

**COMMERCIAL ARBITRATION IN PUBLIC PROCUREMENT.
EXPERIENCES OF THE INTERNATIONAL COMMERCIAL
ARBITRATION COURT ATTACHED TO THE CHAMBER OF
COMMERCE AND INDUSTRY OF ROMANIA**

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ABSTRACT: *Commercial arbitration regarding disputes in which one of the parties is the state or a public entity has been for a long time the subject of debate. Solving the public procurement contracts through commercial arbitration is a matter of great interest, taking into account the fact that the contracts were concluded in accordance with a procedure prescribed by law. The regulation of public procurement as well as the way to settle disputes follow the transposition of European Union directives in national law. In Romania, public procurement arbitration has had a sinuous legislative path. The article analyses both the new Arbitration Law on Procurement, which entered into force in 2016, as well as the relevant cases of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania.*

KEYWORDS: *public procurement; commercial arbitration; Romania; public authority; arbitration agreement; advertising; confidentiality; administrative contract.*

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1. PRELIMINARIES

The advantages and disadvantages regarding the arbitration settlement in public procurement contracts

The relationship between arbitration and "public procurement"¹ supposes dealing with the protection of certain values: confidentiality (commercial arbitration) and transparency

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(public procurement), and from a legal norms' point of view, the meeting between the private law norms and the public law norms. There are divergent interests that arise from the state's and its public entities' necessity to invest and to develop their government programs in good conditions. The goals mentioned can only be achieved through the conclusion of contracts.

If there are administrative contracts that should follow the precise rules of administrative law or (even in part) can be "privatized", this is a technical and necessary discussion. The current state of affairs requires a description, as the modification of the Romanian legislation may seem surprising, but the role of the state in the economy and the important proportion of the gross domestic product referring to the contracts concluded by the state and the public authorities must not be forgotten. That is why there is a pressure from investors and companies with whom the state or public entities contracted to obtain a court or an arbitration ruling within reasonable time and expenses. Hence the reason why a legislative policy that favours procurement arbitration has very important practical consequences.

We must see these consequences from both investors' and the state's perspectives. The state's financially important interests are sometimes put in balance with other reasons (geopolitical strategies, investment development) so that the "oxymoronic relationship"² (procurement arbitration) has begun to be accepted in as many developed states as possible.

Finally yet importantly, all of this must be considered in the international legal context, primarily with regard to Romania's rights and obligations as a member state of the European Union. Coming back to the advantages that the arbitral proceedings may have in the matter of public procurement, we take into account a couple of considerations regarding confidentiality, arbitral fees, and the recognition and enforcement of arbitration awards. Confidentiality³ is an advantage that commercial arbitration (international) implies, but which is not absolute.

¹We use the phrase "public procurement" *brevitatis causa*. As a matter of fact, for the present paper we are interested in arbitration in the field of public procurement contracts, sector-specific contracts and work and services concession contracts, as referred to in Law no. 101/2016.

²Aldo Sandulli, (2013), *L'arbitrato nel codice del processo amministrativo*, *Giornale di diritto amministrativo*, Issue 2, p.205. Available at: http://www.irpa.eu/wp-content/uploads/2011/10/A.-Sandulli-2_2013.pdf. A thorough study of the legal situation after the entry into force of the new Civil Procedure Code (in Romania): (Oglindă, 2014) Bazil Oglindă, (2014), About the validity and operative nature of the compromise agreements concluded by the state, public authorities and other legal entities governed by the public law, in the context of the New Civil Procedure Code and the applicable special legislation, "Revista Transilvană de Științe Administrative" [Transylvanian Review of Administrative Sciences], Issue 1 (34), p. 81-97; (Daniela , 2015) Daniela Ilinca, (August 2015), Attenuation of the administrative nature of the public procurement contract in arbitration proceedings, "Revista de achiziții publice" [Public Procurement Journal], Issue 95, p. 20-21.

³ Confidentiality is one of the reasons why it is difficult to appreciate in how many contracts arbitration conventions were / are introduced, whether they concern arbitration courts in Romania or outside it, how the procedures were conducted, whether the status or public entities were correctly represented. Here are two exceptions, that, however, cannot lead us to satisfactory results from a quantitative research perspective, namely claims solved by ICSID / CIRDI, or cases where actions for annulment were introduced against arbitration awards given by commercial arbitration courts. See: (Sandru & Ploșteanu, 2016) Daniel-Mihail Sandru and Nicolae Ploșteanu, coord. Eugen Hurubă, (2016), Enforcement of arbitral awards rendered under the auspices of the International Center for the Settlement of Investment Disputes (ICSID / CIRDI) against Romania in the context of European law, in the vol. International Conference "Civil Lawsuit and Legal Enforcement. Theory and Practice", 25th-27th August 2016, Tîrgu Mureș, Romania/ „Procesul civil și executarea silită. Teorie și

Recent legal literature has been insisting on the idea of confidentiality.⁴ The public interest in spending the budget was considered fair by the courts, including in terms of appeals.⁵ Therefore, even the arbitration dispute of a public authority / institution is in the field of public communication. Arbitration also entails higher costs than the state justice system does, cost that is particularly incomparable to stamp duties in administrative litigation.

The fear of some of the public entities to use arbitration, given the arbitration fees/ stamp duties, is not justified as long as the arbitration procedure is a constitutional dispute settlement procedure⁶ and soft law documents of the Romanian authorities do not provide for an obligation to justify the difference in expenditure.⁷

practică”, 25-27 August 2016, Tirgu Mureş, România, “Universul Juridic” Publishing House, p. 63-80, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830776

⁴Ileana Smeureanu, (2011), Confidentiality in International Commercial Arbitration, Kluwer Law International; (Smeureanu, 2011)Kyriaki Noussia, (2010), Confidentiality in International Commercial Arbitration. A Comparative Analysis of the Position under English, US, German and French Law, Springer(Noussia, 2010); (Şandru, 2014)Daniel-Mihail Şandru, (2014), Advantages and Disadvantages of International Commercial Arbitration. Romanian Experiences, (“Curierul judiciar” [Curierul Judiciar Journal], Issue 2, p.114-119, fully available in SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579574; (Roşu, 2010)Angelica Roşu, (2010), The Advantages and Disadvantages of Arbitration as a Way of Solving International Commercial Disputes, in Mediation - Alternative Dispute Resolution of International Commercial Disputes, “Universul Juridic” Publishing House, p. 117-119.

⁵“...The situation of appeals filed against the contracting authority at CNSC in the years ... and ... mentioning the contract, the name of the person who filed the appeal and its identification data, the object of the appeal, the state of the appeal, the ruling”(Bucharest Tribunal, Section IXth, Administrative and Fiscal Section, Civil Sentence No. 5067, available in ROLII.ro - <http://rolii.ro/hotarari/587ab895e49009342e001020>)

⁶The Romanian Constitution refers to arbitration in the very text referring to the invocation of the exception of unconstitutionality (Article 146 letter d). The Constitutional Court has shown that: "In the constitutional Court's view, as long as the law does not expressly prohibit legal persons under public law from appealing to the arbitration institution to settle disputes arising from the performance of a commercial contract and since the arbitration agreement is the will of the parties, the arbitral tribunal's verification of its own jurisdiction can only be done in the light of Article 341 par. 2 of the Civil Procedure Code, referring to the prohibition established by Article 340 of the Civil Procedure Code that concerns rights over which the law does not allow any transactions, and it does not concern persons who can not use such a procedure.(Decision of the Constitutional Court No. 331 of April the 10th 2012 on the rejection of the unconstitutionality exception of the provisions of Article 340 of the Code of Civil Procedure, published in the Official Gazette No 384 of June the 7th 2012) See also Ştefan Deaconu in Crenguţa Leaua, Flavius A. Baias (coord), (2016), Arbitration in Romania A Practitioner's Guide, Wolters Kluwer. In a section dedicated to arbitration and constitutional law on fundamental issues for understanding the place the arbitration has in Romania: the constitutionalization of arbitration (Article 146 (d) of the Constitution), the possibility of formulating an objection/exception of unconstitutionality before the arbitral tribunal, discussing fundamental notions such as "arbitration" and "commercial". In the given context, the arguments of the Constitutional Court Decision no. 123/2013, which are extensively and pertinently analyzed in the section, show that since the constitutional text does not distinguish between domestic and international arbitration courts, exceptions of unconstitutionality can be formulated (pp. 32-33). The section analyzes in detail the procedure, the correlation between the rules laid down by the arbitration procedure and the exceptions of unconstitutionality rules, the role of lawyers in the exceptions of unconstitutionality and relevant cases of such exceptions related to arbitration (both the Court of International Commercial Arbitration at the Chamber of Commerce and Industry as well as county arbitration courts, but also by the institutionalized arbitration of ORDA - Decision of the Constitutional Court No. 762/2010, published in the Official Gazette no 437/2010, Decision of the Constitutional Court No. 1652/2009, published in M. Of. No 437/2010); Stefan Deaconu, (April 17th 2013), Premier in the Constitutional Court's jurisprudence. Exception of unconstitutionality raised by an international arbitration court, Juridice.ro; Mădălin-Irinel Niculeasa, (2013), About the Constitutionality of the Arbitration Procedure. The limits of the Constitutional Court jurisprudence on the nature of arbitration from the perspective of access to justice, RRD, Issue 3. See also Decision no. 395/2006 regarding the rejection of the unconstitutionality

A specific element is the application of arbitration to the group of contracts⁸ or to the group of companies,⁹ situations that are rarely encountered in relation to procurement; if no arbitration clauses have been concluded between all the parties involved, in principle they cannot be entered in the arbitration file, unlike the ordinary legal action.

If the non-signatory party of the arbitration agreement agrees to be brought to arbitration and participates in the formation of the arbitral tribunal, then the risk of the arbitration award being annulled on the grounds that the tribunal has not been composed according to the arbitration agreement is eliminated.¹⁰

exception of the provisions of Article 340, Article 340¹, Article 341, Article 342 and Article 359⁶ of the Civil Procedure Code, as well as of Article 13 (3) and (6) of Decree-Law no. 139/1990 on the Chambers of Commerce and Industry of Romania, published in the Official Gazette no. 526 of 19 June 2006: "Examining the objection/exception of unconstitutionality, the Court notes that the legal provisions governing arbitration do not contradict the provisions of the Constitution relating to the courts, for the following reasons: The arbitration agreement is concluded by the parties either in the form of a compromise agreement inserted in the main contract or in the form of a stand-alone arrangement, called compromise, and the parties are therefore free to choose how to settle the dispute. At the same time, the litigation/dispute of the commercial arbitration court is finalized by an arbitral award which, according to Article 364 of the Civil Procedure Code, may be terminated only by an action for annulment brought by the competent courts. As regards to the alleged breach of the provisions of Article 126 (5) concerning the prohibition on the establishment of extraordinary courts, the Court finds that commercial arbitration courts do not meet the characteristics of extraordinary courts, since the procedure followed does not infringe or restrict the procedural rights of the parties provided in the Civil Procedure Code or other rights or their freedoms. The Court holds that the Constitution itself, in Article 146 lit. d), recognizes the existence of commercial arbitration courts, stating that exceptions of unconstitutionality may also be brought before these courts, in addition to the national courts."

⁷The guide on how to verify public procurement and sector procurement, developed by the Romanian Court of Auditors (http://www.curteadeconturi.ro/Regulamente/Ghid_control_achizitii_publice.pdf) and the ANAP Guide - <https://achizitiipublice.gov.ro/workflows/view/0> do not provide anything in this regard.

⁸ Without going into the details on this issue, the arbitral courts were notified with the settlement of litigations that had a number of "agreements", generically called contract, possibly several contracts. However, neither the validity of the arbitration agreement was not called into question nor if it was present in all or only in a part of the "agreements". See wording: "Contract no. N. 6/11/06/2003 (the "Contract"), consisting of several contractual documents which complement each other and stipulate the conditions agreed by the parties, with the object of the defendant rehabilitating 10 schools and 2 colleges located in the Northwest area of Romania. The contract was concluded following an international public procurement procedure and benefited from co-financing (75% through the Phare program and 25% from the Budget). "The arbitral award (Arbitration award No. 5 of March the 5th 2008, ruled by the Arbitral case No. 10/2007 by the Arbitral Tribunal established by the Court of Commercial Arbitration attached to the Chamber of Commerce and Industry of Cluj) was annulled because the arbitral tribunal was not constituted in accordance with the arbitration agreement. See: Cluj Court of Appeal, Commercial, Administrative and Fiscal Section, Civil Sentence no. 49/2010 available in rolii.ro In the given context, we can not fail to note the statement of one of the parties that the EU institutions would have imposed the ICC arbitration: "As it has already been shown before, the arbitration agreement inserted by the parties in the contract provides for the settlement of any disputes under the International Chamber of Commerce Arbitration Rules and the appointment of arbitrators in accordance with these Rules. Because the works under the Contract have been co-funded by the European Union through the Phare program, the Community's authorities have imposed that any future disputes be sent to ICC arbitration, an internationally recognized institution that enjoys probity and equity. In fact, the arbitration appointment mechanism established by the Arbitration Rules of the International Chamber of Commerce enjoys an international recognition and is above local or national interests." Sandra Dinescu, (2014), The extension of the Arbitration Convention: groups of companies and groups of contracts, *Revista română de arbitraj* [Romanian Arbitration Journal], Issue 4, p. 56.

⁹For the distinction between groups of economic operators and groups of companies, see Manole Ciprian Popa, (2011), *Groups of Societies*, Bucharest, "C.H. Beck" Publishing House, p. 288.

¹⁰Martin Platte, (2002), *When Should an Arbitrator Join Cases?*, *Arbitration International*, Volume 18, Issue 1, p. 75-76.

The literature dealing with the administrative law considers that the "privatization" of solving litigations in the field of public procurement can lead to the propagation of corruption phenomena, a reason that has been considered since the amendment of the Administrative Contentious Law of 2004.¹¹ The subject of the transparency of the procurement procedure appears to be linked to the one of corruption in international commercial arbitration¹², and the UNCITRAL Model Law on Public Procurement avoids referring to arbitration as a way of settling disputes¹³. Romanian legislation has changed in order to create mechanisms that prevent fraud in procurement, including at a normative level,¹⁴ and authorities - firstly, the National Agency for Public Procurement (ANAP – also known as “Agenția Națională pentru Achiziții Publice”) - have made strategic documents in this respect.¹⁵ The civil society is making efforts through impact studies and other concrete elements to create tools to counter the corruption phenomenon or to limit its effects on acquisitions.¹⁶

The advantages and disadvantages of settling the dispute over a contract following a public procurement procedure are general except for the considerations of confidentiality and arbitration fees. Apart from these dilemmas, arbitration, as a way of settling disputes, especially if it has an international character, has advantages resulting from the rapid recognition and execution of the arbitration award.¹⁷

According to Article 2 (2) of the Law no. 98/2016 regarding Public Procurement, one of the principles underlying the awarding of public procurement contracts and the organization of a contest of solutions is also the one of transparency (letter d). The provisions of Article 49 and Article 142 are in this regard. According to Article 217 (4) of the same law, the "public procurement file is a public document" after the award

¹¹ Antonie Iorgovan, (2004), *The New Law of Administrative Litigation. Genesis and explanations*, Bucharest, "Roata" Publishing House, p. 9.

¹² Abdulhay Sayed, (2014), *Corruption in International Trade and Commercial Arbitration*, Wolters Kluwer International, p. 29.

¹³ Sue Arrowsmith, (January 2004), *Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard*, *The International and Comparative Law Quarterly*, Volume 53, Issue 1, p. 17-46. The Model Law of UNCITRAL on Public Procurement (2011) there is no reference to arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html

¹⁴ Law no. 184/2016 on the establishment of a mechanism to prevent the conflict of interests in the procedure for the award of public procurement contracts, M. Of. no. 831 of 20 October 2016.

¹⁵ Draft of the Integrity Plan of the National Agency for Public Procurement to implement the National Anticorruption Strategy for the period 2017-2020, available at <http://anap.gov.ro/web/project-plan-de-integritate-al-agentiei-conferat-național-public-to-purchase-to-implement-in-national-strategy-corruption-the-period-2017-2020/>

¹⁶ For example, the "Legislation, economy, competition and administration. Developing a Multidisciplinary Approach to Fighting Fraud in Procurement" project run by Freedom House Romania. The 2nd Edition of the Practitioners' Guide for Public Procurement, developed by Freedom House Romania with the support of the National Agency of Civil Servants, available in digital format at the ghidachizitii2017.lfwd.io/; Transparency International: Integrity Pacts are tools for preventing corruption, available at <https://www.transparency.org.ro/stiri/newsletter/TIRONewsletter201509.pdf>; Public Procurement Criminality: A Practical Guide to Preventing, Countering and Analyzing Corruption Risks accomplished by the Center for the Study of Democracy in Bulgaria available at <http://csd.bg/artShow.php?id=17829>; Also: Sope Williams-Elegbe, (2011), *Fighting corruption in procurement: a comparative analysis of disqualification measures*. PhD thesis, University of Nottingham, <http://eprints.nottingham.ac.uk/13254/1/555409.pdf>

¹⁷ Concerning the recognition of the Ryanair / SMAC judgment in France, see the note by Jonathan Mance, *Arbitration - a law to itself?*, 30th Annual Lecture organized by the School of International Arbitration and Freshfields Bruckhaus Deringer.

procedure has been completed. Paragraphs 5 and 6 of Article 217 establish mechanisms that promote the access to public procurement files, access that can only be restricted if the information is "*confidential, classified or protected by an intellectual property right, in accordance to the law*".¹⁸ According to Article 150, "*the contracting authority ensures through electronic means, such as S.E.A.P. (The Public Procurement Electronic System), direct, complete, unrestricted and free access of economic operators to the procurement documents starting with the publication date of the contract notice*". Thus, this includes the contract, which eventually contains the compromise agreement. Arbitral litigation is confidential, but the compromise agreement inserted in a public procurement contract is not confidential. The confidentiality of arbitration is alleviated in litigations concerning contracts in the field of public procurement. Public procurement may hide possible companies that do not comply with the public procurement procedure¹⁹, a practice that is also required in Romania but which does not yet exist in a systematic form.²⁰

2. HISTORY AND LEGISLATION

In the following, I will go through a brief history in order to understand the current conjuncture of the Arbitration-Procurement rapport. In fact, this rapport or relationship is about the possibility of arbitration to be applied to litigation concerning administrative matters, as well as to administrative contracts.)²¹The first regulations on the arbitration settlement of disputes involving state entities are given by Law no. 15/1990 *on the reorganization of state economic units as autonomous administration and commercial companies*.²²Article 51, which is presently in force, provides as follows: "*Disputes of any*

¹⁸ Bucharest Tribunal, II-nd Administrative and Fiscal Legal Section, Civil Sentence no. 7094 of 21.10.2015 available in rolii.ro - <http://rolii.ro/hotarari/587e08d3e490094811001f14>

¹⁹ See also an idealistic proposal: Claes Cronstedt and Robert C. Thompson, (2016), A Proposal for an International Arbitration Tribunal on Business and Human Rights, Harvard International Law Journal, Volume 57, Spring, p. 68.

²⁰ For its effectiveness, such a method has been used in "SAPARD" projects, as it results from a court ruling: the Cluj Tribunal, the Mixed Administrative and Fiscal, Labor Conflicts and Social Security Litigation Section, Civil Sentence no. 4767 of the 4th of July 2014, available on rolii.ro There are currently series of discussions and even a governmental initiative to send a list to „ANAP”.

²¹ In this way, we can state that the subject is the relation of Article 57 of the Law no. 101/2016 to Article 340 of the Civil Procedure Code and Article 2268 Civil Code Civil Code. See also: Traian Briciu, (2013), Some aspects regarding the possibility of applying arbitration in internal litigations in the light of the new Civil Procedure Code, "Pandectele Române", Issue 8, p. 26. The situation of procurement arbitration is analogous to that of companies governed by Law no. 31/1990. Thus, the doctrine and jurisprudence have come to the conclusion that disputes in which legal rules relating to public policy are not involved or not imposed by the competent court etc. are within the jurisdiction of the arbitral tribunals. Broadly presented, with many examples: Daniel-Mihail Sandru, (2012), Societal pacts. Clauses, pacts, agreements between associations of companies, Second Edition, Bucharest, "Editura Universitară" Publishing House, p. 229 et seq. About the role of administrative contracts, see also: Ioan Lazăr, (2011), Administrative Jurisdictions in Financial Matters, "Universul Juridic" Publishing House, p. 162; Gina Livioara Goga, (2016), Considerations Relating to the Jurisdiction of the Arbitration Litigation on Solving Public Acquisition Contracts, EIRP Proceedings, Vol 11, p. 181.

²² As it can be observed, the vocation of certain entities to conclude the arbitration agreement is established, and there are no types of contracts or procedures for the conclusion of contracts within these provisions. Broadly, see: Daniel-Mihail Șandru, (2007), The Legitimation of the State and Public Authorities to conclude an Arbitration Convention, "Revista română de arbitraj" [Romanian Arbitration Journal], Issue 1, article available at <https://ssrn.com/abstract=2528955>; Ion Băcanu, (2007), Arbitration settlement of disputes arising from public

kind involving autonomous administration or state-owned companies are within the jurisdiction of the ordinary courts (paragraph 1). In order to resolve disputes between them, autonomous companies and commercial companies may also use arbitration (paragraph 2). "As it has been shown in doctrine²³, the interpretation of paragraph 2 was comprehensive, the case law establishing that regulated entities could conclude arbitration agreements not only between themselves but also with other entities (companies governed by Law No. 31/1990). Prior to the Law no. 101/2016 entered into force, legislation²⁴ and jurisprudence²⁵ have made changes to the arbitration settlement of disputes concerning contracts concluded following a public procurement procedure.²⁶ With the new Civil Code entering into force, the public procurement contract was assimilated to the administrative

procurement contracts, concession of public works and services, as well as from concession of public property contracts, "Revista de Drept Comercial" [Commercial Law Journal], Issue 7-8, p. 149 et seq.

²³ See: Victor Babiuc, Octavian Căpățână, (1996), Ability to Conclude an Arbitral Convention in Romanian Law, RDC, Issue 6, p. 5-13.

²⁴ Regarding the 7 amendments to Article 286 of GEO no. 34/2006 (GEO nr. 34/2006, see a detailed analysis: Marian Voicu, Extension of the institutionalized arbitral jurisdiction. A couple of lege ferenda suggestions of subjects to debate, "Revista Arbitrajul comercial în România" [Commercial Arbitration in Romania Journal], Issue 1/2014, available at <http://www.romanianarbitration.ro/?p=897>

²⁵ Moreover, from this point of view, the unanimous jurisprudence in the matter is not surprising. See, for example, admitted action for annulment: High Court of Cassation and Justice (ICCJ) /Supreme Court, Decision no. 3483 of June 29th 2010, unpublished. See also ICCJ, Section II – Civil law Section, Decision no. 1167 of April 29th 2015, LEGALIS, "Buletinul Casatiei" [Cassation Bulletin], Issue 1/2016, p. 25-31, available at <http://www.romanianarbitration.ro/?p=1192> in which the pros and cons of arbitration in the GEO no. 34/2006 (OUG 34/2004) system but also the solution based on a joint order of some ministries can be followed. In another recent case, the Article 281¹ of GEO no. 34/2006 (OUG 34/2006); it is interesting to note that one of the parties claims that the legislative solution is maintained in the Law no. 101/2016. It is true that, in principle, the legislative solution is the same, however, both the object of the regulation and the content of the legal rules are different. The action for annulment was dismissed due to the fact that the parties had the legal capacity to conclude an arbitration agreement. Bacău Court of Appeal, II-nd Civil, Administrative and Fiscal Section, Civil Sentence no. 87 of June the 9th 2017 available on ROLII.ro, at <http://rolii.ro/hotarari/5977f575e49009f81e0000d0>. Article 288¹ of the GEO no. 34 of 19 April 2006 (OUG 34/2006) on the award of public procurement contracts, public works concession contracts and service concession contracts, as it was enforced at the date of conclusion of the contract: "The parties may agree that disputes concerning the performance of the contracts covered by this GEO to be settled by arbitration."

²⁶ Broadly, until the date of publication: I. Băcanu, supra, p. 153 et seq. The author considers GO no. 118/1999 (OG 118/1999), GEO no. 60/2001 (OUG 60/2001), such as the legislation of the year 2004, respectively Law no. 528/2004 amending Law no. 219/1998 regarding the concession regime, as well as the Law no. 554/2004 of administrative section. "Thus, since the entry into force of these two laws, disputes in public procurement continued to be in the jurisdiction of the administrative section, and those in the concessions field under the jurisdiction of ordinary courts. In parallel, such litigation could be resolved, based on a compromise agreement, through arbitration. Thus, the impact of the unification achieved by two laws on the settlement of disputes has practically not been felt" (p. 156). Paradoxically, although GEO no. 34/2006 (OUG 34/2006) and GEO no. 54/2006 (OUG 54/2006) did not have any provisions regarding arbitration, the methodological norms had. Thus, disputes relating to public procurement could also be "settled by arbitration, on a case-by-case basis, when the contracting authority was empowered by law or international convention to conclude an arbitration agreement" (p. 167). With regard to concessions and arbitration, prior to the year 2016: Alexandru-Sorin Ciobanu, (2014), Arbitration of litigations in the matter of concession contracts, in the light of the provisions of the new Civil Procedure Code, RRDA, Issue 5. Dacian Dragoș, Daniela Cîmpean, Public-Private Arbitration in the Romanian Law, in Stephan Schill (Editor), The (Comparative) Constitutional Law of Private-Public Arbitration, Bruylant, an soon to be published, unedited version is available at: https://www.researchgate.net/publication/301816611_Public_Private_Arbitration_in_the_Romanian_Law.

contract and consequently to a single jurisdiction of the courts.²⁷ Although the doctrine has stated that the New Civil Procedure Code brought clarification of the legal status of procurement arbitration, in reality the confusion persisted. The doctrine offers a summary of the arbitration regarding public entities and administrative contracts.²⁸

“Regarding the transaction ability of the object of the dispute, Article 2268 paragraph 1 of the New Civil Code provides the impossibility to make a transaction concerning the capacity or civil status of individuals or concerning rights the parties cannot dispose of under the law. With regard to the possibility of subjective arbitration or ratione personae, article 534 paragraph 2 of the New Civil Procedure Code expressly stipulates the state’s and the public authorities’ faculty to conclude arbitration conventions, provided that this aspect is authorized by the law or by the international conventions to which Romania is a party. This text addresses on one hand the eternal disputes present in doctrine and on the other hand the dilemmas regarding the vocation of the state and the public authorities to conclude an arbitration convention, that are found in practice. Moreover, paragraph 3 of Article 534 of the New Civil Procedure Code states that legal entities which also include economic activities in their object of activity have the faculty to conclude arbitration conventions, unless the law or their act of establishment or organization stipulates otherwise.”

Currently, Law no. 101/2016 *on legal means and remedies regarding the award of public procurement contracts, sector-specific contracts and works and services concession contracts, as well as the organization and functioning of the National Council for the Solving of Complaints regulates*, regulates in certain limitations, the possibility to settle by arbitration in *“matters relating to the award of public procurement contracts, sector-specific contracts and concession contracts”* (Article 1 (1)). According to Article 53 (1) *“the trials and claims for granting compensation to cover the damages caused in the course of the award procedure as well as (the trials and claims) for the enforcement, cancellation, nullity, termination, or unilateral termination of contracts shall be settled at first instance, urgently and in particular, by the tribunal’s administrative and fiscal contentious division in whose jurisdiction the contracting authority has its headquarters, through specialized public procurement teams.”* Article 57 represents the grounds for the following statement: *“The parties can make arrangements so that disputes concerning the interpretation, conclusion, enforcement, modification and termination of contracts shall be settled by arbitration”*.

²⁷Oana Gavrilă, The execution of public procurement contracts: from arbitration, to the ordinary national court, article published at the following addresses <http://www.capital.ro/executare-contractuale-de-achizitie-publica-de-la-arbitraj-at-court-of-law-commun.html> (February 28th 2015) and <https://www.universuljuridic.ro/execution-contracts-de-working-publica-de-la-arbitraj-la-instanta-de-drept-comun/> (March 6th 2015); A. Ciobanu, see supra, There were also opinions that the New Civil Procedure Code reinforced the previous provisions of the legislation that allows arbitration in procurement: Oliviu Puie, (2015), Aspects regarding the arbitration institution regulated by the new Civil Procedure Code and the amendments and additions to the enforcement procedure arbitration decisions by Law no. 138/2014 for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as on the modification and completion of related normative acts, “Pandectele române” Journal, Issue 2. These opinions were not confirmed by the arbitral tribunal or the courts’ jurisprudence.

²⁸Sevim Gliga Baubec, (2012), Aspects of novelty regarding the arbitration procedure in the regulation of the new Civil Procedure Code, RRDA, Issue 3.

The 2016 legislative solution seems to give answers to real problems that the administrative law doctrine had in mind before the previously presented act came into force.²⁹ The entire administrative procedure is under the jurisdiction of the courts (or of the CNSC / NCSC - the National Council for Settlement of Complaints), while, from the moment of the conclusion of the contract, it is possible for the contracting authorities to conclude arbitration conventions as well. This legislative solution must also be seen from the legal regime perspective. The view³⁰ that the complex public procurement procedure has two phases – an administrative one and a civilian one - should be carefully studied not only in terms of joining different legal regimes in regards to the same legal act (or better yet, the same administrative contract), but also in terms of the effects that would be involved in establishing such legal regimes. The Romanian regulation does not specify it, but it applies it, otherwise arbitration could not be explained in the context of a law that deals with the *legal means and remedies in the matter of awarding public procurement contracts and in which the National Council for Solving Complaints is being (re)organized*. Comparative law is only useful to glance at the chosen solutions, but not to actually influence the interpretation of the current legislation or to determine a certain modification.³¹

3. THE JURISPRUDENCE OF THE INTERNATIONAL COMMERCIAL ARBITRATION COURT ATTACHED TO THE CHAMBER OF COMMERCE AND INDUSTRY OF ROMANIA (CAB-CCIR)

The International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania settled disputes in which the contract that included the arbitration agreement, was concluded following a public procurement procedure. Litigations regarding contracts concluded by public entities (such as lease agreement)

²⁹A. S. Ciobanu, *supra*.

³⁰Sabin Ivanov Subev, (2015), Arbitration clause in a contract for public procurement, Vol. XXI, Issue 2, p. 516, available at: <https://www.degruyter.com/downloadpdf/j/kbo.2015.21.issue-2/kbo-2015-0088/kbo-2015-0088.pdf>. The author refers to the necessity to address arbitration as the length of litigation before the courts can last for years on end (p. 517). The same argument is valid in Romania, and another argument may also be added regarding the specialization of arbitrators in certain areas (construction, for example) and the burden of files completely different from the courts. The latter, given the pressure exerted by the other legislative, executive and executive powers, in regards to the celerity resolution of the causes of acquisitions (given the possible blockages in the social and economic activities of the country), rules in difficult conditions.

³¹Alexandra Molina Dimitrijevič, Arbitration as a dispute-solving mechanism in public procurement: a comparative view between Peruvian and Spanish systems, available at: <http://www.ippa.org/IPPC4/Proceedings/01ComparativeProcurement/Paper1-18.pdf>; the author discusses the dual regime (administrative and civil legal acts, p. 8) [Spain and Peru]; Sabino Casesse, (1996), L'arbitrato nel diritto amministrativo, Rivista Trimestrale di Diritto Pubblico, Issue 2, p. 317; Aldo Sandulli, *supra*; Jacopo Polinari, L'arbitrato nel diritto amministrativo in vol.Carmine Punzi (coord.), (2012), Disegno sistematico dell'arbitrato, Seconda edizione, CEDAM, p. 503-561 [Italia]; S. I. Subev, *supra*, p. 515 et seq [Bulgaria]; Volodymyr Yaremko, Oksana Karel (Arzinger), (24.07.2015), Arbitrability of Corporate and Public Procurement Disputes in Ukraine, Kluwer Arbitration Blog, <http://kluwerarbitrationblog.com/2015/07/24/arbitrability-of-corporate-and-public-procurement-disputes-in-ukraine/> [Ucraina]; Stavros Brekoulakis and Margaret Devaney, (2017) Public-Private Arbitration and the Public Interest under English Law, The Modern Law Review, Issue 1, p. 22 [England].

were also settled by the mentioned court.³² Likewise, at certain times, the Court of Arbitration verified its own jurisdiction and found that it had none, thus, it proceeded to give either a referral or declining solution,³³ or one in which it found that it was facing an "inoperative" arbitration agreement in relation to Article 286 from GEO [government emergency order] no. 34/2006.³⁴

Thus, in the case whose object consisted of a contract regarding the construction of roads using EU funds, contract that was concluded in 2008, the arbitral tribunal considered its own jurisdiction stating the following:

„In regards to jurisdiction, it has been the subject of an exception raised by the defendant, an exception that was put up for discussion before the parties. The applicant thus stated that, in an identical action pending before the State Courts, the exclusive jurisdiction of the State Courts in question was established by the final judgment. Moreover, the applicant filed the document in question, Civil Law Decision 349/2014 of the Bucharest Court of Appeal, Civil Division V.

While deliberating, the arbitral tribunal found that in the present case, the Court of Appeal pronounced decision in a a civil law matter that establishes the exclusive jurisdiction of the state courts over the dispute in question, and it considered that the provisions of the law in force at the time of the contract's conclusion would have invalidated the compromise agreement present in the contract concluded between parties. As such, the arbitral tribunal is to uphold the exception regarding its lack of material jurisdiction in the matter and consequently to close the arbitral proceedings without going into the merits of the case.”³⁵

Investigating its own jurisdiction, the arbitral tribunal underlines, in connection with GEO no. 34/2006 (GEO nr. 34/2006) that:

"The inclusion of the compromise agreement in the concluded contract by the parties does not prevent the arbitral tribunal to decide, in the present case, the non-arbitrary nature of the dispute and to establish the lack of jurisdiction of the International Commercial Arbitration Court to resolve the arbitration request formulated by the applicant.”³⁶

Apart from public procurement litigations, the Court also ruled on litigations in which one of the parties was a public entity, the contract rather being a public private partnership that materialized in the form of a joint venture agreement. In this case, the exception regarding the nullity of the arbitration agreement inserted in the joint venture contract was overruled because it concerns a dispute over which the law does not allow for a transaction.³⁷ In support of the exception, it is stated that "a transaction can only be done by those entitled to the possibility of a disposition over the object contained therein"... The

³²Victor Babiuc and Ion Băcanu, (2005), The Capacity of Public Authorities and Institutions to Conclude an Arbitral Convention in Romanian Law. Commentary on a Wrong Court Solution, "Revista de drept comercial" [Commercial Law Journal], Issue 12, p. 34.

³³ As well as a solution to the closure of the arbitration procedure. See, Marin Voicu, (2014), Commercial Arbitration. Jurisprudence annotated and commented. 2004-2014, "Universul Juridic" Publisher House, p. 207. CAB, CCIR, arbitral award no. 51/2014.

³⁴ See, Marin Voicu, (2014), Commercial Arbitration. Jurisprudence annotated and commented. 2004-2014, "Universul Juridic" Publishing House, p. 208, CAB, CCIR, arbitration award no. 77 of 11 April 2012.

³⁵ CAB, CCIR, arbitral award no. 51/2014, cited above

³⁶ CAB, CCIR, Arbitration award no. 74/2013, vol. Marin Voicu, supra, pp. 208-209.

³⁷ CAB, CCIR, Arbitration Notice of 10.02.2016, unpublished.

object of the contract, which includes the compromise agreement, relates to the acquisition/purchase of goods and services by a public administration structure, the municipality..., and the provider is a private company. In regards to the right to purchase works and services from a private supplier, The municipality could not freely dispose of it, but only under public procurement law (GEO 60/2001). The arbitral tribunal finds that the exception is unfounded, and will reject it because the clause is inserted in the joint venture agreement (commercial contract), which was legally concluded on the basis of Article 251-256 Commercial Code (in force at that time), following the adoption of the Decision of the Local Council ... no. ... of ... The object of the contract was not the purchase of works and services, but the undertaking of the two associates as a joint venture to carry out the public lighting activity in the City ..., the rights and obligations of each party being determined by the contractual clauses. "

4. JURISPRUDENCE OF THE COURTS REGARDING THE ENFORCEMENT OF ARTICLE 57 OF THE LAW NO. 101/2016

In one case, the inadmissibility exception was raised by the contracting authority, that has not been notified in advance, according to Article 6 (1) and (2) of Law no. 101/2016 on remedies and appeals in respect of the award of public procurement contracts, sector-specific contracts and works and concession contracts, as well as for the organization and functioning of the National Council for Solving Complaints.) The court, ruling on the *inadmissibility exception* invoked by the contracting authority through a respondent's statement of defence, rejects it, stating that the object of the application refers to a dispute concerning the enforcement of the contract concluded between the parties, the settlement procedure being governed by the provisions of Article 53-57 of the Law no. 101/2016, and it also refers to the settlement of a judicial appeal, as allowed by the provisions of Article 49-52 of the Law no. 101/2016, in which case the notification provided by Article 6 of the Law no. 101/2016 is required. On the other hand, the court observes that, the applicant has proved the fulfilment of the preliminary procedure under Law no. 554/2004 of administrative litigation³⁸ using the correspondence she/he had with the defendant on the object brought to court.

In another case,³⁹ the solution in the appeal is to uphold the decision of the court of first instance, which "*fairly interpreted the court procedure applicable in such a case, namely the provisions of Article 53-57 of the Law no. 101/2016, which do not impose the existence of a pre-litigation procedure before the court, but a special administrative section.*

This, because since Law no. 101/2016 is a special law, for disputes concerning public procurement, its provisions shall be applied with priority and shall be supplemented where necessary with the provisions of Law no. 554/2004 on administrative litigation. In this respect, the provisions of Article 68 of Law no. 101/2016 states that "*the provisions of the present law shall be supplemented by the provisions of the Law on administrative*

³⁸ Dâmbovița Tribunal, Civil II-nd Administrative and Fiscal Section, Decision no. 67 of January the 17th 2017, unpublished available in <http://rolii.ro/hotarari/589b24c8e49009543b000467>

³⁹ Ploiești Court of Appeal, II-nd Civil Administrative and Fiscal Section, Decision no. 1234 of the 21st of June 2017 available on ROLII.ro at <http://rolii.ro/hotarari/598137c4e49009001b000401>

contentious no. 554/2004, with the subsequent amendments and completions, and of the Law no. 134/2010, republished, as amended ... ".

It can be noticed, however, that Law no. 101/2016 provides for a pre-trial procedure before the court, applicable only in the situation presented in Article 6, and the obligation to fulfil it belongs to the person who considers himself / herself harmed in the sense defined in Article 3 par. 1 lit. f of the same law.

In such a context, the court of law substantially and lawfully rejected the exceptions invoked, finding that in the case presented for judgment the provisions of Law no. 554/2004 regarding the realization of the condition of pre-trial procedure are not applicable."

5. TRENDS AND CONCLUSIONS

Commercial arbitration may resolve disputes concerning public procurement contracts within the limits provided by the special law, "*disputes relating to the interpretation, conclusion, execution, modification and termination of contracts shall be settled by arbitration*". The International Commercial Arbitration Court attached to the Chamber of Commerce and Industry has the legal capacity to settle litigations in this category, as it has happened so far, although under non-uniform regulations.

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