# REASONS FOR ADOPTING A LAW ON INTERNATIONAL COMMERCIAL ARBITRATION IN THE REPUBLIC OF MACEDONIA

In the last fifty years the importance of international commercial arbitration has increased significantly. Today, arbitration as a non-governmental (private) institution has been universally recognised as a dominant instrument that is used for resolving international commercial disputes. One of the characteristics of the twentieth century within the area of legal development is undoubtedly the breakthrough and affirmation of international commercial arbitration, as another independent means for parties to settle their disputes.

International commercial arbitration has been the subject of intensive regulation by legislative bodies in certain states but also on an international level. In the past two decades and in a large number of states worldwide, the general trend related to the subject has been to adopt a separate law on international commercial arbitration.

## 1. Assessment of the current situation regarding International Commercial Arbitration in the Republic of Macedonia

Today, in the Republic of Macedonia there are a number of different sources of law regarding international commercial arbitration in place, both as regards international as well as national sources of law.

### 1.1.International Sources

Upon gaining its independence in 1991, the Republic of Macedonia by means of succession became a member of the SFRJ (former socialistic Yugoslavia) in almost all important multilateral arbitration Conventions. These Conventions, with respect to the issues they govern, have supremacy over national legislation. Thus, according to Article 118 of the Constitution of the Republic of Macedonia[1]:
*"International Treaties ratified in accordance with the Constitution are considered as part of the national legislation and cannot be altered by a law".*

The Republic of Macedonia is a member of the most significant multilateral international conventions regulating international commercial arbitration:

1. The Geneva Protocol on Arbitration Clauses from 1923;[2]
2. The Geneva Convention of Enforcement of Foreign Arbitration Decisions, dated the 26th September 1927;[3]
3. The New York Convention on Recognition and Enforcement of Foreign Arbitration Decisions;[4]
4. The European Convention on International Commercial Arbitration, Geneva, dated the 21st April 1961;[5] and

[1] Published in the Official Gazette of the RM No. 52/91 November 22, 1991
[2] Ratified in the Official Gazette of the FNRJ MD No. 4/1959, 23.04.1959
[3] Ratified in the Official Gazette of the SFRJ MD No. 4/1959, 23.04.1959
[4] Ratified in the Official Gazette of the FNRJ MD No. 11/1981, 09.10.1981. Ratification reserves have however been placed regarding the territorial reciprocity and a commercial reserve has been made regarding Article 1 para. 3 of the New York Convention
[5] Ratified in the Official Gazette of the SFRJ MD No. 12/1963, 28.11.1963

5. The Washington Convention on the Settlement of Investment Disputes between States and Citizens of Different States, dated the 18th March 1965[6].

## 1.2.National Sources

The Republic of Macedonia belongs to the group of states that do not have a separate Law on Arbitration. On the contrary, the norms of Macedonian legislation regarding arbitration are dispersed in several rules and regulations.

The Macedonian **Law on Litigation Procedure** (LLP)[7] (Articles 438-459) which stipulates the provisions regarding implementation of the arbitration procedures, is the basic source of law on international commercial arbitration in the Republic of Macedonia. The LLP contains provisions that regulate both national and international arbitration. The LLP stipulates the following: 1) the definition of international commercial arbitration; 2) the suitability of disputes to be considered by international commercial arbitration 3) the definition of arbitration settlement and the types and forms of arbitration settlement; 4) the jurisdiction of the arbitration; 5) the arbitration procedure; 6) the definition of arbitration decisions and the effect of the decisions, etc.

Recognition and enforcement of foreign arbitration decisions in the Republic of Macedonia is regulated by the **Law on Resolving the Conflict of Laws and Regulations of Other Countries in Certain Issues adopted in 1982**[8] of the former SFRJ. This law has priority as a source of law for cases that do not fall within the domain of the International Multilateral Conventions, or Bilateral Treaties approved by the Republic of Macedonia (primarily the New York Convention) In addition, the Law is applicable to issues which are not regulated by Conventions, for example the procedure for recognition and enforcement. Certain issues regarding the recognition and enforcement of foreign arbitration decisions are stipulated in other separate laws such as the Law on Courts, the Law on Non-Contentious Procedure dated the 24th May 1979[9], and **the Law on Enforcement Procedure**[10].

The legislation concerning International Commercial Arbitration in the Republic of Macedonia can be characterised as outdated. Basically, provisions stipulated in the legislation of the former SFRJ are still applicable, a legislation that was adopted in the seventies and eighties of the last century, and that was created in circumstances and conditions of a controlled market and economy. The concept of arbitration is regulated as an integral part of the LLP, which presents a strong indication that the jurisdiction theory with regards to the legal nature of the arbitration is accepted. Moreover, the content of the norms correspond to certain obsolete solutions from the former federal legislation. Finally, the term “elected court” is used to designate the arbitration. (Article from LLP)

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[6] Ratified in the Official Gazette of the SFRJ MD No. 7/1967, 21.07.1967
[7] Official Gazette of the RM No. 33/1998 and 44/2002
[8] Published in the Official Gazette of SFRJ No. 43/82
This law is being applied as a law of the Republic, in accordance with Article 5 of the Constitutional Law for Enforcement of the Constitution of Republic of Macedonia (published in the Official Gazette of the Republic of Macedonia No. 92/91
[9] Official Gazette of the RM No. 19/1979
[10] Official Gazette of the RM No. 53/1997

All the above clearly point to the fact that the existing rules and regulations do not correspond to the current environment of international commercial trade and cannot serve as a framework for the further development of International Commercial Arbitration in the Republic of Macedonia. The Macedonian arbitration legislation is therefore in need of reform, which can only be achieved through the adoption of a new separate law on International Commercial Arbitration. The law needs to be based on the full application of the policy of the free will of the parties in agreeing and enforcing the arbitration procedure, without any unnecessary obstacles.

It is very difficult to imagine the process of revising the existing normative solutions in the Republic of Macedonia, as regards international commercial arbitration, without considering the provisions of **the Model Law on International Commercial Arbitration of the United Nations Committee for International Trade Law** (UNCTRAL), dated the 21st June1985, especially the possibility to fully incorporate them into the national legislation.

Why is it beneficial to incorporate the provisions stipulated in the Model Law into Macedonian legislation? First and foremost because the Model Law unifies and improves the standards of international commercial arbitration law, which have already been established in other sources. Hence, the Model Law offers a safe and verified foundation for drafting legislation concerning arbitration in any country, including the Republic of Macedonia.

## 2. UNCITRAL Model Law

The Model Law is a result of several years of work within the UNCITRAL that involved wide-spread consultations with arbitration institutions and individual experts in international commercial arbitration. The objective of the adopted document was to advance the establishment of a unified legal framework for fair and efficient settlement of disputes arising from international commercial relationships. The final text of the Model law was adopted during the 18th UNCITRAL session that took place in Vienna, on the 21st June 1985, following extensive discussions[11]. The adopted text has been delivered to the UN General Assembly which approved the UNCITRAL Model Law on International Commercial Arbitration by adopting the General Assembly Resolution on the 11th December 1985[12]. The UN Secretary General was bound by the resolution to submit the text of the Model law together with the *travaux préparatoires* (working documents) to the Governments and arbitration institutions as well as to other interested bodies, with a recommendation for all states to carefully review the Model Law, considering the preferred uniformity of the legislation concerning arbitration procedure and the specific needs of international commercial arbitration practice. The drafters of the Model Law paid particular attention to edit the Law in a manner that would be in compliance with the provisions of the New York Convention regarding the Recognition and Enforcement of Foreign Arbitration Decisions from 1958, and the European Convention on International Commercial Arbitration of 1961.

[11] Minutes from the 18th session are contained in the UN Doc. A/CN.9/SR. 305-333 (December 1985).
[12] General Assembly Resolution 40/72, 40 GAOR Supp. No. 53.

The UNCITRAL Model Law had a significant influence on the development of international commercial arbitration. The provisions set forth in the Model Law were used as a basis in the reforms and modernisation of the legislation regarding arbitration in a large number of countries, and especially in countries from Central and Eastern Europe (Bulgaria, Belarus, Lithuania, the Russian Federation, Ukraine, Hungary, Croatia, etc.) As at today's date, the Model law has been accepted in 39 states with different legal traditions, in all continents, as well as in 8 federal states in the USA.[13]

**The basic value and power** of this international instrument, is laid down in the quality of its principles/provisions, which were created by top experts and representatives of different countries and international organisations, who made efforts to achieve an acceptable consensus.

The second significant basis for the success of the Model Law stems from its **flexibility.** The fact that it has been adopted in the form of an international instrument with optional application (i.e. a so-called "soft law" instrument), has in practice developed into an advantage not a deficiency. Unlike international conventions and uniformly applicable laws, the Model law enables its prospective applicants (each individual law- maker being free to evaluate to what extent he will incorporate the model law provisions) to decide: whether they will adopt its provisions in their integral form or whether they will modify them according to their specific needs, whether the issues that are not encompassed by the Model law will be regulated otherwise, etc.

During the past 19 years, the Model law has developed into a firm standard, criterion for modern legislation in the field of international arbitration. The Model law is required to be taken into account within every amendment of arbitration legislation of each individual state. Moreover, it has specified the agenda for the reform of arbitration laws in certain countries such as England and Switzerland where it has been adopted.

## 3. The Objectives to be Accomplished through the Adoption of the Model Law of UNCITRAL from 1985

The adoption of the UNCITRAL Model Law in the internal legislation of the Republic of Macedonia, as already mentioned, should enable the modernisation of the legislation in line with an efficient and independent operation of international commercial arbitration on the territory of the Republic of Macedonia. For that purpose, during the drafting of the working text of the Draft law for international commercial arbitration, the following conclusion has been adopted: to keep, as much as possible, to the original text and structure of the Model Law. Any amendments are to be made solely to the sections of the Model Law which have to be adjusted to the legal system and legal tradition of the Republic of Macedonia and furthermore, only on an exceptional basis, if it is assessed that it is more efficient to regulate certain issues elsewhere.

[13] List of countries that accepted the Model Law can be found on the UNCITRAL web site: http://www.uncitral.org.

The working text of the Draft Law for international commercial arbitration is composed of 40 Articles in total. The headings of the Articles are intended to assist its practical use and reading and should not be used as a means of interpretation (Article 1, page 7). The Provisions of the Draft Law are classified into nine Chapters, as follows: Chapter I- General Provisions; Chapter II- Arbitration Agreement; Chapter III- Composition of the Arbitration Court; Chapter IV- Competences of the Arbitration Court; Chapter V- The Arbitration Procedure; Chapter VI – The Arbitration Decision and Completion of the Procedure; Chapter VII- Legal remedies against the arbitration decision; Chapter VIII- Validity of the arbitration decision and recognition and enforcement of foreign arbitration decisions; and Chapter IX- Transitional and Final provisions. Considering the limited scope of this article, I will try to give a presentation of the most significant provisions from this law.

**The General Provisions (Chapter I)** encompass 6 articles in total. Out of all of them, the most significant is Article 1 which sets forth the field of application. According to this Article, the Draft Law is intended to regulate all international commercial arbitration that takes place on the territory of the Republic of Macedonia (Article 1, paragraph 1). An international arbitration is termed as an arbitration in which, at least one of the parties is a natural entity who has a permanent place of residence abroad, or a legal entity that has headquarters abroad (Article 1, paragraph 2). The possibility to apply arbitration to disputes is set forth rather widely: all disputes related to the parties' rights at the free will of the parties, except the disputes that are, on the basis of a law, subject to the exclusive competence of the Court of the Republic of Macedonia, are eligible to be brought before an international commercial arbitration. (Article 1, paragraph 2 and Article 1, paragraph 5).

Article 2 of the Draft Law contains several definitions and rules related to the interpretation of the same. The most significant of all is the definition that states that the term "arbitration" in the sense of this Law encompasses any arbitration, whether it is organised by a permanent arbitration institution or not. This in turn means that the Draft Law sets out the rules of operation of international commercial arbitration, whether it is organised as a permanent institution or not. The Draft Law does not refer, in any sense, to rules of status, which would regulate the formation in which the institutional arbitration may be established in the Republic of Macedonia. This is left to be regulated by another, special law, according to the assessment made by the law-maker. The Draft Law may therefore also be applied by the unique permanent arbitration institution in the Republic of Macedonia today – the Permanent Elected Court (Arbitration Court) of the Republic of Macedonia, established on the 26th March 1993 within the Chamber of Economy.[14]

This institution meets the generally accepted international standards for permanent arbitration: having its own administration, rules of operation and list of arbitrators. It also has one decade of tradition in solving the disputes in the field of international commercial transactions that also creates a firm basis for its successful operation in the future. The parties do have a choice, whether they will decide to use the advantages given by such an arbitration institution (or eventually some other

[14] According to the provisions of the Law on the Economic Chamber of the RM, published in the Official Gazette of the RM number 38/90 and 10/91.

arbitration institution that may be established in the future), or whether they will form some sort of *ad hoc* arbitration.

Article 3 regulates the delivery of the written notifications, in a modern way that enables an efficient and safe delivery, in a way that deviates from the Model Law to a certain extent.

Article 6 regulates the subject matter and functional competence of the Courts in the Republic of Macedonia, regarding cases based on the provisions of the Draft Law and regarding which they are to take over certain actions related to the arbitration operation.

Chapter II is composed of three Articles, which define the term "arbitration agreement", as an arbitration clause in a specific contract or as a separate agreement / contract (Article 7). This Chapter also sets out the effect of the final valid arbitration agreement with regard to the competence of the court to act upon a complaint relating to the same legal act (Article 8) and also sets out temporary court security measures. (Article 9).

Chapter III regulates several issues related to the composition of the arbitration Court; number of arbitrators, which has to be a compulsory uneven number (Article 10), appointment of the arbitrators (Article 11); reasons and procedure for dismissal of the arbitrators (Articles 12 and 13) and miscellaneous;

Chapter IV regulates the competence of the arbitration court. The Court makes decisions as regards its own competencies (regarding jurisdiction and subject-matter), the so-called "competence- competence" principle (Articles 16 and 17).

The arbitration procedure is regulated in Chapter V (Articles 18-27). The text of this Chapter is mainly based on the original text instrument - the Model Law. The provision that in case there is no agreement between the parties, the arbitration will use the Macedonian language and its corresponding Cyrillic alphabet is an additional regulation (Article 22, paragraphs 3 and 4). Also, it is prescribed that the arbitration procedure is not public, unless the parties have agreed otherwise (Article 24, paragraph 4). This provision emphasises this discretionary right of the parties during the arbitration procedure.

Chapter VI regulates several significant issues relating to the making of the arbitration decision. First of all, it contains conflict provisions for the determination of the competent law for the subject matter of the dispute. The primary starting point of this Article is the prescribed autonomy of the parties' will, as it is prescribed in the UNCITRAL Model Law. The novelty, with regard to the Model Law, is the subsidiary jurisdiction decision- i.e. in the absence of an agreement between the parties the law of the state which is the most related to the dispute shall apply (Article 28).

What is a novelty with regard to the current Macedonian arbitration legislation is the possibility of the arbitration court to make an arbitration decision based on the settlement between the parties (Article 30). Also, this Chapter regulates the exclusive

deviation with regard to the costing calculation of the Model Law, via special provisions related to the costs for the procedure (Article 34).

Chapter VII regulates the claim for annulment as an exclusive legal remedy against the arbitration decision (Article 35).

Chapter VIII presents a significant progress with regard to the current legislation in the Republic of Macedonia, and with regard to the Model Law. The current concept of the Macedonian arbitration legislation, according to which the arbitration decision has a power of a valid court decision towards the parties, has been adopted within this Chapter (Article 36). With this provision the Draft Law deviates from the concept of the Model Law, which regulates the unique regime for recognition and enforcement of domestic and foreign arbitration decisions. Finally, Article 37, following the example of Article 194 from the Swiss Law for International Private Law of 1987, and Article 36 from the Greek Law for International Commercial Arbitration of 1999 and Article 1061 of the German Law for Arbitration of 1997, provides for the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Decisions from 1958, regardless of the country in which they were made.

For that purpose, Chapter IX, which regulates the transitional and final provisions, includes provisions that provide for the cancellation of Articles 97-100 from the Law on resolving the conflict of laws and regulations of other countries (in certain issues) of 1982 and Article 1, paragraph 1, point 2 of the Law on ratification of the New York Convention for the recognition and enforcement of the foreign arbitration decisions from 1958. Practically speaking, the New York Convention will become the exclusive legal regime that will apply in the future with regard to recognition and enforcement of the foreign arbitration decisions. (Articles 38 paragraph 1 lines 2 and 3).

The Draft Law also provides for the cancellation of Article 439 of the LLP. The provisions related to arbitration set forth in that law shall apply solely in cases of internal arbitration (Article 38, paragraphs 1, and line 1).

According to all of the above, it is clear that the proposal for the adoption of a special Law on International Commercial Arbitration in the Republic of Macedonia, presents a reform in the Macedonian arbitration legislation, in the real sense of this word. We have not just made a simple transposition of the solutions set forth in the Model Law for International Commercial Arbitration i.e. the UNCITRAL Model Law from 1985, (notwithstanding the fact that the text of the Draft law is significantly inspired from this specific international document). Effort has been made to take into account the qualities, which have already been proven in the court practice or recognised by the professional and academic public. As such, the proposed Draft Law provides a firm basis for development of international arbitration law in the Republic of Macedonia.