Parallel between the "small reform" law procedure and the arbitration procedure. Practical influences on business environment

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Abstract

The financial blockings determined by the economical crisis in the last years bounded the business environment, through pressures on the legislature and regulations of own associative institutions (commerce chambers), to claim practical measures leading to more rapid and less expensive completion of commercial litigations.

Within the period 2010-2011, these were carried out by adopting the Law 202/2010 and by the New Rules of Arbitral Procedure of International Commercial Arbitration Court of CCIR. The changes of the arbitration norms aim at the simplification of the procedure, but the essential ones – the possibility to attack with action in annulment the conclusions for arbitration adjourn or the agreement of some temporary measures leading to hastening the causes resolutions, are inapplicable, because they are not linked to rigid stipulations of the new CPC.

The changes of Law 202/2010 aim at reducing the litigations resolutions (summoning procedure, term changing, causes postponing). Also, the possibility of cassation with sending to rejudgement is limited.

The changes in the interest of the business environment consist of introduction the mediation, as previous procedure. The normative act specifies adjourning the prescription term during mediation, the right of the judge to fine the parties not present at mediation, after accepting it.

Keywords: *the business environment, reform, norms of arbitration, mediation*

Introduction

In the period of economical increase (2000-2004) and especially in the period of economical boom (2005-2008), the easiness of profit, the growing of the capital rotation speed caused that the business environment not to be based on the amounts of money recovered due to successful ending of economical litigations.

The weight of the obtained amounts of money, reported to the total benefices, was relatively small, and so the favorable ending of litigations resulted from papers, commerce facts represented a secondary activity, abandoned more to lawyers and jurists.

The economical crisis, expressed especially by economical blockage, determined by the reduction of orders and liquidity, made most of the firms base more and more on the money that could be recovered after a favorable ending of litigations.

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So, if at the beginning the duration of litigation was an unimportant factor, now has become essential, making the difference between solvability and insolvability – antechamber of insolvency.

Under these circumstances, the business environment had to analyze the possibilities that could offer a more rapid, less expensive resolution of litigations, referring here to the commercial ones, because with the financial blocking there appeared also salary problems, creating more work litigations.

Business men, lawyers, jurists had to consider the existing alternatives in the Romanian legislation, respectively: resolution by the state instances, arbitration and a new institution within the national legislation – of north American influence – mediation.

Law 192/2006 regarding the mediation and organizing of the mediator profession appeared as a resolution way of the conflicts in a friendly manner, with the help of a third specialized person, as mediator.

With all the modifications brought to this normative act by Law 370/2009 and the Government Ordinance no. 13/2010, with all the publicity and trainings in this matter, we do not consider that this procedure will be successful, especially in commercial litigations, where after months, years of non-payment it is desired to obtain an executory title, and not a new payment promise. It is similar to the weight of "compromises" in comparison with "compromiser clauses, in arbitral litigations".

As a parentheses, Law no. 202/2010, named also "of the small reform" punishes through a new disposition, in the art. 108^{1} paragraph 1 lit. f. "the refuse of the part to be present at the information meeting, regarding the advantages of mediation, in case he/she accepted it, according to the law". The obligatory side regarding the advantages of mediation will be certainly avoided by the tradesmen in need – the simple collocation "the advantages of mediation" not offering the certainty of debit recovery.

It remains for the business environment to choose between arbitrage and judgment procedure in front of the state instances, weighting the time and the procedure costs.

A brief analyze would detect the following advantages of arbitrage in relation with the state justice.

Celerity criteria – of the rapidity to solve the litigation – cannot, in a theoretical way, incline the balance between national justice and arbitrage.

Prof. Octavian Căpățână explains exactly that the arbitrage represents only "the vocation of an increased celerity in solving the litigations"[2].

More concretely, if the procedural terms would be strictly respected in the national procedure, and the lawyers or the parties would want the litigation to be solved, the commercial litigations would be solved in this procedure in a shorter period of time.

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[2] Octavian Căpățână, *Litigiul arbitral de comerț exterior*, Academiei Publishing House R.S.R., Bucharest, 1978, p. 6.

Regarding the litigations whose object is under 100,000 RON, there is, in the procedure of common right only one attack way – the appeal, while the arbitral procedure, because it does not make any difference regarding the value, enjoins two attack ways – action for annulment and appeal, and a supplementary way of attack has longer terms.

Even for amounts over 100,000 RON there are no arguments to affirm that the arbitral procedure takes place in a shorter period of time.

Regarding the previous procedure, according to the rules applied in the first term in arbitrage, a whole procedure – called "previous" takes place, with pre-established terms, respectively 40 days to name the arbiters and to form the arbitral court, 30 days from the request to file statement of defense (in the case of national procedure this term is of 15 days). Also, the summons has to be filed at least 15 days before the term, while the instance postpones the judgment only if this term is shorter than 5 days before the judgment term (art. 89 Code of Civil Procedure).

In the arbitral procedure, the pronouncing can be postponed for 21 days, opposite to 7 days in the judicial one (art. 260 Code of Civil Procedure and art. 360^1 par. 2 Code of Civil Procedure).

Even the term of 30 days for the arbitral instance to communicate the file, in the attack way, to the trial instance for the solving of the action for annulment is not found in the procedure followed by the instances regarding the advance of files in attack ways.

An advantage in the attack ways, only if the decision can be attacked with appeal, would be the fact that the action for annulment is limited to nine motives, while the appeal is a devolutive attack way.

Art. 720^8 Code of Civil Procedure appoints regarding the enforceable character: "The decisions given in first instance regarding the processes and requests in commercial manner are enforceable. Using the appeal does not adjourn the execution". So, we have to emphasize that a judge decision pronounced in commercial manner has enforceable character, and can be put in forced execution, without needing the enforced formula (Decision no. XXXVIII/2007 of the Unite Section of High Court of Cassation and Justice, published in the Official Register no. 764/12.11.2007). Or, the effect of the dispositions of art. 363 par. 3 Code of Civil Procedure: "The arbitral decision communicated to the parties has the effects of a definitive judge decision", respectively the possibility to be invested with enforceable title, show that the arbitral judgment does not represent an enforceable title, but must be invested with this title in a separate procedure.

On the other hand, the arbitral court has to respect strictly some ending terms of the litigation, of 5 months for internal litigations, while in the litigations given to state judgment there is no limitation, the instance can sanction eventually only the "right abuse" (art. 723 Code of Civil Procedure).

Regarding ***the amount of necessary fees*** to be advanced by the parties, the judicial fees have an inferior maximum in comparison with the arbitral ones.

So, for example, at a claim value of 1,000,000 RON the judicial fee, according to law no. 146/1997 is of 3,247.2 RON, while the fee established by the Arbitrage Court Bucharest is double, of 6,500 RON.

The professional specialization of the arbiters has been much argued about in the specialty literature, but, within the last years the specialization grade of the judges has also grown.

Confidentiality represents the biggest advantage of arbitrage reported to the procedure of commune right. This is wanted by a large part of tradesmen who do not wish an excessive transparency of their activity.

Probably the tradesmen are attracted by the confidence and involvement sensation during the procedure – choosing the arbiters, the arbitral procedure, the arbitrage form (ad-hoc or institutional).

Also, the reduced formalism of arbitral procedure constitutes an argument which cannot be ignored by the tradesmen, in comparison with the rigid and even anachronistic procedure of the judgment instance.

The reduced formalism can be linked to the non-conflict attitude of the parties, attitude which seems to be predisposed by the judgment room.

The specialty literature makes ascertainments regarding the fact that arbitral sentences pronounced in international arbitrages have a wider recognition. This aspect, not at all neglected, regarding the intimate belief of those who address the arbitral courts, especially if we refer to the tradition arbitral instances, with international acknowledgement, does not make the recognition procedure of the decisions of these arbitrage centers, or of arbitral sentences in general, to be more facile than the recognition of foreign judgment decisions.

It is obvious that the decision of taking one procedure ore another is difficult regarding the litigations among Romanian juridical or even physical persons; the shorter resolution time is opposed to larger expenses that have to be advanced by the parties.

Regarding the litigations as extrainity element, the option for international arbitrage is a certain one.

Under these circumstances, for the stability of the business environment and for the confidence of the foreign investors regarding the judicial procedure, its predictability and transparency, until the inure of the new civil and criminal codes, predicted for the second half of this year, but certainly postponed until next year, immediate measures have been chosen, by adopting the law 202 from October 25th 2010, with the title "regarding some measures to accelerate the processes resolution".

With the same purpose there existed an implication of arbitral institutions, being adopted by the Leading College of the Commerce and Industry Chamber, organ with full competence in arbitral litigations in Romania, the new Rules for arbitral procedure of the Court for International Commercial Arbitrage, inured on March 25th 2010, respectively March 4th 2011.

The arbitral norms of the Court for International Commercial Arbitrage attached to the Romanian Industry and Commerce Chamber

Regarding the rules of arbitral procedure, the changes are not important, following a reduction of terms, not only in the pre-arbitral procedure, but also in the arbitral one.

A new paragraph 3 of article 30 gives the complainer only 5 days to prove the payment of the registration fee, by contrast to 10 days stipulated by article 39 for the arbitral fees and expenses.

Also, in order to reduce the procedural irregularities that can be appealed at the first trial term, causing the postponing, a new paragraph (3) has been added in article 40: "At least 5 days before the first trial term, the arbitral assistant will contact the parts to prove the preparation of the file for resolution. The communication with the parts is made by telephone, fax or e-mail, etc., the arbitral assistant will file a note regarding the discussed matters, or in case of impossibility of communication, regarding the motives."

Regarding the arbitral procedure, the stipulations regarding the changing of the term have been changed, the new modifications making this possible, without the summoning of the parties, while in the previous formula of the article 61 the summoning for the resolution of such a request was necessary.

An important change appears in article 65^1, newly introduced, which stipulates the attack possibility with action for annulment of the closings of arbitral court for the suspension of the arbitrage course, for the consent of some insurance or temporary measures.

The solving is in the spirit of acceleration of cause resolution, because, opposite to the procedure of commune right, the suspension closing of the arbitral litigation cannot be disputed, and the insurance or temporary measures disposed by the arbitral instance could have been attacked together with the main decision.

We express our doubt regarding the applicability of these dispositions, once the article 364 of the Code of Civil Procedures expressly and restrictedly stipulates the motives of action for annulment, and the resolution of the action is the competence of the judge instances, which cannot permit the extent of the motives of action for annulment.

In the same way expressed itself the High Court for Cassation and Justice – Commercial Section, seeing as inadmissible the annulations action against an interlocutory judgment pronounced by the arbitral court. It has been motivated by the supreme instance that the action for annulment, being a restrictive way to exercise the judging control, not only from the point of view of the decisions that could make the object of the control, but also of the annulment motives, its dispositions cannot be extended also to the suspension closings pronounced by the arbitral court[3].

[3] Decision no. 150 from January 23rd 2009 of the High Court of Cassation and Justice, *Jurisprudence of the Commercial Section for the year 2009*, Hamangiu Publishing House, Bucharest, 2010, p. 208.

It is true that the term for the wielding of the attack way, is in these cases of 5 days from the communication, by derogation from the general 1 month term, envisaged by article 91 from the Rules of arbitral procedure and 365th article 2nd paragraph Code of Civil Procedure.

For a change, the closing of rejection as inadmissible, of the constitutional challenge of art follows the same procedure regarding the contestability, while in initial form, such a closing was not submitted to any attack way. This eventual contestation being made during the arbitral procedure, can lead to a significant deferral of the resolution.

As a specification, it has been also introduced a new motive for admissibility of the action for annulment: "if, after the pronouncing of the arbitral decision, the Constitutional Court has pronounced about the invoked exception in that cause, declaring the law unconstitutional, the ordinance or the disposition in a law or ordinance, which is the object of that exception or another disposition in the attacked act, which, in the necessary and evident way, cannot be dissociated by the previous specifications in notice".

The idea is correct, but, we repeat, the motives for the action for annulment cannot be extended. It is obvious that there has to be the possibility of changing the arbitral decisions, but the solution should be an exceptional "revising", and not the completion of some legal stipulations by an inferior level act. No matter that for example the New Code of Civil Procedure stipulates that by applying at the institutionalized arbitrage, "the parties choose automatically its procedure rules" (art. 610), and art. 599 from the same code stipulates like the actual regulation, the motives that could lead to the admission of an action for annulment.

We will mention that by the dispositions of the New Code of Civil Procedure referring to the judgment of the action for annulment, it returns to the procedure confirmed by Decision no. 5 from June 25th 2001 of the High Court for Cassation and Justice, regarding the nature and competence for the resolution of the action for annulment against the arbitral decisions.

In this way it has been stated the fact that the action for annulment constitutes attack way, and the resolution competence belongs to the judge instance. The New Code of Civil Procedure stipulates that the competence to solve action for annulment belongs to the appeal court where the arbitrage took place (art. 601), "in the panel envisaged by the law for the appeal judgment" (art. 604 par. 1).

It is a more exact stipulation in the sense that the action for annulment represents an attack way[4], not as the dispositions in force of the art. 366[1] Code of Civil Procedure, introduced by Law no. 219/2005 by the approval Government

[4] For a different opinion, see Viorel Mihai Ciobanu, „Despre natura juridică a acțiunii în anulare a hotărârii arbitrale", in the Magazine *Dreptul* no. 1/2002, p. 76-83; for a concordant opinion – each action for annulment is an extraordinary attack way, by judging (not judicial) control, in Savelly Zilberstein, Ion Băcanu, „Desființarea hotărârii arbitrale", in the Magazine *Dreptul* no. 10/1996, p. 27-33.

Emergency Ordinance no 138/2008[5], according to which "in all cases regarding the arbitral decision, the action for annulment formulated according to art. 364 it is judged by the panel envisaged for judgment by the first instance, and the appeal is being judged by the panel envisaged by this attack way".

The decisions of the Appeal Court are definitive (art. 604^4 Code of Civil Procedure), and regarding the use of the extraordinary attack way of the appeal, possible in the actual regulation of the Code of Civil Procedure, for the motives envisaged by art. 304 Code of Civil Procedure, the possibility for the superposition of the appeal according to the New Code of Civil Procedure is limited.

The stipulation in the 477th art. Paragraph 3 according to which: "the appeal tries to give the High Court of Cassation and Justice the examination, under legal conditions, of the conformity of the attacked decision with the applicable right rules", seems to be very important.

It does not have to be omitted the fact that the decisions given in actions with the object evaluable money requests, up to 5,000,000 RON, cannot be subject to appeal.

Still, as a general rule, the promotion of the discourse against the pronounced decisions in action for annulment is possible, because the legislator uses in art. 604 the collocation according to which "the court of appeal will judge the actions for annulment in the panel envisaged by the law for judging the appeal", while, if it were to mention the resolution in appeal, the used collocation would have been in consequence.

Also the art. 94 from the New Code of Civil Procedure referring to the material competence of the judging instance, envisages the possibility for "the appeal courts to judge not only in first instance, as appeal instance, but also "any other requests given by law in their competence".

Together with the appeal, for the motives restricting envisaged in the civil procedure, against the given decision in action for annulment can be exercised other extraordinary ways: legal contest for annulment and revise.

In order to conclude in the same manner, art. 91 of the Rules for arbitral procedure stipulates that, regarding the admission of the constitutional challenge of art, the fact that the exercising term of the action for annulment would be in this case of 3 months from the publication of the decision of the Constitutional Court in the Official Register. In this situation there appears the problem of re-correlation of the legal stipulations that limit, no matter the motive, the one month term.

Norms envisaged by Law 202/2010

The legal stipulations contain enough provisions that confirm the intention of the legislator exposed in the title of the law "of acceleration of process resolutions".

[5] Gabriel Boroi, Octavia Spineanu-Matei, *Codul de procedură civilă adnotat*, Hamangiu Publishing House, Bucharest, 2007, p. 801.

So, art. 132^1 refers to the possibility to give "shorter terms, even from one day to another". This was not forbidden in the past either. More than this, in commercial litigations this provision was express, in art. 720^6 paragraph 2 Code of Civil Procedure, but concretely, the granting of terms was limited due to the real possibility of the instances to administrate the files under the aspect of material time to their disposal and the necessity to respect the procedure norms (for example the summoning of the parties in the case where the provisions of art. 153 paragraph 1 Code of Civil Procedure are not incident).

Another stipulation that is found in the new Rules of arbitral procedure has been inserted in art. 132^1 according to which "the judges will dispose the verifying of the summoning and communication procedures disposed for each term. If there is the case, the instance will order the restoration of these procedures. Beside these measures, the instance will dispose that the summoning of the parties to be done by telephone, telegraph, fax, e-mail or any other communication mean that ensures the transmission of the text of the act for communication for being present at the term, and also the confirmation of act receiving, if the parties have indicated the corresponding dates for this purpose. If the communication has been done by telephone, the clerk will make a report about the notice method and its object".

Here we deal with the generalization of the dispositions from the chapter referring to the resolution of commercial litigations, respectively art. 720^4 par. 3 Code of Civil Procedure.

It has been more clearly stated in art. 136 the fact that "the procedure exceptions that have been not proposed under the stipulations of art. 115 and 132 cannot be invoked during the trial, beside those of public order that cannot be invoked during the process, in law conditions and cases."

A really useful stipulation is that from art. 153, according to which the party, legally summoned by handing over the summoning, or giving the term, in person or by a legal/conventional representative, will not be summoned in the litigation in front of that instance.

A similar stipulation with the one from arbitral procedure allows the changing of the trial term without summoning the parties – art. 153 par. 3 Code of Civil Procedure. The previous regulation stipulated the summoning if the parties knew the term, or the summoning had been sent.

Also the fact that the decisions given in litigations referring to goods evaluated less than 2,000 RON cannot be subject to any attack way, being irrevocable from the moment of pronouncing of the fond instance, it can be seen as an advantage.

The limitation of cassations to a single sending is also a useful measure, being envisaged by art. 312 par. 6^1 that indicates also the cassation motive: "The cassation with sending can be disposed a single time during the trial in case the instance whose decision is appealed solved the process without entering the fond research, in case the trial took place without the party not regularly summoned, respectively in case of cassation for lack of competence. In case when, after cassation with sending according to art. 5 or 6, there occurs a new cassation in the

same case, the courts will re-judge in fond the cause, the stipulations of art. 4 being applicable."

The express stipulation according to which the tribunals and courts of appeal will have to re-judge after cassation with the seizing of the litigation where "any legal proof are admissible", is in the spirit of the law, but the adduction of stipulations of art. 313 Code of Civil Procedure, according to which the High Court for Cassation and Justice can scrap the decision every time it is necessary, we consider to be in contradiction with the above mentioned.

The stipulations referring to the reduction to 3 months from the instance notification of the appeal judge term in the interest of law – art. 330^6 Code of Civil Procedure is a stipulation that interests the judge instances, not bringing any immediate advantage for the environment, especially when the pronounced decisions in appeal in the interest of law produce effects only for the future.

The important changes have been introduced in Chapter XIV, containing dispositions regarding the resolution of litigations in commercial matter, respectively what is of interest for the business environment.

The stipulations of art. 720^1 Code of Civil Procedure referring to the compulsoriness of conciliation before the introduction of trial request, have been completed in the sense that during the previous procedure, the complainer has at disposal the mediation and conciliation for solving the litigation, realizing the transpose to the European directive regarding the compulsoriness of mediation.

In this sense, in order to avoid the loss of material action right by prescription, it has been inserted a new disposal that stipulates that the prescription term is suspended during the mediation, but nor more than 3 months since its beginning. The stipulation, very welcomed, is incomplete, because it does not extend over conciliation (art. 720^1 paragraph 1^1 Code of Civil Procedure).

Referring to arbitral procedure established by stipulations of 720^1 Code of Civil Procedure, we have to mention by until adopting the law 202/2010, its non-fulfillment has been interpreted in practice as a non-reception end, its sanction being the rejection of action, as prematurely introduced, the exception being called upon from the instance.

In the actual regulation, by provisions of art. 109 paragraph 3 Code of Civil Procedure – "the non-fulfillment of previous procedure cannot be called upon by the accused, by statement of defense, under the sanction of decline", the dispositive character of the norm in art 720^1 Code of Civil Procedure is assigned, the sanction being relative nullity, covered by non-calling up a fix term.

These stipulations give the procedure for the resolution of commercial litigations a higher grade of flexibility, and the intention to delay the solving of a dispute can be avoid sometimes, in the sense that the accused prevailed after the first day of the non-compliance with the stipulations of art. 720^1 Code of Civil Procedure, without proving damage and without showing the will to solve the litigation in a friendly manner, in order to paralyze the justice step of the complainer.

Even before the change, the instances avoid interpreting very tough these stipulations, retaining that the terms, conditions, means and manifestation ways of the parties, and the content of the communicated papers, do not represent conditions requested by art. 720^1 Code of Civil Procedure, being sufficient to result only the attempt to solve the misunderstandings between the parties, in a friendly manner, anterior to promotion of the action to court.

By introducing art. 720^1 Code of Civil Procedure the legislator pursued the reduction of instances, the discipline and consciousness of the parties about the advantages (avoid duration and costs of a process) of exercising the rights and assume obligations, in the spirit of the notion "gentlemen's agreement".

The stipulation of art. 720^4 paragraph 3, referring to the applicability of stipulations of art. 132^1 paragraph 2 Code of Civil Procedure, introduced by this normative act, does not represent a practical advantage for the complaining tradesman, being only a technical legislative matter. The stipulations referring till now only at commercial litigation about verifying the summoning and communication procedures between terms, their restoration, communication by any mean, being extended to the whole civil procedure.

Also the stipulations of art. 720^6 paragraph 2 Code of Civil Procedure, as they have been modified by references to art. 132 paragraph 3 Code of Civil Procedure represents an extent of the right of the judges to oblige the parties or other participants to the trial to present papers, written relations, answers or any other steps necessary to solve the case.

In our opinion, the law text is wrong here, by references to stipulations of art. 132 paragraph 3 Code of Civil Procedure instead of art. 132^1 paragraph 3 Code of Civil Procedure.

The text of art. 720^6 paragraph 2 Code of Civil Procedure mentions the fact that the trial can continue in public meeting or in council chamber in the following day or at short successive terms, but for the above mentioned motives, its applicability in practice has some deficiencies.

The text of art. 132 paragraph 3 Code of Civil Procedure is the following "the complainer can ask for a term to file the statement of defense at the reconvention request and to propose the defense evidences", instead, art. 132^1 paragraph 3 Code of Civil Procedure envisages that the "judges can establish for the parties or for their representatives and for other participants in the process duties regarding the filing of proves with papers, written relations, written response to cross examinations according to art. 222, it's assisting in order to solve in term the expertise and any other necessary steps to solve the case. The stipulations of paragraph 2 apply correspondingly."

We consider in fact an evident mistake that should be rectified by the legislator.

A last change regards art. 720^7 Code of Civil Procedure. In fact, in the case of the article referring to the obligation of the instance to insist for the solving of the cause by parties understanding, the eventual understanding being established by

irrevocable and executory decision, there have introduced three paragraphs regarding the exclusivity of the mediation procedure.

The stipulations are foreign from the law body. The judge "recommends to the parties" the mediation, although the competence of a judge had never such obligations, mediation being an optional question, facultative for the parties.

Or, the indicated text mentions that since the parties accept "the recommendation", they have to appear in front of the mediator, under the sanction of fine mentioned above, introduced by the same normative act, in case of art. 108^1 Code of Civil Procedure.

As we mentioned above, the mediation can constitute a delay cause of the file resolution, since the instance has to give the parties a term of minimum 15 days to file the transcript made by the mediator regarding the result of the information meeting.

In conclusion, with the exception of these insertions regarding the mediation procedure, the chapter regarding the resolution of litigations in commercial manner remains a favorable provision of the business environment, especially if we report to art. 720^8 and 720^9 Code of Civil Procedure, referring to the executory character of the given decision in the fond of the case and of the fact that the irrevocable is an executory title without other formalities.

Conclusions

Analyzing the above mentioned we can conclude that although the state and the "private" legislator, if we refer to the Rules of arbitral procedures of the Court of International Commercial Arbitral Bucharest, tried to find favorable solutions so that the business environment not to be blocked by judicial procedures, we cannot say that this thing has not succeeded, but still the weight of the favorable dispositions being superior to those constituted in obstacles.

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