THE ARBITRAL CONVENTION. SOME FRAMEWORKS OF ANALYSIS

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ABSTRACT: *Arbitration – alternative jurisdiction with private law features, presents varied advantages in comparison with state jurisdiction. The parties and the Court of Arbitration can establish procedure rules which are derogatory from common law, provided that they are according to public order and imperative provisions.*
There have been many opinions expressed with regard to the subject of the arbitral convention and its juridical nature. As a result of our research, we propose some frameworks of analysis concerning the arbitral convention, aiming to point out all the aspects that this kind of private justice entails. On account of the arbitral convention, all parties who wish to solve their conflict in conditions of swiftness, fairness and equipoise may resort to arbitration.
The results of our research could prove interesting to: practitioners in the field of arbitration, advocates, legal advisers, professors, students, masters' students, PhD students, practitioners in the field of business.

KEY WORDS: *arbitration, arbitral convention, arbitrator.*
JEL CLASSIFICATION: *K 49*

Arbitration is regulated in the new Code of Civil Procedure, the fourth book "About arbitration", articles 541-621, and the fourth title "International arbitration and the effects of foreign arbitral sentences" comprised in the seventh book "International civil lawsuit", articles 1110-1132.

Arguing about the matter of the arbitral convention represents, from the beginning, the acknowledgement of the transdisciplinary character of the research. The debate upon the arbitral convention emphasizes a larger framework that includes the arbitral procedure as a flexible and specific manner of solving the conflict.[1]

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[1] For a detailed examination regarding arbitration, to be consulted : V. Ros, Arbitrajul Comercial Internațional (International Commercial Arbitration), publishing house Monitorul Oficial, Bucharest, 2000, page 25 and following; S. Zilberstein, Procesul Civil Internațional. Normele de procedură din Legea nr. 105/1992 cu privire

Arbitration is mostly distinguished by pondering over the social subtleties of the conflict and aiming towards re-establishing the relation between the parties of the conflict, deviating from setting out only the guilt and the sanction. Arbitral justice is a type of specific justice because it examines the human conduct in a complex manner – due to the fact that human conduct bears spectacular volitional and intellectual competences. On the grounds of his own will – seized with the arbitral convention-, the individual appeals to arbitration, spirited by the desire to have his actions understood and qualified in a multi-valence manner and not in a solely juridical manner. Personality characteristics, individual values, the pattern of socialization and interaction may play, in the arbitration context, the role of criteria that influence the individual will and, from this point of view, the entire procedure. Hence, it follows that transdisciplinarity will be present in both general approach (of the arbitration procedure as a whole) and special approach (of the connected aspects of the arbitral convention).

The transdisciplinary and thus complex approach of the arbitral convention determined our option towards dividing our study in several frameworks of analysis. Each framework will deal with a connected aspect to the arbitral convention, preserving the transdisciplinary style.

The first framework of analysis is dedicated to the concepts of *will* and *juridical will*. At this point, the axiom of our research becomes obvious : arbitration is a superior type of justice for it is not unilaterally imposed. It is chosen by the individual freely and accordingly to his own will – and this is expressed in the limits stipulated by law, public order and morals.

Referring to the concept of *will* , we intend to demonstrate its intricate content – that, even if it seems exclusively circumscribed to juridical studies, it also encourages the integration of elements which are outward of the field of juridical studies. Therefore, it is fitting that we qualify the term *will* in the psychological, philosophical and folklore paradigm, considering, at the same time, the juridical paradigm. [2] From the psychological point of view, the concept of *will* has a pure signification, reduced at the following definition: *man's capacity to establish and achieve goals through activities that involve overtaking obstacles and using moral and mental resources. Will is man's ability to plan,*

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la reglementarea raporturilor de drept internațional privat, (International Civil Lawsuit. Proceedings rules within the Law no. 105/1992 concerning the regulation of international private law relations), publishing house Lumina Lex, Bucharest, 1994, page 138-144; I.Leș, Tratat de drept procesual civil (Treatise of civil procedure), fifth edition, publishing house Universul Juridic, Bucharest, 2010, page 874 and following; T. Popescu, Arbitrajul litigiilor patrimoniale cu element de extraneitate (The arbitration of patrimonial litigations cu foreign elements), The informing and documentation office of the technical- material provisioning Ministry, Bucharest, 1980; I.P. Filipescu, Drept internațional privat (International private law), second volume, University of Bucharest, 1984, page 266; O. Căpățână, Litigiul arbitral de comerț exterior (The arbitral litigation of foreign trade), publishing house Academiei, Bucharest, 1978; Fl. Măgureanu, G. Măgureanu, Drept procesual civil. Curs pentru masterat. Dreptul afacerilor (Civil law procedure. Masters textbook. Business law), second edition, publishing house Universul Juridic, Bucharest, 2009, page 60 and following; G. Dănăilă, Procedura arbitrală în litigiile comerciale interne (Arbitral procedure in home trade litigation), publishing house Universul Juridic, Bucharest, 2006, page 61; V. Babiuc, O. Căpățână, Convenția arbitrală în dreptul internațional privat român (Arbitral convention in international private romanian law), Law Journal, no. 9/1995, page 3-9; J. Rubelin-Devichi, L'arbitrage. Nature juridique. Droit interne et droit internațional privé, Paris 1965.

[2] I. Dogaru, Valenţele voinţei juridice (The valences of juridical will) , publishing house Ştiinţifică şi Enciclopedică, Bucharest, 1986, page 10.

organize, accomplish, and control the activities that are undertaken in favour of achieving goals. [3]

The problem is more difficult to grasp at the philosophical and folklore level : the Hellen civilization thought *will* is „that human something" which represents intelligence, emotionality, sensibility, and life itself[4] while the Roman civilization considered ***will*** as the synonymous of ANIMUS. Roman writings indicate that ANIMUS is the element that leads, attenuates and arranges all things, similarly to a God who addresses our world (...) sometimes, it must be ruled, by virtue of the principle qui nisi paret imperat. [5]

Reflected in the psychological, philosophical and folklore paradigm, the will is presented as a contemporary aspect of our being which is born and develops together with the individual. Consequently, the will is a given and not a capability that one may acquire in the process of time.

The juridical science advances an opposite perspective : the formation of the will assumes a process (a construction not a pre-existing fact) that knows three major points in its becoming. The starting point is represented by a need that the individual experiments and aspires to satisfy; subsequently, the individual identifies the means of meeting the need, revealing the desire of satisfying the need. Next is the deliberation stage in which we estimate the advantages and disadvantages brought by individual desires and the ways of accomplishing them. Ultimately, alongside with finding out the decisive motive, the individual passes from deliberation to adopting a decision. Naturally, adopting the final resolution is a pure-mental fact, which must be achieved in a concrete manner in order to become a juridical fact.[6]

Sequel to its evolution in the juridical field, the will is free-governed by two important principles – the principle of free will (to which we will refer in particular) and the principle of real will. The freedom of will wasn't recognized by Roman law because of the excessive formalism that was demonstrated by the regulations of that time. The will itself did not constitute a pledge, it was ought to be regulated in order to be juridically effective. Moreover, conventions that did not have a *nomen* nor a *causa* were not juridically effective. Formalism had precedence so, in order that an agreement juridically equalize a convention, it was necessary to be moulded into *verba, litterae,* or to be impose the *handing over of an object*. [7] Therefore, the rule of Roman source – *solo consensus obligat* - is bound to explain the conclusion of the convention, at the same time, forestalling the idea of human solidarity which is found in any convention – in light of the fact that the individual is a social being who resigns to social rules. [8] The rigidity of

[3] Beniamin Zorgo, Ce este voința?(What is will?), publishing house Enciclopedică Română, Bucharest, 1969, page 12.

[4] A. Ferrari, Dicționar de mitologie greacă și romană (Dictionary of Greek and Roman mythology) , Iasi, publishing house Polirom, 2003, page 789.

[5] Q. Flaccus, Horatius, Opera Omnia – Satire. Epistole. Arta Poetică (Opera omnia- Satires. Epistles. Poetical Art), second volume, publishing house Univers, Bucharest, 1980, page 188.

[6] GH. Beleiu, Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil, (Romanian civil law. Introduction in civil law. The subjects of civil law) publishing house Universul Juridic, Bucharest, 2007, page 145-146.

[7] R. Tison, Le principe de l'autonomie de la volonte dans l'ancien droit francais (The principle of free will described into the old French law), publishing house Domat – Montchrestien, Paris, 1931, page 15-17.

[8] J. Domat, Les lois civiles dans leur ordre naturel (The civil laws in their natural order) , first volume, publishing house Kleffer, Paris, 1823, page 30-31.

Roman law will be outdistanced by the ascendancy of the thesis of natural law; according to this thesis, the juridical will is the sole instrument used in the process of self-determination as it is an inner individual element, superior by genesis and force to the immoderate law formalism. Through his will, the individual obtains the natural disposition to engage himself juridically and to independently create an autonomous juridical reality. [9] The will becomes the intellectual foundation of the contract and the source of its binding strength. [10]

Among all the known forms, contractual freedom is, perhaps, the most illustrative form of the principle of free will. Contractual freedom expresses some exigencies that must be observed: no person can be forced to close a contract; no person can force another person to engage him/herself into contractual relations; no person can be stopped from concluding an agreement. The restrictions may be laid down by individual will, law, public order, morals. [11] If the parties wish to enter into an agreement, they are free to choose the form and the content of the contract, they may amend or terminate the contract. The contractual freedom is not a value that remains captive to its own significance. On the contrary, it rejoices of juridical recognition. Article 1169 Civil Code regulates: "parties are free to conclude any agreements and to determine their contents, complying with the limits enforced by law, public order and morals". Doctrine draws up a logical and brief *per a contrario* interpretation of the above-mentioned rule, the result being: if law, public order and ethics are respected, the subjects of civil law are free to conclude any agreements or unilateral act.[12]

Even if the principle of contractual freedom rejoices of legal acknowledgement and of a special statute among other civil law principles, it does not have absolute application. The legislative bodies prescribe limits that need to be obeyed so that the principle of contractual freedom is lawful. The first limit is the law. The rules and regulations in the field of contractual law are mostly non-binding, allowing the parties involved to impose derogatory norms. The binding rules are fewer, non-derogatory and represent genuine bounds of contractual freedom. The second limit is public order. Doctrinary studies show the concept of public order in a very controversial light, in absence of a precise definition. From one point of view, the concept of public order implies all the rules and regulation which create public law, which are all the norms that regulate the structure of state powers and the relations between state powers and the subjects of private law. [13] From another point of view, public order comprises all the binding rules and regulations of both public and private law, through which are protected fundamental state institutions and values, through which competitive economy is enhanced and social protection of all citizens is achieved. [14] Morals- the last limit of contractual freedom, analogous to public order, does not have a clear definition; it is explained by doctrinary studies. It was set down that

[9] A. Weill, Les obligations (The obligations), publishing house Dalloz, Paris, 1971, page 50.
[10] A. J. Armand, Les origines doctrinales du Code civil français (The doctrinary origins of the French Civil Code), publishing house LGDJ, Paris, 1969, page 197.
[11] I. Albu, Contractul şi răspunderea contractuală (The convention and the liability), publishing house Dacia, Cluj, 1994, page 27.
[12] Gh. Beleiu, op. cit., page 146.
[13] L. Pop, Drept civil-Teoria generală a obligaţiilor (Civil Law- The general theory of obligations) , publishing house Fundaţia "Chemarea", Iaşi, 1994, page 34.
[14] Ibidem, page 35.

morals signify the total amount of rules and regulations that emerged into social conscience and that were imposed as binding by a long practice and experience. Because the content of morals is, similar to public order, - changeable in time and space, courts of justice are responsible to determine and to apply it differently from case to case. [15]

To make complete our previous thesis – concerning the principle of free will, the principle of real will emphasizes ideas that were only sketched by the principle of free will. Firstly, we reiterate the idea that real will- when expressed with the intention of producing legal effects is the only one that can create law. Spoiled will is considered like never having existed, creating only a pseudo-norm which will be, unavoidable, abolished. [16] Secondly, we stress upon the dual nature of the juridical will, given the fact that it comprises an internal- psychological element and also an external- social element. With regard to the concordance between those two elements, two practical cases are possible. Between the two elements can exist full concordance, the will remaining unspoiled. But, if the internal and the external element are not in concordance, the issue of establishing priority appears. Will the subjective element have priority upon the objective element or vice versa? In response to this question, the subjective conception (accepted by the Romanian law) will give priority to the internal, real will, while the objective conception will give priority to the external will. As we anticipated, the Romanian law school supports the theory of real will even though not in expresis verbis but by initiating some specific rules, such as: conventions are construed conformable to real will, spoiled will is not a premise for the lawfully engaging into contractual relations, in terms of simulation, the secret contract is considered to be binding only toward the parties and the universal successors. [17]

The second framework of analysis connects the problem of free will to the problem of legal competence – as an essential demand of proceeding to arbitration.

Within this framework of analysis, our attention focuses on the conditions of validation of the arbitral convention, setting them in the hierarchical system. We notice that, the law does not provide with such a system, but we agree that, we can assume the risk of establishing it through doctrine. Our main idea is that the object, cause, consent, capacity are conditions that validate the arbitral convention, but they cannot all be deemed in the same manner. The condition of legal capacity prevails upon other conditions due to the fact that, once fulfilled this condition, the result will not only be the validity of the arbitral convention, but also the possibility to proceed to arbitration.

The production of legal effects sequel to the principle of free will, it`s a sore point of our analysis, upon which we will persevere in the following. As we have already pointed-out, juridical will is not totally free, as it is necessary for this principle to comply with several rigours. Besides this aspect, the principle of free will is in inward connection to the condition of legal capacity. Why is there this unrelenting relation between the principle of free will and the matter of legal capacity? This interrogation is not an incertitude, but it bears a rhetorical meaning and the answer can be easily foreseen: because the most extended proficiency of the principle of free will is the principle of

[15] I. Albu, Drept civil (Civil Law), publishing house Dacia, Cluj Napoca, 1984, pag e 60.
[16] O.Căpățână, Tratat de drept civil (Treatise of civil law) , vol I, publishing house Academiei, Bucharest, 1989, page 234- 235.
[17] Gh. Beleiu, op. cit., page 148.

contractual freedom, because one of the essential conditions for the validity of a contract is the capacity of legal engagement into contractual relations; contractual relations will comprise also the full, legal, capacity as a component.

It has been shown, that, in arbitration, legal capacity is one of the compulsory conditions of proceeding. Despite the fact that the legislator does not clearly name which are the three conditions of arbitration, those three conditions can be deduced from article 542 Code of Civil Procedure: „Those who have legal capacity can agree on solving through arbitration the litigations which can occur, except those that concern legal status, legal capacity, inheritance, family relations and other rights of which the parties cannot dispose".

Doctrinary studies[18] have extracted from the above-mentioned legislation, the conditions to fulfil so that litigations can be arbitrated: legal capacity of the parties; a valid arbitral convention on the strength of which parties can make the option for arbitral justice; the arbitral nature of the litigation – that can be proved by force of legal exceptions.

Legal capacity of the parties equals to a transposition in the arbitral field of notions (existing in common law) regarding legal capacity. Full legal capacity- as legal condition of arbitration – has a simple explanation : resorting to arbitration is an act of free will, and it affects the patrimony of the party that takes the decision of arbitration as by taking such a decision, the party waves the pledges of state jurisdiction and engage to fulfilling the obligations set-out by the arbitral judgement. [19]

The Code of Civil Procedure settles, in article 542, paragraph 3, the matter of legal capacity of juristic persons of public law and their possibility to proceed to arbitration: „Juristic persons of public law that carry on, within their field of action, economic activities, can engage themselves in arbitral conventions, except for the situation in which, the law or their legal founding instruments stipulates otherwise." The legislator's solution is simple and concise, subduing all the subjects to the restrictions provided by law or by statute – restrictions that regard the possibility of engaging in an arbitral convention. Anywise, by force of the article 542 Code of Civil Procedure, the capacity of engaging in arbitral conventions becomes the rule in the relations involving juristic persons of public law that carry on also economic activities.

In respect to the state's ability and to the ability of its administrative and public authorities of engaging arbitral conventions, article 542 Code of Civil Procedure will enclose explicit dispositions : State and public authorities have the ability of engaging arbitral conventions only when they are enabled by law or by international conventions to which Romania takes part. By means of article 542, paragraph 2, the legislator inverts the capacity rule – applied in contractual matters- with the incapacity rule. *Distinctly, it is a rule that state and public authorities <u>don't have</u> the ability to engage in arbitral conventions; extremely, these entities can resort to arbitration only by abiding by the conditions stipulated by law or by international conventions to which Romania takes part.* The doctrine comments upon this legal situation in the sense that: rules regarding capacity

[18] M. Ionaş-Sălăgean, Arbitrajul comercial (Commercial arbitration), publishing house All Beck, Bucharest, 2001, page 36.

[19] V. Roş, Arbitrajul comercial internaţional (International commercial arbitration), publishing house Regia Autonomă Monitorul Oficial, Bucharest, 2000, page 36.

are rules of public order, the exceptions from the capacity rules can be established only by the legislator. [20] The state, in the position of supreme public authority that holds and organizes the juridical function, must have reasonable and special motives to convey with private parties to resort to a private jurisdiction. [21]

Our route- up to this point-moves the focus-point from the link between *freedom of will –legal capacity* to the connection *legal capacity-arbitral convention*. Doctrinary studies minutely comment upon this last connection: arbitral convention can be engaged by the interested party who has legal capacity to serve this purpose or by a legal representative. The capacity of engaging an arbitral convention must be well delimited by the ability of engaging a convention for another party. As it is an important legal act that expresses the free will of the party who invokes it, the engagement of the arbitral convention through representative, is lawful only when made by special representation. [22]

Juristic persons have, in this point also, a special status. In their case, the arbitral convention will be lawful when engaged by the legal representatives; the right to representation may emerge from the status or from a special representation act – entrusted to a specific person by the management body. [23]

This concurrence of circumstances anticipates other connections worthy of consideration in the study of arbitral procedure. The link upon which we changed the focus of our study *legal capacity-arbitral convention* is explained if we appraise the legal capacity as a vital condition of the lawfulness of the arbitral convention. On the other hand, the arbitral convention deserves its title of the keystone of the arbitral procedure[24] only if it is engaged in a legislative framework which can make it effective. [25]

Legal capacity plays an invaluable role regarding the validity of the arbitral convention. Nevertheless, reporting on the arbitral convention we will consider the general dispositions that can be applied to any convention and the special dispositions as well. We must show that, the civil legislator, in article 1179 Code of Civil Procedure does not confine to the condition of legal capacity but evokes all the conditions of the arbitral convention: the parties consent, a determined and lawful object, a lawful and moral cause.

Noticing the legal enumeration, the conditions of the object and of the cause are not foremost, having a limited significance in doctrinary studies.

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[20] V. Roş, Arbitrajul comercial internaţional (International commercial arbitration), publishing house Regia Autonomă Monitorul Oficial, Bucharest, 2000, page 139; Fl. Măgureanu, Drept procesual civil (Civil procedure law), twelfth edition, publishing house Universul Juridic, Bucharest, 2010, page 400 and following.

[21] T. Prescure, R. Crişan, Arbitrajul comercial (Commercial arbitration), publishing house Universul Juridic, Bucharest, 2010, page 55.

[22] G. Dănăilă, Procedura arbitrală în litigiile comerciale interne (Arbitral procedure in home trade litigation), publishing house Universul Juridic, Bucharest, 2006, page 61.

[23] T. Prescure, R. Crişan, op. cit., page 56.

[24] I. Băcanu, Noua reglementare a arbitrajului în Codul de Procedură Civilă Român, (The new regulation of the arbitral procedure in the Code of Civil Procedure) article published in Law Review (Revista Dreptul), Bucharest, no. 1/1994, page 13-25; E. Loquin, Différences et convergences dans le régime de la transmission et de l`éxtension de la clause compromissoiredevant les jurisdictions françaises (Differences and convergences in the regime of transmutation and extension of the arbitral clause in front of French jurisdictions), article published in Journal of Palais (Gazette du Palais), Paris, 2002, page 7.

[25] O. Calmuschi, R. Munteanu, Fundamentul competenţei arbitrajului comercial în soluţionarea litigiilor (The foundation of competence in the field of solving litigations through commercial arbitration) , article published in Private Law Review (Revista de Drept Privat), Chişinău, no. 2/2002, page 17.

The main object of the arbitral convention consists in the conduct of the parties who chose to engage in arbitration and the second object is given by the litigation that is ought to be solved by arbitration. In order to be lawful, the object of the arbitral convention must be determined – condition fulfilled if we consider the compromise because in this case the litigation is born and can be analysed. If we consider the arbitral clause, the object of the arbitral convention is nearly determined by indicating the litigations that could appear in the future. [26] On the other hand, as the law provides, the object of the arbitral convention must be lawful, - which means that it will comply with the rigours of law, public order and morals. We deem that the object of the arbitral convention is unlawful if the law prohibits that the litigation be solved by arbitral justice.

The cause of the arbitral convention represents the decisive motive of legal consent- that is the purpose of the parties engaged in the litigation. By bringing into operation the general theory of contracts, the cause of the arbitral convention will be unlawful if it is opposite to the law and to public order; also, the cause of the arbitral convention will be immoral if it is opposite to morals.[27]

Returning to the legal enumeration of the conditions which must be followed for the validity of the arbitral convention, the matter of legal consent raises several disputations. Article 1204 Civil Code presents the conditions for a valid, legal consent, establishing that it should be serious, free and knowingly expressed. Article 542 Code of Civil Procedure, reminds the condition of legal consent through the expression „parties may convey".

The exteriorized will of juridical engagement – the consent- raises specific problems concerning legal flaws. In respect to consent's flaws and their consequences upon the arbitral convention, doctrinary studies have prescribed persuasive solutions. Thus, the nullity of the arbitral clause doesn't extend upon the main contract, excluding the case in which the arbitral clause was fundamental for concluding the contract (the parties have engaged into the main contractual relations considering that future litigations will be solved by arbitral justice). Similarly, the nullity of the main contract doesn't reflect upon the arbitral clause except for the situation in which the main contract is affected by a legal flaw regarding the main contract as a whole (the main contract was engaged by a person lacking legal capacity or power of representation).[28]

With little application in arbitral justice, the legal flaw of error may be observed in connection to the qualities/aptitudes of the arbitrator. In practice, it is commonly invoked the error as a legal flaw by the part who discovers that the arbitrator appointed by him/her had or has relations with the opposite party, promoting serious doubts referring to the arbitrator independence and impartiality. Violence – as a legal flaw- is invoked in arbitral justice in standard contracts. [29] Concerning deception as a legal flaw, the delusive actions are more flexible construed in arbitral justice in comparison to common law. Dolus bonus – the exaggeration of the quality of goods and services- is exceeded by the protection of

[26] G. Dănăilă, op. cit., pages 73-74.
[27] Ibidem.
[28] Ibidem, page 70.
[29] Sentence no. 9 from 28 January 1974, published in the jurisprudence of the Court of appeal, Bucharest, no.125, pages 7-8.

the consumer and his interests.[30] The subject of lesion- as a legal flaw- is not to be approached in arbitral justice for it is suitable for minors. For minors, the possibility of engaging in an arbitral convention is excluded. [31]

Third, we conceived a framework of analysis in which we surprised the theoretical difficulties of usual problems like: conceptual delimitation, forms and effects of the arbitral convention. The conceptual delimitation of the notion of *arbitral convention* turned out a real provocation, especially because we understood that, in pure form, the arbitral convention will never exist. In fact, there are only compromise and arbitral convention which share some common elements that allow them to be analysed under the name of arbitral convention. The subject of the forms of the arbitral convention is even more difficult to lay out. The arbitral clause- the most usual form of the arbitral convention is indirectly defined by the legislator in article 550 Code of Civil Procedure as the clause through which „parties convey that the litigations that will arise *from* the contract that comprises it or are *in connection to* the contract that comprises it, are ought to be solved by arbitral justice, being established, under the sanction of nullity, the manner of appointing arbitrators." To make complete these stipulations, the legislator provides that, in case of institutional arbitration, is sufficient the reference to the institution or to the procedural rules of the institution that organizes arbitration. The second paragraph of the same legal text brings novel stipulations, specifying that: „the validity of the arbitral clause is independent of the validity of the contract that encloses it." The relation between the arbitral clause and the main contract is similar to the relation of a contract comprised into another contract. From the physical point of view, the arbitral clause is a component of the whole, from the juridical point of view; we observe a halving of the main contract into two separate contracts. One of the contracts (the main one) will establish the rights and duties of the parties and the other one (the arbitral clause) will show the manner of solving the litigations which may occur in relation to those rights and duties. The procedure convention will be detachable from the convention of juridical essence, affirming its autonomy.[32]

The rule of independence between the two contracts (as any other legal rule) must be looked upon with suspicion and mustn't be uphold as absolute. Autonomy is relative and is applied to the existence and validity of the arbitral clause. Otherwise, the two contracts are indistinct: there is only one consent, the contract is signed as a whole. [33]

Qualified in doctrinary studies as an open convention [34], the arbitration clause will have effect upon all the conflicts that derive from the contract or from juridical relations

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[30] I.L Georgescu, Drept comercial român. Teoria generală a obligaţiilor comerciale. Probele. Contractul de vânzare-cumpărare comercială (Commercial Romanian Law. The general theory of commercial obligations. Legal evidence. Commercial sale contract) , publishing house Lumina Lex, Bucharest, 1994, page 143.

[31] T. Prescure, R. Crişan, op. cit., page 67.

[32] J. Robert, B. Moreau, L`arbitrage. Droit interne. Droit international privé (Arbitration. Domestic law. International private law), publishing house Dalloz, Paris, 1993, page 158.

[33] G. Dănăilă, op. cit., pages 53-54.

[34] The opinion was expressed by Ionaș-Sălăgean, in the paper Commercial Arbitration, publishing house All Beck, Bucharest, 2001, page 49. The author argues that, by appearing before the bearing of the litigation, the arbitral clause can't foresee all the elements that will be present in arbitration and, as a result, it can be supplemented before the birth of the litigation (through additional documentation) or after the birth of the conflict – through compromise.

in link with the contract, this situation is regulated in article 550, paragraph 3 Code of Civil Procedure.

The compromise, the second form of arbitral convention is regulated in article 551 Code of Civil Procedure. According to the legal text above-mentioned, through compromise, parties convey that the litigation which has appeared between them is to be solved by arbitral justice, making notice, under the sanction of nullity, the object of the litigation, the names of the arbitrators or the manner of appointing them, in the case of ad-hoc arbitration. The legislator continues to explain that, in case of institutional arbitration, if parties haven't chosen the manner of appointing arbitrators, arbitrators will be appointed by the rules of procedure of that particular arbitral institution. It is also very interesting the provision of paragraph 2, according to which, compromise may be engaged even if the litigation is already on trial.

This last disposition is a natural consequence of the conventional nature of arbitration so that, in case of litigations that are on trial and, at the same time, that can be arbitrated, parties may convey through compromise, to send the litigation to another court. For reasons of rigour, the legal text comments upon a conflict that is allocated to a different court- may it be juridical or arbitral. Hence, parties are able to modify through compromise the rules comprised in an arbitral clause, modifying, at the same time, the competence in solving the litigation. We must underline that the possibility evoked in article 551, paragraph 2 from the Code of Civil Procedure subsists until the solving of the case. [35]

Species of the same genus, the arbitral clause and the compromise leave room to comparison, becoming obvious the similarities and differences between the two species.

Differences overtake the similarities: the arbitral clause is more frequent than the compromise; the arbitral clause is engaged before the birth of the conflict – usually at the same time as the main contract while the compromise is engaged after the birth of the conflict; the compromise has, in comparison to the arbitral clause, an extra element – the object- which has to be mentioned under the sanction of nullity.

Similarities lie in content (taking into consideration the exception we noticed) and effects. It is worth noticing that, in extenso, the content of the arbitral convention is indicated in article 544, paragraph 2 Code of Civil Procedure : „Provided that public order, morals and imperative dispositions are abided by, the parties can establish through arbitral convention or through additional documentation, the latest at the same time with the constitution of the Arbitral Court, directly or by reference to a certain regulation whose object is arbitration, the norms concerning the constitution of the arbitral court, the appointing, dismissal and replacement of arbitrators, the summon and the place of arbitration, the regulations to which the arbitral court must comply, inclusively the prior procedures of solving the litigation, the allocation, between the parties, of the arbitral expenses and, generally, all the norms required for the development of arbitration."

The effects of arbitration-as important similarities between the arbitral clause and compromise- can be synthesize in two hypostases: general effects and special effects.

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[35] Gh. Piperea, C. Antonache, P. Piperea, A. Dimitriu, M. Piperea, A. Răţoi, A. Atanasiu,; Noul Cod de procedură civilă. Note. Corelaţii. Explicaţii (The new code of civil procedure. Notes. Correlations. Explanations), publishing house C.H. Beck, Bucharest, 2012, page 596.

General effects of the arbitral convention can be easily deduced due to the fact that, being in essence a contract, the arbitral convention will be governed by the same rules that are applied in the contractual theory : the principal of binding strength, the principle of good faith, the principle of the relativity of contractual effects.

The first two principles demand that the parties are bound, in order to solve the litigation - object of the arbitral convention, to resort to arbitral procedure and to abide by it. The parties will cooperate with the arbitral court for the proper development of arbitral procedure and for the solving of the case as summoned. Such obligations subsists during the entire arbitral procedure : the plaintiff has the obligation of informing the arbitral court about the litigation, the accused has the obligation to obey arbitration rules, parties are bound to appointing arbitrators and to fulfil all the obligations required for the suitable unrolling of the arbitral procedure; the party that lost the trial must fulfil the sentence freely and at once or at a time limit established in the arbitral sentence. [36]

The principle of the relativity of contractual effects has, as prior consequence, resuming the effects of the arbitral convention to the parties, establishing rights and duties in favour and against them. The effects of the arbitral convention will not extend upon third parties. Moreover, the involvement of third parties into the arbitral procedure is a special situation, given that: the main intervention of third parties, showing the holder of the right, taking action against third parties and requesting warranties, are admissible only with the consent of all parties. In return, the accessory intervention is admissible without further conditions.

Special effects can be also easily resumed, the arbitral convention, as a procedural contract generates : the exclusion of the competence of common law courts regarding the conflict that is the object of the arbitral convention and the investment of arbitral court with the power of judging the litigation, establishing limits of competence.[37]

The first main effect is express enunciated by article 553 Code of Civil Procedure: „ the engagement of arbitral convention excludes, for the litigation that makes its object, the competence of common law courts". Doctrinary studies estimate that the lack of competence of common law courts due to the fact that the conflict was inferred to arbitral procedure is a matter of private order, being a relative exception. The exclusion of the competence of common law courts operates in the limits of breaching the exclusive competence of common law courts. Therefore, the competence of common law courts can't be averted from the fields of insolvency, civil status, disputed administrative claims.[38]

Furthermore, the Fourth Book of the Code of Civil Procedure, points out, in article 547, first paragraph, the necessity of arbitral court's intervention: „In order to discard the encumbrances that may occur during the preparation and development of arbitral justice and in order to fulfil all the rightful attributions of the arbitral court, the interested party may refer to the court in whose district develops arbitration. The court will solve the legal cause in lawful formation; the second paragraph provides that „the court will solve these solicitations with immediacy and priority through the procedure of referee orderly,

[36] G. Dănăilă, op. cit., page 84.
[37] Fouchard Philipe, Gaillard Emmanuel, Goldman Berthold, Traité de l`arbitrage commercial international (Treatise of international commercial arbitration), publishing house Litec, Paris, 1996, page 448.
[38] [38] Gh. Piperea, C. Antonache, P. Piperea, A. Dimitriu, M. Piperea, A. Răţoi, A. Atanasiu, op. cit., page 597.

resulting a final sentence." We esteem that the legislator, by means of this legal text, is not referring to the actual judgement of the cause, but to the encumbrances that may appear during the arbitral procedure. We can deduce, from the final thesis of the first paragraph „the court will solve the *cause* in the formation provided for first instance courts" that common courts avert the competence of Arbitral Court concerning the solving of the action.

If all parties or only one of them was engaged into an arbitral convention –which is invoked before common law courts, common law courts will verify their competence and will profess incompetent, declining their competence in favour of the organization/institution that provides institutional arbitration. In case of ad-hoc arbitration, the court will decline the request on the grounds of being outside the sphere of competence of common law courts.

Finally, the court cannot solve the case if: the accused has no defence based upon the arbitral convention; the arbitral convention is void and inoperative; the Arbitral Court cannot be constituted from causes imputable to the accused.

Concluding, we commenced our paper under the thought of transdisciplinary and it is ought to complete our studies under the same thought. The study of the arbitral convention has a transdisciplinary root because the arbitral convention implies something more than rules and regulations. *We qualify the arbitral convention in terms of a creative norm that springs from the will of the parties and gives birth to an innovatory and independent justice.* We refer to the arbitral convention in terms of creative norm considering two reasonings : first, the arbitral convention is, ontologically speaking, the consequence of the will of the parties; second, the arbitral convention comprises in its content the rules applied in judgement which represent „the law of the parties".

Disputations are experienced in any given study and in regard to the arbitral convention; their presence is felt by far. Doctrinary disagreements have a propitious development first of all, on account of the large volume of information, and second, on account of the genuine dilemmas which can be found during the research. The legislator has umpired the doctrinary disagreements, establishing (if possible) clear paths of action.

The return to the subject of the arbitral convention meant more than underlining the classic theoretical points as: the conditions required for the validity of the arbitral convention, the forms, the content and the effects of the arbitral convention. Although the themes we enunciated weren't neglected, being developed and comprised in our research, we deemed that quality research will not resume at the recall of some points upon which the doctrine and law already spoken. From this idea emanated our initiative of probing the juridical reasons of the arbitral convention, by reporting to notions like: juridical will, the principle of free will and contractual freedom. We discovered that the connotations of the principle of free will have a real stake in the understanding of problems which are connected to the arbitral convention, these connotations being the single elements that extend our discourse by means of their links with the philosophical or psychological field.

Continuing our demarche, we debated upon the validity conditions of the arbitral convention, emphasising the condition of legal capacity. The predilection that we show towards this condition was attracted by the connections advanced in doctrine concerning legal capacity and binding arbitral convention.

By analysing the forms, the content and the effects of the arbitral convention, we followed the flow of doctrinary studies and law; the difficulties we have encountered were mostly technical and less of philosophical nature.

The concern in favour of the arbitral convention – as object of study- appeared from the desire of grasping the impact of the arbitral convention upon the procedural aspects which must be established concurrent with the foreshadow of the potential or actual litigation. Moreover, the arbitral convention is the juridical voice of the parties by means of which, the parties express themselves, independently organizing the premises of accomplishing justice.

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