Rašljanin, I. et al. (2024). Short historical analysis of the development of arbitration law, *SCIENCE International journal, 3*(1), 63-67.
doi: 10.35120/sciencej0301063r UDK: 347.918(091)
347.63(091)
347.965.42:2(091)

SHORT HISTORICAL ANALYSIS OF THE DEVELOPMENT OF ARBITRATION LAW

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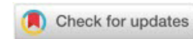

Abstract: This article delves into the historical evolution of arbitration, exploring its roots from ancient times to its contemporary practice. It discusses how arbitration emerged as an informal method of dispute resolution, tracing its trajectory through various civilizations and legal systems. Highlighting significant milestones, it charts the development of arbitration from early city-state mediations to its integration into legal structures worldwide. Examining Roman arbitration and its similarities to contemporary practices, it showcases how the concept evolved within different historical contexts. Additionally, it explores the role of Christian and Islamic arbitration, shedding light on their distinctive contributions to the arbitration landscape. The paper concludes by underscoring the enduring relevance of arbitration as a flexible and effective means of resolving disputes across diverse cultures and legal frameworks.

Keywords: arbitration, roman law, arbitration law, arbitrum, history of arbitration.
Field: Law Sciences

1. HISTORICAL DEVELOPMENT OF ARBITRATION

There exists an interesting event that describes the emergence of alternative dispute resolution, and thereby, arbitration. It involves two men glaring at each other. Long-haired and bearded, their fur soaked from use. Emotions churned due to the rainy season and the river that had devastated their hearths with floods. Who would be brave enough not to hunt prey in the river, and who would hunt near the village? Today, it would be decided. Raised spears marked their readiness for the duel. Suddenly, an old man appeared, shouting: “Here, the deciding stone!” The men stood still in the center. The old man continued: “The smooth side is yours, and the rough, yours.” They looked angrily at the old man deterring them from the duel but eventually agreed. The old man tossed the stone high into the air. Heads turned skyward to see the stone spin and which side it would fall on (Barret, Barret, 2004: 1). When viewed from a historical perspective, arbitration is deeply rooted in history as a science. Arbitration emerges as an informal form of mediation and settlement from people to people. Throughout history, we can see that arbitration is not a newly conceived concept and dates back to ancient times (Bederman, 2001: 8). History tells us that arbitration was very popular among Greek city-states and was the subject of work by many renowned scholars of that time. History also informs us that in the ancient Near East, and even among the Romans, arbitration was not a popular method of dispute resolution (Bederman, 2001: 8, footnote 14). In the last three hundred years, the scope and practice of arbitration have risen to a higher level of professionalism and flexibility. This can certainly be seen in universities where arbitrations are studied as part of law studies, not just as part of “Private International Law,” or as English lawyers like to call it, “Conflicts of Law.” (David, Stephan, Cohen, Triantfilou, 2016: 45).

2. TIMELINE OF ARBITRATION

Here, we will briefly outline the timeline of arbitration’s development, revealing that arbitration existed even in ancient Mesopotami. From the authors J.T. Barrett and J. Barrett, we’ve adopted the chronological timeline of the development of arbitration law: 1) Around 1800 BCE, the kingdom of Mari (a city-state in present-day Syria) utilized mediation and arbitration in resolving disputes with other kingdoms. This is certainly not the sole example of alternative dispute resolution between city-states; 2) Around 1400 BCE, saw the emergence of the ancient Egyptian Amarna system of inter-state relations and diplomacy, including arbitration and mediation; 3) Between 1200-900 BCE, the ancient Phoenicians in the eastern Mediterranean engaged in entrepreneurship and negotiations of all kinds; (Barret, Barret, 2004: 25). 4) In 960 BCE, King Solomon arbitrated a dispute involving a baby, threatening to separate the parents from the child; 5) In 700 BCE, the Sea Law of the state of Rhodes codified traditional rules for establishing

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liability for loss of cargo at sea and rules related to dispute resolution; 6) In 500 BCE, arbitration emerged in India under the name Panchayat; 7) In 400 BCE, Greeks began using public arbitration in city-states. Arbitration decisions concerning disputes between city-states were published on temple columns. Hence, disrespecting arbitral decisions represented a sort of offense and sin; 8) In 300 BCE, Aristotle began to favor arbitration over courts 9) In 100 BCE, the Western Chou dynasty established a mediator's office. 10) In 452 CE, Attila the Hun demolished city after city in his sweep through Europe; at that time, Pope Leo the Great managed to save the city of Ravenna from his sweep through negotiations and arbitral mediation; 11) In 1263, King Alfonso the Wise of Spain ordered the use of binding arbitration; 12) In 1400, Venice established the first overseas diplomatic offices, which played roles in mediation, negotiation, and sometimes arbitration; 13) In 1632, Irish arbitration law proclaimed statutory foundations for arbitration; 14) In 1648, Maximilian mediated to end the Thirty Years' War for the Holy Roman Empire (Barret, Barret, 2004: 25). 15) Between 1624-1644, during the Dutch colonial period, commercial arbitration was extensively used in New York City; 16) Between 1664-1776, during the British colonial period, commercial arbitration continued to exist; In 1770, George Washington established an arbitration clause as his will; 17) Between 1776-1785, Benjamin Franklin, John Adams, and Thomas Jefferson negotiated on behalf of the USA in Europe, establishing diplomatic history for that then-young nation; 18) In 1865, Generals Lee and Grant negotiated surrender terms for the South, thereby ending the Civil War in America; 19) In 1866, General Howard established arbitration regarding labor contracts between former slaves and former owners in America; 20) In 1888, the Arbitration Act was formed, possibly the first statute in America providing for arbitration and ad hoc commissions to investigate special disputes; 21) Between 1899-1907, the Hague Conventions emerged, leading to the establishment of today's most important arbitration body, the Permanent Court of Arbitration in The Hague; 22) In 1920, New York formulated and presented modern arbitration law; within five years, fifteen states followed New York's practice; 23) In 1926, the American Arbitration Association was constituted by merging an arbitration foundation and society (Barret, Barret, 2004: 25 - 27). Taking this in account we will cite the following: „The World is undergoing constant integration in all spheres of people's lives and States' interactions" (Tussupov, 2023: 1).

3. ROMAN ARBITRATION

The concept of arbitration as universally understood today was absent in Roman law. Instead, Roman jurists employed specific legal terms like "arbitrium" "arbitratus" and occasionally "arbiterium" to signify a broader notion of resolving disputes, distinct from the formal civil litigation process (Milotić, 2018: 1). Roman law, as a body of legal rules, has its roots in nearly every legal system worldwide, especially in common law and civil law legal systems. Civil court proceedings (Ius quod ad actiones pertinet) varied in ancient Roman times, including the following procedures: ordinary proceedings or ordo iudiciorum privatorum, which had its subtypes in the form of legisaction proceedings and formulary proceedings. „Civil litigation and arbitration in Roman law represented two substantially different concepts of dispute resolution." (Milotić, 2018: 1). Extraordinary proceedings or cognitio extra ordinem had a subtype known as post-classical court proceedings (Milošević, 2016: 163). Most judicial proceedings in the Roman Empire were legally constituted by state authorities. However, changes occurring in Rome's political, economic, and social life necessitated a change in the judicial system. In Roman law, settling disputes through arbitration differed significantly from civil litigation (Milotić, 2020: 330). Parties were not allowed to outrightly dismiss judicial jurisdiction in their case. Instead, they could steer clear of trials by opting for arbitration, which didn't explicitly exclude the possibility of turning to courts during the legal process (Milotić, 2020: 330). Terms like "arbitrium" and "arbitratus" in arbitration simply indicated the fundamental idea of resolving disputes. It meant both avoiding civil litigation and conclusively resolving the disagreements between the parties involved. (Milotić, 2020: 330). The language used to describe arbitration inherently highlights its funamental principles, distinguishing it from civil litigation and significantly shaping how it is perceived as a distinct method of resolving disputes (Milotić, 2019: 88). Therefore, that law couldn't sustain itself on what it had been, thus, there was a need for a new, more flexible procedure that would grant some degree of freedom to the parties involved. In response to these demands, a new type of ordinary procedure emerged, named formulary proceedings or ordo iudiciorum privatorum per formulas – "private proceedings based on a formula." (Milošević, 2016: 180-181). The name originated from the formula document itself, which contained the basic elements of the dispute and represented an essential characteristic. The trial process in this procedure occurred in two phases: in iure and apud iudicem, and the decisive act, the judgment, was not made by a state organ but by selected judges based on the will of the disputing parties (Milošević, 2016: 181). To sum up, we can conclude that formulary proceedings represent one of the precursors to arbitration, especially as the parties selected judges to decide. One

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of the constitutive elements (the appointment of an arbitrator) of today's arbitration existed even during the Roman Empire. The arbitration procedure in Roman law would be constituted the moment a legally valid arbitration agreement was established (Milotić, 2013: 5). Thus, for the arbitration decision-making process to commence, a valid arbitration agreement had to be presented, legal according to the letter of the law. If it was not valid in the eyes of the law, it would be void under the rule of quad nullum est nullum producit effectum (what is void produces no legal effect), and the parties could not invoke arbitration to resolve disputes, i.e., formulary proceedings would be excluded in such a situation. Furthermore, it is stated that the arbitration agreement must precisely determine the place and time for dispute resolution. If the opposing parties did not establish a time limit for the arbitration process to conclude, the arbitrator had the right to determine that time considering all given circumstances (Milotić, 2013: 5). Therefore, the arbitrator ultimately had the right to decide how much time would be needed to make an arbitration decision. Roman arbitration also gave parties the opportunity to resolve disputes using a language they understood. The language issue was entirely tailored to the parties' needs. Hence, it didn't have to be just the Latin language; it could be Greek, Egyptian, Phoenician, Carthaginian, Persian, etc. (Milotić, 2013: 5) „There is substantial number of evidences on arbitrations conducted in Greece during the Roman rule that were exclusively recorded in Greek language. The arbitral files written exclusively in Greek show a general trend toward usage of Greek language in the arbitral proceeding as well. D. Roebuck and B. De Loynes de Fumichon stated that some sources show that all stages of the arbitral process were recorded in Greek and some in Coptic and other provincial languages." (Milotić, 2013: 8). English is the main language used for drafting contracts today (Cordero-Moss, 2024: 8). (However, the possibility to use another language wasn't the crucial factor it was not a condition sine qua non; it was more about the form, during the developmental phases of Roman and law, parties had a distinct incentive to prefer arbitration stemming from the fundamental structure of legal action in system. In the classical Roman and law procedures, a plaintiff was compelled to fit their claim within specific forms of action outlined in the praetor's edict in Rome. This form dictated the circumstances under which a legal action could be initiated and directed the plaintiff toward the appropriate formula necessary to commence the trial process. Seneca, the philosopher and orator from the first century, explicitly argues that in a trial, the iudex operates within defined confines, unlike the arbiter. The iudex is bound by constraints and limitations set by the formula, making it advantageous for a party with a clear case to opt for a iudex. This limitation prevents the iudex from surpassing certain boundaries. Conversely, the arbiter enjoys absolute freedom of conscience; they can augment or diminish the claim and make judgments based not solely on law and justice but also on principles of humanity and mercy (D. B. 3. 7. 5). We will provide the text in Latin: "… quaecumque in cognitionem cadunt comprendi possunt et non dare infmitam licentiam iudici; ideo melior videtur condicio causae bonae si ad iudicem quam si ad arbitrum mittitur, quia ilium formula includit et certos quos non excedat terminos ponit, huius libera et nullis adstricta vinculis religio et detrahere aliquid potest et adicere et sententiam suam, non prout lex aut iustitia suadet sed prout humanitas et misericordia impulit regere." It's noted that Roman arbitration extended to the region of present-day Croatia, i.e., Dalmatia, and Dalmatian disputes were resolved in the 1st century CE using the language understood by the local community (Milotić, 2013: 8). The arbitrator was limited ultra petita, and their arbitrability was also limited, as the parties determined the extent of authority the arbitrator had in a given dispute (Milotić, 2013: 8). Finally, what interests us is the procedure for making an arbitration decision, and it is stated that the arbitrator must make the decision or the person to whom they have delegated their jurisdiction (Milotić, 2013: 15).

4. „CHRISTIAN ARBITRATION"

Christian arbitration is mostly associated with papal arbitration, which peacefully resolved disputes between opposing parties. Papal arbitration is characteristic of the Middle Ages; however, in that era, there was something better than papal arbitration: a judge between states, which was completed by the establishment of the Permanent Court of International Justice (Fir, 2010: 380). The pope, as the supreme sacred leader of Europe, by official duty (ex officio, ex offo) or as otherwise known, papal ratione paccet, resolved disputes between European states (Fir, 2010: 380). Since the Pope's aspiration for supremacy reached its peak in the early and mid-Middle Ages, states "voluntarily" subjected themselves to the Pope's jurisdiction in resolving disputes among those states, all because the Pope represented the greatest authority in Europe at that time (Fir, 2010: 380). Besides the Pope, representatives, i.e., rulers of major Christian states of Europe, were chosen, such as Saint Louis X and others. Since Alphonse Dupront's work, it's often discussed how, in the early modern era, a shift occurred—from the medieval understanding of Christianity to the emergence of a notion termed as "Europe," primarily through the

lens of catholicity (Pialoux, 2020: 7). The Gregorian Reform in the eleventh century aimed to elevate the pope as Christianity's paramount figure, granting spiritual and universal authority over rulers, enabling intervention and reprimand for secular leaders' actions. However, during the Renaissance, the papacy receded to its territorial confines. The Council of Trent (1545-1563) later endeavored to revive the pope's spiritual supremacy, solidifying Rome as the epicenter of Catholicism. The Bishop of Rome, amid growing ecclesiastical Romanity, aimed to centralize power, striving for doctrinal infallibility and asserting temporal control. Rome, for a considerable duration, became Christianity's headquarters, intending to dominate a unified Christianitas, partly due to the waning influence of the notion of empire. Yet, by the mid-seventeenth century, this envisioned republic encountered the pragmatic realities of Westphalian Europe (Pialoux, 2020: 8).German rulers under the Holy Roman Empire often tried to impose their arbitration but rarely succeeded alongside the Pope, who had the "divine" right to judgment (Fir, 2010: 380). In Western Europe, from the 16th to the 17th century, arbitration almost disappeared, nearly until the 19th century when arbitrations were reconstituted, especially in the USA and England. (Fir, 2010: 380) Papal arbitration is the best example of Christian arbitration related to arbitration between various Roman Catholic states, where the Pope sought to establish peace between two opposing states. The best example of such arbitration was the dispute between Argentina and Chile, called the Beagle Dispute, concerning territorial disputes over Picton Lennox and the Nueva islands. This dispute almost led to war in 1978. On December 12, 1980, the Pope met both delegations and presented a proposal aimed at resolving the dispute (Aert, 2016: 311). The terms of this proposal had been developed discreetly and were meant to remain confidential to prevent divisive public discourse that could undermine confidence in the process and restrict the flexibility of both governments. However, on August 22, 1981, the Argentine newspaper La Nación disclosed the proposal's details. According to the revealed terms, Chile would retain control of all islands, while Argentina would have the right to maintain specific limited facilities (such as shared radar and weather stations) on certain islands and gain significant navigation rights. A crucial aspect was the establishment of an oceanic region known as the Sea of Peace (Aert, 2016: 311). Within this area, extending east and southeast from the disputed island chain, Chile's territorial waters would be confined to a narrow zone. Both countries would equally participate in resource extraction, scientific research, and environmental management within this shared territorial sea. Beyond Chilean territorial waters, there would be a broader oceanic zone under Argentine jurisdiction, yet subject to the same collaborative provisions governing resource usage as in Chilean waters (Aert, 2016: 312).

5. „ISLAMIC ARBITRATION“

History tells us about Islamic arbitration that involved formed bodies in the form of muslihun (mediators, conciliators) who would reconcile conflicting parties. There were bodies directly related to arbitration, for instance, in the legal terminology of the Hanafi school of Islamic jurisprudence (one of the four legal schools of Islam), which mentions arbitration as the concept of "Mejelli," actually representing the appointment of a satisfactory judge (hakima – arbitrator) by two or more conflicting parties to adjudicate their dispute and thus resolve disagreements between them (Crnkić, 2013: 3). Islamic scholars speak about a specific wisdom in arbitration, seeing it in the following ways: swift dispute resolution because the choice of an arbitrator is based on the agreement of disputing parties who have an interest in quickly resolving the dispute. An arbitrator, as a neutral judicial entity, is ready to resolve disputes at any time, any place. This is something incomprehensible before a judge appointed by the state; giving parties the opportunity to choose a trusted individual as an arbitrator; arbitration serves as a preventive measure against the hostility that often results from seeking judgments in court; and finally, arbitration offers the possibility of settling disputes based on Sharia law, even in the West (Crnkić, 2013: 5). Furthermore, we can discuss the conditions that must be fulfilled when appointing an arbitrator, namely, that the arbitrator should be an individually designated person, that the disputing parties should be content with them, and that the arbitrator should be content with the decision of the parties, thus becoming an arbitrator. There are two conditions that must be met for arbitration to be valid, as stated by Islamic scholars: a) that arbitration be constituted for the resolution of a specific and existing dispute; b) that arbitration be constituted for disputes for which Sharia law allows the establishment of an arbitration court. (Crnkić, 2013: 6) From the first element, it follows that fraud legis (evading the law) leads to fraus omnia corumpit (deception corrupts everything), rendering the arbitration invalid. From the second element, it follows that exceeding Sharia law also leads to the illegality of the arbitration tribunal. We believe that arbitration provides a convenience to Muslims, especially those who wish to be judged according to Sharia law. Sharia cannot be applied in "secular" courts, neither in Western states nor in secularly oriented Levantine ones, so arbitration represents the only option that allows the application of the law they desire. The regulation of arbitration

doi: 10.35120/sciencej0301063r UDK: 347.918(091)
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can be found in the former Ottoman Civil Code, where it states, among other things: "Arbitration is the engagement of an arbitrator by the consent of the wills of two conflicting parties to rule in their case and resolve their dispute and disagreements. Hence, from this, we can conclude that arbitration was known to the Ottomans, and therefore to the peoples who were under their rule." (Ottoman Civil Code, 1790: Book XV). In the Middle East, arbitration in its current form began to develop from 1950 onwards, mainly due to the accessibility of oil in that region. Contracts were made between Western transnational companies and Middle Eastern countries. Dispute resolution mechanisms existed then as well, but there was a need for a body that would efficiently resolve newly arising problems, i.e., innovative problems. For this reason, arbitrations were also constituted in the Middle East (Anghie, 2005: 223). These arbitrations arose from disputes regarding the exploitation of oil by transnational companies in the Middle East. This included excessive damage, unequal giving, lack of equivalence between actions, payment defaults, etc. All of this needed legal resolution in a way that satisfied both sides because one of the aspects of arbitration is mediation (Anghie, 2005: 224).

6. CONCLUSION

The historical journey of arbitration unveils its enduring significance as a vital mechanism for resolving conflicts throughout human history. From its humble origins in ancient city-states to its sophisticated modern-day frameworks, arbitration has evolved into a pivotal aspect of legal systems globally. Roman practices laid foundational principles mirrored in contemporary arbitration, emphasizing the parties' autonomy and choice of adjudicators. Christian and Islamic arbitration, while distinct in their approaches, contributed essential perspectives and methods to the field. Arbitration's resilience and adaptability are evident in its continued relevance and expansion, demonstrated by its integration into law and its pivotal role in resolving complex disputes between nations and multinational corporations. As we look back at its historical trajectory, it becomes evident that arbitration's intrinsic values such as flexibility, neutrality, and accessibility have consistently resonated across civilizations, making it an enduring pillar of dispute resolution.

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doi: 10.35120/sciencej0301063r UDK: 347.918(091)
347.63(091)
347.965.42:2(091)