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ORIGINAL PAPER

The Regulatory Framework of International Arbitration

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Abstract
In the field of international arbitration, several international conventions have been adopted,establishing uniform rules of law in order to promote international arbitration and to facilitate the implementation of arbitral awards. International arbitration is also governed by various bilateral treaties, which contain provisions on international arbitration (eg bilateral investment treaties, investment protection agreements, trade and navigation treaties, etc.). Finally, useful international arbitration rules are contained in the International Commercial Arbitration Rules of the United Nations Commission on International Trade Law adopted by the UN General Assembly. In Romanian law, procedural aspects of international arbitration are regulated by the Code of Civil Procedure in Book VII ("The international arbitration process"), Title IV ("International arbitration and the effects of foreign arbitral awards"), Chapter I, which is dedicated exclusively to the international arbitration process and Chapter II, dealing with the regulation of the effects of foreign arbitral awards. All these regulations constitute a major advantage for the participants in international trade, which, together with other such advantages, makes them insert clauses for assigning the jurisdiction of the arbitration courts in the contracts that they conclude.

Keywords: *international arbitration; international conventions; bilateral treaties; uniform law; arbitral award; assigning jurisdiction; arbitration court.*

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1. National arbitration and international arbitration

The legal doctrine distinguishes between national (internal) arbitration and international (foreign) arbitration, with more opinions.

a) Thus, in one opinion (Căpăţînă, Ştefănescu, 1985: 216), a distinction must be made between national arbitration and foreign arbitration. In the case of a distinction between national arbitration and foreign arbitration, the criterion to be used is that of the place where the jurisdictional body is based (the international character of the litigation is presumed). If the headquarters is located in the country, arbitration is national (internal) in nature; otherwise, arbitration is foreign. This territorial criterion is adopted by some international conventions. Thus, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, mainly uses the criterion of the place where the arbitration is conducted, and secondly, the criterion of the law governing arbitration.

The 1958 New York Convention defines as foreign the arbitral award given on the territory of a state other than the one where recognition and enforcement is required (art. 1). At the same time, it also establishes a subsidiary criterion for the qualification of an arbitral award as foreign, considering as foreign the arbitral award which is not considered a national award in the state where its recognition and enforcement is required. This qualification of the arbitral award took into account that not all states accept the objective criterion of the place of arbitration in order to determine the nationality of an arbitral award, but some legislations identify the nationality of the decision given according to the applicable legal system (for example, a national law considers that the arbitral awards pronounced outside the territory of that state are foreign, as well as the awards given on the territory of that state, but on the basis of a foreign procedural law).

b) in a different opinion, a distinction must be made between national and international arbitration. In the case of this distinction, the criterion of the place of arbitration should also be used, with regard to arbitration as a jurisdictional body (Deleanu, Deleanu, 2005: 311). In this opinion, arbitration has an international character if it meets a series of requirements meant to give it an autonomous character toward the national structures, ie its headquarters (such as: plurinational composition of the panel of arbitrators, thus accepting arbitrators with foreign citizenship and the possibility of subjecting the arbitral procedure to a foreign law agreed by the litigants, the vocation to hold debates in any place in the world, etc.). At present, these requirements are mainly met by the arbitration of the International Commercial Arbitration Court of the Paris International Chamber of Commerce (The International Chamber of Commerce located in Paris – ICC, is an association of economic institutions from different countries, established in 1920, as a result of the decision adopted at the International Trade Conference in Atlantic City in 1919 to promote trade between the respective countries. Its members are legal persons such as institutions, corporations, commercial, industrial, financial companies and natural persons with economic concerns. In addition to the ICC there are two independent organizations: a) the International Commercial Arbitration Court; b) the International Jury of Advertising Practices and 3 associated international organizations: the Inter-American Council for Trade and Production, the Bureau International des Containers and the International Employers' Organization. The Chamber of Commerce and Industry of Romania is affiliated to the International Chamber of Commerce, based in Paris, known under the acronym of ICC).

c) Lastly, in a different opinion (Costin, Deleanu, 1994: 151), this distinction must be based on the character of the relations which make the object of the dispute: (i) national arbitration has jurisdiction to settle disputes on the legal relations established between the parties which are part of the legal order of a single state; (ii) international arbitration aims at the settlement of disputes arising out of international trade law relations, relations containing foreign elements (such as the domicile or headquarters of the parties, the place of the conclusion of the contract, the place of performance of the contract) giving them international character. Under the Romanian law, an arbitral litigation in Romania is considered international if it was determined by a private law relation with a foreign element (art. 1111 par. 1 of the Civil Procedure Code). Similarly, the 1961 Geneva Convention stipulates that its provisions apply to arbitration agreements concluded for the settlement of disputes which arose or will arise out of international commercial transactions between natural or legal persons who, at the time of the conclusion of the arbitration agreement, had their regular residence or headquarters in different contracting states (art. I, par. 1, letter a).

2. The regulatory framework of international arbitration in Romanian law.

International arbitration was regulated by the Romanian legislature in the Civil Procedure Code, Book VII ("The International Arbitration Process"), Title IV ("International Arbitration and the Effects of Foreign Arbitral Awards") Chapter I, being exclusively devoted to international arbitration proceedings, and Chapter II being dedicated to the regulation of the effects of foreign arbitral awards. This option of the Romanian legislature, from the point of view of the legislative systematization, had as a premise the idea that "the international arbitral litigation is a variant of the international civil lawsuit" (Bobei, 2013: 235). As noted in the doctrine, the alternative to this option was to regulate international arbitration in Book IV ("On Arbitration") or in a normative act distinct from the Civil Procedure Code. The regulation of international arbitration in the Romanian Civil Procedure Code is structured as follows: Chapter I ("The International Arbitration Process") contains 13 articles with the following titles: Qualification and scope. The arbitrability of the dispute. The arbitration agreement. The arbitral tribunal. Arbitral proceedings. Language of the procedure. Provisional and protective measures. Administration of evidence. Jurisdiction of the arbitral tribunal. Applicable law. Arbitral award. Arbitral costs. Subsidiary application rules. Chapter II ("Effects of Foreign Arbitral Awards") contains 10 articles with the following titles: Qualification. Effectiveness. Competent court. Application. Documents attached to the application. Grounds for refusal of recognition or enforcement. Suspension of the trial. Trial. Probative force. Examination of the merits of the case.

3. Regulation of international arbitration by international conventions

In the field of international arbitration, several international conventions have been adopted, establishing uniform rules of law with a view to promoting international arbitration and facilitating the enforcement of arbitral awards.The following international conventions have received or receive incidence in the international arbitration activity in Romania (Dicționar diplomatic, 1979: 280 et seq.; Ștefănescu, Rucăreanu, 1983: 130-132; Dicționar de relații economice internaționale, 1993: 201 et seq.):

- The 1923 Geneva Protocol on Arbitration Clauses;
- The 1927 Geneva Convention on the Execution of Foreign Arbitral Awards;

- The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- The European Convention on International Commercial Arbitration, concluded in Geneva on 21 April 1961;
- The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted in Washington on 18 March 1965.

International arbitration is also governed by various bilateral or multilateral treaties, which also contain provisions on international arbitration (eg bilateral investment treaties, investment protection agreements, trade and navigation treaties, etc.).

Finally, the International Commercial Arbitration Rules of the United Nations Commission on International Trade Law (commonly referred to as the UNCITRAL Arbitration Rules) adopted by the UN General Assembly, which started from the premise that there must be an administrative authority competent to designate the arbitrator instead of the party who refuses to do so, to decide on claims for challenging, etc, so that ad hoc arbitration would have genuine independence from the courts. [The United Nations Commission on International Trade Law - UNCITRAL, the UN General Assembly body, based in Vienna, created by Resolution 2205 of 1966, has an essential role in the process of unifying international trade law. The purpose of this committee is: a) to coordinate the activities of organizations dealing with the harmonization and unification of private law rules, therefore the rules of international trade law, such as the International Institute for the Unification of Private Law - UNIDROIT; b) to facilitate the widest possible participation of states in existing international conventions and the acceptance of standard laws and uniform laws; c) to develop new international conventions, new standard laws and uniform laws and to encourage the codification and acceptance as widely as possible of terms, rules, customs and practices of international trade; d) to seek ways to ensure uniform interpretation and application of international conventions and uniform laws in the field of international trade law; e) to collect and disseminate information on national laws and modern legal developments, including those of case law, in the field of international trade law; f) to establish and maintain close cooperation with the United Nations Conference on Trade and Development - UNCTAD, the UN General Assembly specialized permanent body, based in Geneva, established on 30 December 1964, and to ensure the relation with other international organizations dealing with the progressive harmonization and unification of international trade law (Dicționar diplomatic, 1979: 220).

In order to standardize and unify international trade customs, UNCITRAL has adopted conventions in various fields, such as: the Convention on the Limitation Period in the International Sale of Goods, New York, 1974; the Convention on the Carriage of Goods by Sea, Hamburg, 1978; the Convention on Contracts for the International Sale of Goods, Vienna, 1980; the International Commercial Arbitration Rules, as recommended by the UN General Assembly, were also adopted. EEC- UNO developed projects for major international trade conventions such as: the Customs Convention on the International Transport of Goods under Cover of TIR Carnets, Geneva, 1959, the European Convention on International Commercial Arbitration, Geneva, 1961, the Convention concerning International Carriage by Rail – COTIF, signed in Bern in 1980, the Convention on the Contract for the International Carriage of Goods by Road - CMR, concluded in Geneva in 1956.

Considering the importance of international commercial arbitration, UNCITRAL approved the revised text of the UNCITRAL Arbitration Rules, published on 12 July 2010, which entered into force on 15 August 2010; the UN General Assembly also adopted the UNCITRAL Arbitration Resolution on 15 December 1976 and amended on 6 December 2010].

A. The 1923 Geneva Protocol on Arbitration Clauses. It was adopted within the League of Nations. Romania became part of the Protocol in 1925 (Official Gazette no. 69 of 21 March 1925). The states parties to this Protocol undertake to recognize the validity of the arbitration agreement by which the parties to a contract (concluded in any matter subject to arbitration) agree that any disputes arising from the contract concluded by them shall be subject to arbitration, even if it took place on the territory of a state other than that whose jurisdiction applies to one of the parties to the contract. The arbitration procedure and the establishment of the arbitral panel are subject to the will of the parties and the law of the state where the arbitration is held. The states parties to the Protocol also undertake to ensure, through legislative provisions, the enforcement of awards given on their territory.

B. The 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. It was also adopted within the League of Nations, being open to ratification or accession only to the states parties to the 1923 Protocol. Romania ratified this Convention in 1931 (Official Gazette no. 71 of 26 March 1931). Under this Convention, the states parties undertake to recognize and enforce on their territory foreign arbitral awards pronounced on the territory of a state party to the Convention provided that such an award is not contrary to public order or to the principles of public law in the country where it was invoked.

C. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was adopted within UNO (after a project developed by the Economic and Social Council of UNO (ECOSOC), ECOSOC deals with international economic and social cooperation).

Romania signed this Convention in 1961, subject only to contractual or non-contractual legal relations that are considered commercial in its legislation. By a further reservation it stated that it would also apply this Convention in the relations with non-contracting states to the Convention, but on the basis of reciprocity established by agreement between the parties (Decree no. 186/1961, published in the Official Bull. no.19 of 24 July 1961).

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed and ratified by most states in the world.

This Convention refers to the recognition and enforcement of foreign arbitral awards, ie pronounced on the territory of a state other than that in which recognition or enforcement is required (objective criterion), or which are not considered to be national in the latter state (subjective criterion), whether the state on whose territory the award was pronounced is or is not a party to the Convention; this provision meant progress as compared with the 1927 Geneva Convention, which provided for the foreign award that was to be enforced, to have been pronounced on the territory of a state party to the Convention.

The Convention allows states to make reserves at the time of accession, to the effect that the Convention applies only to awards given on the territory of another contracting state (art. I, par. 3).

By arbitral awards, the New York Convention means both the awards given by ad hoc arbitrations and the awards given by institutionalized arbitrations; therefore, the Convention marks the equality of awards rendered by ad hoc arbitrations and those given by institutionalized arbitrations, implicitly recognizing permanent arbitrations as a way of settling international trade disputes (art. I, par. 1 and 2).

As to the form of the arbitration agreement, the contracting states recognize only that arbitration agreement which is concluded in written form. "Written agreement" means not only the compromissory clause inserted in a contract or a compromise signed by the parties, but also the arbitration agreement contained in an exchange of letters or telegrams (art. II, par. 2).

Note that the provisions of Romanian law are in line with those of the New York Convention; thus, pursuant to art. 1113 of the Civil Procedure Code, in international arbitration, the arbitration agreement is validly concluded only in written form; the requirement of the written form is met if it can be proved by means of a document, telegram, telex, telecopier, e-mail or any other means of communication enabling it to be established by means of a text.

Under the Convention, if the parties have entered into an arbitration agreement, the court of a contracting state to which the dispute has been brought has the obligation to direct the parties to arbitration, at the request of either of them. This obligation ceases to exist when the arbitration agreement is obsolete, inoperative or unenforceable (art. II, par. 3).

In order to recognize the authority of a foreign arbitral award and to enforce it, the party concerned must submit with the application the following documents: a) the duly authenticated original award or a copy of the original award meeting the conditions required for its authenticity; and b) the original arbitration agreement or a copy of the original one meeting the conditions required for its authenticity. If these documents are not written in an original language of the country where the award is invoked, the party requesting the recognition and enforcement of the award is obliged to ensure their translation by an official translator, sworn translator or diplomatic or consular agent (art. IV).

In accordance with the Convention, the contracting states recognize the authority of an award given under an arbitration agreement and undertake to ensure the enforcement of the award in compliance with the procedural rules of the state where the award is invoked, as provided by the Convention.

For the recognition or enforcement of foreign arbitral awards to which the provisions of the Convention apply, there should be no imposition of more rigorous conditions or higher court fees than those required for the recognition or enforcement of national arbitral awards (art. III).

The New York Convention established the presumption of regularity of the foreign arbitral award. Therefore, the recognition or enforcement of a foreign arbitral award may be refused only if the party against whom it is invoked can prove one of the grounds provided in art. V par. 1 of the Convention, namely:

a) the lack of capacity of the parties to the arbitration agreement;

b) the invalidity of the Convention under the law to which the parties have subordinated or, failing that, by virtue of the law of the country where the award was given (subsidiary criterion);

c) the breach of the right of defense of the party against whom the award is invoked as a result of the fact that the party against whom the award is invoked was not properly

informed of the appointment of the arbitrators or the arbitration procedure or it was impossible, for another reason, to use his defense means;
d) the settlement by an award of claims not foreseen in the arbitration agreement; that is, the arbitral award relates to a dispute not mentioned in the compromise or which does not fall under the provisions of the compromissory clause or contains solutions that go beyond the provisions of the compromise or the compromissory clause; however, if the provisions of the award relating to the matters subject to arbitration may be disjoined from those relating to matters not subject to arbitration, the former may be recognized and enforced;
e) the establishment of an arbitral tribunal or arbitration procedure that do not comply with those agreed by the parties or, in the absence of an agreement, it was not in compliance with the law of the country in which the arbitration took place; it should be noted that the New York Convention enshrined the lex voluntatis principle in determining the law governing the validity of the arbitration agreement in the sense that this agreement must be valid under the law chosen by the parties and, in the absence of the parties' choice, under the law of the country on the territory of which the award was pronounced (art. V, point 1, letter d). The litigant parties may provide both the way of establishing the arbitral court and the arbitral procedure, and the law where the arbitration takes place applies in the silence of the parties;
f) the award has not yet become binding on the parties or has been annulled or suspended by a competent authority of the country in which the award was given or by the law under which the award was given.

For these reasons, which can be raised by the party against whom the arbitral award is invoked, the Convention adds two more reasons, which can be invoked ex officio by the court in charge of the application for recognition and enforcement (art. V, par. 2):
a) in accordance with the law of the country on the territory of which the award is to be enforced, the object of the dispute is not likely to be settled by arbitration;
b) the recognition or enforcement of the arbitral award would be contrary to public order in the requested state.

In Romanian law, too, the recognition or enforcement of a foreign arbitral award may be refused by the competent court for identical reasons. Thus, pursuant to art. 1129 of the Civil Procedure Code, the recognition or enforcement of a foreign arbitral award shall be dismissed by the court only if the party against whom the award is invoked proves that one of the following circumstances exists:
a) the parties did not have the capacity to conclude the arbitration agreement under the law applicable to them, established under the law of the state where the award was given;
b) the arbitration agreement was not valid under the law to which the parties subjected it or, failing that, under the law of the state in which the arbitral award was given;
c) the party against whom the award is invoked has not been properly informed of the appointment of the arbitrators or of the arbitral procedure or has been unable to use his own defense in the arbitral process;
d) the establishment of the arbitral court or the arbitral procedure was not in accordance with the parties' agreement or, in the absence of such an agreement, with the law of the place where the arbitration took place;
e) the award concerns a dispute that was unforeseen in the arbitration agreement or beyond the limits set by it, or contains provisions that exceed the terms of the arbitration

agreement. However, if the provisions of the award which regard matters subject to arbitration may be separated from those on issues not subject to arbitration, the former may be recognized and declared enforceable;
f) the arbitral award has not yet become binding on the parties or has been annulled or suspended by a competent authority in the state in which or under the law of which it was given.

The provisions of the New York Convention are without prejudice to bilateral or multilateral agreements entered into by the contracting states in matters of the recognition and enforcement of foreign arbitral awards.

Under the New York Convention, the two previous regulations (the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards) cease to produce effects between states ratifying the New York Convention.

D. The European Convention on International Commercial Arbitration. It was concluded in Geneva on 21 April 1961 under the auspices of the Economic Commission of UNO for Europe and entered into force in 1964.

As the name implies, the Convention was mainly developed for international arbitration between parties in the European states, being the most important regional instrument establishing uniform rules on arbitration.

Most states in Europe have signed and ratified this Convention.

Romania ratified the Geneva Convention in 1963 (Decree no. 281/1963, published in the Official Bull. no. 12 of 25 June 1963).

This Convention envisages only international commercial arbitration, either ad hoc or institutionalized (art. I, par. 1), aiming at facilitating access to arbitration of participants in international trade.

The international character of arbitration is determined by economic and legal criteria, making it clear that the provisions of the Convention apply to arbitration agreements concluded for the settlement of disputes arising out of international trade operations between natural or legal persons who, at the time of the conclusion of the Convention, were based in different contracting states (art. I par. 1).

The essence of these provisions of the Geneva Convention is found in the Romanian law, which, after defining the international arbitration litigation as arising out of a private law relationship with a foreign element, specifies that the provisions of the Romanian law on the international arbitration process apply when at least one of the parties did not have his domicile or regular residence, or headquarters in Romania at the date of the conclusion of the arbitration agreement (art. 1111 of the Civil Procedure Code).

The Geneva Convention contains provisions on the organization of arbitration, the jurisdiction of the arbitral tribunal, the rules of procedure to be followed in the settlement of the dispute, the motivation of the arbitral award, its annulment, the recognition and enforcement of the foreign arbitral award.

The arbitration agreement is defined as either a compromissory clause in a contract or a compromise, signed by the parties or contained in an exchange of letters, telegrams or telex communications (the New York Convention did not refer to telex communications); in relations between countries whose laws do not impose a written form for arbitration agreements, any agreement concluded in the forms allowed by these laws is valid (art. I, par. 2, letter a).

In accordance with these provisions of the Geneva Convention, the Romanian law (art. 1113 of the Civil Procedure Code) provides that, in international arbitration, the arbitration agreement is valid only in written form; the requirement of the written form is met if it can be proved by means of a document, telegram, telex, telecopier, e-mail or any other means of communication enabling proof by means of a text.

Legal persons under public law have the possibility of validly entering into arbitration agreements for the settlement of disputes arising out of international trade operations (art. II).

In arbitrations subject to the Geneva Convention, foreign citizens may be arbitrators (art. III).

The Geneva Convention also includes regulations aimed at resolving the issue of arbitration organization; this responsibility lies with the parties, the arbitrators, the chairmen of the competent Chambers of Commerce and a Special Committee; courts have no attributions related to this issue.

Thus, pursuant to art. IV par. (1), the parties to the arbitration agreement are free to choose either institutionalized arbitration, in which case arbitration shall be conducted in accordance with the regulations of the appointed permanent arbitration institution, or occasional arbitration, in which case the parties shall have the following tasks: a) to appoint arbitrators or to determine the modalities according to which the arbitrators will be appointed in case of litigation; b) to determine the place of arbitration; c) to establish the rules of procedure to be followed by the arbitrators.

Where the parties have agreed to subject their dispute to ad hoc arbitration and one of the parties refuses to appoint the arbitrator, or if there is disagreement between the parties or between the arbitrators in this respect, the solution of the Convention was to broaden the powers of the arbitrators to ensure the functioning of ad hoc arbitration independently and without any intervention of the courts. Thus, pursuant to art. IV of the Convention, if the parties have decided to subject their dispute settlement to ad hoc arbitration without the arbitration agreement providing guidance on the necessary measures for the organization of arbitration (such as the place of arbitration or the arbitration procedure), the necessary measures for the organization of arbitration shall be taken, if the parties do not agree in this respect, by the already appointed arbitrator or arbitrators and in the absence of an agreement of the parties on the appointment of arbitrators or in the absence of their agreement on the measures to be taken, the applicant may address, if the parties have not chosen the place of arbitration, either the president of the Chamber of Commerce of the country where the defendant has his regular residence or headquarters, or the Special Committee established under the Geneva Convention (both the Chambers of Commerce and the Special Committee having the quality of prearbitral mechanism); this unprecedented regulation subsequently influenced the Regulations of some permanent arbitration institutions.

Considering these regulations of the Geneva Convention in the legal literature it was said that "the objection to the Geneva Convention of 1961 is the great complexity of the regulations and some difficulties in the functioning of the bodies it provides to fill the omissions of the arbitral clauses or the recalcitrance of the litigants" (Căpăţînă, 1978: 35).

As for raising the objection of the arbitrator's lack of jurisdiction, for the purpose of declining arbitral jurisdiction, art. V(1) makes a distinction between (i) the case of objections based on the non-existence, nullity or invalidity of the arbitration agreement (in which case the party raising the objection must do so during the

arbitration procedure, at the latest when presenting his defense in the first instance) and (ii) the situation in which there are objections based on the fact that the litigation would exceed the arbitrator's powers (in which case the party raising the objection must do so as soon as the issue that would go beyond these powers is raised in arbitral proceedings).

The arbitrator may declare the objection admissible, even if it was raised with delay, when he considers that the objection is due to a well-founded cause.

These objections of lack of jurisdiction, if they have not been raised within the time limits set by the Convention, shall not be raised (i) during the arbitration proceedings, if there are objections which the parties themselves have the faculty to raise under the law applicable by the arbitrator and (ii) nor in the course of subsequent legal proceedings on the merits or the enforcement of the award, in the case of objections which the parties themselves have the faculty to raise under the law determined by the conflicting rule of the court deciding on the merits of the case or the enforcement of the award. The court may censor the decision by which the arbitrator found the delay in the objection of lack of jurisdiction (art. V par. 2).

The arbitrator whose jurisdiction is challenged must not reject the case, but has the power to decide on his own jurisdiction and on the existence or validity of the arbitration agreement or the contract to which this agreement belongs; however, his decision will be subject to the subsequent judicial control provided by the law of the forum (art. V, par. 3).

Similarly to the provisions of the Geneva Convention, the Romanian law provides that, in the international arbitration process, the arbitral tribunal decides on its own jurisdiction, without taking into consideration an application having the same object, already pending between the same parties before a state or arbitral tribunal. The objection of lack of jurisdiction must be raised before any defense on the merits (art. 1119 of the Civil Procedure Code).

Most rules of the Geneva Convention are rules of substantive law; there are also conflicting law rules, such as those contained in art. VI, VII and IX.

Art. VI governs the situation in which the defendant in a litigation brought before the court, raises the objection of its lack of jurisdiction based on the existence of an arbitration agreement; under the Convention, such an objection must be raised by the defendant under the penalty of the loss of procedural rights, either before or at the time of the defense of the merits (depending on whether the law of the court considers the objection of the lack of jurisdiction to be a procedural issue or a substantial issue).

The court which has to rule on the existence or validity of an arbitration agreement will decide as follows: a) on the capacity of the parties, in compliance with the law applicable to them; b) concerning the other issues, they will consider: (i) first, the law to which the parties have submitted the arbitration agreement; (ii) in the absence of an option of the parties in this respect, the law of the country where the award must be given; (iii) if there is no option of the parties to apply the law applicable to the arbitration agreement and if, when the matter is brought before a court, it is not possible to foresee the country in which the award is to be given, it will have regard to the competent law by virtue of the conflicting rules of the court deciding on the case.

The court may not recognize the arbitration agreement when, under the law of the forum, the dispute is not subject to arbitration (art. VI, par. 2).

Where an arbitration procedure was initiated, before a court decided on a dispute, and subsequently the same dispute between the same parties, or an application for a declaration of non-existence, the nullity or lapse of the arbitration agreement, was

brought to a court of law, the court will suspend the judgment on the jurisdiction of the arbitrator until the arbitral award has been rendered; by way of exception, if there are serious grounds, the court will rule on the jurisdiction of the arbitrator without waiting for the arbitral award.

Pursuant to art. VI par. 2, the application for provisional or protective measures which the parties address to a judicial authority must not be deemed incompatible with the arbitration agreement; nor is it to be regarded as a submission of the dispute, in matters of substance, to the court.

There are specific provisions in the Geneva Convention on the law applicable to the substance of the litigation (regulation not covered in previous conventions). In this regard, it is specified that the parties have the right to choose the law applicable to the substance of the litigation, and in the silence of the parties, the arbitrators will apply the competent law, indicated by the conflicting rule, which they will deem appropriate to the case, but in both cases the arbitrators must take into account the contractual terms and commercial usage (art. VII, par. 1).

In accordance with the provisions of the Geneva Convention, the Romanian law provides that the arbitral tribunal shall apply the law established by the parties to the merits of the dispute and, if the parties have not expressed their choice regarding the applicable law, the arbitral tribunal shall apply the law it deems appropriate; in all cases the arbitral tribunal must take into account professional rules and usage.

Under the Geneva Convention, the arbitrators may judge as amicable mediators if the parties have agreed to this and if the law governing arbitration permits it (art. VII, par. 2).

The arbitral award must be motivated, unless the parties have decided otherwise, or the law governing arbitration does not require motivation and the parties did not request it before the closure of the debates or, if not debated, before the award was drafted (art. VIII).

The award may be set aside for the following reasons, specifically provided in the Convention: a) if the parties to the arbitration agreement were, under the law applicable to them, affected by incapacity; b) the arbitration agreement is not valid under the law to which the parties submitted it or, in the absence of a choice by the parties in that respect, under the law of the country where the award was rendered; c) if the party requesting the annulment was not properly informed of the appointment of the arbitrator or the arbitral proceedings, or it was impossible for another reason to support his case (ie if the right to defense was infringed; d) if the award relates to a dispute not mentioned in the compromise or which does not fall within the provisions of the compromissory clause; or contains rulings that go beyond the terms of the compromise or the compromissory clause; however, when the provisions of the award referring to matters subject to arbitration may be separated from those relating to matters not subject to arbitration, the former may not be annulled; e) if the establishment of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties or, in the absence of an agreement, with the provisions of art. IV of the Convention (art. IX, par. 1).

In Romanian law, too, reasons identical to those provided by the Geneva Convention for the annulment of an arbitral award are provided as grounds justifying the refusal of the competent state court to recognize or approve the enforcement of a foreign arbitral award. Thus, pursuant to art. 1129 of the Civil Procedure Code, the recognition or enforcement of a foreign arbitral award is rejected by the competent state court only if

the party against whom the judgment is invoked proves that one of the following circumstances exists:
a) the parties did not have the capacity to conclude the arbitration agreement under the law applicable to them, as established under the law of the state where the award was given;
b) the arbitration agreement was not valid under the law to which the parties submitted it or, failing that, under the law of the state in which the arbitral award was given;
c) the party against whom the award is invoked was not properly informed of the appointment of the arbitrators or of the arbitral procedure or was unable to use his own defense in the arbitral proceedings;
d) the establishment of the arbitral tribunal or the arbitral procedure was not in compliance with the parties' agreement or, in the absence of an agreement, the law of the place where the arbitration took place;
e) the award concerns an unforeseen dispute in the arbitration agreement or beyond the limits set by it, or contains provisions that go beyond the terms of the arbitration agreement. However, if the provisions of the award which concern matters subject to arbitration may be separated from those on issues not subject to arbitration, the former may be recognized and declared enforceable;
f) the arbitral award has not yet become binding on the parties or has been annulled or suspended by a competent authority in the state in which or under the law of which it was rendered.

Under the Geneva Convention, the annulment in one of the Contracting States of an arbitral award falling under the Convention shall constitute a ground for refusal of recognition or enforcement in another Contracting State only where such annulment has been rendered in the State in which the award was given, or under the law of which the award was given.

In the relations between the Contracting States which are Parties to both the 1961 Geneva Convention and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the grounds for annulment of the arbitral awards, listed in art. IX of the Geneva Convention will lead to the circumstantial application of the provisions of art. V, par. 1 letter e of the New York Convention, for the purpose of limiting only to the causes of annulment which the Geneva Convention enumerates.

The provisions of the Convention are without prejudice to bilateral or multilateral arbitration agreements concluded by the Contracting States either before or after its entry into force.

E. On the American continent there is the **Inter-American Convention on International Commercial Arbitration** (known as the “Panama Convention”); The Panama Convention is a multilateral agreement addressed to members of the Organization of American States. The Convention regulates the conduct of international commercial arbitration and the enforcement of arbitral awards.

Its entry into force on 16 June 1976 created problems concerning its application and relation to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, since both conventions deal with the same issues and both were signed and ratified by a number of states on the American continent.

F. The Convention on the Settlement of Investment Disputes between States and Persons of Other States, adopted in Washington on 18 March 1965. This Convention was concluded under the aegis of the World Bank and aimed at the establishment of international conciliation and arbitration mechanisms, the auspices of the International Bank for Reconstruction and Development, to which the contracting states and persons of other contracting states may, if they so wish, submit their disputes.

The convention is enforced in most countries of the world. Romania ratified this Convention in 1975 (Official Bull. no. 56/07.07.1975).

Under this Convention, an International Center for the Settlement of Investment Disputes (ICSID) was established. The concept of "investments" was not defined in the Convention, but the doctrine and practice consider that it refers not only to capital investments, but also to those in the field of services and technologies (Deleanu, Deleanu, 2005: 326).

The competence of the Center covers the legal disputes between a contracting state (or a public body) and the persons of another contracting state which are in direct relationship with an investment, disputes which the parties have agreed in writing to submit to the Center. When the parties have given their consent, none of them will be able to withdraw it unilaterally (art. 25, par. 1).

In compliance with the Washington Convention, a person of another contracting state means: a) any natural person who has the nationality of a contracting state other than the state party to the dispute at the time when the parties consented to submit the dispute to conciliation or arbitration, and at the time when the application was registered under the Convention; the person who, on one or other of these dates, equally had the nationality of the contracting state party to the dispute is excluded from the application of the provisions of the Convention; b) any legal person who had the nationality of a contracting state other than the state party to the dispute at the time when the parties agreed to submit the dispute to conciliation or arbitration and any legal person having the nationality of the contracting state party to the dispute on the same date and which the parties agreed, in order to achieve the Convention's objectives, to treat as belonging to another contracting state because of the control exercised over it by foreign interests (art. 25, par. 2).

After the registration of the request for conciliation or arbitration, which is addressed to the Secretary General of the Center, a Conciliation or Arbitration Commission is called. The Conciliation Commission has the duty to clarify the litigious points between the parties and must strive to lead them to a mutually acceptable solution (art. 34, par. 1).

Powers of the arbitral tribunal. In the case of a request for arbitration, the arbitral tribunal decides on the dispute in accordance with the rules adopted by the parties; in the absence of such an agreement, the arbitral tribunal applies the law of the contracting state party to the dispute, including the conflict-of-law rules and the principles of international law in that area (art. 42, par. 1).

Pursuant to art. 46, as a rule, the tribunal must, at the request of either party, rule on all incidental, additional claims or counterclaims directly related to the subject matter of the dispute, provided that such requests are covered by the consent of the parties and are within the competence of the Center.

Rendering the arbitral award. Under the Washington Convention, the arbitral tribunal decides on any issue with the majority of all its members' votes. The award is

given in writing; it is signed by the members of the tribunal who have spoken in its favor. The award must answer all the points in the conclusions submitted to the tribunal and must be motivated. The Center does not publish any award without the consent of the parties (art. 48).

At the request of either party, the tribunal may, after notifying the other party, rule on any matter over which it omitted to pronounce or correct any material mistake contained in the award. This decision is an integral part of the award and is notified to the parties in the same form as the latter (art. 49, par. 2).

Interpretation of the arbitral award. Under the Washington Convention, if there is a misunderstanding between the parties as to the meaning or effect of the award, either party may make a written request for interpretation to the Secretary General. The application is submitted to the tribunal that rendered the award. If this is not possible, a new tribunal is constituted in accordance with the provisions of the arbitration Convention. Where it considers it necessary, the tribunal may order the suspension of the enforcement of the award until pronouncement on the interpretation request has been made (art. 50).

Revision of the arbitral award. Under the Washington Convention, the arbitral award may be subject to revision when one of the parties discovers any fact likely to exert decisive influence over the award; in order for that fact to be raised, a condition must be met, ie before the award was given this fact must have been unknown to both the court and the requesting party or the latter must not have ignored it. The request for revision is addressed in writing to the Secretary General within 90 days of the discovery of the new fact, but no more than three years after the pronouncement of the award. The request is submitted to the tribunal that has rendered the award. If this is not possible, a new tribunal is constituted in accordance with the provisions of the arbitration Convention. If it considers that the circumstances so require, the tribunal may decide to suspend the enforcement of the award until it has taken a decision on the request for revision. If the party requesting the revision requests the postponement of the enforcement of the award, the tribunal must suspend the enforcement until the revision request is decided on (art. 51).

Annulment of the arbitral award. Pursuant to art. 52, either party may request in writing the Secretary General to annul the arbitral award for one of the following reasons: a) defect in the constitution of the tribunal; b) obvious abuse of power on the part of the tribunal; c) corruption of a member of the tribunal; d) serious violation of a fundamental procedural rule; e) lack of reasons.

Some of the grounds provided by the Washington Convention for the annulment of an arbitral award are provided in Romanian law as grounds justifying the refusal of the competent state court to recognize or authorize the enforcement of a foreign arbitral award. Thus, art. 1129 of the Civil Procedure Code provides that the recognition or enforcement of a foreign arbitral award is rejected by the competent state court only if the party against whom the award is raised proves that one of the following circumstances exists: c) the party against whom the award is raised was not properly informed of the appointment of the arbitrators or the arbitration procedure or was unable to use his own defense in the arbitral proceedings; this reason in the Romanian law is equivalent to that existing in the Washington Convention under letter d): the serious violation of a fundamental procedural rule; d) the constitution of the arbitral tribunal or the arbitral procedure was not in compliance with the parties' agreement or, in the absence of their agreement, with the law of the place where the arbitration took place;

this reason in the Romanian law is equivalent to that existing in the Washington Convention under letter a): defect in the constitution of the tribunal; e) the award concerns an unforeseen dispute in the arbitration agreement or beyond the limits set by the arbitration agreement or contains provisions that exceed the terms of the arbitration agreement; this reason in the Romanian law is equivalent to that existing in the Washington Convention under letter a): defect in the constitution of the tribunal.

Under the Washington Convention, an application for annulment must be made within 120 days of the date of delivery of the award, but no more than three years after the award has been given. If the annulment is requested for corruption, the 120-day term begins to run from the discovery of the corruption offense, but no more than 3 years after the award has been given. In order to decide on the request for annulment of the arbitral award, the chairman immediately appoints an ad hoc committee of three members from among the persons whose names appear on the list of arbitrators. The ad hoc committee may not include any of the members of the tribunal that gave the award. Along the same line, the members of the ad hoc committee must not have the same nationality as any of the members of the tribunal which gave the award or the nationality of the state party to the dispute or of the state of which the person is a party to the dispute or who have been designated to appear on the list of arbitrators by any of the aforementioned states or have served as conciliators in the same case.

The ad hoc committee is empowered to annul the award in whole or in part for one of the reasons listed in the Convention. The provisions of the Convention relating to the arbitral tribunal's "Powers and Functions", those referring to the pronouncement of the arbitral award, to the interpretation, revision or annulment of the award in the place of the proceedings and those relating to "Disputes between Contracting States" shall apply "mutatis mutandis" to proceedings before the ad hoc Committee appointed to decide on the request for the annulment of the arbitral award.

The Committee may decide, if it considers that the circumstances so require, to suspend the enforcement of the award until a decision on the request for the annulment of the award is rendered.

Similarly, if the party requesting the annulment of the award also requested the postponement of the enforcement of the award, its enforcement is suspended provisionally until the ad hoc committee has ruled on the request for annulment. In the event that the arbitral award is declared null and void, the dispute will, at the request of the more diligent party, be submitted to a new tribunal constituted under the provisions of the Convention on the establishment of the arbitral tribunal.

Art. 53 specifies that the term of the award includes not only the arbitral tribunal's awards to settle the dispute it had to decide on, but also the awards given for the interpretation, revision or annulment of the award itself. It also states that an arbitral award is final and therefore binding on the parties and cannot be subject to any appeal other than those provided for by the Convention.

Regarding the recognition and enforcement of awards, art. 54(1) lays down the obligation of the signatory states of the Convention to recognize any award given in the Convention as mandatory and to ensure the enforcement on their territory of the pecuniary obligations imposed by the award as if it were a final judgment of a court operating on the territory of those states.

In order to obtain the recognition and enforcement of an award on the territory of a contracting state, the party concerned must present a certified copy, for compliance, by the Secretary General to the competent national court or any other authority that the

contracting state will designate for that purpose. Each contracting state will make known to the Secretary-General the competent court or authorities designated for that purpose by informing him of any change.

In accordance with the Washington Convention, the enforcement of arbitral awards under the Convention is subject to the rules on the enforcement of judgments in force in the state on the territory of which such proceedings are applied (art. 54).

Conclusion: The Romanian Civil Procedure Code adopted, in the regulation of the essential aspects of international arbitration and the effects of foreign arbitral awards, the same solutions that are enshrined in the international conventions on arbitration, conventions to which Romania is a signatory.

For example, the following provisions may be listed: a) as regards the requirement of the written form of the arbitration agreement, the provisions of Romanian law are in line with those of the New York Convention and those of the Geneva Convention; the requirement of the written form of the arbitration agreement is met if the convention can be proved by means of a document, telegram, telex, telecopier, electronic mail or any other means of communication allowing proof by means of a text; b) in Romanian law, the recognition or enforcement of a foreign arbitral award may be refused by the competent court for reasons identical to those provided in the New York Convention; c) the provisions of the Romanian law on the concept of international arbitration dispute are in line with those of the Geneva Convention; d) in the same way as the provisions of the Geneva Convention, the Romanian law provides that, in the international arbitration process, the arbitral tribunal decides on its own jurisdiction, without taking into consideration an application having the same object already pending between the same parties before a state or arbitral tribunal; e) in accordance with the provisions of the Geneva Convention, the Romanian law provides that the arbitral tribunal shall apply the law established by the parties to the merits of the dispute, and if the parties have not expressed their choice of applicable law, the arbitral tribunal shall apply the law it deems appropriate; in all cases the arbitral tribunal must take into account professional usage and rules; f) in Romanian law, reasons identical to those provided for in the Geneva Convention for the annulment of an arbitral award are provided as grounds justifying the refusal of the competent state court to recognize or approve the enforcement of a foreign arbitral award; g) some of the reasons provided by the Washington Convention for the annulment of an arbitral award are provided in Romanian law as grounds justifying the refusal of the competent state court to recognize or approve the enforcement of a foreign arbitral award.

References:

Bobei, R. B. (2013). Arbitrajul intern și internațional. Texte. Comentarii. Mentalități (Internal and international arbitration. Texts. Comments. Mentalities), București: Ed. C.H. Beck.

Căpățînă, O. (1978). Litigiul arbitral de comerț exterior (The foreign commercial arbitration dispute), București: Ed. Academiei Române, 1978.

Căpățînă O., Ștefănescu Br. (1985). Tratat de drept al comerțului internațional, vol. 1 partea generală București: Editura Academiei R.S.R.

Costin, M. N., Deleanu S. (1994). Dreptul comerțului internațional, I, partea generală, București: Ed. Lumina Lex.

Deleanu, I., Deleanu S. (2005). Arbitrajul intern și internațional (Internal and international arbitration), București: Ed. Rosetti.

Dicționar de relații economice internaționale, Coordonatori: Marin G., Puiu A.; Autori: Alexa C., Babiuc V., Cîmpeanu A., Comănescu L., Constantinescu A., Danciu V., Dijmărescu E., Dobrotă N., Duhăneanu M., Gheorghiță V., Ijdelea R., Isărescu M., Korka M., Marin G., Nistorescu N., Popa I., Puiu A., Rujan O., Sută N., Șerb M., Văleanu M., Voiculescu D.; București: Editura Științifică și Enciclopedică, 1993.

Dicționar diplomatic, Bărbulescu P., Cloșcă I., Ecobescu N., Fotino N., Giurescu D.C., Glaser E., Macovescu G., Neagu R., (coord.); București: Ed. Politică, 1979.

Ștefănescu, Br., Rucăreanu I. (1983). Dreptul comerțului internațional (International trade law), București: Editura Didactică și Pedagogică.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958. Retrieved from: http://legislatie.just.ro/Public/DetaliiDocumentAfis/26820.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965. Retrieved from: http://legislatie.just.ro/Public/DetaliiDocumentAfis/35208.

The European Convention on International Commercial Arbitration, Geneva, 1961. Retrieved from: (http://legislatie.just.ro/Public/DetaliiDocument/26821.

The Romanian Civil Procedure Code, adopted by Law no. 134/2010, published in the Official Gazette of Romania, Part I, no. 485 of 15 July 2010, was subsequently amended and supplemented. Retrieved from: http://legislatie.just.ro/Public/DetaliiDocument/140271.

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