

# **REVISTA ROMÂNĂ DE ARBITRAJ**

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# REVISTA ROMÂNĂ DE ARBITRAJ

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**Un an de aplicare a Regulilor Curții de Arbitraj Comercial Internațional de pe lângă Camera de Comerț și Industrie a României (2018)**

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# THE NEW ARCHITECTURE OF THE RULES OF ARBITRATION OF THE COURT OF INTERNATIONAL COMMERCIAL ARBITRATION ATTACHED TO THE CHAMBER OF COMMERCE AND INDUSTRY OF ROMANIA

Cristiana I. STOICA<sup>1</sup>

## ABSTRACT

*The January 2018 Rules of Arbitration adopted by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania were for quite some time expected to be issued. They are showing a significant improvement of vision on arbitration, in general and are tailored in a better manner than previous rules. New procedural instruments and mechanisms are now put in place for conduct of proceedings, better supporting the parties and arbitrators. The 2018 CICA Rules apply both to domestic and international arbitration, aiming to build a new platform for promotion of international standards in the practice of arbitration. A review in a nutshell of the said Rules is contained by the present article, with examples of their most important provisions and with some brief considerations as to their future implementation.*

**Keywords:** 2018 Rules of Arbitration adopted by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania; arbitration, Romania; international arbitration; arbitration in Romania.

## REZUMAT

*Regulile de Arbitraj adoptate în ianuarie 2018 de Curtea de Arbitraj Comercial Internațional de pe lângă Camera de Comerț și Industrie a României erau de ceva timp așteptate să fie elaborate. Acestea reflectă o importantă îmbunătățire a viziunii asupra arbitrajului, în general și sunt mai bine structurate decât regulile precedente. Noi instrumente și mecanisme procedurale sunt acum instituite în ceea ce privește derularea procedurii arbitrale, venind mai mult în sprijinul*

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părților și al arbitrilor. Regulile Curții de Arbitraj Comercial Internațional din 2018 sunt aplicabile deopotrivă arbitrajului intern și celui internațional, în scopul creării unei noi platforme pentru promovarea standardelor internaționale ale practicii arbitrale. O succintă trecere în revistă a acestor Reguli este cuprinsă în prezentul articol, exemplificând câteva dintre cele mai importante prevederi ale acestora, însoțite de scurte considerații privind punerea lor în aplicare pe viitor.

**Cuvinte cheie:** Regulile de arbitraj din 2018 adoptate de Curtea de Arbitraj Comercial Internațional de pe lângă Camera de Comerț și Industrie a României; arbitraj, România; arbitraj internațional; arbitraj în România.

## ***I. From past to present 2018 CICA Rules***

With a long and varied history, lasting for more than 2,500 years, contemporary arbitration, both domestic and international, is completely different from what it meant in the early 20<sup>th</sup> century. Significant developments and trends in modern arbitration emerged since the 1950s, starting with the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. Soon after, another international instrument aiming to protect the international trade was adopted, the 1961 European Convention on International Commercial Arbitration, which was followed by the 1965 Washington Convention adopting institutional arbitration rules for investment disputes, and, few more years later, by the UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model law (with its further 2006 revisions), the most important statutory instrument in the field of international commercial arbitration.<sup>2</sup>

New institutions, instruments, theories and methods of the last half century have introduced structural and practical changes to meet the needs of the increasing and more intrinsic diversity of arbitrations.<sup>3</sup> A large number of arbitral institutions were established all over the world, taking inspiration from the International Court of Arbitration created by the International Chamber of Commerce in 1923, adopting rules of proceedings to accommodate the variety of arbitration disputes, from the most legalistic to the entirely free-and-easy ones.

As an alternative to the courts of law, arbitration constantly proved its advantages as a neutral, costly efficient, confidential and speedy process, based on party autonomy, as a well-established essential principle applying to any type of arbitration. An effective support to arbitration was provided by many

<sup>2</sup> For more details on the evolution of the international arbitration, see Gary B. Born, *International Arbitration: Law and Practice*, Second Edition, Wolters Kluwer, 2016, pp. 21-34.

<sup>3</sup> Baron (Michael) Mustill, "The History of International Commercial Arbitration-A Sketch", pp. 3-33, in *The Leading Arbitrators' Guide in International Arbitration*, Third Edition, Lawrence W. Newman, Richard D. Hill (eds.), JURIS, 2014.

of the national laws which were substantially reviewed and amended in many jurisdictions over the last decades.

A civil law jurisdiction, Romania enacted its first Civil Code and its first Civil Procedure Code since 1865 (both codes being subsequently modified), proving a heroic resistance during the communist regime.<sup>4</sup> Romania is party to the 1923 Geneva Protocol on Arbitration Clauses and has ratified the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.<sup>5</sup> Also, Romania is a contracting state to the New York Convention and party to the Washington Convention.<sup>6</sup>

Institutional arbitration was specifically provided by the last version of the 2013 Romanian Civil Procedure Code (Book IV, Title VII). The provisions of the Civil Procedure Code, to an appreciable extent, bear resemblances to UNCITRAL Model Law, providing both domestic arbitration (Book IV, articles 541 to 621) and international arbitration (articles 1111 to 1133) as well as specific provisions on institutional arbitration. As to institutional arbitration, in 1954, the Bucharest Commission for Arbitration was established to solve disputes between the CMEA<sup>7</sup> states in the form of a compulsory arbitration.<sup>8</sup> This institution was transformed into the currently existent Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania<sup>9</sup> ("CICA") which adopted its own rules of proceedings, subsequently modified.<sup>10</sup>

In this particular context, recent rules of arbitration proceedings were adopted by CICA, as leading arbitration institution of Romania having entered into force on January 1<sup>st</sup>, 2018 ("**2018 CICA Rules**") and applying, to the extent the parties do not agree otherwise, to all disputes registered after January 1<sup>st</sup>, 2018.<sup>11</sup>

<sup>4</sup> Book IV of the 1865 Civil Procedure Code providing *ad-hoc* arbitration was never abolished during the communist regime; also, the 1865 Civil Code was not abolished, its last version entering into force since October 1<sup>st</sup>, 2011.

<sup>5</sup> Ratified by Decree No. 281, 25 June 1963.

<sup>6</sup> Ratified by Decree No. 62, 30 May 1975.

<sup>7</sup> Council for Mutual Economic Assistance (COMECON).

<sup>8</sup> This institution applied its own rules of arbitration, not the provisions of Book IV of the Civil Procedure Code.

<sup>9</sup> This transformation took place in accordance with the provisions of the Decree Law no.139/1990 and of the Government Decision no.799/1990.

<sup>10</sup> At present time, chambers of commerce in Romania are governed by the Law no. 335/2007 (subsequently modified). The national chamber rules were last amended in June 2014. For the evolution of the Romanian law on institutional arbitration and of the arbitration rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, see Cristiana I. Stoica, *Institutional Arbitration in Romania*, pp. 287-315, in C. Leaua, F. Baias (eds.), *Arbitration in Romania. A Practitioners' Guide*, Kluwer Law International, 2016.

<sup>11</sup> Together with the 2018 CICA Rules, CICA also adopted its new operation rules, the rules on the Court's Board and the rules on fees and expenses, entered into force as of January 1<sup>st</sup>, 2018.

## **II. Preliminary remarks on the 2018 CICA Rules**

First, the 2018 CICA Rules apply both to domestic and international arbitration (Article 1, Scope of the Arbitration Rules). The option for a unified system between domestic and international arbitrations aims to offer premises for a continuous evolution of the arbitral institution – Court of International Commercial Arbitration, attached to the Chamber of Commerce and Industry of Romania towards administration of international disputes, apart from the domestic ones that currently represent the great majority of its permanent activity.

Second, major principles of arbitration are covered by the 2018 CICA Rules. According to Article 3, par. 1 of the 2018 CICA Rules, the institution, its president, its board, its secretariat, the parties and the arbitrators are each and all called to act in full respect of the good faith principle which has to govern the entire proceedings. Party autonomy is recognized with priority in case of discrepancy between the arbitration agreement and the 2018 CICA Rules, with the observance of the limitations imposed by the later (Article 3, par. 4 2018 CICA Rules) or by law. Moreover, the principle of due process is confirmed by provisions stipulating that each party benefits of an equal treatment and of the right to defense as well as of the right to a fair trial (Article 3, par. 2 and 3 2018 CICA Rules). Confidentiality of the arbitration and its efficiency, the speedy character of the proceedings, as well as the requirement for independence and impartiality of arbitrators are clearly provided by the 2018 CICA Rules (Article 3, par. 2 and 3; Article 4).

Third, with respect to territorial application of the 2018 CICA Rules, the parties may opt to apply other arbitration rules than the 2018 CICA Rules, to the extent that such chosen rules do not explicitly prohibit their application. Application of the rules of another arbitral institution is left at the discretion of the arbitral tribunal that will determine if such rules are compatible and applicable upon the circumstances of the dispute (Article 7, par. 2 and 3 2018 CICA Rules).

Fourth, no prior conciliation or mediation procedure is expressly imposed as a pre-condition to the application of the 2018 CICA Rules for disputes administrated by CICA, and this, of course, to the extent such pre-condition is not addressed specifically by the parties' agreement.

## **III. New procedural instruments and mechanisms introduced by the 2018 CICA Rules**

The conduct of the proceedings reflects a number of new instruments and mechanisms which were missing from the past CICA rules and which are considered to contribute significantly to the improvement of the administration of disputes before CICA.

For example, *the appointment of arbitrators* is based either on their selection from a list confirmed by the Board of the National Chamber of Commerce and made upon the proposal received from the CICA Board<sup>12</sup> or following the parties' own choice, from the mentioned list or outside such list. The number of the arbitrators, their appointment and nomination, the date of constitution of the arbitral tribunal, their resignation, challenge and removal from the list and their replacement are provided by Chapter 3, Articles 18 to 25 of the 2018 CICA Rules.

*The independence and impartiality of arbitrators*, are reaffirmed by the 2018 CICA Rules, as a crucial aspect of arbitration, being indirectly defined through a number of specific conditions imposed to arbitrators, by including the duty of disclosure according to international standards (Article 22 2018 CICA Rules, Incompatibility cases). Any action or omission by an arbitrator in connection with an arbitration is subject to a financial liability, if such action or omission is due to their willful misconduct or gross negligence (Article 53 2018 CICA Rules).

It is recognized to each party the right to apply for *consolidation* of an arbitration to an already pending one (Article 17 2018 CICA Rules), subject to the conditions prescribed for by the same rules, where party autonomy prevails. Consolidation is possible if all claims are made under the same arbitration agreement or where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transactions or series of transactions and the arbitral tribunal considers the arbitration agreement to be compatible with the dispute.

Complex arbitrations, with *multiple claimants or/and multiple respondents*, are given express regulation by the 2018 CICA Rules (Article 19, par. 4 provides appointment of arbitrators for cases involving more than one claimant or more than one defendant).

*Acting in conformity with the rules and in the spirit of the rules* is an essential option for the arbitral tribunal. Otherwise, if neither the parties, nor the 2018 CICA Rules provide a specific element of procedure, or they are insufficient, the arbitral tribunal shall conduct proceedings following the Civil Procedure Code provisions (Article 26, par. 2 2018 CICA Rules).

The measures taken by the arbitral tribunal during the proceedings, within or outside the hearings, are part of a *procedural order* (Article 27, par. 1 2018 CICA Rules), arbitrators having the authority to issue procedural orders between hearings as well, with the prior consultation of the parties (Article 27, par. 3 2018 CICA Rules). Procedural orders may be issued also for interim and conservatory measures rendered under an expedited regime (Article 40, par. 1 2018 CICA Rules).

With respect to interim or conservatory measures, which are based on Article 40, par. 3, and may be requested *before the initiation of the arbitration or before the*

<sup>12</sup> Rules on the Organization and Operation of the Court of International Commercial Arbitration attached on the Chamber of Commerce and Industry of Romania, article 8.2.g).

*constitution of the arbitral tribunal*, the 2018 CICA Rules offer the parties a new mechanism – the *emergency arbitrator* (Annex II). The procedural order issued by an emergency arbitrator has binding effects upon the parties (Article 9, par. 1, 2018 CICA Rules) and may be revoked or amended at the reasoned request of a party (Article 9, par.2, 2018 CICA Rules).

In order to organize, schedule and set out applicable procedural rules, evidence included, or for establishing the procedural calendar for filing the written submission, the arbitral tribunal has the power to order a *case management conference* (Article 31 par. 1 2018 CICA Rules), the date of such conference representing the first arbitration hearing date (Article 31, par. 2 2018 CICA Rules). As under other arbitral institutions rules, the case management conference may be conducted *in personam* or by audio – video means.

In accordance with Article 31, par. 6 of the 2018 CICA Rules, prior to or at the latest during the conference, the parties have the obligation to inform the arbitral tribunal whether or not they object to the manner in which the arbitration is organized.

As per Article 31, par. 8 2018 CICA Rules, at the end of the case management conference, the arbitral tribunal shall issue a procedural order, establishing a *procedural time-table* for the arbitration (e.g., time-limits for the submission of memoranda, approximate date for oral arguments and for issuances the award).

Annex IV to the 2018 CICA Rules sets out a list of *illustrative case management techniques*, to be used in arbitration proceedings as methods for increasing their efficiency: bifurcation of the proceedings; issuance of one or multiple partial awards, if permitted by law; identification of issues to be solved by agreement between the parties or their experts or to be decided solely based on documentary evidence; various documentary evidence techniques taking inspiration from the Redfern Schedule adopted by the 2010 IBA Rules on the taking of evidence (the production of documentary evidence; avoidance of excessive or unnecessary documentary evidence, upon the circumstances of the case; establishing reasonable time limits for the production of evidence; the use of a timetable for production of documents); using technical means in support of procedural hearing when attendance in person is not essential or use of online communications between the parties, the arbitral tribunal and the Secretariat of the institution; organizing a preliminary conference to discuss and to determine the logistical aspects related to the hearings as well as the issues that the arbitral tribunal believes that parties should address with priority at the hearing; use of procedural timetable; the selection of neutral experts and specialists; the amicable settlement, in part or in full, of the dispute.

Based on Article 34, par. 7 2018 CICA Rules with respect to administration of evidence, parties may opt to apply the Rules of Taking of Evidence in International Arbitration adopted by the International Bar Association, that once agreed by the parties to apply achieve a binding character.

*Witness statements* may be submitted as notarized instruments, or the confirmation of the identity of the witness may be given by the counsel, as this is provided by Article 36, par. 1 2018 CICA Rules.

*Parties' written memoranda* is covered by Article 32 2018 CICA Rules, with clear specification that no new claim or adjustment of such claim or of defenses is admissible after the first hearing date.

In order to better apply the principle of an expedited procedure in arbitration, the 2018 CICA Rules provide, by their Annex V, *special rules for expedited arbitration*, for disputes amounting less than 50.000 RON (approx. 10.000 Euro) or as opt-in, based on the parties' agreement. In such cases, the award has to be issued in maximum 3 months (less than the term of 6 months of a standard procedure) since the first hearing date. The special rules for the expedited procedure are supplemented by the provisions of the 2018 CICA Rules.

*Deliberations* can take place by means of distance communication that have to ensure their secrecy (Article 45, par.1 2018 CICA Rules).

Reasonable arbitration costs are ordered in the final award by the arbitral tribunal with respect to costs related to the representation before the arbitral tribunal, taking into account the result of the dispute and the manner by which each party contributed to the issuance of an expedite and efficient procedure, in conformity with the specific circumstances of the dispute (Article 51 2018 CICA Rules).

*The rendering of a final and binding award* represents the final step of the proceedings and partial awards may be issued in specific circumstances (where the respondent accepts part of the claim and the claims request its issuance-Article 44, par. 1 and 2 2018 CICA Rules). Awards are made in maximum *one month term* from the date of closing the proceedings, as a general rule; also, the one month term may start from the date of the filing of post-hearing submissions or, as the case may be, within the time limit agreed upon with the parties (Article 45, par. 3 2018 CICA Rules). This term may be extended by the President of the Court based on the reasoned request of the arbitral tribunal. Dissenting or concurring opinions are accepted, if grounded, being drafted and attached to the award (Article 45, par. 5 2018 CICA Rules). The setting aside procedure can be started before the Court of Appeal with jurisdiction at the place of arbitration, following the limited formal conditions for an action in annulment imposed by the Civil Procedure Code (Book IV, article 608 et seq.).

\*

Taking inspiration from major international arbitral institutions (e.g., ICC, SCC, HKIAC), the 2018 CICA Rules provide a modern approach, becoming an efficient tool for parties and arbitrators, and thus, aiming to position the institution among the most professional ones in the CEE region and beyond. However, good rules are *per se* not sufficient. Consistent improvements on a continuous basis are absolutely