Law Review ● vol. VIII, issue 2, July-December 2018, pp. 236-255

A CENTURY OF ROMANIAN ARBITRATION: HISTORICAL MILESTONES, FROM TRADITION TO MODERNITY

Associate Professor, Cristina Ioana Florescu, PhD
USH, Faculty of Juridical, Political and Administrative Sciences, Bucharest
Arbitrator (Bucharest, Brasov, Paris, Vienna, Chisinau)
Lawyer, Bucharest Bar

Abstract

This paper presents the evolution of Romanian arbitration, proving its effort and orientation towards efficiency in order to meet the users' needs and to adapt to the challenges of a changing world.

In the seventeenth and eighteenth centuries, when the whole of Europe was struggling with the legislative activity imposed by the breaking of the old feudal tradition and the demand to meet the needs that were born with the revolutions and changes dictated by them, in our country, Caragea Code entered into force regulating also arbitration, taking over from the Donici Handbook and the Calimach Code. The latter, however, was considered superior to Caragea's legislation and applied for nearly 50 years.

It followed the Unification of the Principalities and the adoption of the 1865 Civil Procedure Code with the arbitration regulated in the Fourth Book, which lasted until 1993, when arbitration was given a revival and ample regulation aligned with contemporary legislation.

During the communist era there was an institution adapted to the new socialist principles for settling foreign trade disputes, the State Arbitration. This contributed keeping alive of the Commercial Code which was not abrogated, for it continued to use commercial law and its principles when Romanian law was to apply.

The last significant change occurred with the entry into force of the current Civil Procedure Code in 2013, which harmonized the Romanian arbitration legislation with the most evolved trends.

As culmination of the latest changes to meet the demand of placing Romania on the current international arbitration map as a suitable place to conduct a modern arbitration process tailored to trends, and to promote a sustainable arbitral system for the future, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania recently adopted new Rules of arbitration developed from good practices and international rules in the field.

Keywords: *arbitration, history, regulation, evolution*

1. Preamble

I admit that one of my favorite books is the novel "A Century of Loneliness" by Gabriel Garcia Marquez and I was thinking of putting this title on my paper on Romanian last Century arbitration, but the poetic license of loneliness and decline does not fit into the general arbitration perspective. Above all, although the novel is referring to a 100-year historical approach to a family destiny in which all the characters are accompanied by the feeling of "loneliness" , the aspects I have proposed to present hereby cannot play back this status. This is because the arbitration is not related to a particular fictitious cycling or to regress, but rather to evolution and development in accordance with the progress of society (on all levels, economic, social, financial, cultural and not only) and to its users' requirements. And in the present paper we are actually proposing to show that it is not only a matter of a century in arbitration, but that it has been a millenary past, and the Romanian one has more than 200 years of regulatory attestation.

2. Introductory notes on arbitration, framework and its significance in general

Arbitration, domestic and international, deserves special attention, if not for anything else, but for its practical, historical, contemporary importance, and its future in settling business disputes, where for centuries arbitration has been a preferred method. Lately, arbitration has been revitalized and regulated in line with trends commanded by practice and the needs of its users. The preference for arbitration has been revived and has become more pronounced, but in the last decades, when international trade and investment have flourished, they became more complex, more complicated and multiplied by globalization.

At a more fundamental level, arbitration deserves to be studied and known as it illustrates the complexity and uncertainties of the society in which we live - legally, commercially, culturally, socially and not only - and which it is dealing with, and trying to address them in an effective, efficient and sophisticated manner, tailored to the needs and demands of those they are using this dispute resolution process. Beyond the immediate practical importance, arbitration deserves attention because it involves a framework of legal, institutional, good practice and ethical rules that it manages in a remarkable, successful and lasting way to provide a fair, neutral, flexible, professional and efficient mechanism of dispute resolution. Its framework allows the various players in an arbitration process in a variety of jurisdictions, both private and state-owned, to cooperate to resolve complex, sustainable, neutral and satisfactory disputes that allow business relationships to continue. The analysis and mechanisms that have been developed in the context of top-level arbitration offer models, perspectives and promises of amicable resolution for other aspects of international affairs.

Over time, the legal rules and institutions relevant to international commercial arbitration have evolved in multiple and diverse countries and regions. In principle, where society was free, both politically and economically, the expressions of autonomy and private association, like arbitration, flourished, but where totalitarian or tyrannical regimes have mastered, they have been repressed or forbidden. In spite of periodical political episodes, the last half of the last century witnessed the progress and unprecedented expansion of the legal framework of international arbitration, almost always being made thanks to the effort of public and private sector cooperation. The private sector has been the driving and the dominant force for the successful development and widespread use of arbitration, and governments and courts, particularly from developed countries with tradition in commerce, market leaders, have contributed considerably to ensuring recognition and the enforcement of private arbitration conventions and arbitration awards, while affirming the party autonomy principles and of the judicial non-immixture in the arbitration process.[1] It should be understood that arbitration as a private alternative does not substitute for state jurisdiction in general, which actively participates in strengthening the structure and principles of arbitration, but they are in a complementary relationship, beneficial to both forms of justice.[2] Thus, arbitration is a non-state procedure, a form of private justice designed to give the parties the advantages that they do not find in state justice.

In the last decades, the resulting legal framework of international arbitration has achieved and realized a virtually progressive success and especially acceptance in all regions of the world.[3] This resounding success of international arbitration is reflected in the growing number of international and domestic arbitrations, both ad-hoc and institutional, the use of arbitration clauses in most international contracts, the preference towards arbitration (and of other forms of dispute resolution) of businesspeople and business leaders in the various fields (such as disputes related to investment, corruption, human rights, construction and complex development projects, competition, securities market, intellectual property, media and information technology, oil and gas, energy, insolvency or other matters), the broad adoption of international pro-arbitration conventions and national arbitration laws favorable to new trends in the field, the redefinition and refinement of institutional rules so as to meet the most current needs of users and to correct the deficiencies observed in practice, the adoption of "soft law" (good practices, guides) that respond to the principles of a fair and efficient process, not

[1] G. B. Born, International Commercial Arbitration, vol. I, Wolters Kluwer 2009, p. 2.

[2] V. Roş, Arbitrajul comercial internaţional, Ed. Regia Autonomă M. Of., Bucureşti 2000, p. 17.

[3] M. Voicu, Unele consideraţii privind arbitrajul comercial în activitatea jurisdicţional internă şi europeană (2014-2017), 28 august 2017 în JEssentials, https://juridice.ro/essentials/1610/unele-consideratii-privind-arbitrajul-comercial-in-activitatea-jurisdictional-interna-si-europeana-2014-2017.

to mention the advantages of arbitration that recommend it as a procedure adapted to the most intimate and particular users' so different requirements.

This year celebrates the 60th anniversary of the New York Convention, which is marked and celebrated in numerous conferences around the world, publishing of articles and books. The New York Convention is widely recognized as the instrument for the establishment of international arbitration. It requires the courts of the Contracting States to implement the arbitration conventions, to recognize and enforce the arbitral awards made in the Contracting States (currently 159, Romania adhering in 1961), subject to specific limitations.

Lately, the evolution of Romanian arbitration has experienced an extraordinary revival, especially the traders (professionals) recognized its superior advantages compared to the judgments made by the state courts. Nowadays, arbitration becomes an increasingly widespread, popular method of settling disputes agreed by the parties due to its more appropriate features to resolve commercial disputes and, in particular, international trade disputes between parties involved in international trade.

The own definition of arbitration is not a loophole of the Romanian law alone. The Romanian arbitration did not have a legal definition until the entry into force of the New Civil Procedure Code in 2013, which established in the opening of the Fourth Book in Art. 541 that "Arbitration is an alternative private justice", and private character is reinforced by the second paragraph of the same article: "In the administration of this jurisdiction, litigants and the competent arbitral tribunal may establish procedural rules derogating from ordinary law, provided that such rules are not contrary to public policy and to the mandatory provisions of the law."

In general, the arbitration regulation is in the Code of Civil Procedure, special legislation, International Conventions and Treaties, and Rules of arbitral procedure, rules issued by permanent arbitral institutions.

We do not intend to present conciliation, mediation, arbitration or other alternative forms of dispute resolution legal regulations of special laws in various fields (such as liberal professions, labor law, copyright, medicine, financial investment, insurance, consumer protection, etc.) that have created various bodies or statutes of special mechanisms (binding in principle).

2.1 Permanent arbitration institutions in Romania

The Reform of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, the most famous, reliable and old permanent arbitration institution in Romania, celebrating this 65th anniversary of its existence this year, has changed its rules since 1 January 2018. The new rules strive to consistently promote Bucharest as a modern arbitration

hub and have a strong modern, international, slim and flexible emphasis, being developed in accordance with the best practices in the field.[4]

We do not intent to present the status and approach of other permanent arbitration institutions in Romania, but we can distinguish that other Courts of Arbitration have been set up alongside several Chambers of Commerce and Industry, such as the Bucharest Municipality, the Bilateral Trade Chambers Romanian-German (AHK), Romanian-American for example or with representations in Romania such as AmCham, which established the Bucharest International Arbitration Court (BIAC). We ascertain an extension of the institutionalized arbitration in Romania, and so are the permanent or specialized courts established by various associations, which intend to solve also the civil litigations that can be resorted to arbitration (more common are divorce settlements, the determination of the minors' domicile, the intellectual property or the civil cases part in criminal cases). The most well-known such an institution is the Permanent Court of Institutionalized Arbitration with its headquarters in Targoviste, which has developed and opened its centers in several other cities in Romania, trying to attract users for which it resolves disputes through partnerships with the business environment, with institutions and with various professional associations.[5]

2.2 Advantages of arbitration

We cannot conclude these introductory notes without listing at least the most significant arbitration advantages above mentioned, which therefore recommend using this alternative to the state courts method.

Knowing the legal status and jurisdiction from the moment the contract is concluded is likely to give the involved parties a more comfortable position and greater certainty and confidence in the business consequences. In addition, commercial relationships imply and necessarily require fairness and efficiency in settling disputes as well as any issue arising in connection with contract performance and business conduct in general. Thus, among the most significant

[4] C. Florescu, Tendinţe de eficientizare în lumina noilor reguli române de procedură arbitrală, în Dreptul românesc la 100 de ani de la Marea Unire. Dimensiuni şi tendinţe, *Ed. Universul Juridic 2018, p. 121-126;* C. Florescu, A Time For Change: Internationalizing Romanian Institutional Arbitration Rules, în 100 Years Of United Romania Within The International Relations Context, Ed. Pro Universitaria 2018; *D. M. Şandru,* Elemente esenţiale ale noilor Reguli de procedură ale Curţii de Arbitraj Comercial Internaţional de pe lângă CCIR, RRD nr. 6/2017, p. 41-48; Numirea arbitrului – pilon fundamental al procedurii. Observaţii privind noile Reguli de procedură arbitrală ale Curţii de Arbitraj Comercial Internaţional de pe lângă Camera de Comerţ şi Industrie a României, RRDA nr. 2/2018.

[5] There are discussions and comments about the efficiency and quality of the services provided by this Tribunal, but we believe that is necessary to see the positive side because they are also trying to contribute to the popularization, promotion and extension of arbitration.

advantages offered by arbitration are (i) the speed of the procedure and the avoidance of the lengthy and complicated legal remedies of ordinary judiciary system, (ii) the decisions are final and binding for the parties, and their set aside can only be made based on specific and procedural grounds which are foreseen expressly by the law, (iii) the international recognition and enforcement of arbitration awards, (iv) the confidentiality, (v) the flexibility and procedural autonomy appropriate to each case, (vi) party autonomy principle (as a cornerstone of arbitration, being essentially a voluntary alternative procedure), (vii) costs and duration can be streamlined (more suited to complex, high-profile disputes), (viii) neutrality (on the possibility of agreeing on the language and place of arbitration, the organization and conduct of the hearings, the nationality of the arbitrators, legal representation), (ix) but especially the possibility of the parties choosing their judges (specialization and professionalism, reputation and experience representing essential requirements).

3. Briefly historical view on arbitration before the last century

It can be noticed that during the history of law there has been transformation and evolution of the concepts and institutions, legitimate and natural requirements for the adaptation of the notions to the continuous globalization, diversification and inclusion. In this sense, it has been observed that it is impossible for people to live in society without their interests or passions giving rise to disputes. This is due to the fact that the rules of objective law are not always abided, the subjective civil rights satisfied or the obligations fulfilled. When such incidents occur it is normal to reach a litigious state and to implicitly ask who will restore the socio-economic order and the security of the civil or commercial circuit. Therefore, the jurisdictional ways of resolving social conflicts are necessary,[6] and the alternative methods have their source in the need to look for more suitable solutions, adapted to the particularities of the case.[7]

Thus, the state justice, implemented through the courts, falls primarily within these ways. But there exists also a private justice, to which the parties can resort, namely, arbitration,[8] which has a millennial history and claims that it actually existed well before any written law or state judicial organization. This recognizes ancient landmarks on arbitration in the Bible (Solomon's judgment), the legends of ancient Greece (the judgment of Paris, interpreting the scenes depicted on the

[6] V. M. Ciobanu, Tratat teoretic şi practic de procedură civilă, vol. I, Ed. Naţional 1997, p. 8.

[7] C. Florescu, Arbitrajul comercial. Convenţia arbitrală şi tribunalul arbitral, Ed. Universul Juridic 2011, p. 30, 31.

[8] Ibidem, p. 10.

shield made for Achilles by Hephaistos described by Homer[9]), in ancient Rome (Cicero orator citing the compromises in arbitration, arguing that "arbitration is the means of not winning a whole good process, or completely losing a bad process"[10]), in Egypt at the time of the pharaohs, and even in Asia, China (reports still dated from 2100 to 1600 BC).[11]

In fact, the evolution of arbitration may begin with some historical references from ancient times, when the council of elders and wise men was appreciated as a way of settling disputes that preceded the era of antiquity (Romans and Greeks, those who devote aspects related to this institution and who were able to influence our country), continuing with the Middle Ages and reaching into more modern times. Arbitrators were actually those people who knew the habit of the place, were experienced, had good reputation, morality and honor, especially inspiring trust in the parties in dispute. We consider it the main feature underlying the rise and triumph of arbitration, the possibility for the parties to choose the arbitrators in which they have the highest trust from all points of view and whom they consider worthy to offer a solution that is then willingly followed.

Arbitration, as a court procedure, in the most strictly legal sense, is actually meet as 'claim' in the Romans. By *iudicis postulatio*[12], one was suing if the law required that the case be dealt within a certain manner, for example the *Law of the XII Table*, for what was claimed by a stipulation. Thus, once the cause of the case was indicated, an arbitrator was immediately called.

In the Romans, the impression that created is that the law binds; to the Greeks, that it settles. Something curious happened with "law" in our conception: we took the word from the Romans and gave it Greek meaning.[13] Romanian law, *lex*, comes from *lego*, *lege*, gather assembling the signs, reading. The "law" is the written one, for unlike the *mos* - habit, morals, it had a precise formulation and was a decree engraved in stone, with no possible and equal interpretation for all. Facing this dissolution of the concept of law, concept that has started from the healthy sense of the law as an expression of intimacy, there are the objective meanings of the word, which language was forced to accept and join them: the legal and the scientific one. The legal sense of the law, as a rule established by a human authority, could not miss our community, like any organized community. Abiding to the law can only be the release through law.[14]

---

[9] It is a matter of judging a murder by several elders, each preparing a decision, but the final one is to be determined not by collegial but by vote, i.e. the one considered the most appropriate. V. Roş, op.cit., p. 21.

[10] V. Roş, op.cit., p. 20.

[11] http://www.ccia-arad.ro/curtea-de-arbitraj-comercial/.

[12] C. Tomulescu, La responsabilite de Iudex romain a l'epoque classique, Iura 1973, p. 80-89.

[13] C. Noica, Cuvânt împreună despre rostirea românească, Ed. Eminescu, 1987.

[14] C. Florescu, Arbitrajul comercial. Convenția arbitrală şi tribunalul arbitral, Ed. Universul Juridic 2011, p. 31.

The establishment of the arbitration institution took place from the times when arbitrariness and not arbitration was agreed.[15] The origins of the arbitration can be found in antiquity, but especially in the Middle Ages, when commercial disputes were settled by the parties through an authority designated by the parties, with an untouched reputation, aware of the subject matter of the dispute, but moreover beholder of the full confidence of those who were judging.

The exact etymology of the Latin word '*arbiter*' is not well known.[16] Originally, the word meant the "witness", but had the meaning of "master", "teacher". In Greek, the synonym of the word 'arbitrator' suggests what arbitration is in fact. The French word '*arbitre*' was used in 1213. The *arbiter* had a legal acceptance, while the *arbitre* was the person appointed by the parties to settle a dispute. Obviously, during Roman law, state and arbitral judiciaries were in functional complementarity relations and that arbitration was and has remained a source of inspiration for legislators from ancient times.[17] In France, in the Middle Ages, arbitration is common, especially in fairs, becoming a serious competitor of state justice. The first royal ordinance on arbitration dates back to France in 1510. In the Middle Ages, the Western states often resorted the disputes to the Pope, the issued decisions thus acquiring an almost divine authority – is renown the decision of Pope Alexander VI (Rodrigo Borgia) in 1493, which has clarified the boundaries between the Portuguese and Spanish colonies of the Pacific Ocean.[18]

4. Regulation of the Romanian arbitration until the 1989 Revolution[19]

In 1818, in Wallachia, the "Caragea Code" enters into force, regulating the arbitration in 21 articles, in Chapter XVIII, entitled "For Erotocrisie". In the

---

[15] V. Roş, op.cit., p. 19.

[16] C. Jarrousson, La notion d'arbitrage, Paris 1987, p. 5.

[17] V Roş, Arbitrajul ad-hoc de comerț exterior, Teza de doctorat, Facultatea de Drept, 1998, p. 14.

[18] http://www.ccia-arad.ro/curtea-de-arbitraj-comercial/; L. Hertling, Istoria Bisericii, Iaşi 1998, p. 294, https://emildumea.files.wordpress.com/2011/12/hertling-istoria-bisericii-traducere-emil-dumea.pdf; V. Iliescu, I. Dinulescu, Bazele filosofice ale medicinii. O epistemologie de la şamanism la genetică, Cluj-Napoca, Dacia 2003 p. 143, 144, https://dokumen.tips/documents/bazele-filosofice-ale-medicinii-vasile-iliescu-napoca-dacia-2003.html.

[19] See the interview of Prof. Emeritus B. Ştefănescu in September 2013, which made a complete and eloquent presentation of this period, https://blog.wolterskluwer.ro/arbitrajul-un-mod-de-solutionare-a-litigiilor-patrimoniale-agreat-de-operatorii-economici-din-romania/; precum şi alte lucrări de specialitate care tratează această prezentare istorică a arbitrajului: G. Florescu, Z. Bamberger, M. Sabău, Arbitrajul comercial în România, Ed. Fundației România de Mâine 2002; T. Prescure, R. Crișan, Arbitrajul comercial, Ed. Universul juridic 2010; Deleanu, S. Deleanu, Arbitrajul intern şi internațional, Ed. Rosetti 2005; G. Dănăilă, Procedura arbitrală în litigiile comerciale interne, Ed. Universul Juridic 2006; D.M. Şandru, Arbitrajul în litigiile comerciale, Editura Tribuna Economică 2010. These works, as well as those dedicated to the practice of arbitration, present historical milestones dedicated to this period analyzed in this point 4 of this paper and issues relevant to the next period, until the entry into force of the new regulations in 2013, see paragraph 5 of this paper.

Moldova "Calimach Code" of 1817, in Part III, Chapter 2, we find in 11 articles (Articles 1828-1839) the rules of an arbitration procedure, which could be also used successfully today. The arbitral tribunal should, according to the Calimach Code, "follow the order and determination of the perfect compromise without crossing its borders or diverting. The arbitrator has to make a clear and reckless decision ... parties being present".

In Romania at the end of the nineteenth century, the framework for the organization of commercial arbitration was created by the Code of Civil Procedure adopted in 1865, which regulated, consolidated and systematized the arbitration in the Fourth Book, "On Arbitrators". In the composition of the Code of Civil Procedure adopted in 1865, the Romanian legislature was inspired by the French Civil Procedure of 1807, the "Civil Procedure of Geneva Canton" of 1819, the "French Transcriptions Act" of 1855. In 1900, the Code is amended (Dissescu's reform), its new form being in force on 1 September 1900, which regulated the arbitration agreement also in its second form, the compromisory clause, but without amending other texts in the sense of correlating them with the compromisory clause, which later gave rise to controversy in the literature and in practice.[20]

The provisions of the Fourth Book of the Civil Procedure Code[21] were applied until the communist regime was established, when the liberal principles of the regulation were in conflict with the new socialist principles. Since then, companies becoming state property, commercial litigations have been resolved by the State Arbitration. This was established by Decree no. 259/1949 (and then by Law no. 5/1954), which assigns the judgement of the patrimonial cases between the Romanian socialist organizations (companies and economic organizations of the state, cooperative and public) to the State Arbitration.[22]

Over a few years, in 1953, arbitration reappeared in the form of institutional arbitration for foreign trade, the only form of non-state arbitration[23] that has been operating in our country for four decades. Decree no. 495/1953, which was subsequently replaced by Decrees no. 623/1973 and 18/1976, established the Arbitration Commission of the Chamber of Commerce of People's Republic of Romania who settled by voluntary arbitration international trade disputes in

[20] V. Babiuc, Starea actuală a arbitrajului comercial în România, Revista Română de Arbitraj nr. 1/2007, Ed. Rentrop & Straton, p. 1; C. Florescu, Arbitrajul comercial. Convenția arbitrală şi tribunalul arbitral, Ed. Universul Juridic 2011, p. 33.

[21] It should be noted that there were also other substantive changes to the Civil Procedure Code in 1948 and then in the 1950s and 1952 when it was reconciled with the new vision of that era.

[22] D. Clocotici, Considerațiuni privind reglementarea arbitrajului privat în legislația României, RDC nr. 6/1993, p.22; V. Roş, op.cit, p. 28; G. Mihai, Procedura arbitrală, Universul Juridic 2015, p. 13.

[23] I. Nestor, Probleme privind arbitrajul pentru comerț exterior în țările socialiste europene, Ed. Academiei 1962, p. 29; I. Băcanu, Renaşterea arbitrajului ad-hoc, Revista Dreptul nr. 9/1991.

which one party was a foreign entity and the other a Romanian state-owned company.[24]

As mentioned, parallel to the activity of this Court of Arbitration that solved international litigation, the State Arbitration institution also operated in Romania. It resolved disputes between state-owned economic companies (industrial, commercial and services), the only ones that at that time carried out activities that could be considered commercial. The State Arbitration was organized on two levels, at county and central (national) level. The latter resolved major litigation and re-arbitration (recourse). It should be noted that the competence of the Central State Arbitration, originally called attached to the Council of Ministers, entangled all the disputes involving foreign trade companies by which the foreign trade activities were carried out, being about 40-50 such specialized companies resolving their disputes through this method.

We believe that this State Arbitration was not arbitrarily called 'arbitration' and not a state court, probably considering precisely the tradition of the arbitration institution in Romania. It is important to note that this State Arbitration and the Arbitration Commission at that time, which were dealing with international disputes, continued to apply commercial law and its principles when Romanian law was to be applied. For this reason, the 1887 Commercial Code remained in force, and has never been explicitly abrogated all that period, although parts of it have fallen into disuse and were no longer compatible with the realities of that period. These principles of commercial law also applied in the alternative when there were no express provisions and in the disputes settled in the State Arbitrages (49 national counties to a certain lower value, and at the Central State Arbitration the higher values and also there were the demands of re-arbitration, but at a different panel than the one on the merits).

The new form of arbitration, practiced and recognized internationally, has been the subject of valuable studies and works that remain indispensable for knowing and deepening the issue of arbitration, ad-hoc arbitration,[25]

---

[24] Decree no. 424/1972 admitted that contractual legal relations between mixed companies and Romanian legal persons may be subject to voluntary arbitration. This was the consequence of the 1972 Moscow Convention, which expressly excluded the arbitration jurisdiction for foreign trade in the socialist countries which were members of CAER, regulating a compulsory arbitration for the economic and technical-scientific cooperation relations.

[25] O. Căpățână, Aplicarea în România a Legii-model şi a Regulamentului de arbitraj al UNCITRAL, RDC nr. 7-8/1996; I. Băcanu, 45 de ani de arbitraj comercial, RDC nr. 7-8/1998; O. Căpățână, Litigiul arbitral de comerț exterior, Ed. Academiei 1978; T. R. Popescu, Dreptul comerțului internațional, Ed. Didactică şi Pedagogică 1976; O. Căpățână, V. Tănăsescu, Instituții de drept comercial internațional, Ed. Academiei 1982; I. Nestor, Probleme actuale ale teoriei şi practicii arbitrajului pentru comerț exterior în țara noastră, RRD 1968 nr.1; O. Căpățână, B. Ştefănescu, Tratat de drept al comerțului internațional, vol. I, Ed. Academiei, 1985; O. Căpățână, Capacitatea procesuală a societăților comerciale cu capital de stat în litigiile arbitrale, RDC nr. 6/1993; O. Căpățână, Constituirea unui tribunal arbitral unipersonal, Revista Dreptul nr. 1/1997; O. Căpățână, S. Zilberstein, Legea nr. 105/1992 cu privire la reglementarea raporturilor de drept internațional privat,

thus ensuring continuity in the applicability of Romanian trade law, which has paved the way for the foundation and the development of private arbitration after the events of 1989.

In the period 1953-1989, the envisaged solutions have taken into account the trend and evolution of arbitration in the world, but they were based not on the provisions of the Fourth Book of the Civil Procedure Code but on the international conventions on commercial arbitration to which our country is a party, as well as the principles specific to international commercial arbitration.

Let us also mention the participation of Romania in the conclusion of international conventions in the field, which in turn influenced our regulations both before 1989 and after: European Conventions (1923, 1927, 1961), New York Convention of 1958, which marks this year the 60th anniversary of its existence, the Washington Convention of 1965, the Moscow Convention of 1972 (until 1997), the bi and multilateral Treaties, the UNCITRAL Model Law (1985, updated 2006), and the UNCITRAL Arbitration Procedure Rules (1976, updated 2010).

Arbitration is therefore an institution with tradition in Romania. The ordinary law in the field of international commercial arbitration primarily consist of the international treaties and conventions, but also of the national rules on commercial arbitration in the states where these procedures are carried out. The legal regulations that directly affect international commercial arbitration - just a few in our law - are considered as normative provisions of a special nature. The legal phenomenon of international commercial arbitration in Romania can only be correctly delineated in conjunction with the special rules that concern it, with those forming the ordinary law in the field of arbitration. We note that, as it has been pointed out in the doctrine, the study of the connection that commercial arbitration has with the other areas of law has more than purely theoretical significance, since it allows a more precise definition of the concept of arbitration, of its own features and peculiarities.[26]

Revista Dreptul nr. 12/1992; O. Căpăţână, Noul drept internaţional privat român, RDC nr. 5/1993; V. Babiuc, I. Băcanu, Gr. Florescu, Aspecte noi în arbitrajul comercial internaţional, RDC nr. 10/2002; V. Babiuc, O. Căpăţână, Situaţia actuală a arbitrajului comercial internaţional în România, în RDC nr. 6/1993 ; V. Babiuc, O. Căpăţână Capacitatea de a încheia o convenţie arbitrală în dreptul român, RDC nr. 6/1996; V. Babiuc, Starea actuală a arbitrajului comercial în România, RDC nr. 7-8/2003; I. Băcanu, Arbitraj comercial. Convenţie arbitrală. Condiţia arbitrabilităţii litigiului. Nu sunt arbitrabile litigiile privind hotărârile adunărilor generale ale acţionarilor unei societăţi comerciale, RDC nr. 10/2000 ; I. Băcanu, Arbitrajul ad-hoc şi arbitrajul instituţional în legislaţia română actuală, Revista Dreptul nr. 8/1995 ; I. Băcanu, Litigii arbitrabile, în Revista Dreptul nr. 2/2000 ; Ş. Beligrădeanu, Reflecţii în legătură cu nelegalitatea şi neconstituţionalitatea arbitrajului obligatoriu reglementat prin Statutul profesiei de avocat, în Revista Dreptul nr. 1/1996 ; A. Savin, R. Leşe, O. Căpăţână, Revocarea implicită a convenţiei arbitrale, RDC nr. 12/1999 ; A. Severin, Competenţa arbitrajului comercial în lipsa unei convenţii arbitrale explicite, Revista Dreptul nr. 1-2/1990 ; S. Zilberstein, I. Băcanu, Desfiinţarea hotărârilor arbitrale, Revista Dreptul nr. 10/1996 ; V.M. Ciobanu, Tratat teoretic şi practic de procedură civilă, vol. II, Ed. Naţional 1997; I. Stoenescu, S. Zilberstein, Tratat de drept procesual civil, Ed. Didactică şi Pedagogică 1977 şi 1983 and many more.

[26] M. Ionaş Sălăgean, Arbitrajul comercial, Ed. All Beck 2001, p. 3.

5. Modernization of the Romanian arbitration after 1990

For almost five decades, until 1993, the provisions of the Fourth Book of the Civil Procedure Code were no longer applied in the private domain, but without being formally repealed. The incidence of the regulation was restricted to the foreign trade relations segment, the only arbitration institution in Romania being the Arbitration Commission attached to the Chamber of Commerce of the Republic of Romania. Arbitration, as a form of private justice, was not used in the communist regime, so that in all official editions prior to 1989 of the Civil Procedure Code, the Fourth Book was accompanied by a note stating that "the institution of arbitration is no longer practically used today, citizens addressing exclusively to court or other state or public bodies with jurisdictional powers to resolve their disputes". As a result, the chapter on arbitration in the Fourth Book of the Civil Procedure Code remained in the modernized form from 1900, and the doctrine and jurisprudence at the stage prior to the years 1944-1948.

After 1989, the international commercial arbitration institution witnessed new attitudes and regulations designed to outline a coherent legislative framework that responds to the new needs and developments of domestic and international trade relations. On the occasion of the amendment of the Civil Procedure Code by Law no. 59 of 1993, a new regulation was issued with a slightly amended title: "On Arbitration", which more correctly expressed the subject matter of the regulation. The draft of the new Fourth Book was developed by eminent specialists, including Octavian Căpățână, Savelly Zilberstein and Ion Băcanu, and its adoption aligned our legislation with the European one in this field.

Access to private arbitration was reopened following the 1989 changes by Decree-Law no. 139/1990 regarding the Chambers of Commerce and Industry of Romania, which stipulated as an express attribution of the Chamber the organization of ad-hoc arbitration, as well as the organization and functioning of the International Arbitration Court attached to the Chamber of Commerce and Industry of Romania. We therefore consider that the actual modernization of arbitration has only been made since 1993, when the Fourth Book of the Civil Procedure Code was amended, taking the UNCITRAL Rules as a model. Decree-Law no. 139/1990 on the Chambers of Commerce and Industry of Romania reopened the private domain, especially in the sphere of trade, the access to the commercial arbitration, normative act that laid the foundations for the re-establishment of the territorial Chambers of Commerce and Industry.

By the same Decree-Law, attached to the Chamber of Commerce and Industry of Romania, the Court of International Commercial Arbitration, a permanent arbitration institution, was established as a body without legal personality. We mention that both the Chamber of Commerce and Industry and the Court of Arbitration were not newly created but replaced the former Chamber of Commerce and the former Arbitration Commission existing since 1953, taking over

its attributions, thus continuing, developing and expanding the activity and field of applicability of these institutions. Currently, Law no. 335/2007 on the Chambers of Commerce repealed Decree-Law no. 139/1990 and became the framework law of the Chambers of Commerce, taking over the provisions regarding the structure and organization of internal and international commercial arbitration.

By Law no. 15/1990 on the reorganization of the state economic units as autonomous public Regies (state own companies) and commercial companies opened the possibility for new trading companies and autonomous regies to resort to arbitration for the settlement of disputes. On the other hand, it should be noted that the new regulations of the Fourth Book of the Civil Procedure Code have had various and important sources of inspiration, such as our legislative tradition, enshrined in the 1940 Civil Procedure Code, promulgated but not embedded in application; Commercial Code Carol II of 1938 adopted, which did not come into force but which was nevertheless the basis of the trade legislation after 1989; the experience gained for four decades by the Arbitration Commission attached to the Chamber of Commerce of Romania (1953-1993); The Report on International Commercial Arbitration, elaborated in 1972 by I. Nestor within UNCITRAL, as well as the regulations on arbitration in different countries, with modern regulations. The provisions are inspired by similar regulations of Western European countries, such as the French, Swiss, Italian, Dutch Civil Procedure Codes, English Law on arbitration, international arbitration provisions from Chapter 12 of the Swiss Federal Law on Private International Law, the UNCITRAL Model Law of 1985 or the UNCITRAL Arbitration Procedure Rules of 1976 and rules of permanent arbitration institutions such as from Paris, Stockholm, Vienna, Zurich, Geneva, New York and others. This aligns the new regulation to the European one in the matter.[27]

Consequently, the voluntary character of arbitration was reaffirmed and restored by the modernization of the Fourth Book by Law no. 59/1993, completing and amplifying its content. Importantly, it is expressly stated that in the absence of the parties' stipulations in the arbitration agreement or in an arbitration procedure applicable to the litigation established by the arbitral tribunal, the provisions of the Fourth Book will be applied, which are therefore predominantly suppressive and subsidiary.

These provisions were maintained by the latest reform in 2013, when the New Civil Procedure Code promulgated in July 2010 entered into force. With the previous entry into force of the New Civil Code on 1 October 2011, the provisions of the Law no. 105/1992 on the regulation of private international law relations is now contained in the New Civil Code, and so was given a new distribution of the provisions on arbitration in the New Civil Procedure Code.

[27] C. Florescu, Arbitrajul comercial. Convenţia arbitrală şi tribunalul arbitral, Ed. Universul Juridic 2011, p. 34, 35.

6. Recent changes in the Romanian arbitration, which further devote the effort to align with international trends

Arbitration occupies a particular place in the alternative dispute resolution system as it is different from the other procedures and is closer to the dispute resolution procedure by holding hearings and similar procedures in ordinary law, the differences being clearly and explicitly stated in the New Code of Civil Procedure. The Fourth Book entitled "On Arbitration" is devoted to internal arbitration, now governed separately from the international one, the Seventh Book "International Civil Process", Title IV, "International Arbitration and the Effects of Foreign Arbitration Awards". The notion of arbitration encompasses all types of arbitration: internal / international, ad hoc / institutional, in law / in equity, commercial / civil (but involving professionals only). We note that institutional arbitration has distinct regulation according to the New Civil Procedure Code, namely in Title VII of Book IV. We note that it is not necessarily a distinct regulation, but a separate organization and presentation in the matter of arbitration regulation has been established.[28]

We will not insist on presenting and analyzing the amendments made to the New Code of Civil Procedure. Although important and numerous have been the reclassifications and additions to arbitration in general and the entire arbitration proceedings, we note that they have led towards adapting to the current requirements, trying to be in tune with international arbitration law and practice. We cannot, however, say that it was possible to achieve a real revolution and complete up-to-date regulation as compared to the current state of market leadership institutions, as we have always been a few steps behind them, considering they are an aspiration and a model for us and we always try to catch them and stay competitive.

Throughout the history after the 1989 Revolution there have been various amendments to the Rules of Arbitral Procedure adopted by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, the most recent from 01 January 2018. The rules contain this time a strong modern, international, slim and flexible emphasis, being developed according to the best practices in the field. They propose improving the functioning of commercial arbitration in Romania by facilitating dispute resolution in the business environment through this arbitration mechanism, offering an

[28] Among the list of books dedicated to arbitration after the entering into force of the New Civil Code are the following: C. Florescu, Mediere si Arbitraj, Curs in tehnologie IFR, Editura Fundația România de Mâine 2015; R.B. Bobei, Arbitrajul intern şi internațional. Texte. Comentarii. Mentalități, Ed. C.H. Beck, 2013; G. Mihai, Procedura arbitrală, Ed. Universul juridic 2015; G. Mihai, Arbitrajul internațional şi efectele hotărârilor arbitrale străine, Ed. Universul juridic 2013; B. Ionescu, Repere esențiale. Practică arbitrală comentată, Universul juridic 2017; C. Ignat, Curs de mediere şi arbitraj, Ed. Universitară 2015.

efficient, flexible, faster procedure, proposing an accelerated option without sacrificing the quality but enhancing it.

Although with pronounced international character, in accordance with the rules of the main arbitration institutions in the European Union, UNCITRAL and beyond, the Rules adopted could not depart from the applicable legal provisions of the new Civil and Civil Procedure Codes, in agreement with the most prestigious doctrinal opinions in Romania and in the field of arbitration. But it is particularly distinct that the Rules have become truly international to avoid the style that is simply adapted to national law, with the need to open up and accentuate the use of newer, more flexible and easy-to-use tools for the virtual space, modern means of communication, concepts already extensively used also on international level.

Of course, the 2014 Arbitration Rules have been a good starting point, but the ones in place since the beginning of this year come to bring new elements to the attention of users and can be considered the most revolutionary so far.

The main novelties brought by the Rules aim to highlight the principle of procedural autonomy of parties and arbitrators, emphasizing the pro-active role of the latter, introducing a clear boundary between the written and oral phases of the arbitration process, emphasizing the importance of written stage, improving leadership and the administration of the case by the arbitral tribunal, by setting the requirement for establishing a provisional or complete procedural timetable, the possibility of bifurcating the procedure, facilitating the taking of evidence and the appointing of experts, regulating a simplified accelerated procedure, introducing the institution of the emergency arbitrator, but especially diminishing the difference of treatment between international and domestic arbitration.

Thus, users are faced with new terminologies, tools and procedures that are more than welcomed and useful in conducting an efficient modern arbitration procedure, as close as possible to the needs of each case and in line with international practice already known by more experienced users. The new arbitration rules package was intended to translate arbitration into a simple, efficient and effective procedure for resolving commercial disputes.

An important aspect of how to select arbitrators is whether the permanent institution chosen by the parties has and applies mandatory or optional reference to a list of arbitrators approved by the institution, from which the parties are urged to form their arbitral tribunal. In addition to the rules of organization and operation of an appropriate organizational structure (own management, auxiliary personnel specialized in providing arbitral services), the permanent arbitration institutions may establish their own mandatory or optional lists of arbitrators, and the parties may appoint their arbitrator(s), in principle, from the persons on these lists. In our legislation, Art. 618 of the new Civil Procedure Code establishes that these lists are not binding. It is noteworthy that since the founding of the Arbitration Court in 1953 to date, this arbitration has had lists of arbitrators

(judges) including the most remarkable specialists in the field of private law, university professors, former judges, practitioners with great experience, high professional, moral and distinguished reputation. As presidents of this Court of Arbitration in Bucharest there have been distinguished personalities, including Ion Gheorghe Maurer, Traian Ionascu, Tudor Popescu, Victor Babiuc, Adrian Severin, Viorel Ciobanu.

7. Back to the Future: Generations of arbitrators, reflections on the future approach

I have to confess that the "golden age" of the arbitration means for me the 1958 New York Convention, its birth, when the first generation of arbitrators (such as Peter Sanders, Wellis Melis, Gerold Herrmann, Eric Bergsten, which I had the privilege to meet) have assumed pioneering, being those who ventured to establish arbitration as a viable private alternative to court litigation. They have contributed to the cause of international arbitration and allow us to understand the aspirations of those who drafted the 1958 Convention and ultimately to achieve uniform global application.

The legal and procedural framework with which this first generation was working was rather rudimentary, and the cases it handled were moderately complex compared to today, particularly with regard to the international sale of goods, distribution, construction and engineering. For the first generation of arbitrators, it was particularly necessary to speak different languages, an interest in international law, international and comparative private law, as well as the desire to understand and accept cultural differences.[29]

Given that there has been an increase in the number of cases in which the parties choose to go to arbitration rather than the state courts, there have arisen a number of substantive and procedural issues at all stages of the arbitration process, including the enforcement phase. This has triggered the need for more advanced regulation to provide more legal certainty to the arbitration process and to win or regain users' trust. This necessity activated the emergence of a second generation of arbitration practitioners with more in-depth and broader knowledge. They focused on evolving and developing procedural rules, as well as on the best practices that are reflected today in a series of changes to the arbitration rules and which prove to be a process of updating, modernization and uniformity that must be permanently maintained.

---

[29] J. Willheim, Why International Arbitration and How? Reflections and Visions for a New Generation,

28 February 2018, https://www.linkedin.com/pulse/why-international-arbitration-how-reflections-visions-willheim.

Based on the experience of the first generation, this second generation has raised the standards of the arbitration process to the sophisticated and effective dispute resolution process that is today. We believe that this second generation has been the longest and most competitive, because it has had to set new higher standards and has had to cope with historical political and social disturbances that have left its mark also on arbitration.

Progress, effervescent development and technology have been the engines for creating and establishing truly global markets in a multitude of sectors and industries. Global markets require transnational, transactional and legal trading standards, as well as efficient and modern dispute resolution mechanisms for smooth functioning. Arbitration is best placed to assume the role of implied litigation in global markets. This is largely due to the fact that, by its private and commercial nature, arbitration imposes on users the net competitive advantages for traders. Competition is the best guarantor for the rapid development needed to meet market demand.

As a consequence of the evolutionary process in which globalization and technology are decision-makers, it is no longer enough for a successful career in international arbitration to include the basic knowledge and set of competencies that have secured the success of the first generation with the know-how and the skills of the second generation. Instead, this combination of knowledge and skills is now only the basic element. In addition to these requirements and abilities developed by the first two generations, in order to succeed in today's competitive landscape, the third generation of arbitration practitioners needs extensive expertise in the legal, business and industry fields that generate the disputes and which they have to deal with.

As a result of the globalization and the development of this domain, the arbitrators are also asked for much higher standards of ethics, independence and impartiality, due to the increased number of relationships that have developed between the specialists in the field, who often assume dual qualities through their work, such as lawyers, counselors, experts and arbitrators. As a matter of fact, they became arbitrators thanks to the experience and the possibility of training before holding this quality of arbitrator, being a lawyer and specializing in practice of dispute resolution.

It is also noted that third-generation arbitration practitioners are not only academics, lawyers of major law firms, renowned lawyers, experts and other neutral categories experienced in the fundamentals of international law, and with competences in international arbitration, as well as experts in specific, niche legal areas, as well as people within certain knowledge in industries such as construction and engineering, energy, oil and gas, life sciences, media and entertainment, not to mention, of course, computer technology, which has an exponential expansion with implications in all branches and in all our current life.

Efficiency and effectiveness require in-depth knowledge and expertise to cope with the ever-growing complexity of arbitration, and its users have proven these needs with certainty. In order to meet the needs of today's users, the new coming generation will have to change their mentality and inner attitude from being litigious lawyers and / or arbitrators to becoming real professional dispute resolution managers, i.e. professionals which at any stage of a possible conflict consistently determines and reassesses the most efficient and appropriate way of preventing or solving it and effectively managing each phase of the procedure according to most newly rules.

This requires more than knowledge of the procedural and substantially relevant law, namely familiarization and experience with available ADR methods. It will become a necessity to appreciate and consistently apply the tools for assessing / analyzing emerging situations and current case management tools such as early case assessment tools, screening tools, analytical tools, and various technological tools. Sometimes it seems advisable that senior institutions and professionals, experienced but not always with contemporary and modern vision adapted to the ever-changing realities, let the promising current generations create new horizons and guidelines, new ways to follow. Just thinking revolutionary, adaptable to diversity, transparency, efficiency, integration of new technologies and modern communication, progressive and innovation-inducing changes can be made to maintain and ensure the reconfiguration and balancing of the domestic arbitration to an international competitive level.

Beside institutions the arbitrators will have also to inform and educate the parties as much as their conventional representatives (lawyers, legal counselors). That is why it is becoming a step of a meaningful strategy to choose arbitrators aware of. We therefore advise the parties to turn to those who do not remain dependent to the old habits, who are open and prepared to assume their active role, to keep themselves informed in the field and to improve their continuous professional training. Admittedly, lawyers need to make these efforts and apply the same diligence and perseverance in order to provide the most competent and effective professional advices in the field.

All of this is not enough and cannot be effectively enforced unless the parties train to understand and grasp the meaning and appreciate the advantages of arbitration. It is desirable for the parties and their attorneys to accept that excessive formalism must be overcome, to respect, appreciate and encourage the pro-active role of arbitrators, to demonstrate cooperation and discipline, to know the organization and regulation of arbitration, what really means this mechanism in order to make the best use of its benefits. It takes more than necessary to educate a

new generation of practitioners[30] and specialists in the field, especially by developing a sustained academic training activity in the field. This is already happening for a while longer and more commendable, at the universities and specialized institutions level, organizing specialization courses in arbitration and all kind of ADR. It is worth mentioning both conferences and seminars that deal with interesting and topical issues, because they manage to gather opinions, to ask questions and draw conclusions, to create innovative ideas. Regarding the fate of the Romanian arbitration, we hope that all this can then generate the necessary amendments in the legislation, to keep Romania on the map of the international arbitration and, moreover, to its transformation into a preferred and increasingly used arbitration place.

Conclusions

Arbitration is primarily used in economic relations that require effective and specific dispute-settlement mechanisms to ensure the parties' confidence in the applicable legal regime as well as in the proceedings and timing of the settlement.

The choice of arbitrators, even in institutionalized arbitration, even more so in ad-hoc arbitration, has the advantage of allowing parties to opt for the decision-maker they trust, given their conception, training or professional reputation. In the hands of professional and skilled practitioners, the arbitration procedure can be adapted to lead to a final decision in an effective and tailored manner.

State judges are required in all cases to strictly apply the law, even if such application may cause inequalities, whereas arbitrators have the opportunity to take account when appropriate of commercial usage or the principle of equity. At the same time, arbitral (final and binding) awards are the result of a procedure that offers the same guarantees as the judgments of the state Courts, even if the parties are recognized as having an important role in organizing this procedure.

The historical roots of the traditions have demonstrated with great significance that the course of arbitration in the history of the last two centuries is an upward and opening up of new horizons that evolved through the preservation of tradition from basics to modernity. All of these have led to the current situation where arbitration has become a method of particular importance in the landscape of the current economic, financial and technological context in which its attributes of confidentiality, procedural flexibility and legal recognition contribute to its preference. The mission of specialists in the field remains to practice it with

[30] This aspect is one of the hot issues debated in 2018, see J. Mackojc,10 Hot Topics for International Arbitration in 2018, 8 March 2018, http://arbitrationblog.kluwerarbitration.com/2018/03/08/10-hot-topics-international-arbitration-2018/.

professionalism, dedication and impartiality, to successfully promote its understanding and use on a large scale.

It is therefore the duty of law-makers, institutions, decision-makers, judges, lawyers, counsels and experts (all the arbitration players) to ensure that the use and practice of arbitration is consistent and modern adapted to the particularities of the national legal system, otherwise there is the risk of moving away the participants instead of encouraging them to develop and use this institution. Ensuring a harmonized regulatory framework as well as a safe and consistent practice encompassing the requirements of the national business community is essential for the success of a recognized and enforceable award on international level.