

# Commercial Arbitration in the Context of Increasing International Trade Disputes

Diana Ramona Popescu<sup>1</sup>

## *Abstract*

*The article focuses on the analysis of the alternative dispute resolution in commercial transactions, in particular on the commercial arbitration and its role in the sphere of international economic relation. The research begins with identifying the causes that have led to the multiplication of trade disputes. In order to indicate the framework of the analysis, the paper continues with terminological clarifications and definitions of commercial arbitration and the identification of the main international arbitration organizations.*

*The objective of the paper is to highlight the advantages of commercial arbitration in ensuring a beneficial environment for the international trade transactions through settling efficiently the disputes arising between the parties.*

*The author focuses on an assessment over the activity of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania by exemplifying two cases of international commercial disputes settled through commercial arbitration.*

*Keywords: globalization, international disputes, commercial arbitration, alternative dispute resolution*

*JEL Classifications: F130, F630, F510*

## **1. Introduction**

International economic relations are subject to structural transformations characterized by rapidity and amplitude. Informational interconnectivity is manifested in economic and political area as well as in international commercial transactions. Globalization must be understood as a reality, as a global international system that influences both the international relations and the internal politics of each state.

Among the factors of globalization are:

- the unprecedented development of communications and the information system;
- the internationalization of capital;
- the liberalization of trade, labor and services;
- shaping of a unique global market.

---

<sup>1</sup> The Bucharest University of Economic Studies, Bucharest, Romania, dy.popescu@yahoo.ro  
Year XXII no. 72

Globalization transformed the international economic relations and led to metamorphoses in the economic, social and political spheres by the action of a complex set of factors, connections and interdependencies.

In this context, transnational companies and multinational corporations have emerged. These are economic structures organized worldwide which have considerable financial resources and developed economic strategies. They become active actors in the sphere of international economic and political relations, being involved in the competition for resources, markets and technological advantages. Besides the benefits of globalization, the business environment faces economic vulnerabilities that lead to the emergence of trade disputes.

The crisis from 2008 has affected the global economy, which has become even more vulnerable to the mechanisms of globalization. The effects of the crisis manifested through the multiplication of the economic risks and trade disputes. The global economic crisis has increased the involvement of states in international affairs, especially through their regulatory function. In this context, the country's economic policy has become austerity, which has translated into a rapid and significant reduction in living standards and increasing trade conflicts [1]. For companies, regardless of size and economic strength, dealing with litigation is unproductive, causing negative implications in all departments of the affected company. In this context, settling commercial disputes only by court becomes increasingly ineffective due to the consumption of resources and time.

## 2. Literature review

Alternative dispute resolution of commercial litigation represent processes and techniques known and used worldwide as more efficient methods for the parties to come to an agreement, usually in the presence of a neutral third party. Recently, many courts from different countries adopted a legislation that requires parties to resort to alternative disputes resolution before the case is tried by traditional law courts. An increasingly used alternative in resolving commercial disputes both at national and international level is arbitration.

As shown in Voicu [2], the commercial arbitration has developed over the last decades due to the following considerations:

- » the development of international transactions and the growth of the number of commercial companies;
- » the poor results in legal systems where the length of court proceedings is measured in years of trial, which contributes to the worsening of the crisis in commercial justice;
- » the effect of globalization that has increased the opportunities in economic and trade relations between states;

» the refusal of the parties, in international trade agreements, to submit to the jurisdiction of the other parties courts.

The 1907 Hague Convention describes arbitration as a means of settling disputes between states on the basis of the rules of international law considered by the parties to be conclusive for the cause through the judges chosen by the parties [3].

International arbitration is a means of peaceful resolution of international disputes in which the parties to a dispute, through a formal agreement, entrusts the resolution of the dispute to a third party and are subjected to his decision as a result of a contentious procedure, resulting in a final and binding decision [4].

For an arbitral award to be enforceable, Kurkela and Turunen [5] assert that the dispute between the parties must be settled through arbitration and the procedural rules applied should be in accordance with the fundamental procedural requirements of the applicable arbitration statute<sup>2</sup>.

The national arbitration laws are not compulsory for the parties, so they can choose the provisions of different international arbitration organizations, provided that they are previously agreed by the national arbitration entity that settle the commercial dispute between the parties.

Commercial arbitration is a private option of companies to resolve misunderstandings between them but with equal authority to that of court decisions. In order to benefit from institutionalized arbitration, the parties must insert a compromise clause into their commercial contract or civil agreement. In practice the conflicts that are most often subject to arbitration regard contractual liability, claims arising from various legal situations or the nullity or termination of a commercial contract.

The advantages of commercial arbitration are [6]:

- The right of the parties to appoint arbitrators, to choose the location of the process and to establish certain rules for the arbitration process, including the possibility of extending the date for the final sentence;
- The confidentiality of the arbitration procedure where the information on the activity and the identity data of the parties is not public. The participation of third parties in arbitration proceedings is possible only with the consent of the parties and with the approval of the arbitral tribunal.
- Diminished period of time in settling disputes. A commercial process in jurisdictional courts lasts up to 3-4 years, while an arbitration process lasts

---

<sup>2</sup> Kurkela, M., S.; Turunen, S., *Due process in international commercial arbitration*, 2010, Oxford University Press

for a maximum of 6 months in the case of an internal litigation and a maximum of one year if it is an international commercial dispute.

- Flexibility in the arbitral proceedings. In the process of arbitration parties may intervene in the arbitration proceeding to establish specific terms of law, to identify faster ways to settle the dispute or to obtain a flat-rate payment of arbitration fees.
- The lower costs in comparison to the fees of courts, especially when the value of the litigation is lower.
- The arbitral award is final and binding, with the same legal value as that of the courts.

The arbitration procedure is applicable both in settling national and international commercial disputes. At international level, arbitration is governed by complex legislation which, in an intrinsic sense, uses similar rules and instruments. Among the internationally recognized arbitration institutions are [7]:

- The International Court of Arbitration attached to the International Chamber of Commerce (ICC) from Paris, which was founded in 1923. The International Court of Arbitration does not solve the litigation directly but supervises and administers the arbitration process at all stages. Arbitration meetings are held in arbitration tribunals under the ICC Rules of Arbitration.
- American Arbitration Association (AAA) was founded in 1926 and is the most important institutions to settle commercial disputes through arbitration from the United State of America. The organization also settles international arbitration cases through the International Dispute Resolution Center.
- The International Centre for Settlement of Investment Disputes (ICSID) is the main international arbitration institution for investor-to-state dispute management. According to statistical data, ICSID arbitration procedures were adopted by 153 states.
- The Permanent Court of Arbitration is a multinational organization based in The Hague, being a private law institution that resolves mainly intergovernmental and inter-state litigations.
- The Australian Centre for International Commercial Arbitration (ACICA) based on Melbourne settles all forms of alternative dispute resolution, under its own sets of Rules as well as ad hoc processes, including under the UNCITRAL Arbitration Rules.
- China International Economic and Trade Arbitration Commission.

### 3. Commercial arbitration in Romania

In Romania, the oldest and the most appreciated organization for settling commercial disputes is the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, which was founded in 1953. The arbitral proceedings applicable in Romania for all commercial disputes are subject to the regulations of the New Civil Procedure Code, the International Chamber of Commerce Rules and to the international conventions to which Romania joined.

The main services of the Court of International Commercial Arbitration refer to settling commercial disputes both national and international. Other tasks relate to: legal assistance in arbitration proceedings, legislative analyzes in the field of arbitration, ensuring cooperation between arbitration committees within the county chambers of commerce and industry from Romania [8]. The Court of International Commercial Arbitration settles commercial litigation in all economic sectors: infrastructure, construction, financing projects, distribution, banking, capital markets, public procurement, energy, oil and gas.

At the county level there are commercial arbitration courts that operate alongside the county chambers of commerce and industry. A recent analysis at the Court of International Commercial Arbitration revealed that between 2008 and 2017 were solved almost 3100 commercial litigation, of which over 700 of the trade disputes were international.

**Table 1 Awards of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania**

Year	Number of registered files	Number of arbitrators of the Court of International Commercial Arbitration	Number of awards
2008	391	59	252
2009	502	60	318
2010	506	87	266
2011	324	112	257
2012	293	120	249
2013	227	130	197
2014	200	127	140
2015	180	69	153
2016	182	98	119
2017	185	102	123
<b>Total</b>	<b>2 990</b>	<b>964</b>	<b>2 074</b>

*Source:* made by the author according to the data obtained from the Court of the International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

In Romania, the main activities of the companies that settled commercial disputes through arbitration are: civil and industrial construction (42%), services (25%) and real estate (17%). Small and medium-sized enterprises represent the companies that register the highest percentage (41%) in the structure of companies that use arbitration to settle commercial disputes. The state economic organizations (25%) and the state-owned companies (19%) also require arbitration services in a high percentage compared to multinational companies (11%) which prefer the resolution of commercial litigations through the courts.

### **3.1 Case study: Settling international commercial disputes at the Court of the International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania**

To highlight the advantages of the arbitration process, the author conducted a qualitative research and analyzed two disputes that have arisen in the contractual relations between Romanian and foreign companies, which were settled by Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

Taking into account the requirements of confidentiality in the arbitral trials, in the analyzed cases there are no elements of identification of the parties.

The company X from Brasov, Romania, entered into a commercial contract with company Z from Thessaloniki, Greece, whereby the Romanian company undertakes to deliver auto parts to the Greek company. The contractual relations took place during 2016 and early 2017. The Romanian company honored its contractual obligations and delivered in several stages the required parts and assemblies. Greek company paid the invoices to the partner, but two bills in the last batch totaling 31 370 euro. According to the terms of the contract, invoices were paid within 10 days of the receipt of products. Otherwise delay penalties were levied, which represented 0.15% from total sum of the invoices calculated on one week delay. The Romanian company tried to settle the dispute through negotiation but without result.

Under these conditions, using the arbitral clause from the contract, the Romanian company introduces an action to the Court of International Commercial Arbitration, requesting the payment of the amount of 31150 euro representing the value of the sold goods, the payment of the amount of 3790 euro representing penalties delay and the payment of arbitration costs by the Greek Company.

In support of the claim, the applicant submitted documents (contract, invoices, expeditions, calculations of penalties) as well as a lawyer's power of attorney. The Romanian company also paid the arbitration fee.

Prior to analyzing the substance of the dispute, the arbitral tribunal detained the international character of the trial and the fact that the parties chose by consensus the Romanian law to be applicable to the substance of the litigation. The arbitral tribunal ascertained that the parties had concluded a valid compromise clause which is also applicable, since the previous negotiation between parties has failed.

The arbitral tribunal was constituted in accordance with the Rules of Procedure of the Court, which provides that each party designates one arbitrator and they, by consensus, elect a super-arbitrator. The procedure being respected and the right of the parties to the defense respected, the arbitral tribunal analyzed the substance of the commercial dispute. During the debates, the judges reviewed the case, listened to the applicant's lawyer's speech and ascertained the lack of involvement of the defendant.

Following the closing of the debates, but before the arbitration award, the defendant paid the principal debit in the amount of 37150 euro, sending an e-mail to this effect to the Court of International Commercial Arbitration. Following the deliberation, having the applicant's confirmation that the defendant paid the principal debit, the arbitral tribunal decided that the party is obliged to pay the amount of 3790 euro, representing penalties for delay. Following the arbitration award, the Greek company also paid arbitration fees, lawyers' fees, and fast courier expenses. The award was given in four months since the introduction of the complaint, and was final and binding.

The second studied commercial dispute settled by arbitration regarded an international services contract between a Romanian company and a Spanish shipping company. The Romanian company was committed in 2016, to make repairs at one of the Spanish company's ships. According to the contract, the total amount for the repairs was set at 44,500 euro, while the deadline for the execution was established to be 15 of May 2017. The Spanish company paid an advance of 14500 euro and within 5 days from the reception committed to pay the difference of 30000 euro. A few days before the deadline, the minutes of the reception and the declaration of conformity were completed. Thus, the Romanian company issued the invoice for the amount of 30000 euro. Considering that after 17 days from issuing the invoice, the beneficiary did not pay the outstanding amount, the Romanian company notified and convened the partner company at its headquarters through two addresses for conciliation. The Spanish company refused to conciliate so the Romanian partner appealed to the services of the Court of International Commercial Arbitration.

The arbitral request was based on the compromise clause from the contract concluded between the parties. According to this, disputes arising during the contract will be settled by the Arbitral Tribunal if the parties do not reach a compromise by conciliation or if the conciliation process is refused by one of the parties. The compromise clause also provides for litigation to be settled in Romania in accordance with the Rules and Procedures of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania.

According to the documents submitted to the file, the Court of Arbitration found that it is competent to settle the dispute. In order to establish the arbitral tribunal, the defendant was called to appoint in due time an arbitrator. Since the Spanish company failed to comply with the request, the Arbitral Tribunal consisted of 3 members, one of which was established by the applicant, one by the President of the Arbitration Court and a third appointed by the other two elected arbitrators. Following the substantive analysis of the case, the Arbitral Tribunal upheld the applicant's action and ordered the Spanish company to pay the sum of 30000 euro representing the outstanding amount. Also, the defendant was ordered to pay the amount of 4000 euro which represents arbitrary costs. The arbitral award was adopted within four months and a half from the request to settle the dispute, being final and binding.

The analysis of the two cases of international commercial disputes, settled by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, highlighted the real advantages for settling commercial disputes through alternative means to the courts. The positive aspects identified as a result of studying the arbitration awards of the Court of International Commercial Arbitration are as follows:

- The short period of time for settling commercial disputes, compared to domestic or international courts, in which case the awards would have been formulated in a few years.
- Costs for settling commercial disputes have been reduced. In both cases, the costs related to the arbitration process were lower compared to those in the courts, where stamp duties, lawyers' fees for long periods of time, internal and external travel represent expenditures that would have exceeded the amounts of the two arbitration awards.
- Confidentiality is one of the main advantages in resolving commercial disputes through arbitration. The financial and commercial documents of the parties involved in both cases that were analyzed were not public.



- The arbitral awards in both cases were final and binding, having the same legal value as the ones from the courts.

#### 4. Conclusions

The changing nature of the business environment due to technology and free markets has led to the multiplication of commercial disputes. Given that economic relations are established between partners from countries with different cultures and negotiation styles, settle commercial disputes in a short period of time and without image costs is a constant concern of businessmen. In this context, national or international commercial arbitration is an efficient alternative to court processes. In Romania, commercial arbitration is not enough developed, given the lack of confidence of business representatives in the arbitration awards, compared to the judicial ones. Even so, the activity of the Court of International Commercial Arbitration is directed to informing business representatives about the advantages of commercial arbitration and to supporting Romanian companies to settle commercial disputes in a more efficient way, without being affected their national and international economic relations.

#### References

- Popa, I., Belu, M. (2018). *Afaceri internaționale. Tehnica operațiunilor de export-import*, Editura ASE, pp. 50-51.
- Voicu, M. (2014). *Arbitrajul comercial. Jurisprudența adnotată și comentată 2004-2014*, Editura Universul Juridic, pp. 22-23.
- Lungu, M. D. (2010). *Rolul Organizațiilor Internaționale în Soluționarea Pașnică a Diferendelor Internaționale*, Editura Universul Juridic, p. 137.
- Năstase, A., Aurescu, B. (2012). *Drept internațional public*, Editura C.H. Beck, p. 217.
- Kurkela, M. and Turunen, S. (2010). *Due process in international commercial arbitration*, Second edition, Oxford University Press, pp. 3-4.
- Kenton, M. and Hirst, P. (2015). *Advantages of International Commercial Arbitration*, available: [https://www.clydeco.com/uploads/Files/International\\_Arbitration\\_15\\_Chapter\\_4\\_ClydeCo.pdf?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](https://www.clydeco.com/uploads/Files/International_Arbitration_15_Chapter_4_ClydeCo.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original)
- Wegen, G. and Wilske, S. (2019). Available at: <https://gettingthedealthrough.com/area/3/article/29352/introduction/>
- The Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania available at: <http://arbitration.ccir.ro/arbitration-rules-2/>