
***CONSIDERATIONS ON THE CHALLENGE, ABSTENTION, DISMISSAL AND
REPLACEMENT OF THE ARBITRATORS***

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Abstract: The arbitrator capacity may stop by challenge, abstention, dismissal and replacement. This survey aims to analyze the procedure regarding each of these grounds regarding the termination of the arbitrator capacity, the distinction between these institutions in the light of the relevant case law but also in the light of the regulations contained in the international conventions relating to arbitration in the national legislations and the rules of the main arbitration institutions.

Keywords: arbitrator, challenge, abstention, dismissal, replacement.

Lately, in the recent years, the challenging of the arbitrators became a common action in the international commercial arbitration¹. The main reason justifying the challenge of an arbitrator refers to the existence of a conflict of interest, but the arbitrators may be challenged also for misconduct².

Traditionally, most arbitration rules provided that the arbitrator may be challenged on the same grounds as a judge. Today, following the model of UNCITRAL Arbitration Rules of 1976, most of the regulations provide that the judges may be challenged for reasons related to their impartiality and independence³. Thus, the Swiss Arbitration Rules 2006 stated in Article 10 section 1 that arbitrators may be challenged if circumstances exist and give rise to justifiable doubts as to the arbitrator's impartiality and independence. For the same purpose are the provisions of Article 19 of the Arbitration Rules of the Court of Arbitration of Milan which provide that each party may file a reasoned challenge against an arbitrator on any ground that casts a doubt on his/her independence or impartiality.

Challenging applications can be drafted against any arbitrator regardless of how he was appointed, either in accordance with the rules of arbitration institutions or in accordance with national legislation.

The UNCITRAL Model Law contains in the Article 12 provisions relating to the challenge of arbitrators. Therefore, the person appointed as an arbitrator shall inform on the circumstances that give rise to legitimate doubts on his impartiality and independence. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts on his impartiality or independence, and if he does not possess qualifications agreed by the parties. A party may challenge an arbitrator only for reasons which it becomes aware of after the appointment has been made.

Regarding the challenge procedure, Article 13 provides that the parties are free to agree to the challenge, and in the absence of an agreement, the interested party shall submit a

¹ For instance, the International Arbitration Court in Paris points out the fact that during 1995-1999, 82 challenge request were drafted, while 140 of this kind of applications were drafted between 2000-2004. Other arbitration institutions encountered similar experiences, as well.

² See Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press Publishing House, United States of America, 2008, p. 140.

³ See Van den Berg, *Justifiable Doubts as to the Arbitrator's Impartiality or Independence*, in *Leiden Journal of International Law*, 1997, no. 10, p. 509.

reasoned request to the arbitral tribunal within 15 days, term which begins on the date of the notice of challenge.

The opposing party may agree to the challenge, the challenged arbitrator being able to waiver in his turn. Otherwise, the request for challenge shall be decided by the arbitral tribunal. If the challenge can not be obtained within this procedure, the interested party may address to the court or competent authority of the state, within 30 days of the rejection of the application for challenge. But Article 13, paragraph 3 of the Law provides that while such a request is pending, the arbitral tribunal including the challenged arbitrator, may continue the arbitral proceedings and make an award.

If the arbitrator becomes *de jure* or *de facto* unable to perform his functions or he fails to act without undue delay, his mandate terminates if he withdraws or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, the parties may address the court or other competent authority of the state.

It should be highlighted the fact that the withdrawal of an arbitrator does not amount to recognition of the reasons for which he was challenged as provided by Article 14, paragraph 2 of the UNCITRAL Model Law. In practice, the arbitrators often waiver when they ascertain that the parties no longer trust them⁴.

If the mandate of an arbitrator terminates under the conditions mentioned above, a substitute arbitrator shall be appointed under the rules applicable to the appointment of the original arbitrator.

On what regards the main causes of challenge, the Rules of Arbitration of the International Commercial Arbitration Court at the Chamber of Commerce and Industry from 2014⁵ mention in Article 20, paragraph 1 that the challenge request shall be judged by the arbitral tribunal without the participation of the challenged arbitrator, this arbitrator being replaced by the President of the Arbitration Court or an arbitrator appointed by him.

The challenge shall be required, under penalty of preclusion, within 10 days after the party became aware of the appointment of its arbitrator or, where appropriate, after the occurrence of the challenge request. (Article 18, paragraph 5 of the Rules of Procedure Arbitration of the International Commercial Arbitration Court at the Chamber of Commerce and Industry 2014)

The Romanian Civil Procedure Code of 2010, republished, expressly provided in Article 1113, paragraph 2 the reasons for the arbitrators' challenge, namely: when the arbitrator does not have the qualifications established by the parties; when there is a cause for challenging arbitrators as provided by the Rules of Arbitration embraced by the parties, or, in case of arbitrators' absence; when the circumstances induce a legitimate doubt on his independence and impartiality.

Regarding the failure for qualifying condition or other conditions relating to arbitrators, the last ability given to the parties is basically a further opportunity to review and control the objectivity, integrity and professionalism of the people entrusted with the resolving of the case⁶. Of course, in practice, such an assessment presents obviously a strong subjective feature.

In case the parties have not established a procedure for challenge, the tribunal at the arbitration headquarters shall rule on the challenge by final judgment. The legal literature has

⁴ See Margaret L. Moses, *op.cit.*, p. 141.

⁵ Published in the Official Gazette of Romania, Part I, no. 613 of 19.08.2014.

⁶ See Monica Ionaș Sălăgean, *Arbitrajul comercial*, All Beck Publishing House, Bucharest, 2001, p. 90.

argued that the hearing report could be challenged by an appeal for annulment or for some reasons, by review⁷.

Article 14, paragraph 1 within the Rules of Arbitration of the International Court of Arbitration in Paris provides that the challenge of the arbitrator may be requested by the parties for lack of independence through a written request to the Secretariat of the Court, in which the reasons for the request are stated. For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt of the notification regarding the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification. (Article 14, paragraph 2 of the rules of Arbitration of the International Court of Arbitration in Paris).

The Court will decide on the admissibility and, if necessary, in the same time on the reasons for the challenge after the Secretariat of the Court has offered the opportunity to the arbitrators in question, to the adverse party and to other arbitrators to express their opinion in writing. Therefore, the procedure for challenge has a contradictory feature.

The French case law has shown that targeted arbitrators may give an award even if the procedure of challenge is in progress; subsequently this decision will be cancelled in case it appears that there was an actual lack of independence and impartiality in what concerns the arbitrators⁸.

In some jurisdictions, the decisions of the International Court of Arbitration in Paris regarding the requests for challenge are final, the reasons for challenge being raised in the proceedings for annulment of the arbitral award, not for the purpose of removing an arbitrator, but to achieve the abolishment of the judgment⁹.

The provisions regarding the challenge of arbitrators are found in Article 10 of the Arbitration Rules of the International Court of Arbitration in London. In addition to the reasons referring to the lack of independence and impartiality, the arbitrators may be challenged if they act in deliberate violation of the Arbitration Agreement; do not act fairly or impartially as between the parties; or do not conduct or participate in the arbitration with reasonable efficiency, diligence and industry and where they do not comply with the arbitration agreement or acting in an unfair or do not drive or take part in the arbitration proceedings with care, avoiding any delay or additional expense. (Article 10.2 of the Rules of Arbitration of the London International Court of Arbitration¹⁰)

The Court will dismiss the arbitrator and shall appoint another arbitrator in the event that any of the arbitrators communicate in writing his intention to abandon the position or if he dies, is seriously ill, refuses or becomes unable to perform his task. The court will decide on the expenses and costs that must be paid to the former arbitrator services.

The challenge request will be submitted within 14 days from the date of the establishment of the arbitral tribunal or later, after becoming aware of the existence of a reason for challenge. In all cases, the arbitrator will have to be heard before the rule of a judgment in what he is concerned.

Regarding the appointment of a new arbitrator, the Court will have complete freedom to decide whether or not the initial procedure should be followed. A possible nomination of

⁷ See Viorel Roş, *Arbitrajul comercial internațional*, Monitorul Oficial Publishing House, Bucharest, 2000, p. 293.

⁸ See Jacques Béguin, Michel Menjucq, *Droit du commerce international*, Litec Publishing House, Paris, 2005, p. 984.

⁹ See Michael Bühler, Thomas H. Webster, *Handbook of ICC Arbitration*, Thomson Reuters Publishing House, London, 2008, p. 170.

¹⁰ The rules entered into force on 1 October 2014. See <http://www.lcia.org>.

the party will be compulsory exercised within 15 days or within another date set by the Court, under the penalty of preclusion.

In Article 24 of the English Law on the arbitration of 1996 regulates extensively the grounds on which the arbitrator may be challenged. Thus, a first reason has in view the existence of certain circumstances that give rise to justifiable doubts regarding the impartiality of arbitrators. Unlike the regulation contained in the UNCITRAL Model Law, the legal text does not refer to the lack of independence of judges, as it was appreciated that the interpretation of this concept would give rise to endless disputes in practice¹¹.

Of course a list of all the reasons that could affect the impartiality of the arbitrator does not exist, therefore, a decision will be taken according to each particular circumstance. The English jurisprudence, facing with the resolving of the challenge request for this reason, argued that the mere relationship between arbitrator and one of the parties is not enough to consider it is affected by impartiality¹².

The lack of qualifications required by the arbitration convention may also be a reason for challenge. The existence of these qualifications such as affiliation to a particular profession, is related to the moment the arbitral tribunal is established, even if subsequently the person no longer performs that profession¹³.

The arbitrator may also be challenged for physical or mental incapacity to conduct the proceedings, or if there are reasons to justify the absence of such capacities.

Another reason for challenging the arbitrator from the trial has in view his refusal or his failure to conduct the procedure or use all appropriate means to solve the case, producing or being prone to produce in this way a substantial injustice to one of the parties.

The arbitral tribunal may issue a decision while the challenging procedure is ongoing. Regarding the arbitrator's fees, the Court will decide as it sees appropriate.

The abstaining arbitrator is regulated by Article 18, paragraph 3 of the Rules of Arbitration of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry in 2014, the person who knows that there is a case for challenge in what the person is concerned is required to notify the parties and the other arbitrators before accepting the appointment as arbitrator and if such cases occur after acceptance, as soon he finds out about the challenge. This person can not participate in the arbitral proceedings unless the parties, notified according to the previous paragraph, declare in writing that they understand not to require the challenge. Even in this case, this person has the right to abstain from judging the case. The statement of abstention shall be in writing and does not need to be substantiated. The written form requirement is met if the statement is recorded in the concluding hearing.

The Romanian Civil Procedure Code of 2010, republished, does not contain regulations regarding the failure of arbitrators in international arbitration and is therefore subject to the provisions of the same normative act relating to domestic arbitration. The person who knows that there is a case for challenge in what the person is concerned is required to notify the parties and the other arbitrators before accepting the appointment as arbitrator and if such cases occur after acceptance, as soon he finds out about the challenge. Regarding the assumption that the arbitrator has not accepted this function yet, it is rather about a refusal to accept the task of being arbitrator and not an actual abstention¹⁴. The

¹¹ See Andrew Tweeddale, Keren Tweeddale, *Arbitration of commercial disputes. International and English Law and Practice*, Oxford University Press Publishing House, New York, 2007, p. 645.

¹² *Idem*, p. 643.

¹³ The way it was ruled in the case Pan Atlantic Group Inc v. Hassneh Insurance Co of Israel Ltd, in Andrew Tweeddale, Keren Tweeddale, *op.cit.*, p. 645.

¹⁴ See Ion Deleanu, Sergiu Deleanu, *Arbitrajul intern și internațional*, Rosetti Publishing House, Bucharest,

arbitrator's abstention does not amount to the recognition of the challenging. The Romanian Civil Procedure Code of 2010, republished, also provides in the Article 562, paragraph 5 that abstention is effective on its formulation without any further formality.

The arbitrator's dismissal was interpreted as having the meaning of its terminating assignment from his capacity, respectively that of resolving the dispute between the parties, considered to be a discretionary and uncensored ordering act¹⁵. Dismissal may also occur following the completion of a transaction by the parties in the dispute or following the parties' abandonment of the settlement of the dispute by arbitration.

The Rules of Arbitration of the International Commercial Arbitration Court at the current regulation somehow distance from this interpretation. Article 19, paragraph 1 of these rules provide that the arbitrator dismissal may be required in the following situations: if after acceptance, the arbitrator abandons unreasonably the capacity of arbitrator¹⁶; if, without good reason, the arbitrator does not participate in the arbitration hearing repeatedly or commits other acts that unreasonably delay dispute or does not rule the judgment by the deadline set by the arbitration convention or by these rules; if the arbitrator does not respect the confidentiality of arbitration by deliberately publishing or disclosing data that he has knowledge in its capacity as arbitrator, without the consent of the parties.

The regulation within the contents of the Rules of Arbitration of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania in 2011 provided another reason for the dismissal of arbitrators, namely the case in which they repeatedly violate their duties. The wording allowed a very broad interpretation of cases justifying dismissal of arbitrators.

The arbitrator's replacement is ordered in case he is unable to exercise his task, for every case (challenge, abstention, dismissal, suspension, cancellation, death, etc.) if a substitute arbitrator was not appointed or if he was prevented from exercising his task (Article 21, paragraph 1, of the Rules of Arbitration of the International Arbitration Court of the Chamber of Commerce and Industry 2014).

According to Article 1113, paragraph 1 of the Civil Procedure Code of 2010, republished, dismissal and replacement of arbitrators shall be made according to the arbitration convention or the agreement set by the parties subsequent to its conclusion, and in absence, the interested party may request from the arbitration tribunal to do this, following the provisions of the Book IV of the same normative act to be applied.

Article 25 of the English Law on Arbitration 1996 provides that an arbitrator may waiver the assignment after notifying the parties, by an application addressed to the Court requesting it to release him of any assignment and decide on the expenditure. The Court will accept the arbitrators' motion to waiver, if it considers that it is justified having in view all the circumstances of the case.

As the arbitrator's mission is personal, it ceases upon death. Also, unless the parties agree otherwise, the death of the party that appointed the arbitrator does not result in the

2005, p. 120.

¹⁵ See Silviu Costache, Raluca Gheorghiuță, *Norme și practică privind soluționarea prin arbitraj a litigiilor comerciale internaționale*, Premier Publishing House, Ploiești, 2005, p. 87.

¹⁶ The previous regulation made reference to the waiver of the arbitrator, the regulation being criticized under many aspects. Therefore, the text produced confusion between the notion of dismissal or waiver, by stating that dismissal will be ordered as a consequence for the unjustified waiver of the arbitrator. However, while the waiver is a case of cessation of the capacity as arbitrator, based on the will of the person that accepted this assignment, dismissal is the consequence of an external will.

arbitrator's dismissal as Article 26, paragraph 2 expressly states in the English Law on arbitration in 1996.

If the capacity of the arbitrator stops, the consequence on what concerns the parties is the conducting of additional costs and delay in the judgment of the case¹⁷. Of course, the parties will attempt to replace the arbitrator as soon as possible, they being entitled to agree upon the procedure to be followed in this regard. In the absence of such agreement of the parties, the provisions of Section 16 and 18 of the English Arbitration Act 1996 shall be applicable.

Cases in which arbitrators may be dismissed from the judgment targets in particular their lack of independence and impartiality. However, unlike the cases of incompatibility of judges, arbitrators may be challenged in case they do not meet the qualifying conditions or other conditions relating to arbitrators that were provided by the parties in the arbitration convention.

Bibliography:

Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press Publishing House, United States of America, 2008

Ion Deleanu, Sergiu Deleanu, *Arbitrajul intern și internațional*, Rosetti Publishing House, Bucharest, 2005

Tweeddale, Keren Tweeddale, *Arbitration of commercial disputes. International and English Law and Practice*, Oxford University Press Publishing House, New York, 2007

Jacques Béguin, Michel Menjuçq, *Droit du commerce international*, Litec Publishing House, Paris, 2005

Michael Bühler, Thomas H. Webster, *Handbook of ICC Arbitration*, Thomson Reuters Publishing House, London, 2008

Jacques Béguin, Michel Menjuçq, *Droit du commerce international*, Litec Publishing House, Paris, 2005

Monica Ionaș Sălăgean, *Arbitrajul comercial*, All Beck Publishing House, Bucharest, 2001

Viorel Roș, *Arbitrajul comercial internațional*, Monitorul Oficial Publishing House, Bucharest, 2000

¹⁷ See Andrew Tweeddale, Keren Tweeddale, *op.cit.*, p. 647.