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CONDUCT OF THE ARBITRAL PROCEEDINGS

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Abstract: *The Romanian Code of Civil Procedure defines the arbitration as being an alternative private jurisdiction. This paper is outlining the particulars of the procedural rules that confer the arbitration the character of a swift, effective and proficient procedure, better suited for the solution of disputes of the traders. The paper examines the applicable procedural rules, the jurisdiction issues, the review of the arbitral file and the carrying out of the hearings, the solution of various procedural incidents (joinder of third parties, interim measures, and preliminary issues). Although the applicable procedural rules are established by the parties, or by the permanent bodies that organize the arbitration, it is essential that, for their validity, those rules do not contravene the public policy and imperative norms.*

Key words: *Procedural Rules, Jurisdiction, Hearings, Interim Measures, Preliminary Issues.*

1. Introduction

Resolution of civil and commercial disputes through arbitration is not the main jurisdictional way to solve such disagreements but aims to be more and more attractive due to its undisputed structural features, as a simple and swift procedure, confidentiality, professional approach and a cost management approach.

In order to prove itself a most appropriate tool to solve commercial disputes, arbitration needs to be carried out in a manner that is known to the traders; organized, predictable, efficient procedures and a professional management of the case are instruments are in line with the aims of a successful trade.

Consequently, the arbitration is carried on under procedural rules that are promoting a pragmatic and effective approach to the case.

2. Procedural Rules

In regard to the applicable rules of procedure, Article 576 of the Romanian Code of Civil Procedure (RCCP) provides three distinct solutions.

The arbitral tribunal applies: (a) the rules established by the parties and/or their arbitrators; (b) the rules adopted by a permanent arbitration institution; or(c) the rules provided by Book IV of the Romanian Code of Civil Procedure.

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2.1. Rules of the Parties

The parties enjoy the liberty of establishing, through the arbitration agreement, the arbitration rules applicable to their dispute, or they may give power to the arbitrators to do so; however, as provided for by Article 541 RCCP, these rules may not be contrary to the public order or to the imperative norms of the law.

This will be an arbitration organized by the parties and the rules adopted by the parties may range from an original, imaginative set of norms to the full adoption of rules already designed for such arbitration, such as UNCITRAL Rules.

If the parties establish their own rules but have omitted to provide for a particular issue, their rules will be supplemented with the provisions of Book IV of the Romanian Code of Civil Procedure, regarded as a common law regulation.

2.2. Selecting Institutional Rules

Whenever the parties' arbitration agreement grants jurisdiction to a permanent arbitration institution, the rules of procedure adopted by that institution will be applicable.

For instance, if an arbitral clause grants jurisdiction the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry (the Bucharest Court), the rules adopted by that Court will be automatically applicable; according to Article 619(2) RCCP, any derogation or deviation from these rules is null and void, unless agreed by the management of the said institutional arbitration court.

One should note, also, that the permanent arbitration institutions apply their arbitration rules that are in force at the date of the filing of the request for arbitration, notwithstanding that when the parties agreed to arbitrate, other arbitration rules were in force and, consequently, they took into consideration a different approach to the resolution of the arbitral disputes.

Some permanent arbitration institutions have adopted arbitration rules that are to be used only by the arbitral tribunals established under the supervision of the issuing arbitration institution.

For instance, Article 1(2) of the Arbitration Rules of the International Chamber of Commerce expressly states that "*The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules".*

Other permanent arbitration institutions, taking into account the conventional and voluntary nature of the arbitral procedure, allow the parties to choose the applicable arbitration rules; for instance, The Bucharest Court's Arbitration Rules state in Article 7(2) that: "*Where the parties choose to apply other arbitration rules than those of the Court of Arbitration, such application shall be permitted only where the said rules do not explicitly prohibit their application. If the rules indicated by the parties expressly prohibit their application by another arbitration body, the present Rules shall apply*."

2.3. Application of Book IV of RCCP

If the parties did not agree upon their own arbitration rules or if they did not agree upon the jurisdiction of a permanent arbitration institution, the provisions of Book IV of the Romanian Code of Civil Procedure are applicable.

3. Review of the Arbitral File

The Romanian law scarcely regulates issues regarding the case management measures to be adopted by the arbitral tribunal.

According to Article 578 RCCP, immediately after the elapse of the time limit granted to the defendant to file the statement of defense, the arbitral tribunal will review the stage of preparation of the case and, if required, will order the parties to supplement the file. Thereafter, the arbitral tribunal will set the hearing and will summon the parties.

This timid approach, reducing the arbitral tribunal role to that of a custodian of the file, does not promote the swift and time-saving resolution of the arbitral dispute. Modern arbitration rules provide, by far, more adequate case management measures.

For instance, Article 17 of the UNCITRAL Arbitration Rules encourages the arbitral tribunal to conduct the proceedings as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

The measures indicated to reach such goals are: (a) establishing a timetable for the arbitration, offering parties a fair and predictable perspective of the arbitration mechanism, (b) the option between oral hearings or a written procedure, based on documents, according to the parties' request and (c) making all communications of the parties with the arbitral tribunal, at the same time.

Taking a further step, Article 24 of the ICC Rules provides the arbitral tribunal's duty to convene a case management conference with the parties, in order to establish such procedural measures as to ensure effective resolution of the dispute and to control time and costs of the arbitration.

Such procedural measures may consist in the bifurcation of the procedure (if expecting a more efficient resolution), identifying issues that may be decided solely on the basis of documents or by the agreement of the parties and their experts, limiting requests for documents to those that are relevant and material to the outcome of the case, using a timetable of submissions by the parties and a schedule for the production of documents, or using video and/or audio teleconferences instead of oral hearings and so on.

More recently, the new arbitration Rules adopted by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (The Bucharest Court) provide a guide for a case management conference as well as for various solutions to streamline the procedures, most of them using the expertise provided by well reputed international arbitration bodies (as ICC Court of Arbitration or arbitration courts in London, Stockholm or Zurich and Genève).

According to the Bucharest Court Arbitration Rules, the first arbitration hearing is dedicated to the case management conference where the parties and the arbitral

tribunal are dealing with preliminary issues and exceptions and are establishing a provisional timetable, for a procedure that encompasses a written phase followed by an oral phase.

The Bucharest Court Arbitration Rules provide, also, for the parties' option to bifurcate the proceedings, to solve amicably certain substantial or procedural issues, to cooperate in the setting of the timetable of the proceedings or to eliminate some procedural phases.

On the other hand, it is true that, in absence of such provisions for the swift conduct of the arbitration, none of RCCP - Book IV provisions are impending the arbitral tribunal to assume more powers in case management, as to ensure an orderly and efficient resolution of the arbitration dispute.

For instance, Article 587(2) RCCP requires the arbitral tribunal to consult the parties when establishing the deadlines for the submission of the evidence; such consultation may be finalized in a timetable of the submissions of evidence and/or production of documents

4. Jurisdiction of Arbitral Tribunal

4.1. Competency

The Romanian law uses the term "*competency*" (derived from the French "*compétence*"), with the same meaning as the term of "*jurisdiction*". In the international arbitration case law and doctrine, the term "*jurisdiction*" is applicable to describe the power of an arbitrator to resolve a particular dispute.

In international arbitration, such power or jurisdiction may be challenged on various grounds, such as:

(a) The invalidity of the arbitration agreement or of the main contract (which includes the arbitral clause);

(b) The arbitration agreement is impossible to perform (e.g., it is a "*pathologica*l" agreement, lacking essential elements);

(c) The non-arbitrariness of the dispute;

(d) The elapse of the time limitation set out for the filing of a request in arbitration;

(e) The inclusion of a third party or a non-party in the arbitration and various other reasons.(Adam, 1989, p.75 -153)

The Romanian term "*competency*" covers most of these issues but mainly addresses the validity and applicability of the arbitration agreement.

For instance, if a request for arbitration is filed after the elapse of the legal time limitation, the arbitral tribunal will have jurisdiction to decide the dispute but, at the request of the defendant, will dismiss the request as time barred.

On the other hand, if the dispute is not an arbitral one, since is concerning civil status issues (like a divorce), the arbitral tribunal will not have jurisdiction to decide upon it and the request will be dismissed as inadmissible.

The arbitrator or the Arbitral Tribunal is entitled to examine and decide upon its own jurisdiction. The term seems to be used first in West Germany, in the form „Kompetenz

– Kompetenz", designing the power given to an arbitrator to decide upon jurisdiction without involving any other court of justice or jurisdictional body (Adam, 1989, pp.179 - 186).

As an application of the "C*ompetence - Competence*" principle, Article 579 RCCP states that the arbitral tribunal will verify and will rule upon its own jurisdiction to solve the parties' dispute.

This query into its own jurisdiction will be made by the arbitral tribunal *ex officio*, without any plea of the parties being required. The jurisdiction issue is decided and a ruling is rendered at the first hearing, provided that the parties were duly convened.

4.2. Jurisdiction Options

Deciding upon its own jurisdiction, the arbitral tribunal may reach two distinct decisions:

- If the arbitral tribunal decides that it has jurisdiction, it will mention this in a ruling, which may be challenged and dismissed only through an action for annulment, filed against the arbitral award.

As a result, the law allows the arbitral tribunal that retained jurisdiction to proceed with the arbitration, thus differing from, for example, the UNCITRAL Model Law that allows a party to challenge the ruling of the arbitral tribunal, within 30 days after having received notice of that ruling; if the requested court decides that the arbitral tribunal lacks jurisdiction, the judgment is binding and final.

- If the arbitral tribunal decides that it does not have jurisdiction, it will decline the case to the state or arbitration court that has jurisdiction; in this regard, the arbitral tribunal will render an award, which cannot be challenged through an action for annulment.

This will not impede the parties to raise the jurisdiction matter in front of the state court to which the case has been declined.

According to Article 544 RCCP, a court vested with a cause in relation with which an arbitration agreement has been concluded will retain jurisdiction if no party challenges that jurisdiction. If both the arbitral tribunal and the court decline jurisdiction, this negative conflict of jurisdiction will be decided by the court of a superior grade to the one found in conflict.

4.3. Challenge of Jurisdiction

If the ruling of the arbitral tribunal retaining jurisdiction is challenged (together with the award rendered) through an action for annulment and the court finds out that the arbitral tribunal never had jurisdiction to decide upon the case, the award will be cancelled and the case will be sent to the court of justice that, according to the law, has jurisdiction.

5. Hearings and Default of Parties

5.1. The Standard Approach

The conduct and management of the arbitral procedure provided for by Book IV of the Romanian Code of Civil Procedure is comparable with the procedure applied by the state courts to the extent that both are based, mainly, on oral hearings and require that the taking of evidence is made during a hearing and in front of the court or arbitral tribunal.

The parties have the obligation to attend the hearings set up by the arbitral tribunal; however, any party may ask the arbitral tribunal to decide the dispute in their absence, based upon the evidence submitted to the arbitral file.

On the other hand, if duly summoned, the absence of a party is not an impediment for the arbitral tribunal to rule on the dispute. To prevent such a decision, the party in default may ask the arbitral tribunal to postpone the hearing, for sound reasons, provided that such request is filed at 3 days before the scheduled hearing. The arbitral tribunal may decide to grant or to dismiss such request, being entitled to appreciate the soundness of the reasons invoked.

If both parties fail to appear at a hearing, although they were duly convened and no plea for postponement has been filed, the arbitral tribunal may proceed with the resolution of the dispute, unless it considers that the presence of the parties is required; in such case, the arbitral tribunal schedules another hearing and summons the parties.

When both parties are missing and the arbitral tribunal decides to continue the proceedings, making the award on the evidence before it, it may also decide to grant the parties a time to file closing written submissions.

5.2. The Modern Approach

As mentioned before, modern arbitration is aiming to offer a simple and faster procedure. Therefore, in the first phase, in order to save time and costs, written submissions of the parties are preferred to the oral hearings that are reserved for the final phase of the arbitration.

Also, tribunals are allowed to replace the oral hearings that may be impaired by the absence of a party with conferences held through remote audio or video means of communications. Moreover, the actual examination of the fact and legal witnesses may be skipped, if the arbitral tribunal and the parties are satisfied with written statements.

All these methods are designed to offer the arbitration a better perspective, in terms of time efficiency and related arbitration costs.

6. Joinder of Third Parties

6.1. Options

As a rule, the Romanian law provides that third parties may join and participate in a particular arbitral procedure, with their agreement and with the consent of all parties, under the conditions provided for under Articles 61-77 RCCP.

According to the provisions of Articles 61-77 RCCP, the parties may join the procedure either on a voluntary basis or on a forced basis. The joined party is commonly known as the intervenient.

6.2. The voluntary intervention

The voluntary intervention may be: (a) a principal intervention, when the intervenient is claiming for himself the right that is the object of a dispute or (b) an accessory or secondary intervention, when the intervenient supports the defense of one of the parties.

The voluntary secondary intervention may be filed in order to assist either the claimant, or the defendant.

As an exception from the rule, a secondary intervention may be filed and the intervenient is adjoined to the procedure although the parties do not agree or oppose the inclusion of the intervenient.

The grounds behind this option of the law is, probably, the fact that the secondary intervenient is only acting in the interest of one of the party, without seeking any personal relief.

6.3. The forced intervention

The forced intervention may display three distinct forms:

(a) Summons of a person that may claim, in a distinct procedure, the same rights as the claimant; for instance, the defendant facing a request filed by one of the joint beneficiaries of the same construction contract, may ask for the joinder of the other beneficiary, in order to avoid the filing of the same claim in a different file.

By doing that, the defendant obtains the resolution of the entire disputed matter in a unique procedure.

(b) The party of pending arbitral proceedings may ask the joinder of a third party to stand as guarantee, if the concerned party is entitled to seek the same kind of relief, in a distinct procedure, from this third party defendant, as the relief sought in the arbitral procedures.

For example, if a constructor is summoned in an arbitral procedure to answer for faulty construction works, he may ask for the inclusion of its subcontractor, to stand guarantee for the faulty works performed by that subcontractor.

At its turn, the party asked to stand guarantee may ask the inclusion of another third party, to stay guarantee for him (for instance, the supplier of faulty construction materials).

(c) The defendant that has been summoned in an arbitral procedure by a claimant that is claiming *in rem* rights upon a good held by the defendant, may indicate the person on behalf of whom he is holding the good and who is the actual title holder; by doing so, the defendant involves the owner of the said right in the arbitral procedure, avoiding to be ordered to comply with an award while lacking the ownership title of the said good.

6.4. Agreement of the Parties

The Romanian law embraces the traditional concept that inclusion of third parties in the procedure is pending upon the agreement of the parties of the arbitral case. This is an expression of the voluntary or contractual nature of the arbitration that requires the agreement of the parties to submit their dispute to an arbitral tribunal. In other words, where there is no arbitration agreement, there are no arbitral proceedings.

The law does not require that the rights or liabilities of the intervenient be based on the same juridical rapport or that the intervenient be party to the same arbitration agreement.

Consequently, whenever an intervenient is not a party to the same arbitration agreement shared by the claimant and the defendant, their plea to join the procedure or the request made by one of the party to include in the arbitral procedures the said intervenient, if agreed by all parties and the intervenient, represents a valid arbitration agreement that confers jurisdiction to the arbitral tribunal.

Unlike other arbitration regulations, the Romanian law allows the joinder of a third person to a pending arbitration, although the parties did not request it. The initiative may belong to the third person, as a voluntary intervention, either as a principal or secondary intervention.

6.5. Time of Filling the Joinder Request

The appropriate time of filing a request or plea for the joinder of a third person is determined in relation with the nature of the inclusion.

A voluntary intervention plea may be filed at any time during the arbitral proceedings, before the closing hearing.

The request for joinder of a person that may claim, in a distinct procedure, the same rights as the claimant as well as the plea for a third party to stay guarantee may be filed by the defendant only together with the statement of defense and by the claimant at any time before the conclusion of the arbitration inquiry.

The application pointing out the actual title holder may be filed only before the expiration of the time for filing the statement of defense.

7. Interim Measures

7.1. According to Article 585 RCCP, preventive (protective or precautionary) and/or provisional measures as well as orders ascertaining particular matters of fact (commonly known in international arbitration as "*interim measures*") may be granted before the commencement and/or during the arbitral proceedings.

Article 585 RCCP does not enumerate the range of the interim measures that may be granted to the claimant; other special procedural provisions of the Romanian Code of Civil Procedure are to be considered in order to determine the extent of such measures. According to Book VI (Special Procedures), Title IV (Preventive and Provisional Measures), these measures range from a precautionary sequestration (attachment) of

goods or seizure of money to entrusting goods in dispute to a judicial administrator named by the court.

Before the commencement of the arbitral proceedings, the granting of such interim measures may be requested only to the court located at the place of the future arbitration; after the commencement of the arbitration proceedings, such measures may be granted either by the above mentioned court, either by the arbitral tribunal.

7.2. If a party requests the court to grant a particular interim measure, it will have to provide the court with copies of documents, including the arbitration agreement and a copy of the request for arbitration; if such request was not yet filed, the concerned party will submit a copy of the notice sent to the other party, inviting it to set up an arbitral tribunal, as per their arbitration agreement.

The requesting party will inform the arbitral tribunal upon the measures granted by the court; this will prevent the arbitral tribunal to grant conflicting interim measures and will make the arbitral tribunal aware about the *status quo* measures ordered by the court.

7.3. If a party, during the arbitral proceedings, decides to request the arbitral tribunal to grant interim measures or to ascertain particulars matters of fact, the measures granted by the arbitral tribunal enjoy, as a rule, the same force as a judgment.

Nonetheless, if a party opposes such measures, the execution of the arbitral tribunal's measures will be ordered by the court located at the place of arbitration.

That means that, from a pragmatic stance, the parties will prefer to address a request for interim measures to a court, since a ruling of an arbitral tribunal, if opposed by one of the parties, needs to be "reinforced" by a court judgment in order to be "enforced".

8. Deciding on Preliminary Issues

8.1. Requests and Exceptions

Sometimes, before determining facts at issue or legal points in disagreement concerning the substantial dispute of the parties, the arbitral tribunal will have to look into requests made and exceptions raised by the parties, more commonly known as the preliminary issues.

Such preliminary issues may regard a plea for joinder of a third party or an exception based on the expiry of the limitation period or a complaint of a party or a challenge of the arbitral tribunal's jurisdiction. Solving these matters as soon as possible may save time and avoid a costly procedure.

8.2. Time of Filling

Therefore, Article 592 RCCP requests the parties to file any exceptions related to the existence and the validity of the arbitration agreement, the setup and the powers of the arbitral tribunal, and the procedural steps fulfilled before the first hearing, no later than

at the aforementioned first hearing, if the law or the arbitral tribunal has not established a shorter time limit.

Failure to do so will deprive the concerned party to further invoke such requests or exceptions, the party's right to make use of them being terminated due to the running out of the time limit provisioned by law.

These provisions of Article 592 RCCP are concordant with those of Article 573 RCCP that sanction with the same civil penalty the defendant that failed to raise their defenses and exceptions through their statement of defense or before the first hearing for which the party had been summoned.

Likewise, according to Article 592(2) RCCP, any other requests and documents are to be submitted before the first hearing, for which the parties were legally summoned. The consequence of failure to do so, with regard to the evidentiary documents, is that such evidence may be submitted, after the first hearing, only if particular conditions are met, as provided for by Article 254(2) RCCP:

(a) The necessity of taking that evidence results either as a consequence of the amendment of the request for arbitration, or during the arbitral inquiry, and was not possible to be foreseen by the party;

(b) The party was objectively impeded to produce such document in due time;

(c) Taking of evidence does not postpone the arbitral proceedings or all parties who agree to the taking of evidence.

Actually, these provisions have more to do with the claimant than with the defendant, since the defendant, however, according to Article 573(2) RCCP, is obliged to provide their means of defense (including written evidence) through their statement of defense and by no means later than the first hearing for which the parties were legally summoned.

On the other hand, there is a slight contradiction between the provisions of Article 592(2) RCCP and those of Article 587 RCCP, that establish that the evidence which was not submitted through the request for arbitration or the statement of defense, may not be further invoked, excepting the cases provided for by Article 254(2) RCCP.

Since both articles refer to taking of evidence, it seems that the writings must be mandatorily submitted either (a) through the request for arbitration or through the statement of defence or (b) before the first hearing, for which the parties were legally summoned. In this context, one should note that Article 592(2) RCCP uses the term „writing" in the common sense given by Article 265 RCCP, meaning any scripture or noting that includes information about a juridical act or fact, independently of the material support or of its way of storage and conservation.

This definition is equivalent to the one of evidentiary document and, therefore, when making reference to the „writings" the law actually refers to „evidence".

Actually, this conflict is solved by the broad construction of Article 254(2) RCCP that allows the presentation of further written evidence, although not invoked in due time, if the necessity results from development of arbitral proceedings.

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