

## **THE EXCEPTION OF UNCONSTITUTIONALITY RAISED BEFORE AN INTERNATIONAL ARBITRAL TRIBUNAL**

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**ABSTRACT:** *The main aim of the paper work is to determine whether the Constitutional Court of Romania could be notified by international tribunals in relation to cases tried under Romanian law.*

*On 5 March 2013 the Constitutional Court of Romania decided, for the first time, on a case concerning an exception of unconstitutionality raised before an international tribunal of commercial arbitration. The exception of unconstitutionality of a Government Emergency Ordinance was raised in an arbitration case pending before International Court of Arbitration of the International Chamber of Commerce, located in Paris.*

*According to Law 47/1992 there is a condition to bring the matter before the Constitutional Court, namely to be notified by a tribunal or by a court of commercial arbitration. Firstly, we will focus on analyzing whether an international tribunal is included in the category mentioned before. Secondly, we will present whether the establishment of the place of arbitration in a different country, by an arbitral convention, influences the substantial law that governs legal relations between the parties.*

**KEY-WORDS:** *the exception of unconstitutionality, international arbitral tribunal, Constitutional Court*

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### **1. INTRODUCTIVE ASPECTS REGARDING THE PROCEDURE AND COMPETENCE OF THE CONSTITUTIONAL COURT TO PERFORM THE CONSTITUTIONAL CONTROL.**

The Constitutional Court is the single authority of constitutional jurisdiction in Romania, independent from other public authority. Its functioning is settled by the art. 4 (1) of the Regulation on the organization and functioning of the Constitutional Court and art. 146 of the Romanian Constitution that establishes the attributions of the Court. Although the Law n°47/1992 on the organization and operation of the Constitutional

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Court defines this institution as "*the unique authority on constitutional jurisdiction*", with the aim to guarantee the supremacy of the Constitution, without expressly vouchsafing a political role, the opinion of a majority within the doctrine considers the Constitutional Court to be a political and jurisdictional body.

The adepts<sup>1</sup> of this point of view which we rally in order to find the foundation of the political dimension of the Constitutional Court as regards the way of appointing the members thereof, on the one hand, and on the other hand, as regards the Court's attributions, even those which do not circumscribe to the control on the constitutionality of laws, Parliamentary regulations and Government rulings, basically aim at applying and observing the Constitution, which is both a political and a juridical attribute.

Another justification of asserting the political dimension of the Constitutional Court resides, in our opinion, in its role of influencing the legislative process, a role that cannot be contested. However, of a correct manner, in its decision the Court stated its role of a negative "*legislator*", according to the phrase used by Hans Kelsen, underlying that it cannot substitute itself for the Parliament for regulations' omissions or in order to modify a legal disposition contested before the Court.

Some of the attributions that justify the political character of the Court are: deciding upon the constitutionality of the Parliament Regulations, supervising the compliance with the procedure of choosing the President, and, maybe the attribution that underlines the most this character, is deciding upon contestations regarding a political party.

It exercises a control over the laws which is materialized in two ways: *a priori* and *a posteriori* control.

*A priori control*, named also preliminary control, is exercised in the phase of project of the law and because of this it is more considered as a guarantor of the legality and constitutionality of the law than an actual control.

*A posteriori control* is manifested by the obligation to decide upon exceptions of unconstitutionality, raised before an act or a government ordinance entered into force. Mihai Carp stated that "what has to be determinant is not the preliminary control, but the repressive one and that is the reason why we consider that the constitutionality control of the laws must be carried out by the jurisdictional bodies"<sup>2</sup>.

This is a constitutional guarantee of the rights, liberties and legitimate interest of the people. Also this is a method through which the Constitutional Court presents as a guarantor of the supremacy of the Constitution<sup>3</sup>.

Unlike the objection to constitutionality, the exception regards also Government Ordinances. This generates a subsequent control, often named and a sanctioning control, given the fact that the law starts to be enforceable only after its publication in Official Gazette, according to the terms established by the Constitution.

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<sup>1</sup> See T. Drăganu, *Drept constituțional și instituții politice – tratat elementar*, Lumina-Lex Publishing House, Bucharest, 1998, p. 307; See Ioan Muraru in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită - Comentarii și explicații*, All Beck Publishing House, Bucharest, 2003, p. 43; See I. Muraru, *Drept Constituțional și instituții politice*, Actami Publishing House, Bucharest, p. 75.

<sup>2</sup> M. Carp, *Dezbateri parlamentare, Adunarea Constituantă*, published in the Official Gazette of Romania, part 2, no. 18 of 16 May 1991, p. 17

<sup>3</sup> See Ioan Muraru and Elena Simina Tănăsescu (coord.), *Constituția României - Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2008, p. 1401.

### *The Procedure*

The exception of unconstitutionality is an incident that appears during carrying out a process before a judicial tribunal and it is about contesting the constitutional legitimacy of a legal provision<sup>4</sup>. Art. 146 d) regulates the referral procedure to the Constitutional Court and the settlement procedure is regulated by the Law no. 47/1992. Art. 146 d) establishes the parties that may initiate proceedings in front of the Court, namely parties in the process, the prosecutor, the judge and the Ombudsman.

Analyzing the abovementioned provisions we conclude that the exception of unconstitutionality may be raised before a tribunal or an arbitral tribunal<sup>5</sup>; it is a matter of damage, limited to the constitutional issue of the applicable law to the dispute, whose object is limited to the Laws and Governmental Ordinances in force; the provisions that were declared unconstitutional by a previous decision of the Constitutional Court could not be the object of such an exception; Constitutional Court holds exclusive competence in solving the dispute.

The court before which the exception of unconstitutionality has been raised has the obligation to notify the Constitutional Court. This is made by a court's resolution which contains parties' points of view, the opinion of the court regarding the exception and the evidences submitted by the parties<sup>6</sup>.

The Constitutional Court completes the trial of the exception of unconstitutionality by a decision, which is final and binding. If the exception is declared admissible, the Court has the power to decide upon other provisions of the disputed act, from which could not be dissociated the provisions mentioned in the intimation.

## **2. THE CIRCUMSTANCES IN WHICH CONSTITUTIONAL COURT WAS ENABLED TO DECIDE UPON THE EXCEPTION OF UNCONSTITUTIONALITY NOTIFIED BY AN INTERNATIONAL ARBITRAL TRIBUNAL**

The interpretation of the constitutional expression "commercial arbitral tribunal"

Art. 29 (6) of Law no. 47/1992 and art. 146 d) of the Constitution impose several conditions for reaching the Constitutional Court, one of them is to be notified by a court or by a commercial arbitral tribunal. The Constitution does not distinguish between national commercial arbitral tribunal and international commercial arbitral tribunal, being satisfied only by establishing one category of arbitral tribunal. Some could argue, based on the principle of interpretation "*ubi lex non distingue nec nos distinguere debemus*", that the legislator didn't want to make any difference between these tribunals, as such the only condition imposed upon them being the type of the tribunal, namely an arbitral commercial tribunal.

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<sup>4</sup> See Ioan Muraru and Elena Simina Tănăsescu (coord.), *Constituția României - Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2008, p. 1402.

<sup>5</sup> See Ioan Muraru in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită - Comentarii și explicații*, All Beck Publishing House, Bucharest, 2003, p. 323.

<sup>6</sup> See Ioan Muraru and Elena Simina Tănăsescu (coord.), *Constituția României - Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2008, p. 1402.

In the present case the commercial arbitral tribunal before which the exception of unconstitutionality was raised is the International Court of Arbitration of the International Chamber of Commerce from Paris. The Constitutional Court in its decision<sup>7</sup> states that the object pursued by the legislator by including the commercial arbitral tribunals in the area of the bodies before which an exception of unconstitutionality may be raised, was to ensure a larger access to the constitutional justice.

By a systematical interpretation of the constitutional provision, the Court emphasizes that, in the case of judicial courts, the constituent legislator expressly refers to the system of national courts, by reference made by the art. 126 of the Constitution to the High Court of Cassation and Justice and to its role in the interpretation and unitary application of the law by the courts; in the case of commercial arbitral courts there is not such a provision, of reference, the field of view of the constituent legislator being manifestly wider. This approach may be justified by the specific of commercial arbitral tribunals in relation to judicial courts, given by the mixed legal nature of the arbitration, the conventional and the jurisdictional one.

The European Court of Human Rights in its case law<sup>8</sup> held that “court” “shouldn’t be interpreted as a classic court, part of the ordinary judicial structures of the state [...]; also, it may include a body charged with the examination of a narrower number of disputes, with the condition that it will always provide proper guarantees”. Within its constant jurisprudence, the Court has developed a general principle according to which the Convention protects concrete and effective human rights and freedoms not theoretical and illusory rights. The right to a tribunal is an essential component of the “system of guarantees” established by the art. 6 (1) of the European Convention of Human Rights<sup>9</sup>. Even though art. 6 of the Convention doesn’t establish “the right to a tribunal” the Court has stated that “the very terms used by the text impose this conclusion”<sup>10</sup> (that Convention involves, in an indirectly way the right to a tribunal). Also the Court has found that art. 6 guarantees to each person the right to a tribunal including the right to access it<sup>11</sup>.

The Constitutional Court considered that in so far as before an arbitral commercial tribunal, notwithstanding the place where it is placed, an exception of unconstitutionality is raised and whose object is the Romanian law, a denial from the Romanian Constitutional Court to judge this exception will be contrary to the willing of the legislator, infringing the constitutional provisions of the art. 21 – The free access to justice, of the art. 146 (1) regarding the role of the Constitutional Court as a guarantor of the supremacy of the Constitution and of the art. 1 (5) according to which “in Romania, the compliance with the Constitution, its supremacy and with the laws is mandatory”.

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<sup>7</sup> See Decision of the Constitutional Court no. 123 of 5 March 2013, published in the Official Gazette of Romania no. 214 of 16 April 2013.

<sup>8</sup> See *Campbell and Fell v. Great Britain*, 7819/77, 7878/77, 06.28.1984, European Court of Human Rights, § 76; *Lithgow and others v. Great Britain*, 9405/81, 07.08.1986, European Court of Human Rights, § 201.

<sup>9</sup> For the effects of the integration in the European Union on the conventional system of the member states, see: Nicolae Ploșteanu, *Încetarea tratatelor internaționale*, Veritas Publishing House, Tîrgu Mureș, 2009, pp. 39-43.

<sup>10</sup> See *Golder v. United Kingdom*, 4451/70, 02.21.1975, European Court of Human Rights, § 31.

<sup>11</sup> See *Pholiss v. Greece*, 06.27.1997, European Court of Human Rights, § 59.

### 3. THE IMPORTANCE OF THE ARBITRAL AGREEMENT IN DISPUTE SETTLEMENT

The arbitral agreement<sup>12</sup> is considered to be a headstone of private arbitration, being the agreement between the parties by which they settle that a dispute or possible disputes to be solved by individuals, chosen or appointed according to this agreement<sup>13</sup>. To underline its importance, it is crucially to mention that it has been developed a principle of autonomy of the arbitral agreement, according to which the arbitration clause is treated separately from all contract clauses. This principle is included in the procedural norms of different arbitral institutions, such as: the Court of International Arbitration from Bucharest, International Chamber of Commerce from Paris, Court of International Arbitration from London, being considered by some tribunals as a rule of *lex mercatoria*<sup>14</sup>. This is a preliminary and primary decision of the arbitration. It is the act that regulates the framework and conditions of the trial, determines the applicable law, thus giving to this institution a distinctive contractual mark.

At the international level the arbitration agreement is defined by the UNCITRAL Law Model in art. 7<sup>15</sup> as “an agreement by the parties to submit the arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”. According to the New York Convention, each of the signatory states recognized the written agreement by which the parties engage to solve the disputes that may arise regarding a certain right, contractual or non-contractual, concerning one dispute that may be solved through arbitration.

The Geneva Convention does not include similar provisions, but settles in the art. 4 the organization of the arbitration, in the situation in which one of the parties hasn't appointed its arbitrator or in the circumstance in which there are not indications regarding the necessary measures for conducting an arbitration in the content of the arbitration agreement. Here results the conclusion that parties are bound to submit to arbitration the raised dispute in conformity with the agreement that they concluded.

In judicial practice<sup>16</sup> it was stated that any exception regarding the existence and validity of arbitral agreement, the establishment of an arbitral tribunal and the limits of the arbitrator, as well as drawing up the procedure to the last term, must be raised until this term, the latest, unless a shorter term hasn't been established.

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<sup>12</sup> Regarding some evolutionary aspects of the arbitration see Dragoș Chilea, *International Public Law*, Hamangiu Publishing, Bucharest, 2007, pp. 145-149.

<sup>13</sup> See Giorgiana Dănăilă, *Procedura arbitrală în litigiile comerciale interne*, Universul Juridic Publishing House, Bucharest, 2006, p. 47 and R.M. Roba, *Procedures in the court of arbitration in cases of international trade litigation*, Petru Maior Publishing House, Tg. Mureș, 2013, p. 173-174.

<sup>14</sup> See Ioan Deleanu, Sergiu Deleanu, *Arbitrajul intern și internațional*, Rosetti Publishing House, Bucharest, 2005, p. 333.

<sup>15</sup> United Nations Commission, UNCITRAL Model Law on International Commercial Arbitration, Vienna: United Nations, 2008, p. 4.

<sup>16</sup> Cluj Court of Appeals, Commercial and Administrative Section, Decision no. 1119 of 04 July 2002, in Florin Ciutacu, *Drept procesual civil. Culegere de spețe. Modele de contracte și alte acte juridice. Modele de acțiuni*, Themis Cart Publishing House, Slatina, 2009, p. 279.

In the national legislation the arbitration agreement is not defined<sup>17</sup> by the Civil Code, yet the Civil Procedure Code makes some references to it in the Title II of Book IV – “About arbitration.” Art. 548 states that arbitration agreement should be made in written form, under the sanction of absolute nullity and art. 549 stipulates the types of the arbitration agreement. Thus there are two possibilities to conclude an arbitration agreement: as arbitration clause included in the main contract or established in a separate convention, to which the main contract refers, or as compromise. The same definition is stated by the art. 2 (1) of the European Convention on International Commercial Arbitration<sup>18</sup> as well as by the art. 11 of the Rules of Arbitral Procedure of the Romanian Court of International Commercial Arbitration.

The arbitration agreement is the legal instrument that will allow the interested parties to entrust the settlement of the patrimonial and transactional disputes to particular arbiters (arbitrators)<sup>19</sup>, in this way refusing the right to lodge a claim to the national jurisdictional bodies.

Arbitral agreement is considered as an arbitration contract, civil or commercial. The authors that embrace such a point of view observe its complex nature, including elements of procedural and material law<sup>20</sup>.

In the case of institutional arbitration, the contractual aspect is still present; the agreement will of the parties<sup>21</sup> in dispute, agreement concluded by signing the arbitral agreement, determines and influences the conditions and framework of the trial. According to art. 369<sup>1</sup> “by arbitral agreement regarding an international arbitration, the parties may establish that one trial (international arbitration) has to take place on the territory of Romania or in another country”<sup>22</sup>. The arbitral tribunal has by its nature an international competence, giving the possibility to the parties of different nationalities to resort to arbitration, or even to the arbitration tribunals of a third state.

The Constitutional Court considers that an interpretation in the sense of narrowing the sphere of arbitral tribunals before which an exception of unconstitutionality may be raised, and limiting to the commercial arbitral tribunals from Romania, cannot be considered as a procedural condition for exercising the right to access to the constitutional justice. Thus, the selection of the place of arbitration outside the territory of Romania cannot be appreciated as a refusal to the access to justice. Such an interpretation would be equal to a sanction imposed upon the parties to the arbitral agreement for the option to resort to an arbitral tribunal from another country in order to settle the disputes, because even Romanian legislation provides such a possibility, without a restriction.

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<sup>17</sup> For a doctrinal definition of the arbitral agreement, see Daniel Mihai Sandru, *International Trade Law*, 3<sup>rd</sup> edition, Universitara Publishing House, Bucharest, 2012, p. 115.

<sup>18</sup> European Commission, *European Convention on International Commercial Arbitration*, Geneva: European Commission, 1961, § 2 (1).

<sup>19</sup> See Cristina Ioana Florescu, *Arbitrajul comercial*, Universul Juridic Publishing House, Bucharest, 2011, p. 136.

<sup>20</sup> Ioan Leș, *Noul Cod de Procedură Civilă*, C.H. Beck Publishing House, Bucharest, 2013, p. 812.

<sup>21</sup> Regarding the law subjects, see Raul-Felix Hodoș, *Elemente de drept civil. Curs selectiv*, Sfera Juridică Publishing House, Cluj Napoca, 2008, pp. 14-28.

<sup>22</sup> See Decision of the Constitutional Court no. 123 of 5 March 2013, published in the Official Gazette of Romania no. 214 of 16 April 2013.

#### 4. SEVERAL CONSIDERATIONS ON THE DECISION OF THE CONSTITUTIONAL COURT

According to this article, and taking into consideration art. 29 of Law No. 47/1992 regarding the organization and functioning of the Constitutional Court of Romania, one of its attributions is to decide upon “the exceptions of unconstitutionality regarding Laws and Ordinances raised before tribunals and commercial arbitration courts”. The key-problem regarding this exception is that by the phrase “commercial arbitration courts”, contained in the art. 146 d) of the Constitution, the constituent considered not only international commercial arbitral tribunals, but also national ones. However the expression included in the same constitutional article is scanty, because it leads us to the belief that “tribunals” could be judicial or commercial arbitral, yet when the phrase “judicial tribunals” is used, all relevant jurisprudence highlights a well-based concept: exclusively the system of judicial tribunals provided by the art. 126 (1) of the Constitution<sup>23</sup>. Therefore, the concept should be interpreted strictly and restrictively regarding the judicial tribunals, the term of tribunal not having a large meaning of any jurisdiction. For this reason, annexation of the noun “tribunals” to the adjectival phrase “of commercial arbitration” is improper, because the same word – tribunal – in the same expression would be used with a larger meaning, which generally includes any arbitral jurisdiction. For this reason, we appreciate that the wording of the art. 146 d) could be optimized, emphasizing that the Constitutional Court decides upon the exceptions of unconstitutionality raised before national tribunals and before arbitral commercial tribunals.

In the analysis made by the Constitutional Court regarding the inclusion of the Paris Court in the scope of application of the art. 146 d) of the Constitution, one of the arguments given in order to decide upon its legality was the principle of interpretation, according to which “where law does not distinguish, neither the interpret should” (*ubi lex non distinguit, nec non distinguere debemus*). The Court’s solution could be correct, but we appreciate that such argumentation would be wrong, at least from two points of view. First of all, the argumentation is doubtful, because the Court has just contradicted the principle, interpreting in order to distinguish, because the constitutional text refers only to the arbitral commercial tribunals, not to the international arbitral tribunals. We appreciate that this misinterpretation is due to the deficiency of drafting the constitutional text, deficiency that forced Constitutional Court to use (wrongly) some arguments to prove its competence. Secondly, it is known that in public law, the main principle of interpretation is that the competence must be expressly mentioned, and not inferred by way of interpretation. Or, in this case the competence explicitly stated belongs to arbitral commercial tribunals, and not to the international commercial tribunals.

The Court’s analysis on the exception’s admissibility, from the point of view of the notifying entity includes various arguments, using the grammatical, systematic and teleological interpretation, concluded in the legality and the admissibility of the referral. We appreciate that the argumentation of the Constitutional Court is far from being rigorous. Thus, for instance, the Court mentions the conformity of the term “tribunal” within the meaning of the art. 6 of the European Convention of the Human Rights and the

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<sup>23</sup> Art. 126 (1) of the Constitution stipulates: „(1) Justice is achieved through the High Court of Cassation and Justice and through other tribunals established by law”.

justice achieved by the commercial arbitral courts, because the access to justice and the right to a fair trial in the view of the European Court can be ensured and guaranteed by any jurisdiction under any state legislation, if such a jurisdiction meets the requirements of a court, stated in the European Convention and embodied in the European Court's jurisprudence<sup>24</sup>. We have previously demonstrated that incorporation in the same phrase of the judicial court and of the commercial arbitral courts, has as effect the primary impossibility that the same term – "courts" to be interpreted in a strict and limited meaning for judicial courts and in a wide sense, European, for the arbitral commercial courts. However, drafting deficiency could be covered by presenting other arguments. Moreover, the judgment from the analyzed case is given by an institution that does not belong to Romanian State, situated on other state's territory, thus "the right to a trial" should not be interpreted as being ignored to the extent that would consider that such international arbitral courts would not have competence to notify the Constitutional Court with an exceptionality.

For the reasons abovementioned, we appreciate that the juridical analysis carried out by the Court is not extremely rigorous, and it should have rather followed exclusively two coordinates:

Firstly, to identify the meaning of the deprivation of the parties of an international arbitration of the possibility to invoke such defenses (exceptions of unconstitutionality), matter usually concerning the contractual nature of the arbitral agreement. By appointing the place and the type of arbitration parties aim the advantages of that choice, but also undertake the risks.

Secondly, the systematical and teleological interpretation made by the Court is precarious and leads, in our opinion, to a wrong conclusion. The Court should have considered the risks of such an interpretation and its consequences. Thus, appreciating that an institutionalized foreign arbitration may appeal to the constitutional competences of the Court, completing the idea of access to justice in a wide meaning, two inadmissible consequences would occur: the access to justice should manifest also for civil arbitration not only for commercial arbitration, because the access to justice should be equally guaranteed to the law subjects; the exception of unconstitutionality should be possible to raise before any jurisdiction within Romania, and not only before the courts mentioned in the art. 126 of the Constitution, based on the same reason that "the right to a tribunal" must be interpreted in a wide meaning, similar to the European one, inclusively when interpreting the Romanian Constitution. For these reasons, the large interpretation of the phrase "commercial arbitral instances" given by the Constitutional Court does not correspond to the scope and meaning already ruled in the Romanian state practice, but distinctively departs from it<sup>25</sup>.

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<sup>24</sup> Juridical coordinates of the relationship between the national law and international law in the matter of human rights are treated in *The relationship between the International Law and The Provisions of the Law of Revision of the Romanian Constitution*, Nicolae Ploșteanu, *Theoretical and practical implications of the revision of Romanian Constitution*, „Petru Maior” University Publishing House, Tîrgu Mureș, 2004, pp. 91-97;

<sup>25</sup> The wide meaning does not correspond to the idea of constitutional competence, which should be well outlined, but rather to a philosophy of justice which correspond to the idea that „the parties”, implied in the legal relationship, understand to have on legal action, see Adrian Boantă, *Claim Form between the past and the present. The elaboration of the claim in Transylvania (18<sup>th</sup> century-first half of the 19<sup>th</sup> century)* in the Review „Juridical Current”, no. 2/2012, pp. 77-78.

In this respect we rely on the position expressed by the Emeritus Professor Mrs. Brândușa Ștefănescu, whose opinion is attached to the case file of the Constitutional Court. The expressed opinion is that the international commercial arbitral court that decides on an international trade dispute does not have the competence to notify the Romanian Constitutional Court with the exception of unconstitutionality of a law or of an ordinance adopted in Romania, made by the applicant in the arbitral procedure, exception to whose admissibility does not even have the power to define its position.

Distinctly from the mentioned opinion, but whose position we undertake, we appreciate that the relations' typology and the juridical basis that supports them, the relations between the Constitutional Court and other juridical entities from Romania, exclude the possibility for an international court, no matter an arbitral one or not, to notify the Constitutional Court, unless such a competence is given under an international treaty<sup>26</sup>. We appreciate that the position assumed by the Court by the decision analyzed in this study, allows the Court to exercise a competence which lacks the possibility of a control of its extension given by the legislator that established its competence, an aspect that is usually avoided by any public management.

On the other hand, it is within the essence of the arbitration, the exclusive management of the process in fact and in law (which does not mean that there are not exceptions) by the arbitrator/arbitrators established by parties. Prior to an arbitration award, parties usually provide the possibility to challenge the arbitration award within an action for annulment before the national courts of a state, for reasons of law error. On this occasion there could be managed also an exception of unconstitutionality, when arbitrators have not appreciated on the "conformity" between the Constitution and the legislative act challenged by one party. Such an appreciation is not impossible and it is performed through a classical process in the international law field, by qualification of the terms or of the judicial institutions. Such a qualification is usually made by reference to the law system to which the normative act, the terms and the interpreted judicial institution belong.

Before concluding this study, we consider that discussions are far from being clarified on this topic, but it is extremely important to focus on the situation in which the international arbitration, judging on *lex fori*, does not allow the parties to invoke the exception of "unconstitutionality" or, even if it allows, it is rather seen as an exception of "constitutional conformity" and decides on it, but not having the competence to notify a Constitutional Court of other states. Starting from such a hypothesis, following the Constitutional Court's reasoning in the analyzed case, one can conclude that the arbitral court, applying *lex fori*, has infringed Romanian international private law order, infringing the access to justice of one of the parties and affecting the exclusive competence of the Constitutional Court to analyze the constitutionality of the laws. The consequence is that such a decision would not be recognized or enforced in Romania, and filing such an action for annulment before Romanian judicial courts would have high chances to succeed. We appreciate that such a consequence should not be accepted as the parties of the arbitral agreement aimed to establish the arbitral way in the view of its effectiveness on the settlement of the substance matter and on the enforcement of arbitral decision.

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<sup>26</sup> For a doctrinal opinion on the role of international treaties, see Nicolae Ploșteanu, *Încetarea tratatelor internaționale*, Veritas Publishing House, Tîrgu Mureș, 2009, pp. 17 -18.

## 5. CONCLUSIONS

Notwithstanding the solution that the Constitutional Court gave in this decision, it has explained the meaning of the “arbitral commercial tribunal” and stated that in this case, the Constitutional Court is legally notified. According to the scope and type of the arbitral agreement the parties could choose to settle the dispute before an international arbitral tribunal applying the national law. It is possible that such a decision could give rise to a wave of exceptions on unconstitutionality raised before international tribunals, especially regarding Governmental Emergency Ordinances that could significantly charge the Constitutional Court and delay the arbitral trial, but at the same time it is unacceptable that a tribunal will apply provisions of laws whose constitutionality is questionable.

Under the conditions of the present review of the Constitution, we appreciate that the constitutional text that empowers the Constitutional Court to decide on the exceptions of unconstitutionality should be reformulated as such: ”decides on the exceptions of unconstitutionality regarding laws and ordinances, raised before judicial courts or national arbitral courts; (...)”.

