

The Arbitration Decision in the Light of the Legal Provisions: Theoretical and Practical Aspects

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Abstract

The arbitration decision is enforceable and forcefully executed as a judgment. The arbitration decision is binding on the parties under the arbitration convention and the law, and it is treated as a final judgment having the force of *res judicata*. The content of the arbitration ruling is similar to the judicial decision. The fundamental principles of arbitration are the principle of equal treatment of litigants, the principle of the right to defense, the principle of the contradictory, the principle of flexibility of arbitration proceedings, the principle of confidentiality, the principle of availability, the principle of the right to a fair trial and the principle of the active role of the arbitrators. The arbitral ruling must be issued within the period set by the parties or by the law. In the absence of clauses accorded by the parties, a settlement period of five months is given, the period running from the date of constitution of the arbitral court. Also, under the term provided by law, the pronouncement of the arbitration ruling may be suspended or extended. The arbitration ruling/decision must be put in written form and must be signed by all arbitrators, unless it is drawn up a separate opinion.

Key-Words: Arbitration, Decision, Agreement, Arbitral Court, Condition, Interpretation

1. Introduction

1.1. Concept. Legal requirements. The legal nature of the arbitration decision

1.1.1. Legal provisions

The arbitration decision is subject to several chapters from Book IV of the Romanian Civil Procedure Code, including

- chapter IV "The arbitration decision" – article no. 601 – 607;
- title V "Declaring the arbitration decision void" – article no. 608 – 613;
- title VI "Enforcement of the arbitration decision" – article no. 614 – 615;

and also from Book VII, about International civil trial, including

- title IV "International arbitration and the effects of international arbitral decisions", chapter I "International arbitral trial" – article no. 1111-1123;

- chapter II "The effects of the international arbitral decisions" – article no. 1124-1133.

The provisions of the Romanian Civil Procedure Code are developed by the regulations of the permanent arbitration institutions, to which express reference is made. Of these regulations, priority is given to the Rules of Arbitration of the Court of International

Commercial Arbitration attached to the Chamber of Commerce and Industry of Bucharest, which is regulating the most advanced in the field, serving as a model for other such institutions in the country (Civil Procedure Code, 2017).

1.1.2. Definition

The arbitration decision is a jurisdictional act through which the arbitral court, composed of arbitrators appointed by the parties in the arbitration agreement or under that convention, settles with a certain procedure, arbitral litigation resulted in law or based on an explicit agreement of the parties, in fairness. Therefore, the arbitration decision is binding on the parties under the arbitration convention and the law, and it is treated as a final judgment having the force of *res judicata* and being also capable of being enforced.

The arbitration decision has the same status in law as the whole arbitration and it is binding on the parties just like a contract.

1.2. Categories of Arbitration Decisions

The classification of the arbitral decisions is made according to several criteria:

- As the amid dispute is resolved or not, the decisions are divided into sentences and conclusions.
 - After spreading the contents of "conviction" decisions fall into the full judgment and partial judgment.
 - After the criteria of "conviction", there are decisions only "conviction" or "conviction" alternative;
 - After the appearance of the duration of action, proper judgment and provisional judgments;
- As it may or may not be enforceable, arbitral decisions are divided into enforceable judgment and unenforceable judgment;
 - After the arbitral institution who gives the decision or after the way how the arbitration is organized, there are decisions gave in ad hoc arbitration and rulings gave in institutionalized arbitration;
 - After how the court is composed, the judgment of one arbitrator and the judgment of a court of arbitration board;
 - Once the powers granted to the arbitrator, arbitration rulings can be as strict or in equity;
 - After their effects, decisions may be constitutive or declaratory;
 - As the parties have not participated in the debate proceedings, decisions may be given in the presence or absence of the parties.

2. The Form and the Content of the Arbitration Decision

The ruling/decision shall be made in written form and must contain the particulars specified by article no. 603 of Civil Procedure Code. Therefore, it must be written and communicated to the parties within one month from the date of pronouncement. This term is not a limitation period, but it must be respected for the need for speed of arbitration, because overcoming it could attract liability under the provisions of article no. 565. According to the practice of the Court, the ruling shall be written by an umpire and finalized with arbitrators who entered the composition of the arbitral court. The arbitration decision does not exist if it does not take a written form, this requirement being expressly provided by law. This requirement is necessary for several reasons: to preserve them, to communicate it to the

parties and the reasons underpinning knowledge solution for the exercise of judicial review and enforcement of the arbitral ruling.

The content of the arbitration ruling is established by art. 603 paragraph 1 Civil Procedure Code and it is similar to the judicial decision:

- the nominal composition of the arbitral court, place and date of the judgment;
- the name of the parties, their domicile or residence or, where applicable, name and address, the name of the representatives of the parties and other persons who participated in the debate dispute;
- mentioning the arbitration convention under which the arbitral proceedings;
- the subject of the dispute and a summary of the parties;
- factual and legal grounds for the judgment, and in case of fairness arbitration reasons as underlying the solution;
- the judgment;
- signatures of the arbitrators and, if necessary, arbitration assistant's signature.

3. Deliberation and Pronunciation of the Arbitral Ruling

In all cases, the judgment must be preceded by deliberating in secret, with the participation of all arbitrators in person, being recorded in the ruling this participation. This debate, like the entire development process, must be made taking into account the following fundamental principles of arbitration proceedings:

3.1. The Fundamental Principles of Arbitration

The Principle of equal treatment of litigants

This principle is present in all stages of the arbitral process, the failure to conduct concerned with the invalidity of the arbitration ruling. CAB Rules of Arbitration of the Arbitration Procedure provide that all parties must provide, under penalty of nullity of the arbitration award, equal treatment. Applying this principle requires unrestricted access to all procedure subject to the case.

The Principle of the right to defense

This principle has two meanings in the material sense it includes the whole complex of rights and procedural safeguards that are established by law in order to enable the parties to defend their legitimate interests. In a formal sense, that means the right to defense and the right side to get a defender to have such a qualified defense.

The Principle of the contradictory

The essence of this principle is that it provides the parties the opportunity to express their views on all matters of the subject of arbitration judgment. Observance of the parties assumes the correct information about the existence of the arbitration process, the claims at issue, evidence and evidence in defense administered. Also, the court may not raise and settle by default, an exception without put it, in advance, in debate and also the court may not take into consideration the objections raised by the parties by written conclusions (Magazine of Commercial Law, 2009a).

The Principle of flexibility of arbitration proceedings

This principle is reflected in the fact that the entire procedure of the arbitration shall be conducted according to the free will of the parties, dominant in all its forms. In support of the principle of flexibility may be brought arguments related to the lack of solemnity of hearings,

how colloquially the debates are, the lack of attire required - elements that confer conduct arbitration proceedings look informal.

The Principle of confidentiality

Confidentiality is one of the advantages that arbitration proceedings have against the state judgment. Resorting to arbitration the parties feel more protected from the point of view of professional information security and credibility in terms of their quality of traders.

The Principle of availability

From the material point of view, the principle of availability requires that the parties can manage the dispute according to their procedural interests, while from the procedural meaning of this principle, the parties have the possibilities to use the procedural means provided by the law.

The principle of the right to a fair trial

Public policy should govern any trial proceedings - arbitration or common law - following the guarantees of a fair trial. The failure to guarantee a fair trial constitutes a violation of procedural public policy, this being severely penalized by annulment of the arbitration.

The principle of the active role of the arbitrators

The active role of arbitrators is focused on highlighting all issues which can lead to the best solution in the law or in equity issues brought before the arbitral court. Arbitrators may require production of evidence or clarify certain situations or even can try resolving the dispute on the basis of reconciliation of the parties. The arbitrators participate in debates and deliberation personally and their participation is mentioned in the decision and in the session.

The arbitral court may consist of one or more arbitrators in accordance with the rules of the arbitration clause or arbitration institution that organizes institutionalized arbitration. If the arbitral court is composed of an odd number of arbitrators, the ruling shall be taken by majority of vote. If an arbitrator has a different opinion he will draw up and sign a separate opinion showing the reasons on which it is based. If the court is composed of an even number of arbitrators and they cannot agree on the solution, it will proceed to the appointment of an umpire who will rally to one solution, one may change or may render another decision, but only after hearing the parties and the other arbitrators. If an arbitrator is unable to participate in the deliberations, delivery may be delayed for up to 21 days, subject to compliance with the arbitration term (Magazine of Commercial Law, 2009b).

3.2. The Term of Judgement

The arbitral ruling must be issued within the period set by the parties or by the law. The parties may freely determine, by convention, the period within which the arbitral court has to give the judgment. In the absence of explanations given by the parties, a settlement period of five months is given, the period running from the date of constitution of the arbitral court. Also, under the term provided by law, the pronouncement of the arbitration ruling may be suspended or extended, depending on the situation.

3.3. The formal requirements of the arbitration decision

From the point of view of article no. 603 Civil Procedure Code, it requires that the arbitration ruling must be put in written form and signed by all arbitrators, unless it is drawn up a separate opinion. Failure to comply with these conditions leads to form deprivation effect of the judgment in question, which cannot be rendered enforceable for enforcement nor invoked as *res judicata*.

3.3.1. Features of arbitral decision

- *The binding force.* The ruling settled by a court of arbitration based on an arbitration agreement, in a valid and proper form with the minimum content, is binding on the parties just as a judgment.

- *The finality* of the arbitration ruling consists in the solution itself of the dispute settled by the arbitral court, which is final. No other court will be able to adjudicate it. It can be challenged by an action for annulment, which is however restricted to the grounds provided by law and which relate to procedural matters and not formal aspects of the merits process will only fund research for finding of invalidity of the arbitration ruling.

- *Enforceability.* After being communicated, it has the effects of a final judgment, and because of its enforceability can be brought out by force against those in refusing execution on one's own will based on investing the decision with executor's formula by the courts.

Suspension of the arbitration ruling may be made under the same conditions as it may request suspension of enforcement of a judgment. The decision may be corrected or completed under the law, at the request of the parties within 10 days from communication.

3.3.2. Communication and Registration of the Arbitral Ruling

The arbitration decision shall take effect from the date of communication, because Romanian law assimilates the judgment regarding the effects and implementation of the procedural act of communication. The arbitration decision shall be communicated to the parties within one month from the date of pronouncement.

After communication, according to article no. 607 Civil Procedure Code, the arbitral court, within 30 days from the date of communication, will submit the case file to the court that in the absence of the arbitration agreement would have had jurisdiction to resolve the dispute, attaching and evidence of communication of the decision arbitral parties.

If the arbitration is organized by a permanent institution, the file is kept at that institution, who shall communicate the courts only if one party does not perform its obligations provided for in determination and declaration of enforceability is required.

4. Execution of Foreign Arbitration Decisions

4.1. The Term of Foreign Arbitration Decision

According to the provisions of article no. 1123 Civil Procedure Code, by foreign arbitral decision, Romanian law indicates a decision settled in a foreign state which in Romania is not considered as national judgment. Regarding the effects of foreign arbitral decisions, Romanian Civil Procedure Code law refers to the provisions of private international law. This law also calls for assimilation, meaning the assimilation effects of foreign arbitral decisions to the effects of foreign judgments.

According to article no. 1125 of Civil Procedure Code, any arbitration decision mentioned by article no. 1124 is recognized and can be executed in Romania if the dispute forming the subject thereof may be settled by arbitration in Romania and only if that decision does not include contrary provision against Romanian private international law.

Foreign arbitral decisions have effects in Romania only after certain checks are made by Romanian courts of law.

4.2. Acknowledging of an International Arbitral Decision

The deadline for recognition of an arbitration decision involves the administration, in the state in which recognition is sought, the effects of judgment arbitration. The main effect

of recognition, is that the decision issued by the foreign arbitral court, is definitively recognized.

Recognition gives to the foreign arbitral decision the effect of *res judicata* and it also prevent the same dispute settlement again. Upon recognition of foreign arbitral decision will have *res judicata* in respect of the same treatment as a judgment of a national court.

The conditions of recognition are the followings:

• *Positive conditions*

- The decision shall be final according to the law of the state where it was rendered;
- The arbitration court should have been competent to rule according to the law where the judgment was rendered;

- To be reciprocity regarding the effects of arbitral decision between Romania and the State of judgment.

• *Negative conditions*

- The decision shall not be the result of fraud committed in the procedure followed abroad;

- Do not violate the public policy of private international law;
- The dispute should not have been settled between the same parties by a decision, even not final, by the Romanian courts, or may not be currently under adjudication before the foreign court is seized. If not achieving any of these conditions, this can lead to refusal of recognition (Sitaru, 1996).

4.3. Enforcement of Foreign Arbitral Decisions

Enforcement may be direct (in kind) or indirectly (equivalent). In any of its forms, enforcement debtor may not wear on the person, but only on his property. Exclusion of enforcement on the person (via imprisonment debtor bad payer) is a fundamental feature of our civil rights. Such a procedure, even if it were permissible in law of the State in which the judgment was given, cannot be accomplished in Romania. Article no. 1103 of Civil Procedure Code provides that foreign arbitral decision which are not brought out voluntarily by those forced to execute them, can be put into enforcement in Romania, by applying accordingly the provisions of articles no. 1103-1110.

Enforcement must first be accepted by the competent judicial authorities of the requested state. The judicial procedure in which a foreign arbitral award is enforced, after the control exercised over them by the courts of the state in which enforcement is sought, is called *exequatur*. The conditions required for the *exequatur* are imposed by the state law where the enforcement is going to be done, and varies usually from one state to another.

The conditions which must meet for foreign decision to be declared enforceable in Romania are set out by article no. 1104, which is related to article no. 1096. These articles provide that:

- the final decision is enforceable according to the law court which issued it;
- the court which gave the decision had the legal competence to judge the case;
- between the states there is reciprocity (Sitaru, 2013).

4.4. Weight and Importance of Foreign Arbitral Decisions

Foreign decisions, since coming from competent courts, have in front of Romanian courts probative value with respect to the facts they set. This solution is consecrated by the Civil Procedure Code, dealing with the probative value of foreign arbitral awards rendered by

a competent arbitral court. In Romania, foreign arbitral decisions enjoy probative value, distinct from *res judicata*, the truth of the findings of fact contained in the motivation (as distinct from its judgment), but depending on the nature of the facts alleged by the interested party.

If there are facts established personally by the foreign arbitral court which are recorded as such in the decision, these facts benefit of probative value given by the state law from which the decision comes. This is a proof until declaring it false. The fact that the opponent refuses to recognize the findings of the foreign decision judgment, their probative value does not decrease in the state in which that judgment is invoked. The weight subsists until forgery is declared in the state where the judgment was given (Dănăilă, 2006).

4.5. The Effects of Transactions Concluded before an Arbitral Foreign Court

Transactions concluded before an arbitral foreign court produce effects that the state laws where they were concluded provides them and they can be enforceable in Romania, if they meet the requisite conditions by Romanian law. The execution is under the law by the court in the jurisdiction where it is to make the enforcement. Conditions and procedure for obtaining recognition and/or enforcement are required for recognition and/or enforcement of foreign arbitral decisions which confirms the transaction.

4.6. The Procedure of Acknowledging and Executing Foreign Arbitral Decisions

4.6.1. Cases of Application

To the extent that a person refuses to recognize the effects of a foreign arbitration decision, the interested party to obtain recognition has two procedural routes, main and incidental way. Between the two ways there are no differences regarding the procedural court and through which the request is settled. The application for recognition is solved principally by the court in where is domiciled or headquartered the party who refused to recognize the foreign judgment. In this case, the Romanian court will rule on the application by a judgment which would be applicable to the judgments referred to the expressed provisions of Civil Procedure Code.

The second way, the incidental one, occurs when the application is resolved by the court, hearing another trial, in which the exception is applied to the power of ruling, the exception based on the foreign judgment, the court is required to verify the conditions for recognition of a foreign decision. The court will rule on the objection by a particular ruling, which cannot be appealed separately. The demand for recognition will be made according to the requirements for the application for summons, which shall be attached:

- copy of the foreign arbitral decision;
- definitively proving in its country of origin.
- the copy that proves that the summon and the complaint was communicated to the party that was not present before the foreign court.
- any other document, which demonstrates, in addition, that foreign arbitral decision fulfills all the other conditions.

Application for recognition shall be settled in contentious proceedings, which necessarily require quoting the interested parties, both those who made the request, and the one that refused to recognize. The contentious procedure is contradictory, allowing the defendant to defend themselves using all available evidence. The defendant cannot invoke defenses but calling into question the merits of their cases abroad (Roş, 1999).

4.6.2. The Procedure of Declaration of Enforceability

Foreign decisions which are not executed of one's own will can be executed in Romania based on the investing decision, requested by the concerned party, by the court where the execution is to be made. The material competence is the same as for the recognition; territorial jurisdiction is different, however. If recognition, territorial jurisdiction belongs to the court within whose jurisdiction the interested party is domiciled, in case of declaration of enforceability of the foreign decision, the court in the jurisdiction which is competent to be made the enforcement. The application for the declaration of enforceability must meet the same requirements as applications for summons and:

- the copy of the foreign decision;
- definitively proving;
- the copy that proves that the summon and the complaint was communicated to the party that was not present before the foreign court;
- any other document, which demonstrates, in addition, that foreign arbitral decision fulfills all the other conditions;
- proving enforceability of the foreign judgment issued by the court that issued it.

The application for a declaration of enforceability shall be settled after summoning the parties, by a judgment, which is subject to appeal enshrined in the Romanian civil procedural law. After a final and irrevocable judgment, is issued enforcement, mentioning the declaration and determination. The procedure of effective enforcement of foreign arbitral decisions in Romania is conducted in accordance with Romanian law, without extraneous elements of judgment to be of any interest.

4.7. The Effects of Foreign Arbitral Decisions as to the Conventional Law

In order to remediate the difficulties arising from the diversity of national legislation on the effects of foreign arbitral decisions and ease of its use by the international arbitral decisions, states have concluded international treaties by subjecting a regime more liberal than the effects produced by an arbitration decision into a Contracting State in the territory of the other Contracting States. In arbitration matters were concluded the following major international conventions ratified by Romania:

- Geneva Protocol, of 1923;
- Geneva Convention, of 1927;
- New York Convention, of 10 June 1958, Recognition and Enforcement of Foreign Arbitral Awards (ratified by Romania by Decree no. 186/1961).

It also concluded agreements with regional scope, such as:

- European Convention on International Commercial Arbitration, adopted in Geneva on April 24, 1961 (ratified by Romania by Decree no. 281/1963);
- Moscow Convention;
- Convention on arbitration regarding particular areas;
- Washington Convention.

The Geneva Protocol of 1923 is the first action taken by states to recognize and enforce international arbitration decisions abroad. This protocol endorsed two main objectives:

- ensure the enforcement of arbitration decisions and conventions internationally;
- ensure the enforcement of judgments on the basis of such conventions in the country of establishment of the court.

At its beginning, that triggered the dispute, the states shall ensure that the parties have concluded an arbitration agreement applies to resolve their differences falling within the

scope of the arbitration agreement by arbitration, and at the end of arbitration to be secured recognition and enforcement of arbitral decisions their respective territories. Geneva Convention of 1927 provided that an arbitration award should be recognized as binding on the parties and shall be enforced internationally territory of any State, subject to certain conditions.

Under the Convention, in order to recognize a foreign judgment must meet certain prerequisites and additional conditions, whose probation incumbent party claiming recognition or enforcement. New York Convention of 1958 represents considerable progress in terms of recognition and enforcement under much simplified and considerable effectiveness.

This Convention shall supersede the 1927 Geneva Convention between States party to both and gives much broader effects to conventions and arbitration clauses.

It definitely adopted an international attitude regarding recognition and enforcement of foreign arbitral awards, enshrining the presumption of regularity international arbitral awards and facilitating their effects. The Convention applies to recognition and enforcement of foreign arbitral awards rendered in a state other than that where recognition and enforcement is sought, on disputes between individuals or legal entities. The Convention shall also apply to arbitral awards not considered as domestic awards in the State where the recognition and enforcement is sought under two reserves: The commercial and reciprocity.

Regarding enforcement, the Contracting States shall endeavor to ensure enforcement of sentences under the agreement according to their own internal rules of procedure, based on their assumption regularity. The person requesting recognition and/or enforcement does not have the obligation of proving the regularity of scheduled international sentencing, which is presumed. The burden of proof lies with the party invoking the irregularity (Băcanu, 2005).

Convention provides five irregularities that may be invoked by the person who opposes recognition and/or enforcement:

- gap of capacity or lack of a valid arbitration agreement;
- violation of the adversarial principle;
- exceeding the limits of arbitration agreements;
- procedural flaws;
- lack of binding or enforceable sentence. There are also two additional cases which may be raised by both the parties and the court of its own motion:
 - non-arbitral nature of the dispute;
 - public order.

The party seeking recognition and/or enforcement just communicate sentence competent jurisdiction and that the arbitration agreement was the basis thereof. If that party does not have the originals of those documents, certified copies allowed to conform to the original. European Geneva Convention 1961 International Commercial Arbitration was mainly regulatory issues related to the establishment and operation of commercial arbitration arising from contracts between partners in European countries. This refers to:

- arbitration agreements concluded for the settlement of disputes which have arisen or will arise from international trade operations between natural or legal persons having their habitual residence when the agreement is concluded or registered in different Contracting States;

- procedures and arbitration decisions based on the aforementioned conventions.

If an arbitration decision is canceled in the origin country due to valid reasons in this country, the arbitration decision is still capable of recognition and enforcement in other

Contracting States. Washington Convention of 1965 for the settlement of disputes regarding investments between States and Nationals of other States aims mainly the establishment of mechanisms for conciliation and arbitration of international investment and establishing rules applicable to conciliation and arbitration. This convention was established International Centre for Settlement of Investment Disputes (ICSID), with headquarters at the International Bank for Reconstruction and Development with the objective of organizing conciliation and arbitration in disputes over foreign investment.

The arbitral decision is binding to the parties and they must bring it out voluntarily, otherwise they will be applying a similar regime applicable to the enforcement of judgments handed down by their own courts (Căpăţină, 2000).

5. Conclusions

Arbitration is an alternative private justice that people who have full capacity to exercise rights can resolve property disputes between them, apart from those concerning rights which the law allows no transaction is made. From 2007-2009, it can be observed among dealers in Romania and across Europe a tendency to choose arbitration instead of the courts. Every trader knows that time is money. It is one of the fundamental rules of trade and generated while basic principles of commercial law.

Advantages consist in:

1. Parties have the opportunity to nominate themselves the arbitrators.
2. This procedure provides quick settlement of cases.
3. The arbitration costs are lower.
4. The dispute, the file and the decision are confidential.
5. The arbitration procedure is completed, as the courts.
6. The arbitration offers the parties a conciliation procedure.

The key to remember is that access to the court, the complaint is valid only with the written consent of the parties in this regard. Any patrimonial dispute arising out of or in connection with this contract, including its validity, interpretation, execution or termination of its effects, will settle the commercial arbitration, organized by the Chamber of Commerce and Industry, in accordance with the General Rules and the Rules of Arbitration of this House. The arbitral decision is final and binding on the parties committing to execute voluntarily (Sălăgean, 2001).

The applicant submits at the Secretary of the Arbitration Court a request for arbitration with the documents which bases itself and the name of the arbitrator proposed. The Secretary will forward the request to the other party to the dispute, which within 30 days will present his defenses and will nominate the arbitrator.

That will do the arbitral tribunal consists of one or three arbitrators, according to the will of the parties. It will examine and discuss the dispute in closed meetings and after deliberation will decide the arbitration decision. The documents shall be submitted in original or certified copy. If the request for arbitration or the documents submitted in a foreign language, the arbitral court of its own motion or on request, order a translation form of them in Romanian or in other foreign language. The parties may request that the translation be at their expense, by the Court of Arbitration.

The request is addressed to the Court of Arbitration. Within 20 days of receiving the request for arbitration, the respondent shall communicate to the applicant his defense with documents. If the defendant has a claim against the plaintiff arising from the same legal relationship, he may file a counterclaim, who settled together with the main claim.

The arbitration costs include: the arbitral fee, expenses of taking evidence, translation of documents and debates, the arbitrators' fees, attorneys' fees, experts and advisers, travel expenses to parties, arbitrators, witnesses, experts and advisers and other expenditure relating to settlement of the dispute. The parties may participate in the debate dispute personally or through representatives and may be assisted by lawyers, advisers, interpreters or others. With the agreement of the parties and with the consent of the arbitral court, the President of the debate dispute may involve other people. The arbitration proceedings shall end by pronouncing an arbitration decision, called arbitral decision. If the defendant acknowledges a part of the applicant's claims, the arbitral court, at his request, will settle a partial recognition decision. If the plaintiff waives arbitrary or right itself claimed before the arbitral tribunal, arbitration proceedings are closed by a resolution of the President of the Court of Arbitration.

The arbitral award is final and binding. It brings out voluntarily, the party against whom was pronounced immediately or within the period stated in the judgment. The arbitral award communicated to the parties has the effects of a final judgment (Homotescu, 2004).

6. Arbitration Ruling pronounced by Romanian Football Federation/Appeals Commission

Decision no. 43/24.07.2014 of the Romanian Football Federation/Appeals Commission

By application registered at the National Chamber for Dispute no. 519 of 08.05.2013, the player's agent MFP has applied S.C.S. Football Club C.F.R. 1907 Cluj S.A. to pay the sum of 250,000 euros fee due under the Civil Convention no. 718/ 15.05.2006 and addendum dated 24.03.2010.

By the decision no. 406/19.09.2013 of the National Chamber for Dispute Resolution upheld the objection of *res judicata* invoked in front of the authority by S.C.S. Football Club C.F.R. 1907 Cluj S, A. and, for this reason, rejected the applicant's request.

It was previously noted that, by resolution no.196/17.05.2012, confirmed by the Appeals Committee by decision no. 67/2012 and by the Arbitral Sports' Appeal Court Decision no. 2012/A/ 2887, the application of the player's agent ordering club to pay the sum of 250,000 euros was rejected as inadmissible, because of the identity of persons, object and cause, in relation to the second request.

Decision no. 196/17.05.2012 was quashed by the Appeal Commission for failure summoning procedure, so the case was sent back to the first Arbitral Court, CNSL.

CNSL, by resolution no. 101/22.05.2014, dismissed authority with the exceptions of *res judicata* and substantive law barred the action alleged by the defendant, and, in substance, rejected the summons as unfounded.

In deciding so, CNSL held that the decision 196/17.05.2012 the plaintiff's action was dismissed as unacceptably because his license had been suspended. But from the evidence in this case actually result in a different situation than the one existing at the date of judgment, 17.05.2012, as a result that the players' agent FPM is listed as active agents licensed by Romanian Football Federation - FRF.

On the merits of the case held that the addendum concluded between the parties on 22.03.2010 club was established the obligation to pay 500,000 euros in two installments. The second tranche, subject to the applicant's claim, was assumed condition precedent to concluding a transfer agreement, permanently or temporarily, but consideration of one or both players, CSP and DAF.

Against the decision no. 101/22.05.2014 of CNSL appealed, within regular time, both sides. In its appeal, the club criticized CNSL' decision parried the matter of resolving the two exceptions to *res judicata* and limitation. In essence, it showed that between this case and those previously held there is triple identity, of parties, cause and object. Quality players' agent applicant is a subsidiary of ownership of the right to trial and therefore not removes the identity of parties between the two cases. In the limitation period it showed that it started to flow on the 22.03.2010, end date addendum between the parties.

In its appeal, the applicant criticized solution date of application for summons. It showed that the wrong way was retained in the amendment inserting a *suspensive condition*, in reality it is about a standstill period, CNSL' wrong interpretation failing addendum clauses by reference to the civil provisions of the Convention no.718/15.05.2006.

The Club defendant filed against the applicant's appeal. In their opinion, the exceptions were resumed on *res judicata* and limitation. With regard to the allegations of the appellant-plaintiff, it was revealed that he cannot talk about a standstill period since it implies a future event and sure achievement and CNSL retained the right that upcoming event took into account the parties failed to achieve. It presented the situation of transfers of football players CSP and DAF, showing that it has not been paid any amount of money from transfers.

The applicant submitted, in turn, about the club's appeal against the defendant proved that he cannot be retained because *res judicata* first solution was pronounced dispute by granting an exception. In addition, the final judgments explain *res judicata* only as long as the facts contemplated taking their pronouncement does not change. Limitation on the addendum showed that the parties had agreed a standstill period; therefore no limitation period began to run on the date of signing the addendum. Moreover, relative to transfer of the last of the two players, the action is not prescribed.

The appellant applicant filed written submissions and subsequently filed supplement to written conclusions. It showed that it cannot be a condition precedent because the obligation to pay was born after the conclusion of the addendum between the parties. He argued that even assuming, they would consider that it is a condition, it should be considered fulfilled because defendant prevented its fulfilling, transferring players free of charge. He also claimed that this condition would be purely *potestative* that would avoid the clause. In reality, it is a standstill period, uncertain conclusion that is revealed by the systematic interpretation of acts concluded between the parties, that interpretation will determine the actual establishment of the parties. It was invoked rule of interpretation provided by article no. 978 of the Romanian Civil Code from 1864. With regard to the limitation, it was shown that the term began its run on the 30.06.2012, the date of expiration of contract between the club and the two players. At that moment it was born the right to action into justice, because until then the club could transfer the two players and to obtain money from a transfer. In the *res judicata*, there were developed submissions from defense.

The analysis of evidence or the Commission retains the facts presented as follows.

On 15.05,2006 between the parties was concluded an agreement whose object representing civil plaintiff services agent players, which were to be rendered in favor of the defendant, meaning the club. Through this agreement were set general conditions of carrying out the legal relationship between the parties. In the agent fee due was envisaged that this will be determined later by addenda signed at each club player transfer agent defendant to provide advice and specialized assistance.

Subsequently, the parties were signed addenda on the transfer of players at the club parried the applicant was involved.

On the 22.03.2010, between the parties was signed a new addendum in which the club has recognized the obligation to pay the amount of 800.000 euros in civil conventions no.718/15.05.2006, as mentioned earlier and addenda by which the parties settled the price of services provided by the applicant on the transfer of players CSP, SRP and DAF, same addendum by reducing the amount agreed to 500.000 euros that were due to be paid in two equal installments. The first of these was to be paid until the 15.04.2010, and the second, the subject of this dispute, to be paid to "the proceeds of the transfer or loan players PCS and DAF, with priority payment flow". The parties also agreed that, in case the first installment is not paid in due time, the amount owed by the club is to be the initial 800.000 euros.

The Club, as a defendant has concluded several agreements for the temporary transfer of the two players, CFS and DAP, all free of charge. In these transfer agreements was mentioned the club's option assignee to obtain permanent transfer in payment of compensation for transfer. Club defendant has not completed a transfer for consideration of any of the two players. Contractual relations between the two players and the club ceased parried by arrival time on the 30.06.2012.

The amount of 250.000 euros, representing the second tranche agreed in the amendment of the 22.03.2010, was held the first dispute between the parties concluded with a decision to reject as inadmissible the application in light of the fact that at that time license the applicant's agent was suspended. He was subsequently lodged, the summons relating to this dispute, complaints regarding the same amount of 250.000 euros, representing the second tranche agreed in the amendment of the 22.03.2010. This time, the result of the evidence that the applicant is included in the list of active players' agents, having a valid license.

As discussed above detained by the court decision on the merits, the exceptions raised by the defendant and the club were rejected and the applicant's demand of summons was also rejected as unfounded. The club appealed against the decision, reiterating exceptions raised in the fund, and the plaintiff appealed criticizing solution on substance, showed essentially that it was wrong qualified addendum clause of the 22.03.2010 on the second installment of payment obligation for the football club.

The football club has brought in question, first, *res judicata*. Authority with the exception of *res judicata* was properly denied. *Res judicata* exists only in the issue resolved by the decision earlier. *Res judicata* is the decision which solves background process. In the event that the decision sets forth, an exception of *res judicata* may be invoked only to the extent that admission irregularity that caused exception exists in the second case. If, however, the irregularity was removed the next request will not be able to invoke *res judicata*. Or, in this case, the first application was rejected as inadmissible; sports jurisdictional committees unable resolved a case filed after more than six months after the termination of the applicant's agent. So, the first application was rejected on the basis of an exception, but ceased after its admission under the applicant regained its status of players' agent. The date the applicant had new demands of agent, so do not linger admission irregularity that caused the exception upon which ruled solution in the first issue. So CNSL solved correctly the exception of *res judicata*, so it appears that this appeal as unfounded. By the Addendum signed on the 24.03.2010, the parties have determined the amount of the payment obligation incumbent on the club, respectively 500,000 euros and payment thereof, staggered as follows:

"1. 250.000 euros payments until the 15.04.2010

2.gap 250.000 euros will be paid from the proceeds of the transfer or loan for players PCS and DAF, with priority payment flow. "

Obviously, in the second installment (which is regulated by the clause in question here) we have to do with an obligation unaffected ways. Contrary to some assertions club performance of the obligation cannot be claimed immediately that the conclusion of the addendum.

First, it is beyond question that part 2 of art. Addendum II to regulate the disbursement of the second tranche of the amount agreed by subsequent assumption of the first installment. And the first installment was not claimable at the conclusion of the addendum, on the 24.03.2010, but later on the 15.04.2010. It results that, however, the second installment could not be considered due on the date of conclusion of the addendum. Moreover, it appears obvious that claims the club in the immediate sense of chargeability of the second tranche was made only to support the plea on limitation. And the correct qualification of contract terms cannot be made fit subsequent submissions of the parties, manifestly subjective arguments presented in correspondence with serving arguments presented during the trial. Qualification contractual clauses must be made in relation to the situation and the statements of the parties at the conclusion of the convention (i.e., in this case, the addendum).

Second, the wording of the clause, the use of the future tense, leaves no doubt as to the lack of character of the two installments payable at the conclusion of the addendum. The applicant could not ask for immediate fulfillment of the obligation of payment of the second tranche, according to conclusion of the addendum.

Therefore, in analyzing the contractual clauses should start from the premise that it established a later time of maturity of two tranches. It is to determine whether it was safe or just due subsequent possible. The clause in question has the effect of deferring the payment, but such a delay should be qualified in law. Such qualification can only lead to the conclusion existence of a standstill period, which would not be affected until chargeability or a condition precedent that would have affected even the obligation effectiveness. Both the term and condition are ways of legal act or elements contained in civil legal acts consisting in circumstances that have influence on the effects occur or should occur. The difference between term and condition in terms of interest here (without keeping in mind the difference in effects), remains that, if the term is an event (fact) future, but sure, condition is a future event, but uncertain as achievement. Even if uncertain term, the only uncertainty when the event will be made and there, but the safety of its occurrence. If the condition is uncertain, achievement or failure of the event itself, and not only its time and consist of term and condition circumstances. When time has elapsed lies in the fact we are dealing with a period. When circumstance consists of a natural event or human action (namely, event or fact), we are in the presence of a condition.

Through contractual clause in question here disbursement of the second tranche (amount claimed in the application for summons) was related to obtaining this amount of "transfer or loan players PCS and DAF".

And now in question without taking reference to obtaining amount, transfer or loan players cannot be considered as an event sure as an achievement. Transfer or loan depended on a number of factors such as the return of players from the transfer market in football offer, identifying a potential club transferee will of the parties involved, club transferor, transferee club, player himself etc. But more parties have referred not only to transfer or obtain loan amounts, but take from them the conclusion that consideration of such operations. Either this

increase the possibly of closing this transaction. If the conclusion of a permanent or temporary transfer agreement (loan) was possible but not certain, the more their conclusion was only a possibility for consideration.

Therefore, the clause in question refers to uncertain events that achievement which precludes its classification in the sense of establishing a deadline. And, contrary to what the plaintiff, assuming we are not regulated by article no. 1420 of New Romanian Civil Code. The new Civil Code defines the term (article no. 1411) as a future event and sure achievement. From this starting assumption article no. 1420 must be understood as the situation in which the parties consider (on completion of the legal act) a future event as safe as achievement, but this prediction of the parties proves wrong, the event defeating it (in addition, the legal text refers to a time when the event was supposed to occur normally, not being it, the hypothesis of an uncertain term). Or, in this case cannot be argued that the parties were seen as safe a transfer permanently or temporarily players mentioned, much less a transfer for consideration. Both sides developing activities in the field of football were supposedly in full knowledge of the character eventual conclusion of such an operation. Support hostile or safety concluding a transfer for consideration would be absurd and contradicted by the reality of the case.

In reality, if they would accept the view that it is a standstill period would be no difficult, if not impossible to determine when that would be followed to fulfill. For parties were about to transfer permanently or temporarily (more even in obtaining money from them) then (if there had not been other arguments that oppose qualification as the standstill period) would have to be considered that has been considered any such transfer, and then the term would have started to run from the date of the first transfer (if you would support that had to wait for it first transfer for consideration when either they would consider that it is a term, whether they would consider that it is a condition, the application of summons could not be accepted: if it was within, not made a transfer for consideration obligation had not been chargeable if this condition was not fulfilled would thus not be required performance of the obligation), which would be drawn within extinctive prescription. But assuming they do not, it would have been no transfer, it would have been impossible to determine when they would be fulfilled the term (of course, this impossibility stems from the fact that the parties made reference to uncertain events that realization). It therefore cannot be received opinion on the existence of a standstill period.

Consequently, it is impossible to qualify as a deadline suspensive clause. Reduction *ad absurdum* argument logic compels us, since one of two possible interpretations was removed, consider as right on the second or interpretation that clause sets a condition precedent. Besides, a simple analysis of the clause in question leads to this conclusion, the fact that the parties have bound payment obligation represent a transfer for consideration, permanently or temporarily players mentioned. This fact does not consist in the passage of time (which would be specific term) but in fact (human action), which is specific condition. Furthermore, as was stated above, circumstances contemplated by the parties could not be considered as safe as achievement.

This conclusion does not preclude any rule of interpretation. The appellant-plaintiff indicate the provisions of article no. 977 of the previous Romanian Civil Code, citing real intention of the contracting parties, but no argument and no evidence thoroughly in the sense that the real intention of the parties that were presented to him. And systematic interpretation proposed by appellant-plaintiff is not coherent. This phased accept the idea of the amounts established, but claims that, in the second tranche (the one in question here),

the parties would have provided an uncertain term and not a requirement. But when it comes to the time of expiration, the applicant oscillates between the last transfer date (although there is no reference in the text to the last transfers) and date of termination of contractual relationships between players and club. It also claims that the contract clause there is no reference to whether consideration of the loan, thus ignoring the express mention on the payment of the amounts obtained after transfers (which involved the character consideration thereof), and, further, in his defense made in alternatively, it claims without basis, that the transfer of players depended on the will of the club defendant.

The rule of interpretation laid down in article no. 978 of the previous Civil Code is understood and wrongly invoked by the plaintiff. This rule of interpretation requires establishing the meaning of the clause would actually produce in concrete effects. The rule requires choosing the direction in which the clause could take effect. The clause could take effect would be achieved if the condition established by the parties. Moreover, the applicant's opinion wrong interpretation of the rule laid down in article no. 978 can easily be combated using the arguments of *reduction ad absurdum*. Assuming that the applicant's view was correct. it would mean that there could be no clause that to provide precedent conditions. The conclusion is absurd and cannot be intercepted. The possibility of inserting precedent conditions is unquestionable. In reality, we cannot interpret a contractual clause (interpretation assuming establish the meaning of clause that the parties have taken into account the conclusion of the act) in the light of what happened later the signing of the act or through the fulfillment or not of the precedent condition. The clause in question, setting a condition, can achieve effectiveness if provided. Defeating the condition, performance of the obligation cannot be required, but this was the intention of the parties. This cannot change the meaning of clause depending on the achievement or failure of the condition. The rule of interpretation invoked by the plaintiff appellant is not applicable here.

In addition, no throwaway rule of interpretation according to which if the clause remains unclear, it shall be constructed in favor of the one who undertakes (*in dubio pro reo*). Either analysis of the clause in question cannot lead in any way to the conclusion that the plaintiff is right. And then, even if it would appreciate that no qualification clause as establishing a condition is not beyond doubt, however, the rule *in dubio pro reo*, would require the choice of interpretation favorable to the debtor (one who undertakes), respectively, in this case the club.

It should be noted, however, that the establishment of a condition related to the transfer of the two players mentioned does not appear as meaningless by analyzing the relationship between the two parties, plaintiff and defendant. As shown even the complainant, the amounts claimed had their source in its benefits made to transfer the club parried three players, two of whom are even those mentioned in clause subject to analysis is possible, therefore, that, precisely in view of the fact that the birth of claims the applicant was related to the transfer of players in the same manner, and their extinction (payment) to be linked to the transfer in the opposite direction to other clubs. Of course, one cannot determine with certainty what were the reasons determining the insertion of the clause in question, but it is clear that it cannot support it (understood as a condition) would be manifestly against running earlier of contractual relationships between the parties, moreover, any waiver of a portion of the amount agreed is not usual in progress.

In the alternative, the plaintiff-appellant invoked the provisions of article no. 1014 of Civil Code from 1864, claiming that making the condition has been hampered by the club defendant (debtor) and, therefore, the condition should be considered satisfied. First, it

should be noted that the applicant does not make any sense of the evidence shown, namely the realization condition was hampered by the club defendant. And wrong they are invoked by the plaintiff provisions of article no. 1080 and 1082 of Civil Code. The question is not an obligation for the club but a condition defendant means the legal document. There was parried club that wanted to make the point any evidence in question here. The burden of proof lies on the person making the claim, the applicant respectively. Moreover, the club defendant to prove the contrary to what the applicant would amount to prove a negative (not preventing the achievement condition) which could not be pretending.

More, however, the content of the temporary transfer agreements signed by the club defendant concerning the club's football players mentioned in the addendum of the parties in dispute, concludes that the defendant tried to achieve the transfers, in exchange for money. These temporarily transfer agreements contained clauses regarding the payment of compensation for transfer if the club wanted to permanently transfer the player.

Therefore, the requirement does not follow that achievement that would have been prevented by the club defendant, but on the contrary, it follows that its act meets the condition, meaning the agreement terms for transfer.

Consequently, the outcome of CNSL in the merits (application of summons) being correct, the applicant's appeal will be dismissed as unfounded (Decision no. 43/2014).

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