ALTERNATIVE METHODS FOR THE RESOLUTION OF TRADE DISPUTES

Gabriel MIHAI[*]

ABSTRACT*: The domain of alternative trade dispute resolution provides a wide field of mechanisms and procedures designed to facilitate the optimal dispute resolution in a creative and effective way, without the intervention of courts, by using a rich range of procedures.*
All extra-judicial means of resolving commercial disputes, from the pure and simple transaction to mediation, conciliation and arbitration, are based on the agreement of parties.
Traders need to get rid of the statist mentality that only supports state intervention in resolving disputes and to embrace alternative ways of resolving these conflicts, which are more flexible, faster and cheaper and which must be taken in this context of new socio-economic conditions.

KEY WORDS: *commercial disputes; alternative resolution; reconciliation; mediation;*
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1. INTRODUCTORY REMARKS ON TRADE DISPUTES

In the sequence of steps made in order to settle a conflict that arises between the parties to a legal commercial relationship, it is logically started from direct negotiations between parties, followed by the involvement of a third party as conciliator or mediator, and, finally, if this method does not lead to a satisfactory outcome for the parties in conflict, the dispute is settled by arbitration or by a general civil procedure in a state court.

For the effective management and settlement of disputes arising from the execution of commercial contracts, in practice, we tend to identify the ways that exceed the established jurisdictions.

Currently, there is a major preoccupation regarding the encouragement and the prior use of alternative extrajudicial procedures, especially in order to obtain the best results and solutions early in the initiation stages of litigation.

[*] Associate Professor, PhD The Faculty of Law and Administrative Sciences Ovidius University of Constanta, Commercial arbitrator – The Court of Commercial Arbitration of Constanta, ROMANIA.

It should be noted that all these alternative methods of conflict resolution are aimed at settling the relations between parties, so that after using these methods, the parties can resume their existing partnership relations, even under the same contract.

The domain of the alternative settlement of commercial disputes[1] provides a wide field of mechanisms and procedures designated to facilitate the optimal dispute resolution in a creative and effective way, without the intervention of courts, by using a rich range of procedures, from negotiation and conciliation to mediation and arbitration.

2. CONCILIATION

The conciliation is an alternative method for the settlement of disputes which are either imminent or in progress, by which the parties jointly agree to their direct conciliation or use the specialized services of a professional conciliator, who meets them separately in order to settle the dispute. The conciliation plays an important role in reducing the number of litigations and in ensuring harmonious relations among traders.

The importance of direct conciliation results from its aim, i.e. trying to amicably settle the dispute, reducing the volume of court activities, thus preventing the introduction of unexpected additional court applications, creating difficulties to the other party.

In Romanian law,before the New Code of Civil Procedure has come into force[2],the preliminary direct conciliation procedure used to be an admissibility condition for the applications in commercial matters which were assessable in money.

Thus, before the application of summons, the plaintiff tries to settle the dispute through direct conciliation. To this end, he/she calls the other party, informing it in written about his/her claims, their legal base and all the documents that support them. The convocation is made by registered letter with proof of delivery, by telegram, telex, fax or any other means of communication, which ensures the transmission of the text document and the confirmation of the receipt.

The result of the conciliation shall be recorded in a written document, asserting the mutual claims on the litigation object and the point of view of each party. The written document on the outcome of conciliation or, if the defendant did not comply with the summons, the proof of the receipt of such notifications, shall be attached to the application of summons.

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[1] Known and widely used in the law and practice of Anglo-Saxon countries, the concept of "Alternative Dispute Resolution" (ADR) includes all forms of extrajudicial settlement of disputes through third parties, procedure which constitutes an alternative to litigation in State court laws. In English, American and Canadian legislations, the concept of ADR includes arbitration, along with other modern methods of conflict resolution, such as negotiation, conciliation, mediation etc. In the literature there are two main types of ADR: conventional - taking place in institutions, agencies, non-judicial, independent or even by private persons designated by the agreement of the parties - and in court proceedings - which are managed, controlled or even ordered by the courts of common law.
In principle, such procedures are not required because the parties may be required not use them against their will, in commercial disputes; however, the legal framework introduced mandatory conciliation procedures before directly solving the dispute by the courts. The term ADR has become „Appropriate Dispute Resolution".

[2] NCPC has been adopted by Law no. 134/2010, published in the Romanian Official Gazette, Part I no.485/15, July 2010 and entered into force on 1st September 2012,under Law no. 76/2012 for the implementation of the Code of Civil Procedure.

Art. 720[1] of the Code of civil procedure asserts the binding and preliminary nature of this procedure, and its failure attracts the rejection of the application as unacceptable, excluding the possibility of performing conciliation after the application of summons.

Pursuant to Law no. 202/2010, failure to execute the preliminary conciliation procedure in commercial disputes with a pecuniary nature does not attract the sanction of action inadmissibility[3].

Article 720[7] of the Code of Civil procedure states that: "In trials and applications in commercial matters of pecuniary nature, before the application for summons, the plaintiff shall try to settle the dispute either through mediation or by direct conciliation."

The analysis of the legal text reveals that, in this form of the procedural provision, there are configured two alternative ways of settling the dispute amicably, having an optional nature for the applicant, by laying down both versions.

Through this legal basis there has been provided for the parties' possibility of using the mediation or conciliation procedure, not only before court notification but also afterwards, on the recommendation of the court, during trial proceedings.

The New Code of Civil Procedure rules that the conciliation, as a preliminary procedure, is not provided for anymore, being considered as a counterproductive mechanism, which hinders timeliness and efficiency in commercial matters; it is not mandatorily imposed but parties can use it on a voluntary basis[4].

3. MEDIATION

Mediation is an optional extrajudiciary way to efficiently settle conflicts amiably through a third party acting as specialized mediator, under the circumstances of neutrality and confidentiality.

Mediation[5] is based on the trust that the parties have in the mediator, as he/she is seen as a person able to facilitate the negotiations between the parties and support them in order to settle the conflict by obtaining mutually agreed solutions, which are efficient and persistent[6].

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[3]Iulia Vucmanovici,*Consecinta neindeplinirii procedurii concilierii prealabile in litigiile comerciale*, Revista de Drept Comercial nr.3/2011, Ed. Lumina Lex, Bucuresti, 2011, p.169.

[4] Tudor Chiuaru, Roxana Giurea, *Arbitrajul intern si international*, Ed.Universul Juridic, Bucuresti, 2012, p.22.

[5] The word "mediation", introduced in the U.S. as a specialty term, means "intermediation" by means of an independent third party and freely by the parties. Mediation became, in time, a means used in solving global conflicts. In the U.S., there is a real culture of mediation; according to some statistics, only about 10% of all conflicts come to be settled by the court, the rest being settled through mediation; the term "mediation" was first introduced in the United States of America, and it was taken, as such, in English and in German, in 1970. The Germans call mediation "die mediation", the French - "la mediation". Historically speaking, forms of mediation have been found in the ancient Greece, the Bible, the traditional communities in Asia and Africa, and the fourteenth-century England - as "mediators of questions".

[6] In Europe, Directive 2008/52/EC circumscribes the EU target on maintaining and developing a commercial space of freedom, security and justice (during this year the free movement of persons and goods is ensured). Under law 192/2006 on mediation and the profession of mediator in Romania, the parties may voluntarily resort to mediation, including after the start of a trial before the court, agreeing to resolve any conflicts in this way in civil, commercial, criminal, family etc. matters. The mediation law stipulates that "individuals or legal persons have the right to resolve disputes through mediation, both outside and within the compulsory procedures, for the amicable settlement of disputes provided by law".

Mediation can diminish the tension of conflicts arising in the business environment, identifying the concrete ways of fulfilling the obligations assumed by the contract. It is necessary to introduce in the commercial contracts the mediation clause, concerning the settlement of disputes that may arise from the contract.

The reason to resort to negotiation is to keep the commercial partners and to prevent the aggravation of conflicts (which, in a trial court, could worsen or could even lead to the breach of commercial relationships). In mediation the solution is amicably negotiated and it is immediately accepted by both parties, being an affordable and fast method of conflict settlement.

It is more likely that the agreements resulting from mediation to be voluntarily complied with by the parties, in order to maintain an amiable and permanent relationship between traders, especially in situations that have an international element[7].

Mediation necessarily involves the conclusion of a mediation agreement between the conflicting parties (taking note of the legal nature of a certain contract) and, if necessary, of a second convention of "accord", of "agreement" on how the dispute is to be dealt with, agreement which can take the form of an extrajudicial or judicial transaction, as appropriate.

Mediation has the advantage that it can be optionally used by the parties to a commercial conflict before a possible trial that can be avoided by a favorable outcome.

A potential trial involves a risk factor for the creditor because, in the current context, the other party can go bankrupt; income instability, the uncertainty of the execution of the court decision, the rigid and long procedure are other factors that stimulate the use of alternative ways of conflict settlement[8].

If parties do not go through the mediation procedure before seizing the court (the replacement of conciliation by mediation), by virtue of its active role, the court must empower the parties to reach an agreement, in order to settle their dispute. In the event that the parties cannot reach an agreement, the court will advise them to go through mediation; the preliminary mediation procedure involves the stage when parties receive information and they may decide to settle the dispute by mediation or to return to the court.

The mediation procedure is completed as appropriate, either by concluding an agreement between the parties after the settlement of the conflict, or by finding the failure of mediation by the mediator, or by the denunciation of the mediation contract by one of the parties.

When the conflicting parties have reached a consensus,an agreement is drawn up which contains all the agreed terms and which is equivalent to a written document under private signature; the agreement of parties shall not contain provisions which violate the law and the public order, but it may be affected by deadlines and conditions.

The classical resolution of conflicts, by deducting it to judicial authorities, does not often meet the interests of parties, because it is a solution based on the winner-loser concept; however, the conflict settlement through mediation represents the outcome of the will of parties. The solution obtained through mediation is not imposed from the outside,

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[7] Alina Gorghiu, Nicolae Bogdan Codruț Stănescu, Manuela Sîrbu, Mihai Munteanu, Ion Dedu, *Medierea-oxigen pentru afaceri*, Ed. Universul Juridic, București, 2011, p. 32.

[8] Lidia Frunza,Elena Liliana Aldea,*Medierea evita un proces*, Revista *Medierea* nr.12/2011,pag.6.

but it is the reflection of the common interests of parties in the decision adopted. The mediator facilitates the creation of a communication channel between the parties, through which they acknowledge themselves which is the best way to defuse their conflict[9].

According to Article 2, paragraph 2 of Law no. 192/2006 on mediation and the organization of the profession of mediator, unless the law provides otherwise, the parties, natural or legal persons, can use mediation voluntarily, even after the onset of a trial before the competent court, agreeing to settle in this way any conflicts in civil, commercial, family, criminal and other matters, as provided by law. Mediation is applicable to existing disputes on a right which the parties may have: claims made by one party against the other.

The mediation agreement is materialized through a written document under private signature and it can be certified or authenticated.

Mandatorily, the mediation agreement does not contain provisions that may violate the law and the public order, being subject, from this point of view, to the verification and consent of the court (pursuant to art. 63, paragraph 2 of Law no. 192/2006)[10].

The mediation agreement made after the delivery of the court decision will be sanctioned by the court of appeal by changing the sentence in part because of the agreement.

The Romanian jurisprudence has revealed the delivery of some court decisions where the mediation agreement is vested with a writ of execution; these decisions are criticized[11] because they are against the European legislation. The Directive no. 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters having no direct applicability establishes as objective the achievement of the enforceability of the agreements concluded through mediation, while leaving the states to choose the way that will ensure the execution of mediation agreements.

The Directive recognizes that the parties can request the attainment of the enforceable nature of the content in the written agreement resulting from mediation, but this is done separately, according to the law of each EU country.

In Romanian law, following the amendments made by Law no. 202/2010 of the Code of Civil Procedure, it was stated that the court would take notice of the mediation agreement under the same conditions in which it takes note of a transaction under the expedient decision (Article 271 of Code of Civil Procedure)[12]. Prior to these changes,

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[9] Cristopher W.Moore, *The Mediation Process*, ed. 3, Ed. Jossey-Bass Inc. Pub.,San Francisco, 2003, p. 124.

[10]Mediation agreement inadmissible under the legality of concluding such a mediation agreement between a local administrative authority – city hall and a (natural or legal) person who raises a claim for failure to fulfill duties incumbent to the city hall or for its delayed fulfillment. It also raises the question to what extent the court can be determined to rule a provision regarding a measure (the payment of damages in a case) that is related to the local budget and that should be subject to City Council discussion. In these cases, there is discussed the liability of the administrative authority, which can not be the object of a mediation agreement. The mediation agreement may intervene in private law and not in public law (with the sole exception of criminal cases in which the law provides for the exercise of the criminal action under the victim's complaint, aspect that transfers the discussion in the field where the parties may rule under the law), where the liability is based on Law no. 554/2004 of the Administrative Court.

[11] Constanta Court, the civil sentence no. 786/com/2011/01.02.2011, file no. 11935/118/2010, GMME – The Group of Magistrates supporting Mediation, the Romanian section, *Culegere de hotarari judecatoresti pronuntate in materia medierii*, Editura Universitara, Bucuresti, 2011, pp. 116-135.

[12] *Ibidem*, pag.114-116.

without a separate legal provision establishing the enforceability in terms of investing the mediation agreement by a writ of execution, there are not allowable the direct investment applications of the mediation agreements without a court order that sanctions the agreement or in default of an authentication of the public notary.

The practice of commercial courts has revealed the parties' reluctance to use the mediation procedure in order to settle their litigation; however, in cases where parties have tried this way of solving the conflict, most attempts have failed either before the court notification or during the trial, when the case judgment had been suspended in order to appeal to mediation and then, after the failure of this amicable endeavor, its judgment was resumed in order to settle the dispute judicially.

Features and benefits of mediation

1. The mediation is voluntary; the parties to the conflict can not be forced to accept the mediation procedure. They participate in mediation only if they wish so, having the right to terminate the contract of mediation at any stage of the procedure. Unlike the American system, the European legislation adopted the model of the nonmandatory mediation throughout the EU.

2. The mediation belongs to the parties. The key feature of mediation implies that the settlement of the conflict depends solely on the parties; solutions are not developed by the mediator, but by those in conflict. The mediator may propose some solutions on the outcome of mediation, he/she can generate options, but these solutions must be expressly accepted by the parties.

3. The mediation is confidential. The mediator is obliged to keep the confidentiality of the information and the documents that he/she receives in the course of his/her activities,even after the relegation of his/her function; professional secrecy is a primary and fundamental duty of the mediator; the breach of confidentiality shall entail the disciplinary liability of the mediator.

4. The mediation is a quick way to settle the dispute because saves significant time and avoids the stress[13] caused by a dispute conducted in front of the court

5. The mediation involves significantly lower costs than those incurred by legal proceedings. It avoids trial costs, judicial stamp duties, fees of experts etc.

6. The mediation can be used in a wide range of dispute resolution. Any type of conflicts in civil, commercial, family, criminal matters etc.

Comparison between conciliation and mediation

1. Conciliation, as a method, does not encourage, in particular, the meeting of parties and direct discussions. In mediation, the parties communicate directly, in person, or by proxy, about their problem.

2. Prior direct conciliation is mandatory in some legislations in commercial patrimonial disputes. However, it is questionable whether the obligation of parties to a potential dispute to follow a very complicated and rigid procedure, full of legal constraints, strains the dialogue of parties. Prior conciliation would have been more appropriate if it were optional, so that parties should not feel tied down in such a procedure. Mediation offers a different content of the conciliation idea, as parties do not

[13] Jennifer E. Beer & Eileen Stief, *The Mediator's Handbook*, NewSociety Publishers, Gabriola Island, Canada, 2009, p.86.

opt for conciliation in this case only to go through the legal proceedings on their way to litigation, but in order to concretely settle the dispute before litigation[14].

3. Conciliation applies, mainly, the dispute settlement strategy by means of compromise. By building collaborative relationships between the parties, the mediation aims at the final settlement of all the interests of parties, in the most advantageous way possible for each of them.

4. The conciliator develops and selects a series of objectives, priorities and ends with each party, separately. On the other hand, the mediator analyzes, firstly, the root causes of the conflict and, then, after identifying all the problems, he/she starts to outline the needs and the proposals for mutually beneficial settlements.

5. By means of conciliation, the parties apparently save their collaborative relationship, at least on a short term, aiming primarily at rapidly settling the present dispute. In mediation, the parties are helped to get everything they need and even more, to rebuild and strengthen their affected commercial relationship.

4. ARBITRATION

Arbitration is a conventional private law jurisdiction used in order to settle certain disputes by one or more persons, in a proceeding based on the autonomy of the will of parties and with the observance of the public order and decency and of the mandatory rules of law. The notion of arbitration makes reference to the court (tribunal) or to the procedure which must be followed for the settlement of the dispute or the subject of the judicial activity itself *(res litigiosa*).

Arbitration is an institution based on the autonomy of the will of parties.

The basis of arbitration is the arbitration agreement. By means of the arbitration agreement - concluded as a clause registered in a contract (arbitration clause) or as a separate document (compromise) - the parties agree to entrust the settlement of their dispute to some particular persons (arbitrators), excluding the jurisdiction of courts. The arbitration agreement is a bilateral, consensual and commutative contract; it is an act of disposal, because, on the one hand, the parties give up the specific guarantees of state justice, and, on the other hand, they are obliged to execute an arbitral decision that can impose the payment of a certain amount of money or the transfer of the ownership of an asset[15].

If in a contract the parties have agreed that any disputes arising from the improper execution of the contract to be settled by arbitration courts or by the courts chosen, this formulation is not an arbitration clause under Article 343 of the Code of Civil Procedure and Article 13 of the Rules of Procedure of the Court of Arbitration[16].

The arbitrators are independent and impartial performing their duties; they are not the parties' representatives. The arbitration court checks its own competences in order to

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[14] Jean-Louis Lascaux, *Practique de la mediation*, ed. V, ESF Editeur, Paris, 2009, p.111.

[15] Ion Turcu,*Tratat teoretic şi practic de drept comercial,* Editura C.H.Beck, Bucureşti, 2008, p.204.

[16] Such a provision, which contains an alternative power, signifies the habilitation granted to the applicant to choose between the two jurisdictions (C.A.B., decision no. 124 of 22.07.1999). The Chamber of Commerce and Industry of Romania , the Court of International Commercial Arbitration, *Jurisprudenţa Comercială Arbitrală 1953-2000*, Bucureşti, 2002, p. 10.

settle a dispute, conducts the research and delivers a decision in the arbitration case[17]. By concluding the arbitration agreement, the parties undertake to accept the arbitral decision and to execute it voluntarily.

Commercial arbitration is defined as a derogation of the common law with the object of solving the dispute in the field of trade relations[18]; arbitration is a practical and functional juridical institution, benefiting from a coherent legal framework and from a long practice[19].

Arbitration is today considered a form of justice specifically tailored[20] to disputes between merchants and representing a special attraction for the business world, being an alternative to traditional justice. Individuals expect from arbitrators that the dispute be settled quickly, in a supple procedure, established, in particular, within ad hoc arbitration, even by parties, with lower costs.

In commercial matters, arbitration may be a reflection of traders refusing to comply with, and to observe, the encysted forms of common law procedures, situation which gave birth to more malleable forms, specific to arbitration.

A tendency of modern arbitration looks towards its functional empowering towards courts, by restricting or eliminating them for the benefit of permanent arbitration courts.

Comparison between arbitration and mediation

Mediation and arbitration are the traditional methods of settling disputes between individuals, corporations and countries. Parties could agree to use an alternative method of conflict resolution after it has occurred or may require the use such methods in the future by introducing a mandatory clause for mediation / arbitration in their contract[21].

Following the action of the factors responsible for the vulnerability of the business environment (economic, financial, monetary, political, legal), there are frequent trade disputes whose settlement is done voluntarily by the parties or at a government agency's initiative, through mediation and / or arbitration[22].

There are some similarities between the two ways of dispute settlement:

1. Both arbitration and mediation are alternative ways to state justice of dispute settlement;

2. Parties are free to choose an arbitrator or mediator;

3. Both arbitration and mediation offer much greater flexibility regarding the procedure to be followed compared to the procedures in a court, being conditioned only by the observance of law and morality;

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[17] Articles 5(4), 20 and 31(2) of the Regulation 2000, the Court of International Commercial Arbitration of Romania.

[18] Marin Voicu, *Dreptul Comerțului Internațional*, Constanța, ed. Ex Ponto, 2002, p.123.

[19] Regulations in the Codes of Civil Procedure (Book IV of the Romanian Code of Civil Procedure) or the arbitral Rules of different arbitration courts. The regulation of arbitration in the New Code of Civil Procedure, Book IV art. 563-612; art. 1096-1118;

[20] Gabriel Mihai, *Arbitrajul maritim*, Ed. C.H. Beck, Bucuresti, 2011, p. 26.

[21] In the U.S., arbitration and mediation are often used to resolve labor disputes arising from the conflicting interpretations of the terms of employment contracts, construction disputes, usually between the contractor and subcontractors on the compensation or payment terms between builders and owners on payment terms contracts, commercial law disputes and companies on the evaluation of assets.

[22] Christian Buhring-Uhle, *Arbitration and Mediation in International Business*, Ed. Kluwer Law International, Leiland, Netherlands, 2006, Cap.I, p.7.

4. Both arbitration and mediation procedures involve the principle of confidentiality; the information presented in such proceedings is accessible only to the parties, unlike the procedure in common law courts which is public, including in terms of decision delivery;

5. Both are faster solutions for settling the disputes between the parties, in comparison to state justice;

6. The solution resulting from arbitration or mediation is mandatory for the parties, as the state guarantees its observance.

Between the two methods there are some extremely important differences, likely to individualize them in relation to the other:

a) Parties may resort to mediation, but they can equally quit it at any time. In arbitration, the existence of arbitration clauses or of an arbitration agreement invests the arbitral body with the resolution of the cause in the event of disputes, the parties being subsequently unable to stop the arbitration procedure and to refer to the courts of common law.

b) The arbitrator should have a certain recognized experience and qualifications in the field and the lack of this quality is a reason for challenge; in mediation, the mediator is not necessarily a specialist in the cause that he/she has to mediate; the mediator only facilitates the discussions between parties, through various techniques, in order to reach a mutually agreed solution.

c) The solution given in the arbitral decision belongs to the arbitrator. Based on the evidence given, on the request of parties and on the conclusions drawn from them, the arbitrator pronounces a decision on which one party can either agree or disagree; however, this solution, by investing it with a binding formula, acquires the force of res judicata. In mediation, the solution does not belong to the mediator, but to the parties.

Both parties must accept the solution that has the nature of a contract that produces effects according to the principle of "*pacta sunt servanda*". In arbitration, the procedure will always finish with a solution, while in mediation the parties may not reach an agreement.

d) Even if the two methods are similar in that both involve a saving of time compared to state justice, the mediation procedure involves a saving of time even in relation to arbitration proceedings, as in the case of arbitration, the management of evidence is done more thoroughly.

e) The expenses incurred in these procedures are different; they are substantially lower in the case of mediation. In mediation procedures, stamp duties, experts or other expenses related to evidence are not paid; only the mediator's fees have to be paid, unlike arbitration proceedings.

f) The scope of the mediation procedures is more extensive and it can be applied in both criminal and civil cases, and in commercial, family and any other cases, where such procedures are not contrary to law and morality. The arbitration procedure is applied mainly in commercial disputes.

In the context of the existing interference between mediation and arbitration, it is required a mixed procedure which incorporates elements of both ways of dispute settlement: Med-Arb. This recent creation of international commercial practices[23] aims at

[23] The Regulation is to be found in Law Model UNCITRAL on the International Commercial Conciliation of 2002.

settling disputes by taking into consideration the interests of parties, which are mutually recognized through mediation, and by delivering a decision that can be enforced, if necessary, following arbitration[24].

5. CONCLUSIONS

All extra-judicial means of settling commercial disputes, from the pure and simple transaction to mediation, conciliation and arbitration, are based on the agreement of parties.

In this context, the conclusion of such agreements in order to settle trade disputes involves the mutual recognition of the rights and obligations of the Contracting Parties and maintaining the trust between the business partners.

Traders need to get rid of the statist mentality that only supports state intervention in the settlement of disputes and to embrace alternative ways of settling these conflicts, ways which are more flexible, faster and cheaper and which must be asserted in this context of new socio-economic conditions.

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[24] Tudor Chiuariu, Roxana Giurea, *Arbitrajul Intern si Interational*, Ed.Universul Juridic, Bucuresti, 2012, p. 24.