

THE ARBITRATION CLAUSE. ASPECTS OF COMPARATIVE LAW.

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Abstract: *In the matter of contracts, the Civil Code regulates, in article 1169 the freedom to enter into a contract by stating that the „parties are free to enter into any contracts and to determine the content of those contracts, within the limits stated by law, public order and morals”. As a result, the parties are free to reach an understanding regarding the way in which they will create, change, execute or terminate a legal act, within the limits stated above. This is achieved by writing in the contract the so-called arbitration clause. However, we must state that this procedure does not restrict free access to justice; it offers the parties another possibility of solving a potential conflict thus ensuring a closer connection between man and justice, by facilitating the free access to several types of manifestation in human society.*

Key words: *Civil Procedure Code, Civil Code, contracts, law, arbitration clause.*

1. Definition and concept

In order to fully understand the nature and specifics of the arbitration clause, but also its significant importance in regards to its purpose, that of creating a freely consented connection between man and justice, as the former chooses the way in which a conflict is solved, before these means are even necessary, we must provide an extremely accurate definition of this clause. One of the first statements to be made is in regard to the meaning of the word „clause”; a contractual clause is that provision whereby the parties of a contract agree on one of the aspects of the contract, unless the law states otherwise.

Article 550 first alignment of the Civil Procedure Code states that „the arbitration clause helps the parties in agreeing that any potential litigation arising from the contract will be solved by arbitration also pointing out, under the sanction of annulment, the means by which the arbiters will be named. In case of institutional arbitration, a reference to the institution or the procedural rules of the arbitration institution is sufficient”.

In crystallizing the concept of „arbitration clause” we must also consider the provisions of article 549 first alignment of the Civil Procedure Code, which mentions that the „arbitration convention can be concluded in the form of an arbitration clause, written in the main contract or established by separate convention as annex to the main contract or under the form of compromise”. Through the arbitration convention, the parties agree in writing that all present or future litigation, resulting from their legal relations to be solved

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by arbitration (Boroi, G. *apud* Păncescu, F.G., 2013, p. 32).

As a result, by interpreting the above mentioned provisions we can state that the arbitration clause is a form of manifestation of the arbitration convention, whether written in the main contract or concluded separately by convention, thus valorizing the consecrated contractual rule regulated by article 1201 of the Civil Code which states that „if the law does not state otherwise, the parties are held by the clauses of the contract they entered into”.

In regard to the arbitration clause, we must keep in mind the first thesis of article 548 first alignment of the Civil Procedure Code which mentions that „the arbitration convention is concluded in writing, under the sanction of annulment”. Given the fact that this convention can either be written in a contract or concluded as a separate convention, we notice that the existence of an arbitration clause can't be presumed; it needs to be expressly regulated, in writing, under the sanction of annulment. We believe that, in this case, the sanction is absolute annulment, given the phrasing of the lawmaker.

Foreign doctrine stated that „the arbitration clause is that clause which intervenes in contract and by which potential litigation resulting from that contract are given to arbitration courts and the courts of law” (Schäfer, F.L., 2012). In this context and considering the existing regulation regarding the arbitration clause, we can define it as that certain provision of a contract by which the parties agree that solving possible litigation resulting from the contract is achieved by the arbitration court, regardless of whether it is ad-hoc arbitration or institutionalized arbitration, as it represents a form of manifestation of the arbitration convention concluded between the parties before the conflict occurs.

2. The legal nature of the arbitration clause

Any contract provides the possibility of regulating an unlimited number of clauses whose different legal nature does not impact on the existence of the contract. The importance of the legal nature of the arbitration clause resides in the fact that it must be distinctive and independent from other clauses, as it can't be considered a part of the clauses regulated in regard to the creation, change, execution or termination of any obligations deriving from the contract.

Article 553 of the Civil Procedure Code states that „concluding an arbitration convention excludes the competence of the courts of law”. In analyzing the legal nature of the arbitration clause we must also consider the provision of the second alignment of article 550 of the Civil Procedure Code, which states that „the validity of the arbitration clause is independent of the validity of the contract in which it was written”. Another legal provision which helps in separating the arbitration clause from other contractual clauses, but also in establishing a special legal regime, which derogates from common law, is the one stated in article 1203 of the Civil Code, which states that „standard clauses which limit liability of the person who suggests that clause, the right to terminate the contract, to suspend the execution of obligations who state the other party's loss of certain rights, the restriction of exercising certain rights, the tacit renewal of the contract, the applicable law, arbitration clauses which derogate from the regulations regarding the competence of courts of law do not trigger effect unless they are expressly accepted, in writing, by the other party”.

We must also consider the content of article 1202 third alignment which states that „negotiated clauses overcome standard clauses”.

Thus, in an attempt to determine the legal nature of the arbitration clause we must keep in mind the following aspects: first of all, it is an unusual clause, which derogates from common law in regard to solving a potential conflict between the parties of a contract by arbitration and not by filing a complaint before a court of law. Furthermore, given the fact that this clause does not have a standard form, as it must expressly accepted by both parties, in writing, thus consent in regard to this clause can't be presumed to exist, it often appears as a negotiated clause. By applying the law principle *ubi lex non distinguit nec nos distinguere debemus* we can see that a written agreement regarding a standard arbitration clause is necessary even in a relation between professionals.

By analyzing the content of article 550 second alignment of the Civil Procedure Code, we must notice its accessory character; thus, doctrine states that if this clause is „written in a contract, it does no represent an obstacle in regard to the independence of the validity of this clause as opposed to the validity of the contract” (Bobei, 2013, p.57) and regardless of whether it is written in the main contract or in a contract which represents an accessory to the main contract.

Given the fact that it is a form of manifestation of the arbitration convention, it is concluded in writing, under the sanction of (absolute) annulment, thus the arbitration clause will have to be determined in writing.

The last issue on this matter refers to the interpretation of the arbitration clause; thus, article 550 third alignment of the Civil Procedure Code states that „in case of doubt, the arbitration clause is interpreted as it applies to all misunderstandings which derive from the contract or the legal relation to which it refers”, except for those which are not in the competence of the arbitration court. These provisions must be completed according to the general rules regarding the interpretation of contracts, namely those of article 1268 fifth alignment of the Civil Code, which state that „the clauses which are meant to exemplify or remove any doubt in applying the contract to a particular case do not restrict its enforcement in other cases which were not expressly regulated”.

As a result, given the traits of the arbitration clause, it can be considered as having a complex legal nature, as it is essentially a clause which awards competence. However, we must keep in mind that awarding competence does not equal derogation from the competence rules which function in regard to filing a complaint before a certain court, in case the listing of the lawmaker is an alternative one.

3. The object and content of the arbitration clause

As a general rule, the object of the contract must not be confused with the object of a clause written in the contract; as the provisions of article 1225 first alignment of the Civil Code point out, „the object of the contract is a legal operation, such as the selling, renting, lending and other such operations agreed upon by the parties, as resulting from all contractual rights and obligations”.

As a result, the object of a contractual clause will be an action or inaction stated for one of the parties in order to achieve the object of the contract. However, given the fact that the arbitration clause is a form of manifestation of the arbitration convention, the object of the arbitration convention (thus, that of a possible contract) will be overlapped with the object of the arbitration clause.

This conclusion can be drawn from the interpretation of article 550 first alignment first thesis of the Civil Procedure Code, which states that „through the arbitration clause the parties agree that any litigation arising from the contract in which this clause is written in, will be solved by arbitration and the means by which the arbiters are named must be precisely described, under the sanction of annulment”. As a result, the object of the arbitration clause is future litigation, which did not occur at the time when the contract had been concluded.

In regard to the content of the arbitration clause, the Civil Procedure Code does not make a clear statement of the aspects which can be regulated by such a clause. Based on the provisions of law, we can point out the content of this clause in regard to the form of arbitration which is chosen in case of conflict. Thus, the second thesis of article 550 first alignment of the Civil Procedure Code states that „in case of institutionalized arbitration, the reference to the institution or the procedure rules of the arbitration institution are enough”. By interpreting these provisions, we deduce that, in case of ad-hoc arbitration, mentioning the means by which the arbiters are named is mandatory, under the sanction of absolute annulment. In case of institutionalized arbitration, the parties can choose to mention the means by which the arbiters are appointed, the institution which organizes the arbitration or any reference to the procedure rules of the institution which organizes the arbitration. The lack of any of these mentions will cause absolute annulment.

Although the lawmaker specified what an arbitration clause should contain, we appreciate that, in writing this clause, we must consider, the provisions of article 552 of the Civil Procedure Code, which state that „the end of an arbitration procedure, with or without a decision in regard to the matter of the cause does not affect the efficiency of the arbitration convention. It will remain valid and will serve as grounds for any new arbitration procedure which will derive from the main contract”. As a result, regardless of the number of litigations which may occur during the existence of a contract, the arbitration clause will continue to exist until the contract is terminated. Also, given the fact that it must be in writing in order for it to be valid, any change to this clause will also have to be made in writing and accepted by all parties, and regardless of whether it is a negotiated or standard clause, in accordance with the provisions of article 1203 of the Civil Code.

4. Aspects of comparative law

Starting from the present European context, we notice that there is a tendency to unify laws, a tendency which manifests itself more strongly in case of European laws which must be regulated by internal laws. However, we must point out some aspects of comparative law in regard to the arbitration clause, in order to understand the way in which it is regulated in other national laws. Furthermore, this matter is important in regard to the law which applies to the arbitration convention, regardless of whether it manifests under the form of the arbitration clause or that of a separate contract. In regard to these aspects, article 1112 second alignment of the Romanian Civil Procedure Code states that „in regard to form requirements the arbitration convention is valid if it meets the conditions of one of the following laws: a) the law agreed upon by the parties; b) the law which governs the object of litigation; c) the law which applies to the contract that contains the arbitration clause; d) Romanian law”. As a result, we can see that the parties choose which law applies, as the lawmaker expressly lists their options.

4.1. German law

If the Romanian lawmaker chose to expressly regulate the arbitration clause, by pointing out the form, object and content of the clause, by examining the provisions of the German Civil Procedure Code, we will notice that there is no express regulation in regard to the arbitration clause. However, the notion is regulated in German law, as we can find the general traits of the arbitration clause.

Thus, article 1029 first alignment of the German Civil Code, states that „the arbitration convention is the agreement which occurs between the parties by which they decide that all or part of any future litigation resulting from contractual or non-contractual relations will be solved by arbitration”. The second alignment states that this agreement can be concluded in the form of a separate contract or as a clause in the initial contract (art. 1029, second alignment of the German Civil Procedure Code).

As a result, the legal nature of the arbitration clause is still that of a clause which awards competence, given that the potential conflict will be solved by arbitration and not by the courts of law.

In regard to the object and content, given the fact that the German lawmaker does not make a clear distinction between the content of the arbitration convention concluded in the form of a separate contract and that of the arbitration clause, the provisions of article 1030 first alignment of the German Civil Procedure Code will be considered, stating that „any complaint which can be evaluated in money can be subject to arbitration. In case of complaints which are impossible to evaluate in money, they can be subject to arbitration if both parties conclude a transaction under the provisions of the law”.

As we can see, the German civil procedure law is different from the Romanian one in regard to the object and content of the arbitration clause. As a result, the object of the arbitration clause is any litigation which might occur in regard to any patrimonial rights of the parties, whether resulting from a contract or not. As an exception, if the parties can conclude a convention in regard to non-patrimonial rights, any litigation resulting from these can be the object of arbitration.

Another difference in regard to the object of the arbitration clause is represented by the fact that the German lawmaker does not regulate a sanction for disrespecting the requirements of the law.

Finally, one last observation regards the form of the arbitration clause. Thus, the first alignment of article 1031 of the German Civil Procedure Code states that „arbitration convention is validly concluded between parties in writing or by letter, mail or any other means of communication, which can be used as proof”. By way of interpretation, we can see that the German lawmaker, much like the Romanian one, regulated the obligation of drafting up the arbitration clause in writing, so it can be proven.

As for the form of the arbitration clause, we must consider the provisions of article 1031, sixth alignment of the German Civil Procedure Code which states that, in case the arbitration clause is not regulated in writing, the clause will still be active if the parties bring their litigation directly before the arbitration court, even if the arbitration clause was regulated in writing (Article 1031, sixth alignment of the German Civil Procedure Code); this possibility is not regulated by the Romanian Civil Procedure Code.

4.2. Italian law

Similar to the Romanian lawmaker, the Italian one thought it was necessary to expressly regulate the arbitration clause. Thus, according to article 808 first alignment of the Italian Civil Procedure Code, „the parties can agree, through a clause in their contract or by separate convention, that any future litigation resulting from their contract will be solved by an arbitration court, provided their conflict can be subject to arbitration. The arbitration clause must result from a document which is concluded in the specific form required by law, according to the provisions or article 807”. According to article 806 of the Italian Civil Procedure Code, all litigation resulting from rights which the parties can handle can be subject to litigation, if not expressly forbidden by law (Article 806, first alignment of the Italian Civil Procedure Code).

In regard to the legal nature of the arbitration clause, given the fact that the Italian lawmaker’s vision regulates that the courts are competent to solve litigation, thus solving it by any other means is a special situation, which derogates from common law, resulting in a clause which awards competence. The object of the arbitration clause will be future litigation resulting from the main contract. Furthermore, the object of the conflict must result from a contract and it must pertain to the rights which the parties can dispose of. Also, the possibility of solving a conflict by arbitration must not be expressly forbidden by law.

As an exception, even non-contractual litigation can be the object of an arbitration clause, under the conditions of article 808 bis of the Italian Civil Procedure Code: „the parties can establish that any future litigation resulting from a specific situation be solved by arbitration. The arbitration clause must result from a contract and it must be concluded in the form required by law, according to the provisions of article 807”. As a result, much like German law, the conflict which is subject to arbitration can result either from a contract or from another specific situation.

As we can see, the Italian lawmaker expressly regulated the form of the arbitration clause, regardless of whether it is a conflict resulting from a contract or from another situation, thus emphasizing the provisions of article 807 of the Italian Civil Code, which indicate the written form as a mandatory condition, under the sanction of annulment (Article 807, first alignment, Italian Civil Procedure Code). Thus, regardless of the way in which the arbitration clause is regulated, it will have to be made in writing and it will have to point out the object of litigation; for not abiding by any of these provisions, the sanction is annulment, as the Italian Civil Procedure Code does not regulate a situation similar to the German Civil Procedure Code, by which the lack of written form can be remedied after litigation occurs.

As a resemblance with the Romanian law, we must also mention the provisions regarding the efficiency and the autonomy of the arbitration clause, but also in regard to its interpretation, provisions which are regulated in a similar manner in the Italian Civil Procedure Code.

4.3. French law

Similar to Italian and Romanian law, French law contains express regulations regarding the arbitration clause, but also its object and form. By article 1442 first alignment of the French Civil Procedure Code it is regulated that „the arbitration convention has the form

of an arbitration clause or an agreement". Thus, similar to Romanian law, the arbitration clause is a form of manifestation of the arbitration convention. Given all these, the French lawmaker made a clear distinction, by stating in article 1442 second alignment that „the arbitration clause is that convention by which the parties of a contract or more contracts agree to solve any potential litigation which might result from their contract by arbitration”.

As a result, by way of interpretation we can deduce that by including an arbitration clause in a contract, all litigation which might result from this contract, will be solved entirely or partly by an arbitration court, depending on the parties' decision. So, the French lawmaker also believes that the arbitration clause awards competence.

The object of the arbitration clause is future litigation resulting from one or more contracts. As a result, unlike the German and the Italian lawmaker, the arbitration clause is applied only in the matter of contracts. However, the French lawmaker makes no distinction between the types of litigation which are the object of arbitration, as they can be both patrimonial and non-patrimonial rights.

Since it is applied only to litigation resulting from contracts, we consider that the object of the arbitration clause will be litigation regarding rights of which the parties can claim, according to the law.

In regard to the content of the arbitration clause, the French lawmaker also believes it is a form of manifestation of the arbitration convention, thus it will have to contain all the arbitration regulations, the name of the arbiters or the procedure used to appoint them (Article 1444, French Civil Procedure Code).

If the Romanian lawmaker expressly lists similar mentions under the sanction of absolute annulment, the French lawmaker states no sanction. Furthermore, the French lawmaker does not make the distinction made by the Italian lawmaker regarding the possibility of a certain conflict to be solved by arbitration.

Similar to all other previously examined laws, in order to be valid, the arbitration convention must be concluded in writing; as a result, the validity of the arbitration clause must be drawn up in writing, under the sanction of annulment (Article 1443, French Civil Procedure Code).

In regard to its validity, we must consider the provisions of article 1447 first alignment of the French Civil Procedure Code, which regulates the independence of the arbitration convention and thus, the independence of the arbitration clause: „the arbitration convention is independent of the contract to which it represents an annex. It is not affected by the inefficiency of the contract”. As a result, the arbitration clause will not be terminated along with the contract, if the contract is ineffective.

5. Conclusions

As we can see from the present paper, regardless of the way in which it is regulated and its specifics, the notion of arbitration clause is regulated in the laws of the great European states and the provisions are somewhat similar. Also, the role of the arbitration clause is identical, as it allows the parties to choose an arbitration court which would solve any potential conflict, thus facilitating the relation between man and justice. The regulations in regard to the arbitration clause are found in the matter of arbitration, whether ad-hoc or institutionalized, because, as we have noticed before, the Romanian lawmaker made this distinction. Another provision which was noticed was that of the German Civil Procedure

Code, regarding the annulment of the arbitration clause, as the described situation is the only one of this kind. In this context, it remains to be seen which solutions will be the most suitable on a national level, in regard to the situations which will arise in practice.

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