

## **PRIVATE LAW**

### **THE COMENCEMENT OF THE ARBITRAL PROCEEDINGS**

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#### **ABSTRACT**

*The commencement of the arbitral proceedings is a complex and important phase of any arbitration, since establishes the main boundaries of the litigation process. The arbitration’s commencement requirements are extensively addressed by the procedural rules of the arbitration institution designated by the parties to organize the resolution of their dispute. Whenever the arbitration is not organized by an arbitration institution but by the parties themselves (Ad-Hoc Arbitration) and neither the parties, nor the arbitral tribunal have established or opted for other procedural rules, Articles 571 – 575 of the Romanian Civil Procedure Code offer rules that are applicable to the commencement of the arbitration procedure; these rules are also applicable whenever the procedural rules of the designated arbitration institution are silent or do not provide otherwise.<sup>1</sup>*

**KEYWORDS:** *Public Law, Civil Procedure Law, Commencement of Arbitral Proceedings, Request for Arbitration, Statement of Defense, Counterclaim, Procedural Acts.*

#### **1. SETTING UP THE ARBITRAL TRIBUNAL**

Whenever the parties are organizing an ad-hoc arbitration, their first step is to establish an arbitral tribunal, according to their arbitration agreement or to the applicable provisions of the Civil Procedure Code. The selection and the setting up of the arbitral tribunal is a time consuming process, involving both parties’ cooperation and sometimes the participation of the state courts.

The parties have to collaborate in establishing the arbitral tribunal; in this respect the claimant shall notify the defendant, through a Request for Arbitration, upon his intent to start an arbitration and will appoint an arbitrator (provided that

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<sup>1</sup> This presentation constitutes a revisited part of the author’s contribution to a collective work entitled ARBITRATION IN ROMANIA. A PRACTITIONER’S GUIDE, edited by C. LEAUA and F. A. BAIAS, published by Kluwer Law International B. V., The Netherlands, in 2016 and, as such, is reprinted with permission of Kluwer Law International.

such appointment has not been done through the arbitration clause) and will ask the defendant to also do so. The appointed arbitrators will, thereafter, nominate their chairman.

The parties may, nevertheless, invest the arbitral tribunal through a jointly drafted and signed minute, showing out the facts in dispute and the legal points at issue. When, due to the deterioration of their cooperation, the parties are not able to establish an arbitral tribunal, this burden will be deferred to the state court.

Whichever solution will be chosen by parties, according to Article 566 RCCP, the arbitral tribunal will be legally formed on the date when everyone or all appointed arbitrators have accepted the designation. This is the moment of the commencement of the arbitration proceedings, an important moment since the law attaches to it various legal consequences as it is, for example, the duration of the arbitral proceedings.

It is worth mentioning that Article 3.2 of the UNCITRAL Arbitration Rules establishes that “*Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent*”.<sup>2</sup> This solution does not require the setting up of the arbitral tribunal as a prerequisite for commencing the procedures, saving the claimant a lot of time and it is, definitely, a better solution than that endorsed by the Romanian law.

## 2. THE REQUEST FOR ARBITRATION.

As mentioned before, the arbitral proceedings are triggered by a request for arbitration filed by the claimant. Article 571 (2) RCCP also provides for an alternative to the unilateral request for arbitration, allowing the parties to jointly initiate the arbitral proceedings, through a minute executed in front of the arbitral tribunal. Of course, when the parties are already in a strong disagreement, such alternative is highly improbable.

According to Article 571(1) RCCP, the request for arbitration must be submitted in written form and will include some specific elements, several of which deserve a proper consideration:

(a) The request must provide identification data of the parties, including full name, residence, personal numeric or fiscal code, registration number, banking accounts and so on. If part of the identification data of the defendant is not known to the claimant, he will have to at least provide the name and residence of the defendant.

If the claimant is a natural or legal foreign person, then a residence in Romania should be indicated and all the notices and communications regarding the arbitral dispute will be addressed to such residence.

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<sup>2</sup> The UNCITRAL Arbitration Rules have been adopted through Resolution no. 31/98 of 15 December 1976 of the General Assembly of the United Nations and have been revised in 2010.

The claimant will also indicate the name and the qualifications of the person that is representing the claimant in the arbitration, providing proof of such quality.

(b) The claimant will have to indicate the arbitral agreement that constitutes the basis of its decision to submit the claim to arbitration. Such arbitral agreement may embrace either the form of an arbitration clause inserted into a contract or into a separate document that makes a reference to the said contract, either the form of an arbitration compromise that is an independent and separate agreement to arbitrate an already existing dispute. In both cases, proof of the arbitration agreement should be attached to the request for arbitration. That arbitral agreement will constitute the foundation of the arbitral tribunal decision on jurisdiction; therefore, any irregularities that may be adversely interpreted will complicate the parties' choice of venue and the arbitral tribunal's decision.

(c) The request for arbitration will mention the object and the value of the claim and will indicate the methods or the calculation used to determine such value. The expression "*the object of the claim*" is used by the Romanian lawmaker to identify the relief or remedy sought by the claimant. For instance, the claimant may ask the arbitral tribunal to ascertain a legal or contractual right of the claimant or to order the defendant to do something or to give something to the claimant. Whenever such object is expressed in money, the value of the claim should be proved with legal documents and demonstrated through calculation tables (i.e., for penalties or interest fees).

(d) The claimant will also indicate the facts at issue as well as the legal points in dispute, mentioning the legal reasons of the claim; likewise, the claimant will point out the evidence that supports its claim. Actually, the law requires the claimant to determine a complex of issues, in order to allow the arbitral tribunal to decide on its claim.

First of all, the claimant has to provide an accurate presentation of the factual context that triggered the dispute. Secondly, it has to indicate the legal issues risen by the parties' dispute and to mention the legal provisions on which it bases its claim. Third, the claimant will have to indicate and to provide evidence supporting its claim (documents, fact witnesses' testimonies, expert and legal expert reports, etc.).

With regard to the evidence indicated by the claimant, the law does not actually requires such evidence to be attached to the request; according to Article 587 RCCP the said evidence will be "proposed" in the request for arbitration, but the taking of evidence will be decided and administered by the arbitral tribunal, which may set down time limits for the presentation of the evidence accepted by the tribunal.

In any case, the claimant will usually attach to its request such evidence, consisting of written documents, as required to prove, at least, the jurisdiction of the arbitral tribunal and the basic facts and legal points in dispute. Such documents

will be delivered to the defendant and to the arbitrators, together with the request for arbitration.

(e) The law requires the claimant to indicate, within the request for arbitration, the names and residences of the arbitrators. Such a task may be complied with only if the parties have already gone through the formalities of setting up an arbitral tribunal. Usually, the arbitration agreement consist of an arbitration clause included in the parties' contract, providing for the right of the claimant to submit to arbitration all or certain disputes which have arisen or which may arise between the parties, in respect of a defined contractual relationship.<sup>3</sup> Such an arbitration clause does not mention the names and particulars of the arbitrators, because the parties are considering disputes that may arise during the performance of their contractual obligations and are only indicating the means by which the arbitrators will be appointed.

Therefore, at the time of filing a request, the claimant is able to indicate the name and particulars of all the arbitrators only if this information is already included in the arbitration agreement or the arbitral tribunal has been already set up. But, of course, the claimant will be able to provide the name and the details of the arbitrator appointed by the claimant, prompting the defendant to also make its appointment.

(f) The request must be signed by the claimant. As a general rule, a request that lacks the signature of the claimant is null and void (Article 196 RCCP); this omission may be covered by signing the request in front of the arbitral tribunal. That means that such nullity is relative and the irregularity may be covered until or during the first arbitration hearing.

The claimant has the obligation to deliver to the defendant and to every arbitrator a copy of the request for arbitration and of the evidence submitted. This is an important obligation of the claimant, since the receipt of the said copy and evidence triggers various obligations for the defendant, the main being to file a statement of defense.

The delivery should be addressed directly to the defendant and the arbitrators; the arbitral tribunal will not act as reception and distribution point for the procedural papers and documents issued by the parties. That means that the claimant will have to prove the delivery of the request, should the defendant deny receipt of it. Article 577 RCCP deals with these issues.

### **3. THE STATEMENT OF DEFENSE.**

Within 30 days of receiving the request for arbitration, the defendant must submit its statement of defense. Following the structure of the claimant's request, the statement of defense will mention the exceptions raised by the defendant in its

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<sup>3</sup> See "Article 7 - Definition and form of arbitration agreement" of UNCITRAL Model Law on International Commercial Arbitration (Model Law).

defense, its arguments regarding the facts at issue and the disputed legal points as well as the evidence that he intends to submit to the tribunal. Correspondingly, the statement of defense will also provide all the mentions required by Article 571 RCCP in regard to the request for arbitration, as the names and particulars of the parties, of the arbitrators and of the person that is representing the defendant in the proceedings (including proof of the position or qualifications of the representative) and signature of the defendant.

In order to promote the celerity of the arbitral proceedings, Article 573(2) RCCP requires the defendant to disclose its exceptions and other means of defense within its statement of defense or, if he failed to do so, until the first hearing for which he was duly summoned. The failure to comply with this requirement deprives the defendant of the right to further raise or argument those exception and defenses; this is a civil penalty that, practically, terminates the right of the defendant to present and take advantage of such exceptions and defenses in front of the arbitral tribunal.

This consequence concerns all exceptions, irrespective of their nature (absolute or relative); providing so, Article 573(2) RCCP regulates an important deviation from the common law rule expressed by Article 247 RCCP that shows that the absolute exceptions (based upon the infringement of public policy norms) may be raised by the parties or by the court in any stage of the civil process.

If the defendant fails to submit, in due time, its statement of defense, the arbitral tribunal may order the defendant to pay the arbitration costs caused by the postponement of the resolution of the arbitral dispute, if any (Article 573(3) RCCP). As a rule, Article 595 RCCP establishes that the arbitration costs will be distributed between the parties, according to their agreement; in absence of such agreement, the costs will be paid by the party which lost the arbitration dispute. Therefore, the above mentioned provision of Article 573(3) RCCP is an exception to the rule, allowing the arbitral tribunal to order the defendant to bear a part of the arbitration costs, even if the claimant's request has been dismissed.

A copy of the statement of defense and the attached documents will also be communicated to the claimant and each arbitrator; that means that the 30 days period of time mentioned by Article 573(1) RCCP, that starts running from the moment the defendant receives the request for arbitration has its terminus point at the moment when the arbitrators have received the statement of defense (or when the defendant mailed it to the arbitrators).

#### **4. THE COUNTERCLAIM**

The defendant that has a claim against the claimant, claim that arises from the same juridical rapport, may file a counterclaim with the arbitral tribunal (Article 574 RCCP).

The provisions of Article 574 RCCP are restrictive if compared with those of Article 209 RCCP that regulate the ordinary counterclaim, filed before a state court.

Such a common counterclaim may present claims that derive from the same juridical rapport with the claimant's claim or which are closely related to such claim. That means that the defendant's own claims do not need to be born out of the same contract, but may originate from the performance of an auxiliary contract, such as a technical assistance contract that supports a sale contract.

The option expressed by Article 574 RCCP may be determined by the specificity of the arbitration, as a private alternative jurisdiction, based upon the agreement of the parties to submit their dispute to an arbitral tribunal and not to the state jurisdiction. As a result, a counterclaim may originate only from the same contract or juridical rapport that provided the arbitration agreement. Even if resulting from a closely related juridical rapport, a claim cannot be heard by an arbitral tribunal as long as it is not based upon the same arbitration agreement.<sup>4</sup>

On the other hand, this is not a very powerful argument; identical arbitration agreements may be included in distinct but related contracts and one cannot see the reason to deny the parties access to the same arbitral tribunal, in order to globally solve their disputes based upon a complex contractual relationship.

The Model Law does not apply such restrictions, Article 2(f) of the Model Law stating only that where a provision of the law refers to a claim, it also applies to a counterclaim. Likewise, the International Chamber of Commerce Rules of Arbitration, commonly known as ICC Rules<sup>5</sup>, do not provide for any material restrictions in filing of a counterclaim, only asking the defendant/respondent to provide a description of the nature and circumstances of the dispute giving rise to the counterclaim [Article 5(5) of the ICC Rules].

What happens if the counterclaim filed by the defendant is not derived from the same juridical rapport as the main claim? The solution, in an ordinary state jurisdiction will be to form a distinct file that will be separately tried. This option will not work, as a principle, in the arbitration provided for by Book IV of the Romanian Code of Civil Procedure; if the counterclaim is contested on the grounds that is not arising out of the same contract that contains the arbitration agreement, the arbitral tribunal has to dismiss the counterclaim. This solution is based on the principle that "*the arbitral tribunal may not exercise jurisdiction over claims that are not within the scope of the arbitration agreement*"<sup>6</sup>.

Nevertheless, Article 592(3) RCCP is stating that any irregularity of the procedural acts is purged if not invoked, in due time, by the interested party; that

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<sup>4</sup> Such discussion heavily depends on the definition of the juridical rapport. *Stricto sensu*, the juridical rapport is construed as a single contract; *lato sensu*, it may be conceived as a net of various acts that compose the entirety of the parties' will to conclude a unique juridical rapport (e.g. a sale contract, additional acts, technical assistance agreement, licence agreement, etc.)

<sup>5</sup> The International Chamber of Commerce Arbitration Rules have been revised in 2012 and constitute the substance of ICC Publication 850E.

<sup>6</sup> *Redfern and Hunter on International Arbitration*, Fifth Edition, Oxford University Press, 2009, p. 383.

means that, since the counterclaim, as well as the claim, is considered by the Romanian law as an “act of procedure”<sup>7</sup>, the arbitral tribunal may retain jurisdiction on the counterclaim, especially when the contract that it arises from contains the same arbitration clause as the contract giving rise to the claimant’s claim. Such a solution may be grounded, also, upon an extensive construction of the legal expression “the same juridical rapport”, since one may consider that a collection of closely related and interdependent contracts may constitute the substance of the same complex juridical rapport, expressed in various facets or hypostases.<sup>8</sup>

The counterclaim may be filled only within the 30 days period of time granted to the defendant in order to file the statement of defense or, at latest, prior to the first hearing for which the defendant was duly summoned [Article 574(2) RCCP].

If the counterclaim is filed after the elapse of such time limit, the arbitral tribunal may retain it, if the claimant is not objecting, Article 592(3) RCCP being applicable. But, if the main claim is ready to be decided and the late filed counterclaim is delaying the solution of the arbitration dispute, the arbitral tribunal may decide to judge separately the claim and the counterclaim, unless the joint judgment of both said claims is required for the unitary solution of the arbitration file (Article 210 RCCP).

The counterclaim will meet the same conditions as the request for arbitration. It will be submitted in written and will include all the requirements provided for by Article 571(1) RCCP; likewise, a copy of the counterclaim and of the attached documents will be communicated to the claimant and to the arbitrators.

Since the claimant will be a respondent to the counterclaim, he will assume all the procedural rights and obligation of a defendant; he will have to file a statement of defense against the counterclaim, which will be delivered within a time limit that, in absence of any legal indication, will be established by the arbitration tribunal. Its statement of defense will have the same regime as the one delivered by the defendant against the main claim.

## 5. PROCEDURAL ACTS

There is no legal definition of the procedural acts, but the wording of Article 148 and following provisions of RCCP allows the conclusion that any request addressed to a court as well as summons, orders or judgments of the court are procedural acts. Likewise, when regulating the communication of the procedural acts, Article 577(1) RCCP mentions the written submissions of the parties, the summons, the arbitral awards and the minutes of hearings.

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<sup>7</sup> See Article 148 RCCP.

<sup>8</sup> For a similar rationale, but based on the economical interdependence of several contracts, see R. B. Bobei, *Arbitrajul intern si international. Texte.Comentarii. Mentalitati*, Editura C.H.Beck, Bucuresti, 2013, p.574

All these procedural acts will be circulated through the parties or to the parties and, as the case may be, to the arbitrators. The communication will be made through a registered letter (declaring the content), with acknowledgement of receipt; such precautions provided by the law are designed to secure the proper information of the parties and to protect their rights to defense. It is worth mentioning that, when regulating the communication of the procedural acts in the arbitration proceedings, the law is, pointless, more restrictive than it is when is addressing the standard procedure before the state courts; in such cases, the communication of the procedural acts may be done through facsimile messages, electronic mail and any other means that secure the conveying of the text and acknowledgement of the receipt, provided that the parties delivered to the court the required information like e-mail address and facsimile machine numbers.

Notices addressed to the parties regarding other measures ordered by the arbitral tribunal may be sent by facsimile messages, electronic mail or any other means that secure the conveying of the text and acknowledgement of the receipt. These are procedural acts of lesser importance or that require a speedier delivery and, therefore, the law promotes more rapid and modern means of communication.

As an alternative, any procedural act that is a written document may be hand delivered to the interested party, the receipt being acknowledged through signature affixed on the document or on the notice of delivery.

In order to secure proof of delivery of the procedural acts, the arbitral tribunal will file any evidence attesting the communication of the procedural acts, which may be later referred to by the parties or by the arbitral tribunal.

Whenever the arbitral tribunal communicates a summons, it will take measures as to allow for a 15 days interval between the receipt of the summons and the hearing so convened. This period is provided in order to allow the convened party to react and to prepare any written submissions or evidence required by the tribunal.

In order to produce their legal effects, the procedural acts must be fulfilled or communicated under the conditions set out by the law; as a rule, a procedural act that is carried on by infringement of the legal material or formal requirements is null.

Nevertheless, with regard to the arbitration proceedings, the lawmaker has adopted the doctrine of safeguard of the procedural acts, aiming to preserve their validity as long as the parties and the arbitral procedure were not harmed. To this effect, Article 592(3) RCCP provides that any irregularity of the procedural acts is covered if the affected party did not invoke it at the same hearing during which the irregularity has been produced or, if the party missed that hearing, at the first next hearing for which the parties were legally summoned, but before the closing hearing.

This approach widely differs from the common rules that govern the nullity of the procedural act. Articles 174-179 RCCP regulate the causes, the forms, the

remedies and the effects of the nullity of the procedural acts. The procedural acts stricken by nullity may be cured only if their cause has been eliminated and, if the irregularity consists in breach of imperative rules of law, the nullity is absolute and may be invoked not only by the concerned party, but by any interested party, the judge or the prosecutor.

This is one of the few areas where the Romanian Code of Civil Procedure adopted an innovative and audacious approach, renouncing to simply adapt the common procedure rules and providing an uncomplicated system that offers efficiency to the arbitral proceedings.

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