

## THE LIABILITY OF ARBITRATORS IN CIVIL LITIGATION

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**ABSTRACT:** *Arbitration is an alternative jurisdiction with private character. The arbitrators are appointed, dismissed or replaced according to the arbitration covenant. They are responsible for their actions if causing injuries to the parties involved in the arbitration proceedings. However, the opinions on the legal nature of the liability of arbitrators are not uniform. Some authors consider that there is a tort liability, while others argue that there is a contractual one.*

*In our opinion, the arbitrators' liability is contractual, insofar as their appointment is grounded in the arbitration agreement and is confirmed through the acceptance of that position.*

**KEYWORDS:** *alternative jurisdiction; arbitration; appointment; contractual liability*

**JEL CODE:** *K4*

### 1. PRELIMINARIES

The concept of arbitration is mostly used with two very precise meanings, namely for the body designated to solve litigation in a peaceful way and, respectively, for the mere special procedure of solving private law litigations. (Leș, 2013)

The Code of Civil Procedure regulates the voluntary, private arbitration. The rules contained in it represent the common law with respect to arbitration.

Book IV is devoted to arbitration. From the very beginning, art. 541 Code of Civil Procedure emphasizes that arbitration is an alternative private jurisdiction. Due to this feature, the parties will be in the position to decide whether to fill the case to the ordinary courts or to arbitration. (Roșu, 2016)

Underlining this feature within the new Code of Civil Procedure goes in accordance to the enhanced role played by arbitration in contemporary world and, in particular, with the existent legislative efforts to identifying alternative means to solve civil disputes and not only. In this respect, arbitration represents a *good alternative to state justice* (our emphasis). (Leș, 2013)

### 2. APPOINTING ARBITRATORS

Through the arbitration agreement, the task of resolution may be conferred to one or more persons invested by the parties with due powers to judge the case and pronounce a

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final and binding decision. The sole arbitrator or, as the case may be, the invested arbitrators constitute the Arbitral Tribunal.

From the outset, we should note that the arbitrators do not have a law of organization and functioning, the way lawyers<sup>1</sup> or notaries<sup>2</sup> have. The arbitrators pursue their activity in accordance to the Rules of arbitral procedure, adopted by the Courts of Arbitration.

The parties might also carry the organization of procedures. In this case, the arbitration procedure will be set and will work in accordance to the arbitration agreement. Through the same agreement or through any document set up later but in advance to the constitution of the Arbitration Tribunal, the parties may also establish several aspects as: the rules with respect to the constitution of this tribunal, the appointment, the revocation or replacement of the arbitrators; the date and place of the settlement; the procedural rules which the arbitral tribunal will have to follow in judging the litigation, including possible pre-litigation procedures; the allocation of costs of arbitration between the parties; or any other rules with respect to the proper conduct of the settlement. Such issues may be established either directly in the covenant or indirectly, referring to a certain specific regulation. Nevertheless, they should respect public order and good moral as well as the mandatory dispositions of the laws in force.

In the absence of any rules foreseen by the parties, the arbitral tribunal would be in the position to formulate the procedure the way it will consider appropriate. If neither the tribunal establishes these rules, the provisions of the Code of Civil procedure will apply.

A third party may also organize arbitration. The subjects involved may agree that the settlement to be organized by a permanent arbitration institution, according to Title VII in Book IV or by any other entity or individual. In such cases, the dispute resolution will be entrusted to some arbitrators appointed or just accepted by the parties in accordance to the arbitration agreement or to the rules of the permanent arbitration institution. (Roșu, 2016)

If there are several plaintiffs or defendants, the parties will appoint a single arbitrator, should they have common interests.

The parties propose arbitrators upon the arbitration agreement and if they had not determined the number of them, a panel of three arbitrators will solve the dispute. In addition, the parties will propose an alternate for the case in which the one arbitrator would turn unable to perform his duties.

The appointed arbitrator will have to accept this task in writing and to communicate his acceptance to the parties within 5 days after nomination. This communication may be performed through mail, fax, email or any other means providing the transmission of the full text of the document as well as the confirmation of its reception.

The two arbitrators will nominate the super-arbitrator and an alternate of him, within ten days from the last acceptance. The super-arbitrator will accept the duties in the same written way as the arbitrators and will communicate it to the parties within 5 days after his nomination.

Several shortcomings may occur here. For instance, the parties may disagree with respect to the appointment of the unique arbitrator; or one part may not nominate its

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<sup>1</sup> Law 51/1995 on the organization and functioning of the profession of lawyer, republished in the Official Journal of Romania, Part I, no. 98, February 7th, 2011, with revisions and extensions.

<sup>2</sup> Law 36/1995 of the public notaries and notarial activity, republished in the Official Journal of Romania, Part I no. 444, June 18th, 2014.

arbitrator or the two arbitrators disagree on the person of the super-arbitrator. In any of such cases, the part seeking arbitration may ask the tribunal in the area of which the arbitration is to take place, to nominate the arbitrator or, accordingly, the super-arbitrator.

The Tribunal shall give its decision within ten days from the referral, calling the parties. This decision may not be subject to any means of attack. In our opinion, the absence of any way of appeal is correct, since the arbitration tribunal must be established in due time while the court's decision only solves an existing impasse. (Roșu, 2016)

### 3. LIABILITY OF ARBITRATORS

With respect to the arbitration activity, the legislator has given a special importance to the issue of their liability for the damages they might cause. (Leș, 2013). As far as the legal nature of this liability is concerned, the opinions are divergent.

Thus, according to one opinion, there is a contractual connection created between the parties and the arbitrator, upon the acceptance of the nomination. Due to this aspect, there is a contractual liability of the arbitrator, according to art 565 Code of Civil procedure, with respect to non-fulfillment of the duties enshrined in the Convention. (Păncescu, 2016; Baias, Zidaru, 2016)

According to another opinion, the arbitrators' liability is a tort one, similar to the patrimonial liability of judges. To support this, it was argued that contractual liability is, obviously, incompatible with the jurisdictional nature of the activity of an Arbitration Tribunal. The arbitrators do not commit to a particular result or to a particular approach towards any of the parties. They are expected to fulfill their tasks independently and impartial. (Leș, 2013)

It was also argued that calling the arbitrators' liability an exclusive contractual one is incompatible with the jurisdictional nature of their task, despite of the arbitration contract between the arbitrator and the parties. While being assimilated to the judges due to their jurisdictional duties, the arbitrators must enjoy not necessarily that kind of immunity, but a certain protection meant to provide them with the framework to deliver as well as with the safety after the ruling. (Roș, 2000)

There was also voiced a third opinion in support of a mix regime, with contractual liability in case of violation of the duties established through the arbitration convention and tort liability in all the cases regulated by the Code of Civil Procedure. (Florescu, 2011)

*In our opinion*, arbitrators' liability has a contractual nature, because their nomination is based on the arbitration convention, which is confirmed through the acceptance of such a position. Besides, the situations in which arbitrator's liability is involved make us conclude that the responsibility can't be but a contractual civil one.

It is true that the arbitrators fulfill a jurisdictional function, but that is grounded on the arbitrator's convention, expressed as a compromising clause or as a compromise. There is no way in which arbitrators may exercise their duties apart from the parties' convention in contrast to the judges, for whose nomination parties have no option to consent or not.

We do not consider that the arbitrator's liability is a tort one, even if he exercises a jurisdictional function, because he is only invested in accordance to the arbitration convention that is in accordance to the procedural rules established in the convention. Even when the parties run for the institutionalized arbitration, that nomination is also

grounded in the arbitration convention, which will trigger the contractual liability for the arbitrators involved in solving the dispute.

In addition, we do not share the mixed character of the arbitrators' liability, since they act only in accordance to the arbitration convention, even if inappropriately when breaking the provisions in the Code of Civil Procedure.

The legal literature noticed that due to the similarity of the jurisdictional activity of the arbitrators and the judges, the liability of the first ones acquires some particular accents from the later' responsibility. (Baias, Zidaru, 2016) We do not share such an opinion! Arbitrators do not exercise this duty as a profession, they are only paid according to a specific litigation, do not enjoy the recognized advantages of the judges, therefore even their liability can't be compared to that of the judges.

The liability of the arbitrators cannot be hold for the solution in the dispute, but only for the partial or full break of their jurisdictional task or for having done other facts that cause prejudices to the parties or to only one of them, in connection to the said dispute. (Deleanu, 2005; Deleanu, 2013)

Usually, the parties choose to resort to institutionalized arbitration, due to the prestige of such arbitration, due to their rules, to the possible arbitrators as well as to the permanent character of such a tribunal. The institutionalized arbitration is set and acts close to a domestic or international organization or institution or as a non-governmental organization of self-contained public interest. Whichever the case may be, there are provisions related to the conditions in which the arbitrator to work independently and impartial. Thus, according to art 616 al. 2 Code of Civil Procedure, the institutionalized arbitration is autonomous in relation to the institution that has settled it.

Moreover, even if considering that arbitrators' liability has a contractual legal nature, it also bears particularities that are determined by the specificity of his work. This specificity comes noticeable within the conditions for questioning the arbitrator's liability.

**3.1. The Conditions of Questioning the Civil Liability of an Arbitrator.** In our opinion, there are several conditions to be met in order to question one's arbitrator's liability. They are the following:

**3.1.1. The arbitrator has committed one of the actions displayed at letter a-c of art. 565 Code of Civil procedure.** Such facts are unlawful since they represent a violation of the obligation assumed while accepting the arbitration mandate.

Thus, according to the law, the arbitrators' liability is involved once they commit the following acts:

a) After accepting the nomination, they unduly give up with their task. This is the case of renouncing the task, with no reason, despite of a previous acceptance. Before such an acceptance, there is no liability to question provided for the non-fulfillment of the promise to contract, as according to art 1279 Civil Code. (Păncescu, 2016)

According to art 1279 al.2 Civil Code, in the case of non- fulfillment of a promise, the beneficiary has the right to interest-damages. Should the arbitrator cause a certain prejudice to a party, he will have to remediate it through paying damages, on the extent of the prejudice. However, in contrast to common justice, if the person to promise, in this case, the arbitrator, refuses the nomination, the Court will not be able to issue a decision through which to supplement the absence of consent.

b) An arbitrator does not take part to solving the litigation or does not issue the decision within the term established by the arbitration convention or by law, with no justification. The fact of unreasonable failure to perform the duties – that of taking part to solving the dispute or failure to respect the term established through the arbitration convention for issuing the decision represent a further reason to call for arbitrator's liability. (Păncescu, 2016). The parties may establish through the arbitration convention the term in which the dispute to be solved. In the absence of such a term provisions of art 567 Code of Civil procedure are to be applied. They stipulate that, unless the parties have decided otherwise, the arbitration tribunal shall give its ruling within a maximum of six months from the date of its constitution, subject to the sanction of caducity of that arbitration. For appropriate reasons, the arbitration tribunal may order the extension of the deadline once, for at most three months. The civil liability of arbitrators derives from their fault. This conclusion comes from the references to subjective elements, in the legal text, as in the first two mentioned cases. Thus, one may consider that in the first two situations, objective circumstances exclude the civil liability of the arbitrator. This would be the case of the occurrence of a serious disease or any other objective obstruction. (Leș, 2013; Baias, Zidaru, 2016)

c) The arbitrator does not respect the confidential nature of the arbitration, through publishing or disclosing data without having the parties' allowance but of which they are aware of as arbitrators. This third possible case of liability reveals a fundamental character of arbitration, *the confidentiality*. This feature is one of the main differences from the judgment in front of a court, which is subject to the principle of publicity, as provided by art. 17 Code of Civil Procedure. The arbitrator is obliged to abstain from publishing or disclosing the data he becomes aware of, while acting in this position, without the parties' permission to do so. (Păncescu, 2016). In order to provide confidentiality, the arbitration tribunal does not display on its website the cases debated that day; there are only the parties to participate at the hearings, their representatives and the arbitrators, and possible witnesses or experts. However, the hearings are not public! The extent of the duty of confidentiality is set in the convention that defines the relations between the parties and the arbitrator, as well as their tasks. (Păncescu, 2016)

d) The arbitrator violates with bad faith or serious negligence, other duties they hold.

In this last case, liability arises only if the arbitrator acts in bad faith or serious negligence. Usually, nothing prevents the remedy to take place through the arbitration route, as well. (Păncescu, 2016) The solution promoted by the legislator in this last case is similar to the one proposed in art 99 letter t in Law 303/2004 regarding the judges and prosecutors<sup>3</sup>, namely that the exercise of one's office in bad faith or serious negligence constitutes a disciplinary offense. The concept of bad faith stays for the intention of an arbitrator or a judge to produce negative effects in the field of social relations, namely to harm somebody. (Leș, 2013)

The phase „serious negligence“ might sometimes generate difficulties in the interpretation, respectively in determining the facts to be qualified as having been committed through negligence or serious negligence. (Leș, 2013)

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<sup>3</sup> Law no. 303/2004 regarding the statute of judges and prosecutors has been republished in the Official Journal of Romania, Part I, no. 826, in September 13th 2005, with further changes and amendments.

In the case of judges, the legislator has defined what to understand through „bad faith“. Art. 99<sup>1</sup> align 1 in Law no. 303/2004 provides that there is bad faith when a judge or prosecutor knowingly violates the rules of substantive or procedural rules, pursuing or accepting harming of a person. Moreover align 2 of the same article explains that by "serious negligence", is meant the case when a judge or a prosecutor disregards by fault, seriously, undoubtedly and inexcusably, the rules of material or procedural law. For the arbitrators there is no such legal provision! Therefore, it will be the task of the arbitration tribunal seized with an action for damages or of the court to establish whether the violation of an arbitrator's duties had occurred with bad faith or serious negligence.

We consider that there is also the case of subjective elements of liability in the last two determined situations! Some authors consider that the provisions of art 565 Code of Civil Procedure do not represent an exhaustive list of the cases in which arbitrators might be held accountable, but only an indicative one. In this case, the prevailing argument shows to the contract of arbitration which is an onerous one taking for granted the professional's diligence. Only when one will find that the arbitrator had acted in breach of his obligations as a professional, an action for his liability would be fully admissible once all other conditions will be met. (Prescure, Crişan, 2010)

We, however, adhere to the contrary position that the reading of legal dispositions in art 565 Code of Civil Procedure says that the civil liability of arbitrators cannot intervene out of the conditions and cases clearly determined by the text. (Leş, 2013)

In the legal literature was underlined that the patrimonial liability of arbitrators for issuing a wrong solution is not wholly excluded and might be also questioned within the same framework as that of judges, namely for the exercise of one's office with bad faith or with serious negligence. (Baias, Zidaru, 2016). We cannot agree with the assimilation of arbitrators with judges, even if both professional categories do exercise a judicial function. And here are some reasons!

The arbitrators' exercise does not have continuity, since they only play their role in the files for which the parties appoint them. In contrast, judges are constantly solving cases without the parties being able to choose the panel of judges.

The organization of the arbitration is not set through any law but by the rules established by the parties, by a third party or by an arbitration tribunal through its organizational regulation, all of these being accompanied by the specific rules in the Code of Civil Procedure. In contrast, the judges act in accordance to Law 303/2004 regarding the statute of judges and prosecutors.

The arbitrators do not benefit from the advantages reserved for the judges. Thus, the arbitrators receive fees in accordance to the value and complexity of the dispute to resolve. This is, still, not a constant income, but one relative to the cases they rule. In this time, the judges benefit from a high salary, as a guarantee of their independence, irrespective of the number of files they solve. Besides, the judges may be promoted to higher courts or receive the professional status of a higher court, turning for them into a substantial increase of the salary. According to art 74 in Law 303/2004 the judges are entitled to a remuneration established in relation to the level of the court, to the position they hold, with their seniority in magistracy as well as with other criteria provided by the law.

Another difference is that arbitrators do not enjoy immovability, meaning that they may be removed much easier from the list of arbitrators, than the judges can be release

from magistracy. According to art 2 in Law 303/2004 the judges appointed by the President of Romania are irremovable. They may be transferred, delegated, posted or promoted only with their consent and may be suspended or dismissed under the conditions laid down in the said law.

According to art 5 in the Regulation regarding the organization and activity of the Court of International Commercial Arbitration, the removal of an arbitrator from the list may happen for the case of an extreme serious breach of his specific duties. The person in case may contest the Resolution of the Governing Body of the Romanian Chamber for Commerce and Industry within 15 days after the communication of that decision. Contestation must be handed to the same Governing Body that has issued it and which will make a final decision to be immediately communicated to the arbitrator. Whether there will be a situation of incompatibility with the arbitrator's standing for reasons that have appeared after the person was enrolled in the list of arbitrators, he will be suspended by the Body of the Court of Arbitration<sup>4</sup>. Same provisions are enshrined in art 5 of the Regulation regarding the organization and functioning of the Court of Arbitration in Timisoara<sup>5</sup>.

The arbitrators must exercise their activity independently. Thus, art 13 in The Regulation related to Organization and Functioning of the Court of International Commercial Arbitration associated to the Romanian Chamber of Commerce and Industry as well as art 12 in the Regulation related to the organization and functioning of the Court of Arbitration in Timisoara, they mention that „the arbitrator and the super-arbitrator perform their activity on an individual, independent and impartial basis, subject only to the law. The arbitrators and super-arbitrators fulfill their tasks in accordance with the provisions of art 21 align (1)-(3) in Romanian Constitution, republished, as well as to those in art 6 align (1) of the ECHR, guaranteeing the right to a fair and reasonable trial and the right to an independent and impartial tribunal“.

Although these provisions establish the independence and impartiality of the arbitration, their independence is not protected by any express provision nor by any institution with such a task. The judges, in return, enjoy this possibility. According to art 75 in Law 303/2004 the Superior Council of Magistracy has the right and the duty to protect the judges against any act that might affect their independence or impartiality or would induce suspicions in this respect. Moreover, the judges who consider that their independence and impartiality are affected one way or other through any interference in their professional activity, may address to this Supreme Council of Magistracy in order to call for the necessary legal measures.

Arbitrators do not benefit from measures of social protection, while judges have such measures ensured. In this respect, according to art 77 in Law 304/2004 the judges and prosecutors, either acting or retired, have the right to be provided with special means of protection against threats, violence or any other acts that endanger them, their families or their assets.

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<sup>4</sup>[https://arbitration.ccir.ro/Regulation\\_related\\_to\\_the\\_organization\\_and\\_functioning\\_of\\_the\\_Court\\_of\\_international\\_Commercial\\_Arbitration.pdf](https://arbitration.ccir.ro/Regulation_related_to_the_organization_and_functioning_of_the_Court_of_international_Commercial_Arbitration.pdf)

<sup>5</sup>[http://www.cciat.ro/cciat\\_Regulation\\_related\\_to\\_the\\_organization\\_and\\_functioning\\_of\\_the\\_Court\\_of\\_Arbitration](http://www.cciat.ro/cciat_Regulation_related_to_the_organization_and_functioning_of_the_Court_of_Arbitration)

Arbitrators will receive compensations for the damages suffered for issuing a certain solution only if they will apply to the common court. The judges, on the other side, may benefit from compensations, according to art 78 of Law 303/2004, from the budgetary funds of the High Court of Cassation and Justice, the Ministry of Justice, the Public Ministry once their life, health or property are at risk as a consequence of performing their professional duties. These compensations are given in accordance to the conditions established by a ruling of the Govern, in accordance to the Superior Council of Magistracy.

Other advantages that judges enjoy and not the arbitrators will be the following: annual paid holiday; medical leave; paid leave for studies; six free return trips in the country; specific pension in quantum of 80% of the basis of calculation represented by the enrollment monthly gross salary or as the case may be, the basic monthly salary plus the bonuses of the last month of activity before the date of retirement; and also early retirement before the age of 60 if they had performed at least 25 years in a position of judge.

This is why we argue that due to these substantial differences between the judges and the arbitrators we cannot equal the liability on the persons in the two positions. It is natural that judges' liability to be higher than the arbitrators, as related to the offered benefits and advantages. In the case of questioning the arbitrator's liability, the explanations offered by the Superior Council of Magistracy work as guidance. The Council is a disciplinary instance with respect to the notions of bad faith and serious negligence. Legal literature mentions Decision 1/20.01.2013 of the Section for Judges that defines the breach of substantive or procedural rules as those acts of special gravity with consequences over the validity of the documents issued by the magistrate, over the term of procedures or those who produce serious damage to the rights and interests of the parties. As for the „serious negligence“, there are only those mistakes with an obvious and indisputable character, lacking any justification but being in clear contradiction with the legal provisions, that can question the disciplinary liability of the magistrate. (Baiaș, Zidaru, 2016)

On the contrary, we argue, due to the total different legal regime of the exercise of the two functions, one cannot consider the interpretation of the Superior Council of Magistracy with respect to the arbitrators' liability. The Courts of Arbitration do not have a hierarchical organization such as the ordinary courts and there is no similar organ to the Superior Council of Magistracy. This last one is only the guarantee of the independence of justice as well as the competent institution to recruit, promote, transfer, post, disciplinary sanction or dismiss the judges and prosecutors.

Alternatively, the Rules of Arbitration Procedure issued by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania<sup>6</sup> describe (art 19 align 3) the arbitrators' liability for the bad faith or for serious negligence for the facts defined in art 19 align 1. They are in accordance to the provisions of art 565 Code of Civil Procedure and mention the following misbehavior of an arbitrator:

- a) After having accepted nomination, the abandons his tasks with no justification;
- b) Unjustifiable, the misses repeatedly the arbitration meeting or commits any other facts expected to postpone unreasonable the solution of the dispute; he does not announce

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<sup>6</sup>[https://arbitration.ccir.ro/Reguli\\_de\\_procedura\\_arbitrala.pdf](https://arbitration.ccir.ro/Reguli_de_procedura_arbitrala.pdf) (Rules of arbitration procedure)

his decision within the term established by the arbitration convention or by the present Rules;

c) He does not respect the confidential character of arbitration, publishing or willingly disclosing data he acknowledged while working as an arbitrator, without the consent of the parties involved.

One should remark that the first sanction to be applied in this case is the revocation of the arbitrator or super-arbitrator, in accordance to the gravity of the action. If these facts are committed with bad faith or serious negligence the arbitrators may (our emphasis, C.R.) be held patrimonial responsible within the limits of the fee received.

Similar provisions are included in art 19 of the Rules of Arbitration Procedures of the Court of Arbitration attached to the Chamber for Commerce, Industry and Agriculture Timis<sup>7</sup>.

### ***3.1.2. The actions committed by the arbitrator have caused an prejudice.***

The provisions related to causing a prejudice are explicitly provided in art 565 Code of Civil Procedure. A prejudice is defined as the negative patrimonial or non-patrimonial consequence, to the detriment of one part, emerged through the non-fulfillment of the duties by the other part. (Popa, 2015). In its turn, the prejudice must meet several circumstantial conditions in order to be remediated. (Popa, 2015) In the case of the one caused by an arbitrator, these conditions are:

*The certainty character of the prejudice.* The rule is provided in art 1532 Civil Code, underlining that only the prejudice to be certainly determined may be subject to the remedy through damage-interests. Certain prejudices are of several types, as the present prejudice, the future one and the one caused by the lost of a chance. (Popa, 2015)

In the case of the present prejudice cause by an arbitrator, we should look, for instance, to the case in which the arbitrator does, unjustified, not issue the decision in due term of six months, or, if the case, within the extended one with other three months. Once the parties have appealed through the arbitration convention to solve their dispute this way, they have considered one of the major advantages thereof, namely the speed. Thus, the failure to comply with the term may trigger the creation of the damage, for instance the one in which one of the parts does not fulfill its assumed duty and cannot be forced to do so until the dispute is settled.

The prejudice cause by the lost of a chance may be, for instance, the outcome of the breaking of confidential nature of arbitration, by the arbitrator. The fact that he discloses the identification data of one part and the information that the given part is involved in a dispute, may, for instance, preclude the conclusion of a contract with another partner who would have intended to sign the contract in the absence of that information.

The prejudice whose quantum cannot be certainly established will be determined by the court in accordance to art 1532 align 3 in the Code of Civil Procedure.

### *The remediation of the material and of the moral prejudice*

The remedy for material and/ or moral prejudice is regulated in art 1532 Civil Code, including both the material and the moral damage. In the case of arbitration, the material damage can come out, for instance, from the fees the creditor loses, through not passing the judgment in time. The moral prejudice may result from affecting the image of one of the parties involved in an arbitration litigation, for instance because the arbitrator does not

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<sup>7</sup>[http://www.cciat.ro/cciat\\_Reguli\\_de\\_procedura\\_arbitrala](http://www.cciat.ro/cciat_Reguli_de_procedura_arbitrala) (Rules of arbitration procedure)

respect the confidential character of arbitration, disclosing data without the party's consent.

**3.1.3. The causal report between the illicit deed and the prejudice suffered by the creditor.**

This is a condition required by the regulation of the right to damage-interests (art 1530 Civil Code) where there is an explicit provision that a prejudice must have been caused by the debtor's failure to provide, in order to be remedied. Moreover, it should be the direct and necessary consequence of this failure to provide. (Popa, 2015)

In the case of arbitration, it must be proved the causality connection between the facts listed in art 565 Code of Civil Procedure, respectively in the Rules of Arbitration Procedure and the caused prejudice. If the damage caused to one of the parties is not the effect of the arbitrator's action, there will be no discussion on the liability of that arbitrator.

**3.1.4. The guilt of the arbitrator**

According to the legal literature, the *ground of the civil liability of an arbitrator* is a *subjective* one, based on the element of guilt for committing an illicit act and according to the essence of duties hold by a professional. Thus, while exercising his profession, the arbitrator undertakes to offer his skills, knowledge and expertise to pronounce a fair solution and to carry out the arbitration procedure under the best conditions. His specific obligations are *diligence duties* (our emphasis, C.R.). Therefore, in order to question one arbitrator's liability one needs to prove not only the *illicit act* but also the *causal linkage, the prejudice* as well as the *guilt* of the professional in the performance of his duties. (Luntraru, 2017)

We may also identify *outcome obligations*. For instance, the judiciary practice has outlined the act of an arbitrator allowing the timeline be exceeded out of the parties' agreement and without any Court being asked for help. This one would be such a breach of an outcome obligation and would lead to the question of the arbitrator's liability. (Luntraru, 2017). In the case of outcome obligations, the civil liability is independent of any fault, since the mere producing of a given result is the proof of breach of the assumed obligations. In such cases, the contractual liability is objectively grounded with no need to prove the fault of the responsible person. The bare fact of not achieving the sought objective mentioned in the contract is likely to ask for contractual liability. (Luntraru, 2017)

Yet another opinion noted that the questioning of the arbitrator's liability requires the proof of the fulfillment of general conditions for civil liability: the illicit action (among those listed in art. 565 Code of Civil procedure; the real producing of the damage; causal link between the illicit deed, the prejudice and the arbitrator's guilt. (Frențiu, Băldean, 2013)

Still, the arbitrator is not responsible for the way in which he uses the evidences or issues the decision, enjoying full independence to rule the case subject to arbitration. In this respect, art. 591 Code of Civil Procedure provides that the arbitrators interpret the evidences in accordance to their own beliefs.

The concept of arbitrators' immunity is a creation of the doctrine and jurisprudence from the *common law* countries, meaning that, in principle, the arbitrators cannot be hold responsible for the manner in which they perform their jurisdictional task. (Roș, 2000)

The arbitrators are independent and impartial, being expected to solve the case like a judge, in accordance to their conscience and professional knowledge, being excluded any external interference of pressure. (Baias, Zidaru, 2016)

Ignoring *ante factum* the arbitrators' liability, through exclusionary clauses or just through limiting responsibility cannot be considered as valid, since the parties cannot assess in advance the possible injuries to be caused to them by any illicit behavior of the arbitrators. Therefore, there is no way to set a maximum limit of the amounts to be paid as interest-damages. (Baias, Zidaru, 2016)

Ultimately, we must remark that there is no way to question any disciplinary responsibility of the arbitrators, since they are neither employees of the parties, nor public servants. (Leș, 2013)

#### 4.CONCLUSIONS

Arbitrators' liability is of private nature. It may be invoked only in the particular cases defined by art.565 Code of Civil procedure and with respect to those circumstances. (Leș, 2013)

In our opinion, the contractual legal nature of arbitrators' liability corresponds best to the duties they exercise on the ground of arbitration agreement. Even is the arbitrators do not act within a regulated profession, their role is extremely important, representing a viable alternative to the common justice, with respect to solving litigations.

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