

**POSSIBLE EFFECTS ON THE ARBITRATION AGREEMENT
DETERMINED BY THE ANTICIPATED NON-PAYMENT
OF THE COSTS ORDERED BY THE ARBITRATION
TRIBUNAL TO THE PARTIES**

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ABSTRACT: Particular to the alternative private jurisdiction represented by the arbitration, is the fact that the litigant parties, in accordance to the arbitration agreement can establish derogatory provisions from the common law, in determined conditions. The start of the arbitration procedure, gives the right to the arbitration tribunal, without creating a previous imperative condition in its charge, to force the parties, or each one of these, to pay any expenses needed for the organization and deployment of the arbitration. If the parties don't respect the tribunal's order, the arbitration tribunal can refuse to solve the arbitration case, until the parties will deposit or will pay on advance the costs, the provisions of the Civil procedure code not making a mention about the concrete method of the settlement of the litigation "delaying" or about the maximum period in which the arbitration litigation file can be delayed. The question that rises is if a state of passivity of the parties, in relation to the orders given by the arbitration tribunal and relative to the provisions of the arbitration agreement, cannot be considered a tacit common motion to withdraw to this alternative jurisdiction?

KEYWORDS: *arbitration procedure; agreement; arbitration tribunal; anticipated payment; motion to withdraw.*

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The arbitration represents an alternative jurisdiction to solve the litigation issues between different entities founded on the principle of volunteering, which due to the speedy trial, to the flexibility and discretion that characterize it, is replacing progressively, more and more frequently the ordinary common jurisdiction, due to the crisis of the classic judicial system, determined by the irrational prolongation of the civil case duration.

Therefore, the major advantage brought by the arbitration system, is determined first of all, by the short settlement time of the litigation aspect, settlement time which can be

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very short in comparison with the average time in which we can obtain a final judgement in the classic public jurisdiction.

Also, the considerations for the annulment of the arbitration award are characterized by a much greater diversity than those specific to the ordinary law rulings, being covered by the provisions of the Article 608 from the Romania Civil Procedure Code, corresponding to the considerations regulated by the Article 34 from the UNCITRAL Convention from 1985 (Roba, 2015).

The issue raised in connection with this procedure, especially concerning the *ad hoc* arbitration, is the problem of the costs involved by this procedure, which are much more higher compared to the costs involved by the settlement of a litigation issue in the public legal system (Tizzi, 2008).

If in the case of the institutionalized arbitration the Courts of arbitration have managed the costs of arbitration in such a manner that these will not become more onerous than in the case of the public legal system, those who apply to the *ad hoc* arbitration don't take advantage of it.

Analyzing the costs of the arbitration trial, *first of all*, it is needed to underline the fact that the arbitrators' fee, are the first costs that involve the settlement of a case in this alternative private jurisdiction.

Next to this expense, there are the costs necessary for the deployment of the arbitration procedure, which in the case of the institutionalized arbitration rise up to a "consistent" percentage from the disputed amount, and in the case of the *ad hoc* arbitration are represented by the utilities' costs of the location where the arbitration will take place effectively.

The arbitrators invested with the settlement of the litigation issue on the arbitration jurisdiction, have the right to be paid for their activity, are entitled to the payment of their fees, which, based on the regulations given by the Article 591, the first paragraph, from the Romanian Civil procedure Code (Anon., the 10th of April 2015) "*are paid by the parties*", but based on the provisions of the Article 591 the first paragraph from the Romanian Civil procedure Code "*the payment of the arbitrators' fee will be done after the delivery to the parties of the final arbitration judgment*".

These fees, will be paid, according to the arbitration agreement that has occurred between the parties on the occasion of the conclusion of the arbitration agreement, otherwise, the arbitration costs will be supported by the party which will lose the litigation, commensurate to the proportion of the admission of the litigation case, based on the provisions of the Article 592, the second paragraph, from the Romanian Civil procedure Code.

But mostly, in principle, according to the arbitration agreement, the costs will be equally born by all the parties of the case, exactly considering the fact that the arbitration is a way of settling a dispute chosen by the parties, with the assumption of the costs involved by such a procedure.

By accepting the arbitration task, and by communicating this to the parties of the dispute, in accordance with the term and procedure governed by the provisions of the Article 599 from the Romania Civil Procedure Code (5 days from the date of the nomination), between the parties of the dispute and the arbitrator it is concluded a synallagmatic bilateral contract, called "arbitration agreement" in the doctrine.

Thus, in view of this contract, correlated to the obligation of the arbitrator / arbitrators to settle the dispute and to deliver the arbitration award (sentence), arises the obligation of the parties to pay the expenses related to the compensation for this activity, according to the arbitration agreement, namely the obligation of the loser of the case to bear this cost, unless the arbitration agreement established in another way (Giacobbe, 1996) .

If, in the case of *ad hoc* arbitration, the arbitration agreement does not necessarily take the written form, in the case of institutionalized arbitration the management of the arbitration agreement is in the responsibility of the Court of Arbitration, which will establish, in principle, a contractual relationship with the parties, assuming the payment of a certain amount of money, the obligations which are resulting from the administration of the private justice.

In contradiction with the provisions of Article 599 (1) from the Romanian Civil Procedure Code, which stipulate that the payment of arbitrators' fees will be made after the arbitration award has been communicated to the parties, the Article 596 (1) from the Romanian Civil Procedure Code gives to the arbitration tribunal the option "*to provisionally assess, the amount of the fees of the arbitrators, and may oblige the parties of the dispute to consign, in accordance with its provisions, that amount of the fee by an equal contribution for each party.* "

This procedure may also become incidental in the situation concerning the "*advancement of any expenses necessary for the organization and conduct of arbitration procedure*". Moreover, this contract is assimilated to the contractor agreement, provided by the conditions of Article 1851 from the New Civil Code¹, provisions by which the contractor undertakes, at its own risk, to execute, respectively, to provide an intellectual service to the beneficiary in return for a price.

This type of contract allows the subject who is invested with that mandate and who is required to provide an intellectual service, to ask in advance from the beneficiary to pay the expenses, or the costs incurred by that service.

In the special field of arbitration, as regards the expenses related to the early payment of arbitrators' fees, according to the Article 596 (3) from the Romanian Civil Procedure Code "*if the defendant fails to fulfill his obligation according to paragraph 1 (early payment n.n.) within the set deadline established by the arbitration tribunal, the applicant shall consign the full amount of the expenses, following the arbitration award to determine the final amount of the fees due to the arbitrators, as well as the manner (proportions) in which the parties will bear the costs.* "

What happens, however, if the applicant does not consign this amount which contains the arbitrators' anticipated fee?

The situation complies with the provisions of the Article 597 from the Romanian Civil Procedure Code concerning the early payment of the arbitration costs, which generally refer to the advancement of "*any arbitral costs*", implicitly those related to arbitrators' compensation, and the failure of the parts concerning the fulfillment of the dispositions required by the arbitration tribunal gives to this institution the possibility "*do not to arbitrate until the consignment, advancement or payment of the amounts will be done.*"

¹ Law no.278/2009 concerning the New Romanian Civil Code, published in the Romanian Official Journal no. 505 from the 15th of July 2011.

Analyzing the general wording used by the Civil Procedure Code, namely that, in the absence of anticipated payment of the arbitration costs, the arbitration tribunal "will not arbitrate", the arbitration proceedings enter in a state of "**rest**", inside of which the arbitrators can refuse to perform their arbitration obligations, without however, resulting any compulsory or facultative technical suspension would occur to the proceedings in the meaning of the provisions of Civil Procedure Code, or an interruption of the delivery of the arbitration award, or at least an interruption of the arbitration procedure itself, or the termination of the arbitration procedure.

It is a certainty the fact that in such a situation, the arbitrators can "subordinate" the continuation of the arbitration procedure to the anticipated payment of any expenses necessary for the organization and conduct of the arbitration.

In the absence of a suspension of the arbitration procedure, the possible refusal of the arbitrators to fulfill their arbitration tasks results from the application of the exception of the non-fulfillment of the obligations deriving from the arbitration agreement, which we were talking about earlier, but in the meantime continues to run the 6-month term inside of which the arbitration award shall be pronounced.

Therefore, in the present legislative context, the failure of the litigant parties to pay the anticipated arbitration costs may lead, either to the maintenance of the arbitral duties materialized in a period of inactivity of the arbitrators until the expiration of the maturity date for the arbitration award delivery, provided by the Article 567 paragraph 1 from the Romanian Civil Procedure Code, with the legal consequence of establishing the arbitration default, in accordance to the provisions of Article 567, paragraph 2, from the Romanian Civil Procedure Code, or the possibility of their lawful waiver to the arbitration agreement, with the consequence of requesting their replacement under the provisions of the Article 564 from the Romanian Civil Procedure Code and implicitly the modification of the composition of the arbitration tribunal.

Therefore, we purport that the non-payment by the litigant parties of anticipated arbitration costs, both in the situation of maintaining the arbitrator quality and in the case of a lawful waiver to the arbitrator quality, leads in the end to the lapse of the arbitration proceedings, and in the case of both situations creates disadvantages to the arbitrator.

Moreover, such a situation, such a behavior, could be the consequence of the parties' concordant will to avoid the commissary pact regarding the litigation issues which are the object of the arbitration procedure or the consequence of the unethical behavior of the party who refuses to pay in advance the expenses settled in accordance to the arbitration agreement.

Under the circumstances in which the provisions of the Civil Procedure Code give to the arbitrator the right to a fee, a compensation, for the intellectual work performed (the Article 599 from the Romanian Civil Procedure Code), even before the dispute was settled (the Article 597 from the Romanian Civil Procedure Code), we ask ourselves whether it would not be a legitimate consequence the lawful waiver of the arbitrator to the assumption of this quality in the case in question, in the situation that neither party of the litigation makes the payment in advance of arbitration costs.

All these regulations are provided in the sense that the early payment of arbitrators' fees functions as a guarantee that the arbitrators, the private "judges" of the dispute, will receive their allowances after the arbitration award has been communicated.

It therefore feels the need for a more effective legal instrument, that avoids the coercion of the arbitrators to follow the arbitration procedure, even if the parties do not comply with the anticipated payment of any arbitration costs.

Such a provision could condition *the admissibility* to the arbitration procedure by the prepayment, in advance, in part or in full, of the arbitration costs, without having any effect on the validity of the compromise or compromise clause, respectively on the possible reiteration of a request for the settlement of the litigation by the arbitration procedure.

Or, in a much more severe version, as is the case in other legal systems, the concrete case of the provisions of Article 816⁷ from the Italian Civil Procedure Code², the failure to pay the arbitration costs in advance entails *the lapse of the arbitration clause*.

Thus, according to the provisions of Article 816⁷ from the Italian Civil Procedure Code "*The arbitrators may condition the continuation of the arbitration procedure, by the early payment of the arbitration expenses. In the event that the arbitration costs are shared, it is up to the arbitrators to determine concretely the extent to which, the each party is entitled to the pay. If one of the parties does not advance the amount of the costs anticipated by the arbitration tribunal, the other party may proceed with the full amount. If neither party pays the arbitration fees within the time limit set by the arbitrators, the parties shall no longer be bound by the arbitration agreement in respect of the dispute which gave rise to the arbitration proceedings.*"

This provision has a "devastating" effect on the effectiveness of the arbitration clause, or on the entire arbitration proceeding (Claudio Consolo, 2014), resulting in the arbitration court's "lack of competence" for a possible procedure deriving from the same litigation issue.

By the mentioned provision, the Italian legislator confers to the situation of non-payment of the anticipated costs of the arbitration procedure the effect of a "*qualified tacit waiver*" to the arbitration clause (Claudio Cecchella, 2006) recognizing in such a conduct the concordant volition of the parties to circumvent the compromise clause on the litigation aspect which makes the object of the arbitration procedure, taking exactly in consideration the voluntary nature of this procedure.

The purpose of the legal provision in question is exactly to prevent contradictory behaviors, which are not specific to the arbitration procedure or even more, to prohibit the behaviors *contra factum proprium* of the parties of the arbitration agreement. If such a radical legal provision does not exist, the party of the arbitration agreement which is more interested that the dispute shall be settled, it is compelled to propose, if it wishes to protect its interests, arbitration demands which will be bound to bear (although by the arbitration agreement the parties have agreed otherwise), for example the opposing party is mala fide, or simply does not have access to the opportunity to protect their own interest (Claudio Consolo, 2014).

The same implications are also invoked in the light of the provisions of Article 597 from the Romanian Civil Procedure Code, which, being not vehement enough, restrict

² Approved by the Royal Decree no.1443 from the 28th of October 1940, published in the Official Newspaper of the Italian Kingdom no.253/the 28th of October 1940.

access to the private justice of the party which is in good faith, in the advantage usually of the defendant, which has no interest to pay in advance the arbitration costs.

Moreover, the more categorical provisions of the Italian Civil Procedure Code come from the former Swiss *Konkordat über die Schiedsgerichtsbarkeit*³, which provided that the arbitrators could condition the continuation of the arbitration procedure by to prepayment of the anticipated arbitration costs, namely the fact that, in the situation when neither of the parties does not assume these costs, the other party may assume the entire amount, otherwise it is considered that the parties have renounced to the effectiveness of the arbitration agreement.

It is true that the provisions of the New Swiss Civil Procedure Code (Anon., the 19th of december 2008), in the Article 378⁴, amended this radical provision with a more lenient solution that allows the party who has fulfilled its obligation to pay the arbitral costs either to bear the party's expenses who did not pay them, or give up to the arbitration proceeding. Subsequently, this party may either to initiate a new arbitration procedure or it may appeal to the public courts, by this new regulation being rescued the interest and the possibility of the diligent party to make another demand to the arbitration tribunal.

The earlier legal Swiss provision, as well as the provision adopted by Italian law, even if it is more rigid, has the merit of avoiding the risk of a succession of arbitration proceedings without an arbitration award, which would arise if, in the event of a new arbitration procedure, the reluctant party refuses to pay its own share of anticipated expenses, thus making it again possible the standstill situation we found in the first arbitration procedure (Claudio Consolo, 2014).

On the other hand, if the Italian legislator has expressly indicated the effect of the lack of early payment of the arbitration costs within the time-limits set by the arbitrators, namely the lapse of the arbitration clause, it did not clearly and precisely established the effects of that conduct on the arbitration procedure.

There were points of view in the Italian doctrine, which argued that the effect of this situation would be the simply renouncement to the arbitration tasks, the non fulfillment by the parties of the tasks assigned by the arbitration tribunal exonerates the arbitrators from the accomplishment of their duties, with the consequence of the appointment of a new arbitration tribunal, and the continuation of the arbitration proceedings in front of the new appointed tribunal (Claudio Cecchella, 2006).

To the contrary, it has been argued that the anticipated non-payment of the arbitration expenses does not entail a simple waiver to the arbitrators' duties but an automatic *ex officio* extinguishment of the arbitration obligations as a result of the nonfulfillment of the obligations set by the arbitrators within the time limit set by them.

³*Konkordat über die Schiedsgerichtsbarkeit* (Arrangement concerning the arbitration), adopted at the Conference of the judiciary canton managing directors from Switzerland the 27th of march 1969, and approved by the Federal Council at the 27th of august 1969.

⁴ "Art.378. *Avance de frais*

Le tribunal arbitral peut ordonner l'avance des frais de procédure présumés et subordonner la poursuite de la procédure au versement de l'avance. Sauf convention contraire des parties, il fixe le montant à la charge de chacune des parties.

Si une partie ne verse pas l'avance de frais qui lui incombe, l'autre partie peut avancer la totalité des frais ou renoncer à l'arbitrage. Dans ce cas, cette dernière peut introduire un nouvel arbitrage ou procéder devant l'autorité judiciaire pour la même contestation".

Another part of the doctrine has argued that such a situation entails the end, the finish of the arbitration procedure, being necessary to point out that the text of the law does not expressly provide this aspect.

The generally accepted view of the doctrine was that of declaring the arbitration procedure *inadmissible*.

In conclusion, in the Italian civil procedure, concerning the arbitration procedure, in the case of the nonfulfillment of the obligation to pay in advance the arbitration costs, there are two considerations for which the procedure will not end with an arbitration award: *firstly*, because of *the inadmissibility of the arbitration procedure*, sanctioned by the provisions of the Article 816⁷ (1) from the Italian Civil Procedure Code, which may be relied on both by the parties of the dispute and by the arbitrators throughout the arbitration proceedings and, *secondly*, because of exception of the court's "*lack of competence*" which arises from the effect of the lapse of the arbitration agreement (the compromise clause provided by the dispositions of Article 816⁷ (2) from the Italian Civil Procedure Code, as a result of the prompt invocation of this exception by one of the litigation parties.

Turning back to the legal regulations in this field provided by Article 597 from the New Romanian Civil Procedure Code, I believe that I am in the assent of all when I say that they are general, uncertain, lacking in legal effectiveness, and do nothing but prolong a state of uncertainty in the field of legal proceedings, to the detriment of the party that initiated the arbitration procedure without having the financial resources necessary to cover all the arbitration costs, and in favor of the party who is sometimes *mala fide*.

It is also obvious that this provisions need to be supplemented, materialized, but belongs to the doctrine the task of detecting and suggesting which of the two alternatives would be more appropriate to the arbitration procedure governed by the provisions of the Romanian Civil Procedure Code: *the variant of declaring the arbitration procedure inadmissible* as a consequence of the nonpayment by the arbitration parties of the estimated expenses, with the possibility of a new demand for the settled of the litigation issues inside the arbitration procedure or *the declaring the arbitration tribunal's lack of competence* as a result of the lapse of the arbitration clause concerning the respective dispute, caused by the nonpayment of the arbitration procedure expenses.

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