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CONTENTS

CONCEPTUAL ASPECTS OF THE RESEARCH

The actuality and importance of the topic is reflected in the importance and perspectives of foreign investments in the development of the economy of the Republic of Moldova and its integrity in the European community. Thus, direct investments can be made through investment contracts concluded with the host state. Given that any investment activity may give rise to disputes between foreign investors and the authorities of the Republic of Moldova, the multidimensional assessment of the risks and effects of the settlement of contractual disputes in investment arbitration constitutes a current exercise for theoreticians and practitioners in the field. This implies the need to conduct a scientific study focused on the settlement of contractual disputes in investment arbitration. The issues addressed in the thesis arises from the interaction between different legal regimes in the context of investment arbitration. Investment treaties protect "*investments*", which can be made through a separate instrument, such as a contract between the foreign investor or its local subsidiary and the host state. These contracts govern the rights and obligations of the parties to the contract, and usually contain their own forum selection clause, or an arbitration clause regarding the contractual disputes. In contrast, bilateral and multilateral investment treaties are generally not concerned with such details. However, these two areas of protection must be separate. In other words, investment treaties must have a material scope that is separate from that of the contract. Thus, the violation of a provision of the investment treaty should not be confused with the improper execution or non-execution of an obligation of the investment contract.

The purpose of the paper is to conduct a research and identify certain recommendations for the Republic of Moldova regarding the settlement of contractual disputes in investment arbitration and its effects. The purpose includes the analysis of the theoretical-practical aspects related to the effects of the settlement of contractual disputes by investment arbitration tribunals. In order to make the applicable framework to the respective disputes more efficient, it is also proposed as a goal to formulate some recommendations in order to avoid parallel proceedings regarding one and the same dispute examined simultaneously by contractually designated forums and forums designated by the applicable investment treaties.

Research objectives are: three categories of objectives were formulated. 1) Regarding the doctrine of investment arbitration, we proposed: the conceptualization of the *Salini Test* in the matter of the material competence of the arbitral tribunal; the theoretical synthesis of the limits of the state's responsibility in attribution of the illegal conduct of its organs and entities to the state; outlining the limits of the governmental capacity of the actions taken by the state entities and bodies within the contractual relations with foreign investors; ascertaining the controversial

theoretical aspects regarding the essential basis of the claim filed in the contractually designated forum and before the investment arbitration tribunal; identifying the mechanisms to avoid parallel proceedings, with the emphasis on the force of *res judicata* and *lis pendens*. 2) Regarding the provisions of the investment treaties to which the Republic of Moldova is a party, we intended to: identify the problems regarding the definitions of *investment* included in the investment treaties to which the Republic of Moldova is a party, and to propose solutions that would exclude the possibility for settlement of contractual claims in investment arbitration; to determine the role of umbrella clauses in the possibility of examination of contractual claims in investment arbitration by the arbitral tribunals; to notify the applicability of fork-in-the-road clauses in the settlement of contractual disputes in investment arbitration; to assess the applicability of opt-out clauses in the settlement of contractual disputes in investment arbitration; to identify solutions to improve the quality of negotiation of investment treaties concluded by the Republic of Moldova with third countries, by attracting specialists in international investment law and investment arbitration for drafting and negotiating the investment treaties. 3) Regarding the legislation of the Republic of Moldova applicable to foreign investments, the following objectives were drawn: to evaluate the grounds for the initiation of investment disputes based on the national legislation of the Republic of Moldova and the determination of the national legal regime applicable to investment disputes; to identify the provisions of the national legislation of the Republic of Moldova that can be a source for the initiation of legal proceedings both under national legislation and under investment treaties; to notify the conditions that would ensure the application of the legislation of the Republic of Moldova when settling the investment disputes; to establish the grounds for the settlement in investment arbitration of contractual claims in relation to public-private partnerships; to assess the relation between the investment contract governed by national legislation and investment treaties in the matter of repairing the damage caused to the investor by an authority engaged in an investment relationship; to identify the conditions for the exclusion of other jurisdictional remedies if the parties to an investment relationship have initiated legal proceedings with reference to an investment dispute; to ascertain the particularities of the interaction of agencies and state bodies involved in investment disputes; to identify the conditions under which a foreign investor can initiate proceedings before different arbitration institutions, both under the investment contract governed by the laws of the Republic of Moldova and under the investment treaties; to submit relevant models of opt-out clauses to alternative forums to be included in the models of public-private partnership governed by the legislation of the Republic of Moldova.

Research hypothesis: the research starts from the hypothesis that following the investment process, disputes may inevitably arise between the Republic of Moldova as the host state of foreign

investments and foreign investors. In some cases, foreign investments are made through an investment contract concluded between the foreign investor and the competent authority of the host state. Thus, following the emergence of a dispute arising out of, or in connection with, the investment contract, the foreign investor can initiate proceedings both under the investment contract and under the investment treaty. Therefore, the State may be involved in multiple and parallel lawsuits that essentially concern one and the same dispute. In order to minimize such situations, as well as to avoid double compensation by the state for one and the same unlawful conduct, it follows: 1) to identify the causes that create grounds for the initiation of parallel proceedings; 2) to identify the different approaches regarding the settlement of contractual disputes in investment arbitration, as the most frequent phenomenon in triggering parallel proceedings in investment arbitration; and 3) to come up with solutions to avoid exposing the state to parallel proceedings.

Synthesis of the research methodology and justification of the chosen research methods: the theoretical and methodological support of the research is composed of the fundamental achievements in the field of private international law as well as of other branches of law. The complex character of the work determines the diversification of the general scientific methods (systemic, logical, historical, comparative). The theoretical basis of the research is composed of the works of researchers in the field of private international law, public international law and civil procedural law. The applied research methods are the logical method, the comparative method and the historical method. The conducted research is based on the study of the doctrine, the applicable international normative investment framework, and the national legislation of the Republic of Moldova. The study is based on the research of the theory of international investment law, in particular on the settlement of contractual disputes in investment arbitration, addressed by theoreticians and other authors in books, scientific articles and analyses. Over 30 scientific works published in the Republic of Moldova, and over 150 scientific works published abroad in English, French, Spanish and German were analyzed. Also, in the conducted investigation, the provisions of the investment treaties to which the Republic of Moldova is a party were analyzed, including the Energy Charter Treaty (***TCE***), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (***ICSID Convention***), Bilateral Investment Treaties (***BIT***) to which the Republic of Moldova is a party, as well as the relevant provisions of the national legislation of the Republic of Moldova applicable to foreign investments. The empirical basis of the paper is the jurisprudence of investment arbitration tribunals. Thus, more than 250 arbitral decisions of the international arbitral tribunals established on the basis of the TCE and the BITs from more than 20 countries were analyzed.

The scientific novelty consists in the fact that, for the first time in the Republic of Moldova, a detailed investigation materialized in the form of a doctoral thesis is carried out on the subject of investment arbitration, and in particular on the settlement of contractual disputes in investment arbitration. Also, this doctoral thesis is an innovation in the region of Central and Eastern Europe, including Romania and Ukraine, this subject not being addressed in detail by any work in the field. the doctrine of the Republic of Moldova, research is carried out in the field of the science of investment arbitration. New definitions and classifications have been proposed. In particular, the strict definition of the term "investment" was proposed, the inclusion of fork-in-the-road clauses and waiver clauses in the text of investment treaties, in order to avoid parallel processes.

The scientific problem of the research is determined by the need to theoretically identify the mechanisms for the settlement of contractual disputes in investment arbitration and the effects of their settlement.

The theoretical importance of the work consists in identifying the problems in the wording of the provisions of the investment treaties to which the Republic of Moldova is a party, which allow investment arbitration tribunals to examine contractual disputes and allow contractual claims in investment arbitration; identifying the intersection of legal regimes governed by investment treaties and contractual legal regimes, in light of international investment treaties to which the Republic of Moldova is a party; the analysis of doctrinal approaches regarding the issue of settlement of contractual disputes in investment arbitration as well as the systematization of an existing theoretical basis for the development of a research on the respective subject in the Republic of Moldova.

The applied value of the thesis: the conducted research, the conclusions and recommendations shown in this thesis contribute to the efficiency of the mechanism of negotiation and conclusion of investment treaties and investment contracts, as well as in *lege ferenda* process on the matter of the promotion and protection of foreign investments. Also, the results can be used in the teaching process at law faculties. The conclusions, suggestions and recommendations presented in this thesis can be taken into account by the competent bodies of the Republic of Moldova, in the negotiation of investment treaties, the wording of which will limit the possibility of settlement of contractual disputes by investment arbitration tribunals. The implementation of these suggestions will minimize the risks of exposing the state to parallel proceedings initiated under both investment contracts and investment treaties. At the same time, the conclusions and recommendations can be taken into account by the competent state bodies in the negotiation and

conclusion of investment contracts, in order to establish a clear contractual framework regarding the specific bodies empowered to resolve contractual disputes.

The approval of the results was carried out within the Doctoral School of Legal Sciences of Moldova State University. The results of the research were approved by the Guidance Committee within the Doctoral School and by the Department of International and European Law, Faculty of Law of Moldova State University. The results of the research were materialized in scientific articles published in international journals such as: Romanian Arbitration Journal, Bulletin of the Swiss Arbitration Association, Studia Universitatis Moldaviae, as well as in participation in the international conference "Integrare prin cercetare și inovare" MSU.

Publications on the topic of the thesis: 27 publications.

The volume and structure of the thesis: 295 pages of text, composed of the introduction, 4 chapters, general conclusions and recommendations, the bibliography is composed of 594 sources.

THE CONTENT OF THE THESIS

Chapter 1. Analysis of the situation in the field of contractual dispute resolution in investment arbitration

In chapter 1, the scientific materials related to the topic of the thesis, published both in the Republic of Moldova and abroad, were examined. These materials have facilitated the resolution of important issues regarding the settlement of contractual disputes in investment arbitration. Aspects regarding the settlement of contractual disputes in investment arbitration have been identified in relation to which there are different and contradictory points of view in the analyzed materials.

1.1. Analysis of scientific materials on the settlement of contractual disputes in investment arbitration published in the Republic of Moldova

The issue of investment arbitration and the settlement of contractual disputes in investment arbitration has been examined to a limited extent in the legal doctrine of the Republic of Moldova. As a rule, the given issue is examined in the general context of international arbitration. In the Republic of Moldova, the authors A. Băieșu, V. Cojocaru, L. Gribincea, V. Babără, D. Lazăr, E. Belei, A. Prisac, M. Buruiană, I. Șeremet, A. Buruian, O. Balan, N Suceveanu, D. Sârcu, N. Osmochescu, O. Dorul, V. Arhiliuc, V. Gamurari, E. Serbenco, C Ciugureanu-Mihailuță analyzed in their works the international arbitration as a means of resolving disputes, as well as international means of protection and promotion of investments.

1.2. Analysis of scientific materials on the settlement of contractual disputes in investment arbitration published abroad

The scientific materials published in Romania have mainly focused on the issue of international commercial arbitration rather than investment arbitration. In Romania, the authors V. Roș, A. Cobuz-Băgnaru, A. Bolintineanu, A. Năstase, B. Aurescu, M. Mihăilă, A. Preda-Mătăsaru, D. Mazilu, I. Macovei, and others, examined international arbitration as a type of dispute resolution in commercial legal relations. However, the authors from other foreign countries, such as Great Britain, the United States of America, France, Australia have analyzed in detail the problem of settlement of contractual disputes in investment arbitration. These authors are J. Crawford, C. Schreuer, Z. Douglas, C. Kovács, G. Born, W Michael Reisman, J. Richard, J. Sicard-Mirabal, Yves Derains, and others. Following the analysis of the respective works, we find that there are different opinions regarding: (i) the interpretation of the evaluation standards of investment and assets qualified as investments in light of investment treaties; (ii) the interpretation of the test of effective control of subsidiaries (part of investment contracts) by qualified foreign investors under

investment treaties; (iii) interpretation of umbrella clauses; (iv) interpretation of the standards for evaluating the object and basis of the contractual dispute versus investment dispute; (v) the grounds giving rise to parallel proceedings in contractually designated courts and arbitral tribunals established under investment treaties; (vi) solutions to avoid parallel proceedings.

1.3. Analysis of the legislation of the Republic of Moldova relevant to the protection and promotion of foreign investments

The legislation of the Republic of Moldova regulates the aspects related to the protection and promotion of foreign investments, and aspects related to contractual relations between state bodies and authorities and foreign investors. However, some normative provisions, such as provisions of the Law no. 81/2004 regarding investments in entrepreneurial activity and Law no. 179/2008 regarding the public-private partnership are yet unclear and create grounds for the initiation of parallel proceedings by foreign investors, both under investment treaties and under investment contracts governed by the national legislation of the Republic of Moldova.

1.4. Analysis of arbitral jurisprudence with the involvement of the Republic of Moldova

The Republic of Moldova was involved in 13 investment arbitration cases. Regarding these cases, we note that approximately half of them ended with an arbitral award in favor of the state. One of the most famous investment arbitration cases for the Republic of Moldova is the *Franck Charles Arif v. Republic of Moldova* case, settled in accordance with the ICSID arbitration rules and under the auspices of the ICSID. The claimant invoked the violation of the BIT concluded between the Republic of Moldova and France. In particular, the claimant claimed that the national courts of the Republic of Moldova annulled the exclusivity clause in the lease agreement signed between Le Bridge Corporation (an entity wholly owned by the claimant) and the Customs Service of the Republic of Moldova. As a result, the claimant lost the exclusive right to operate duty free shops at four state border crossing points of the Republic of Moldova. The claimant also claimed that the local courts annulled the tender won by his company, depriving the claimant of the right to build and operate a duty-free store in Chisinau International Airport. Other alleged violations invoked by the applicant referred to the expropriation of the shop in the Chisinau International Airport and the implementation by the state of unreasonable and arbitrary measures in relation to the applicant's shops at other border points. The tribunal found that the Republic of Moldova only breached the legitimate expectations of the investor as part of the standard of fair and equitable treatment only with regard to the airport store, which was completely evicted following the decision of the national courts and replaced by a store of its competitor. The claimant sought $50 million in damages for breach of the applicable investment treaty warranties. The court issued the

arbitral award which stipulated that, should the respondent accept the return of the claimant's assets seized at the Chisinau International Airport, the respondent would be obliged to pay the claimant the sum of approximately 6.5 million Moldovan lei as compensation. If the respondent refused the restitution, he would be obliged to pay compensation in the amount of about 35 million Moldovan lei. In the end, the Republic of Moldova did not return the goods in question, and paid the respondent the amount ordered by the arbitral tribunal.

The only investor from the Republic of Moldova who initiated an investment arbitration case against a third state (*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan,* SCC Case No. V 116/2010), he won his case.

Although this statistic suggests that the Republic of Moldova still has to show caution regarding the attitude of the authorities towards foreign investors, however, it assumes that the investment climate is favorable for the realization of foreign investments in the Republic of Moldova.

Following the analysis of the situation in the researched field, I concluded that the national and international doctrine as well as the investment arbitration jurisprudence comes to facilitate the interpretation and application of the rules of the investment treaties regarding the tangent of the contractual legal regimes with those governed by the investment treaties

Chapter 2. Peculiarities of jurisdiction of the arbitral tribunal in settling contractual disputes in investment arbitration

In chapter 2, the aspects of jurisdiction of the arbitral tribunal were analyzed. The jurisdiction of the arbitral tribunal is acquired over the person (*ratione personae*) and over the investment (*ratione materiae*). *Ratione materiae* is one of the conditions for the exercise of the jurisdiction of the arbitral tribunal which assumes that the financial contributions of the investor on the territory of the host state must be qualified as investments through according to the definition provided by the applicable treaty. *Ratione personae* is another mandatory element for the exercise of jurisdiction of the arbitral tribunal. Thus, in order to satisfy the jurisdictional requirements of an arbitral tribunal, a dispute must arise between a state party to the investment treaty and a national of another state party to the same investment treaty.

2.1. Material competence in the settlement of contractual disputes in investment arbitration

The opinion was expressed that *ratione materiae* is one of the requirements for the exercise of the competence which implies that the financial contributions of the investor in the territory of the host state must be qualified as investments in light of the notion defined by the applicable treaty and that "investment" is one of the *elements* that determines the competence of investment arbitration tribunals. The obligation to define "*investment*" in the investment treaty arises from the need to understand what types of activities are, and should be, protected by the investment treaty. According to most of the investment treaties, "*investment*" means any kind of assets owned by an investor of one of the contracting parties, invested in the territory of the other contracting party, in accordance with its laws and regulations, including the right to claim a debt or other rights conferred by law or based on an investment contract. TCE, for example, defines investment as any investment associated with an economic activity in the energy field. It was also mentioned that the ICSID Convention limits the jurisdiction of the International Center for Settlement of Investment Disputes (***ICSID***) to "*legal disputes arising directly out of an investment*". The ICSID Convention does not define either the term "*investment*" nor the terms "*legal dispute*". The *Salini test* applied by some arbitral tribunals was also identified and analyzed. The test stipulates that, in order to qualify an asset as an investment in accordance with the investment treaties, that asset must contribute to the development of the host state. According to this interpretation, contractual rights do not fall under the definition of investment unless, by executing the contract, the investor has contributed to the economic development of the host state.

The preamble of the ICSID Convention mentions that "*the need for international cooperation and for economic development and the role of foreign investment*". Some arbitral

tribunals have considered that the preamble of the ICSID Convention requires the application of the "*contribution to the economy of the host state*" element as an additional element to the other 3 classical elements of an investment. Thus, this criterion is a starting point for the application of the *Salini test* [1]. *The Salini* test means the following: for an asset to qualify as an investment, it must constitute: (a) a contribution of money, goods or services, (b) an assumption of risk, (c) a duration, and (d) a contribution to the economic development of the host state. These characteristics constitute requirements that should objectively be met as a condition for the jurisdiction of the ICSID arbitral tribunal. This element has given rise to conflicting interpretations by arbitral tribunals examining contractual claims in investment arbitration.

Salini approach considers the contribution to the economic development of the host state as a mandatory condition provided by the ICSID Convention. Thus, even if the dispute arises out of an investment, such a dispute would fall outside the jurisdiction of the Center if it did not contribute to the economic development of the host state. The *CSOB* approach,[2] on the other hand, it considers that the contribution to the economic development of the host state is a subsidiary criterion for a dispute to meet the investment requirement of the ICSID Convention. Thus, if a dispute arises out of a transaction or activity that does not constitute an investment under the ordinary meaning of the term, the dispute may still fall under the jurisdiction of the Center if such transaction or activity has contributed to the economic development of the host state. But, although different, these two approaches have in common the idea that the notion of investment according to the ICSID Convention contains a mandatory element which is "*contribution to the economic development of the host state*".

Other arbitral tribunals have identified the fifth element of the definition of investment. Some courts have added to the four elements of the Salini test a fifth characteristic, that of the *magnitude of the investment*. The magnitude of the investment is a subjective criterion and gives rise to many interpretations, since the standard of the term is not established. On the other hand, the subjective approach assumes that, for an asset to qualify as an investment within the meaning of the investment treaty, it must meet only three of the four elements discussed previously. In particular, the investment involves: (a) a contribution of money or other goods; (b) a risk; (c) a duration. This approach includes contractual claims under the umbrella of the definition of investment.

[1]The Salini test was established by the arbitral tribunal in *Salini v. Morocco* (ICSID case no. ARB/004).
[2]The CSOB test was established by the arbitral tribunal in *Ceskoslovenska Obchodni Banka, AS v. The Slovak Republic* (ICSID Case no. ARB/97/4).

In general, non-ICSID tribunals are not affected by the absence of a definition of the concept of investment in Art. 25 (1) of the ICSID Convention, as it is not applicable in non-ICSID disputes. These arbitral tribunals consider only the definition provided by the applicable investment treaty. If the definition *ratione materiae* also covers contractual claims, then the arbitral tribunal will examine the issue of the settlement of contractual claims beyond the stage of the arbitral tribunal's jurisdiction, i.e. at the stage of admissibility of claims or even at the stage of the merits of the dispute. Also, the party bringing contractual claims in investment arbitration must be an investor within the meaning of the applicable investment treaty. Otherwise, the arbitral tribunal will not exercise jurisdiction *ratione personae* to examine the case.

Although national law does not govern an investment dispute arising under an investment treaty, the arbitral tribunal shall take into account the national investment protection laws. Art. 4 paragraph 1 of Law no. 81 of March 18, 2004 regarding investments in entrepreneurial activity, mentions that the investment can take the form of "*e) monetary claim rights or other forms of obligations towards the investor that have economic and financial value"* and *"g) other contractual rights, including those resulting from the public-private partnership*". Such wording would allow investment tribunals to examine contractual disputes in investment arbitration. Also, this provision allows foreign investors to initiate legal proceedings under Law no. 81/2004 in national courts, as well as arbitration proceedings under investment treaties.

2.2.Personal competence in the resolution of contractual disputes in investment arbitration and the determination of the qualified claimant in the initiation of investment arbitration

Another mandatory element for the exercise of the jurisdiction of the arbitral tribunal is *ratione personae*. Art. 25 para. (2) (b) of the ICSID Convention provides that the jurisdiction of ICSID extends to "*any legal person having the nationality of a Contracting State party to the dispute… and where, because of external control, the parties have agreed that it should be treated as a national of another Contracting State within the meaning of this Convention*". According to art. 25 para. (2) (b) of the ICSID Convention, the parties must have agreed that a local subsidiary will be treated as a foreign national, either through a provision in an arbitration clause in an investment treaty (for example, using the ICSID Model Clause), or in a BIT. Art. 25 para. (2) (a) of the ICSID Convention excludes from the definition of "*investor*" the natural persons with dual citizenship, if one of the citizenships is that of the host state.

Thus, to satisfy the jurisdictional requirements of an arbitral tribunal, the dispute must arise between a Contracting State and a national of another Contracting State. The ICSID requirement

regarding the "*nationality*" of the investor raises a number of issues, in particular the nationality of a local branch of a foreign legal entity established in the host state.

Our view is that the legal entities incorporated in the host state (and therefore having the nationality of the host state) may benefit from treaty protection if: (a) they are controlled by entities incorporated in the other contracting state; and (b) both States have agreed in the applicable treaty to extend treaty protection to such controlled entities. It was concluded that if the definition *ratione materiae* also covers contractual claims, then the arbitral tribunal will examine the issue of the settlement of contractual claims beyond the jurisdiction stage of the case, i.e. at the stage of admissibility of claims or even at the stage of the merits of the dispute.

After examining the aspects of the jurisdiction of the arbitral tribunal in the settlement of contractual disputes in investment arbitration, we concluded that the jurisdiction of the arbitral tribunal is acquired over the person (*ratione personae*) and over the investment (*ratione materiae*). *Ratione materiae* is one of the conditions for the exercise of the jurisdiction of the arbitral tribunal which assumes that the financial contributions of the investor on the territory of the host state must be qualified as investments through the lens of the notion defined by the applicable treaty. *Ratione personae* is another mandatory element for the exercise of jurisdiction of the arbitral tribunal. Thus, to satisfy the jurisdictional requirements of an arbitral tribunal, a dispute must arise between a state party to the investment treaty and a national of another state party to the same investment treaty.

Chapter 3. Aspects of admissibility of contractual claims in investment arbitration

3.1. Umbrella clauses: coverage of contractual commitments undertaken by states through investment treaties

In this subchapter, the role, effects and applicability of umbrella clauses were analyzed. Umbrella clauses, which can be found in many investment treaties, effectively transform contractual claims into investment treaty claims. An umbrella clause therefore extends the scope of the investment treaty to foreign investors, as these clauses often stipulate that host states assume any commitments regarding foreign investment. Therefore, such commitments would also include the contractual commitments assumed by the host states in relation to foreign investors, thus facilitating the initiation of contractual disputes before the arbitral tribunal established under investment treaties.

The umbrella clauses, that can be found in many investment treaties to which the Republic of Moldova is a party, effectively transform contractual claims into claims under the investment treaty. An umbrella clause therefore expands the scope of treaty protection for investors, thereby facilitating the submission of multiple lawsuits in different fora.

The umbrella clauses were categorized into two groups: 1) general types of umbrella clauses; and 2) umbrella clauses that provide for special obligations. The first category of umbrella clauses are the general clauses found in most of BITs concluded by the Republic of Moldova. These clauses provide that: "*Each Contracting Party shall respect any obligation it has assumed/would have assumed with respect to the investment of the investor of a Contracting Party*". The second category of umbrella clauses is less common and is only found in certain investment treaties. Some umbrella clauses are combined with investment legality requirements, and state that: "*Each Contracting Party must comply with any obligation it has undertaken in writing with respect to investments by investors of the other Contracting Party that is clearly in accordance with applicable domestic legislation*".

Some umbrella clauses are combined with the requirements regarding legality of investments meaning that each contracting party must comply with any obligation it has undertaken in writing with respect to investments by investors of the other contracting party that is clearly in accordance with applicable domestic law. Some models of investment treaties avoid the inclusion of umbrella clauses altogether. We consider such an approach to be correct, as umbrella clauses often provide general wording regarding the commitments of the host state.

Thus, the ambiguous wording of the umbrella clauses allows the investment arbitration tribunals to consider that the commitments assumed by the host states by including the umbrella clauses also include the contractual commitments assumed by the host states towards foreign investors. TCE contains an umbrella clause in art. 10(1) which specifies that "*obligations concluded with an investor*" must be respected. Also, four approaches to umbrella clauses were analyzed, namely: a) the restrictive approach; b) the "*automatic*" approach; c) the "*acta iure imperii*" approach; and d) the literal (execution) approach.

Under art. 5 (1) of Law no. 595/1999 of the Republic of Moldova regarding the international treaties, the text of the treaties is drafted by "*the specialized central bodies of the public administration of the Republic of Moldova, which initiated the conclusion of international treaties within the limits of competence established by the legislation. The texts are drafted, starting from the interests of the Republic of Moldova in the respective field, in accordance with the provisions of the domestic legislation*". Thus, the specialized central bodies have leverage to exclude umbrella clauses from the text of investment treaties. If the contracting states come up with their own draft, pursuant to art. 5(2) of the same law, the central specialized body can present an alternative draft.

3.2. Obligations of exhaustion of local remedies by foreign investors

Another aspect of the admissibility of contractual claims in investment arbitration was also analyzed. This concerns the clauses that require the exhaustion or at least the pursuit of local remedies before the initiation of an investment arbitration. The Draft Articles on the Responsibility of States for Internationally-Wrongful Acts, annexed to Resolution 56/83 of 12 December 2001 of the UN General Assembly, adopted by the UN International Law Commission (***ILC Draft Articles***), in its attempt to codify the customary international law on diplomatic protection recognized the following exceptions to the requirement of exhaustion of local remedies: a) local remedies do not offer a reasonable possibility of compensation; b) the unjustified delay of the judicial proceedings attributable to the state whose responsibility is requested; c) there is no relevant connection between the state whose liability is requested and the injured person; d) the injured person is clearly prohibited from resorting to internal remedies; e) the state has waived the requirement of exhaustion of local remedies.

These clauses are in some sense the antithesis of fork-in-the-road clauses – instead of requiring the dispute to be brought in a single forum, they give grounds to the possibility to bring the claim in multiple foras in a consequential order. These clauses have generally proven ineffective in limiting parallel proceedings. Thus, the requirement regarding the exhaustion of

local remedies does not limit parallel proceedings, but rather creates an impediment to the foreign investor in terms of the effectiveness of the defense of its investment rights.

3.3. Fork-in-the-road clauses

Another aspect of the admissibility of contractual claims in investment arbitration that has been analyzed concerns the clauses that require the claimant to use only one dispute adjudication route. Thus, investment treaties contain unique mechanisms that seek to limit the undue multiplication of procedures, such as fork-in-the-road clauses.

Thus, these treaties attempt to limit the occurrence of parallel proceedings through fork-in-the-road clauses, or clauses which state that if the tribunal would otherwise have jurisdiction under a treaty, a party loses "*the right to resort to one forum by choosing another forum for the settlement of its dispute*". Thus, the purpose of fork-in-the-road clauses is to prevent parallel proceedings relating to the same dispute concerning the same investments in different fora. Finally, it was concluded that the fork-in-the-road clause is effective in combating parallel proceedings, however, the arbitral tribunal is to determine whether the initiated disputes are identical.

Following the analysis of the aspects of the admissibility of contractual claims in investment arbitration in the process of settling contractual disputes by the arbitral tribunal, we concluded that the umbrella clauses effectively transform contractual claims into claims under the investment treaty. Thus, an umbrella clause extends the scope of the investment treaty to foreign investors, as these clauses often provide that host states assume any commitments regarding foreign investment. Also, the requirements requiring the exhaustion of national remedies before the initiation of an investment arbitration constitute another aspect of the admissibility of contractual claims.

Chapter 4. Attribution of the conduct of state bodies and entities to states within the contractual relationships concluded by them and foreign investors

4.1. General aspects regarding the assignment of the conduct of state bodies and entities to states

In investment arbitration there is a special aspect of state responsibility, which has become increasingly important. This aspect refers to the attribution of the illegal conduct of state bodies and entities of the state. In this chapter, the general aspects regarding the attribution of the illegal conduct of state bodies and entities were examined. It was determined that ILC Draft Articles identify the two elements of an internationally wrongful act of a state: (i) conduct "*attributable to the state in accordance with the international law*"; and (ii) conduct "*that constitutes a violation of the international obligation of the state*".

Attribution is a mandatory element in order to claim the international responsibility of the state for conduct of its organs and entities. It was established that the ILC Draft Articles regulate the conduct of state bodies as well as persons or entities that do not qualify as state bodies, but are empowered by national legislation to exercise elements of governmental authority.

The conduct of these bodies or entities is also considered to be the conduct of the state and therefore attributable to it under international law. Investment arbitration jurisprudence has been found to be uneven in attributing conduct to centralized government bodies established as separate legal entities and authorized by law to perform an executive public function. Public sector entities frequently interact with foreign investors or their local subsidiaries. When an investment treaty dispute arises, investors try to demonstrate that the conduct of these entities is attributable to the state, arguing that they are acting on behalf of the state as state organs. In response, host states typically argue that the separate legal personality of such entities precludes state organ qualification. Finally, it was concluded that if the conduct of state entities that have engaged in a contractual relationship with a foreign investor is attributable to the state, then most likely, contractual claims can be brought directly against the state.

4.2. State bodies and state liability for contractual obligations assumed by state bodies in relation to foreign investors

Given the many ways in which states organize themselves, international law's criteria for identifying state organs cannot be exhaustive. However, the following connecting factors form the general criteria that can be applied to the varying circumstances of each case: (1) the statutory establishment of powers given to persons or entities exercising governmental authority; (2) lack of separate legal personality under domestic law; (3) lack of institutional or operational

independence; (4) performing basic governmental functions; (5) lack of a separate assets of the entity or body compared to the assets of the state; (6) lack of financial autonomy; or (7) the operation of the entity or body on the principles of public law, subject to governmental control or supervision. Depending on the legal context in which state involvement is examined, the procedural treatment of attribution in investment disputes is varied. For example, the application of the rules of attribution in order to establish state responsibility in international law raises not only different substantive issues but also different procedural dilemmas in examining whether a state is bound by a contractual relationship entered into by a state entity or whether a claim brought by a state entity is attributable to the state.

The existence of a breach of an international obligation and the attribution of conduct are sufficient to establish the state responsibility. If an investment treaty contains provisions relating to the attribution to the state of the conduct of the bodies or entities, the wording of the treaty is essential for determining the role of national law in the arbitral tribunal's analysis. For the purpose of attributing responsibility to the State under international law, a state organ is a constituent part of the state because it is established and controlled or supervised by the state and is charged with carrying out the state's own functions. Attributing the conduct of state bodies requires a broad test, which is carried out across the spectrum of state bodies, without any functional and sub-national limitation. Consequently, a state organ acting in its official capacity incurs state responsibility, regardless of whether it exercises a governmental or commercial function and whether it is a centralized or decentralized entity within the general structure of the state.

With regard to *de jure* bodies, it is generally accepted that Governments, Ministries, members of Government and Government officials, as well as Ministries acting in this capacity, are State organs and that their acts and omissions are therefore imputable to the state. However, investment arbitration jurisprudence is uneven in attributing conduct to centralized government bodies established as separate legal entities and authorized by law to perform an executive public function. Public sector entities frequently interact with foreign investors or their local subsidiaries.

When an investment dispute arises, investors try to demonstrate the attribution of the conduct of these entities, arguing that these entities are acting on behalf of the state as state organs. In response, host states typically argue that the separate legal personality of such entities precludes their qualification as a state organ. A number of arbitral tribunals have considered whether privatization agencies are state organs for purposes of assigning their acts to host states. Although it is generally accepted that privatization, like nationalization, is an inherently sovereign process, courts have been divided on the characterization of a privatization agency as a *de jure* state organ

under art. 4 of the ILC Draft Articles, or as an entity to which the state has delegated governmental authority, as described in art. 5 of the ILC Draft Articles.

4.3. State entities and state liability for contractual obligations assumed by them in relation to foreign investors

With regard to state entities, international law recognizes that a state may act through persons or entities that are not part of the organic structure of the state. The conduct of such persons or separate entities is deemed to be the conduct of the state when undertaken in the exercise of governmental powers granted under domestic law. The category of state entities essentially includes two classifications of separate entities: 1) state enterprises with a different degree of state participation; and 2) state agencies with a degree of independence separate from the state.

Regarding the purpose of governmental powers, the commentary to the ILC Draft Articles leaves no doubt that the requirement to exercise governmental powers necessarily excludes private or commercial activity. The justification for the attribution under international law of the conduct of the entities lies in the fact that the domestic law of the state conferred upon such entity the exercise of certain elements of governmental powers. For the consideration of unlawful state conduct for the purpose of incurring international responsibility, the conduct of an entity must accordingly relate to governmental activities and not to other private or commercial activities in which the entity may engage. Therefore, purely commercial contracts concluded by state entities do not fall under governmental powers and are not imputable to the state.

4.4. The relevance of attributing the conduct of state entities in settlement of contractual disputes in investment arbitration

The existence of a contractual relationship does not in itself preclude the ability of a state entity to act in a governmental capacity. The challenged acts and omissions of a state entity involved in a contractual relationship must have been committed in the exercise of governmental powers in order to be attributed to the state. Some arbitral tribunals have determined that when the relevant conduct involves a state's interference with the operation of a private contract, it is capable of engaging the state's international responsibility for that conduct, which amounts to a breach of treaty standards. Other courts have held that the contract itself may reflect the parties' understanding of the issue of governmental powers.

Some arbitral tribunals have determined that the governmental nature of an activity does not necessarily mean that all actions related to that activity are exercised for governmental purposes. State agencies are separate entities empowered by domestic law to perform specific regulatory or administrative functions, often alongside commercial activities, on behalf of the

state. When integrated into the organic structure of the state, state agencies act as state organs under international law, regardless of their separate legal personality. When state agencies are not organs of the state, they constitute a category of state entities, whose acts undertaken in their governmental capacity are attributed to the state under art. 5 of the ILC Draft Articles.

State-owned enterprises are separate corporate entities owned and/or controlled by the state, empowered by domestic law to carry out commercial activities on behalf of the state. Although SOEs are engaged in commercial activity, they may also be empowered to act as a government authority, particularly when their activity relates to the management of property or resources belonging to the State. If the conduct of state entities and state bodies that have engaged in a contractual relationship with a foreign investor are attributable to the state, then most likely contractual claims can be brought directly to the state.

With respect to the attribution of wrongful conduct of state organs and entities to the state, we concluded that the conduct of an entity or body must relate to governmental activities and not to other private or commercial activities in which the entity may engage. Therefore, purely commercial contracts concluded by state entities do not fall under governmental powers and cannot be attributed to the state. Thus, if the arbitral tribunal reaches the stage of examining the merits, and the conduct of the state entities that are contracting parties to the investment contract is attributable to the state, then the investment arbitral tribunal will examine the contractual dispute. This situation can lead to parallel proceedings initiated by the investor both in the contractually designated forum and before the arbitral tribunal constituted under the investment treaty. Also, if the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will enforce any valid choice of forum clause in the contract. On the other hand, where the fundamental basis of the claim is founded in a treaty which establishes an independent standard by which the conduct of the parties must be examined, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot function as an obstacle to the application of the treaty standard.

Chapter 5. Mechanisms to avoid parallel proceedings based on investment contracts and those based on investment treaties

5.1. General considerations on parallel proceedings as an effect of contractual dispute resolution in investment arbitration: the interaction between national courts and investment tribunals

The parallel proceedings in international arbitration can be defined as proceedings pending before two (or more) arbitral tribunals or national courts, where the parties, the legal basis and one (or more) of the examined issues are the same or substantially the same. This definition, which analyzes parallel proceedings from a substantive perspective, considers parallel those proceedings in which, at the same time: 1) the purpose of the claims is the same; 2) the facts on which the claims are based are the same; 3) the legal basis of the claims is substantially identical; 4) the parties in the procedures represent the same interests, even if they are not formally identical.

The domestic legislation of the Republic of Moldova contains rules that create grounds for the initiation of parallel proceedings. For example, art. 15 of Law no. 81/2004, when settling the investment dispute, the legislation of the Republic of Moldova is applied, unless the parties to the dispute have agreed otherwise. The legislator through the terms "*if the parties to the dispute have not agreed otherwise*" leaves to the discretion of the parties the possibility to designate another law applicable to the dispute than the legislation of the Republic of Moldova. Also, in accordance with art. 9 (2) of Law no. 81/2004 and art. 23 (3) of Law no. 179/2008 on the public-private partnership, the investor can request from the relevant authority the repair of an alleged damage. However, at the same time, the investor has the possibility to request from the state under an investment treaty the reparation of the same damage. This regulation creates grounds for the initiation of parallel proceedings for one and the same prejudicial fact, requesting the reparation of one and the same damage. Also, art. 11 of Law no. 81/2004 regulates the guarantee of repairing the damage caused to the investor by an authority engaged in an investment relationship with the respective investor. We believe that this provision should be limited to the damages caused in the contractual framework and in the investment relations governed by the national legislation, and not by the investment treaties. In the current wording, there is a risk for the initiation of parallel proceedings both under investment treaties and under Law no. 81/2004. According to point 46 of the Regulation on the manner of elaboration, conclusion and monitoring of the implementation investment agreements regarding strategic investment projects approved by GD no. 274/2019, the foreign investor can have the option: a) to submit the dispute for resolution to the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of the Republic

of Moldova (***CACI***); or b) the dispute settlement mechanism provided for by the investment treaty. This option is provided by the term "*chosen by the investor*" in the text of point 46. This language can offer the investor the possibility to initiate 2 parallel proceedings, considering that the respective provision does not expressly prohibit the initiation of the dispute resolution process both before the CACI and before an arbitration institution provided for by the investment treaty. Moreover, this option directly allows the investor to submit a contractual dispute for resolution before an arbitral tribunal established under investment treaties. This provision creates confusion regarding the contractual aspect of the investment and the investment aspect under the investment treaty. Art. 3 of Law no. 81/2004 defines the investment dispute as a misunderstanding or disagreement that occurs between the investor and the public authorities regarding investments, including regarding: a) investment activity; b) the interpretation of an action or inaction of the public authorities, within the meaning of this law, other laws of the Republic of Moldova or international law; c) any agreement to which the Republic of Moldova and the investor are parties. Therefore, this norm directly creates grounds to initiate a proceedings under Law no. 81/2004 regarding the "*investment dispute*" and proceedings under an investment treaty regarding the same "*investment dispute*".

5.2. Solutions to avoid parallel litigation and double reparation of damage by the state

The two most effective tools to avoid parallel proceedings are *lis pendens* and *res judicata*. *Lis pendens* refers to situations where two claims are pursued at the same time, while *res judicata* applies when two claims are pursued consecutively. It has been found that where the essential basis of a claim brought before an international tribunal is breach of contract, the tribunal will enforce any valid choice of forum clause in the contract. On the other hand, if the fundamental basis of the claim is founded in a treaty that establishes an independent standard by which the conduct of the parties must be examined, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its organs or its entities cannot function as an obstacle to the application of the treaty standard. The immediate consequence of such an approach is that the investor has the opportunity to submit: (i) claims under the contract; (ii) claims under the treaty; or, theoretically, (iii) make claims under both the contract and the treaty. It is therefore obvious that the dualism between contractual and treaty-based claims increases the risk of parallel proceedings being initiated. It has been concluded that a breach of contract occurs when a state breaches a contract obligation simply by acting in its role as a party to a contract. Alternatively, a breach of a treaty occurs when a state operates outside of its public

purpose or when a state violates an international obligation to which it has previously consented through an exercise of its sovereign power.

Pending the initiation of proceedings in an investment arbitration, including ICSID arbitration, the parties may resort to the domestic courts of the host state in an attempt to resolve the dispute, unless there is a fork-in-the-road clause prohibiting the claimant from taking such steps. If the essential basis of a claim brought before an international tribunal is breach of contract, the arbitral tribunal will enforce any valid choice of forum clause in the contract. On the other hand, where the fundamental basis of the claim is founded in a treaty which establishes an independent standard by which the conduct of the parties must be examined, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot function as an obstacle to the application of the treaty standard. The immediate consequence of such an approach is that the investor has the possibility to submit: (i) contractual claims; (ii) claims based on the treaty; or, theoretically, (iii) submit claims under both contract and treaty. It is therefore obvious that the dualism between contractual and treaty-based claims creates and/or increases the risk of parallel proceedings.

Following the analysis of the mechanisms to avoid parallel processes based on investment contracts and those based on investment treaties, we concluded that several ICSID arbitral awards have held that tribunals may decide to apply provisional or other measures before a final award is made, in order to prevent or stop any parallel legal proceedings, often through anti-suit measures, which prohibit the parties from initiating or continuing legal proceedings in other jurisdictions or before other forums. *Lis pendens* could be a solution to avoid parallel trials, although it is a well-recognized principle in Anglo-Saxon countries and less so in civil law jurisdictions. *Res judicata* is also a mechanism to exclude parallel proceedings. The problem is in the qualification of the object and the ground of the action. In national courts, the action is based on the contract and the national law applicable to the contract, and before investment arbitral tribunals the action is based on an investment treaty and customary international law. Opt-out clauses in investment treaties are also mechanisms to avoid parallel proceedings. The opt-out provisions prohibit investors from opting for investment arbitration after the initiation of domestic legal proceedings in relation to the same measure. However, we believe that if the investor decides to submit a claim for arbitration under the dispute settlement provision of the investment treaty, it is necessary to cease domestic legal proceedings or waive its right to re-initiate such proceedings.

GENERAL CONCLUSIONS AND MAIN RECOMMENDATIONS

On the matter of the doctrine of investment arbitration

1) The existence of a contractual relationship does not in itself preclude the ability of a state entity to act in a governmental capacity. The actions or omissions of a state entity involved in a contractual relationship must have been committed in the exercise of governmental powers for them to be attributable to the state.

2) The doctrines *of res judicata* and *lis pendens* are the mechanisms that can be applied to avoid parallel proceedings. These mechanisms are not found in the text of international treaties, but rather in customary international law. Therefore, their express regulation and definition within investment treaties would strengthen the application of the respective mechanisms in investment arbitrations.

Regarding the provisions of the investment treaties to which the Republic of Moldova is a party, with recommendations for the commissions delegated by the Republic of Moldova to negotiate investment treaties

3) The jurisdiction of the arbitral tribunal is acquired over the person (*ratione personae*) and over the investment (*ratione materiae*). The obligation to define "*investment*" in the investment treaty arises from the necessity to know what type of activities are, and should be protected, through the lens of the investment treaty. At the same time, the definition of "*investor*" regulates which subjects are qualified as foreign investors under the investment treaty. The definition of investment may include or exclude contractual rights and claims or rights associated with an investment contract. If these rights are excluded, then the arbitral tribunal has no substantive jurisdiction to resolve contractual disputes in investment arbitration. Thus, clarifying the assets that qualify as investment will exclude the uncertainty regarding the extension of the substantive jurisdiction of the investment arbitration tribunal. ***It was recommended*** the strict definition of the term "*investment*" in the process of negotiating investment treaties by the Republic of Moldova, with the exclusion of overly general formulations found in most investment treaties to which the Republic of Moldova is a party, which assumes that "investment means any kind of *investment / assets on the territory of the host state* [...]". In this sense, it was recommended to exclude from the definition of the term "*investment*" the terms associated with "*monetary claims or any claim with economic value and associated with an investment*". It was also recommended to examine the possibilities of excluding contractual rights from the definition of the term "*investment".*

Regarding the legislation of the Republic of Moldova applicable to foreign investments

4) Art. 4 (1) of Law no. 81/2004 regarding investments in entrepreneurial activity, mentions that the investment can take the form of "e) *monetary claim rights or other forms of obligations towards the investor that have economic value and financial*" and "*g) other contractual rights, including those resulting from the public-private partnership*". Such wording would allow investment tribunals to hear contractual disputes in investment arbitration. This provision allows foreign investors to initiate proceedings under Law no. 81/2004 in national courts, as well as under the investment treaty. Thus, this provision creates grounds for the initiation of parallel proceedings, both before national courts under the Law no. 81/2004 and before arbitral tribunals under investment treaties. ***It was recommended*** to exclude points e) and g) from the text of art. 4 (1) of Law no. 81/2004 regarding investments in entrepreneurial activity, which provide that the investment can take the form of "*rights to monetary claims or other forms of obligations towards the investor that have economic and financial value*" and "*other contractual rights, including those resulting from the public-private partnership*" in order to avoid the possibility of initiating parallel proceedings both before national courts and before arbitral tribunals investment.

5) Art. 15 of the law no. 81/2004 regarding investments in entrepreneurial activity**,** mentions that when settling the investment dispute, the legislation of the Republic of Moldova is applied, unless the parties to the dispute have agreed otherwise. Thus, we find that the legislator through the terms "*if the parties to the dispute have not agreed otherwise*" leaves to the discretion of the parties the possibility to designate another law applicable to the dispute than the legislation of the Republic of Moldova. More than that, considering that the investment is made in the Republic of Moldova, according to the legislation of the Republic of Moldova, we consider the selection of a foreign law applicable to the substance of the dispute inoperable. Therefore, ***we recommended*** replacing the text of art. 15 of the law no. 81/2004 which provides that " *when settling the investment dispute, the legislation of the Republic of Moldova shall be applied if the parties to the dispute have not agreed otherwise*" with the wording "*the legislation of the Republic of Moldova shall be applied to the settlement of the investment dispute*", in order to exclude possible controversies regarding the law applicable to the investment dispute and the limits of the applicability of the legislation of the Republic of Moldova and the foreign legislation chosen by the parties, to the investment dispute. Also, the wording proposed by us will exclude the possibility of applying the provisions of an investment treaty in the settlement of the dispute, which will

exclude the possibility of the settlement of one and the same dispute by two different forums, established both under Law no. 81/2004 as well as under investment treaties.

6) In accordance with art. 36(2) of the Act no. 179/2008, the parties to the public-private partnership may opt for mediation or arbitration. However, the law does not create a mandatory dispute resolution mechanism. In this sense, ***it was recommended*** to replace the text of art. 36(2) of Law no. 179/2008 which provides that "*The parties may agree on mediation or arbitration as a way to resolve disputes arising in the process of realizing the public-private partnership*" with the following text: "*All disputes related to the partnership public-private will be settled either by national courts or by arbitration, if the parties have agreed to arbitration, to the exclusion of any other national and international remedies. Once legal proceedings have been initiated in national courts or in arbitration, the parties will not be able to initiate another legal process with reference to the same dispute*".

Conclusions regarding investment contracts and recommendations for the Private Partner Selection Commission, the Government of the Republic of Moldova and the Investment Agency, Council for the promotion of investment projects of national importance

7) Pursuant to art. 25 d) of the Law no. 179/2008 regarding the public-private partnership, the procedure for initiating the public-private partnership and the procedure for selecting the private partner includes the stage of drawing up the model of the public-private partnership contract, in this sense it was recommended to the Private Partner Selection Commission **,** in the basis of art. 25 d) from Law no. 179/2008 to include in the model of the public-private partnership agreement clauses to waive alternative forums in case the investor initiates legal proceedings under the public-private partnership agreement and under Law no. 179/2008, and to insist on maintaining clear clauses regarding the separation of contractual and treaty-based disputes. A sample waiver clause would be "*The party asserting claims under the public-private partnership agreement pursuant to the forum selection clause or arbitration clause waives any initiation of any other legal proceedings with respect to that dispute in any other forum designated by the investment treaties to which the Republic of Moldova and the investor's host state are parties*".

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ADNOTARE

Dolea Sorin, "Soluționarea litigiilor contractuale în arbitrajul investițional". Teză de doctor în drept. Școala Doctorală Științe Juridice a Universității de Stat din Moldova. Chișinău, 2023.

Structura tezei: introducere, cinci capitole, concluzii generale și recomandări, bibliografie din 594 titluri și 295 pagini de text de bază, 27 de publicații la tema tezei.

Cuvinte-cheie: arbitraj investițional, litigii contractuale, proceduri paralele, competența materială, competența personală, clauza umbrelă, atribuirea conduitei ilicite către stat.

Scopul lucrării: constă în efectuarea unei cercetări în domeniul soluționării litigiilor contractuale în arbitrajul investițional, în vederea identificării și soluționării problemelor teoretico-practice legate de interacțiunea regimurilor juridice aplicabile raporturilor contractuale dintre investitorii străini și organele sau entitățile Republicii Moldova pe de o parte, și cele aplicabile raporturilor investiționale bazate pe tratate investiționale dintre investitorii străini și Republica Moldova.

Obiectivele cercetării: pentru a realiza analiza respectivă, au fost formulate trei categorii de obiective: 1) cu privire la materia doctrinei arbitrajului investițional; 2) cu privire la prevederile tratatelor investiționale la care Republica Moldova este parte; și 3) cu privire la legislația Republicii Moldova aplicabilă investițiilor străine.

Noutatea și originalitatea științifică a tezei: constă în faptul că pentru prima dată în doctrina din Republica Moldova este realizată o cercetare în domeniul științei arbitrajului investițional. Au fost propuse noi definiții și clasificări, în special definirea strictă a termenului "*investiție*", a clauzelor răscruce și clauzelor de renunțare în textul tratatelor investiționale.

Rezultatul obținut care contribuie la soluționarea unei probleme științifice importante: lucrarea contribuie la identificarea unor mecanisme cu privire la soluționarea litigiilor contractuale în arbitrajul investițional. În prezenta teză sunt propuse recomandări cu privire la efectele soluționării litigiilor contractuale în arbitrajul investițional, inclusiv în disputele cu implicarea Republicii Moldova.

Semnificația teoretică a tezei: constă în (i) stabilirea interacțiunii regimurilor juridice contractuale și a celor guvernate de tratatele investiționale; (ii) identificarea problemelor în formulările prevederilor tratatelor investiționale care permit tribunalelor arbitrale investiționale să examineze litigii contractuale; (iii) sistematizarea unei baze teoretice existente pentru dezvoltarea cercetării subiectului respectiv în Republica Moldova; (iv) analiza abordărilor doctrinare privind problema soluționării litigiilor contractuale în arbitrajul investițional.

Valoarea aplicativă a tezei: cercetările efectuate, concluziile și recomandările expuse în prezenta teză vin a contribui la eficientizarea mecanismului de negociere și încheiere a tratatelor investiționale și a contractelor investiționale, cât și în procesul de *lege ferenda* în materia promovării și protecției investițiilor străine. De asemenea, rezultatele pot fi utilizate în procesul didactic la facultățile de drept.

Problema științifică a cercetării este determinată de necesitatea identificării teoretice a mecanismelor de soluționare a litigiilor contractuale în arbitrajul investițional și efectele acestora.

Implementarea rezultatelor științifice: rezultatele cercetării au fost implementate în 27 de publicații științifice și comunicări la conferințele internaționale precum Revista Română de Arbitraj, Buletinul Asociației Elveține de Arbitraj, Studia Universitatis Moldaviae, conferința internațională "Integrare prin cercetare și inovare", cât și în procesul didactic. La fel, rezultatele s-au materializat în recomandările expediate în adresa Ministerului Justiției a Republicii Moldova referitor la perfecționarea cadrului legal în materia protecției și promovării investițiilor străine și în materia negocierii și încheierii tratatelor investiționale.

АННОТАЦИЯ

Доля Сорин, “Разрешение договорных споров в инвестиционном арбитраже”. Докторская диссертация по юриспруденции. Докторантура юридических наук Государственного университета Молдовы. Кишинев, 2023.

Структура диссертации: введение, пять глав, общие выводы и рекомендации, библиография из 594 источниках и 295 страниц основного текста, 27 публикаций.

Ключевые слова: инвестиционный арбитраж, договорные споры, параллельное производство, предметная подсудность, персональная подсудность, зонтичная оговорка, отнесение противоправных действий государственных органов и органов к государству.

Цель работы: заключается в проведении исследования в области разрешения договорных споров в инвестиционном арбитраже, с целью выявления и решения теоретико-практических проблем, связанных с взаимодействием правовых режимов, применимых к договорным отношениям между иностранных инвесторов и Республики Молдова, и применимых к инвестиционным отношениям, основанным на инвестиционных договорах.

Задачи исследования: для проведения исследования были сформулированы три категории целей применительно к: 1) предмету доктрины инвестиционного арбитража; 2) к положениях инвестиционных договоров, стороной которых является Республика Молдова; 3) к законодательстве Республики Молдова, применимом к иностранным инвестициям.

Новизна и научная оригинальность диссертации: заключается в том, что впервые в доктрине Республики Молдова проводится исследование в области науки об инвестиционном арбитраже. Были предложены новые определения и классификации, в частности строгое определение термина “*инвестиции*”, перекрестные оговорки и оговорки об отказе от участия в тексте инвестиционных договоров.

Получен результат, способствующий решению важной научной проблемы: способствуют выявлению некоторых механизмов разрешения договорных споров в инвестиционном арбитраже. В данной диссертации предлагаются рекомендации относительно последствий разрешения договорных споров в инвестиционном арбитраже.

Теоретическая значимость диссертации: состоит в (i) установлении взаимодействия договорных правовых режимов и режимов, регулируемых инвестиционными договорами; (ii) выявление проблем в формулировках положений инвестиционных договоров; (iii) систематизация существующей теоретической базы; (iv) анализ доктринальных подходов к проблеме разрешения договорных споров в инвестиционном арбитраже.

Прикладное значение диссертации: проведенные исследования, выводы и рекомендации, представленные в данной диссертации, способствуют повышению эффективности механизма ведения переговоров и заключения инвестиционных договоров и инвестиционных контрактов, а также процесса *de lege ferenda* в вопросах защиты иностранных инвестиций. Также результаты могут быть использованы в учебном процессе на юридических факультетах.

Научная проблема исследования: определяется необходимостью теоретического выявления механизмов разрешения договорных споров в инвестиционном арбитраже.

Внедрение научных результатов: результаты исследования реализованы в 27 научных статьях таких как Румынский журнал арбитража, Бюллетень Швейцарской арбитражной ассоциации, Studia Universitatis Moldaviae, и международная конференция “Integrare prin cercetare și inovare”, а также в учебном процессе. Результаты нашли отражение и в рекомендациях, направленных Министерству юстиции, по совершенствованию правовой базы в области защиты и продвижения иностранных инвестиций.

ANNOTATION

Dolea Sorin, "Settlement of contractual disputes in investment arbitration". Doctoral thesis in law. Doctoral School of Legal Sciences of Moldova State University. Chisinau, 2023.

Structure of the thesis: introduction, five chapters, general conclusions and recommendations, bibliography of 594 sources and 295 pages of core text, 27 publications on the topic of the thesis.

Keywords: investment arbitration, contractual disputes, parallel proceedings, material jurisdiction, personal jurisdiction, umbrella clause, attribution of the unlawful conduct.

The purpose of the work: it consists in conducting a research in the field of settlement of contractual disputes in investment arbitration, in order to identify and resolve the theoretical and practical issues related to the interaction of the legal regimes applicable to the contractual relations between foreign investors the Republic of Moldova, and the regimes applicable to investment relations based on investment treaties between foreign investors and the Republic of Moldova.

The objectives of the research: in order to conduct the respective analysis, three categories of objectives were formulated: 1) regarding the doctrine of investment arbitration; 2) regarding the provisions of the investment treaties to which the Republic of Moldova is a party; and 3) regarding the legislation of the Republic of Moldova applicable to foreign investments.

The novelty and scientific originality of the thesis: consists in the fact that for the first time in the doctrine of the Republic of Moldova, a research is carried out in the field of the science of investment arbitration. New definitions and classifications have been proposed, in particular the strict definition of the term "*investment*", cross clauses and opt-out clauses in the text of investment treaties.

The obtained result that contributes to the solution of an important scientific problem: contribute to the identification of some mechanisms regarding the settlement of contractual disputes in investment arbitration. In this thesis, recommendations are proposed regarding the effects of the settlement of contractual disputes in investment arbitration, including disputes involving the Republic of Moldova.

The theoretical significance of the thesis: consists in (i) establishing the interaction of the contractual legal regimes and the regimes governed by the investment treaties to which the Republic of Moldova is a party; (ii) identifying the issues in the wording of the provisions of investment treaties that allow investment arbitration tribunals to examine the contractual disputes; (iii) the systematization of an existing theoretical basis for the development of research on the respective subject-matter in the Republic of Moldova; (iv) the analysis of doctrinal approaches to the issues of settlement of contractual disputes in investment arbitration.

The practical value of the thesis: the research, the conclusions and recommendations presented in this thesis contribute to the efficiency of the mechanism of negotiation and conclusion of investment treaties and investment contracts, as well as in *de lege ferenda* in the matter of the promotion and protection of foreign investments. Also, the results can be used in the educational process at law faculties.

The scientific problem of the research: is determined by the need to theoretically identify the mechanisms for the resolution of contractual disputes in investment arbitration and their effects.

Implementation of scientific results: the results of the research were implemented in 27 scientific articles such as Romanian Arbitration Journal, Bulletin of Swiss Arbitration Association, Studia Universitatis Moldaviae, international conference "Integrare prin cercetare și inovare", as well as in the educational process. Also, the results materialized in the recommendations were sent to the Ministry of Justice, with respect to the improvement of the legal framework in the field of protection and promotion of foreign investments.

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DOLEA SORIN

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