OVERVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION OF THE REPUBLIC OF MOLDOVA

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Arbitrajul comercial internaţional este mijlocul prin care un litigiu sau mai multe litigii ce vor apărea în viitor vor fi soluţionate definitiv de o persoană neinteresată şi nonguvernamentală. Arbitrajul comercial internaţional este o instituţie juridică pentru soluţionarea litigiilor ce apar în cadrul relaţiilor comerciale internaţionale de către persoane învestite cu această sarcină chiar de către părţile contractante aflate în litigiu.

Republica Moldova a ţinut seama de tendinţele evoluţiei arbitrajului comercial internaţional, deoarece:

- la 26.09.1997 a aderat la Convenţia Europeană de arbitraj comercial internaţional din 21.04.1961 de la Geneva şi la Aranjamentul Relativ la aplicarea Convenţiei Europene de arbitraj comercial internaţional din 17.12.1962 de la Paris [1];
- la 10.07.1998 a aderat la Convenţia pentru recunoaşterea şi executarea sentinţelor arbitrale străine din 10.06.1958 de la New York [2] , cu următoarele rezerve:
  1. Convenţia va fi aplicată de către Republica Moldova numai la sentinţele arbitrale pronunţate după intrarea ei în vigoare pentru Republica Moldova;
  2. Convenţia va fi aplicată de către Republica Moldova pe bază de reciprocitate numai la sentinţele arbitrale pronunţate pe teritoriul unui alt stat parte la Convenţie.

International commercial transaction merchants inevitably risk facing international business disputes, even if both parties have the best intentions in contracting. As a result, laws facilitating international disputes are increasingly important and rapidly evolving. Recent decades of globalization have exacerbated the need for international arbitration agreements, as evidenced in its inclusion of numerous bilateral investment treaties and regional treaties [3].

Republic of Moldova took into consideration the recent developments of the international commercial arbitration. Based on the Parliamentary Decision No. 1331-XIII dated September 26, 1997, Republic of Moldova adhered to the European Convention on International Commercial Arbitration done in Geneva, April 21, 1961, (shall be referred to as Geneva Convention) and to the Agreement Relating to application of the European Convention on International Commercial Arbitration done in Paris, December 17, 1962.

Based on the Parliamentary Decision No. 87 - XIV dated July 10, 1998, Republic of Moldova adhered to the Convention for Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, (shall be referred as the New York Convention).

In Republic of Moldova, the international commercial arbitration is regulated separately from the domestic arbitration. There are two separate laws in this regard:

- Law No. 24-XVI of February 22, 2008 on International Commercial Arbitration [4], which entered into force on June 20, 2008 (here in after – Law on International Commercial Arbitration);
- Law No. 23-XVI of February 22, 2008 on Arbitration [5], which entered into force on May 20, 2008 (here in after – Law on Arbitration). The Law on Arbitration repealed the Law No. 129 – XIII of May 31, 1994 on Arbitrary Court (Arbitration), which allowed the establishment of arbitration for the settlement of economic and other disputes that appeared from contractual and non-contractual agreements. In 1994, the International Commercial Arbitration Court was established under the Chamber of Commerce and Industry of the Republic of Moldova, which is a non-governmental, non-corporate body of arbitration, independent in the exercise of its powers that is organized and is operating in conformity with the Law No. 393-XIV of May 15, 1999 regarding the Chamber of Commerce and Industry of Republic of Moldova. The International Commercial Arbitration Court has already achieved relevant experience in the settlement of disputes.
- Some of the aspects concerning the international commercial arbitration are regulated by the Code of Civil Procedure of Republic of Moldova, No. 225-XV of May 30, 2003 [6] (here in after – Code of Civil Procedure). This Code regulates such issues as the changing of the disputes to the arbitration court, recognition

and enforcement of the foreign arbitral awards and agreements, the refusal to recognize and enforce the decisions of the foreign arbitral awards, procedures of appeal of the arbitration decisions and of the issuance of the titles for forced enforcement of the arbitration decisions.

The Law on International Commercial Arbitration is the result of recognition of usefulness of international commercial arbitration as an alternative method of dispute settlement, as well as a result of the need to legally regulate international commercial arbitration in Republic of Moldova.

For the first time in Republic of Moldova, the Law No. 134 –XVI on mediation was adopted on June 14, 2007. The law entered into force on July 1, 2008.

As stipulated in the Law on arbitration (art.6) [7], the arbitration can be institutionalized (established) as a permanent body under the Chamber of Commerce and Industry, exchanges, unions, associations, and other organizations which are functioning on the basis of the regulations adopted by them. The said decision of the establishment of the arbitration should be communicated to the Supreme Justice Court. No arbitration bodies shall be established under the central and local public administration bodies. For the settlement of specific dispute, the parties are entitled to establish ad-hoc arbitration.

In Republic of Moldova, the International Commercial Arbitration Court is established under the Chamber of Commerce and Industry of Republic of Moldova [7]. The International Commercial Arbitration Court under the Chamber of Commerce and Industry of Republic of Moldova was established in 1994 for the commercial arbitration administration, with the scope to settle disputes regarding the foreign trade. The Arbitration Court is a permanent, non-corporate, non-governmental and independent institution in execution of its functions. The objective of the Arbitration Court is to promote the internal and international commercial arbitration as well as conciliation procedure and other ways of alternative dispute resolution within business environment of Republic of Moldova.

In the Republic of Moldova, there are specialized arbitration courts in different fields, for example the specialized Arbitration Commission with the State Agency on Intellectual Property of Republic of Moldova (AGEPI), the Arbitration Court under the International Association of Automobile Transporters of Moldova.

The relationship between national courts and arbitral tribunals [8] swings between forced cohabitation and true partnership. In spite of protestations of "party autonomy", arbitration is wholly dependent on the underlying support of the courts who alone have the power to rescue the system when one party seeks to sabotage it.

In the course of international commercial business relationships most companies find it advantageous to include an arbitration clause in their agreements. The agreements are done in the hopes that should a dispute arise the parties can seek a faster, more cost efficient resolution to their dispute without the difficulties of resorting to national courts [9].

Ratification of the New York Convention for Recognition and Enforcement of Foreign Arbitral Awards and enactment of corresponding law. Republic of Moldova adhered on July 10, 1998 to the New York Convention with the following reservations:

1) Republic of Moldova shall apply the Convention only to arbitral awards made after the Convention comes into force on the territory of Republic of Moldova;
2) Republic of Moldova shall apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of another Contracting State.

Code of Civil Procedure stipulates (art.16) that the enforcement of the foreign arbitral awards is carried out on the basis of the said code, in conformity of the provisions of the international treaties to which the Republic of Moldova is a member state, and on the principle of reciprocity. The provisions of the Code of Civil Procedure, as well as of the Law regarding the international arbitrations are in line with the provisions of the New York Convention.

Arbitration Law applicable to domestic and international commercial arbitration and salient features. As it is mentioned above, the international arbitration and the domestic arbitration are regulated by separate laws in Republic of Moldova. According to Article 1, provisions of the Law on International Commercial Arbitration shall apply in the case when the international commercial arbitration is located on the territory of Republic of Moldova. The law has provisions related to:

- arbitration agreement and filing statement of claim on the subject-matter of the dispute (art.8);
- arbitration agreement and the interim measures adopted by the court (art.9);

- recognition and enforcement of arbitral award (art.38);
- refusal to recognize and enforce arbitral awards shall also apply in case when the place of arbitration is outside the territory of Republic of Moldova.

Law on International Commercial Arbitration stipulates (art.1 para 4) that upon the agreement of the parties, the following disputes are submitted for settlement to the international arbitration:

- The disputes that appeared from the civil relationships, and from other legal relationships, which arises from the execution of the international trade agreements and from other foreign economic relations, if one party is located outside of Republic of Moldova;
- The disputes that appear between the companies with foreign investment and associations, international organizations founded on the territory of Republic of Moldova, the disputes between their participants, as well as disputes between their representatives and other legal entities of Republic of Moldova.

The Code of Civil Procedure of Republic of Moldova contains provisions related to arbitral institution, which can be divided into:

a) provisions related to authority and obligation of court instances tangent with arbitration, and
b) provisions related to arbitration.

The following provisions fall within the first category:

I. According to provisions of Article 29, item (1), sub-item e), economic court instances settle cases related to cases of contestation, in compliance with law, of arbitral awards and issue order of enforcement.

II. As for referral of dispute to arbitrary court, the Code of Civil Procedure envisages that civil action falling within the competence of a general jurisdiction court or a special-purpose court may be referred, before the decision is ruled, to arbitration, if parties agreed upon that and if such referral is not prohibited by law. Contestation of arbitral award falls within the competence of the Court of Appeal or the Economic Court of Appeal (Article 30).

III. Other provision of the Code of Civil Procedure refers to refusal from acceptance of statement of claim. Thus, according to Article 169, item (1), sub-item d), the judge shall refuse to accept statement of claim, if there is a valid judgment of arbitral tribunal, mandatory for the parties, on the same substance and on the same grounds, except for cases when the court rejected the application for issue order of enforcement of arbitral award or sent back the case for reconsideration to the arbitral tribunal which made the arbitral award, but it is impossible to examination of the case in the same arbitral tribunal.

IV. According to provisions of Article 185, item (1), sub-item e), during preparation of the case for the legal proceedings, the judge shall explain to the parties their right to recourse to arbitration as to settle the dispute, and consequences of such an act.

V. Other provisions of the Code of Civil Procedure, tangent with arbitration, refer to the grounds of dismissal of action and grounds for leaving the claim undecided. Thus, the court instance shall:

- decide on dismissal of action if there is a valid judgment of arbitral tribunal, mandatory for the parties, on the same substance and on the same grounds, except for cases when the court rejected the application for issue order of enforcement of arbitral award or sent back the case for reconsideration to the arbitral tribunal which made the arbitral award, but it is impossible to examination of the case in the same arbitral tribunal (Article 265, sub-item e);
- leave the claim undecided in case when parties closed an agreement according to which the dispute shall be settled in arbitration, and the respondent filed objections against settlement of the dispute in the court before examination of the case on its merits (Article 267, sub-item e).

The following are provisions directly related to arbitral institution:

I. *Chapter XLII called „Recognition and enforcement of foreign judicial decisions and arbitral awards"*, which regulates:

- contents of the motion to recognize foreign arbitral award (Article 469, item (1), (2), and (4));
- procedure of examination of a plea for recognition of foreign arbitral award (Article 470);
- refusal to permit compulsory enforcement of foreign arbitral award (Article 471, item (1) sub-item e) and sub-item g), item (2));
- recognition of foreign arbitral award, which do not require compulsory enforcement (Article 472);
- recognition and enforcement of foreign arbitral awards (Article 475);

- refusal to recognize foreign arbitral awards and to enforce thereof (Article 476).

II. *Chapter XLIII called „Proceeding of contestation of arbitral awards"*, which regulates:

- contestation of arbitral awards (Article 477);
- contents and necessary documents to be annexed to the motion to set aside arbitral award (Article 478);
- examination of the motion to set aside of arbitral award (Article 479);
- grounds for setting aside arbitral award (Article 480);
- court's ruling on contestation of arbitral award (Article 481).

II. *Chapter XLIV called „Proceeding of issue of* order of enforcement *of foreign arbitral awards"* regulates the following matters:

- issue of order of enforcement of arbitral award (Article 482);
- contents, necessary documents to be annexed, and examination of application for issue order of enforcement of arbitral award (Articles 483, 484);
- grounds for refusal to issue order of enforcement of arbitral award and court's ruling on issue of order of enforcement (Articles 485, 486).

Domestic arbitration. Law on arbitration stipulates (art.3) that any property right may be the subject matter of an arbitration agreement. An arbitration agreement with regard to non-property rights may produce legal effects to the extent that the parties are entitled to enter a voluntary settlement with regard to the subject matter of the dispute. The law stipulates clearly which disputes cannot be the subject of the arbitration agreement:

- Claims pertaining to family law;
- Claims based on dwelling premises lease (rent, tenancy) contracts, including disputes regarding conclusion, validity, termination and qualification of such contracts;
- All claims and property rights regarding dwellings.

Recognition and enforcement of foreign awards and agreements – Law and procedure. In Republic of Moldova the recognition and enforcement of foreign arbitral awards is governed by the Code of Civil Procedure and Law on International Commercial Arbitration. According to the Law on International Commercial Arbitration (art.38), the award, regardless of the country in which it was made, is recognized as binding and submission to the competent court of a written application, is running by right, taking account of the law.

Recognition and enforcement of foreign arbitral awards. According to the Law on International Commercial arbitration, an arbitral award, irrespective of the country in which it was made, shall be recognized as binding. The party relying on an award or applying for its enforcement shall supply to the court the duly authenticated original application, arbitral award and the original arbitration agreement or a duly certified copy thereof.

The Law implicitly recognizes the value of the New York Convention, taking over provisions of this Convention with regard to recognition and enforcement of foreign arbitral awards.

If the arbitral award or arbitration agreement is not made in Romanian, the party applying for recognition and enforcement of the award shall produce a translation of these documents. The translation shall be certified as required by law.

Application for recognition of foreign arbitral award shall be examined by the court, with legal notice to the debtor about the place, date and time of examination. Failure of the debtor legally quoted to be present at the examination due to unfounded reasons is not preventing the examination.

The Court may approve the founded request of the debtor concerning the postponement of the application's examination. In this case the Court notifies the debtor about the postponement.

The court, after listening to explanations of the debtor and examining the evidence presented, gives a concluding declaration of enforcement of foreign arbitral award or refusal of authorization enforcement.

If the foreign arbitral award contains solutions on multiple severable claims, their enforceability may be awarded separately.

In examining the application for recognition of foreign arbitral award, the court may, if necessary, require explanations, and question the debtor regarding the application field, or require explanations issuing foreign court.

Subject to verification as provided by law for enforceability of foreign arbitral award, the court cannot proceed to review fund foreign arbitration award or to change them.

Refusal to allow enforcement of foreign arbitral award is allowed only in one the following cases [10]:

a) Enforcement of the award could harm the sovereignty, may threaten the security of the Republic of Moldova, or they may be contrary to public policy.

b) The limitation period for submission to the enforcement award has expired, and creditor's request for relief in this period was not satisfied with the court of Republic of Moldova.

Refusal to recognize foreign arbitral awards and execute them is governed by Cod of Civil Procedure (art.476) and Law on International Commercial Arbitration (art.39), which correspond to the provisions of article V of the New York Convention. Thus, recognition and enforcement of foreign arbitral award may be refused only in the following two cases:

1) At the request of the party against whom the award is invoked, only if that party furnishes to the competent court, were the recognition and enforcement is sought, the proof that:

a) a party to the arbitration agreement was, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

b) the party against whom the arbitral award is invoked was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings or was otherwise unable to present his case; or

c) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement; or

d) the award contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement, was in conflict with a provision of the law of the country where the arbitration took place; or

f) the award has not yet became binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.

2) If the court finds that:

a) The subject matter is not capable by arbitration under Moldovan law, or

b) The recognition and enforcement of the award would be contrary to the public policy in Republic of Moldova.

If an application for the setting aside or suspension of the award has been made to a court, the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Procedure in cases of issue of enforcement title of arbitral awards is governed by the Code of Civil Procedure (art.482-486).

Thus, the issue of enforcement title of arbitral award shall be examined by the court, at the request of the winning party. Request to issue enforcement title, shall be filed in court, unless the arbitration agreement, were competent to hear the case in fact at first instance.

Request to issue enforcement title of arbitral award shall be submitted in writing by the party who won the case or her representative and should provide:

a) the court that has issued such request;

b) the arbitral tribunal that has made the decision and composition of arbitral tribunal;

c) the name of the parties in arbitration, their domicile or headquarters;

d) place and date of pronouncing of the arbitration award;

e) date of receipt of the arbitral award by which the court addressed;

f) request from party that won the arbitration process to be issued enforcement title of arbitral award.

At the request should be attached:

a) the original arbitration award or a certified copy;

b) the original arbitration agreement or a certified copy;

c) proof of payment of state tax;

d) a copy of the request to issue a enforcement title of arbitral award;

e) document certifying empowerment of the person signing request.

The request is examined in the court within one month from the date of filing in court. The Court refuses to issue enforcement title of arbitral award only if the losing party of the arbitration process, presented in court that:

a) the arbitration agreement is invalid under the law;

b) the party against whom the arbitral award is invoked has not been given proper notice of the appointment of the arbitrator, or of the arbitration proceedings or was otherwise unable to present his case; or

c) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contain decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matter submitted to arbitration can be separated from those not so submitted, the court my issue the enforcement title in the part of the award, which contains decisions on matters submitted to arbitration;

d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or was not in accordance with the law of the country where the arbitration took place;

e) the award has not become binding on the parties, or has been set aside or suspended by a competent authority of the country in which that award was made.

After examining the request for enforcement title of arbitral award, the Court makes a decision either for granting the enforcement title or for refusal.

The refusal to release title of arbitration award enforcement does not preclude the parties to seek arbitration again, if the possibility of appealing is not exhausted, or to submit actions on general grounds.

In the event of total or partial refusal to release the title of arbitral award enforcement due to arbitration agreement invalidity or in the event of decision issuing in a litigation not provided by the arbitration agreement, or in the event of non-inclusion in the arbitration agreement, or of existence in arbitration agreement provisions in unforeseen problems, the parties in arbitration have the right to appeal to court in order to settle such litigation.

In Republic of Moldova the necessary legal framework for solving international trade agreements litigations through arbitration is in place. Also, the arbitrators included in the list of The International Commercial Arbitration Court of the Chamber of Commerce and Industry of Republic of Moldova in 2011 are persons with authority, competent to solve such litigations. Though, it is necessary to raise the awareness within the business environment of the advantages of international commercial arbitration as a way of solving litigations.

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