SOME ASPECTS OF ARBITRATION AS A WAY OF SETTLING INSURANCE DISPUTES

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Abstract

The paper aims at briefly reviewing the advantages of arbitration in relation to classical, public justice, on the one hand, and, on the other hand, of specialized arbitration (in insurance) compared to the general arbitration. Alternative dispute resolution has been received in recent decades as a necessary measure not only to relieve the courts of a significant part of the potential cases, but mainly because of the confidential and rapid nature of the procedures adopted. Technological changes brought with them new ways of communicating, and conflicts can now arise not only from lack of communication, but also from the inappropriate communication of information or because of too much information that leads to the loss of the essential data. Exiting the pre-defined formats of the participants on the insurance market must also lead to the adaptation of methods of alternative dispute resolutions, and specialized arbitration is one of the most important ways to choose.

Keywords: insurance, arbitration, justice, compensation, decision.

JEL Classification: K41

1. History and present in commercial justice

If arbitration, as a form of litigation, appeared in the darkness of time, most likely immediately after the emergence of the concept of property, commercial arbitration was born out of the need for specialization, on the one hand, but mainly due to the need of securing confidentiality, on the other hand. The affirmation of arbitration as private justice is known from Roman antiquity. [2] In the Romanian Provinces, the regulation of arbitration, known as "eretocrisie" was made for the first time in the Donici Handbook of 1814 in Moldova, immediately followed by the Calimach code in 1817, and in Wallachia by the Caragea Code in 1818. Subsequently, under French and Swiss influence, arbitration rules are contained in the 1865 Civil Procedure Code. The Fourth Book on Arbitration resisted

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despite changes in the political regime and in the social and economic organization, with wider modifications only in 1993, and resisted until the adoption of the New Civil Procedure Code (2010), [3] which entered into force in 2013.

Commercial justice has its origins in the system of commercial judges in France, in the 1400s; in 1563 King Charles IX established a commercial tribunal in Paris with fast, informal and specific procedures etc. [4] With some modifications to the proceedings, the French commercial courts have retained the most and most important features until today, one of the most important being the sitting of professionals in the commercial field in court, especially due to their knowledge of specific regulations and procedures.

In recent Romanian law, the French model of commercial tribunals was welcomed to our system, the first step being made in 2004 by setting up the commercial courts in Cluj, Pitesti and Tirgu Mures. These resulted from the reorganization of the respective county courts by the detachment of the commercial sections. If the first step was taken, the following ones totally missed, notably by the lack of openness to the access to the courtroom bench of the professionals in the field, but also to the elimination of excessive formalism. Further, the judges of these tribunals are regular judges, and the issue of specialist assistants, such as the panels specialized on employment cases, has not been raised. Moreover, following the entry into force of the New Civil Procedure Code in 2013, the three commercial courts have changed their name to specialized courts in disputes between professionals, motivated by the removal of the word "commercial" from the architecture of the new Romanian private law and no other new court has not been opened, all the commercial sections of the other courts being transformed into "civilian" sections. [5]

Beyond the absurdity of the situation that led to the creation of forms without content and impossible to implement, the application of the principle of the economic prevalence over the legal is an essential condition of a market economy, namely of Romania's membership to the European Union. Thus, until a necessary re-establishment of commercial law within the normal framework, including the less formal procedural rules leading to speedy and confidential justice for traders, the effective option in commercial justice is alternative dispute resolution (ADR) through specialized arbitration , as we will see below.

2. Regulation. Notion. Forms

In Romania, arbitration is regulated in Book IV of the new Civil Procedure Code (2010). According to art. 541 of this normative act, arbitration is defined as an alternative private

[3] Law no, 134/2010 on the Civil Procedure Code, published in the Official Gazette of Romania, Part I, no. 485/15 July 2010, republished in the Official Gazette of Romania, Part I, no. 545/ 3 August 2012, entered into force on 15th February, 2013;

[4] M. Voicu, *Arbitrajul comercial: jurisprudență adnotată și comentată*, Universul Juridic, Bucharest, 2014, p.17;

[5] For more details and arguments on monism of the Romanian private law, see: M. Nicolae, *Unificarea obligațiilor civile și comerciale*, Universul Juridic, Bucharest, 2015;

jurisdiction where the parties may establish their own procedural rules as long as they do not violate public order or essential legal regulations. Having a mixed legal status, also contractual and jurisdictional, arbitration may only deal with disputes that do not apply to rights the parties are not entitled to, or rights that are established by the law as not being subject to arbitration, such as civil status, inheritance disputes, family relationships, etc. [Art. 542 par. (1) of the new Code of Civil Procedure].

Arbitration involves the presence of at least one third party to the parties, called the arbitrator, a third party whom they invest with jurisdiction, according to an agreement prior to the occurrence of the dispute or established after the litigation arises, but prior to its final settlement. Formally, we distinguish two types of arbitration: ad hoc arbitration and institutionalized arbitration. Ad hoc arbitration or arbitration is created by convention of the parties in accordance with the rules set out in the new Civil Procedure Code in Book IV, without the need for an outside intervention or authorization for the will. However, and to the extent that the parties so agree, it may be organized by a third party.

Institutional Arbitration presupposes the organization of arbitration by a permanent institution as defined by art. 616 et seq., NCPC. In this respect, the organizing institution of the arbitration must have as its object the organization of the arbitration, having no economic and profit-based character; the arbitration activity should have its own organization, with its leadership, personnel and its own material base; it should have its own rules of organization and functioning, respectively arbitration proceedings and, last, but not the least, its own body of arbitrators. [6]

The obligation to enforce the rules of law leads us to the distinction between *de jure* or *ex aequo et bono* arbitration respectively the application of the rules of law in their entirety and the *ex aequo et bono* arbitration as seen by the arbitrators, a vision limited by the application of the imperative norms of law and public order.

Ex aequo et bono arbitration is the exception, so the parties must clearly specify whether they require that the solution to be given by the arbitrators should be given on these grounds, rather than the strict legal rules. [7]

We also distinguish between national arbitration and international arbitration, depending on the existence of an element of internationality in the arbitration clause, such as the determination of the jurisdiction of an arbitral tribunal based in another country, parties from different countries, etc.

Finally, but not less important, in terms of the jurisdiction of the arbitral institutions, arbitration may take the form of general arbitration, such as that of the Court of Internal and International Arbitration attached to the Chamber of Commerce and Industry of Romania, [8]or the form of specialized arbitration, as is in the field of insurance the Court of Arbitration

[6]G. Mihai, *Procedura arbitrală*, Universul Juridic, Bucharest, 2015, p.93 et seq.
[7] For more see T. Prescure, R. Crișan, *Arbitrajul comercial*, Universul Juridic, Bucharest, 2010.
[8] http://arbitration.ccir.ro

within the Association "The Centre of Insurance Arbitration and Mediation"[9], both of which with their headquarters in Bucharest.

3. Arbitration Agreement

Arbitration may not take place outside an arbitration agreement. It will always have to be in the written form under the sanction of nullity (art. 548 par. (1) NCPC]. We find it in the form of arbitration clause or compromise and it can be concluded even if there is litigation in court, the direct and inevitable consequence of its conclusion being the exclusion of the courts from the pending or eventual settlement of the dispute (art.553, NCPC).

Among the substantive conditions to be met from the point of view of the validity of the arbitration agreement (capacity to contract, consent of the parties, subject matter and cause), two are those which must be carefully considered from the perspective of the insurance arbitration: consent and object. Thus, as regards the validity of the consent, beyond the general conditions of validity, it should also be checked the quality of the person who has granted it, respectively his/her status as professional or consumer. The problem arises only in the case of the natural person, the quality of consumer or professional being given by the purpose of concluding the insurance policy: for personal or family interest or in the interest of his/her profession or business. Where the natural person is a consumer, in accordance with paragraph (1) letter l of the annex on the list of clauses considered as abusive by Law no. 193/2000, [10] as amended and supplemented, it has been established that a clause preventing him/her from taking legal action or exercising another legal remedy simultaneously with the establishment of an arbitration procedure is considered abusive and in accordance with art. 6 of the same law this will not have effect, even if the professional could prove that the consumer has granted a free and without undue influence whatsoever.

On the other hand, the consumers or beneficiaries of insurance contracts have been awarded the possibility of alternative dispute resolution within the SAL-FIN, an entity of alternative non-banking financial dispute resolution organized by the Financial Supervisory Authority under G.O. 38/2015. [11] It is worth mentioning that the alternative way of settling disputes in the non-banking financial sector, namely the conciliation, although in the form of enforcing

[9] http://www.acama.ro

[10] Law no.193/2000 on the abusive clauses in the contracts concluded between professionals and consumers, published in the Official Gazette of Romania, Part I, no.560/ 10 November, 2000, republished in the Official Gazette of Romania, Part I, no. 305/ 18 April, 2008, subsequently amended by Law no. 161/2010, published in the Official Gazette of Romania, Part I, no 497/ 19 July, 2010.

[11] Government Ordinance no.38/2015 on alternative dispute resolutions between consumers and traders, published in the Official Gazette of Romania, Part I, no. 654/ 28 August 2015 by means of which are transposed the provisions of Directive 2013/11/UE of the European Parliament and of the European Council/ 21 May, 2013 on the alternative consumer dispute resolutions and of amendment to the Regulation (CE) no. 2.006/2004 and the Directive 2009/22/CE (Directive on SAL in the matter of consumer protection), published in EU Official Journal, series L, no. 165/ 18 June, 2013.

the resolution is extremely close to arbitration, it has a special regime, established by specific norms by the Financial Supervisory Authority and cannot be subject to a pre-formulated clause or even negotiated in a contract with the consumer. Moreover, the right to use this procedure belongs only to consumers, not to professionals for whom only the path of the courts is open.

As regards the subject-matter of the arbitration agreement, this must be lawful and determined or determinable. The regulation of art. 542 par. (1) of NCPC on the subject of arbitration establishes the rule of general arbitration and establishes the exceptions *expresis verbis*: "the civil status, the capacity of persons, the inheritance dispute, the family relations, as well as the rights that the parties cannot dispose of". We understand that any litigation arising from insurance contracts may be subject to arbitration. On the other hand, the arbitration agreement identifies the arbitrator or the arbitral institution and, in the absence of such an indication, it is under nullity. [12] At the same time, other provisions may be agreed upon by the arbitration agreement, in particular those relating to the applicable procedural rules, the language of arbitration, the appointment of arbitrators, etc.

4. Arbitrators

Any individual may perform the function of arbitrator, provided he/she has full exercise capacity (Art.555, NCPC). If there is more than one arbitrator, there must be an odd number and they constitute the arbitral tribunal. They may be appointed by the arbitration agreement itself or later by the agreement of the parties and, in the absence of this agreement, they may be appointed according to the rules of the arbitral tribunal in the case of institutionalized arbitration, respectively by the competent court, the county court in whose jurisdiction the arbitration takes place.

The arbitrators are incompatible to judge, according to art. 562, NCPC, in all cases provided for judges, but also in special cases related to: a) lack of qualification or other conditions established by the arbitration agreement; b) the existence of an interest of a legal person to which the arbitrator is affiliated or a governing body; c) the existence of direct employment or service relationships or, as the case may be, commercial relations of the arbitrator with one of the parties, or with a company that is controlled by one party and is under joint control with this; or (d) providing consultancy by the arbitrator to one of the parties, namely, he/she has assisted or represented one of the parties or testified in one of the preceding stages of the dispute.

If the arbitrator who knows that he / she is in a case of incompatibility does not refrain from the trial, he / she may be challenged by the parties and the competent court will resolve the application by a resolution that is final and is not subject to any means of appeal, and subsequently, if applicable, he/she will be replaced.

[12]G. Mihai, *op.cit.,* p.100.

The arbitral tribunal shall be constituted on the date of acceptance by the single arbitrator of the assignment or at the date when all commissions are accepted by all those proposed (art. 566 par. (1) NCPC]. After this moment, the arbitrators shall be liable for the damage caused, if: a) they unjustifiably give up their assignment, b) do not participate in the settlement of the case; c) do not give the decision within the term stipulated by the arbitration agreement or by the law; d) violate in bad faith or in serious negligence any other duties (Article 565, NCPC). Failure to comply with the confidentiality of arbitration by publishing or disclosing data that they acquire as arbitrators without the consent of the parties is also grounds for their accountability.

5. Arbitration

The term of arbitration is, according to Romanian law (art. 567 par. (1) NCPC], of 6 months, subject to the penalty of obsolescence, if the parties have agreed to invoke it. The place and language of the arbitration shall be those established by the parties or, if there is no agreement, the arbitral tribunal shall decide upon them.

The arbitration procedure itself, although similar to that before a court, is characterized by a less formal procedure. Referral to the arbitral tribunal is usually made through a request for arbitration which must include all the elements necessary for the identification of the parties, the subject matter, the reasons of fact and law, and the evidence on which it is based. By the arbitration request or later, within the time limit set by the arbitration institution's secretariat, the arbitrator or the arbitrators proposed for the arbitral tribunal shall be mentioned. Upon notification of the arbitration request, within 30 days, the defendant will make a defense against the claim by which he/she will make his own defense and possibly a counter-claim if he/she has a claim against the original claimant and will appoint the arbitrator or arbitrators for the formation of the arbitral tribunal. In case of the existence of particular procedural rules, they will apply, but not disregarding the fundamental principles of the civil process (art. 575 par. (2) NCPC].

Arbitration costs shall be incurred by agreement between the parties and, in the absence of such agreement, by the party who lost the dispute. Checking the expenses may be made by the competent court at the request of either party, and then an enforceable resolution is to be made, which is not subject to any appeal (Article 598, NCPC).

6. Arbitration award

The decision rendered by the arbitral tribunal is final and binding (Article 606, NCPC); it is enforceable and is under enforcement in the same way as a court ruling (Article 615, NCPC). The parties cannot dispose in an absolute way of their rights, as these rights can only be exercised within the limits of the principles on respect for good morals and public order. Thus, an action for annulment may be brought against the arbitral award only for the express reasons provided by art. 608 of the NCPC, and the action is to be registered at the court of appeal in whose jurisdiction the arbitration took place (art.610, NCPC).

The time limit for filing an action for annulment is different, depending on the reasons given [Art. 611 par. (1) NCPC referred to art. 608 para. (1), NCPC].

Thus, it is one month after the decision is communicated in the following situations: a) the litigation should not have been settled by arbitration; b) the arbitral tribunal resolved the case in the absence of an arbitration agreement or under a null or inoperative agreement; c) the establishment of the arbitral tribunal was not carried out in accordance with the arbitration agreement; d) the party was absent at the time when the debates were held and the summoning procedure was not performed according to the law; (e) the decision was given after the expiry of the term of the arbitration, when one of the parties invoked obsolescence and there was no agreement for continuing the arbitration; f) the arbitral tribunal ruled *extra petita* or *plus petita*; g) the arbitration award is not reasoned, it does not indicate the date and place of its ruling or does not include the signatures of the arbitrators; h) the arbitration award violates the principles of public order or good morals or other imperative provisions of the law.

The term is three months if, after the arbitration award is given, the Constitutional Court rules on an exception included in that file, declaring the unconstitutionality of the law, ordinance or provisions of the challenged normative act, which, obviously and necessarily, cannot be dissociated from the legal provisions invoked in the referral.

Conclusions

After 2013 dispute settlement through arbitration has certainly become a way of safeguarding the commercial interest in front of highly formal procedures such as those on which civil proceedings before the courts are based and which have created an oversized and flagrantly dishonest civil legislation. However, the reduction of formal requirements, limited by the fundamental principles which have been referred to in this article, leads to a reduction in costs and, at the same time, a reduction in the time of litigation.

Celerity is one of the advantages that arbitration enjoys in relation to the justice provided in the judiciary courts, because it sets from the very beginning a maximum trial time limit of six months, a term that can only be exceeded in the case of exceptions of strict interpretation. The stability of legal relations, updated swiftly by short-term arbitration resolutions, can only be desirable as long as uncertainty causes much greater losses to the parties in relation to the value of the litigation.

The choice of arbitrators belongs to the parties, while the judge of the case pending trial is appointed randomly, without taking into account the experience in the field. In the absence of specialization of the courts, the appointment of judges with no experience in the field of insurance will only increase the risk of solutions that are not substantiated or based only theoretically. On the other hand, the appointment of arbitrators with practical experience in

the field will lead not only to a well-grounded solution, but also to a reduction of costs from the perspective of the administration of the evidence and the length of the dispute.

An extremely solid principle of arbitration is related to the confidentiality of the case file and of the solution given. On the other hand, as a rule, court hearings of the judiciary courts are public, and the judgments are also publicly pronounced.

The independence, neutrality, moral integrity and impartiality of arbitrators, as well as their professional competence, emphasize the advantage of specialized arbitration as part of the Alternative Dispute Resolution (ADR) system. Therefore, there are arguments that the pronounced resolution will obviously be reasoned, correct and objectively justified, based on the theoretical and practical experience of the arbitrators' panel, of the arbitral tribunal.

All the above arguments plainly lead us to the conclusion that specialized arbitration has real practical advantages both in relation to judiciary court proceedings and to non-specialized arbitrations, not only in terms of the immediate costs, but mainly as regards the quality of the solutions given in cases which require much specific knowledge, such as the domain of insurances.

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