Arbitration as Mean of Solving Litigations between Professional Traders – Novelties Inserted in the New Civil Procedure Code

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Based on the “New York” Convention of 1958 [1] arbitration has become a true and efficient alternative of the common law jurisdiction.

The regulation of arbitration in the new Civil Procedure Code [2] is found in the same Book (Book 4), divided into 7 Titles, instead of 11 Chapters. As a concept, the regulation of different specific arbitration institutions is similar to that provided for by the actual Book 4. The 7 Titles includes the general provisions on arbitration, arbitration agreements, arbitration tribunal, arbitral procedures and institutionalized arbitration (Art 533-612). Regarding arbitration procedure, it regulates the notification of the arbitration tribunal, arbitration trial, arbitration expenses and the decision of arbitration. Institutionalized arbitration is, for the first time settled by Art 607-612 of the Civil Procedure Code. Also, Title 4 of Book 7, named “International civil trial”, settles the international arbitration (Art 1096-1118).

Keywords: arbitration agreement, trial procedures, arbitrator, institutionalized arbitration, international arbitration
Conceptual delimitations and limitation in the application of arbitration as mean for solving litigations between professional traders

1. Concepts

One of the main novelties inserted in the new regulation of arbitration is the definition of arbitration (Art 533, Title 1, Book 4) and of institutionalized arbitration (Art 607, Title 7, Book 4). Thus, arbitration is defined as an alternative jurisdiction having a private nature with the recognized possibility for the parties in litigation and for the competent arbitration court to establish procedural rules derogating from the common law, limited for reasons of public order, or because of certain imperatives of the law.

Regarding institutionalized arbitration [3], it is defined as being that form of arbitration jurisdiction which is established and operates on a permanent basis attached to an organization or domestic or international organization or as an independent public interest nongovernmental organization, according to law, based on its own regulation applicable in the case of all disputes submitted for its settlement according to an arbitration agreement.

International arbitration has the competence in terms of solving the international litigations. Specifically, Art 1096 of the new Civil Procedure Code an arbitration litigation taking place in Romania it is considered international if it is derived from private law relationships having foreign features.

2. Categories of subjects and the object of arbitration procedures

Regarding the general provisions on arbitration, the new Code settles a set of new and important regulations.

Thereby, according to Art 534 the parties that may agree that a future or an already existing litigation be solved by arbitration are “legally competent persons”. Art 534 Para 2 states special conditions for certain
categories of subjects who may invoke arbitration, thus, for instance, the state and public authorities are empowered to conclude arbitration agreements only if they are authorized by law or by international conventions to which Romania is party. The same provision also states regarding the object of arbitration that public law persons who have as object economic activities are competent to conclude arbitration agreements, only if the law, their articles of incorporation or organization rules states this.

Concerning the object of arbitration, the above mentioned article states in the same paragraph that legally competent persons can decide to solve litigation by arbitration. The text expressly and limitative establishes the exceptions with respect to the object subjected to arbitration, namely: litigations on civil status, legal capacity of persons, family relationships, as well as the rights on which the parties cannot agree.

Another interesting provision refers to the representation of parties in arbitration, stating that the legal representation mandate represents the domicile or the address for service, if it is not otherwise stated; such a legal representation mandate offers the lawyer the right to invoke an obsolete arbitration, as well as to request or accept the extension of the terms of arbitration.

**Specificity of arbitration as an alternative to common law procedures**

1. **Arbitration agreement**

Concerning the arbitration agreement as an institution, the principle of concluding it in written form under the sanction of nullity is maintained. New is the provision on the manner in which the parties have concluded the agreement. Thereby, it is considered as fulfilled the condition of written form of the agreement when it was agreed through correspondence, regardless of its forms, through exchange of procedural acts or when the existence of the agreement was alleged in written by one of the parties and not contested by the other party [4].

We also note as novelty Art 540 Para 2 where referring to the object of arbitration, namely to the transfer of the right to property and/or the
creation of another type of real right on an immovable property, it is requested the written form for the notary authenticated form under the sanction of absolute nullity.

So, it becomes practically recommendable the inclusion of the arbitration clause in the legal act ascertaining the transfer of the right of property (or the creation of another real right on an immovable property), in the absence of such clause, the parties having the possibility to choose the arbitration only by concluding a compromise in authenticated form.

On the categories of arbitration agreement, Art 541 of the new Code maintains the provisions of the actual Code in the meaning of concluding the arbitration clause inserted in the main contract or concluding the compromise concluded separately from the main contract.

In this context we mention that the existence of the arbitration agreement shall be presumed if the applicant files a request for arbitration, and the defendant does not take any objections on the first term he has been legally summoned (by the arbitration court, our emphasis, E-N.V) does not raise objections to arbitration trial [5].

According to compromise, it is defined as being the document by which the parties agree that litigation between them to be solved by arbitration. The new regulation states that it can be concluded only if the parties are in litigation in front of another court (a common law court) [6].

On the competence of solving arbitration, the new Code does not state that the arbitration tribunal must ground its own jurisdiction on the part dedicated to arbitration agreements, but on Title 4 “Arbitration Procedures”, namely on Chapter 2 which states the arbitration trial (Art 571 – checking the competence). Thus, checking the competence by the arbitration tribunal is considered to be part of the arbitration procedure, which seems to be structurally and formally fair.

Even more, Art 545 provides that the conclusion of an arbitration agreement excludes the competence of courts to try the object of litigation. This provision is strengthen by the next article which states that if a common law court was seized with a case for which was concluded such an agreement, except express cases stated by the law [7], the court shall declare its lack of competence.
Arbitration tribunal is settled by Title 3, in which we note some novelties. Specifically, considering Art 547 we note that, unlike the actual Code, the condition of Romanian citizenship in order to be an arbitrator was removed, the new Code maintaining only the legal capacity as condition for arbitrators.

The number of arbitrators must always be odd [8]. If the parties did not agree on the number of arbitrators, then the litigation is solved by a commission of three arbitrators [9]. Also, the principle of designating the umpire by the other two arbitrators is maintained. This provision must be corroborated with and applied in relation to the provisions on institutionalized arbitration of the new Code, namely Art 609 Para 2, covering the case in which the arbitrators fail to agree on the umpire, the nominating authority shall indicate this person. If the person nominated as arbitrator accepts the nomination, Art 551 of the new Code states that it shall only be made in written and it shall be communicated to the parties by any means insuring the receipt and confirmation of receipt of the text, namely by mail, fax, email or in any other mean.

On the terms of arbitration, Art 559 of the new Code states that if the parties have not agreed otherwise in their arbitration agreement, the arbitration court shall issue a decision in maximum 6 months, unlike the actual term of 5 months, from the moment of its notification, under the sanction of declaring the arbitration as obsolete. For grounded reasons, the tribunal may decide a single extension of the term of arbitration with maximum 3 months, unlike 2 months from the actual regulation. “The single time” extension is designed to remove any interpretation on the term decided by the arbitration tribunal. Art 559 Para 5 maintains the actual provisions of 3 months extension in case of death of one of the parties.

A new and useful provision refers to the language of arbitration [10]. If the parties fail to state in their agreement or fail to subsequently agree on this aspect, the language of arbitration is the language of the contract that generated the litigation or an international language established by the arbitration tribunal.
2. Arbitration procedure

Like the common law procedure, the arbitration tribunal is notified by a request of arbitration filed by the plaintiff. Regarding the content of the request we notice that unlike the provisions of the actual regulation, we find in the new Code as mandatory the elements of identification of the parties, as well as the ID number of natural persons, namely the VAT number or trade Register registration number for legal persons. To such requirements are added the already stated ones, namely: surname, first name and the quality of the party’s representative in litigation, name of the arbitration agreement, the annexation of a copy of the contract providing for the agreement, for the compromise a copy of it, the object and value of the request, de facto and de jure reasons, as well as the evidences grounding the request, surname, first name and address of arbitration tribunal’s members, signature of the parties. If the plaintiff resides abroad [11], it shall be indicated also a Romania address (headquarters), where are communicated the procedures [12].

Concerning the arbitration request (summons), the defendant can file a respondent plea [13] or a counterclaim [14]. Specifically, the texts referring to the two procedural institutions are maintained in relation to those inserted in the actual code. Thus, the defendant can file a respondent plea within 30 days from the receipt of the copy of arbitration request, the counterclaim being filed within the same term stipulated for the respondent plea or the latest until the first term he was legally summoned. While the respondent plea can invoke exceptions on the summon of the plaintiff, the de facto and de jure answer to this summon, evidences in his defense, the counterclaim is filed every time the defendant invokes his own claims regarding the request filed by the plaintiff.

The arbitration tribunal verifies his competence at the first term of the trial, if the procedure has been legally carried out (Art 571 Para 1). So, if the arbitration tribunal considers itself competent registers this in a ruling which can be attacked only by annulment filed against the arbitration decision. If it considers being incompetent, declines its competence by a decision which cannot be subjected to annulment according to Art 571 Para 3.
Regarding the burden of proof, we note that, unlike common law procedures where the burden of proof is carried out by the plaintiff, namely the person filing a request to the court [15], in arbitration each of the parties must prove its claims in litigation, namely the claim or the defense. The evidences are proposed either by summon, respondent plea or counterclaim, until the first term the plaintiff has been legally summoned. Art 579 Para 2 must be corroborated with Art 248 Para 2, specific to common law procedures, in the meaning that the arbitration tribunal can accept evidences over the above mentioned term only if “the need of administrating that evidence derives from the judicial research and the party could not have foreseen it”.

The administration of evidences is performed in the court, in front of all arbitrators and umpire. Nevertheless, the tribunal may accept that the administration of some evidences be made either only in the presence of the umpire, or only in the presence of one of the arbitrators, but only the agreement of both parties. We must note that unlike common law trials, the procedure of evidences in front of the arbitration tribunal is more flexible, because in the first one the evidences are administrated only in the presence of the judge panel according to Art 255 stating that “the administration of evidences is performed in front of the notified court, counsel chamber, if the law does not state otherwise”.

The same flexibility is noted also regarding the interrogation of witnesses and experts in front of the arbitration tribunal in the meaning that, on the one hand they can be interrogated without an oath, at their request or with their consent, at their home or office address. Unlike arbitration procedure, the common law procedure is rigid and express, thus Art 313 states the “obligation of oath” for witnesses and Art 314 states the categories of persons and situation allowing derogation from the oath. The arbitration tribunal may postpone the cause for that witnesses or experts to answer the question addressed to them in written (Art 581 Para 1-2).
3. Arbitration decision

According to the new Code of Civil Procedure, the deliberation of the arbitrators on the arbitration decision is secret, by the mean stated by the agreement. The sentencing can be postponed for maximum 21 days with the condition of preserving the term of arbitration. The decision is taken with majority of votes, including, where necessary, the separate opinion. After deliberation is drafted a minute shortly stating the purview of the decision. Arbitration decision communicated to the parties is final and mandatory [16].

The arbitration decision is written and must comprise: the nominal structure of the arbitration panel, surname, first name and address, surname and first name of parties’ representatives, where appropriate, the arbitration agreement, the object of litigation and brief pleadings of the parties, de facto and de jure grounds of the decision, purview and signature of all arbitrators. We consider as interesting Art 594 Para 2 regarding litigation on transfer of ownership of property and/or the establishment of other real right on immovable property, where the decision to be applied must have an enforceable title from the tribunal or to be presented to public notary in order to issue an act based on which the immovable property is registered in the Real Estate Register.

The above article is an atypical provision for a regulation specific to the Code of Civil Procedure, because it joins elements from fiscal legislation with elements specific to cadastre and Real Estate Register areas. We consider that such regulation was used to avoid the ambiguity created because of different interpretations given to some fiscal obligations or regarding the regime of the Real Estate Register on applying the arbitration decision; thereby, the arbitration decision can be performed with celerity, without obstacles or delays from public authorities or institutions called to ensure the definitive and mandatory feature of the decision in the special case of transferring the ownership of property, in the real estate area.

The annulment of arbitration decision is settled by Title 5 of the new Civil Procedure Code.
• The reasons for annulment of the arbitration decision are stipulated by the new regulation, as following: The litigation cannot be solved by arbitration
• The tribunal has solved the litigation without an arbitration agreement
• The arbitration tribunal was not established according to the arbitration agreement
• The party missed the debates and the procedure of summon was not legally performed.
• The decision was issued after the expiration of the term of arbitration stated by Art 559, though at least one of the parties has invoked the obsolete feature of the decision, and the parties did not agree the pursuit of the trial.
• The arbitration decision is against public order, morals or law.

It is also stated that cannot be invoked as reasons for annulment irregularities (such as requests and exceptions on the existence and validity of the arbitration agreement, the composition of the arbitration tribunal, the limitations in arbitrators’ competences and the performance of the procedure) not stated in front of the arbitration tribunal until the first term the parties were legally summoned. Also, cannot be reasons for annulment those irregularities which can be solved according to the procedure of clarification, amendment or correction of the decision, stated by Art 595 (of the new Code).

Regarding the competence of solving the action for annulment of the arbitration decision, it belongs to the Appellate Court, which rules in the form stated by the law for appeals. The respondent plea is mandatory in actions for annulment of arbitration decisions. The term in which the action for annulment can be filed is 1 month from the moment of communication of the arbitration decision [17].

The solutions of the court when such action is admitted depend on the reasons invoked in support of annulment, namely:
• the litigation could not be solved by arbitration [18]
• when the arbitration tribunal trailed in lack of an arbitration agreement or based on a void or inoperative arbitration agreement [19]
• when the decision was issued after the expiration of the term of arbitration stated by Art 559, though at least one of the parties invoked the obsolete feature of the agreement, and the parties did not agree the pursuit of the trial [20].

In all other situations [21] (for instance, when the arbitration tribunal was not formed in accordance to the arbitration agreement or when the party missed the debates and the procedure of summon was not legally performed), the Appellate Court shall trial as first instance, and if are necessary new evidences, the Court shall trial as first instance after the administration of the new evidences.

In the latter situation, the Court shall issue two decisions, thus, according to Art 604 Para 3 the decision for annulment of arbitration shall be issued, and only after the administration of evidences, shall issue the decision as first instance.

The decisions of the Appellate Court are final. Thus it is removed the actual regulation which states that the decision of the court on the annulment of arbitration can be attacked. This situation creates the premises of a quicker solution of the annulment decision, especially in the case of a new trial in front of the court competent to solve the action for annulment.

4. The application of the arbitration decision

The new Code maintains the main provisions on the application of the arbitration decision from the actual regulation, but in a simpler and more organized manner, stating them in two articles “Willingly application” [22] and “Foreclosure” [23]. Thereby, it is considered as willingly execution the situation in which the party who has lost the arbitration decision performs the purview of the decision as soon as he receives it or in the term stated by it. Foreclosure requires the enforceability of the decision, which thus is performed according to specific procedures, applicable in common procedural law stated by the new Code of Civil Procedure.
For the first time, institutionalized arbitration is settled by Art 607-612 of the new Code of Civil Procedure.

The new regulation states that the activity of the institutionalized arbitration does not have an economic nature and does not pursue to obtain profit, an important statement removing any future attempt to structure this type of arbitration as a commercial society. It is (re)affirmed the autonomous feature of the institutionalized arbitration in relation to its management, principle confirming the independence of arbitrators and their objective decision.

Procedure rules of the institutionalized arbitration shall be adopted by its management according to its operation norms [24]. Appointing by the arbitration agreement a certain institutionalized arbitration, the parties agree on the application of its own procedure rules, the new Code stating that any derogation from this principle is void. Nevertheless, exceptionally, considering the conditions of the litigation and the content of the procedure rules indicated by the parties as applicable, the management of the institutionalized arbitration shall decide if are applicable also the rules agreed on by the parties, establishing if their application is effective or analogous.

According to Art 612 in case of refuse of the organization or institution named to provide for the institutionalized arbitration, the later one remains valid, and the litigation follows its course to be solved according to common law in arbitration, the regulation of agreed by the parties arbitration institution being invalid.

**International arbitration – procedure applicable to litigations between professional traders in the international market**

Concerning the international arbitration and the effects of foreign arbitration decisions, these are stated in the “International civil trial”. Thus, international arbitration is a special mean of solving international litigations. We note that Art 1096-1108 restates the essential aspects concerning general arbitration. Art 1096 of the new Code considers
arbitration litigation unfolded in Romania as being international if it is derived from a private law relationship with foreign element.

Referring to the arbitration agreement, formally, it shall be proven by the existence of any written mean of communication appropriate for the establishment of evidence, as well as referring to the first instance requirements this is valid if it meets the conditions imposed by the law established by the parties in the agreement, law governing the object of litigation, the applicable law of the contract (stating the arbitration clause) or the Romanian law.

In international arbitration are doubled the terms established in Book 4. The procedural language is established in the same conditions as for national arbitration.

On the applicable law, Art 1105 Para 1 states that the arbitration tribunal shall apply the law decided by the parties, and if the parties have failed to decide it in their arbitration agreement, then it shall be applied the law considered as appropriate by the tribunal, also taking account of the usages and professional rules[25].

The effects of foreign arbitration agreements, stated by Chapter 2 of Title 4 (Book 7) firstly state the qualification of these decisions as “foreign arbitration decisions”, defining them as being those national or international arbitration decisions issued by a foreign state and not considered as national by Romania (Art 1109). The efficiency of the foreign arbitration decisions is ensured when these decisions are recognized and can be applied in Romania, to the extent to which its object is solvable by arbitration in Romania and if the decision does not state against Romania private international law public order [26].

**Conclusions**

As conclusion, the new regulation on arbitration creates the premises of access for litigants to an arbitration tribunal, as an alternative to common law jurisdiction, having specific procedural forms ensuring the issuance with celerity of fair decisions.
References


[3] Art 607 Para 1; Art 540 Para 1; Art 541 Para 2; Art 543 Para 2

[4] Art 546 Para 2; Art 568 Para 1

[5] The designation of the umpire is mandatory in the new regulation, as according to Art 550 Para 5 “At the proposal of arbitrators... the parties shall also propose an umpire...”


[7] Art 563 Para 1 Let a)

[8] Art 563 Para 1 Let a)

[9] Art 566; Art 234; Art 597; Art 602

[10] Art 604 corroborated with Art 559 Para 1 Let a)


[12] Art 604 corroborated with Art 559 Para 1 Let e)

[13] Art 604 corroborated with Art 559 Para 1 Let c), d), f), g) and h)

[14] Art 605

[15] Art 606

[16] Art 610 Para 1


[18] Art 110