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HINDSIGHT VIEW ON ARBITRATION FROM THE PERSPECTIVE OF THE VISIONS, INSTITUTIONS AND THE PERSONALITIES WHICH HAVE ADDED AND CONTRIBUTED TO THE EVOLUTION OF THIS FIELD IN THE LAST CENTURY FROM A TO Z

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Abstract

The paper aims to present the field of arbitration from the perspective of the evolution of both the notions and the institutions, as a synthesis of the concepts, legal terms and terms specific to the arbitration.

We could talk about a kaleidoscope only from the perspective of the images that are going on in time.

The paper is also a retrospective with reference to past and present facts and situations, all of which have a legal connotation and have had and continue to have an impact in the field of arbitration.

This is a progressive legal process that has developed in the field of litigation and through the arbitration institution.

ARBITRATION[1] - is the institution by which the parties entrust the arbitrators, freely designated by them, the task of settling their disputes. After 1989, the normative act that contributed to the promotion of the internal arbitration was the Law no.15 / 1990, which stipulated that in order to settle the disputes

1 The legal framework for the organization of commercial arbitration in Romania was created in 1865, according to the French model, the Fourth Book of the Civil Procedure Code being the first attempt to systematize the domain that benefited from previous regulations - as a timeline we recall its Handbook Donici from 1814; Caragea code of 1818; as well as the Calimah Code of 1817 which uses 11 articles to present and discuss arbitration issues, containing Roman and Greek-Roman elements.

between them, the autonomous administrations and commercial companies may also resort to arbitration (art.51 paragraph 2).

In 1993, the Code of Civil Procedure was amended by Law No.59 of 1993. The Fourth Book[2] was impacted and transformed by the European legislation in the matter, the voluntary arbitration regime of private law being restored to the fore.

Arbitration has a ***contractual aspect***, *considering the arbitration agreement by which it is created; a* ***judicial aspect*** *in the light of the decision by which it is finalized; and a* ***procedural aspect,*** *considering the conduct of a genuine arbitral judgment*.

The advantages of commercial arbitration can be summarized as follows:

- **accessibility** - consisting of the ability to quickly conceive arbitration agreements, either by means of a compromise clause or by compromise;
- **rapidity -** diligently obtaining an arbitration award or amicable settlement of conflicts;
- **confidentiality** - files, debates, and all arbitration work are confidential;
- **impartiality**, fairness and integrity on the part of arbitrators;
- **specialization of arbitrators** in various fields (legal, economic, technical).

AD-HOC ARBITRATION - is the arbitration organized by parties, a natural or legal person, empowered by the parties to do so. Ad hoc arbitration was occasionally governed by the 1865 Civil Procedure Code, Book IV (art. 340-371), the texts being inspired by the Geneva Canton Civil Procedure Act of 1819, five articles were taken from the French procedural law in 1842, and eight texts were formulated on the basis of principles deriving from the nature of matter[3]. Ad-hoc arbitration is about resolving a particular litigation that ended when the arbitral award was passed. But it was necessary for the parties to resort to the principles of equity, otherwise they were obliged to apply the law of a determined state and, automatically, to take into account conflicting norms of the same nature.

ARBITRATION IN EQUITY (Amiables compositeurs) - Defined by opposition to arbitration in the law, arbitration in equity is the one made after the arbitrators'judgment. The name "Amiables compositeurs" is used in both national and foreign doctrine, without proper translation. The Geneva Convention of 1961 proving itself as a real opening in this field, regulates not only arbitration under the law but also arbitration in equity.

2 Initially from 32 articles - they introduced new articles - reaching 76 articles in 11 chapters.

3 We mention the Protocol on Arbitration Clauses, done at Geneva on March 24, 1923, the Convention for the Settlement of Disputes in State Investments, concluded at Washington on March 18, 1965, the UNCITRAL Arbitration Rules of April 28, 1976, the International Law Arbitration Law of June 21, 1985.

ARBITRATORS - the powers exercised by the arbitrators as well as their jurisdiction derive from the will of the parties involved in the dispute. For the period we refer to the arbitration panel, the list of referees had to be renewed every three years. The list of arbitrators of the arbitration panel is comprised of 35 to 40 referees, selected from among highly qualified legal professionals with knowledge of foreign trade and international economic relations. Proposals are made by the Chairman of the Arbitration Commission, the Arbitrators being appointed in this capacity by the Presidium of C.C.I.B. The designation of the arbitrators depended on the two principles, closely linked to one-another: the "selection" by drawing up a list of 3 to 3 years, and the "election", consisting of the right of the parties to opt for one of the selected arbitrators, from the valid list at that time.

BILCESCU SARMIZA (April 25, 1867 - August 26, 1935) - the first woman in to graduate law from the Paris Sorbonne University (1884-1887). She also obtained the first doctorate in law awarded to a woman (1890) *„From the legal condition of the mother* ".

Se was a lawyer - the first woman in Europe - being enrolled in the Ilfov Bar (1891) at the time, the dean of the Bar was Take Ionescu. However, the Court of Cassation denies her right to plead. Unfortunately, she never practiced, giving up in 1897 as a lawyer.

The **CALIMAH CODE**, also known as the "Codex of Moldova", was drafted in Scarlat Calimah's initiative in Greek (version that was printed in 1817) and in Romanian language (version that was printed in 1833). The Code contained 2032 articles structured in three parts: the first part referred to the "**people's heart**", the second part to "**the depth of things**," and the third part to "**the impropriety of the people together and things**." This general branch code represented a modern synthesis of the existing law system, being inserted into the reform process of the Romanian society according to the pre-iluminist conception.

CARAGEA CODE (more precisely the Caragea-1818 Legion) - the writing of this legislative act belongs to the prince Gheorghe Caragea, this act being drafted and published in 1818. The development of the commercial exchange and the new perspectives in which the relations between commodity and money were carried out became more visible in the contents of this normative act, the subject matter of the obligations and the contracts being largely regulated, here being the direct influence of the two civil codes, the French (1804) and the Austrian (1811). Significant changes were brought to the evidentiary system, the writings and testimonies being regulated as evidence.

CONTRA PROFERENTUM - is a principle used in arbitration practice, according to which the convention must be interpreted against the proferentum, i.e. against the one who has drafted the ambiguous or obscure clause. Professor Octavian Capatana examined this rule under the name of "*interpretation to the detriment of the party who formulated the arbitration clause*."[4]

CAPATANA OCTAVIAN - born in 1919 in Cernauti[5] - began his career as a magistrate (1943) as a judge at the Ilfov Tribunal - the civil and commercial sections. He was enrolled as a state notary in Giurgiu. He has worked at the Institute of Legal Research of the Academy in the international private law sector.

He was an associate professor at the Paris I Sorbonne University, an associate researcher at the Max Planck Institute and taught as an Associate Professor at the Hague International Law Academy. For his merits he received the "I.L. Georgescu "of the Jurists' Union. He published a number of reference works in the field of commercial law and transport law: "Effects of Judicial Judgments in Romania" (1971), "International Commercial Law Institutions" (co-author 1973), "Arbitration of Foreign Trade Arbitration" (1978) , The Treaty on the Law of International Trade (coauthor 1987); "Extending the jurisdiction of the Arbitration Commission at the Chamber of Commerce of the Socialist Republic of Romania" (1973).

THE ARBITRATION COMMITTEE OF ROMANIA'S CHAMBER OF COMMERCE AND INDUSTRY - C.A.B. was established in 1953, being the only foreign arbitration institution with permanent character throughout the country.

Three normative acts have successively governed its activity: in 1953 the name was the Arbitration Commission, the 1973 Regulation assigned it the name of Arbitration Commission for Foreign Trade Disputes, and by the 1976 it returned to the name of Arbitration Commission .

The 1976 Regulation established the jurisdiction of C.A.B. (art. 2-3) and included the necessary rules for the conduct of all stages of a dispute, from the appointment of the arbitrators by the parties until the enforcement of the arbitral award (art. 11-50).

It is very important to recall the general features of the arbitration panel's jurisdiction, namely: a) its **non-derogatory character**, in other words, the arbitration commission had the obligation to verify in each litigation their own jurisdiction; b) **Unrestricted accessibility of jurisdiction**, in other words, it was not reserved only for privileged categories of imputed ones[6]; c) its **voluntary character**;

4 RDC No.12-1999- "Arbitrary Arbitral Convention";

5 DICTIONARY OF ROMANIAN LEGAL PERSONALITIES _ Hamangiu Publishing House 2008 - authors Tudorel Toader - Dan Constantin Mata, Ioana Maria Costea;

6 It is irrelevant, in other words, whether the applicant or the party is a member of C.C.I.B. In other words, if the parties signed an arbitration agreement or an international agreement then that litigation falls within the material jurisdiction of that jurisdiction.

d) the **exclusive jurisdiction of the arbitration panel** - in other words, if it was established that a dispute would be settled by the arbitration panel, it was excluded that the dispute would be under the jurisdiction of the judiciary courts.

THE COURT OF ARBITRATION AT THE BORDER CHAMBER OF COMMERCE AND INDUSTRY OF ROMANIA AND THE BUCHAREST MUNICIPALITY - the transition period from the hyper-socialist economy to the market economy, after December 1989, generated for both the courts and the arbitration courts different legal issues, a very complex set of issuies- whose solutions were identified only after a continuous and controversial decantation. The Court of Arbitration has provided the source of a wealth of commercial jurisprudence and private international law. Significant decisions were published in the Repertories of the Romanian Arbitration Practice of Foreign Trade, published in 1982 and 1987, as well as in the "Arbitration Commercial Law". After 1990, CAB decisions were published by Professor Ion Băcanu in the Commercial Law Magazine.

ARBITRATION COSTS IN THE ARBITRATION PROCEDURE - By including in the contract between the parties a compromise clause which allows the settlement of disputes between the parties through arbitration, the parties automatically strive to equally of the arbitral costs, which he advances during the course of the arbitration proceedings. As a rule, arbitration costs consist of: arbitrator fees, evidence management costs, travel expenses of the parties, arbitrators, expert fees, lawyers' fees, etc.

According to art. 35 par. (8) of the Rules of Arbitration[7] of the International Commercial Arbitration Court of the Romanian Chamber of Commerce and Industry, the arbitral tribunal may, ex officio or at the request of the interested party, reduce the lawyers' fees or, are inappropriately large compared to the value of the litigation or work done. Thus, on the lawyer's fees, the arbitrators may intervene, reducing the fees of the lawyers of the party who has won, and this fee will be only partially borne by the party that has lost.

BILATERAL CONVENTIONS CONCLUDED BY THE SOCIALIST REPUBLIC OF ROMANIA WITH NESOCIALIST STATES - "Trade and Shipping Treaty concluded with Japan", this treaty was ratified by Romania by

7 The Rules were approved by the College of the Arbitration Court on 16 January 2012, in accordance with the provisions of Art. 18 of the Regulation on the Organization and Functioning of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania, approved by the Board of Directors of the Romanian Chamber of Commerce and Industry on January 16, 2012, published in the Official Gazette of Romania, Part I, no. 97 of 7 February 2012;

Decree no.22 of 31.01.1970[8], by this treaty the contracting states committed themselves to recognize the enforceability of arbitral awards rendered in their territories. The Treaty on Legal Aid concluded with Tunisia[9], this bilateral treaty was ratified by Romania in 1972 and makes a distinction between the legal regime applicable to arbitral awards differently, as they differ between commercial or civil legal relationships. The Treaty on Legal Aid concluded with Morocco[10], this bilateral treaty was ratified by Romania in 1973, in turn, this treaty makes a distinction between the legal regime applicable to civil cases by the legal regime applicable to commercial cases. The Treaty on Legal Aid concluded with Italy, ratified by Romania in 1973[11], establishes a unified legal regime without dissociating between civil and commercial cases. The Legal Assistance Convention concluded with Greece[12] establishes a legal regime similar to that provided for in the Treaty between Romania and Tunisia.

THE 1958 NEY YORK CONVENTION[13] - applies in the matter of recognition and enforcement, both to arbitration judgments given occasionally and to those issued by other permanent arbitration institutions.

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8 In accordance with Article 9 (2) of this Treaty, the enforceable power of an arbitral award is denied in the following cases: a) if the judgment has not acquired the enforceability of a final decision in accordance with the laws of the country in which it was pronounced; (b) if the decision engages the parties in actions incompatible with the laws of the Contracting State in which recognition of the executing power is sought; c) if the decision is contrary to the public order of the Contracting State in which enforcement is sought; (d) if the party against whom the judgment is to be enforced has not been informed of the arbitration in due time, and as a consequence has been unable to substantiate the case or has not been properly represented.

9 The Treaty between Romania and Tunisia was ratified by Decree No.483 of January 29, 1972.

10 The Treaty between Romania and Morocco was ratified by Decree No 291 of 4 June 1973

11 The Treaty between Romania and Italy was ratified by Decree no. 288 of June 2, 1973 respectively: According to Article 20 of this bilateral treaty: "arbitral awards rendered in the territory of a Contracting Party shall be recognized and enforced in the territory of the other Party pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 1958 ".

12 The Legal Assistance Convention concluded with Greece was ratified by Romania by Decree No 290 of June 3, 1973.

13 Romania adhered to the Convention by Decree no. 186 of July 10, 1961, published in the Official Bulletin no. 19/24 July 1961.

Unique article. - The Romanian People's Republic adheres to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York on 10 June 1958, with the following reservations:

"The Romanian People's Republic shall apply the Convention only to disputes arising out of contractual or non-contractual law relations which are considered commercial by its national law.

The Romanian People's Republic will apply the Convention on the Recognition and Enforcement of Sentences in the Territory of Another Contracting State. With regard to the sentences given in the territory of non-Contracting States, the Romanian People's Republic will apply the Convention only on the basis of reciprocity established by agreement between the parties ".

THE GENEVA CONVENTION OF 1961[14] - originally remedied the shortcomings of occasional arbitration, organizing it as a stand-alone procedure. At the same time, he managed to overcome the reported difficulties, stemming from the positive or negative conflicts of jurisdiction between the courts and an arbitration body.

THE MOSCOW CONVENTION OF 1972[15] - had a broader sphere of application during the communist era, considering the arbitral judgments pronounced in the relations of economic and technical-scientific collaboration between the economic organizations of the socialist countries participating in this international instrument. At the time, it was appreciated that the Moscow Convention, through its regulations, achieved, compared to the 1958 New York Convention, a progress in simplifying the conditions for international regularity of arbitral awards.

CONVENTION ON THE REGULATION OF DIFFERENCES RELATING TO INVESTMENT BETWEEN STATES AND PERSONS OF OTHER STATES[16] - the Washington Convention of 18 March 1965 provided for the establishment of an International Settlement of Investment Disputes Center based at the International Bank for Reconstruction and Development (IBRD) . This jurisdiction shall have regard to the procedure for the settlement of legal disputes between a Contracting State and the legal or natural persons of another Contracting State in connection with an investment, a dispute which the Parties have agreed to submit to arbitration by the Center.

In order to use this procedure, three conditions must be met: 1) the parties must agree that their dispute will be solved through the ICSID procedure; 2) the dispute must be between the contracting states; and 3) the dispute must be legal, derived from the investment.

CIBERSPATIO - represents the virtual space of the Internet. Theoretically, it can spread all over the globe, but in reality it can not be located anywhere in the private world, therefore the question of jurisdiction of this space is raised. The law should recognize cyber space as a separate jurisdiction, involving new authority in cyberspace that does not find its foundation in any sovereign legislative system.

14 Romania has ratified the European Convention on International Commercial Arbitration by Decree No 281/1963

15 Romania ratified the Moscow Convention by DECREE No. 565 of 20 October 1973 on the arbitrary settlement of civil disputes arising from the economic and technical-scientific cooperation relations.

16 Romania has ratified this Convention by Decree No 62-1975

FORMS OF OBLIGATORY ARBITRATION - Over time the law has stipulated forms of compulsory arbitration. For example, Law no.15 / 1991 regulated arbitration as the procedure for solving collective labor disputes, but only at the request of the Ministry of Labor and Social Protection, without the existence of an arbitration convention.

We mention later the appearance of Law no. 168/1999 on the resolution of conflicts of work[17] which had to deal with the arbitration of conflicts of interests before the strike or subsequent strike and imposed that the claims to be submitted to arbitration through a commission.

In the Statute of the National Union of Public Notaries[18], compulsory arbitration is established between notaries, for "all non-petitions of patrimonial nature" as well as for "associative forms of notary activity".

Another institution of professional arbitration formed within a "guild" is that of lawyers - art. 238 and the following from the Lawyers' Statute[19] - which "obliges" lawyers after trying to solve misunderstandings amicably - through a conciliation organized by the dean if that procedure fails, to have recourse to arbitration.

IONAŞCU TRAIAN[20] - (April 17, 1897-19 November 1981, Bucharest), graduate of the Law Faculty of Iaşi. Doctor of Law of the University of Paris. Knight of the Legion of Honor of the French Republic (1931), member (1970) of the International Law Academy of the Hague. He was a correspondent member of the American Institute of Comparative Law and Legislation in Washington. He was an active member of the London International Law Association and the Paris Law Society.

LAW APPLICABLE TO THE ARBITRAL PROCEEDING - the duality of the legal nature of arbitration influences and determines the law governing arbitration. There are substantial differences from one legislation to another. For example, the English common law system dissociates the law of the arbitration convention from procedural law. In the 1975 Regulations of the CAB it was stipulated in Article 16 that this regulation shall be filled in with the procedure established by the parties or in the absence thereof, with rules established by the arbitrators.

17 Official Gazette No.582 of 29 November 1999

18 Art.48 of this Statute - M. Of. No 13 of 14 January 2000

19 The status of the profession of lawyer was published in M.Of. no. 45 of 13 January 2005

20 DICTIONARY OF ROMANIAN LEGAL PERSONALITIES _ Hamangiu Publishing House 2008 - authors Tudorel Toader - Dan Constantin Mata, Ioana Maria Costea

PLACE OF ARBITRATION - As regards the place where the arbitration panel is held, the legal provisions have evolved. According to the 1953 Regulations, the meetings could only take place at the C.A.B. The 1976 regulation came with an innovation in court hearings, and court hearings[21] could take place not only in Bucharest, but anywhere else in the country.

ALTERNATIVE DISPUTE SETTLEMENT METHODS - the most common are: negotiation, conciliation, mediation, arbitration. The main advantages of such methods are the low costs and the short time needed to resolve disputes.

NESTOR ION[22] - born on November 18, 1920 - in Pietroasele commune, he graduated from the Faculty of Law of the University of Bucharest graduating with the qualification -Magna cum Laudae-1943. He obtained the title of Doctor in Law with the thesis "Arbitration for Foreign Trade in the Countries of the World Socialist System" (1967).

He worked as a lawyer between 1944-1950. In 1954, he obtained a post of senior scientist at the Private International Law Sector of the Legal Research Institute of the Romanian Academy, where he worked closely with Traian Ionascu. At the same time he worked as an arbitrator assistant, becoming an arbitrator in the Arbitration Commission of the Chamber of Commerce and Industry of Bucharest, being a correspondent member of the Romanian Academy (1955).

He was the representative of Romania in Vienna, the International Atomic Energy Agency (1963-1965, 1970-1972), the UN Special Rapporteur (1968-1973). He collaborated with Professor Octavian Capatana and Professor Savelly Zilberstein.

His research activity resulted in the elaboration of the papers "Arbitration in the Foreign Trade of R.P.R." (1975), Issues Concerning Foreign Trade Arbitration in the European Socialist Countries (1962), UN International Trade Arbitration Document (1973).

THE OBLIGATION OF CONFIDENTIALITY - in the doctrine it was stated that the obligation of confidentiality bears a three-dimensional approach from the perspective of three elements: a) the participants in the arbitration (ratione personae), b) the ratione materiae and the duration of this obligation (ratione

21 In accordance with Article 32 of the 1976 Regulations, we quote: "The sittings of the panel are held at the Arbitration Commission. The arbitration panel may order the hearing to take place elsewhere. "

22 DICTIONARY OF ROMANIAN LEGAL PERSONALITIES _ Hamangiu Publishing House 2008 - authors Tudorel Toader - Dan Constantin Mata, Ioana Maria Costea

tempori) . In arbitration, the obligation of confidentiality applies to arbitrators, parties, arbitral institutions under whose auspices arbitration proceedings, witnesses to experts, assistants and interpreters are conducted. The Arbitral Tribunal has the obligation to ensure the confidentiality of the debates, without the presence of other persons in the hearings, except with the agreement of the parties.

PROCEDURAL ORDER - is an order issued either by the President of the Arbitral Tribunal or by the entire Arbitral Tribunal by which the parties establish instructions on the way arbitration is conducted. The power of the Arbitral Tribunal is similar to that of a court of law, and may issue binding orders on the parties.

THE LITIGATION OF ROMANIAN NATIONALITY IN ACCORDANCE WITH REGULATION C.A.B. 1976 - although this regulation avoided listing Romanian legal persons not to impose any limitation default, however there were certain categories of prospective litigants distinction. The rule was that, C.A.B. to emerge from foreign trade relations established between a Roman legal person and a foreign national. We list in the category of Romanian legal entities: economic units with foreign trade activity, power plants, specialized foreign trade enterprises, international economic unions based in Romania.

PROBLEM arbitrability - in literature was appreciated that the arbitrability issue can be established in three different times: the first time is the conclusion of the arbitration agreement; the second moment is to verify this condition if challenged by one of the parties; and the third moment is after the final sentence, being related to its recognition and execution abroad.

REFEREES powers - sometimes parties conferred special powers referees - be they have taken steps to conserve goods in question or acted as amiable mediator to resolve the dispute - an equitable bono-.

Over time, attributions of the arbitrators have been identified, which are related to the procedure itself or to the claim funds invoked by the parties.

RULES OF PRINCIPLE IN SOLVING THE ARBITRAL LITIGATION The principle of legality is a principle of arbitration by the judges. Article 38 of the 1976 Arbitration Commission Regulation provided that this jurisdiction should follow the terms of the contract and take account of commercial usage. The principle of arbitrators' independence is another principle used and used over time in arbitration. The principle of referees right to assess the evidence according to their intimate conviction, shall be taken into account in the past and now the credibility and reality of each evidence, notwithstanding the formal criteria.

RECOGNITION OF AN ARBITRAL JUDGMENT - Recognizing a foreign arbitral decision means recognizing its effects. Law 105/1992 on the regulation of the relations of private international law stipulated in art.167-172 the procedure of recognition of foreign court judgments.

ARBITRAL SENTINETY - is the decision of an arbitral tribunal by which the parties to a dispute have entrusted it with the task of resolving and ruling on a dispute. The Arbitral Tribunal shall state in writing the reasons on which the sentence is based. The sentence must bear the signature of the arbitrators, stating the date and place where it was issued.

THE ARBITRAL TREATY - is constituted by the decision of the parties, they determine the number of arbitrators, the necessary qualifications and the modalities of appointment. The Arbitral Tribunal must adopt procedures appropriate to the circumstances of each case, avoid unnecessary delays or costs, giving each party the opportunity to present its case. If the parties did not provide for arbitration, the arbitral tribunal may be appointed by the nomination authority.