BRIEF COMPARATIVE ANALYSIS ON THE CONSTITUTIONALITY OF NON-VOLUNTARY ARBITRATION

DOI:10.47743/rdc-2022-1-0005

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Abstract

The issue of the constitutionality of arbitrations is not considered often – as a method of dispute resolution alternative to courts, arbitration is a closed system designed by the parties and typically removed from constitutional protections. Nevertheless, the question of the constitutionality of aspects relevant to an (international) arbitration can be raised in some circumstances. For example, during the arbitral process per se as constitutional challenges to the applicable law, or at the stage of setting-aside an arbitral award or during the recognition and enforcement of foreign arbitral awards, on limited (procedural) grounds and pertaining usually to consent, due process, or public policy (mostly arbitrability).

Arbitral jurisdiction typically arises from the choice of the parties – an assertion of party autonomy. Arbitral tribunals are voluntarily granted jurisdiction through a pre-dispute agreement (clause compromissoire) or in considering an existing dispute (compromis). Which is why, as a rule, the voluntary agreement to participate is of the essence for any arbitration procedure. However, every rule has exceptions. As such, non-voluntary arbitrations exist, notably in the case of statute mandated arbitrations. This is where the issue of constitutionality comes in as it pertains to consent, which, as an intrinsic factor, is normally also a precondition for the very existence of an arbitration.

The analysis will assess whether non-voluntary arbitration is constitutional, from a comparative perspective (mainly Romania and the United States) as the answer can only be qualified relative to a specific Constitution.

Keywords: *constitutionality, arbitration, consent, non-voluntary, mandatory, party-autonomy*

I. Preliminary considerations

The issue of the constitutionality of arbitrations is usually considered only in limited circumstances and in rapport to the legislative framework[1] applicable to the

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[1] Except in equity arbitrations, where the Arbitral Tribunal acts as *amiable compositeur* and decides *ex aequo et bono (i.e.* according to the right and good) and is not technically bound by certain laws. Paradoxically, however,

arbitration in question. Under the sovereignty doctrine, as one of the fundamental principles of international law, a State's Constitution can only be subjected to that state's interpretation[2], namely the interpretation of that State's Constitutional Court (or corresponding court, based on its own legal system)[3, 4]. Although, there are on this issue different opinions when it comes to the overlapping of certain norms, such as supranational and national norms in the European Union[5] or federal and state norms in federal countries[6], in most situations the constitutional interpretation is left to the State itself, notwithstanding the fact that said interpretation is always made considering different legal orders and even different branches of law, aside from the relevant constitutional law. Whether it's a domestic or an international arbitration makes little difference in this regard, because, most of the times, the applicable law

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the power of the Arbitral Tribunal to decide a dispute in equity does not derive only from the parties, but also has to be enshrined in the applicable law. *See, e.g.:* A.F.M. Maniruzzaman, *The Arbitrator's Decision by Amiable Composition and Ex Aequo et Bono: The Conceptual Paradigm* "Transnational Dispute Management" 3 (2004), available online at*: www.transnational-dispute-management.com/article.asp?key=254* last accessed June 24, 2022.

[2] John, Charvet, *The Idea of State Sovereignty and the Right of Humanitarian Intervention.* "International Political Science Review / Revue Internationale de Science Politique", *18*(1), 1997, pp 39–48, available online at http://www.jstor.org/stable/1601447 last accessed June 24, 2022.

[3] *See e.g* Decision no. 2160 from April 5, 2021 of the Romanian High Court of Cassation and Justice (the Panel for the Clarification of Certain Points of Law), published in The Official Gazette of Romania, no. 572 from June 4, 2021, explaining that the only authority with competence to decide on the (non)constitutionality of a certain issue is the Romanian Constitutional Court, whether via *ex-ante* legislative control or *ex-post*.

[4] See also Marieta Safta, *Constitutionalizing the Act of Justice in the European Union*, "Romanian Constitutional Law Review" 1/2020, pages 47-63, at 51, available online at http://www.revistadedrept constitutional.ro/wp-content/uploads/1contents/2020_1/2020_1_Marieta_Safta_Constitutionalizing_the_act_ of_justice_in_the_European_Union.pdf last accessed July 24, 2022.

[5] The Court of Justice of the European Union (CJEU) has a consistent jurisprudence affirming the primacy of European Union (EU) law, which, under the CJEU interpretation "precludes a national rule under which national courts have no jurisdiction to examine the conformity with EU law of national legislation which has been held to be constitutional by a judgment of the constitutional court of the Member State". *See* CJEU's most recent interpretation on this issue, the Judgment in Case C-430/21.

However, some EU Member States have a contrary (and equally consistent) jurisprudence based on their interpretation of EU law. For example, as far back as 1974, through what is now called the "Solange *(as long as)* Doctrine" (which has been nuanced along the way), the German Federal Constitutional Court decided that because the EU derives its powers from the member states they still have a "reserve jurisdiction" to review certain constitutional protections in compliance with their own constitutional legal order. Or, the case of the Romanian Constitution which does not recognize, under its present wording, the supremacy of EU law over its own national constitutional legal order. As the Constitutional Court of Romania (CCR) stated, its decisions are mandatorily applicable *erga omnes* and domestic courts do not have the authority to ignore or reinterpret the issues already decided by the CCR. Thus, CJEU's Judgment in Case C-430/21 cannot be applied unless and until the Constitution is amended in accordance with the applicable national procedure. See the CCR press release, from December 23, 2021, available online at https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/ last accessed July 24, 2022.

[6] For example, the overlap or lack thereof between the United States (US) Constitution and that of its States, corresponding to the overlap (or divergence) between federal and state legislation, with few exceptions. For details, see the US government's official presentation of "The Court and Constitutional Interpretation" available online at https://www.supremecourt.gov/about/constitutional.aspx last accessed July 24, 2022.

chosen by the parties and/or applied by the arbitrators[7] circles back to a (supra)national legal framework either directly, or indirectly in the case of international norms[8] interpreted through the lenses of a relevant legal system or jurisdiction[9].

Depending on the stage of the arbitration process the issue is raised in, the results could affect either the possibility to arbitrate a dispute or to recognize and enforce an arbitral award already rendered (in a foreign jurisdiction). That is because before a final arbitration award is rendered, constitutional challenges on grounds pertaining, for example, to the arbitrability of the dispute itself could potentially render the arbitration procedure inapplicable. Or on consent grounds when a challenge is raised to decide whether non-signatories can be bound by an arbitration agreements or if there are some applicable constitutional protections precluding this.

During an arbitration *per se* (the initial stage of the procedure, taking place in front of an Arbitral Tribunal) constitutionality issues can be raised as constitutional challenge to the applicable law, in certain situations. Interestingly, many countries allow constitutional challenges to be raised only in court proceedings, with just a few countries allowing them during arbitration procedures, as well. Among the countries allowing for such "arbitral constitutional challenges" are Romania[10] (where the Constitutional Court decided that the right to raise a constitutional challenge is not limited to proceedings seated in Romania[11]) and the United States (US)[12].

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[7] Although arbitrators are normally limited to the parties' choices of law, under the *Iura Novit Arbiter* principle, the Arbitral Tribunal is allowed to give its own interpretation of applicable norms independently of (or even contrary to) the parties' assertions. For a discussion on the subjectivity of the arbitrators in interpreting the law chosen by the parties *see* Emmanuel Gaillard, *The Role of the Arbitrator in determining the applicable law*, "Leading Arbitrators' Guide to International Arbitration", 3rd Edition, Chapter 18, 2014.

[8] *E.g*. international treaty.

[9] *See e.g.* the Micula Saga – Micula *v.* Romania – multiple investor state arbitration proceedings and annulment decisions – in accordance with BIT signed pre-ascension to the EU, Romania was found liable for monetary compensation, which upon payment was deemed by the European Commission to be state-aid incompatible with EU law. In a decision that some considered to be an "overreach", the CJEU applied its Achmea B.V. Judgement (Case C-284/16) and found that Romania's consent under previous BIT was inoperative after its ascension to the EU. *See* Nikos Lavranos, *The new Micula judgment and the overreach of the ECJ*, "Thomson Reuters Arbitration Blog" available online at http://arbitrationblog.practicallaw.com/the-new-micula-judgment-and-the-overreach-of-the-ecj/ last accessed July 24, 2022.

[10] Under Romanian law only constitutional challenges raised in commercial arbitrations are allowed explicitly, however, by analogy, some authors consider that it could be raised in any type of arbitration. See Crenguta Leaua, *L'exception d'inconstitutionnalite et l'arbitrage commercial. Certains aspects pratiques*, "EST EUROPA Revue d'etudes politiques et constitutionnelles", Numero special 1/2013, 100 ans d'exception d'inconstitutionnalite en Roumanie, pages 57-76, at 63.

[11] The first constitutional challenge under this legislation, raised in an International Chamber of Commerce (ICC) International Arbitration Court (ICC Paris) case. *See* the Romanian Constitutional Court's Decision no. 123 from March 5, 2013, published in the Romanian Official Gazette no. 214 from April 16, 2013.

See also, Stefan Deaconu, *Premieră în jurisprudența Curții Constituționale. Excepție de neconstituționalitate ridicată de o instanță arbitrală internațională,* available online at https://www.juridice.ro/254245/premiera-in-jurisprudenta-curtii-constitutionale-exceptie-de-neconstitutionalitate-ridicata-de-o-instanta-arbitrala-internationala.html last accessed June 24, 2022.

[12] Although a common law system, the US Supreme Court's (SCOTUS) jurisdiction is also supplemented by statutes in addition to its original jurisdiction (enshrined in the Constitution itself).

At the stage of setting aside an arbitral awards in annulment procedures or during the recognition and enforcement of (foreign) arbitral awards, since they take place in (domestic) courts, the issue of constitutionality can be raised pertaining to virtually any arbitral award, but on limited grounds — mostly procedural — usually pertaining to due process or public policy[13] issues (mandatory laws)[14]. Depending on whether it is a domestic or an international arbitration different grounds could apply[15].

The issue of consent is of great importance for any arbitration given the typically voluntary nature of this alternative dispute resolution method, as an expression of party autonomy. But, depending on the applicable theory on the nature of arbitration, party autonomy may be limited[16]. Thus, *non-voluntary*[17] arbitration is normally restricted to arbitration specific statutes[18] or treaties[19].

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[13] There are some differences between the notions of *public order* from civil law systems and *public policy* from common law systems. Nonetheless, for the purpose of the present paper, the two are considered analogues. For details on the correspondence, *see* C. Leaua, F.A. Baias (ed.)"*Arbitration in Romania. A practitioner's Guide, Kluwer Law International 2016*", endnote 404.

[14] *See* Mistelis, Loukas. A., Lew Julian. D. M., "*Pervasive Problems in International Arbitration"*, Ed. Kluwer Law International, 2006.

[15] Usually, in international arbitrations, for signatories of the 1978 New York (NY) *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, recognition and enforcement can be refused only on very limited grounds, exhaustively detailed in the convention – mainly due process or public policy issues.

[16] *See* Yu, Hong-Lin, "A Theoretical Overview of the Foundations of International Commercial Arbitration", Contemporary Asia Arbitration Journal, Volume 1, Issue 2, p. 255, 2008.

[17]The term "non-voluntary" is preferred instead of "mandatory", "compulsory", or forced" arbitration to avoid confusions, since — although somewhat synonymous and usually used interchangeably by scholars and professionals alike — there are nuances distinguishing them.

Mandatory arbitration typically pertains to arbitration on the basis of an existing binding arbitration agreement. That is, where the parties have already expressed consent to arbitrate, either through explicit consent and/or by waiving the right to court proceedings, or by proxy – normally, non-signatories cannot be compelled to arbitrate, in some cases, they can be considered bound to such an agreement. See William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma* 2 "Dispute Res. Int'l" 84 (2008), Multiple Party Actions in International Arbitration 3 (Permanent Court of Arbitration, 2009), *Extending the Arbitration Agreement to Non-Signatories,* ch. 4 Int'l Commercial Arb. Practice: 21st Century Perspectives (H. Grigera Naón & P. Mason eds. 2010; 2d Ed. 2013), Adapted from *Non-Signatories and International Arbitration*, in Leading Arbitrators' Guide to International Arbitration 707 (L. Newman & R. Hill, 3d Ed. 2014), Boston Univ. School of Law, "Public Law Research Paper No. 17-27", Available online at SSRN: https://ssrn.com/abstract=3018722 last accessed July 24, 2022.

Compulsory arbitration, however, technically refers to *forced* arbitration (although some use it to mean the same as mandatory). *See e.g..* Orme W. Phelps, *Compulsory Arbitration: Some Perspectives*, "Industrial and Labor Relations Review" vol. 18, no. 1, 1964, pp. 81–91. *JSTOR*, https://doi.org/10.2307/2520526 Accessed 25 Jul. 2022.

While *forced* arbitration usually means *non-voluntary* arbitrations *per se (i.e.* no consent), some authors use this term when referring to binding arbitration agreements where consent – although it exists – is not given freely, such as employment arbitrations.. See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, "Hofstra Law Review" Volume 25, Issue 1, Article 2, 1996, Available online at: http://scholarlycommons.law.hofstra.edu/hlr/vol25/iss1/2 last accessed July 25, 2022.

Thus, "*non-voluntary"* arbitration purposes to encompass all situations where consent was either not-given freely, or at all (*e.g.* statute mandated arbitration).

[18] For example, in the Romanian legislation, "Regulation on the organization and conduct of arbitrations" by the Professional Court of Arbitration for Attorneys, instituted via Decision no.1063/2015 of the Council of Bars.

Although the topic is very complex[20], given the constraints of the present paper the following section will address the issue of the constitutionality of non-voluntary arbitration in Romania and, respectively, in the US, mainly through a brief comparative review of applicable legislation and of the relevant case law.

II. Non-voluntary arbitration in the United States vs. Romania

While part of different legal systems — with the US as a common law exponent and Romania as a civil law one — there are, nonetheless, some similarities in the approach pertaining to the constitutionality analysis of both.

In the United States, as early as 1632 — long before its official beginnings as a federal country — arbitration has been accepted as a form of alternative dispute resolution[21]. Interestingly though, despite being part of a common law system, it was a statute (*i.e*. the Massachusetts Colony Arbitration Statute[22]) that first provided for this.

As the case-law[23] and the overall legal framework[24] evolved, they shaped more and more a federal policy favoring (mandatory) arbitration on the idea that for certain types of arbitration (such as employment or consumer) there is no constitutional impediment to enforce an arbitration based on contractual waivers of the right to litigate a potential dispute in court, despite the fact that such clauses are virtually nonnegotiable. So, for a long time, the US considered non-voluntary arbitrations to be constitutional, even as recently as 2015, in the US Supreme Court *in DirectTV Inc. v. Imburgia*, case[25].

However, this approach has been met with continued "dissent" for many decades, culminating this year with the adoption of a new bill by the US House of Representatives, *i.e.* the Forced Arbitration Injustice Repeal Act of 2022 (FAIR act). If voted also by the Senate, the bill will "ban pre-dispute arbitration agreements and pre-dispute class action waivers in disputes regarding employment, trusts, civil rights, and/or in the sale of property and/or the usage of a service"[26].

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[19] For example, Bilateral Investment Treaties, in the case of Investor-State arbitrations.

[20] See *e.g.* Peter B. Rutledge, *Arbitration and the Constitution,* Cambridge University Press, 2013.

[21] Steven Certilman*, A Brief History of Arbitration in the United States*, "New York Dispute Resolution Lawyer", 2010, Vol. 3, No. 1.

[22] *Id.*

[23] Historically there seems to have been a "hostility of common law to arbitration". *See* Wolaver, Earl S. "The Historical Background of Commercial Arbitration." *University of Pennsylvania Law Review and American Law Register* 83, no. 2 (1934): 132–46, p. 139. https://doi.org/10.2307/3308189 Last visited, July 21, 2022.

[24] With the first Federal Arbitration act enacted in 1925, initially drafted to enforce pre-dispute arbitration agreements. *See* Sarah Rudolph Cole, *Curbing the Runaway Arbitrator in Commercial Arbitration: Making Exceeding the Powers Count*, "Alabama Law Review", No. 344, 2016, available online at SSRN: https://ssrn.com/abstract=2773657 last accessed July 24 2022.

[25] 577 U.S, No. 14-462, slip op. at 1.

[26] https://www.congress.gov/bill/117th-congress/senate-bill/505.

As such, the US is currently having an overhaul of the legislation pertaining to mandatory arbitration in order to ensure (constitutional) protections for the more vulnerable party.

In Romania, it wasn't until 1865 that a first comprehensive arbitration legal framework pertaining to arbitration was adopted in the Civil Procedure Code[27]. During the communist rule, although not formally repealed, it was *de facto* inapplicable, considered incongruent with the principle of the State's Monopole on Justice[28]. Arbitration was mainly employed in the commercial disputes of the socialist state, based on mandatory norms dictated in specific statues drafted on the soviet model[29].

Currently, mandatory arbitration in the Romanian legislation[30] is limited to institutional arbitration of professional disputes, to be settled by arbitral institutions (established by and affiliated to certain professional associations) which can also act as disciplinary bodies[31]. Among those, The Court of Professional Arbitration for Attorneys. The relevant norms seem to be contradictory, however, referring to such arbitrations both in imperative terms and in terms more appropriate for voluntary arbitrations — *i.e.,* professional disputes are "to be settled [by arbitration] as set forth in the present section…" or "recourse to arbitration after following the mandatory mediation procedure"[32], while at the same time also referring to "model" arbitration agreements[33] to be signed by the parties.

The Romanian (constitutional) jurisprudence is also silent on the specific issue of non-voluntary arbitration statutes. In fact, the only decision of the Romanian Constitutional Court on this matter[34] recognizes binding arbitration only on the basis of the parties' previous explicit consent to arbitrate, with due regard to party autonomy, and, as such, recognizes it to be essentially an exclusively voluntary procedure[35].

So, as a matter of *lex ferenda*, clarifications are warranted in order to harmonize the applicable legal framework. Either from the legislative bodies through new or revised legal provisions, or from the Romanian Constitutional Court itself through *ex-post* control for existing norms, as well as through *ex-ante* and (or) *ex-post* control for any potential changes made by the legislative bodies.

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[27] Book IV pertaining to arbitration.

[28] Gabriel Mihai, *Arbitrajul privat românesc între tradiție și actualitate,* "Universul Juridic", Vol 1, 2019.

[29] *Id.*

[30] Some authors consider that in describing arbitration only as a voluntary procedure the Romanian legislation implicitly prohibits mandatory arbitrations, which are "a thing of the past". See Beatrice Onica Jarka, *Permit reglementarile actuale arbitrajul obligatoriu?* "Curierul Judiciar" 4/2020, vol. 19.

[31] Ion Deleanu, Sergiu Deleanu, *Domestic and International Arbitration*, Rosetti Publishing House 2005, page 128.

[32] Articles 185 and 251 of The Romanian Lawyer's Profession By-Laws.

[33] According to article 7.3. of the Standard Rules of Arbitration for Lawyers, set forth in Annex no. II to the UNBR Council's Decision no. 1063 of March 7 2005, a model Submission Agreement is stipulated in article 4.7. to Annex no. 1 to the Romanian Lawyer's Profession By-laws.

[34] The Romanian Constitutional Court's Decision no. 203 from March 7, 2006, published in the Romanian Official Gazette no. 267 from March 24, 2006.

[35] Basically alluding to the autonomous nature of arbitration. *See also, infra,* note 38.

Thus, with a longer history in deciding arbitration disputes as well as a vast jurisprudence for different types of arbitrations, the US could, *mutatis mutandis*, be a model for the changes that need to be implemented in the Romanian legislation, especially considering the recent developments in the US legislation restricting the scope of non-voluntary arbitrations.

III. Conclusion

As detailed in the analysis, the issue of the constitutionality of arbitration proceedings is rarely raised in the arbitration procedure *per se*. The reason for this is the restrictive legislation, with few countries allowing for constitutional challenges to be raised at the stage when the procedure takes place in front of the Arbitral Tribunal.

Most often, constitutionality issues appear in annulment proceedings or at the stage of enforcement and recognition of (foreign) arbitral awards, pertaining mostly to due process or public policy issues, including the arbitrability of the procedure and/or mandatory laws.

It is the issue of consent, however, that is most important when assessing the constitutionality of non-voluntary arbitrations, since freely-given consent is normally considered of the essence and a precondition[36] for any arbitration. Still, there are exceptions.

In conclusion, notwithstanding the differences arising from the specificities of the applicable legal system and some inconsistencies in the relevant jurisprudence, depending on the relevant normative framework and type of arbitration, non-voluntary arbitrations can be considered constitutional[37] provided that the constitutional protections (mostly procedural) which are potentially applicable in similar court proceedings are complied with[38].

[36] Wang, Guiguo, *Consent in Investor-State Arbitration: A Critical Analysis, "*Chinese Journal of International Law" 13, 2014, available online at https://www.researchgate.net/publication/269837716_Consent_in_Investor-State_Arbitration_A_Critical_Analysis last accessed June 24, 2022.

[37] Except when the autonomous nature of arbitration is applied, in which case there are virtually no limits to party autonomy, leading to the conclusion that any non-voluntary arbitrations would be unconstitutional in such circumstances. This is one interpretation possible based on the only Decision issued so far on this matter by the Romanian Constitutional Court. *Supra*, notes 35 and 36.

[38] Gabrielle Gilbeau, *Arbitration and the Constitution*, "Penn State Arbitration Law Review", Volume 6, 2014, available online at https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1078&context=arbitrationlawreview last accessed July 25, 2022.