Law Governing International Commercial Arbitration

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Abstract: The scope of this article is to identify the law governing the international commercial arbitration by reporting the international and internal regulations. We shall consider the situation of contracting parties selecting the law governing their contract and when the parties have not selected the governing law and decided for arbitration as manner of solving their disputes.

Keywords: *international commercial arbitration, alternative jurisdiction, disputes, governing law*

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I. General issues related to international commercial arbitration

1.1 Notion

The international commercial arbitration is no longer an alternative means of solving the disputes subject to analysis; it has become a realistic method to solve the disputes generated by international commercial transactions (Strong, 2012, p. 7).

In the international trade, the arbitration has been defined as facultative and conventional jurisdictional system, when a dispute is solved based on a procedure determined by the arbitrators appointed by parties (Mihai, 2013, p. 35).

1.2. Relevant provisions

In the field of international commercial arbitration, the main international regulations adopted by Romania by ratification, are the following:

- International convention related to acknowledgment and enforcement of foreign arbitral judgements from New York 1958;
- European Convention of international commercial arbitration from Geneva 1961;
- in internal law, the international commercial arbitration is ruled by the Code of Civil Proceedings (art. 541 – 621 - Book IV – About arbitration and art. 1111 – art. 1133 – Book VII – International Civil Trial, title IV – International arbitration and effects of foreign arbitration decisions, chapter I - International arbitration trial and chapter II – Effects of foreign arbitration decisions);
- Rules of arbitration proceedings of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania from 2018;
- Arbitration regulations of UNCITRAL from 1976, subsequently amended, which represent rules of arbitral proceedings applicable to solving arbitration disputes when the parties have agreed to enforce it.

1.3. Nature of arbitration

In conformity to the disposals of art. 541 par. (1) Code of civil proceedings, arbitration is an alternative private jurisdiction. In the doctrine, arbitration is considered a private jurisdiction (Macovei, 2009, p. 263).

Being considered a private jurisdiction used by parties to avoid submitting the dispute to a state court, in practice, by state court, the public authority interferes with arbitration in several situations. The relation between arbitration and state courts is complex, the arbitration relying on existing judicial system to solve different incidents occurring during arbitral procedure and, if necessary, for the acknowledgment and execution of arbitral decision (Fox, 2013, p. 313).

II. Determining the governing law by parties

2.1 Preliminaries

In order to solve the dispute, the governing law is the law selected by parties. However, if they have not selected the applicable law, the arbitration court, avoiding enforcing the conflicting norms and considering the customs and professional regulations in the field of dispute, applies the law deemed proper. The court, with the express consent of parties, may solve the dispute in equity or as *amiable compositeur*.

If the disputes are solved by arbitration courts, it raises the problem of governing law.

Therefore, in the field of international commercial arbitration, the uniform material norms prevail, in the detriment of conflicting norms. The first category of norms namely the conflicting ones are complementary norms, enforced when material law is not complete.

Also, in the international commercial contracts, the principle of will autonomy of parties prevails who usually decide for the law governing their relations. When the parties fail to make such decision, the arbitration court in charge with solving the dispute determines the governing law using conflicting norms or other criteria.

Consequently, we shall consider two situations, namely: the first situation when the contracting parties select the law governing their contract and arbitration as manner of solving their disputes; the second situation

when the parties fail to select the governing law and decide for arbitration as manner of solving their disputes.

2.2. Situation when the parties select the law governing the international commercial contract and arbitration as manner of solving their disputes

On the level of EU states, the Regulation no. 593/2008 related to law governing the civil and commercial contractual obligations – Rome I represents the main tool to determine the law governing the contracts.

Romanian law sets forth the priority enforcement of Regulation Rome I, of EU regulations and international conventions in determining the law governing the contract. Therefore, according to art. 2640 Civil Code, the law governing the contractual obligations is determined according to EU regulations (Tuleașcă, 2017, p. 235).

In conformity to art. 20 of above-mentioned Regulation, „The enforcement of the law of any country determined in terms of this regulation means the enforcement of law norms enforceable in such country, except for its norms of international private law, except for the case when this regulation stipulates otherwise”. If the parties decide for the law governing their contract, they do not decide for the law overall, as it includes conflicting norms that may refer to another law, but they decide only for material norms.

If the parties select arbitration as manner of solving their disputes, they may turn to „stabilisation” of the law rules selected. The majority of law systems enforce the law selected as it was on the date of concluding the contract, only thus being able to observe the will autonomy of parties. Therefore, a stabilisation clause is not necessary but if a party (among the international trade operators) is the state. In this case, stabilisation is recommended to avoid the amendment of law by such state, with the risk of occurrence of a contractual misbalance (Kessedjian, 2015, p. 62).

The stabilisation clause represents the rule in state contracts. This allows the „freezing” of normative power of state, who undertakes to amend the norms in the field or, if they change it, the amendments shall not be enforced to the contract in progress. It is a rule of transitory law

(enforcement of laws in time): the contract is subject to governing law on the date of its conclusion. Such rule may have as exception only a public order norm with immediate application, including related to the contracts in progress (Kessedjian, 2015, p. 70).

The parties may select certain „rules of law” including any norms of legal value, elaborated by a state, by the international commercial operators, such as the UNIDROIT Principles, *lex mercatoria*, or even a convention not enforceable to contract, but adjusted by parties to their own interests, fragmenting it – procedure known as *paramount clause* –, except for the situation when fragmentation is restricted by convention or by a state law governing the contract.

In the international commercial contracts concluded between private operators, the parties frequently prefer to decide for a national law as governing law or a national law completed by principles and rules belonging to *lex mercatoria*. The parties are interested in selecting a law they know how it is interpreted, with a jurisprudence that offers them the certitude of execution (Moses, 2008, p. 70). Only when they cannot reach an agreement related to the national law governing the contract (law of one of the parties or even a „neutral” law, not related to the parties or contract) the contracting parties may decide that *lex mercatoria* governs the contract, referring for instance to UNIDROIT principles.

Usually, in the state contracts, namely in the contracts of investments concluded between a (host) state or entities controlled by state and a foreign investors, the parties may agree that applicable law is *lex mercatoria*. The reasons of such decision consist in the fact that no party is ready to accept the right of the other as law governing the contract, in order to avoid that the party whose law is selected has advantages with respect to the other party; also, in the long-term contracts, during the execution, radical amendments of receiving state law may be made, and *lex mercatoria* operates as a stabilisation clause, the amendments of law (which is not the law governing the contract) not affecting the rights and obligations of contracting parties.

In many national legislations governing international arbitration, there are disposals allowing the parties to select *lex mercatoria* as law governing their contract. UNCITRAL Model Law on International Commercial Arbitration of 1985, amended in 2006, represented a soft law source included by many national laws. Art. 28 par. (1) of UNCITRAL Model Law expressly stipulates that the parties may select the „rules of law” as law governing the contract. The notion of „rules of law” was explained in the Explanatory Note and quoted in UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, giving the parties the possibility to select a new national law and other rules of law, as those elaborated by an international forum, not incorporated by a system of national law.

2.3. Situation when the parties do not select the law governing the international commercial contract and decided for arbitration as manner of solving their conflicts

In internal law, according to the disposals of art. 1120 par. (1) Code of civil proceedings, if the parties do not select the governing law, the arbitration law enforces the law deemed proper, considering always the customs and professional regulations. According to par. (2) of the same article, „The arbitration court may rule in equity only with express authorisation of parties”. Therefore, the arbitrator has not the obligation to enforce the conflicting norms in order to determine the governing law. It shall determine the governing law depending on the laws deemed proper.

When the arbitrator/arbitration court solves the dispute by enforcing the law deemed proper, it means that it uses the so-called „direct way” to select the governing law.

The international conventions may be used by arbitrator, but it has no obligation to enforce it. However, if it determines as enforceable the law of a state signatory of an international convention in the target field, it may then enforce the convention, as integral part of governing law (Kessedjian, 2015, pp. 154-155).

The arbitration court may decide as well related to the enforcement of cumulative method in determining the governing law. This means that it

analyses the conflicting norms and uses as well the „direct way” to determine the law, all indicating the same governing law.

It may decide as well that, for the settlement of dispute, it best serves the interests of parties the enforcement of *lex mercatoria* or UNIDROIT Principles, in order to obtain a neuter solution, followed by parties.

The determination of governing law by arbitration court in the absence of the decision of parties is ruled by the norms of arbitration institutions, where the arbitrators are usually allowed to enforce *lex mercatoria*. Also, few national regulations related to international arbitration allow the arbitrators to enforce *lex mercatoria* in the absence of parties’ decision related to the governing law.

There are three possible solutions to determine the governing law (Ungureanu, 2018, p. 398):

- the arbitration court enforce the law deemed proper (without using the mechanism of conflicting norms). For instance, UNCITRAL Arbitration Ruled stipulates that the arbitration court shall enforce the law deemed proper (art. 35 par. 1); art. 1120 par. (1) Romanian code of civil proceedings stipulates similarly that the parties have not decided for governing law, the arbitration court enforces the law deemed proper. Many modern legislations ruling arbitration lack disposals related to conflicting norms for the determination of governing law. The arbitrators do not pass a judgement in the name of a state and they do not have the obligation to enforce conflicting norms, as arbitration lacks *lex fori* (the law of notification of court);

- the arbitration court enforces the law regulations deemed proper. The possibility of arbitrators to enforce the „rules of law”, in the absence of selection of law by parties, means their right to enforce *lex mercatoria*. Frequently, the arbitration courts enforce the UNIDROIT principles;

- the arbitration court enforces the conflicting norms deemed proper for the determination of governing law, not being compelled to use certain conflicting norms, belonging to a certain legal order. For instance, according to UNCITRAL Model Law on International Commercial Arbitration, the arbitration court determines the law using the best conflicting norms.

The rules of arbitration procedure of the Court of International Commercial attached to the Chamber of Commerce and Industry of Romania stipulate in art. 30 par. (2) that „If the arbitration dispute is international, the arbitration court solves it in terms of law or of other norms of law selected by parties and if they failed to select the governing law, in terms of law or other norms of law deemed proper. Any selection of law of a certain state by parties is deemed to refer to significant law of such state and not to its regulations related to law conflict”.

Art. 1120 Code of civil proceedings (Romanian Parliament, 2010) stipulates: „The arbitration court applies to the dispute the law selected by parties and if the parties have failed to determine the governing law, the law deemed proper, considering always the customs and professional rules”. Presuming that the customs and professional rules are part of *lex mercatoria*, it may be drawn the conclusion that the Romanian arbitration court is entitled to enforce *lex mercatoria* in any situation deemed proper, regardless if the contracting parties have selected or not the governing law.

Considering as well the disposals of art. 30 par. (1) of the Regulation of arbitration procedure of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (2017) which stipulate that: „The arbitration court solves the dispute in terms of the written or unwritten norms of law in force, considering all circumstances of the case and considering, among others, the general law principles, the requisites of equity and good-will”, this interpretation may be considered.

III. Conclusions

Our legislation, in agreement with the international regulations and the EU norms, stipulates, in principle, that, in order to solve the dispute, the governing law is the law selected by parties.

The selection of law must be dealt with differently, depending on how the parties decided to solve the disputes between them, by arbitration or not.

The law governing a legal report represents a primordial issue, every time there is a legal demarche related to international contracts.

The norms of Romanian private international law refer to EU law in the field, namely to Rome I Regulation.

The parties may select either a state law to govern the contract or certain „rules of law”, which may include any legal norms elaborated by a state, by international commercial operators or even a convention.

The arbitration court, if the parties fail to select the governing law, avoiding enforcing the conflicting norms and considering the customs and professional regulations in the field of dispute, enforces the law deemed proper.

Three solutions of selecting the governing law are available, namely: the arbitration court enforces the law deemed proper (without using the mechanism of conflicting norms); the arbitration court enforces the rules of law deemed proper; the arbitration court enforces the best conflicting norms to determine the governing law, not being compelled to use certain conflicting norms, belonging to a certain juridical order.

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