INTERNATIONAL ARBITRATION IN YUGOSLAVIA

*Predrag Sulejic**

Arbitration has become the ordinary and normal means of solving disputes in international commerce and its extraordinary expansion constitutes one of the outstanding phenomena of our time. As a way to solving disputes, arbitration has become undeniable part of a system in which exists private enterprise, a free economy and liberal trade policy as the best incentives for success. The reason for this is the need to ensure careful balance between the interests of foreign states of parties involving in a commercial contract on the one hand, and the requirements of an orderly conduct of international trade on the other.

The Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Economy has long been one of well-known center for international arbitration. Found in 1947 it is recognized today internationally as an institution of expertise, experience and integrity. Although attached to the Chamber of Economy, this Court is and always has been an autonomous institution, independent in its work.

The Yugoslav Foreign Trade Court of Arbitration is a permanent court of arbitration which provides facilities for and promotes:

1. The settlement of disputes arising out of business relations established in foreign trade transactions between Yugoslav enterprises, and foreign physical and legal persons, and settlement of such disputes between foreign physical and legal persons.
2. The settlement of disputes related to ships and navigation on the see and inland waters, and disputes to which the law of navigation applies, provided that at least one of the parties is a foreign person.

In such disputes the Arbitration may, at the request of one or both parties, mediate between them for the purpose of conciliation.

Yugoslavia is a party to many international treaties pertaining to international commercial arbitration, such as the Geneva Protocol of September 24, 1923, the Geneva Convention of September 26, 1927 on the Enforcement of Arbitral Awards, the New York Convention of June 10, 1958 for the Recognition and Enforcement of Foreign Arbitral Awards, the Washington Convention of March 18, 1965 for the Settlement of Differences Concerning Investments between States and Nationals of other States.

---

* Professor, Faculty of Law, University of Belgrade.

Yugoslavia is also a party to several bilateral treaties which provide for the recognition and enforcement of arbitral awards. As a result, an international arbitration award issued in Yugoslavia is enforceable practically anywhere in the world.

In this paper will be discussed some of fundamental principles on which the law of arbitration is based: the reasons for arbitration, the validity of the arbitration clause, autonomy of the parties (concerning the composition and constitution of the arbitral tribunal, the choice of the procedure to be followed before the arbitrators), liberty of the arbitrator, (inclusive the impartiality and independence of arbitrators), and some questions about form and effects of the award.

The reasons for arbitration

There are many reasons which has induced the parties to submit their disputes to a particular form of arbitration. The first is the distrust of an alien political, economic, legal or cultural system.

In spite of the fact that most national courts are competent and have experienced and impartial judges, arbitration developed as an alternative system of dispute settlement due to distrust of foreign national courts. Other advantages are: ability and authority of arbitrators, flexibility of procedure, non-national influences, privacy. The distrust exists between the parties from civil law and common law; between the developed countries and developing countries; also, distrust existed between businessman from western free-market system and socialist, centrally planned economic system. Even if rationally unjustified they influence the minds of contract negotiators. Arbitration is seen as the remedy to those problems - notwithstanding the differences in arbitration law and practicers in the various countries. Owing to the internalization of arbitration (international conventions) a uniformity of national views and law has developed, and the parties have confidence in the system of arbitration on which they have agreed.

The validity of the Arbitration Clause

The clause should clearly express the parties intent to submit to arbitration. Like in the other institutional Arbitrations, the Rules of the Yugoslav Foreign Court of Arbitration (in further text: Yugoslav Rules) suggest to the parties the following clause: «All differences arising out of or relating to this contract shell be considered amicably. In the case of a dispute, the parties agree upon the jurisdiction of the Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Economy, by whom the dispute shell finally be settled..»

According to the Yugoslav Rules the jurisdiction of the Arbitration may only be established by an agreement concluded by the parties in writing. But, like in the other countries and international conventions (e.g. in the New York Convention of the 1958) an agreement concluded by exchange of letters, telegrams or telexes, or by consonant statements made by the parties at the oral hearing and entered into a record, shell also be deemed to be an agreement in writing. An arbitration agree-

ment shell also be deemed to have been validly concluded when a provision on the jurisdiction of the Arbitration is contained in General Conditions, when they are a constituent part of the basic legal transaction.

The Independence and Impartiality of Arbitrators

Each party has the right to appoint an arbitrator of its choice. But this arbitrator, like a judge, should be impartial and independent of all the parties. Many institutional arbitration rules contain provisions of this kind. The Yugoslav Rules determines that the parties may challenge the arbitrators according to the Code of Civil Procedure, i.e. the same regime as it is for the judge of a state courts.

According to the Yugoslav Rules, arbitrators shell be elected from a Panel of Arbitrators drawn up by the Broader Presidium of the Arbitration. A foreign party may choose as arbitrator a foreign citizen who is not on that Panel of Arbitrators.

Procedural arrangements by the parties

The parties are free to choose how they wish to organize the ar-bitration proceedings. They have a large autonomy to determine their own procedural rules and freedom is recognized by the national statutes. The Yugoslav Code of Civil Procedure confirms that the parties may determine the rules of procedure to be applied by the arbitrators, whilst the Yugoslav Rules recommends to negotiating parties, as a possible way: «The parties are free to agree upon the application of the UNCITRAL Arbitration Rules, and upon the application of any substantive law to the settlement of the emerging dispute».

Moreover, the New York Convention of 1958 does not only confirm the parties autonomy to draft their own procedural rules, but even sanctions any award where the arbitrators did not respect the parties procedural arrangements: recognition and endorsement may be refused when «the arbitral procedure was not in accordance with agreement of the parties». (ARTY 1, d).

The Yugoslav Rules provides that each party must be allowed to state its case, be given access to every document submitted to the arbitrators, that no party may be denied the right to attend the hearings. The parties attend the hearings in person or through an autopsied agent. The agent of a party may be a foreign citizen if the party has his place of business outside Yugoslavia.

Whilst the parties are free to choose the rules of procedure, there are nevertheless some fundamental rules which apply to any arbitration. The purpose of those rules is to ensure the fairness of the proceedings and to ensure that general principles of due process will be abided. For example, if one or both parties, although duly summoned, fail to appear at the oral hearing, the arbitrators shall, if they are satisfied that the parties were duly summoned to the oral hearing and that they have no justified reasons for absence, have the power to proceed with the arbitration of the dispute and such proceedings shell be deemed to have been con-

ducted in the presence of the parties. (Art. 35, 6 Yugoslav Rules).

The Arbitral Award

The arbitral tribunal (or the sole arbitrator if it is the case) shell apply the law stipulated by the parties as the substantive law applicable to their contractual relationship. But, if the parties have failed to stipulate it, the arbitral tribunal shell apply the law indicated by the conflict of laws rules whose application the arbitrator deems to be the most suitable for the case involved. In all case, the award must be in conformity with the provisions of the contract, and shell take into account trade usages that may be applied to the case involved.

Yugoslav law, like most other legal systems, provides that the arbitration award may be challenged in Court under certain specific circumstances, e.g. if the arbitration tribunal was not regularly appointed, if an award was totally contrary to the most basic concepts of law, or because it grossly and obviously disregarded the facts of the case, or, if the arbitration tribunal decided an issue which was not submitted to it.

Finally, in a number of international contracts the parties exclude the application of any national system of law and agree to submit their agreement to the general principles of law, or to principles common to the countries of the parties - than the parties agree that any disputes between them should be decided ex aequo et bono. Such law clauses are perfectly valid under Yugoslav arbitration law, and if this happen, arbitrators have opportunity to contribute by their awards to the development of what is sometimes described as the lex mercatoria.