

CRITICAL REMARKS ON THE ART. 594 PARA. 2 AND 3 OF THE CODE OF CIVIL PROCEDURE

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ABSTRACT: *While highlighting the novelty of character by the separate plea for annulment of certain categories of conclusion rendered by the arbitral tribunal, the study is criticizing the superficial references, void or unfounded, that the art. 594 of the Code of Civil Procedure has on the regime of the aforementioned separate pleas for annulment by referring to others provisions of Book IV of the Code of Civil Procedure.*

KEYWORDS: *Action for annulment; separate action for annulment; pleas for annulment; conclusion of the arbitral tribunal attack.*

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1. INTRODUCTION

The New Code of Civil Procedure, which took effect recently, is undoubtedly a modern regulatory procedural legislation in Romania and brings many useful changes for the most part. The same direction is followed by amendments to the provisions of Book IV of the former Code of Civil Procedure relating to arbitration. From these changes, our attention goes to those which are absolutely innovative for the Romanian legislation. These concern the possible separate plea for annulment of the closing of the hearing (art. 594), as in the previous regulation the judicial review used to apply only to the arbitration award and this was achieved by the plea for annulment; some of the closings of the sessions, such as those relating to establishing jurisdiction by the arbitral tribunal could be challenged - then, but also now, only while appealing on the arbitration decision given in that case.

2. CATEGORIES OF DECISIONS OF THE ARBITRAL TRIBUNAL THAT CAN BE ATTACKED SEPARATELY WITH PLEA FOR ANNULMENT

According to art. 594 of the Code of Civil Procedure¹ litigants can attack separately with plea for annulment the decisions that:

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¹ Pentru detalii a se vedea (V. M. , T. C. , & C. C. , 2013) (Frențiu & Bâldean, 2013) (Leș, 2013) (Deleanu, 2013)

- a) suspended the arbitration according to art. 412 and 413 of the Code of Civil Procedure; or
- b) set provisional or precautionary measures according to art. 585 of the Code of Civil Procedure; or
- c) rejected as inadmissible the request for referral to the Constitutional Court concerning the constitutionality of legislation.

From the very start it should be noted that references to art. 412 and 413 of the Code of Civil Procedure or the art. 585 of the Code are not exempt of any criticism; however we do not intend to discuss them in this study, whose subject is presenting the reasons that can be invoked to promote the separate plea for annulment of decisions set by the art. 594 of the Code of Civil Procedure.

3. SEPARATE PLEAS FOR ANNULMENT OF THE ARBITRAL TRIBUNAL UNDER ARTICLE 594 PARA. 1

Concerning the separate pleas for annulment, art. 594 para. 3 states that "outside the grounds provided by art. 608, in a plea for annulment it is possible to invoke the lack of conditions provided by law for taking measures ordained by the decisions".

Therefore, in a separate plea for annulment of some of the decisions of the arbitral tribunal it is possible to invoke both general reasons provided by art. 608 of the Civil Procedure Code and the above-mentioned reason which consists of the lack of statutory conditions foreseen by law in order to enforce the measures ordered by the decision.

Mentioning the lack of statutory conditions foreseen by law necessary to enforce the measures ordered by a decision as a reason for the separate plea in annulment for the decisions prescribing the said measures makes that the legal statute of the arbitral decisions contemplated by art. 594 of the Code of Civil Procedure does not differ from the legal regime of similar rulings through which the courts decide suspension (as provided for in art. 414 of the Civil Procedure Code) or through which were taken provisional or precautionary measures (as provided in art. 953 para. 3 of the Code of Civil Procedure), or which rejected as inadmissible the request for referral to the Constitutional Court concerning the constitutionality of legal provisions (as set out in art. 29 of Law no. 47/1992 on the organization and functioning of the Constitutional Court). However, numerous critical remarks can be formulated concerning the possibility of invoking the separate plea for annulment for rulings mentioned by art. 608, which is referred to by the art. 594 para. 3.

It should be mentioned in this regard that, according to art. 608 para. 1, "arbitral award may be set aside only for annulment for one of the following reasons:

- a) the dispute was not possible to settle by arbitration;
- b) the arbitral tribunal settled the dispute without the existence of an arbitration agreement or under a void or inoperative agreement;
- c) the arbitral tribunal has not been constituted in accordance with the arbitration agreement;
- d) a party was not present for the scheduled discussions and the summons procedure was not legally fulfilled;

- e) the decision was given after the expiry of the arbitration term pursuant to art. 567, although at least one part declared that it intended to rely lapse and the parties did not agree to continue the trial, according to art. 568 para. (1) and (2);
- f) the arbitral tribunal decided on aspects that were not requested, or gave more than requested;
- g) the arbitral decision does not include the enacting term and the reasoning, does not show the date and place of delivery or is not signed by the arbitrators;
- h) the arbitral decision violates public order, morals or mandatory provisions of the law;
- i) if, after the arbitration judgment, the Constitutional Court ruled on the exception raised in that case, declaring unconstitutional a law, ordinance or a provision of a law or an ordinance which was the subject of that exception or other provisions of the contested measure which necessarily and obviously cannot be dissociated from the provisions specified in the notification."

Proceeding to analyze the reasons provided above, we see that, in the light of art. 592 in conjunction with Art. 579 para. 2 of the Code of Civil Procedure, the grounds for annulment established by art. 608 para. 1 lit. a, b and c cannot be invoked to cancel separately rulings envisaged by art. 594 para. 1, because that would mean violating direct provisions of art. 579 para. 2, which expressly provide that the conclusion of the arbitral tribunal on its competency to rule on the case in question may only be overturned by an action brought against the arbitration award.

Admitting the possibility of invoking the separate action for annulment of the grounds set out in art. 608 para. 1 lit. a, b and c aimed, ultimately, at the power of the arbitral tribunal to hear the case would be, in fact, to attack the conclusion of the arbitral tribunal that it has determined that it is competent to hear the case in question in violation, thus violating art. 579 para. 2. Moreover, the reasons for the suspension of the course of the arbitration specified by art. 412 and art. 413 of the Code of Civil Procedure or a request for provisional or precautionary measures or request for referral to the Constitutional Court on the constitutionality of legal provisions, may intervene in the arbitration while any exception concerning the existence and validity of the arbitration agreement, the establishment of the arbitral tribunal, the limits of the arbitrators' authority, has to be raised under sanction of rejection, until no later than the moment of the first hearing (art. 592 par. 1) which makes that, from this perspective as well, the reasons for annulment provided for in art. 608 para. 1 lit. a, b and c can not be invoked in a separate plea for annulment of decisions.

The reason provided by art. 608 para. 1 lit. it can not be invoked either because the decisions that art. 594 considers are delivered in settlement of incidental requests addressed to the arbitral tribunal, the arbitration deadline being suspended during their trial, as required by art. 567 para. 2, which makes it impossible to therefore question the occurrence of obsolescence.

It is also difficult to imagine the way in which the reason provided by art. 608 para. 1 lit. f could be invoked, since the decision appealed would order either suspension on the grounds of the occurrence of one of the objective cases provided for by art. 412 and art. 413 of the Code of Civil Procedure, or provisional or precautionary measures requested by the party have been taken, or the request for referral to the Constitutional Court was

rejected as inadmissible, the arbitral tribunal being unable to rule on things that were not requested or to give more than asked.

As for the reason referred to in point. g, its invoking it should be replaced with a reference to art. 593 of the Code of Civil Procedure, which foresees the mandatory contents of a conclusion of the hearing, and accordingly, to art. 603 para. 2 of the Code of Civil Procedure.

We believe that the reason provided by art. 608 para. 1 lit. h is not applicable either, because in practice it is impossible that there be any violation of the public order, of morals or of mandatory provisions of the law in the cases in which the aforementioned decisions are rendered.

The reason provided by art. 608 para. 1 lit. i could be invoked if, hypothetically, in the concluding five days following the conclusion, provided by art. 594 para. 1 lit. c Constitutional Court, in another case, the statutory provision would be declared unconstitutional.

Of the nine reasons specified in Art. 608 para. 1, the separate plea for annulment might be invoked if needed only for the reason mentioned in point. d, but only if the arbitral tribunal would have ruled without a party being legally summoned for the term in which the conclusion was given and without the party being able to make use of the provisions of art. 592 para. 3, which supposes that the party summoned illegally to the term of conclusion, and obligated to invoke the irregularity during the first hearing where present or legally summoned, has not had another hearing available to proceed in conformity with the legal dispositions, which seems highly unlikely.

Therefore, in our opinion, the separate plea for annulment foreseen under art. 594 of the Code of Civil Procedure could invoke as grounds for annulment only the lack of statutory conditions provided by law for taking measures ordered by the decision and perhaps, as pointed out, the reason provided by art. 608 para. 1 lit. d although, at least concerning the conclusion of the session covered by art. 594 para. 1 lit. b and c, since, as stated in art. 594 para. 5, filing a separate action for annulment does not suspend the arbitration, the concerned party would be able to proceed to exercise the possibility given by art. 592 para. 3.

4. CRITICS ON THE REFERENCES OPERATED BY ART. 594 PARA. 2

Concerning the conclusion foreseen by art. 594 para. 1 lit. c, we also note that the deadline for five days to promote a separate plea for annulment from art. 594 para. 4, is inconsistent with the 48-hour deadline set by art. 29 para. 5 of Law no. 47/1992 on the organization and functioning of the Constitutional Court for the appeal procedure on the conclusion rendered by the instance where the exception of unconstitutionality was raised.

Finally, regarding the conclusion provided in art. 594 para. 1 lit. b we note that, according to art. 585 para. 4, in case of resistance, execution of the precautionary measures and provisional measures accepted by the arbitral tribunal shall be ordered by the court, more precisely the court whose jurisdiction the place of arbitration falls under, and the court's decision to enforce the decision (art. 203 par. 2) may be appealed within 5 days of notification to the competent court of appeal (art. 953); It follows that, in this matter, the party unhappy with the solution of the arbitral tribunal, as ordered by the conclusion, may utilise both the separate plea for annulment under art. 594, and, where

appropriate, the appeal on the execution sentence ordered by the competent court at the place of arbitration.

We observe that art. 594 of the Code of Civil Procedure also involves criticism concerning the lack of precision of the references made towards art. 609, Art. 611, Art. 612 and Art. 613 impossible to apply in a separate plea for annulment against the provisions of art. 594 para. 4, and partly par. 5 and alin. 6.

We show in this respect that art. 609 of the Code of Civil Procedure targets the possibility of the parties to abandon the plea for annulment after the rendition of the arbitral decision in question, or art. 594 para. 4. alin. 1 takes into account, naturally, from the beginning, just the possibility of attacking separately with plea for annulment the aforementioned arbitral rulings, since it cannot be envisaged to incorporate a commitment of the same parties to abandon the promotion of a separate plea for annulment .

Since art. 611 of the Code of Civil Procedure provides the deadline in which the plea for annulment of the arbitration decision can be promoted, the reference to these provisions is void since art. 594 para. 4 expressly regulates the time within which the separate plea for annulment can be introduced, a special provision which prevails over the dispositions of art. 611 of the Code of Civil Procedure.

Because art. 612 of the Code of Civil Procedure governs the possibility for the appeal court vested with the plea for annulment of an arbitration decision to suspend the execution of the said judgment, the mechanical reference made by art. 594 para. 2 to these provisions can have no effect, since, on the one hand, according to art. 594 para. 3 the separate plea for annulment does not suspend the period of arbitration in the cases provided by paragraph. 1 lit. b and c, and on the other hand it is possible to apply art. 585 para. 4, as well as art. 29 of Law no. 47/1992 on the organization and functioning of the Constitutional Court, as amended, and regarding the decisions foreseen in the art. 594 para. 1 lit. the course of the arbitration being suspended, there is no longer any interest to apply art. 612 of the Civil Procedure Code which refers to art. 484 para. 2-5 and 7 of the Code, this procedure being more cumbersome and expensive than the separate plea for annulment from art. 594 para. 4.

Concerning the provisions of art. 613 of the Code of Civil Procedure aimed at prosecuting the plea for annulment of the arbitration decision and the possible solutions to be adopted in this respect by the Court of Appeal, these are absolutely inexplicable because art. 594 para. 6 governs precisely the determination of the aforementioned separate plea for annulment; the possibilities given by the procedural law to the court of appeal being very different from those provided for in art. 613 of the Code of Civil Procedure. Moreover, the decision of the Court of Appeal made pursuant to art. 594 of the Code of Civil Procedure is final, while ruling under art. 613 para. 3 of the Code of Civil Procedure is subject to appeal (Art. 613 para. 4 of the Code of Civil Procedure).

The above reasons lead us to emphasize that the formula "can be applied correspondingly" from art. 592 para. 2 with reference to art. 609, Art. 611, Art. 612 and Art. 613 of the Code of Civil Procedure is inadequate and that a law of such importance as the the Code of Civil Procedure must be written with the utmost rigor.

5. CONCLUSIONS

Under reserve of critical analysis and reference to art. 594 para. 1 to art. 412 and 413 of the Civil Procedure Code and Art. 585 of the Code, which will be the subject of a future study, we conclude that the references made by the sameaArticle 594 to "the provisions of art. 608-613" to be applied "correspondingly to the extent in which the the current article does not dispose differently" are for the most part, as shown, useless or void, since some of the provisions of the articles referenced by art. 594 para. 2 cannot be applied to the separate plea for annulment for the decisions the arbitral tribunal under art. 594 para. 1 lit. a, b and c.

The above observations lead to propose a change in art. 594 of the Civil Procedure Code, in the sense that paragraph 2 and the referencing to art. 608 of the Code of Civil Procedure paragraph 3 should be barred.

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