

## **NOVELTY ELEMENTS OF THE JURIDICAL NATURE OF THE ARBITRATION FROM THE PERSPECTIVE OF THE NEW CIVIL CODE AND THE NEW CIVIL PROCEDURAL CODE IN ROMANIA**

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**ABSTRACT:** *In the article the need to adapt the arbitration in Romania to the requirements deriving from the status of Romania as a Member State of the EU was presented. The modifications brought to this institution were presented, especially the novelty elements related to the juridical nature of the arbitration. Also the difference between the arbitration and other alternative dispute resolution means have been noted, especially by report to mediation, conciliation and settlement.*

*Such a novelty element exists even from the definition of the arbitration of art. 533 par. 1 of the Civil procedural Code which states that the arbitration represents an “alternative jurisdiction with a private character”. A symmetry between art. 533 of the New civil procedural code and art. 169 of the Civil Code is noted. The mixt nature is of the essence of the arbitration and has been rightfully regulated by the lawmaker in the civil procedural provisions.*

*In art. 534 par. 1 of the Civil procedural code the object of the arbitration is presented, the new regulation being characterized by a higher degree of precision. In the article novelty elements related to the parties of the arbitration were also presented.*

*With respect to the arbitral agreement, its legal regime is governed, both by the provisions of the new Civil Code and of the New Civil procedural code by the articles 1179 of the Civil Code and 540 of the Civil Procedural Code.*

*In art. 541 of the Civil procedural Code the law maker provided the assumption of the arbitral agreement, when the claimant files an arbitration claim and the respondent does not raise objections at the first hearing for which he was legally summoned. The arbitral convention can only be concluded in writing under the sanction of nullity (art. 343 of the Civil procedural code).*

*As a conclusion an evolution was noted with respect to the regulation of the arbitration as a dynamic domain with an increasing importance at the international level, in the Civil code and the Civil Procedural code, and it remains that through the efficient application of the codes and the direct involvement of the state in the economical life to increase the foreign investments and the public-private partnerships.*

**KEYWORDS:** *arbitration, Civil code, Civil procedural code, legal nature of the arbitration, arbitral agreement*

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## 1. INTRODUCTIVE CONSIDERATIONS

The need to adapt the Romanian arbitration to economic realities and requirements resulted from the statute of Romania of European Union member was considered, within the preoccupations of civil proceedings amendment, which determined a new regulation thereof, more ample and more rigorous, in agreement with the exigencies of international documents in the field. The new Code of Civil Proceedings<sup>1</sup> and, implicitly, the new Civil Code<sup>2</sup>, creates a frame which, in our opinion, is more adapted to the current role of arbitration and the objectives thereof. Also, the new regulations are characterized by a higher clarity and accuracy, answering to the requirements of providing legal security, claimed more and more often in the jurisprudence of European courts.

Considering the complexity of the subject, we shall refer further on only to the novelty elements of the contractual side of arbitration, in order to surprise, simultaneously, the amendments determined by the said regulations, characterized by certain symmetry of the legal institutions applicable in the field, meant to determine a unity of the arbitration legal side.

## 2. DEFINING AND CHARACTERIZING THE ARBITRATION

One of the most important novelty element is, in our opinion, the arbitration definition, stipulated in art.533 par.(1) of the Code of Civil Proceedings, according to which it represents "*an alternative jurisdiction with private character.*"

We consider necessary a definition and qualification of such institution, both due to coherency and accuracy of regulation. Even though it does not directly concern the problem under analysis, we consider it useful to mention that a precise definition and regulation of the institution of arbitration will clarify the confusion that represents the basis of criticism like the ones related to the fact that the organization of arbitration breaches the disposals of art.126 par.(5) of Constitution, which interdicts the existence of extraordinary courts. Having to pronounce upon such critics, the Constitutional Court stated that "*the courts of commercial arbitration do not meet the characteristic traits of extraordinary courts, since the proceedings followed by them neither breach nor restrict the proceedings rights of parties stipulated in the Code of civil proceedings or other rights or freedoms*"<sup>3</sup>. However, the fundamental law itself acknowledges the existence of commercial arbitration courts, expressly stipulated in art.146 lett.d), which determines that constitutional challenges may be drawn up as well before these courts, besides the law courts.<sup>4</sup>

Par.(2) of the same art.533 of the Code of civil proceedings complements the definition from the first article, determining a range of traits of arbitration previously surprised in the doctrine and jurisprudence. The text mentioned stipulates expressly that "*in the management of such jurisdiction, the litigants and the qualified arbitration court may determine rules of proceedings derogatory from common law, provided that such regulations are not contrary to public order and to the imperative disposals of law.*" As we are stating, it has been outlined in jurisprudence the less formal character of the

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<sup>1</sup> published in the Official Gazette of Romania, Part I no. 485 of July 15<sup>th</sup> 2010

<sup>2</sup> republished in the Official Gazette of Romania, Part I no. 505 of July 15<sup>th</sup> 2011 and is effective starting with October 1<sup>st</sup> 2011

<sup>3</sup> Decision no.395/2006, published in the Official Gazette of Romania, part I, no.526 of June 19<sup>th</sup> 2006

<sup>4</sup> M.Tăbărcă, G. Buta, *Code of civil proceedings, commentated and annotated with legislation, jurisprudence and doctrine*, Universul Juridic, Bucharest, 2007, p.990

arbitration procedure, in terms of a higher freedom of the parties involved in this procedure. For instance, the Constitutional Court stated in its decisions that *"arbitration is an exception from the principle according to which law enforcement is performed by courts and represents that efficient legal mechanism, meant to provide an impartial, faster and less formal, confidential judgment, completed by decisions susceptible of forced execution"*<sup>5</sup>.

In this respect, it is noticed a symmetry between art.533 par.(2) from the new Code of Civil Proceedings, and the disposals of art.1169 of Civil Code, according to which *"The parties are free to conclude any contract and to determine the content thereof, within the limits of law, of public order and good faith"*, symmetry determined by the mixed nature of arbitration, respectively its contractual origin and jurisdictional purpose<sup>6</sup>.

It is important that this mixed nature which, being the essence of arbitration, was fairly surprised by legislator in the disposals of civil proceedings that regulate the *"Notion"* of arbitration, is assimilated including by the parties who decide for this procedure.

We mention in this respect as relevant jurisprudence in terms of the disputes which may be generated by the misunderstanding of this nature, another cause settled by the Constitutional Court<sup>7</sup>, when one of the parties in the dispute on the docket of the Court of International Commercial Arbitration claimed the constitutional challenges of some disposals of the Code of civil proceedings related to arbitration, motivating that a party of the dispute on the docket of the Court of International Commercial Arbitration is the Chamber of Commerce and Industry of Romania, its management college, on the proposal of the Chamber chairman, appointing the arbitrators forming arbitration court. In the opinion of the author of exception, pursuant to this act, the arbitration court, regardless the structure, does not provide enough independency guarantees, consequently, it cannot be deemed impartial.

The Constitutional Court rejected the unconstitutionality exception formulated, solution which we believe to be just, given that the criticism brought to it did not consider the juridical regime of the arbitration and the fact that as the Court has mentioned in its arguments, *"it is organized and conducted out in terms of the arbitration convention concluded by parties, with the observance of the principle of free will, under the reserve of respecting public order, good morals, as well as the imperative disposals of law, [...].* It is obvious that the rules concerning the forming of the arbitral tribunal, the ones related to the nomination, retracting and replacing the arbitrators, the deadline and place of the arbitration etc., are established by the parties through the arbitration clause or by an addendum and the acceptance, by the author of the exception, without prejudice of the clause stating that the arbitration will be heard before the Arbitration Court imposes the observance of the said clause<sup>8</sup>.

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<sup>5</sup> Decision no.8/2007, published in the Official Gazette of Romania, part I, no.73 of January 31<sup>st</sup> 2007

<sup>6</sup> I. Deleanu, S. Deleanu, *Internal and international arbitration*, Rosetti publishing house, Bucharest, 2005, p.14

<sup>7</sup> Decision no. 870/2011, published in the Official Gazette of Romania, part I, no. 520 of July 25<sup>th</sup> 2011.

<sup>8</sup> The Constitutional Court has concluded to the following: *"The author of exception queries the independence and impartiality of arbitration court due to the fact that the plaintiff – part of the dispute submitted to judgement - is, simultaneously, body that appoints arbitrators. The Court considers that the author of exception accepted, on his free will, the arbitration clause (stipulated in the contract concluded with the Chamber of Commerce and Industry of Romania) according to which the settlement of the dispute generated between the parties is of the competence of Arbitration Court and, subsequently, this clause has to be observed, on the contrary, being breached the constitutional rights guaranteed of the other party in dispute."*

In addition, as shown before<sup>9</sup> "determining the arbitration nature, the accurate qualification of this institution, presents inters since it, firstly, allows a delimitation of arbitration opposite to other means of settling the disputes, alternative to state justice, namely mediation, conciliation, transaction, etc., similar to arbitration."

### 3. ARBITRATION OBJECT

According to art.534 par.(1) of the new code of civil proceedings, any dispute may be submitted to arbitration, except for those related to "*civil status, persons' capacity, succession debate, family relations, as well as the rights on which the parties cannot dispose.*"

The new regulation is characterized by a higher degree of accuracy than that determined by the current Code of civil proceedings, according to which only patrimonial disputes may be submitted to arbitration, except for those related to rights on which law interdicts any transaction.

The lack of accuracy of the old regulation and, generally, of the syntagm "*patrimonial disputes*" determined other controversies related to the competence of commercial arbitration courts, and divergences of jurisprudence of law courts. We mention in this context the decision of the High Court of Cassation and Justice which, passed within a referral in the interests of law<sup>10</sup> determined that "*the disposals of art.1.1, art. 2.1. lit. a and b and art. 2821 par. 1 of Code of civil Proceedings, are construed so as, with a view to determine the material competence of settlement in lower court and means of appeal, the civil and commercial disputes are financially assessable having as object the existence or inexistence of a patrimonial right, nullity, annulment, resolution, termination of some legal acts related to patrimonial rights, regardless if it is drawn up or not the ancillary cause related to the restoration of initial situation*".

### 4. PARTIES IN ARBITRATION PROCEDURE

Arbitration conventions may be concluded, according to art.534 par.(1) of Code of civil proceedings, by the "*persons with full exercise capacity*". The text mentioned is completed by the disposals included in Book I of Civil Code – *About persons*, disposals stipulated as well in art.1181 of Civil Code which, referring to the rules related to contracting capacity, stipulate that "*these are mainly provided in book I.*"

Unlike the current regulation, the new Code of civil proceedings provides expressly the faculty of state and public authorities to conclude arbitration conventions but "*only if authorized by law or international conventions to which Romania has adhered.*" The legal persons of public law including as well in their object the economic activities are competent to conclude arbitration conventions, "*except for the case when the law or their deed of incorporation or bylaw stipulates otherwise.*"

Therefore, for the state and public authorities, the rule is that they cannot conclude arbitration conventions, except for the case when the legal persons concerned are authorised

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<sup>9</sup> O. Căpățână, *Arbitration dispute of external commerce*, Academia Română publishing house, Bucharest, 1978, p.22, Dragoș- Alexandru Sitaru, *Private international law*, Lumina Lex publishing house, Bucharest, 2000, p.97, Giorgiana Dănilă, *Arbitration procedure in internal commercial disputes*, Universul Juridic, Bucharest, 2006, p. 45

<sup>10</sup> Decision no. 32 of June 09th 2008, published in the Official Gazette of Romania, part I no. 830 of December 10<sup>th</sup> 2008.

by law or international conventions. It is noticed the taking over by the law text of a solution settled on the jurisprudential level of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania who decided that, in the absence of a legal competence, the state and public authorities are not allowed to conclude an arbitration convention for internal disputes,<sup>11</sup> rule which may be explained by the fact that arbitration is essentially "a private business" of some natural and/or legal persons of private law, relying on the arbitration convention concluded between them, expression of their will autonomy.

It is emphasized in this context the fact that by Law no.554/2004 of administrative contentious, the Romanian legislator decided for the regime of public law of the contracts concluded by public authorities having as object the valuation of public property goods, the performances of public interest, rendering public services, public procurements, and which, according to art.2 par.(1) lett.c) of law are assimilated (somehow forced, in our opinion) to the administrative deed. The reason seems to be the consolidation of the state role over the administrative contracts, considering their importance for national economy and, often, their high values. The rule instituted by the new code of civil proceedings is correlated to the special regulation of administrative contentious, leaving however open the way for a possible evolution of conception, in the sense of the possibility of "authorising by law" the state and the public authorities to conclude arbitration conventions. As for the terminology used by legislator, we consider that this has to be strictly construed, the notion of "law" included in the quoted syntagm designating the judicial act adopted by Parliament, in the application of art.61 of Constitution, and not law in the wide sense of normative act.

As for the legal persons of public law including as well in their object economic activities, the rule is that they may conclude arbitration conventions, except for the cases when the law or their deeds of incorporation or bylaws stipulate others. It is noticed in this respect the valuation of the disposals of art. II par.1 of the European Convention of commercial arbitration from Geneva, 1961, according to which "the persons qualified by the law applied to them, as legal persons of public law, are allowed to validly conclude arbitration conventions".

## 5. ARBITRATION CONVENTION

As for the arbitration convention, considering its nature of "contract predominantly procedural"<sup>12</sup>, its legal status is simultaneously governed by the disposals of the new Civil Code, respectively of the new Code of civil proceedings.

Thus, with respect to the essential conditions of validity of arbitration convention, these are stipulated by art.1179 of Civil code – capacity to contract, parties' consent, a determined and licit object, a licit and moral cause, form of convention, to which par.(2) of the same article 1179 of civil code refers to being stipulated by art.540 of the new Code of civil proceedings. The new regulation of proceedings maintains, as general rule, the

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<sup>11</sup> Judgement no.174 of November 11<sup>th</sup> 1999, published in the Review of commercial law no.7-8/2000 p.268 and the Protocols no.175 of November 11<sup>th</sup> 1999 and no.179 of July 14<sup>th</sup> 2000, quoted in I. Băcanu, "Settlement by arbitration of the disputes generated by the contracts of public purchase, concession of public works and services, as well as by the contracts of concession of public property goods.", *Review of commercial law no.7-8/2007*, pp.146-167; similarly, in France, see, for details, Pierre Delvolve, "Le contentieux des sentences arbitrale sen matiere administrative", in *Revue francaise de droit administratif*, no.5, September–October 2010, pp.971-979

<sup>12</sup> Giorgiana Dănăilă, quoted work p.56, referring as well to the resolution of the Institute of International Law according to which the arbitration clause is governed by the law of the seat of arbitration court, which involves a proceeding qualification of arbitration convention

condition of written form of arbitration convention, under the nullity sanction, rule currently provided by art.340 of the Code of civil proceedings, but it institutes, in addition, a legal fiction and a presumption, both meant to determine a higher flexibility mainly in terms of arbitration rules of evidence, valuing the parties' will, even though it concerns only their silence.

Thus, according to art.540 par.1 second thesis of the Code of civil proceedings, the written form condition of the arbitration convention may be deemed achieved when arbitration was selected by exchange of correspondence, regardless its form or exchange of proceedings or when its existence was claimed in writing by a party and it was not disputed by the other. It is obvious the adjustment to the current conditions of development of communication and electronic trade, respectively a valuation of the disposals included in the model UNCITRAL law, according to which *"a(n) (arbitration) convention is deemed concluded in written form if included in a document signed by parties or within an exchange of letters, telex communications, telegrams or any other manner of telecommunication which certifies its existence or, also, by an exchange consisting in an action and event where the existence of convention is supported by a party and it is not disputed by the other."*<sup>13</sup> In terms of the validity of arbitration convention, we consider that the disposals of art.1179 of civil code are applicable in this case as well.

Art.541 of the Code of Civil proceedings institutes the presumption of the existence of arbitral convention, when the plaintiff draws up an arbitration application, and the defendant, on the first term when it is summoned, has no objection in this respect, namely a solution opposed to that deduced by jurisprudential means from the current regulation. Thus, opposite to the disposals according to which the arbitration convention cannot be concluded but in writing, under the nullity sanction (art.343 of the Code of Civil proceedings) the arbitration courts considered that the *"silence of the representatives of the defendant company related to settlement by arbitration cannot be construed as tacit acceptance. The silence without other manifestations will not be deemed but the equivalent of refusal, except for the case when law stipulates otherwise. Or, in terms of selecting the state jurisdiction, such disposal does not exist."*<sup>14</sup>

We consider that the presumption instituted by the quoted text is a relative legal presumption, namely it may be combated by other means of evidence. The disposals of art.548 par. (1) of the new code of civil proceedings will be considered in this respect, stipulating that *"any exception related to the existence and validity of arbitration convention, constitution of arbitration court, limits of the arbitrators' duty and development of procedure until the first hearing when the party was dully summoned, under the sanction of preclusion, has to be raised, at latest on this term, if a shorter term wasn't determined."*

The fiction, respectively the legal presumption examined, do not apply if the arbitration convention refers to a dispute related to ownership transfer and/or constitution of another real right over an immovable good and when the convention has to be concluded in notarised form, under the sanction of absolute nullity. It is noticed the symmetry to the disposals of art.1244 of civil code, according to which *"Besides other cases stipulated by law, one has to conclude by notarised writ, under the sanction of absolute nullity, the*

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<sup>13</sup> taken from M. Tăbărcă, G. Buta, quoted work, p.1017

<sup>14</sup> Court of International Commercial Arbitration Bucharest, Judgement no.140/1998, Review of commercial law no.6/1998, p.120

*conventions which change the venue or constitute real rights that are to be registered in the land register.”*

## 6. BRIEF CONCLUSIONS

The few issues analysed, included, due to purely theoretical reasons, in what we have called issues of contractual side of arbitration (being difficult to determine contractually and procedurally in this field), determine us to draw the conclusion of a beneficial evolution of regulation of a dynamic field and of increasing importance on international level. Further on, the legislator will render efficient mainly those disposals that stipulate the possibility of authorising the state and public authorities to conclude arbitration regulatory conventions, in agreement with economic realities, namely direct involvement of state in the economic life, the regime of foreign investments, the public-private partnership relations.

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