

# SHORT OVERVIEW OF INTERNATIONAL ARBITRATION RULING IN ROMANIA FROM THE PERSPECTIVE OF THE RULES OF NEWLY ESTABLISHED ARBITRATION FORUMS

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## **Abstract**

*In Romania there are several traditional or new arbitral Courts that are willing to provide their services to legal entities in an international context and in a competent and efficient semblance. Two of these, the Arbitration Court of the Romanian-German Chamber of Industry and Commerce and Bucharest International Arbitration Court, adopted their Rules relatively recent and eluded from practitioners reviews. Therefore, the present article will analyze the Rules of the mentioned arbitral Courts by comparison with the ICC Rules, LCIA Rules and HKIAC Rules, starting from the most valuable characteristics of international arbitration, as determined in the 2015 International Arbitration Survey<sup>3</sup>, with the purpose of concluding if the new arbitral Courts of Romania are important competitors in the field and if their recommended arbitration agreement should be included in the commercial agreements.*

**Keywords:** international arbitration, arbitration's seat, arbitrators' appointment, arbitration's costs, arbitral institutions.

**JEL Classification:** K33, K49

## **1. Introduction**

Emboldened by the European Parliament to become an arbitral State<sup>4</sup> and discarding the existent arbitration means, local Romanian entities decided to create new arbitral Courts and to rule new arbitration Rules. This approach is understandable and meritorious taking into consideration the fact that the freedom of arbitration from the institutional control was overlooked<sup>5</sup> in Romania and the fact that the Rules of arbitration of International Commercial Arbitration's Court attached to the Romanian Chamber of Commerce and Industry are old-fashioned in consideration to the applicable rules, number of arbitrators, nominated arbitrator's statement, the challenge grounds of an arbitrator, seat and venue of the arbitration, written communications etc.

Most notably, the new Arbitral Courts and the new drafted arbitration Rules in Romania, which will be analysed by comparison with ICC, LCIA and HKIAC Rules, are the Rules of Arbitration of the Arbitration Court of the Romanian-German Chamber of Industry and Commerce (from now on referred to as *ACAHKR* - Arbitration Court AHK Romania) and the Rules of Arbitration of Bucharest International Arbitration Court (from now on *BIAC*).

The basis of the comparison is inspired from the most valuable characteristics of international arbitration, ranked in the 2015 International Arbitration Survey, as following: the characteristic of avoiding specific legal systems and national Courts, flexibility, selection of arbitrators, costs and speed. The comparison will also consider the parties autonomy in arbitration as the driving force behind the choice for this dispute resolution method.

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<sup>3</sup> Queen Mary, University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, 2015, p. 6, available online at: <http://www.arbitration.qmul.ac.uk>, November 5, 2016

<sup>4</sup> European Parliament, Directorate-General for Internal Policies, *Legal Instruments and Practice of Arbitration in the EU*, 2014, p. 155, available online at: <http://www.europarl.europa.eu/studies>, November 5, 2016

<sup>5</sup> European Parliament, Directorate-General for Internal Policies, *Legal Instruments and Practice of Arbitration in the EU*, European Union, Brussels, 2014, p. 154, available online at: <http://www.europarl.europa.eu/studies>, November 5, 2016

## 2. Avoiding specific legal systems and national courts in international arbitration pursuant to the new Romanian arbitration rules

As well known among the scholars and practitioners of international arbitration, the place of arbitration has important consequences in terms of the law governing the arbitration proceedings and the arbitral award's *nationality*. The usual practice is that the parties agree upon the place of arbitration. In the opposite case, the different arbitration forums Rules provide solutions. After the parties agree to arbitrate, with no reference to the place of arbitration, pursuant to ICC Rules<sup>6</sup>, the place of arbitration will be determined by the Court considering a number of factors such as: the arbitration law and the country from which the parties originate<sup>7</sup>. An approximately comparable solution is provided by HKIAC Rules<sup>8</sup> and LCIA Rules<sup>9</sup> according to which the Arbitral Tribunal can establish other arbitration seat than Hong Kong or London, in view of the case's circumstances. Similar to the international renowned Rules, ACAHKR Rules<sup>10</sup> awards the Arbitral Tribunal the possibility to decide the place of the arbitration considering all the circumstances.

Distinct from the above are BIAC Rules<sup>11</sup>, which stipulate that in the absence of a provision regarding the arbitration's seat agreement, this shall be Bucharest, Romania, even if the circumstances indicate the need for another arbitration seat. Such rule contradicts the alleged and declared international vocation of the newly established arbitration forum.

Therefore, BIAC Rules offer a predictable future of the arbitral award, in case there are no provisions regarding the arbitration's seat in the arbitration agreement, since the party knows exactly the challenge and the enforcement procedures before the commencement of arbitration. The same cannot be said about the other arbitral institutions considering that the Arbitral Tribunal has the power to determine the arbitration's place considering the circumstances.

The arbitration's seat can also determine the law applicable to the merits of the dispute, in case there are no express provisions in the arbitration agreement, due to the fact that the Arbitral Tribunal can apply the conflict of law rules from the arbitration's seat, in order to determine the law applicable to the merits. Regarding this aspect, there is another solution provided by the Rules of international renowned Courts which establish the Arbitral Tribunal power to determine the appropriate<sup>12</sup> applicable rules of law. ACAHKR Rules, according to Article 27 (2)<sup>13</sup> provisions, states an associated solution according to which the Arbitral Tribunal will apply the law with the closest connection to the case.

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<sup>6</sup> Article 18(1) of the 2012 ICC Arbitration Rules: "The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties."

<sup>7</sup> Fry Janson, Simon Greenberg, Mazza Francesca, *The Secretariat's Guide to ICC Arbitration*, ICC Services, Publication Department, France, 2012, p. 203

<sup>8</sup> Article 14 (1) of the 2013 HKIAC Rules: "The parties may agree on the seat of arbitration. Where there is no agreement as to seat the seat of arbitration shall be Hong Kong, unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate."

<sup>9</sup> Article 16 (2) of the 2014 LCIA Arbitration Rules: "In default of any such agreement, the seat of the arbitration shall be London (England), unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another arbitral seat is more appropriate."

<sup>10</sup> Article 26 (2) of the 2010 ACAHKR Rules: "The parties shall agree on the place of arbitration. In the absence of such agreement, the arbitral tribunal shall decide with regard to the place of arbitration, taking into account all circumstances."

<sup>11</sup> Article 10 (1) of the 2016 BIAC Rules: "If the agreement to arbitrate does not contain a provision regarding the seat of the arbitration, such seat shall be Bucharest, Romania."

<sup>12</sup> Article 21 (1) of the 2012 ICC Arbitration Rules: "The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

Article 35 (1) of the 2013 HKIAC Rules: "Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

Article 22 (3) of the 2014 LCIA Arbitration Rules: "If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate."

<sup>13</sup> Article 27 (2) of the 2010 ACAHKR Rules: "If the parties have not agreed on the applicable law, the arbitral tribunal shall apply the law with the closest connection to the case."

Distinct from the above, BIAC Rules are silent regarding the law applicable to the merits of the case and, for this reason, it is acceptable to consider that the law applicable to the merits of the dispute will be determined by the Romanian conflict rules.

Considering these strong differences, one may argue that the mentioned Romanian Arbitral Courts are designed for different arbitrations, ACAHKR for international arbitrations and BIAC for arbitration proceedings with close connection to Romania.

### 3. Flexibility of the new rules of arbitration in Romania

As stated above, the chance of the parties to structure the proceedings is another valued characteristic in international arbitration. The liberty of the parties to determine the procedure is treated differently by the Arbitral Courts and by the Arbitral Tribunals.

For example, ICC Rules<sup>14</sup> grant a higher importance to the rules of the parties than the rules determined by the Arbitral Tribunal, and LCIA Rules<sup>15</sup> encourage the parties to determine the applicable procedure.

Opposite to the above, the other rules analysed offer the Arbitral Tribunal the power to determine the applicable procedure. HKIAC Rules<sup>16</sup> grants the Arbitral Tribunal the power to adopt the suitable procedure and BIAC Rules<sup>17</sup> grants almost full power to the Arbitral Tribunal when determining the applicable procedure.

Distinct from the above are ACAHKR Rules<sup>18</sup> which grant, in appearance, the full liberty of the parties to determine the applicable procedure to their arbitration.

Considering these differences, one may notice that the general liberty of the parties in arbitration and especially in determining the procedure that will be applied, is different and the parties may take advantage or not from this. For instance, from our point of view, if it is predictable that one will be the plaintiff in an arbitral proceeding, rigid arbitration rules are to be chosen due to the exact nature of the arbitration's conduct, and if it is predictable that one will be the respondent in an arbitral proceeding, flexible arbitration rules are to be chosen due to the creativity that can delay the proceedings.

The new Romanian arbitration Rules, appealing for both plaintiffs and respondents considering the above mentioned, will have to be improved in the light of the renowned arbitration rules. It is our opinion that in arbitration, a perfect set of rules will provide that the Arbitral Tribunal will be bound by the will of the parties, but will also be capable to intervene in some circumstances. Considering that before BIAC the parties do not have the same liberty in determining the procedure as before ACAHKR, another supplementary argument in favour of the already stated *prima facie* rises. In this way, BIAC is more appropriate for arbitration proceedings with a close connection to Romania and therefore more local, and ACAHKR is more appropriate for international arbitration.

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<sup>14</sup> Article 19 of the 2012 ICC Arbitration Rules: "The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

<sup>15</sup> Article 14 (2) of the 2014 LCIA Arbitration Rules: "The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal's general duties under the Arbitration Agreement."

<sup>16</sup> Article 13 (1) of the 2013 HKIAC Rules: "Subject to these Rules, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues and the amount in dispute, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case."

<sup>17</sup> Article 13 of the 2016 BIAC Rules: "The arbitral proceedings shall be conducted in accordance with these Rules, the rules of procedure and procedural directives of the Arbitral Tribunal under Article 12 of these Rules, and any other decisions of the Arbitral Tribunal. Agreements of the parties regarding the arbitral procedure, if any, shall be taken into account insofar as the Arbitral Tribunal considers them practicable and expedient in the particular circumstances. Due process shall be guaranteed with respect to the conduct of the entire arbitration process."

<sup>18</sup> Article 24 of the 2010 ACAHKR Rules: "The arbitral proceedings shall be governed by the applicable mandatory procedural laws on arbitration at the place of arbitration, by Rules of Arbitration and, as the case may be, the rules mutually agreed by the parties. Apart from that, the arbitral tribunal determines the proceedings in its own discretion."

#### 4. Selection of arbitrators pursuant to the new Romanian arbitration rules

Perhaps, the most important characteristic of international arbitration is the parties' capacity to determine the person who will decide upon their dispute. As stated in the first section, Romanian traditional arbitration institution neglected this characteristic in the past and, on this premise, someone will think that the new Arbitral Courts adopted new rules, with a modern mechanism.

BIAC Rules provide that, in case the parties fail to appoint the arbitrator, the Governing Board shall appoint an arbitrator from BIAC's arbitrators list, taking into account the International Bar Association's Guidelines on Conflicts of Interest in International Commercial Arbitration<sup>19</sup>. No provisions exist in BIAC Rules regarding the possibility of the parties or of the Governing Board to appoint an arbitrator outside the list made available by BIAC.

ACAHKR Rules provide that, in case the parties fail to appoint the arbitrator, the Board of the Court will appoint an arbitrator from the arbitrators list, which is not binding<sup>20</sup>.

Those solutions are keeping the international trend in the arbitrators selection and, from our perspective, offer predictability on the persons who might settle the dispute.

In opposite BIAC Rules do not present the same flexibility as found in arbitration rules of many forums, including ACAHKR Rules.

While ICC is not keeping a list of available arbitrators, BIAC goes to the extreme where no clear provisions are available as to the appointment of the arbitrator directly by the parties, and whether such arbitrators should be from BIAC's list or not.

The Rules provide only for the appointment of arbitrators from BIAC's list when the parties do not appoint their arbitrators or when the chairman is not nominated. This ambiguity may be a weak point of the new forum of arbitration which will affect the party's full autonomy in choosing arbitration as a dispute resolution mechanism.

The free will of the party in choosing the arbitrator, considering his experience with commercial practices, trade usages, legal structures, ability to apply different national laws and deal with comparative law issues is an important element of the party's autonomy in arbitration. The party's autonomy in appointing a suitable arbitrator, considering the above, is infringed by BIAC rules which do not provide the possibility to choose an arbitrator outside the list.

#### 5. Speed of the arbitration proceedings according to the new Romanian arbitration rules

As we know, the arbitration's speed depends mainly on the parties' strategy and conduct<sup>21</sup>. The arbitration rules came forward and offered the parties the possibility to determine in a way the speed of the procedure and ICC, at the time of the drafting of the present article, decided to amend the Rules in order to adopt an expedited procedure<sup>22</sup>.

Firstly, BIAC, as a rule, decided to refuse the hi-tech approach of arbitration and requests paper format for all submissions<sup>23</sup> and, by contrast, permitted live audio – video communications for

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<sup>19</sup> Article 3 (1) of the 2016 BIAC Rules: "In the case of an Arbitral Tribunal consisting of one arbitrator, if the parties fail to agree upon such arbitrator within the fifteen (15) calendar days period stipulated and communicated by the secretariat of the BIAC (the "BIAC Secretariat") in accordance with Article 7(3) of the Rules, the Governing Board shall appoint an arbitrator from the BIAC's then current list of arbitrators."

Article 4 (4) of the 2016 BIAC Rules: "The International Bar Association's Guidelines on Conflicts of Interest in International Commercial Arbitration shall be applicable to any and all appointments of arbitrators and arbitration procedures carried out by the BIAC."

<sup>20</sup> Article 14 (1) of the 2010 ACAHKR Rules: "If the parties agreed to have the disputes settled by a sole arbitrator, but failed to jointly nominate a sole arbitrator within four weeks of delivery of the request for arbitration, any of the parties may request the appointment of a sole arbitrator by the Board."

<sup>21</sup> See Hamed Alavi, Tatsiana Khamichonak, *International arbitration and its exclusion from the Brussels regime*, in „Juridical Tribune – Tribuna Juridica”, vol. VI, issue 1, June 2016, p. 8.

<sup>22</sup> Jacob Grierson, Thomas Granier, *New International Chamber of Commerce Expedited Procedure*, available online at: [www.mwe.com](http://www.mwe.com), November 20, 2016;

<sup>23</sup> Article 15 (1) of the 2016 BIAC Rules: "Written submissions, including annexes, shall be transmitted to the chairman of a particular Arbitral Tribunal, together with one copy for each of the arbitrators and the secretary or clerk, if any, as well as one copy for the

the hearings<sup>24</sup>. In opposition, ACAHKR recognizes the possibility of the parties to send documents by other means<sup>25</sup> but refuses to recognize the possibility to hold hearings using technology. Further, the rest of the arbitral institutions under review, offer the possibility to send documents and hold meetings/hearings using other means.

One hi-tech approach, which is present in our daily life and would improve the quality of the arbitration services and influence upon the arbitration speed, is using a secured online platform that will instantly make available to the parties, arbitral tribunal and administrative structures running the arbitration forum, all the file documentation and the parties submissions in the case, together with the procedural documentation. The Romanian arbitration Rules do not provide for such a hi-tech approach or anything similar.

Secondly, considering the procedural terms, the new Romanian arbitration rules are similar to ICC, LCIA or HKIAC Rules. A difference is made by ACAHKR Rules which give the Court a considerable importance in determining the time limits which, mostly, are determined in weeks, not days.

Finally, the most important provision regarding the speed of the arbitration proceeding maybe the one which determines the time limit in which the arbitral tribunal must render its award. Such provision can be found in BIAC Rules<sup>26</sup> and ICC Rules<sup>27</sup>, both setting a time limit of six months from the agreement upon the terms of reference. This term may be prolonged by the different structures within the arbitration forum.

This approach is different from the other Rules analysed which are silent regarding the time limit in which the Arbitral Tribunal should render its award.

One should not disregard when determining the speed of arbitration, which is added to those six months, the influence of the actual time of the Arbitration Tribunal constitution and the time the Terms of Reference are drafted. Most of the rules analyzed, including BIAC Rules do not offer a predictable time expectation until the arbitral award is delivered. As a partial answer to this disappointment, ICC established in the future expedited procedure that the „*award will be rendered in six months from the date of the case management conference, which itself must take place within the 15 days from the moment in which the file is transferred to the Arbitral Tribunal*”<sup>28</sup>, time limits that are subject to no extension.

## 6. Costs

Arbitration is a fancy way to settle a dispute and, for this reason, it can be more costly than the legal fees before a traditional Court, which usually offer more levels of jurisdiction. Even though, arbitration is presented in most of the occasions as less costly than the public Courts, the actual status

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*opposing party or each of the opposing parties, as applicable. Unless otherwise decided by the Arbitral Tribunal, exhibits must be itemized in a list attached to the written submission and must be submitted in the same number of copies as the written submissions. Written submissions in electronic or facsimile form may only be permitted with the consent of all parties, provided that copies in paper format are made available to the Arbitral Tribunal on demand.”*

<sup>24</sup> Article 15 (3) of the 2016 BIAC Rules: “*The Arbitral Tribunal may at any stage of the proceedings order oral hearings. The oral hearings will take place at such venue considered appropriate by the Arbitral Tribunal, taking into account the availability and convenience of the participants and all relevant circumstances. Subject to the requirements of due process, a part or the entirety of an oral hearing may be conducted with respect to one or more of the participants by means of live audio-video communication permitting simultaneous two-way transmission and recording thereof.*”

<sup>25</sup> Article 3 (1) of the 2010 ACAHKR Rules: “*All documents shall be sent by registered mail/return receipt requested, courier service, telecopier or any other means of service inasmuch as they provide a record of receipt. Unless the parties have agreed on a manner of service, the arbitral tribunal may instruct a specific mode of service.*”

<sup>26</sup> Article 20 (2) of the 2016 BIAC Rules: “*The time limit within which the Arbitral Tribunal must render its final award is six (6) months, with such time limit starting to run from the date of the confirmation of the Terms of Reference in accordance with these Rules.*”

<sup>27</sup> Article 30 (1) of the 2012 ICC Arbitration Rules: “*The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference [...]*”

<sup>28</sup> Jacob Grierson, Thomas Granier, *New International Chamber of Commerce Expedited Procedure*, available online at: [www.mwe.com](http://www.mwe.com), November 20, 2016.

of costs in arbitration is that such costs are higher than the similar Court costs as the arbitration offers a private dispute resolution, customised to the needs of the parties and the case's circumstances. So, higher costs are justifiable in arbitration in the sense that paying a top dollar, would get a front row seat. Usually higher costs are coming from the regular choice of the parties for a single member or a three member Arbitration Tribunal.

For a precise comparison we will consider a claim in amount of 1,000,000 US Dollars which would be filed to ICC, HKIAC, LCIA, ACAHKR and BIAC.

If someone decides to submit its request, with the amount mentioned, to ICC with a sole Arbitrator Tribunal and only with two parties, will have to pay, in average 60,000 US Dollars. We used for this exercise the calculator available on ICC website. Using a similar method available on the website of this institution, with the same request, at HKIAC, the party will have to pay approximately the same amount. While not offering an online fees calculator, ACAHKR offers fees which are fourth of the ones mentioned above.

Not having the same method in determining the costs of the arbitration, the person intending to file a request before LCIA is in the impossibility to predict solely its budget, if not assisted by a person who has experience before LCIA.

BIAC adopted a mixed approach regarding the arbitration costs. According to the Rules, a party is in the impossibility to predict the administrative costs but can determine the arbitrator fees. For the same claim of 1,000,000 US Dollars, the arbitrator fee will be at a lower amount than the arbitrator fee before ICC or HKIAC.

By comparison to the legal fee before the traditional Romanian Court (until an enforceable award in an ordinary procedure), the arbitrator fee in Romania is approximately 200% higher for BIAC and approximately the same ACAHKR.

## 7. Conclusions

Considering the new arbitral institutions, Romania may be an arbitration forum to choose. The Rules adopted by BIAC and ACAHKR, although they may be refined, are in accordance to the standard offered by the renowned arbitral institutions.

As opposed, due attention must be given to the aspects presented in the comparison above, and the arbitration provided by Romanian set up forums should regain in the eyes of the business international communities, the nature of a method of dispute resolution not only in competition with other international notorious forums of arbitration but also with the local Courts. Viable arbitration solution could rely only on credible ruling in arbitration which would offer the litigating parties the comfort of the appointing independent and impartial professionals as dispute solvers at a fair price. Whether ACAHKR and BIAC Rules, and their application offer this comfort, remains to be seen.

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