009). The basis of this type of arbitration is constituted by the will of the parties, who, by understanding the situation of the dispute and its resolution by arbitration, are the ones who determine the arbitrators and their power, the regulations to be followed in the proceeding and the method of establishing the resolution they come to. According to this opinion, the will of the parties is recognized as a normative value above the judicial nature of arbitration, without negating nevertheless, that the interference of the authority of state institutions is inevitable in the assurance of effectiveness of contractual regulations imposed by the parties.

The jurisdictional thesis of arbitration sustains that the state holds legislative and jurisdictional monopoly, in the name of which it has the obligation and right to distribute justice on the entire territory of the country in which its sovereignty manifests in all categories of litigation (Roş, 2000). According to this opinion, the institution of arbitration represents a delegated form of justice which is exerted by people, who are not employees of the state.

Our literature of specialty agrees with the mixed character of arbitration, both contractual and jurisdictional (Dogaru, et al., 1980). The component elements of arbitration condition each other and confer to this institution a complex character.

Whether an arbitrator may or may not be held liable has been lively discussed in the legal literature (Moses, 2008).

International conventions do not contain provisions relating to the liability of arbitrators. The UNCITRAL² model law is silent on this matter, the reason being that the immunity issue of the arbitrators has been a very controversial one; therefore, it could not reach a common conclusion (Roş, 2000).

In favor for granting immunity there are arguments in the sense that the arbitrators fulfill a quasi-judicial position, so that they should not become subjects of the discontented Parties. However, in the absence of immunity, many qualified persons would refuse to arbitrate. On the other hand, the idea that arbitrators could be exonerated from liability, gave rise to the concern that this will encourage indifference, fraud or abuse of power.

The Romanian Code of Civil Procedure of 2010, republished, limits the liability of arbitrators to a number of reasons expressly stated in article 565. Under this normative act, the arbitrators are liable to damages in the following situations: if, after acceptance, they unduly abandon their task. Before acceptance, the liability of the person to whom the position was proposed can not be entailed only as provided for non-compliance with the promise to contract, as provided by article 1279 of the Civil Code – in cases of non-compliance with the promise to contract, the beneficiary is entitled to compensation for damages: if, without valid reason, the arbitrator does not participate in the arbitration proceedings or does not rule the award on the deadline set by the arbitration agreement or

² 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>.

by law. In domestic arbitration, unless the Parties have expressly provided otherwise, the arbitral tribunal shall rule the award within 6 months from the date of its constitution and in international arbitration within 12 months at most; if they do not comply with the confidential nature of arbitration, publishing or disclosing data to their knowledge as arbitrators without the consent of the Parties. One of the principles and strengths of the arbitration procedure is confidentiality; if they violate in bad faith and gross negligence their duties.

A first issue that needs to be stressed is that the Romanian legislator does not distinguish between the domestic and international arbitration in respect of the cases that entail the liability of the arbitrators.

A second aspect that needs to be considered is that our legislation may be regarded as demanding regarding the liability of arbitrators and the wording allows both the parties and the Arbitration Court to have a subjective and widely appreciation of what it means breach of duty by the arbitrators (Roş, 2000).

The legal enumeration does not seem to be limiting and allows therefore the engagement of liability for arbitrators also for cases other than those stated.

Arbitrators can not be held liable for the outcome of the dispute, but for the total or partial failure to fulfill their jurisdictional mission or for committing other damaging acts to the parties in connection with the litigation under judgment.

The same facts are set out in article 19 of the ICC Rules of Arbitration of the International Chamber of Commerce, of 5 June 2014, which are likely to attract the arbitrators' revocation. As for the financial liability of the arbitrators, it is limited by the article 19, paragraph 3 of the Rules, noting that it may occur only where the facts are committed in bad faith or gross negligence. Another limitation consists in that the arbitrators may respond only to the extent of the fee received.

Concerning the basis of the arbitrators' liability, there is no uniform opinion in our doctrine. Some authors support the thesis of the exclusively contractual nature of the arbitrators derived from non fulfillment or defective fulfillment or delay in fulfilling their obligations under the investiture contract and others consider that their liability is based on tort (Prescure & Crişan, 2005). As for us, we believe that the liability of arbitrators has a mixed basis, both contractual and in tort. Thus, by accepting their mission, they must undertake to fulfill the judicial positions, but also the conditions of the arbitration agreement and of the procedure rules.

Regarding the disciplinary liability, article 5 paragraph 1 of the Regulation on the organization and functioning of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania provides that, in cases where the arbitrator commits serious violations of the obligations incumbent upon his mission of arbitrator, he may be removed from the list of arbitrators, following the reasoned decision of the Court of Arbitration College.

In terms of criminal liability, we notice that in the New Romanian Criminal Code there are express provisions on the liability of arbitrators, respectively article 293 according to which the provisions on accepting and soliciting bribes apply accordingly to persons who, based on an arbitration agreement, are called upon to make a judgment on a dispute that is given to them for settlement, by the Parties to this Agreement, regardless the arbitration procedure is conducted under the Romanian law or under other laws.

The Rules of the International Arbitration Court in Paris acknowledge for arbitrators an absolute immunity, assimilating them with the state judges. Thus, article 40 of those Rules provides arbitrators' exemption from liability for any act or omission related to the arbitration, except cases where such an exemption contravenes the provisions of applicable law.

These provisions have been criticized by the French doctrine (Sytsma, 2011), which appreciated that these provisions are likely to overprotect the arbitrator, with the risk that he treats too lightly the mission entrusted.

The French legal literature (Guyon, 1995) argued that although the judicial arbitrators perform a jurisdictional task, their responsibility is one of *common law*, not subject to special arrangements related to the liability of the state judges. The liability of arbitrators is regarded as a contractual one, which draws from the rules applicable to the liability of trustees and which requires a proven fault.

The reasons that may lead to the liability of arbitrators refer to the cases where arbitrators accept this mission despite the existence of an incompatibility, where they exceed the limits for the arbitration award, or if they commit an error likely to lead to the annulment of the award (Guyon, 1995).

The older French jurisprudence held that arbitrators do not enjoy immunity in respect of their liability on the existence of a fault in the performance of their arbitration responsibilities or the fulfilling or control of the arbitral proceedings. The recent French Court awards conclude that only claims for entailing liability for fraud and serious errors will be admitted (Born, 2009).

In the case of L'Oréal, the court admitted the application for incurring the liability of arbitrators following the discovery that the arbitrator had a relationship of interest with one of the Parties. The Supreme Court of Justice, in the case Consorts Juliet, admitted the application for incurring the liability of an arbitrator on a contractual basis for not ruling the award within the established deadline, stating that it was an obligation of result.

In the Italian law, Article 813 of the Civil Procedure Code expressly provides that, in case the arbitrators do not rule the award within the time established, or they give up their duty after acceptance, they can be forced to compensate for damages.

The Rules of the International Court of Arbitration in London provide within Article 31.2 that arbitrators are not liable for any act or omission in connection with the arbitration, unless the respective act or omission constitutes a culpable act of that person. This immunity extends to all members of the Arbitration Court. Moreover, after the award is ruled, neither the judges nor the members of the Court are obliged to make any statement on any matter of arbitration and shall not be allowed the capacity of witnesses in any proceedings relating to arbitration.

The English law on arbitration of 1996 contains regulations on the judges' immunity in Section 29, entitled "Immunity of arbitrator". The provisions contained in this section have been introduced on the recommendation of DAC (Departmental Advisory Committee) which considered that the immunity of the arbitral tribunal should be the same as the immunity of the judge. DAC argued the following (Tweeddale & Tweeddale Keren , 2007): in cases where the arbitrators are not granted immunity, the purpose of the arbitration process may be compromised. The prospect that the unsuccessful Party will desire the re-arbitration on the grounds that a competent arbitrator would not have decided in his favor is daunting.

An arbitrator is not liable for anything that he performed or omitted within his responsibilities as arbitrator, except for the cases where he acted in bad faith, as provided by paragraph 1 of Section 29 of the English law on arbitration. This provision is without prejudice to the responsibility of the arbitrator due to the fact that he gave up on his position.

The concept of bad faith has been interpreted either as a grudge towards a personal feud or a desire to harm, either as a lack of competence to take a decision on the matter (Rubino-Sammartano, 2001). In case law, the term was interpreted as equivalent to the notion of dishonesty or equivalent to other terms, depending on the context in which it is used and the type of person who uses it, but in all cases, the moral component is essential (Tweeddale & Tweeddale Keren, 2007).

The Arbitration Rules of the American Arbitration Association expressly provide at section R-52 that the arbitrator will not be liable to any party for any claim for damages in relation to an arbitration conducted in accordance with these rules.

By analyzing the provisions of the laws and rules of the arbitration institutions, one may find that there are two major trends in terms of the arbitrators' liability: granting an absolute immunity and limited liability for certain determined acts thereof. Thus, in the legal system of common law (jurisprudential law) there is the bias to grant immunity to arbitrators, while in the civil law systems the arbitrators' responsibility could be engaged.

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