

THE STATEMENT OF DEFENCE AND THE COUNTERCLAIM IN THE ARBITRATION PROCESS

Roxana Maria ROBA*

ABSTRACT: *In the arbitration process, the defendant is required to answer the claimant's request, the contents of this answer being covered by most national legislations and rules of arbitration institutions. Also, if the defendant has its own claims against the claimant arising from the same legal relationship he may promote a counterclaim. This study aims to analyze the statement of defence and the counterclaim in the light of the regulations of the national law and of the comparative law.*

KEYWORDS: *arbitration, statement of defence, counterclaim, Rules of Arbitration, defendant.*

JEL CODE: *K 49*

In the arbitration process, the defendant's response to the claimant's request should be submitted within the deadline set by the parties in the contents of the arbitration agreement or by the arbitral tribunal.

Unlike the first version, UNCITRAL Rules of 2010 provide for the defendant the obligation to answer to the notice of arbitration ("Answer to the notice of arbitration") within 30 days of its communication, the contents of which is provided by Article 4. According to this legal text, the counterstatement of the defendant shall contain the name and the contact details of the defendant as well as an answer to each of the claims made by the claimant in accordance with Article 3, paragraphs 3, letter c) - g).

The institution of the arbitral tribunal shall not be hindered by any controversy with respect to the defendant's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration. (Article 4 section 3 of the 2010 UNCITRAL Rules)

Article 21 of the UNCITRAL Rules provides the possibility for the respondent to communicate a statement of defence containing its response to the claimant's written submission. There is no deadline set within which the respondent is obliged to respond to the request of the claimant, this deadline being later determined by the arbitral tribunal. Regarding the statement of defence, the Rules of Arbitration Procedure of the International Commercial Arbitration Court attached to the Chamber of Commerce and

* Assistant Professor, Phd, „Petru Maior” University of Tg. Mureş, ROMANIA.

The research presented in this paper was supported by the European Social Fund under the responsibility of the Managing Authority for THE Sectoral Operational Programme for Human Resources Development, as part of the grant POSDRU/159/1.5/S/133652.

Industry of Romania, provide in Article 31, paragraph 1 of the Rules, that this must include: the name of the arbitrator appointed by him or the answer to the claimant's proposal on resolving the dispute by a single arbitrator; the exceptions relating to the claimant's request; the response *de facto* or *de jure* to the claimant's request; evidence submitted in defense, for each claim of the claimant's application; other documents and requirements provided by Article 27 for the request of arbitration in an adequate way. It is about the identification data of the parties, the identification data of the party's representative, if applicable and the signature of the defendant.

Failure to file the statement of defence does not mean acknowledging the claimant's claims¹, however, if proceedings are adjourned because of this, the defendant will be obliged by the claimant's request, to pay the costs caused by the delay, as stated in the same rules.

According to Article 31, paragraph 2 within the Rules of Arbitration of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania, the statement of defence shall be filed within 20 days of the receipt of the request for arbitration.

In the Romanian procedural law the penalty for the failure to file the statement of defence is the termination of the defendant's rights to bring evidence and to invoke procedural exceptions with relative features. Termination of rights is the sanction that extinguishes a procedural right that was not exercised within the period provided by law.

Analyzing the provisions of the Rules of Arbitration within the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Romania, they are not very clear in what the consequences are for failing to submit the statement of defence in time. Thus, as regards the exceptions relating to the existence or validity of the arbitration agreement, the establishment of the arbitral tribunal, arbitrators' authority limits, they should be filed, under the penalty of preclusion, no later than the first day of the hearing.

Also, in terms of evidence, the evidence may be required by the defendant not only by statement of defence, but also by written submission filed before the first day of the process and communicated to the claimant. (Article 57, paragraph 3 of the Rules of Arbitration of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania).

More detailed provisions regarding the contents of the statement of defence we find in the wording of the Rules of the International Court of Arbitration in Paris. Article 5 states that the defendant is obliged within 30 days of receipt of the request for arbitration to prepare a response that will, among other things, contain the following information: full name and address of the defendant; his comments to the nature and circumstances of the dispute giving rise to the claimant's request; his response to the claims of the claimant; any comments concerning the number of arbitrators and their election in the light of the claimant's proposals; any other objections regarding the place of arbitration, the applicable rules and the arbitration language.

The items the statement of defence should contain do not have a limitative feature. The provisions are not very strict regarding the defendant's obligation to present all its

¹ See, in this matter, Judgment no. 51 of 7 December 2010, ruled in the File no. 253 of 2010, not published and Judgment no. 232 of 18 November 2010, ruled in the File no. 80 of 2010, not published.

arguments *de facto* and *de jure*. However, unlike the claimant, the defendant is not obliged to attach all evidence in support of his position. However, it was appreciated that it is advisable for the defendant to prove that he reserves the right to complete his defense and to submit written evidence in support of its position (Schaefer, *et al.*, 2005).

In the International Court of Arbitration in Paris, failure to file the statement of defence within the term of 30 days was not considered to have as effects the defendant's termination of the right to challenge the claimant's claims (Tweeddale & Tweeddale, 2007).

The 30-day term at the defendant's service with the purpose to express his position was considered extremely short, even unrealistic for most international arbitrations, arguing that within such term, the party would be able, at most, to hire a lawyer (Derains & Schwartz, 2005).

Precisely for this reason the Rules provide the possibility of obtaining by the defendant an additional term in which to complete his statement of defence, based upon the request addressed to the Secretariat of the Court. (Article 5, section 2 of the Rules of the International Arbitration Court in Paris). Although not stated explicitly, such a request must be made within the initial term of 30 days. However, the application must contain the defendant's position on the appointment of the arbitrators.

Although in case law the application of these provisions was frequently used, the extension of the deadline within which the statement of defence could be formulated wasn't decided, thus aiming to encourage the speeding course of the arbitral process (Derains & Schwartz, 2005).

Similar to those provided for the request for arbitration, the Rules of the International Court of Arbitration in London provide that the defendant's drafting as a response to the claimant's request will take place in two stages. Thus, Article 2 of the Rules provides that within 30 days of receipt of the request for arbitration or a shorter period settled by the Court, the defendant shall send a response to the Registry containing or accompanied by:

- a) confirmation or rejection in whole or in part of the claimant's claims;
- b) a brief description of the nature and circumstances of any claim the defendant would have against the claimant;
- c) his response to the proposals of the claimant in respect to the arbitration proceedings;
- d) name, address, telephone, fax, telex or email of the arbitrator appointed by the defendant, in case it was provided in the wording of the arbitration agreement;
- e) confirmation by the Court Registry of the fact that there were sent copies of the statement of defence simultaneously to all parties by one or more media carriers that are to be identified by this confirmation.

The answer of the defendant, accompanied by all supporting documents shall be submitted to the Registry in two copies or if the parties have agreed or the defendant considers that three arbitrators are to be appointed, then four copies should be submitted.

Failure to submit the answer by the defendant does not entail the termination of the right to challenge the request for arbitration or to draft a counterclaim. However, if the parties agreed to nominate an arbitrator in the arbitration agreement, the failure of nomination by the defendant leads to his termination of that right. (Article 2.3. of the Rules)

Regarding the content of the written submission by which the defendant is liable to the claimant's request, it should contain sufficient details on the legal situation and the claimant's arguments that he agrees upon or rejects its claims. The written submission will be submitted within 30 days from the date of communication by the claimant of its written submission. (Article 15. 3 of the Rules)

Most national laws do not contain detailed provisions for the content of the statement of defence. Likewise is the UNCITRAL Model Law which states only that the defendant will present a written submission that will have the same terms as the petition form.

The defendant has the opportunity to file a counterclaim in the event that he has, in his turn, claims against the claimant.

Among international conventions in this matter, only the Washington Convention of 1965 refers to counterclaims, featuring in the Article 46 as follows:

Except for a contrary agreement by the parties, the court shall, at the request of one of them, to rule on all incident, additional or counterclaim requests directly related to the subject of the dispute, provided that such claims are covered by the consent of the parties and, furthermore, they fall within the center's jurisdiction.

The Convention therefore requires the counterclaim to be directly linked to the subject of the dispute. The provision was criticized in the legal literature appreciating that it would cause difficulties in case law, due to the fact that the defendant would have to submit an application for arbitration, even based on the same arbitration agreement, to another arbitral tribunal (Gaillard & John, 1999).

Unlike the previous version which expressly provided that the counterclaim arise from the same contract, the Model Rules UNCITRAL 2010 require only the application to be within the jurisdiction of the arbitral tribunal, the latter requirement being considered one of the fundamental principles of the arbitration jurisdiction (Pavić, 2006).

Most arbitration rules allow the defendant to formulate a counterclaim, however some limit the opportunity of the defendant to submit a counterclaim to claims arising from the same legal relationship, while others do not contain detailed provisions on this matter.

According to the Rules of Arbitration Procedures of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania, the wording of the counterclaim is conditioned by the existence of the defendant's own claims against the claimant, deriving from the same legal relationship. The counterclaim may be filed no later than the first day of the process, as provided by Article 32, paragraph 2 of the Rules of Arbitration of the International Commercial Arbitration Court. However, after the first day of the hearings, the arbitral tribunal may approve the receipt of a counterclaim for reasons that relate to the proper administration of disputable relations between the parties, always by respecting the claimant's procedural rights.

We appreciate that the provisions of Article 574 of the Romanian Code of Civil Procedure of 2010, republished, on the introduction of the counterclaim, are much clearer in this regard. According to this article, the counterclaim will be introduced within the period for filing the statement of defence or at the latest at the first hearing the defendant has been legally summoned and it must meet the same conditions as the main claim.

The Rules of the International Court of Arbitration in Paris provide that the defendant may draft a counterclaim together with his response to the request for arbitration in which he shall state: the description of the nature and circumstances giving rise to the

counterclaim and a written submission where the proposed remedy is to be mentioned indicating the amount requested.

Faced with a counterclaim that did not have the grounds under the same contract the initial arbitration petition was based upon, the International Court of Arbitration in Paris ruled its judgment marking that any review would be likely to deny the defendant's right to trial (Rubino-Sammartano, 2001).

Article 15.3 of the Rules of International Arbitration Court in London do not refer only transitorily to the counterclaim, noting that it must be drafted under the same form as the request for arbitration in what concerns the exposure of claims.

The rules of other arbitration institutions provide that the counterclaim should necessarily be subject to the same contract or rely on a claim arising from the same contract. The Rules of the Commercial Committee of the Inter-American Arbitration expressly state in Article 19.3 such a requirement in respect of the counterclaim.

Equally, the jurisprudence of the Court of Arbitration at the Polish Chamber of Commerce stated that the concept of counterclaim action considers strictly a request connected to the main claim or arising from the same legal relationship (Rubino-Sammartano, 2001).

Another issue debated in the legal literature refers to the solution that is imposed in case the counterclaim is filed tardily. Such a situation can occur only under *ad hoc* arbitration, unless the parties have provided for resolving such issues. It is the task of the arbitral tribunal to decide whether the promotion of such a request constitutes a procedural abuse intended to delay the resolving of the case or if a legitimate interest of the party prevails in resolving all issues in the dispute (Redfern & Hunter, 2004).

In practice, the defendant may have the interest to introduce a third party in the process by way of counterclaim. Such a situation could exist where the contract containing the arbitration agreement is signed by more than two parties, without mentioning anything about the institution of an arbitration procedure among several parties. The defendant may have the interest of introducing the third party in the process. In these circumstances, the question arises whether such a request may be promoted in the initial process or if the defendant must file a separate application, in which case it is of course possible the judgment of contradictory awards (Gaillard & John, 1999).

Even though this issue has not formed the object of regulations, the doctrine and jurisprudence generally considers that the participation of a third person within the arbitration procedure is possible in principle, and the rules applicable result directly from the nature and scope of the arbitration proceedings².

For a long time, the Rules of the International Court of Arbitration in Paris were interpreted in the meaning that they did not allow the introduction in the process of a new party which was not originally mentioned in its request for arbitration (Born, 2009).

Currently, in the light of Article 10 of the Rules, it is estimated that the introduction of a new party in the process is possible if several conditions are met (Derains & Schwartz, 2005): all parties to have signed the arbitration agreement; the defendant to have claims against the third party he wished to introduce in the process; the request to have been

² See International Chamber of Commerce Case no. 12171, Award on Third Person Notice, 7 April 2004, B. Claimant v. K, Respondent, in Swiss Arbitration Association Bulletin 2005, no. 2, p. 273.

made before the arbitrators were appointed or approved by the Court. To the extent that these requirements are met, we think there is no question of breaching the principle of parties' equality in the process.

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