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ARBITRATION – AN  
ALTERNATIVE SETTLEMENT  
OF INTERNATIONAL TRADE  
DISPUTES

Theoretical  
article

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**Abstract**

*Arbitration is today considered a form of justice adjusted specifically for disputes between traders, representing a special attraction for the business world. Arbitration can be considered as a refuse reflex from the traders to obey close-minded forms of common law procedure, characterized by excessive rigor or conservatism and as an expression of their propensity towards more malleable means of settling disputes, specific to arbitration.*

The complexity of international economic relations and the celerous deployment of these operations have led to the diversification of the methods used by traders for settling disputes between them.

Patrimonial disputes arising out of commercial law relations are likely to be resolved by conciliation, mediation, trial or by arbitration. The special literature (Voicu M.,2002) observed that in international trade disputes between the contractors are to be settled in an overwhelmingly proportion by international commercial arbitration, an alternative way of resolving foreign trade disputes quickly and fairly.

International commercial arbitration plays an important role not only in resolving disputes, but also in the development of commercial practices and in creating a climate of trust and good faith in the business environment.

The expansion of commercial arbitration is based on its flexibility of adjusting to international trade practice. International commercial arbitration means removing the international trade dispute by the will of the conflicting parties from the courts of common law, and referring the matter to specialized jurisdiction, constituted ad hoc or institutionalized.

International commercial arbitration is defined as a legal institution provided for resolving international commercial disputes, by persons entrusted with this task, even by the contracting parties of the dispute. The concept of international commercial arbitration is established in international conventions (European Convention on international commercial arbitration in Geneva in 1961), specialized legal doctrine and practice of international trade. The expression "international commercial arbitration" was promoted by the European Convention on Arbitration (Geneva 1961) and Law-type enacted by the UN Committee Trade Law (1985).

International commercial arbitration has proven to be the most appropriate way to resolve disputes arising out of commercial relations with foreign elements, because of the numerous advantages it presents compared with common law jurisdictions: the simplicity and flexibility of the process, secret debates, smaller costs, specialized arbitrators, knowledge of international trade rules and commercial practices.

International commercial arbitration allows parties to avoid conflicts of jurisdiction and conflict of laws. The existence of a specific jurisdiction confers certainty for the participants in the international trade legal regarding their contractual relations.

Trade freedom acquires through arbitration additional forms of affirmation and consolidation; facilitating operative solutions to the disputes between business partners belonging to different legal orders, arbitration allows the blurring of differences in national regulation systems (many of

them insufficiently flexible to meet modern needs) and, implicitly, it removes barriers and difficulties owed to them, thereby encouraging the free exchange of values and conferring a high level of safety in international economic relations.

Consecration of international commercial arbitration was conducted in the period between the two world wars, and the aftermath of the Second World War was one generalization in a geographical sense, extending in the Far East and in Latin America. During the same period there was also the development of many types of specialized arbitration, with a permanent nature. In the first International Congress of Arbitration in Paris (1961) it was stated that "the characteristic feature of modern international arbitration is its institutionalization, meaning the proliferation of arbitration bodies of all kinds."

#### *The actuality of the International commercial arbitration institution*

At present, international commercial arbitration institution acquires new valences and meanings, being adopted by almost all trade partners in the world (Macovei I.,2014).

The timeliness and extent of ways to resolve disputes and litigation between parties, in the legal relations with commercial and foreign characteristics, is explained by multiple considerations and motivations, of which the most important is the pragmatic nature. For traders, allowing good relations in the business development, in the trade relations, is more important than cutting a dispute in court. During the execution of the contract there is a strong emphasis on the collaboration between parties, to prevent difficulties and avoiding disputes, and if they still have occurred, they will be resolved amicably. If amicable settlement is not possible, resorting to judicial process to resolve the dispute becomes inevitable.

Because of the inadequacy of judicial proceedings, traders turn less to courts and more to arbitral tribunals (BabiucV.,2001). This change of essential principles induces the need for resolving any disputes of commercial nature, part of private law, in an efficient and economical mean, determining implicitly the growth and development of international trade. That is why, in terms of commercial disputes arbitration is preferred over the judicial procedures belonging to national courts of common law, procedures that are often cumbersome, expensive and time-consuming.

The current importance of international commercial arbitration is motivated by considerations relating to the special qualification available to arbitrators in solving international trade problems, by the possibility of the parties to nominate, under the free will of agreement, the arbitration court, the arbitrators, the law applicable to the legal relation concluded as *lex causae* etc., which is inconceivable in terms of common judicial proceedings.

The argument that in today's world international trade is one of the basic expressions of "globalization", determines, as a natural consequence, simplifying the procedures for the settlement of undesirable conflicts between partners, which finds its expression in the major advantage of international commercial arbitration.

Currently, participants in international commercial trades in commercial, as states - subjects of international public law, or as traders - subjects of international private law, are seeking modern ways to meet new conditions for the conduct of international trade and hence contribute to resolving disputes arising from such relations, being well known the availability of fast, efficient and economical dispute resolution conducted by international commercial arbitration, and this is a guarantee of the development of trade and investment.

In the same context, it is noticed that the need for mediation of international commercial disputes by arbitration, instead of court proceedings held before national courts. By consecration of the important and major role of the international commercial arbitration, results the need to uniform the national legislations in this matter.

The specialist in commercial arbitration (Paulsson J.,1999) have noticed that the methods in resolving a dispute by arbitration have perfected, due to experience and to correlating regulations with the requirements of their practice and by adapting them to these requirements. Therefore, parties are subject to arbitration regulations "known in trade circles" and also useful, because they are in accordance with the evolution of commercial relations (Mazilu D.,2001). Featuring the parties power to choose, by their agreement, the arbitration body, they avoid the risks of eventual forfeiture and invalidity of a formal nature, given the fact that they are previously informed about them.

International commercial arbitration is governed by important international sources as the European Convention on international commercial arbitration (Geneva1961) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), and a variety of both national and international regulations which are in a continuous improvement and adaptation to the exigencies of international trade. States of the international community have worked hard to adopt, usually within international organizations, legal instruments of the kind of multilateral international conventions. At the same time, provisions on international commercial arbitration are the subject of bilateral or multilateral international treaties for economic cooperation or in other aspects.

International commercial arbitration law (*de jure*) resolves the dispute based on the material and procedural regulations that are applicable in that dispute.

Determining the legal nature of international commercial arbitration has imposed an analysis of several theoretical concepts, since the qualification of the legal nature of arbitration is especially important in terms of private international law.

According to the *contractualist concept*, international commercial arbitration is presented as a set of legal acts of a contractual nature. The judicial powers and competence of arbitrators result from the common will of the litigants, a will which has normative value (Macovei I., 2014).

According to the *judicial concept*, the institution of arbitration represents a form of delegated justice that is exercised by persons who are not state employees. By deeming the activity of judicial courts, the arbitral award is granted with *res judicata* and the possibility of enforcement. Using provision, the state may authorize the parties that, in some areas, to recourse to arbitration. If one accepts that arbitration has a jurisdictional nature, therefore it will be recognized that the law enforcement within the state court where the arbitration procedure is pending has priority (Macovei I.,2014).

Unfortunately, each of these theses caused reserves, because they do not fully explain the complex nature of arbitration, context in which, the doctrine currently tends to share a mixed conception, an eclectic one.

Within the *mixed concept*, the legal source of arbitration has a contractual nature, expressed in the arbitration agreement. By derogation from this rule, the legal basis of arbitration may be represented by the mandatory provisions of an international convention.

Equally, the settlement of the dispute presents a jurisdictional nature, which is externalized in the arbitral award. Therefore, a contract takes effect in a procedural way. Consequently, the mixed thesis tends toward a compromised formula, in which *lex contractus* involves a series of correctives arising from the jurisdictional characteristics of arbitration. By decoupling its components, arbitration has an eclectic nature, both contractual and judicial (Macovei I.,2014). The contractual nature of arbitration is manifested in the conditions of validity of the arbitration agreement. The issues regarding the judicial nature concerns the elements of the arbitrary claim and the statement of defense, systems appointing arbitrators, conducting the debates, the sentencing, appeals, enforcement procedures.

International commercial arbitration corresponds to the following characters:

a) The *arbitral character* means to distinguish this jurisdiction to the common law in that the source of the power of arbitrators to settle the dispute is the will of the litigants and not the law, accord expressed in the arbitration convention (Leş I. - coord., 2015) .

b) The *commercial character* arises from the fact that its purpose is to dispute which have

arisen or will arise from trade operations (Diaconu N.,2005).

c) The *international character* derives from the presence of foreign elements in disputes subject to arbitration (Leş I. - coord., 2015).

#### *Ad-hoc arbitration and institutional arbitration*

Ad hoc arbitration (the occasional one) was the traditional way of arbitration which works only in order to resolve a determined dispute. In some legal systems, to ensure the constitution of the arbitral court and to the normal course of the proceeding, there exist provisions which organize an administrative mechanism, called competent authority or "appointing authority", that intervenes mainly for the appointment of arbitrators. The competent authority will resolve any request for recusal of arbitrators under the provisions of *lex causae*. Ad hoc arbitration presents an essentially voluntary character, as it is an optional procedure that appears occasionally and whose existence ends with the pronouncing of the sentence. Even if,generally speaking, it remains voluntary,there are cases where by international agreements, participants in international trade relations are bound by mandatory rules, to use it.

The system organized by the Geneva Convention of 1961, the functioning of ad hoc arbitration is independent of the jurisdiction of common law. In the expression of art. 1 section 2, letter b of the European Convention on International Commercial Arbitration, ad hoc arbitration means "... regulating disputes...by arbitrators appointed for specific cases."

The autonomy of ad hoc arbitration was achieved by expanding the powers conferred on arbitrators and by creating Pre-arbitration administrative mechanisms.

Administrative mechanisms established by the Convention are the President of the competent Chamber of Commerce and the Special Committee. In the absence of agreement between parties or arbitrators, the administrative mechanisms are necessary to ensure that appropriate measures will be taken for organizing the arbitration. Thus, the Geneva Convention of 1961 explicitly provides in art.VI pt. II letter a, the faculty of the parties to select the law which will govern their arbitration. The arbitration procedure is conducted according to par.1 of article IV, as determined by the parties. They have the power to appoint arbitrators or to establish rules under which they will be appointed in case of dispute, to determine and fix the procedural rules to be followed by arbitrators (Macovei I.,2014).

In the absence of an agreement between the parties on the measures needed to organize arbitration, par.3 article IV states that they will be taken by the arbitrator or arbitrators which have were appointed, who have the ability to cause conflict, that would be appropriate in that case (Article VII, par.1).

*Institutional arbitration* has emerged recently amid the decline of the occasional arbitration caused by organizational deficiencies of improper conduct for one of the parties.

The more pronounced the preference in favor of institutional arbitration which is supported by the fact that the parties, traders, participants in international trade relations, which are separated by great distances is, the more wanted is the organization of the arbitration to achieve specialists established in known places, knowledge of business practices and the languages spoken by the parties, to apply the same material and procedural rules. Thus the first permanent institutionalized arbitration centers functioning within the national and international chambers of commerce or large corporate or professional associations arose, as institutions specializing in popular shopping areas and major ports around the world.

The institutional character of the arbitration results from the existence of a law that regulates the functioning of the courts and the existence of a predetermined number of arbitrators (Leş I. - coord., 2015).

Permanent institutional arbitration is performed through an institution organized in private, nongovernmental, which pre-exists the dispute. Judicial powers shall be exercised continuously without being dependent on the duration of a particular dispute.

Continuity is configured by the existence of a proper organization and functioning. Thus, the provisions of art. IV, par. 1 lit. of the Geneva Convention of 1961 established that the parties to an arbitration agreement are free to provide that their disputes will be subject to a permanent arbitration institution, in which case the arbitration shall be conducted in accordance with the rules designated institution.

The main structural elements of arbitration are the permanent appointment system of judges, arbitrators and secretariat list. Everything is determined by regulation and functioning of the permanent arbitration.

The arbitral tribunal may consist of a certain person or a collegial body. The competent authority shall designate the arbitrator when the parties refuse to appoint and replace an arbitrator. Similarly it is designated the presiding arbitrator, if the arbitrators of the parties cannot agree. The list containing the names of those arbitrators that have the necessary training to resolve international trade disputes. The list shall be updated periodically and is being made available to the litigant parties to decide on the choice of arbitrators. When registering the arbitrators on the list, the principle of the selection applies, and in exercising the option of the parties, the principle of the election applies (Macovei I.,2014).

The Secretary carries out the administrative functions of the institution of arbitration. The attributions of the Secretary

consists in communication of procedural documents, summoning the parties, participation in debates, preparation of the session, drafting arbitration decisions.

The arbitration procedure is governed by the provisions of the Regulation of the institution in front of which it was brought before. Corresponding to these rules, the arbitration procedure will be mandatory or optional. In relation to the character of the procedural provisions, the parties will or won't have the possibility to agree on the amendments it deems necessary. Permanent arbitration may have a general or specialized material competence and arbitration institutions have various territorial jurisdictions in resolving trade disputes. Specialized arbitration institutions can only solve disputes in certain areas of trade activities: eg, the arbitral tribunal Bremen cotton exchange, the Court of Arbitration for international trade of seeds in Geneva. From the point of view of territorial jurisdiction, arbitration may be bilateral (Arbitration Chamber of the Franco-West German products of the soil or the Commission US-Canadian Commercial Arbitration), regional (Commission Scandinavian Arbitration for skins or the international commercial arbitration) and international (Court of arbitration of the International Chamber of Commerce in Paris).

Depending on the attributions performed by the permanent arbitration centres, they are administered and settlement arbitrations. (American Arbitration Association-AAA and the London

Court of International Arbitration (LCIA) are considered arbitration institutions). In general, permanent arbitration institutions are administered or organization arbitration institutions. They perform a set of tasks related to the dispute and litigants, but does not resolve the dispute, the administrative structures and not the judicial structures. Such centres are presented as a mechanism to facilitate administrative and procedural arbitration organization.

In international doctrine (Redfern A., Hunter M., Smith M., Robine E., 1994) it was pointed that the International Chamber of Commerce in Paris that provides a significant example of semi-administered arbitration. The Court of Arbitration appoints arbitral tribunal and secures the place of arbitration in the absence of agreement between the parties, sets its own arbitrators and administrative fees. Although the court secretary receives copies of official documents submitted to the arbitral tribunal by the parties, administration and arbitration proceedings are subordinate to the solving mode agreed by the parties, the agreement concluded by them and only in the case of a missing agreement, the arbitral tribunal will decide. Specialists appreciated (Redfern A., Hunter M., Smith M., Robine E., 1994) that the future in international commercial arbitration lies in its institutionalization. Arbitration as a legal institution "has expanded and will continue to expand due to its effectiveness", demonstrated in international commercial dispute resolution (Sanders P., 1999).

## Reference list

- [1] Babiuc V., 2001, *Treaty on International Trade Law*, Sylvi Publishing House, Bucharest;
- [2] Diaconu N., 2005, *The characteristics of international commercial arbitration*, Commercial Law Revue nr.4/2005, Bucharest;
- [3] Leş I. (coord.), Jugustru C., Lozneau V., Circa A., Hurubă E., Spinei S., 2015, *Treaty of civil procedural law*, vol. II, Universul Juridic Publishing House, Bucharest;
- [4] Macovei I., 2014, *Treaty on International Trade Law*, Universul Juridic Publishing House, Bucharest;
- [5] Mazilu D., 2001, *Treaty on International Trade Law*, Lumina Lex Publishing House, Bucharest;
- [6] Paulsson J., 1999, *Awards set aside at the place of arbitration*, in "Enforcing Arbitration Awards under the New York Convention. Experience and Prospects" United Nations, New York;
- [7] Redfern A., Hunter M., Smith M., Robine E., 1994, *Droit et pratique de l'arbitrage commercial international*, Paris;
- [8] Sanders P., 1999, *The making of the Convention, Experience and Prospects*, United Nations, New York;