ARBITRATION. IMPLICATIONS OF COMMUNICATION AND OF OTHER SECONDARY FACTORS

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ABSTRACT: *Arbitration is the institution based on which the parties empower one or more individuals, to the extent permitted by law, in the given circumstances, to settle the legal dispute between them thus drawing out that dispute from the courts' jurisdiction. This study aims to analyze the implications of communication and of other determining secondary factors in the parties' option for choosing arbitration but also the manner of performance of this alternative procedure regarding the resolving of the disputes.*

KEY WORDS: *arbitration, communication, procedure, arbitration award, arbitration agreement*

Business people preference for arbitration as an alternative way of resolving the dispute, results from the fact that arbitration has proven a form of justice adapted to their needs.

The parties may choose among the different forms of arbitration, those that best fit their interests.

The international commercial arbitration displays several forms, there being a number of criteria used for their classification.

Thus, following the organizational structure, the parties may opt for theinstitutional and occasional (ad-hoc) arbitration[17]. Arbitration is institutional insofar as for the resolving of the dispute the power is given by the parties to an institution or permanent organization which has usually an inherent organizational structure, personnel and rules, while occasional or ad-hoc arbitration is established for a particular dispute.

Occasional or ad hoc arbitration is established by the will of the parties to resolve an induced dispute and its existence ends with the resolving of the case, thus having a limited duration[18].

The Romanian legal literature[19] showed that ad hoc arbitration is a form of non-state jurisdiction with a particular feature, susceptible of being used in international trade relations, established by the will of the litigants with the aim of settling their dispute.

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[17]SeeIoanMacovei, *Dreptulcomerţuluiinternaţional*, vol. II, C.H. Beck Publishing House, Bucharest, 2009, p. 269.

[18]See Ioan Macovei, *op.cit.*, p. 270.

Ad hoc arbitration is organized at the initiative of the parties, aiming to settle an induced dispute with a temporary legal existence, which ends with the release of the award. It is necessary that within this form of arbitration, the parties to determine all the elements capable of rendering functionality to arbitration, respectively the names of arbitrators, the place of arbitration, the applicableprocedure, the language used within the debates, the time when the award is released[20], etc.

What characterizes this type of arbitration is the lack of any predetermined rule and the fact that it is independent of any permanent institution[21].

The freedom of the parties to establish rules of applicable procedure may also be a disadvantage in those cases where one of the parties deliberately obstructs the progress of the process.

To avoid such situations, the European Convention on International Commercial Arbitration in Geneva from 1961 sets out the cases where an external entity can intervene for the dispute to be resolved. These cases are set out in Article IV of the Convention: when the parties have agreed to submit their dispute to a permanent arbitral institution without that institution to be designated; when the parties could not even agree on the procedure of arbitration; when the parties have decided to submit their dispute to an ad hoc arbitration but did not point out the necessary steps in organizing it. The legal literature highlighted the lack of practical application of the solutions provided by the Convention[22].

One of the advantages of ad hoc arbitration is that parties have to pay costs in an amount less than in the case of an institutional arbitration[23]. This type of arbitration is most often used in cases where one party is a state and requires more flexibility in the advancement of the proceedings[24].

The institutional or permanent arbitration is achieved through an organized institution which pre-exists the dispute, its judicial powers being exercised continuously without being dependent on a particular dispute[25].

In the view of the European Convention on International Commercial Arbitration in Geneva,the institutional arbitration is actually the regulation of the disputes by permanent arbitration institutions[26]. The prestigious authors showed that the institutional arbitration is

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[19]SeeMircea N. Costin, Sergiu Deleanu*Dreptulcomerţuluiinternaţional. II. Parteaspecială*, Lumina Lex Publishing House, Bucharest, 1997, p. 152.

[20]SeeTitus Prescure, *Curs de arbitraj comercial*, Rosetti Publishing House, Bucharest, 2005, p. 24.

[21]See Andrew Tweeddale, Kerern Tweeddale, *Arbiration of commercial disputes. International and English Law and Practice*, Oxford University Press, New York, 2007, p. 89.

[22]See Mircea N. Costin, Sergiu Deleanu, *op. cit.,* p. 154.

[23]See Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, New York, p. 9, and Indira Carr, *International trade law*, Cavendish Publishing Limited, London, 2005, p. 623.

[24]See Margaret L. Moses, *op. cit.,* p. 9.

[25]See Ioan Macovei, *op. cit.,* p. 270.

[26]Article 2, letter b) of the European Convention on International Commercial Arbitration in Geneva from 1961.

that form of international arbitration which does not depend on the duration of a given dispute and which involves the exercise of jurisdictional attributions uninterruptedly, being organized in a framework institutionalized by law and having permanence and continuity features[27].

The permanent arbitration institutions display indisputable advantages[28]: the professional competence of arbitrators, the default procedure which the parties can recognize and easily can comply to; opportunities to clog the gaps in the arbitration agreement if it is incomplete or insufficient; the location of arbitration, etc.

Also, a permanent arbitration institution enjoys stability, greater opportunities to help create a uniform practice thus giving the parties adequate conditions for proper performance of arbitration (suitable premises, secretarial staff, etc.)[29]. Moreover, some arbitration institutions analyze arbitration awards and communicate to the arbitratorspossible modifications of the shape or of the relevant issues that should be considered by them[30].

The inherent regulations oforganization and functioning of the arbitration institution are effective in dealing with various situations that may arise. In addition, an award given by a prestigious institution of arbitration enjoys greater credibility and can not be questioned[31].

Doctrine[32] showed that, although there are a variety of permanent arbitration centers, in addition to the differences between them, they have a number of common elements.

Firstly, the institutionalized arbitration is established as a permanent vocation jurisdiction with the calling to settle any dispute falling within its jurisdiction and on which it was invested to fulfill the arbitration proceeding therefore it is not established to solve a specific dispute practicallyinduced.

Secondly, there is the existence of an inherentRegulation of organization and functioning of the arbitration institution. The rules include permanent organizational structures specific to the arbitration institution as the competent authority to appoint arbitrators, the list of arbitrators and the secretariat. The Regulation also contains rules of procedure for resolving the disputes for which the arbitration court is vested.

It should be stressed that some of the provisions of the Regulation shall be binding on the parties, being considered as implicitly accepted by them and others are optional, so that the parties can bring the desired amendments.

Regarding the powers conferred to arbitrators, arbitration may be in law and in equity. Arbitration in law is conducted by law while arbitration in equity is that arbitration where arbitrators are dispensed by applying rules of law, the judgment being made by the arbitrators'conscience and forethought.

Arbitration in law or "strict juris" or "in jure" settles disputes according to the law, as well as the legal courts do[33].

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[27]SeeMircea N. Costin, Sergiu Deleanu, *op. cit.,* p. 154.

[28]See Tudor R. Popescu, *Dreptul comerţuluiinternaţional*, Editura Didactică şi Pedagogică Publishing House,Bucharest, p. 402.

[29]See Giorgiana Dănăilă, *Procedura arbitrală în litigiile comeciale interne*, Universul Juridic Publishing House, Bucharest, 2006, p. 37.

[30]See Indira Carr, *op. cit,* p. 622.

[31]See Margaret L. Moses, *op. cit.,* p. 9.

[32]See Mircea N. Costin, Sergiu Deleanu, *op. cit.,* p. 155.

Arbitration in equity does not have a definition, it is usually viewed in opposition to the arbitration in law and it is also called “de facto”, “amiable compositeur”, “ex aequitate” or “ex aeque et bono”[34]. The rules of equityafter which the dispute is resolved are not foreign and not opposed to the law, the requirement being for the arbitrator to use those rules of equity that have legal relevance, *ie* the part of equitynotion that is closest and tied to the content of the concept of law[35].

In general it was found that a limited number of international arbitration agreements provide the empowering of arbitrators to judge “ex aequo et bono” or as “amiable compositeur”[36], although such clauses are possible under their freedom of will.

As regards the distinction between “ex aequo et bono” and “amiable compositeur” there is no unanimous opinion. While some authors consider them synonymous[37], others appreciate that the term “ex aequo et bono”regardsthe attenuation by the arbitrators of the strict law, while the term “amiable compositeur” requires the arbitrators to seek the reconciliation of the parties, the settlement of the conflict between them[38].

It was argued that under such a clause, the arbitrators are free to judge outside any legal norms, being entitled to act according to their own sense of justice and commercial practice, while others suggested that arbitrators should apply the national law first and then to adjust or reduce its results if they consider appropriate or just[39].

The option for arbitration in equity makes useless any verification system of private international law, but the arbitrators empowered to judge in this way are not prevented to base their judgment on the law, when its application leads to the most correct solution, or to refer to a certain legal text,considered to respond to the best idea of equity[40].

It was revealed that arbitrators on equityare not based solely on practical reasons, but they judge by rules and principles most likely to be applied in any similar situation[41]. Arbitration in equity provides a rather easier procedure for settling disputes than placing the arbitration activity outside the law[42].

Parties who are considering inserting a clause which entitles the arbitrators to judge “amiable compositeur” and “ex aequo et bono” should first ensure that the award so rendered

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[33]See Ioan Macovei, *op. cit.,* 2009, p. 271.

[34]See Viorel Roș, *Arbitrajul comercial internațional,* Monitorul Oficial Publishing House, Bucharest, 2000, p. 400.

[35]See Tudor R. Popescu, Corneliu Bărsan, *Dreptul comerțului internațional. vol. IV. Arbitrajul comercial internațional*, Bucharest, 1983, p. 99.

[36]See Gary B. Born, *International Commercial Arbitration*, Kluwer Law International Publishing House, Netherlands, 2009, p. 2238.

[37]See Andrew Tweeddale, Keren Tweeddale, *op. cit*., 190.

[38]See Mauro Rubino-Sammartano, *International Arbitration. Law and Practice*, Kluwer Law International Publishing House, Netherlands, 2001, p. 472.

[39]See Gary B. Born, *op. cit.,* p. 2240.

[40]See Viorel Roș, *op. cit.,* p. 404.

[41]See Ioan Macovei, *op. cit.,* 2009, p. 273.

[42]See Ion Dogaru, Tudor R. Popescu, Constantin Mocanu, Maria Rusu, *Principii și instituții în dreptul comerțului internațional,* Scrisul Românesc Publishing House, Craiova, 1980, p. 352.

may be acknowledged and enforced by the law of the state in connection with the litigation.This is, even though the validity of such a clause results from thespecific international conventions and rules of the arbitration institutions. Thus, the Geneva Convention of 1961 provides in Article 7 section 2 that the arbitrators will decide as amiable mediators, if it is the will of the parties and if the law governing the arbitration permits this proceeding.

In a similar formulation, the Convention on the settlement of investment disputes between States and people of other states concluded at Washington in 1965 provides under Article 42, paragraph3, that the arbitral tribunal is entitled to decide "ex aequo et bono" if the parties have so agreed.

UNCITRAL Model Law expressly provides that the arbitral tribunal will decide "ex aequo et bono" or as "amiable compositeur" if the parties have expressly authorized it to do so. We note that one can not speak of a presumption regarding the insertion of such a clause, the will of the parties must win without question.

The Rules of Arbitration Procedure of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania[43]provide in Article 63, paragraph2, that based on the explicit agreement of the parties, the arbitral tribunal may settle the dispute in equity. In such a case, the award is given on the basis of the arbitral tribunal intimate conviction, by mitigating the strict application of the rules of law.

Finding an equitable solution is undoubtedly a difficult endeavor, found under the sign of numerous and various assessment criteria[44]. Thus, the arbitrators or the arbitrator will attempt to restore the balance of the contract, to share equally the unforeseen risks of the contractual operation, the losses and possiblythe gains resulting from the circumstances that the parties have not foreseen. The arbitration in equity is conducted by arbitrators' consciousness[45]. Regarding the law governing the validity of the clause by which the parties would choose forthe arbitrators to judge as amiable mediators, it is a matter of substantive law, therefore it will be governed by lexcontractus[46].

The Court of Appeal inParis summed up, in a judgment of a case,the implications of the inserting of the clause "amiable compositeur", arguing that it is a conventional renunciation of the effects and of the benefit of the rules of law, the parties thus losing the power to require their strict application of the rules of law and the arbitratorsconcomitantly receiving the power to modify or to moderate the consequences of contractual stipulations becausethe equity and good interests of both parties request it[47]. Also, the court seized with an

[43]Published in Official Gazette of Romania, Part I, no. 613 of 19 August 2014.

[44]See Ion Deleanu, Sergiu Deleanu, *Arbitrajul intern şi internaţional*, Rosetti Publishing House, Bucharest, 2005, p. 236.

[45]See Ioan Macovei, *op. cit.,* 2009, p. 271.

[46]See Arbitration award no. 53 of 1985 of the Commission for Arbitration attached to the Chamber of Commerce and Industry of Romania, in *Revista Română de Arbitraj*, 2011, no. 2, p. 45.

[47]See Jacques Béguin, Michel Menjucq, *Droit du commerce international*, Litec Publishing House, Paris, 2005, p. 1038.

action for annulment against the arbitration award will have to take a decision applying the same strict law, acting practically to the same extent as thearbitrators[48].

The only restriction regarding the faculty granted to arbitrators to decide in equity is represented by the public order.

Regarding the distinction between arbitration of strict law and the arbitration in equity, the legal French literature[49]stressed that regarding the applied procedure,they do not differ, both of them being required to subject to the same principles. Relative to the merits of the case, the arbitrators who judge in equity often found convenient to apply the rules of law while in arbitration of strict law, equity clearly should not be missed.

In the international trade, arbitration has proven that it has a utility and efficiency that can not be challenged. The parties'option for one or another form of arbitration, is influenced by a number of factors. Communication between the parties is essential, since a valid arbitration can not exist without the agreement of the parties in this regard, expressed in the form of an arbitration clause or of compromise.

Also, during the settlement of the dispute, the parties are able to reach, with the support of arbitrators, the amicable settlement of the dispute. Clearly, such a transactional solution is not possible only as a result of the negotiation and effective communication between the parties respectively between the parties and the arbitrators.

Another determining factor in choosing arbitration is economic in nature. Although initially it was considered that one of the advantages of arbitration would bethe reduced costs, arbitration costs are currently quite high, which even led to the conclusion that arbitration would be a “luxury justice”.

The timeliness in resolving the disputes between contractual partners is another undeniable advantage of arbitration and also an element influencing the parties in choosing alternative ways of resolving the disputes. Unlike state justice, the parties have the guarantee of resolving the disputes in a short term, which fully complies with the relations within the international trade law.

By the option for arbitration, the parties deliberately renouncethe jurisdiction of the courts and the procedure followed by them in resolving the disputes, namely the guarantees of independence and impartiality that the state justice offers. Consequently, in case the parties are conservative,they will notchoose arbitration easily. Resolving the dispute through arbitration requires the parties to takesome possible risks, such as that relating to lack of imperium of the arbitral tribunal, which may be observed in the taking of evidence and in the taking of measures with ensuring and temporary feature.

[48]See Eric Loquin, *Le contrôle de l'exercice par l'arbitre de son pouvoir d'amiable compositeur, suite!,* in Revue trimestrielle de Droit Commercial et de Droit Économique, 2009, p. 550.

[49]See Jacques Béguin, Michel Menjucq, *Droit du commerce international*, Litec Publishing House, Paris, 2005, p. 1040.

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