

CONSIDERATIONS ON THE REGULATION OF ARBITRATION IN THE NEW CIVIL PROCEDURE CODE – WITH PARTICULAR CONSIDERATION OF INSTITUTIONALIZED ARBITRATION – ¹⁾

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Abstract

In the following study, the author makes a relatively exhaustive analysis of the provisions of book IV in the new Romanian Civil Procedure Code (Law no. 134/2010, a Code already published (on 15 July 2010) in the Official Journal of Romania, but not yet in force.

In this context, the author examines the provisions of “About arbitration” (art. 533-612) in the new Romanian Civil Procedure Code, (with a special focus on the institutionalized commercial arbitration) in relation both to the corresponding provisions in the current Romanian Civil Procedure Code, and to the provisions contained in the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

Keywords: *the new Romanian Civil Procedure Code; regulations regarding arbitration; special focus on the institutionalized commercial arbitration*

1. The Romanian Parliament adopted a new Civil Procedure Code²⁾. Its coming into force shall be established by a separate law³⁾. Until then, the preliminary measures have to be taken, rendering its application efficient and accurate as soon as it gains mandatory powers.

The new code continues to regulate arbitration in Book IV, but it brings several innovations, among which, the most important is the addition, at the end, of a title (title VII) regarding institutionalized arbitration.

2. The first article of title I (General Provisions) of Book IV, art. 533, includes the definition of the notion of arbitration. In this respect, para. 1 provides that “*arbitration is an alternative jurisdiction having a private nature*”. Of course, the

¹⁾ Article translated from the Romanian language. It was published in “Dreptul” Magazine No. 1/2011, p. 40-75.

²⁾ Law No. 134/2010 regarding the Civil Procedure Code was published in “Monitorul Oficial al României”, Part I, No. 485 of 16 July 2010.

³⁾ According to art. 1.119 para. 1 of Law No. 134/2010 regarding the Civil Procedure Code, “*Within 6 months from the publication date of this code, the Government shall submit to the Parliament for adoption the draft law for the application of the Civil Procedure Code*”.

definition is insufficient to clarify the entire contents of the notion and it's the doctrine's role to supplement it. Independently from this fact, the positive law text has a big importance, having multiple consequences. Thus, it may be noticed that the Romanian lawmaker recognizes arbitration as a form of jurisdiction and, by this, it adopts the theory of its jurisdictional nature⁴⁾. The proximate genus of arbitration is state jurisdiction. The specific difference resides, according to the Romanian lawmaker, in the private nature of the jurisdiction. The first consequence resulting from such specificity is provided in the very para. 2 of art. 533. According to such, "*for the administration of this jurisdiction, the litigants and the competent arbitration tribunal may establish procedure rules derogating from the common law (...)*". What happens if contradictions appear between the rules established by the parties and the rules established by the arbitration tribunal? Which rules shall prevail? The answer may be deduced from even the order of the enumeration chosen by the lawmaker: first the litigants and then the arbitration tribunal.

The answer also requires, however, the clarification of the relationship between the private nature of the jurisdiction and the interests justifying the recognition in the public order of a private jurisdiction. These are interests resulting from the logic of some activities which, although conducted through the agency of private law subjects, have a significant impact on the public life. Consequently, the private nature of arbitration is based on the private nature of the interests of the litigants, worth of being protected also in the public order, and not on the private nature, meaning non-state nature, of the arbitration tribunal. For this reason, the holders of the right to derogate from the common law procedure rules are, primarily, the litigants and, only in subsidiary, the arbitrators forming the arbitration tribunal.

The conclusion remains also valid in the case of institutionalized arbitration when the possibility of the parties to derogate from its procedure rules is excluded, limited or circumstantiated. Even then, the procedure rules are imposed by virtue of the parties' option for a certain arbitration institution, and not as a result of the arbitrators' expression of wills. In this meaning, the arbitration is the "parties' jurisdiction" recognized by the state – in opposition with the state's

⁴⁾ In respect of the nature of arbitration, see: V. Babiuc, *Dreptul comerțului internațional*, Atlas Lex Publishing House, Bucharest, 1994, p. 173-174, A. Severin, *Elemente fundamentale de drept al comerțului internațional*, Lumina Lex Publishing House, Bucharest, 2004, p. 379-381, V. Roș, *Arbitrajul comercial internațional*, Monitorul Oficial Publishing House, Bucharest, 2000, p. 77-82, I. Deleanu, *Arbitrajul intern*, in "Arbitrajul intern și internațional" by I. Deleanu, S. Deleanu, *Arbitrajul intern și internațional*, Rosetti Publishing House, Bucharest, 2005, p. 11-15, T. Prescure, R. Crișan, *Arbitrajul comercial – modalitate alternativă de soluționare a litigiilor patrimoniale*, Universul Juridic Publishing House, Bucharest, 2010, p. 48-52. The French literature includes references to the contractual source of the jurisdictional mission of the arbitrator. See C. Jarroson, *La notion d'arbitrage*, Librairie Générale de Droit et de Jurisprudence, Paris, 1987, p. 101-110.

jurisdiction–, and not the “arbitrators’ jurisdiction”.

The prevalence of the procedure rules established by the parties over those established by the arbitration tribunal is, moreover, explicitly worded in respect of the institutionalized arbitration in art. 608 para. (2) providing that, “in case of opposition between the arbitration convention and the institutionalized arbitration regulation to which it refers, the arbitration convention shall prevail”⁵⁾.

This being the situation and, because the parties organize the jurisdiction by their meeting of wills, which has to be acknowledged also by the arbitrations (in the case of institutionalized arbitration, we are dealing with a “public offer of arbitration” accepted by the litigants through the arbitration convention), the result is that the arbitration activity also has, by its nature, a contractual dimension. The very insertion of consensualism in an activity of an essentially jurisdictional nature renders the respective jurisdiction useful for the (business) environment to which the litigants belong. We find here the pragmatic reason for which the parties have to be given the possibility to stand away, by arbitration, as much as necessary from the state jurisdiction in order to satisfy the particulars of their case. Any limitation of this capacity renders the resort to arbitration deprived of any interest.

Moreover, the fulfillment of a jurisdictional role⁶⁾ being at stake, the arbitrators are neither employees – of the parties or of the arbitration tribunals, as the case may be – to which the labor law regulations should apply (as a Court of Appeal in Great Britain⁷⁾ has erroneously established recently), nor suppliers of commercial services to which the public law norms regarding the economic activities generating profit should apply (as the European Commission has been considering, until recently, in its directives regarding the harmonization of budgetary policies).

Reinforcing this latter aspect, art. 607 para. (1) last thesis specifies that “*the activity of the institutionalized arbitration does not have an economic nature and does not pursue to obtain profit*”. Although it refers to institutionalized arbitration, the quoted text covers all the forms of arbitration, including, consequently, the *ad-hoc* arbitration. Hence, another consequence arises with other two effects. The main consequence is that the arbitration duties have exclusively the purpose to cover the expenses related to the procedure (including the arbitrator’s fees). The sub-consequences are: the arbitration duties may not be subject to any form of taxation which refers to the profit yielding economic activities (VAT type); from the arbitration taxes, no income to the budget of other

⁵⁾ This rule has explicit and implicit limitations which shall be presented below (see item 6).

⁶⁾ Explicitly defining arbitration as a jurisdiction and leaving its consensual dimension to be deducted from the private nature of the jurisdiction to which the text of the law refers, the Romanian lawmaker adopts the solution of the mixed nature of arbitration – both jurisdictional and consensual – in a nuanced form which stresses the jurisdictional element. This seems to be the essence of the arbitration procedure, while the contractual element defines only its nature.

⁷⁾ Resolution of the Court of Appeal of London No. 1287/20 10 (not published).

institutions may be taken (such as the chamber of commerce attached to which the courts of institutionalized arbitration operate).

3. The capacity of the parties to establish specific procedure rules has, however, some limitations. Thus, according to art. 533 para. (2), the derogation from the common law may take place on “*condition that the respective rules are not contrary to the public order and imperative provisions of the law*”. The last thesis of the quoted text (referring to the imperative provisions of the law) is, in our opinion, in contradiction both with the first paragraph of art. 533 presenting the arbitration as an alternative jurisdiction, and with its private nature.

Compelling the parties to observe the public order even when we are dealing with a private jurisdiction is correct because the public order belongs to the fundamental principles that a state understands to place at the basis of its social organization. Nobody may derogate from such without corrupting the discipline and coherence of that respective society.

In exchange, submitting the arbitration procedure to all the imperative norms of the law means minimizing, without any reasonable explanation, the alternative nature of the arbitration jurisdiction and, at the same time, imposing drastic and unjustified limitation to the expression of the private interests which generated it. As long as the state had to acknowledge the need for an alternative jurisdiction, this means that the *de facto* situation had such outstanding particulars, that the state jurisdiction was unable to satisfy its exigencies only by minor adaptations and fine tuning. Also, while the state decided to recognize such a jurisdiction in its public order, this means that it found the interests which required it as sufficiently legitimate and, especially, sufficiently important for the entire society so as to grant them public protection by the legislative regulation. This leads to the conclusion that it was normal that the lawmaker permitted the interested parties to move away as much as possible to the common law governing the public jurisdiction, obviously, provided that the limits of the public order are not exceeded. Otherwise, the procedural differences are practically limited to the establishment of the arbitration tribunal, which is way too little, turning arbitration into a jurisdiction of arbitrators and leaving no interest for the parties to resort to it when the law applicable to the procedure is the Romanian law.

Echoes of this statist mentality, which is in contradiction with the logic of arbitration asserted by the lawmaker itself may also be found in other provisions, of which we remind only art. 599 regarding the legal action for annulment, which in para. (1) letter h) includes among the reasons for annulment of the arbitration award the reason that “*the arbitration award infringes the public order, the good character or the imperative provisions of the law*”. Given that the grounds for promotion and admission of an action for annulment are mainly, of a formal (procedural) nature, this text only consolidates the text of art. 533 quoted before.

Our criticism is also in line with international trends. Thus, the New York

Convention on the recognition and enforcement of foreign arbitral awards⁸⁾ (to which Romania is a party) allows the refusal to attach mandatory consequences to the award only if such was ruled in breach of the public order norms, and not in breach of the imperative legal provisions. The verification of compliance with all these provisions would be the equivalent of re-judging the case, which is contrary to the arbitration theory.

Moreover, noticing the difficulty to define the boundary between the public order norms and the imperative norms (which have an extended scope) and intending to avoid the situation to reach, because of the confusion, the cancellation of an arbitral award which does not affect in essence the public order, the French jurisprudence held that, in order to cancel an arbitral award for reasons of infringement of the public order, the infringement has to be “*substantial, effective and flagrant*”⁹⁾. We consider that, *de lege ferenda*, such a provision should also be included in the Romanian law.

4. The limitations brought by art. 533 para. (2) are the more drastic that, in the trial-related law, most of the provisions have an imperative nature. The fact that many of these are not compatible with the logic of arbitration is more serious. For this reason, the doctrine and the jurisprudence are called to an imaginative and brave effort of accommodation.

To which provisions does art. 533 para. (2) of the new Civil Procedure Code refer? It refers to the procedure rules regarding the “administration of arbitration”. Consequently, it refers to the imperative rules of common law regulating arbitration, and not to the norms of trial-related civil law in general. Given that art. 533 para. (1) specifies that the arbitration is “an alternative jurisdiction” (and the Civil Procedure Code itself reserves a special regulation for it) the result is that the common law in the matter of a private jurisdiction may not consist of the rules applicable to the public jurisdiction from which it presumably is essentially different. Otherwise, the term “alternative” loses its meaning.

Which is the common law of the arbitration procedure? This is Book IV of the Civil Procedure Code¹⁰⁾. In order to be applied to the arbitration, the norms

⁸⁾ Romania acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, by Decree No. 186/1961, published in “Buletinul oficial No. 19 of 24 July 1961.

⁹⁾ For a comment of the Thales case settled by the Court of Appeal of Paris on 18 November 2004, see S. Lazareff, *Arbitrage et ordre public: priorité à l'exécution des sentences*, in “Les Cahiers de l'Arbitrage No. 2/2006”, p. 3-4. For a previous quotation of this case, see V. Babiuc, *Ordinea publică de drept internațional privat în practica arbitrală (I)*, in “Revista Română de Arbitraj” No. 3/2007, p. 1, footnote no. 1. The French jurisprudence reasserted the viability of the principle established by the Thales case. In this respect, see *Linde* case, published in “Revue de l'Arbitrage”, 1, 2010, p. 124-139, with a *Comment* by F. X. Train.

¹⁰⁾ See the provisions of art. 568 (1) according to which “The parties may establish, in the arbitration convention, the procedure rules applicable to arbitration or may empower the arbitrators

included in other parts of the new Civil Procedure Code were explicitly received in Book IV¹¹⁾. Once they were integrated here, they have to be interpreted in the light of the particulars of the arbitration differentiating it from the courts of law.

To the extent that, in the performance of the arbitration procedure, the need arises for regulations absent both from the arbitration convention, and from the common law of arbitration, as previously identified, the arbitrators may resort to the pertinent norms of civil procedure applicable to the state jurisdiction, but not as a subsidiary law, but resorting to the analogy of the law. But, passing through the filter of analogy, the imperative nature of a norm called to govern the state jurisdiction may be lost when the respective norm is applied by an alternative jurisdiction whose special procedural law is even the “law of the parties” (meaning precisely the arbitration convention). *Mutatis mutandis*, in the case of the institutionalized arbitration, the special law consists of the procedure rules of the arbitration institution chosen by the parties¹²⁾, and the common law is Title VII of Book IV of the new Civil Procedure Code. In case of need, the norms of other titles of Book IV, which represents the common law for the *ad-hoc* arbitration, shall apply by analogy for the institutionalized arbitration. Consequently, even the imperative procedure norms of Book IV which are not included in Title VII of the same book, no longer have a mandatory nature for the institutionalized arbitration.

According to art. 536 para. (2) of Book IV, the parties may establish (by their convention) any norms regarding the good performance of arbitration, provided that the public order, good character and imperative provisions of the law are observed. According to para. (3) of the same article, if such rules are absent – in our interpretation, either because the parties did not establish them at all, or

to establish such rules. *Such rules shall be supplemented, if applicable, by the provisions of this book*” (our emphasis; A.S.). Only if neither the parties nor the arbitrators establish the arbitration procedure rules applicable to the case, according to art. 568 para. (3) “the arbitration procedure is the one established by this book”. The provisions of Book IV of the Civil Procedure Code clearly appear, thus, as having a suppletive nature in principle.

¹¹⁾ See, otherwise, the provisions of art. 567 (2) specifying that, despite the normative freedom granted to the parties and to the arbitrators, “the fundamental principles of the civil trial provided in art. 5 para. (1) thesis II, arts. 8-10, arts. 12-16, arts. 19-21, art. 22 paras. (1), (2), (4), (5) and (6) and art. 23 are applicable *accordingly* (our emphasis; A.S.) also in the arbitration procedure”. In the same manner, art. 554 (1) specifies that the incompatibilities provided for the judges are also valid in the case of the arbitrators, without mentioning them explicitly.

¹²⁾ The new Civil Procedure Code is explicit in this respect, providing in art. 568 (2) that “When the parties resort to institutionalized arbitration, the provisions of art. 608 para. 3 shall apply”, *i.e.* the rules of institutionalized arbitration valid on the date of seizing it. The literal interpretation of art. 568 (2) corroborated with art. 568 (1) leads to the conclusion that, unlike the *ad-hoc* arbitration, in the case of which the parties or the arbitrators, as the case may be, should take into account certain general provisions regulating the civil trial within the state jurisdiction (such provisions no longer having a suppletive nature), in the case of the institutionalized arbitration, the freedom of the permanent arbitration institution to establish its own procedure rules is unlimited. This, obviously, within the limits established by Title VII of Book IV.

because they did it in breach of the imperative norms of the law – “*the arbitration tribunal may establish the procedure to be followed as it thinks appropriate*”. Showing, including in the case of an *ad-hoc* arbitration, more confidence in the tribunal (consisting of professionals of the law) than in the parties (professionals of other fields), the lawmaker may not longer impose to the arbitrators the same restrictions regarding the establishment of the procedure rules. Just on the line, they may replace a procedure norm established by the parties without observing the imperative provisions of the common law, by another norm necessary to the case, which, in its turn, moves away from the respective imperative provisions. In case of a possible action for annulment, the competent court may not, under these consequences, admit the application for reasons of infringement of the imperative procedure provisions of the law¹³⁾.

The situation is the same in the case of the institutionalized arbitration. Thus, art. 610 para. (1) provides that the “*Procedure rules of the institutionalized arbitration shall be adopted by its management according to its operation norms (...)*”. The management of the institutionalized arbitration established by its incorporation deed thereof has therefore full competence in adopting the rules of procedure, without any restriction. As the lawmaker has repeatedly referred to the obligation to observe the imperative norms of the law, when it no longer makes this reference, we may think it was by accident.

It is true that, in these latter hypotheses, the law no longer refers to the public order, also. We think that the observation of the public order must be deduced

¹³⁾ Able to answer the exigencies of the field in which the litigants operate, the arbitration procedure is linked to the idea of professionalism, meaning that several trial-related guarantees offered by the common law to subjects having various professions and being unfamiliar with the regulation of their disputes by judicial means are no longer maintained in arbitration. This ensures celerity in overcoming the uncertainties related to the rights in dispute, taking advantage of the fact that, since they are performed between professionals for which the fluidity of the commercial circuit is more important than the compliance of the ruling with the formal legal logic and which do not require the formalism of the procedure in order to become aware of and protect their interests, such processes may accept pragmatic simplifications. Starting from the observation that the arbitration is a procedure of the “informed parties” having as its premise the professionalism of the participants in the process, some authors (see Ș. Beligrădeanu, *Discuții în legătură cu unele aspecte privitoare la reprezentarea convențională și la asistarea părților în arbitrajul instituțional-jurisdicțional înfăptuit de Curtea de Arbitraj Comercial Internațional de pe lângă Camera de Comerț și Industrie a României*, in “*Revista Română de Arbitraj*” No. 1/2009, p. 29-38) argued that if, obviously, the parties which define the arbitration convention may not be requested to have legal studies (assistance by legal professionals being however more than recommended), at least within the actual performance of the arbitration procedure they should be, on a mandatory basis, represented by legal counsels or lawyers. Thus, the arbitration’s deviations from the common law or from the procedure of the state courts may be correctly managed from a legal standpoint, avoiding the risk that the fundamental right to defense and equitable trial of the litigants be affected. The new Civil Procedure Code did not retain this idea. We believe, taking into account inclusively the experience of the current arbitration practice, either domestic and international, that such an approach is worth being promoted *de lege ferenda*.

from the normative set and from the necessity of the existence of an essential benchmark rendering the applicable law and the rule of law it grounds coherent.

However, what happens if the arbitration tribunal omits to establish the procedure rules? (obviously this refers to the *ad-hoc* arbitration) In such cases, art. 536 para. (3) provides that “*the following rules shall apply*”, namely the rules included in Book IV, from title II to title VI. Thus, the respective rules are clearly indicated as having a subsidiary nature as a whole; consequently, also the provisions, otherwise imperative, of other parts of the new Civil Procedure Code to which the respective texts of Book IV refer and that they incorporate. By this, the scope of the suppletive norms in the field of arbitration procedure extends considerably.

5. But, are all the norms included in Book IV susceptible of being considered as suppletive norms? The answer requires several distinctions. First of all, the distinction between the procedural norms and the administrative norms. We are considering here, in particular, the provisions of title VII regulating the relationships between the institutionalized arbitration and the institutions attached to which it is organized. Since they are not norms regarding the arbitration procedure, but norms regarding the organization and operation of the arbitration as an administrative institution (called to organize the application of the law and to concretely apply it), they are not only imperative, but also, the parties may not derogate from them. The parties may establish norms regarding the organization and operation of the arbitration tribunal, but not norms regarding the organization of the arbitration institution.

Secondly, it must be noticed that, among the provisions of Book IV, there may also be norms of public order which, having a constitutional nature, may not be turned into suppletive norms not even by an organic law, like the new Civil Procedure Code. This is an organic law in trial-related matters, not in constitutional matters.

Such public order regulations are, for instance, the parties’ right to defense – a fundamental right of citizens in all democratic constitutional systems. Such a right shall receive however specific applications in various branches of the state’s system of laws. One of them is the trial-related civil law. Another is the arbitration law, with its sub-branch, the international arbitration law. Such distinctions lead to the conclusion that each of the respective branches has its own public order. For this reason, when the lawmaker makes reference –implicitly or explicitly, expressly or tacitly – to the observance of the public order, it separates the public order of the civil trial from the public order of arbitration, and the public order of domestic arbitration from the public order of international arbitration. Consequently, when verifying the compliance of the arbitration procedure rules with the public order norms, such verification is related to the respective state’s concept of the public order in the arbitration field as a non-state jurisdiction, and not to the public order of the civil trial administered by the state courts. In its turn, such a concept may be different when we refer to international arbitration.

Returning to the example of the right of defense, the recognition, protection and exercise of such right must take place under conditions of compatibility with the features of the arbitration or, in other words, with the features of the legitimate interests which justified the acceptance of such a private jurisdiction as alternative to the state courts, in the nations' rule of law. For this purpose, it is beyond all doubt that the *celerity* is an essential feature of arbitration. Especially when it is a commercial arbitration, because the purpose of any form of trade is profit (*finis mercatorum est lucrum*), and it depends on the circulation speed of the capital, in its turn dependent upon the clarification of the disputes, it is clear that the arbitration procedure must be conceived so as to answer the exigency of celerity resulting from the economic laws specific to the commercial activity. The sooner is a dispute settled, the faster are the certitudes feeding the engine of engaging in legal relationships, meaning the trust¹⁴⁾ restored. This is why, the establishment of the correct contents of the right to defense should pursue a balance between the exercise of such right and the need for celerity intrinsic to the arbitration procedure for which the parties opted. Such a balance is concretely established taking also into account that, since they are professionals, the parties have sufficient systems to rapidly organize their defense. Thus, the arbitrators shall have the possibility to reject the applications for postponement of the judgment because of the absence of defense (namely for hiring a lawyer) or in order to review new documents whose assessment does not require long time, and may be made on the spot. In the same manner, the summoning procedures of the parties shall be simplified also using for this purpose electronic means such as e-mail or fax. On the same basis, the arbitrators may assess more exigently the abuse of the right to defense. In such actions, the arbitration tribunal may also rely, as the case may be, on the pertinent commercial practice¹⁵⁾. For this reason, it may be said that the limitation of the exercise of the right to defense by the parties in the manners in which the respective right is regulated by the civil trial-related law and observed by the courts of law does not constitute an infringement of the public order, if such limitation is justified by the skills specific to the trade professionals, has as its purpose the acceleration of the settlement of the dispute and the limitation of procedural abuses, as well as if the commercial practice in this field is applied.

The case of the principle of contradictoriness is the same. For the same considerations, the contradictory nature of the debates may also be ensured by correspondence, referring to the situation in which not all the parties are simultaneously present before the tribunal to fight their judicial battle. In fact, in

¹⁴⁾ One of the reasons for which traders prefer arbitration is that, usually the term of settlement of the disputes is shorter than in the courts of law (see V. Babiuc, *op. cit.*, p. 170).

¹⁵⁾ For a conceptualization of the commercial practices from an international perspective, see I. Rucăreanu, *Uzanțele comerciale internaționale*, in "Dicționar juridic de comerț exterior" by B. Ștefănescu, O. Căpățînă (coordinators), Editura Științifică și Enciclopedică Bucharest, 1986, p. 367; also, see A. Severin, *op. cit.*, p. 80-103.

the international commercial arbitration practice (involving litigants and arbitrators living at great distances from one another, as well as tribunals without a stable office) the most part of the procedure takes place by correspondence, the presence of all participants in the trial being requested only for a possible hearing of the witnesses and formulation of conclusions.

With reference to the institutionalized arbitration, art. 610 para. (4) provides that “*the litigants’ right of defense and the contradictoriness of the debates are guaranteed*”. This provision has an imperative nature. At first sight, it was not necessary because, given that it referred to public order norms, it is implied that, at any rate, the respective principles had to be observed. The fact that the lawmaker felt the need to expressly repeat in the title of the Civil Procedure Code specifically dealing with the institutionalized arbitration shows that, on the one hand, in its opinion, the nature of the arbitration could have justified, in the absence of the respective specification, even the departure from such public order norms (which would seem excessive to us), and, on the other hand, that, in their application, the arbitrators are called and entitled to grant them a content different than the one given by the interpretation of the courts of law.

The adaptation of the public order norms to the particulars of the arbitration (or, more precisely, the recognition of a public order specific to arbitration) may create difficulties and controversies. Thus, a British court of law – to which an action for annulment was lodged, considered¹⁶⁾ that an arbitration clause stipulating that the arbitration tribunal has to be formed of arbitrators of a certain nationality was null or, in another case¹⁷⁾, of a certain religion. The arguments of the rulings were that such a clause would infringe the obligation of non-discrimination, as revealed by the European Charter of Fundamental Rights, the European Union Directive against discrimination and the pertinent British legislation. The described interpretation could have stood if it had regarded the interdiction of employing judges because of their nationality or religion. However, in the case of arbitration, by establishing such criteria for the composition of the arbitration tribunal, the parties did not intend to proceed to discriminations in the large anonymous mass of the persons who would have had the theoretical vocation of becoming arbitrators, but to make sure that, in the exercise of their right to appoint the arbitrators, none of them shall proceed to appointments limiting or questioning their neutrality and objectivity. In that case, the arbitrators of a certain religion or nationality could have been suspected of sympathizing for one party or the other¹⁸⁾; this problem may not arise in the domestic arbitration,

¹⁶⁾ See judgment no. 1154/2010 of the Court of Appeal of London, not published.

¹⁷⁾ See judgment no. 1219/2010 of the Court of Appeal of London, not published.

¹⁸⁾ This problem arises, in particular, in the cases having as their object disputes resulting in relation to the execution of the state contracts or, in general, in the cases in which the state is a party. In such situations, there is a suspicion that the arbitrators who are citizens of the respective state may be inclined to favor it.

but it may arise in the international arbitration. The guarantee of absolute neutrality specific to arbitration took in the case mentioned above the form of pseudo-discrimination¹⁹⁾.

Thirdly, among the provisions of Book IV regarding the arbitration procedure, to which title I makes a general reference as to subsidiary rules, there are some rules whose infringement is expressly sanctioned by absolute nullity. It is difficult to argue that, including from the standpoint of the previous considerations, such provisions do not have an imperative nature. Consequently, derogating from such provisions may not occur without the risk of subsequently justifying the admission of an action for annulment of the arbitral award. What may be done, however, is that, in the application of the respective rules, their rigor is attenuated by means of interpretation, so that to ensure compatibility with the particulars of the arbitration. At any rate, being inserted only in the articles referring to the *ad-hoc* arbitration, the provisions mentioned do not apply to institutionalized arbitration.

In the same context, it should be also specified that the repetition in Book IV, regarding arbitration, of norms intended to regulate, on penalty of nullity, the procedure of the state jurisdiction does not preserve their imperative nature if the reference to the respective sanction is not preserved or if the imperative nature of the norm does not clearly result from explicit equivalent wordings. Both the entire regulations of Book IV, and the general theory of arbitration as alternative jurisdiction lead to the conclusion that, usually, the legal norms regarding the arbitration procedure have a suppletive nature and only in exceptional cases they are imperative. Given that also in this matter the exceptions are of a strict interpretation, they should be explicitly indicated by the lawmaker.

6. Art. 610 inserts an apparent limitation of the parties' right to establish the arbitration procedure rules in the case of institutionalized arbitration. Thus, after para. 1 provides that the procedure rules are established by the management of each Court of Arbitration, para. (2) provides as follows: "*By the appointment of a certain institutionalized arbitration as being competent in the settlement of a certain dispute or type of disputes, the parties automatically opt for the compliance with its procedure rules. Any derogation from this provision shall be null unless, taking into account the circumstances of the case and the contents of the procedure rules indicated by the parties as being applicable, the management of the competent institutionalized arbitration decides that the rules chosen by the parties may also be applied, establishing if the application of the latter is effective or by analogy*". As

¹⁹⁾ Interpretations, such as the one adopted by the British courts of law, shall not equalize the chances of potential arbitrators of being appointed as members of the arbitration tribunals, but shall determine the litigants not to appoint London as place of the arbitration, in order to avoid the application of the British law as the law governing the procedure or in order not to expose themselves to such interpretations by the British courts of law vested with the settlement of the actions for annulment.

we have shown, in reality, this does not concern the limitation of the parties' right of decision in respect of the procedure, but even an extension thereof.

First of all, we emphasize that para. (1) of art. 610 establishes the exclusive right of the management of the courts of arbitration (as such is structured by its establishment deed) to adopt arbitration procedure rules applicable in all the cases in which the respective institutionalized arbitration is seized. The respective right has to be also regarded as an obligation because the existence of the said rules is a defining element of the institutionalization of arbitration (a right in the relationships with the institution attached to which the arbitration operates and an obligation in the relationship with the persons susceptible of being parties in the arbitration process).

The norm to which we refer does not belong however to the trial-related law, but to the administrative law. It does not govern the relationship between the litigants and the arbitration tribunal, but the relationship between the Court of Arbitration and the institution which created it and attached to which it operates (usually, a chamber of commerce). The provision is based on an obvious argumentation – each arbitration institution establishes its own procedure rules as an expression of its autonomy and as an identification element – and it is not new in the Romanian legislation²⁰⁾. The novelty consists of the fact that, this time, it is a general norm consolidated by its connection to the provisions of art. 607 para. 2 establishing the autonomy of the institutionalized arbitration by reference to the institution which created it, compelling, at the same time, the latter to take the necessary measures in order to guarantee the respective autonomy. Being an administrative norm included in the Civil Procedure Code, it has an imperative nature and, consequently, no derogation from it is possible. For this reason, it leaves outside the law the current practice of the Chamber of Commerce and Industry of Romania which adopts in its management forums the Procedure Rules of the Court of Arbitration operating attached to it, in order to send them afterwards to it for confirmation. Although taking the form of a recommendation, such an action represents both the non-fulfillment of the obligation to guarantee the autonomy of the Court, and the infringement of its right to establish its own procedure rules free from any pressure and interference.

The question which arises is: which are the guarantees, respectively the sanctions in respect of the compliance of the provisions of art. 607 para. (2) corroborated with art. 610 para. (1)? The question is even more pertinent because

²⁰⁾ A similar provision was inserted in Law No. 335/2007 of the chambers of commerce in Romania. According to art. 29 para. (5) of this normative act, "*The procedure rules of the Court of International Commercial Arbitration shall be proposed by the president of the Court and shall be approved by its college*". The same principle was also established by art. 13 para. 4 of Decree-Law No. 139 of 12 May 1990, published in "Monitorul Oficial al României", Part I, No. 65/12 May 1990, according to which "*The procedure rules of the Court of International Commercial Arbitration shall be approved by its college*".

the management of the Court of Arbitration is appointed by the management of the Chamber of Commerce which organized it and attached to which it operates, sometimes receiving (as it is currently the case, in fact, in Romania) an indemnity paid from the budget of the latter. But, the appointment and the indemnity are two efficient means of pressure. The first consequence resulting from here is that the mandate of the management of the court of arbitration has to be established for a certain term²¹⁾ and that it may not be revoked before expiry except for well-grounded reasons which may be supervised by the courts of law²²⁾.

The litigants are protected against a sudden modification of the arbitration procedure rules following abusive interventions from outside the respective arbitration institution, by the possibility offered to them based on art. 608 para. 3 (identical with art. 610 para. 3)²³⁾ to agree that the rules applicable to the procedure are different from the rules existing as of the date of the arbitration action; so, maybe, those existing as of the date of conclusion of the arbitration convention²⁴⁾. If such an agreement is not included in the arbitration clause and it may not be reached upon seizing the arbitration court, the party prejudiced by the abusive modification of the procedure shall have, we believe, the possibility to initiate an action for damages against the institution (Chamber of Commerce) attached to which the arbitration operates.

A fortiori the litigants may file an action in tort against the respective institution when other breaches of the autonomy of the arbitration court cause them damages. Such breaches may regard, for instance, the confidentiality of the arbitration process or the abusive intrusion of the institution organizing the arbitration in the composition of the arbitration tribunal or even the cases in which that institution reserves the exclusive rights in respect of the appointment of

²¹⁾ According to art. 3 para. 2 of the Regulation of the College of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, "*The mandate of the members of the College shall be of three years*". The term of this mandate is equal to the term of the mandate of the Court of International Arbitration attached to the International Chamber of Commerce in Paris.

²²⁾ According to art. 3 para. 3 of the Regulation of the College of the Court of International Commercial Arbitration, "*Before reaching its term, the mandate shall cease: for natural causes, by resignation, by release from office according to a procedure in correlation with the appointment*" (our emphasis; A.S.). Since the appointment of the "management" has a discretionary nature, according to the text quoted above, it results that the release from office may also be discretionary which is obviously not compatible with the idea of autonomy of institutionalized arbitration. Given that the relationships between the members of the College of the Court and the Chamber of Commerce and Industry of Romania have a legal nature specific to administrative relationships, our opinion is that any potential disputes arising from the respective relationships fall under the jurisdiction of the administrative dispute courts.

²³⁾ Probably, because of a typographical error, the same text is identically repeated in art. 608 para. (3) and art. 610 para. (3).

²⁴⁾ The consequences of art. 608 para. (3) shall be presented in more detail in a paragraph below (item 15).

arbitrators²⁵⁾ (when the arbitrators fail to appropriately fulfill their mission, the litigants which initiate an action for professional liability against them might also initiate it against the Chamber of Commerce and Industry of Romania which played a role in their appointment).

Besides any such remedies, the litigants always have the possibility to use the “commercial weapon”, meaning refusal to resort in the future to the problematic arbitration institution, as well as to warn the business environment on the abusive limitation of its autonomy.

Given that the arbitration is an alternative jurisdiction and, consequently, the general condition of justice in a country depends on its good operation, we believe that the Ministry of Justice also has an equal ability to watch over the autonomy of the arbitration institutions, as well as to intervene if such autonomy is infringed. Such ability arises from the general function of the Ministry of Justice and not recognizing it would leave the legal provisions regarding the autonomy of institutionalized arbitration deprived of sufficient guarantees.

Last, the courts of law competent to rule on the actions for annulment may admit such actions for the reason related to the lack of autonomy of the arbitration institution when such lack of autonomy was felt, in whatever form, in the cases notified to them²⁶⁾. The ground for admission is the breach of the public order

²⁵⁾ According to art. 17 para. (2) of the Rules of Arbitration Procedure of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, published in “Monitorul Oficial al României”, Part I, No. 197 of 29 March 2010, “... *the dispute shall be judged by an arbitration tribunal formed of 3 arbitrators, one appointed by each party or appointed by the Nomination Authority, and the third one – the chairman – appointed in all cases by the Nomination Authority*” (our emphasis; A.S.). This last thesis is taken over by art. 37 (“Appointment of the Chairman”) of the Procedure Rules of the respective Court, as follows: “*In all the cases, the chairman shall be appointed by the Nomination Authority*”. Given that the Nomination Authority is the president of the Chamber of Commerce and Industry of Romania, it may be noticed that the right to appoint the chairman exclusively belongs to the Chamber of Commerce and Industry of Romania. Consequently, it may be called to be held liable jointly with such in the case of an action for civil liability against them. Such a provision becomes however illegal according to the provisions of the new Civil Procedure Code, as we shall present below (see item 11). We emphasize that we use the terminology of *nomination* authority (and not appointment or designation) because this is the terminology used by the said rules of arbitration procedure. As for us, our opinion is that, within these Rules, the barbarism “nomination” could have been avoided, using instead the Romanian term “appointment” or “designation”.

²⁶⁾ The revocation of the arbitrators forming the arbitration tribunal, for whatever reasons, by another person than the management of the institutionalized arbitration, even if the revoking party is the nomination authority, constitutes a sufficient reason to find the infringement of the autonomy of the arbitration institution. From this perspective, the current provisions of the Arbitration Procedure Rules of the Court of International Commercial Arbitration of Romania (art. 23) are in contradiction with the provisions of the new Civil Procedure Code as long as they leave for the College of the Court only the capacity to propose the revocation of the arbitrators to the nomination authority, which is the president of the Chamber of Commerce of Romania. Even if the mentioned text were interpreted in the sense that the nomination authority would be exclusively

because the independence of justice – without the distinction between state jurisdiction or a private alternative thereof – represents a public order norm.

7. Returning to art. 610 para. 2 thesis (1), it does not deny the rule according to which the arbitration procedure norms are available to the parties, but only inserts the presumption that, in the case of institutionalized arbitration, the litigants, opting for a certain arbitration institution, also opted for its standard procedure rules. The presumption is *juris tantum* because the parties may however derogate from the procedure rules of the seized arbitration institution. Such a derogation is subject to the censure exercised by the management of the respective institution which is called to verify two aspects: if the derogation is motivated by the particulars of the case and if the derogation is effectively applicable. Otherwise, it has no effect.

The mentioned provisions tend to solve a real problem that the institutionalized arbitration faced. Thus, in some cases, the parties appointed a certain Court of Arbitration as being competent to judge their disputes, but indicated the procedure rules of another Court as being applicable, without observing that this way the arbitration clause became impossible to enforce. Concretely, the Court of International Commercial Arbitration of Romania may be requested to apply the Procedure Rules of the Court of International Commercial Arbitration attached to the International Chamber of Commerce in Paris (CCI). These rules provide, among others, that, if the parties fail to appoint their arbitrators or the arbitrators do not reach an agreement on the appointment of the chairman, the national committees of CCI shall be called. But, it is doubtful that the said committees would be ready to answer the requests of other courts of arbitration. A possible refusal would block the procedure in the absence of an efficient nomination authority.

Also, the Court of Arbitration attached to CCI endorses²⁷⁾ the text of arbitral awards before it may be notified to the parties. To the extent that an arbitration tribunal operating under the aegis of institutionalized arbitration attached to the Chamber of Commerce and Industry of Romania would be held to apply the rules of the arbitration attached to CCI, the question arises if the prior verification of the award should be operated by the Court in Paris or by the one in Bucharest, by analogy. In the first case, the Court in Paris would probably refuse such mission,

competent to revoke the arbitrators which have not been appointed by the parties, the solution remains still illegal. According to the new Civil Procedure Code, the role of the president of the Chamber may include at most the appointment in subsidiary of the arbitrators. A nomination authority outside the Court is not and may not be a revocation authority also. When the president of the Court is the nomination authority, it may also fulfill the role of the revocation authority, but under a different title. The nomination shall be made by substitution of the party, while the revocation is made in the exercise of the obligation of the management of the institutionalized arbitration to ensure the good performance of its activity.

²⁷⁾ The endorsement is mandatory in respect of the fact that the draft award is forwarded for debates by the Court without exception, but its standpoint has the legal efficiency of a recommendation.

at least for the reason that the verification of awards issued by the tribunals of other courts is not provided by its procedure rules. In the latter case, the Court in Bucharest may not be organized for the application of such procedure or the respective procedure may contravene the public order of the forum. Again, the arbitration clause would prove impossible to apply.

Since an inoperative arbitration convention is deprived of the effects intended by the parties, the impossibility of an arbitration institution to apply the rules of another arbitration institution restores the jurisdiction of the courts of law. In this respect stands art. 546 para. (2) letter c of the new Civil Procedure Code which provides that when a court of law is seized with a case, and one of the parties invokes the existence of an arbitration convention, the respective court shall retain the case for judgment, consequently, considering itself as having jurisdiction, to the extent that the arbitration convention is null or *inoperative*. Consequently, according to law, a convention may remain deprived of its effects even if it is legally valid when, from the practical standpoint, it may not be operated.

But, according to the general principle of saving conventions, if the parties' will to submit their dispute to arbitration is beyond any doubt, but the arbitration convention in the adopted form is inoperative, the question which arises is which is the determinant element depending on which the competent jurisdiction is established: the arbitration institution explicitly appointed or the arbitration institution whose procedure rules are indicated as being applicable? The new Romanian Civil Procedure Code clearly answers now this question, opting for the first variant. Consequently, the arbitration clause or the arbitration shall be valid, but the derogation from the procedure rules of the appointed arbitration court shall be null.

However, consistent with the idea that the parties should have a determinant role in the organization of arbitration as a private jurisdiction and that, consequently, the institutionalization of arbitration is only a measure in support of the parties, and not a measure whose purpose is to restore the spirit characterized by the *imperium* specific to the state jurisdiction, the Romanian lawmaker also permits derogations from the rules of the seized arbitration institution leaving for its management the possibility to apply other rules by analogy, *i.e.* adapting them to its manner of organization and operation. Thus, an inoperative clause becomes operative.

For such an effort not to be the consequence of an abusive option, but also in order to see the extent to which the parties did not intend to submit their case to *ad-hoc* arbitration, the law also requires to verify if the derogation from the rules of the seized arbitration institution is justified by the particulars of the case. If the case does not justify the derogation, the ambiguity of the arbitration convention shall be solved by a priority granted to the appointed court, meaning that the designation of its competence entails the identification of the procedure to be applied, and not the other way round, when the designation of the procedure rules would indicate the competent court.

The new Civil Procedure Code establishes the competence for all these verifications and decisions as belonging to the management of the arbitration institution explicitly designated by the litigants. Without such provisions, the only solution would have been to return to the state courts. However, according to art. 610 para. (2), although they may be seized with the inoperative nature of the arbitration convention for the reasons described above, the court of law may not longer retain the case, but it shall send it to the arbitration court. In its turn, before starting the formation of the arbitration tribunal, it shall decide on the manner and the extent to which the derogations from its procedure rules, as established by the parties, may produce effects. The issues established by the arbitration institution by its management are final. Not even the arbitration tribunal may change them.

In consideration of these conclusions, it may be said that the lawmaker established an obligation of due care by the arbitration institution explicitly seized, to adapt its standard procedure rules to the intentions of the litigants. Thus, an institutionalized arbitration shall apply *ad-hoc* procedure rules. If the request of the parties is not grounded or impossible to satisfy, the arbitration convention remains valid, only the derogations from the standard procedure are null. The option for the institutionalized arbitration prevails thus over the option regarding the procedure rules. However, if the parties insist for the application of the rules indicated by them, by their agreement, they may give up the institutionalized arbitration and shall resort to *ad-hoc* arbitration *stricto sensu*.

The considerations above have to be also correlated with the text of art. 608 para. (2) providing that “*in case of contradiction between the arbitration convention and the regulation of the institutionalized arbitration to which it refers, the arbitration convention shall prevail*”. We consider that this text is a principle in relation to the institutionalized arbitration, and its repetition in the Civil Procedure Code, related to art. 610 para. (2) final thesis, is useless. Indeed, art. 610 para. (2) does not deny the principle, but circumstantiates it putting it in agreement with the general definition of arbitration as private jurisdiction²⁸⁾. Thus, for instance, if the arbitration convention indicated another nomination authority than the one provided in the rules of the competent arbitration institution, the parties’ convention shall prevail. But, if the authority chosen by the parties refuses the mission, and the convention become inoperative as such, but at the same time it has to be saved, return shall be made to the provisions of the procedure rules of the seized arbitration. Such reasoning applies *mutatis mutandis* on all the cases in which the arbitration convention may not operate.

8. As we have previously stated, the main innovation made by the new Civil Procedure Code in the matter of arbitration consists in the special regulation of the institutionalized arbitration (art. 607-612). Art. 607 para. (1) provides that

²⁸⁾ It is even more useless to repeat an identical text in art. 608 para. (3) and art. 610 para. (3).

“institutionalized arbitration is that form of arbitration jurisdiction which is established and operates on a permanent basis attached to an organization or domestic or international organization or as an independent public interest non-governmental organization, according to law, based on its own regulation applicable in the case of all disputes submitted for its settlement according to an arbitration convention”.

Obviously, the institutionalized arbitration existed in Romania before the normative act subject to our review. The most recent explicit legal ground was found in the Law regarding the Chambers of Commerce in Romania²⁹⁾ which, by art. 28 para. (2) letter e, included among the duties of the National Chamber the duty to organize *“the activity of settlement by arbitration of commercial and civil disputes, domestic and international, under the conditions provided by the Civil Procedure Code, by the special laws in this matter and by the international conventions to which Romania is a party”*. For the application of this principle text, the same law also provided the organization of the Court of International Commercial Arbitration as a *“permanent arbitration institution”* operating *“attached to the National Chamber”*. The adoption of the Regulation for organization and operation of this Court was established in the competence of the Management College of the National Chamber, while the adoption of the Arbitration Procedure Rules was established in the competence of the College of the Court of Arbitration.

Other courts of arbitration were organized based on the general legislation regarding foundations, associations and other non-governmental organizations or on the regulations (schematic and lacunary) regarding the establishment of legal persons able to create arbitration institutions. Each of them was established according to the founder’s inspiration, pursuing, however, the international practice and the normative framework of the Court of Arbitration attached to the National Chamber.

The new Civil Procedure Code offers a unitary and inclusive basis for the institutionalization of arbitration in Romania. Concerning administrative norms, we are dealing with provisions which are at the same time imperative and with immediate application.

The new regulation allows, in a first hypothesis, any institution or organization, either domestic or international, to organize arbitration institutions in Romania. The absence of any specification regarding the legal status of the arbitration institutions may lead to the idea that – unlike the provisions of Law No. 335/2007 of the Chambers of Commerce in Romania, which provide that the arbitration operating attached to the National Chamber is devoid of legal status – they may be legal persons or not. However, in both cases, they remain to operate attached to the organization which created them, always enjoying a status of autonomy.

²⁹⁾ Law No. 335/2007 published in “Monitorul Oficial al României”, Part I, No. 836 of 6 December 2007.

We consider that automatically depriving of legal status some institutions which have all the elements necessary for a legal status is not justified. The autonomy of the institutionalized arbitration is best ensured by the recognition of the legal status of the Courts of Arbitration. But, it is true that the legal status triggers several expenses which would render arbitration more expensive. Also, in order to ensure the objectivity of the management bodies of the Courts of Arbitration and in order to increase their responsibility, certain outside interventions are necessary (for instance, in respect of the appointment of the management of the Courts of Arbitration). For this reason, independently from the legal status, it was specified that a connection shall be kept between the institutionalized arbitration and the institution which organized it, expressed by the forma, otherwise ambiguous, “attached to”. At any rate, the Romanian lawmaker wanted to immediately specify – art. 607 para. (2) – that “attached to” does not mean “subordinated to” showing that the autonomy of the institutionalized arbitration by reference to its creator is guaranteed³⁰⁾.

The new Civil Procedure Code also inserts a second hypothesis which also allows the organization of completely independent arbitration institutions as “*public interest non-governmental organizations*”. The reference to the public interest involves several comments. Shouldn’t the other arbitration institutions be of public interest? Who establishes the existence or fulfillment of the public interest and on which criteria or according to which procedures? May there be any connection made between the concept of “public interest” used here by the Civil Procedure Code and the concept of “public utility” used in the legislation regarding foundations of this nature?

Admitting that the institutionalized arbitration may also be organized from a non-institutionalized private initiative on condition that the product is a legal person (this time, the need to acquire legal status may not longer be questioned, because, without it, the institution cannot be identified and cannot express itself in its relationships with third parties) of public interest, the lawmaker involves the circumstance that also the arbitration institutionalized by and attached to other legal persons has such a nature resulting from the fact that its originator serves the public interest. Consequently, the result is that the recognition of the arbitration institutions is made in consideration of the fact that they fulfill a public interest activity. The existence of this interest is deducted from the nature of the entity organizing the institutionalized arbitration and which, in its turn, fulfills a public interest function or from the concrete objectives of the independent arbitration institution. The notion of “autonomy” is included in the mechanism of fulfillment of the public interest. Consequently, its infringement may lead to non-recognition of the awards of the arbitration institution which, being no longer autonomous, may no longer serve the public interest, but the interest of the entity controlling it

³⁰⁾ We shall analyze in more detail the consequences of this provision below (item 9).

moreover, it results that only the public interest institutions or organizations may organize permanent arbitration institutions attached to them.

We believe that the verification of the fulfillment of the criterion of “public interest” is made in some cases *ex ante*, and in other cases *ex post*. In the case of the arbitration institutions with legal status, the verification is made by the courts of law competent with their registration. They shall have the obligation to analyze the incorporation deeds in order to verify the extent to which they are oriented to serving the public interest. Only afterwards and on condition of a positive conclusion, the legal person may be legally established. In the case of all arbitration institutions, the analysis is made *ex post* and, concretely, also by the courts of law, by judging the actions for annulment. Since the obligation of serving the public interest is a public order one, the result is that an action for annulment may be admitted when it is found that the arbitration tribunal directly or indirectly served another interest. And this because it is both the interest of the parties and the public interest that the arbitration takes place free from any public or private interference and is not directed by other principles than those regarding the interest of justice or commerce, social stability and fluidity of civil circuit, of certitude (on which the trust/credit is based) and celerity (on which profit is based).

In terms of their contents, the concepts of “public interest” and “public utility” are equivalent. The procedure of recognition of “public utility” established by the law in the general case of foundations is not however adequate in the case of organization and operation of the arbitration institutions. We believe however that the respective legislation may not be totally ignored. Until a regulation specific to arbitration is adopted, the current legislation may be applied by analogy of the law. In this context, for instance, the court of law called to verify the fulfillment of the legal conditions for the organization of an arbitration institution with legal status may request the endorsement of the Ministry of Justice or the fulfillment of other procedures provided by the legislation regarding public utility foundations, to the extent that they are compatible with the purpose and modality of operation of arbitration.

9. Article 607 para. (2) sets forth that *“in governing and exercising the jurisdictional business, institutional arbitration is independent of the institution that set it up; it shall establish the requisite measures to guarantee autonomy”*. The text allows no other interpretation of the more ambiguous formula “attached to”. The institution establishing institutional arbitration may not achieve it in order to satisfy its own interests, but to promote wider interest, since it itself was created for public interest. Otherwise, there would be no reason to explain the establishment of a permanent arbitration institution that brings no direct profits to its creator and, moreover, bears the responsibility of supporting duties. To take one practical example, the Romanian Chamber of Commerce and Industry can not make money out of arbitration fees, but may be compelled to support via its services the business of the International Commercial Arbitration Court.

However, the National Chamber was established to help create a favorable business environment for the convenience of its members and trade in general. For this purpose, with the view to fulfill its mission, it set up besides it, so outside its functional structures, a Court of Arbitration meant to conduct an independent jurisdictional activity for the benefit of litigants and thereby trade in general. Only the public service of the Chamber accounts for and explains the establishment of an arbitration institution holding a different public office.

In order to be effective, institutional arbitration autonomy is not limited to the fact that the arbitrators are outside the control of the one constituting the arbitration institution. The entire activity of institutional arbitration, in all its components and structures, among which the law makes no distinction, should be independent.

Therefore, arbitration institutions (Courts of Arbitration) must appear outside the organizational chart of the legal entity having them established, thus including the exclusion of any relationship of subordination between them. Thence, the technical staff available to the arbitration institution (Secretariat of the Court of Arbitration), even if formally employed by the institution under which arbitration operates (as it exclusively enjoys legal personality), must be selected by the management of the institutional arbitration, solely responsible before it and may be licensed by the aforesaid alone. Control of arbitral activity under auxiliary forces' monitoring forming the secretariat of the Court of Arbitration, by the Chamber of Commerce making it available, as the current practice goes, is incompatible with the autonomy required by law.

Likewise, functional departments servicing arbitration institutions (such as financial and accounting departments, public relations departments, etc.), while performing work dedicated to arbitration business can not receive directions from the Chambers of Commerce management boards under the organizational chart they operate. On these lines, the amounts of money collected from litigants as arbitration fee do not belong to the Chamber of Commerce, but to the Court of Arbitration attached to it and, therefore, they should be highlighted in separate accounts or subaccounts, while the Chamber's management board may not in the least make free with it. Presumably, the said amounts appear within the accounting books of the Chamber under which operates the institutional arbitration as a deposit, being due to arbitrators constituting the arbitral tribunal for the relevant case and to the arbitration institution under aegis of which was set up that court, in order to cover administrative expenses relating to arbitration.

When a Chamber of Commerce deems necessary to subsidize the business of the arbitration institution operating under it, the amount allotted should be provided as fund available to the relevant Court of Arbitration management board, and not as expenditure according to the options of the Chamber. The best example is the one related to the possible compensation of members managing the arbitration institution. Such management allowances may not be paid under a

direct relationship between each member of the Court of Arbitration management board and the Chamber of Commerce. A relationship as such may lead to place the arbitration management in a relationship of dependency and subordination to the Chamber. It is true that, compared to the considerable volume of work the management of institutional arbitration is required to carry out, accomplishing this *pro bono* mission does not seem realistic. Financial compensation should be facilitated, where appropriate, by making available to the Court of Arbitration a budget at its disposal, and not under payment methods that might suggest a certain dependence of the Court upon the Chamber.

The situation is even more obvious when it comes to appointing the management of the Court of Arbitration (college) by the leadership of the Chamber of Commerce “under which” it operates. To that effect, ensuring autonomy is achieved only by arbitrators’ irremovability in the constitution of the arbitration institution’s management over a clearly established validity period of its mandate³¹⁾.

Finally, the new Code of Civil Procedure provides in Art. 611 that “*in the event of arbitration conducted by a permanent institution, the fees for conducting the arbitration, arbitrators’ fees, as well as other arbitration costs shall be determined and paid according to the rules of that institution*”. This stands for a different approach from the one under Law no. 335/2007 on the Chambers of Commerce in Romania, where Art. 30 para. (1) provides that “*the rules on arbitration and arbitrators’ fees shall be approved by the Governing Board of the National Chamber, at the suggestion of the College of International Commercial Arbitration Court*”. It is explicit that the new legislation makes a step forward on the line of institutional arbitration’s autonomy.

A particular difficulty in the interpretation and correlation of these texts may result from the way the two aforementioned laws use the term “regulation”. Law 335/2007 makes a clear distinction between the *Regulation* on organization and operation of the Court of International Commercial Arbitration which is adopted by the Chamber of Commerce Board (Art. 29 para. 3) and contains rules setting out the constitution of the Court, its organizational structure and its relationships with the Chamber, the *Rules of Procedure of the Court of International Commercial Arbitration*, which are nominated by the Chairman of the Court and are adopted by its Board (Art. 29 para. 5), constituting the “*Code of Arbitration Procedure*” specific to the relevant Court and the *Rules on arbitration fees*, which are submitted by the Court’s Board and are approved by the Chamber’s Board (Art. 30 para. 1). Therefore, the *Regulation* falls entirely under the jurisdiction of the Chamber of Commerce under which operates the Court of Arbitration and does not refer to the arbitration procedure, *holding an administrative function*; the

³¹⁾ For the same reason, even if the list of arbitrators the institutional arbitration may produce acts solely as recommendation, we argue that the figures on the relevant list can not be replaced until the expiration of a reasonable length of time set for its term of validity.

Rules of procedure fall exclusively under the jurisdiction of the Court of Arbitration; the *Rules on arbitration fees* (including arbitrators' fees) are the joint responsibility of the Court and the Chamber, the former enjoying the exclusive right to propose and the latter the exclusive right to rule.

The new Code of Civil Procedure, after providing in Art. 607 para. (2) that “*in governing and exercising the jurisdictional business, institutional arbitration is independent of the institution that set it up*”, in other articles it uses both the term of “regulation” and the phrase “rules of procedure” as interchangeable. Thus, Art. 608 para. (2) sets forth that “*in case of contrariety between arbitration agreement and institutional arbitration regulation it refers to (s. n.; A.S.), the arbitration agreement shall prevail*”, and in Art. 608 para. (3), as in Art. 610 para. (3) it is provided that “*unless the parties otherwise agree, the rules of procedure of institutional arbitration shall be applicable (s. n.; A.S.) in force at the time of its referral*”, while Art. 609 para. (2) states that “*the appointing authority is the Chairman of the institutional arbitration, unless its rules of procedure (s. n.; A.S.) or the parties themselves do not provide otherwise*”, and in Art. 610 para. (2) it is stated that “*by appointing a specific institutional arbitration ... the parties automatically choose so that its rules of procedure shall be applicable (s. n., A.S.)*”. Art. 610 para (1) provides that “*the rules of procedure of institutional arbitration (s. n.; A.S.) shall be enacted by its management board in accordance with its operating rules set within the incorporation act*”, while the aforesaid Art. 611 deals with “*the regulation of that institution*” (i.e. the institutional arbitration) with reference to the *sedes materiae* of arbitration fees. To summarize, we should bear in mind that, under the new Code of Civil Procedure: *i.* regulation of the jurisdictional business (Art. 607) and, thus, adopting rules of procedure of institutional arbitration is its sovereign right (Art. 610); *ii.* the sum of rules of arbitration procedure stands for the regulation of institutional arbitration (Art. 608 and 610); *iii.* arbitration fees should also be included in the regulation of the institutional arbitration (recommended in our opinion, as an appendix to it) to which the parties refer under the arbitration agreement (Art. 611); *iv.* the rules of procedure, i.e. the regulation of the arbitration procedure (jurisdiction) shall be adopted by the institutional arbitration board in accordance with the operating rules set within its incorporation act. Therefore, it goes out clearly that, what Law no. 335/2007 calls “regulation”, the new Code of Civil Procedure calls “incorporation act” (document that should preexist to the arbitration institution, and, therefore, can not be attributed but to its creators/organizers); what Law no. 335/2007 calls „rules of procedure”, the new Code of Civil Procedure equally calls “regulation” or “rules of procedure” (in fact, Law no. 335/2007 deals with “regulation on *organization and operation*” of arbitration, while the Code of Procedure deals with the “*regulation of the institutional arbitration*” the arbitration agreement refers to, while the latter can not refer but to rules of arbitration procedure, and not to provisions governing the relationship between

the institution of arbitration and the one establishing it); both Law no. 335/2007 and the Code of Civil Procedure call provisions on arbitration fees as rules. The conclusion is that, under the new Code of Civil Procedure, institutional arbitration management powers are greatly increased, giving a more consistent expression of its autonomy. Thus, the establishment of arbitration fees, which also involves defining the relationship between arbitration fees and administrative expenses, as well as methods of calculating charges fall within the absolute power of those who practice arbitration, standing beyond the control of the ones responsible for organizing the institution.

The question is which are the legal provisions that shall prevail in terms of differences between Law 335/2007 and the new Code of Civil Procedure. Once we notice that all the legal rules under consideration are equal in nature, i.e. they are not related to the arbitration procedure, but to the institutional (administrative) order of arbitration business, such being immediately applicable, we could mention that one possible response would be that Law no. 335/2007, as a special law, has the power of waiving the general law which is the new Code of Civil Procedure. Provisions of Art. 2 (2) of the new Code of Civil Procedure seem to lead to the same effect, stating that the *“provisions of this Code shall apply to matters governed by other laws, to the extent that these do not contain contrary provisions”*. It is no less true that the new Code of Civil Procedure introduces for the first time in Romanian law a set of rules aiming to regulate institutional arbitration on uniform criteria. Out of this manifest intent, and of the time sequence of the two enactments, we would conclude that all institutional arbitration rules adopted under Law no. 335/2007, contrary to the new Code of Civil Procedure should be aligned with its provisions. This, all the more so as, in this particular case, we do not deal with procedural rules, but with the rules of administrative law inserted into civil procedural law, and especially as the rules in question come to clarify the meaning of the principle of “arbitral jurisdiction autonomy”, which, like the principle of “independence of the judiciary”, belongs to public policy. To these arguments it can be also added the one of maximum relevance according to which even Art. 28 para. 2 of Law no. 335/2007 allows the Romanian Chamber of Commerce to run arbitration businesses exclusively within the scope of the Code of Civil Procedure. *Therefore, since the special law in itself shall refer to the law, when it comes to institutional arbitration, it turns out that amendment of the general law requires the harmonization of secondary legislative acts committed under the special law witho the new rules of common law.*

However, even the current legislation on the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry of Romania provides, beyond the fact that approval by the Romanian Chamber of Commerce and Industry of arbitration fees may only be achieved based on a proposal submitted by the Court of Arbitration Board, that *“arbitration fees are intended for covering expenses related to the business of dispute*

resolution, payment of arbitrators' fees and relevant documentation, secretarial expenses and other expenses requisite for the operation of the Court of International Commercial Arbitration” (Art. 30 para. 2 of Law no. 335/2007). Therefore, the budgetary and financial separation between the Chamber and the Court has already been stated as binding.

10. Art. 609 para. (1) of the new Code of Civil Procedure provides that the lists of arbitrators that arbitration institutions have the discretion to adopt are open, being optional. This means that litigants have the right to appoint, as well, other arbitrators than the ones written down in the said lists.

Such facility does not rule out, however, the arbitral tribunal's ability to establish procedures for verification and acceptance of assignments, so they are not abusive or inappropriate. Indeed, it is needless to say that a person whose interests are in conflict with the interests governing the mission entrusted is not compatible with that of an arbitrator in a given case. A similar conflict of interests could also stand as grounds for a subsequent challenge. But the challenge procedure may delay completion of the case, so that a prior verification of the state of conflict of interest by the permanent institutions of the relevant court of arbitration may be deemed as desirable.

If, in the event of a conflict of interest, there is, however, the challenge remedy, in case of mismatch between the specialization of the person appointed as arbitrator and professional skills required by the case assigned to arbitration, things are far more complicated. Inclusively in relation to a similar situation, there is the possibility of a professional liability action, but evidence and repair of damage caused by the professional incompetence of an adjudicator is difficult to achieve. A preventive solution is therefore preferable. This so much the more when some fancy designations hide abuse of procedural law, being made with the intent to hinder the progress of the case.

Such considerations allow institutional arbitration to establish a special procedure on the establishment of arbitral tribunal, procedure that, allowing litigants to take initiative in appointing arbitrators, grants to its permanent courts the right of censorship. Obviously, this right is also based upon agreement of parties expressed by accepting institutional arbitration rules of procedure along with the choice made by the arbitration agreement. On the other hand, its exercise must not be abusive. The decision not to confirm an arbitrator appointed by the parties must be justified and, if necessary, it may be sanctioned by a civil liability action. To better ensure the rights of litigants, by means of arbitrations rules of procedure, it is useful to provide that denial of an appointment allows the interested party to submit another. Only if such an approach would unduly delay the proceedings, it may be appealed to nomination *ex officio* by the appointment authority.

The rule provided by Art. 609 para. (4) has a multiple nature. First, we deal with an alternative provision of an administrative nature. It is about the provision

according to which “*institutional arbitration may (s. n.; A.S.) draft optional lists of persons who may be arbitrators or umpires*”. In relation to the organization of institutional arbitration, this rule is imperative. It leaves up to the arbitral institution to prepare a detailed list of names of possible arbitrators or not. But the alternative is limited that much. This means that an imperative list (a closed list) is not permitted by law.

The solution ranges on the line of current practices in the European Union. The existence of lists may stand for assistance given to litigants, which can thus lead in relation to figures who may arbitrate their disputes. At the same time, compiling such lists, the arbitration institution concerned shall ensure, at least ethically, the competence and probity of names entered. Prohibition of appointments outside the list would be contrary to the private nature of arbitral jurisdiction and would reduce the degree of confidence of parties in the arbitral tribunal. Or, trust is not just an element of attraction to arbitration, but rather a stimulus for the dynamics of business environment and a basis for voluntary execution of arbitral awards. The practice of closed lists is characteristic of totalitarian regimes and lines of thought. Return of the Romanian Court of International Commercial Arbitration to a similar practice – banned under the new Code of Civil Procedure – is therefore regrettable.

Secondly, Art. 609 para. 1 includes a rule of jurisdiction which, by that very nature, is also mandatory. We bear in mind the provision according to which the list of arbitrators shall be drawn up by the arbitration institution (the Court of Arbitration), and not by the organizing institution under which it operates (the Chamber of Commerce). In this regard, the new Code of Civil Procedure puts out of court the relevant provisions of the Regulation on Organization and Operation of the International Commercial Arbitration Court attached to the Romanian Chamber of Commerce and Industry, which provide that the list of arbitrators is drawn up by the Romanian Chamber of Commerce and Industry Romania as closed list³²⁾.

11. Regarding para. (2) of Art. 609, it sets a number of general procedural rules, thus suppletive, but also with regard to jurisdiction, thus compelling. It covers regulation of cases where the parties fail to exercise their procedural law of appointing arbitrators (in our interpretation, including when the appointment is

³²⁾ In line with Regulation on the Organization and Operation of the Romanian International Commercial Arbitration Court, appointing as arbitrator a person not entered on the List of Arbitrators leads to qualifying arbitration as *ad hoc* arbitration, even if the parties have asserted their option, within the arbitration agreement, for institutional arbitration. This approach, more than questionable, is specifically settled down to Art. 6 in the aforementioned Regulation: “*Should the party nominate as arbitrator a person not entered on the List of internal and international arbitrators, list that was submitted to him by the Secretariat of the Court, the arbitration shall be subject to ad hoc arbitration rules, which is conducted in accordance with the provisions set forth in Part I of the Rules on arbitration procedure*”. The provision cited is contrary, therefore, to the new Criminal Procedure Code and shall be deleted.

unreliable – the case of people obviously incompetent – or unacceptable – the case of people in conflict of interest) and cases in which the arbitrators fail to agree on the umpires. In such circumstances, the nominating authority is the one indicated by the parties or the one prescribed by rules of procedure of the arbitration institution referred to. Should they keep silent, jurisdiction falls under the heading of the Chairman of the arbitration institution.

The first consequence of the law's wording cited is to solve a controversy that gathered way on several occasions – characterizing, *inter alia*, the Romanian arbitration. Thus, art. 609 para. (2) clarifies that the rules on constitution of the arbitral tribunal are rules of procedure, rather than rules of organization of the institutional arbitration. As such, they are established via rules of procedure for whose adoption the arbitration institution has jurisdiction (the Court of Arbitration), and not via its rules of organization under the jurisdiction of the arbitration institution under which arbitration operates (the Chamber of Commerce etc.)³³⁾. In light of such disposition, provision of the Regulation of Organization and Operation of the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry, according to which the appointing authority falls upon the Chairman of the Romanian Chamber of Commerce and Industry (who, as a matter of fact, also owns the monopoly of appointing umpires) are illegal twice: firstly, because the arbitration procedural rules are not adopted by the Court of Arbitration, but by the Chamber of Commerce under which the arbitration operates, and, secondly, as conferring exclusive rights of appointing umpires to the Chairman of the Chamber of Commerce and Industry it violates the arbitrators' right to do so in the first instance.

According to the Code of Civil Procedure, it is indubitable that the appointment of arbitrators falls mainly on the parties and, alternatively, to persons designated by them or by the rules of the arbitration institution referred to and the relevant *prima facie*. Regarding the appointment of umpires, the main competence comes to arbitrators (mainly appointed by the parties themselves and therefore, failing to represent them, invested, however, with their confidence), and the

³³⁾ We can not speak in this case of a novelty brought about under the new Code of Civil Procedure, but only about settlement on the way of positive law of a doctrine controversy with effects in secondary law regulation. The fact that the formation of the arbitral tribunal is a procedural issue and not an organizational one, it was defended until the adoption of the new Code of Civil Procedure, including by the author of the study hereby. But the opinion was not followed by some institutions organizing the institutional arbitration (e.g., the Romanian Chamber of Commerce and Industry) that have reserved the right to regulate the incorporating procedure of the arbitral tribunal and to intervene specifically in the implementation of the said procedure, considering it as part of the administrative organization of arbitration. Failing thus to enact a new regulation on the issue, but clearing up its nature and, consequently, jurisdiction over legislation, the new Code of Civil Procedure not only requires amendment of contrary rules in the secondary law with *ex nunc* effects, but also flags them as illegal *ab initio* urging, therefore, their annulment, i.e., an amendment with *ex tunc* effects.

subsidiary jurisdiction falls upon persons authorized by them or by the rules of procedure relevant for the case. A final subsidiary is explicitly established under the Code of Civil Procedure: under the silence of the parties or the rules of arbitration procedure, the appointing (designation) authority is conferred upon the Chairman of the relevant arbitration institution.

The question is what happens when the appointing authority chosen by the parties by means of the arbitration agreement and the one specified by the relevant Rules of arbitration procedure are different? The answer is explicitly given in Art. 608 para. (2) of the new Code of Civil Procedure within the meaning of the prevalence of the arbitration agreement. We argue that this solution, fully compatible with the nature of private jurisdiction of arbitration, is also reinforced by the literal interpretation of Art. 609 para. (2) listing alternative solutions in their reverse order, i.e., first it mentions the Chairman of the institutional arbitration, who is the last entitled to intervene in the proceedings of incorporation of the arbitral tribunal, proceeding thereupon with the rules of procedure of institutional arbitration and ending with the parties' option, obviously expressed in the arbitration agreement. The logical reasoning goes the same direction. Since, within the boundaries of unabusive exercise of law, litigants are the ones having primary jurisdiction in appointing arbitrators, enjoying, by law, the power of investing them, with the same gesture, with derived jurisdiction, but also absolute to appoint the umpire, *a fortiori* they can delegate such authority to a third party before anyone else may be able to do so.

The procedure of establishing the arbitral tribunal described above is, as I said before, a correct expression of the essential logic of circumscribing the arbitration institution jurisdiction as private jurisdiction. Default of an appointing authority to unblock procedure where indolence or renitence of parties fails to allow the constitution of the arbitral tribunal is one of the main disadvantages of *ad hoc* arbitration. Institutional arbitration, involving the establishment of permanent forums that may retrieve anytime the nomination authority function, prevents such a deficiency. This does not mean that the parties' right in organizing jurisdiction according to their specific interests can be limited when it comes to appeal to institutional arbitration. The institutionalization of arbitration is intended to enhance the effectiveness of private jurisdictions, and not to establish state control (administrative control) over the relevant jurisdiction, for the purposes of limiting the parties' ability to subvert the organization of an arbitration tribunal to enjoy their confidence, to guarantee objectivity and therefore to ensure celerity of proceedings, including under voluntary execution of the arbitration award, seen as the ending of a fair trial. That is why we believe that the mechanism described is not arbitrary, but is imposed by the essence of arbitration, coming, *per se*, under its public policy. Therefore, procedures that limit the right of parties to appoint arbitrators directly (save the procedure of fighting the consequences of procedural law abuse or the procedure on challenge) and umpires indirectly (as things stand with current rules applied by the Court of International Commercial Arbitration

attached to the Romanian Chamber of Commerce and Industry) *are likely to be sanctioned by way of admission of actions for annulment.*

As a final remark, it may be avouched that, by means of the rules of procedure, institutional arbitration may leave the subsidiary appointing authority function to someone other than its Chairman. A similar solution can be imposed by the very logic of organizing a specific permanent arbitration institution. Thus, the Court of Arbitration attached to the ICC (Paris) serves as subsidiary appointing authority the ICC national committees. This allows the Court to subsequently intervene with greater objectivity in the preventive control of accuracy in the constitution of the tribunal or in the drafting of the arbitration award.

On the other hand, the appointing authority set forth under institutional arbitration rules of procedure must also accept fulfillment of a mission as such; this does not necessarily happen if the relevant authority is not part of the institutional arbitration system or is in default of a special agreement with it. Likewise, the appointing authority must be free from the suspicion of lack of objectivity, which is not the case with the Chambers of Commerce, whose members can often be even litigant. In light of these findings, the new Code of Civil Procedure, by assigning the authority to appoint, even in the most distant subsidiary, to the Chairman of the permanent arbitration institution, shall ensure that such a mission will be accepted and exercised impartially, the Chairman being right the one called to ensure the smooth functioning of the institution. We believe that if the subsidiary appointing authority established by the arbitration agreement or applicable rules of procedure is any person outside the jurisdiction of the relevant arbitration institution and he/she refuses, explicitly or implicitly, to fulfill the mission, under applicability of the new Romanian Code of Civil Procedure, the solution would be appeal to designation by the Chairman of institutional arbitration. The same is also required when a similar appointing authority appears to be in conflict of interest, conflict that may be found by the institutional arbitration management *ex officio* or at the parties' request. Thus, the purpose intended by the parties is achieved by applying an alternative procedural rule set forth in positive law that, even if set aside by them by means of delivering another option, appears to be the only one operational.

Given this background, there comes to light the opportunity idea that the legislator's preference for the Chairman of the institutional arbitration – as subsidiary appointing authority, to be taken over by the Rules of Arbitration Procedure of the relevant arbitration. If this fails to occur, those rules should provide return to the Chairman of the institutional arbitration or, where appropriate, to its comprehensive management when the appointing authority fails to fulfill its obligations, carries it out improperly or is in conflict of interests. Finally, we consider that such solutions should be enshrined in *lege ferenda* primary positive law.

12. Article 609 para. (3) of the new Code of Civil Procedure, under a broad interpretation, seems to exclude from the quality of appointing authority those

professional associations or organizations that are in dispute with third parties. The legislator does not distinguish between a main or subsidiary appointing authority. The wording may be understood in the sense that, including the case of subsidiary appointing authority, the conflict of interest must be avoided³⁴⁾. Coming under the guarantee of a fair (correct) trial, this rule also belongs to public policy.

Its application involves fulfillment of two cumulative conditions. The first relates to the fact that the association or organization in question has been designated as subsidiary appointing authority and the second that it is a litigant in the very process in which it acts as appointing authority. Otherwise, on principle, one can not refuse a litigant, albeit one association or organization mentioned in Art. 609 para. (3), to appoint its arbitrator in the arbitration process in which they participate. At the same time, there would be no more case if the relevant association or organization would not act as subsidiary appointing authority. We believe, however, that if this is the legislator's assumption, the conflict of interest should be considered and resolved in the same way, regardless of whether the relevant party is an associative organization, an organization formed to defend the interests of a professional group or any other subject of law. Since the Code of Civil Procedure does not prohibit such a solution able to cover the problem as a whole (assumption in Art. 609 para. 3 can be construed only as an extreme situation that the legislator sought to regulate directly, without prohibiting institutional arbitration to settle other cases in the same spirit), it can be applied until a future improvement in legislation, either in relation to the interpretation of the law by analogy, or under the rules of arbitration procedure of each institutional arbitration.

Despite its clerical ambiguities, the wording of the new Code of Civil Procedure may solve the real problem created by the overlapping and conflict occurred between the quality of litigant in the arbitration case and that of appointing authority nominated under the rules of procedure of institutional arbitration. Those rules may not apply when the appointing authority follows the interests of either party³⁵⁾. The question remains, however, who will then play the

³⁴⁾ Article 554 of the new Code of Civil Procedure defines in detail the incompatibility of arbitrators, but the law does not explicitly provide anything about the possible cases of incompatibility that the subsidiary nomination authority might fall under. Art. 609 para. (3) can be taken as basis to that effect, setting forth that the liberty of the person entitled to appoint arbitrators may be limited when it can lead to the constitution of an arbitral tribunal that, although it poses no problems of incompatibility in the strict sense of law, inflames distrust of parties in the objectivity under which the procedure develops or renders vulnerable the neutrality of arbitrators in consequence of dependency relations, be it either distant, mediated and sophisticated between them, the one who appointed them and the parties.

³⁵⁾ It is, for instance, the case of the arbitrator (umpire) designated by the subsidiary appointing authority (e.g., the Chairman of the Romanian Chamber of Commerce and Industry) which has no connections with litigants likely to bring him under Art. 554 of the new Code of Civil Procedure, but hangs instead upon the interests of the relevant authority, which is in turn connected to the parties' interests.

role of appointing authority? In the absence of an explicit response under the law, we consider that the impossibility of applying one of the overriding subsidiary solutions leads to the application of the last alternative, namely the Chairman of the permanent arbitration institution's active role in the matter. If this one is also incompatible on account of a conflict of interest, the appointing authority shall be exercised by one of his deputies by rights.

However, a strict interpretation of purport in Art. 609 para. 3 could also lead to another interpretation. Thus, the relevant wording sets forth that organizations and associations listed should only be unable to appoint "arbitrators out of their members". This suggests the hypothesis that we have to do with litigants not acting as subsidiary appointing authority, but would not benefit from a legal entity distinct from that of people by whose association they have been created. Since only individuals can be designated as arbitrators, it is understood that members of relevant associations and organizations the law alludes to are individuals. The argument for such a prohibition would be that, for such organizations and associations, the connection of interest between them and their individual members is so large and intimate, that the appointment of the latter as arbitrators would be tantamount to placing the litigant party itself in the position of arbitrator. Or, the arbitrator is appointed by the party, but it is not the party's representative and even less, the party itself. We believe that, *a fortiori*, the solution is the same when a similar party acts as appointing authority, as well.

If the association or organization in question shall appoint an arbitrator in breach of Art. 609 para. (3) we argue that, bearing in mind the rules of arbitration procedure specific to each institutional arbitration, the arbitration institution referred to may refuse the appointment and shall request another one. If there is no another option asserted in due time, the appointing authority shall be appealed to. However, since appointment under breach of law may be considered, especially when litigants are professionals accustomed to arbitration, as procedural abuse or testimony of bad faith, appeal to subsidiary appointing authority may be performed immediately. This is especially applicable when performing otherwise equals to unnecessarily spin out the case's time. What would happen, though, should a party be appointed under the arbitration agreement, so under the agreement of all parties, in its capacity as subsidiary appointing authority? Article 549 in the Code of Civil Procedure sets forth that "the arbitration agreement clause stipulating *the right of a Party to appoint arbitrators for the other Party* or to have more arbitrators than the other Party is null and void". This article touches, however, *ad hoc* arbitration, and it can be argued that institutional arbitration rules of procedure may deviate from the rule which it lays down. In such case, it is clear that *prima facie* we would have to do with a conflict of interest. However, the interpretation of the Code of Civil Procedure is conducive to the fact that right of litigants to nominate arbitrators is available. In carrying it out, they may draw upon a third party named as appointing authority. A similar

ability has no restrictions³⁶⁾, at least under Art. 609 para. 2. Moreover, Art. 549 refers to the waiver of the right of appointing the arbitrators directly by the parties (as main appointing authority) and this on the strength of their committed agreement under the arbitration agreement and not to the relegation of the subsidiary appointing authority by one Party to another, under a unilateral deed. Consequently, nothing seems to preclude that either party transfers alternatively the exercise of its procedural right to another litigant³⁷⁾.

If this Party fits the cases covered under Art. 609 para. 3, it shall not be able to appoint arbitrators from among its members, even if it is about an arbitrator appointed for and on behalf of the other Party. The same goes if the Party for which it is performed the arbitrator's appointment is subject to Art. 609 para 3. In the first case, it is about protecting the private interest of litigants consisting in the appointment of arbitrators whose probity is reliable. In the second and third case, we are dealing with the public interest of ensuring fairness (objectivity and neutrality) of the arbitration process. Consequently, what the Party can not execute personally, the appointing authority replacing it may not do it either; especially since it was appointed by the Party. Otherwise, there would be the case of a fraud in law.

13. An important innovation brought under the new Code of Civil Procedure deals with regulation of validity conditions of the arbitration agreement. The

³⁶⁾ In practice, when they appeal to a third party as appointing authority, litigants do it under the arbitration agreement, *ipso facto*. The wording of Art. 609 (2) "*if ... the parties themselves do not provide otherwise*", even if the plural is used, does not imply the obligation of appointing a nomination authority to be consensual. Thus, each Party may designate another appointing authority, and this can be done until the expiry of the deadline the relevant Party was entitled to appointing the arbitrator personally. Consequently, we would deal not even with an agreement that would be voidable (should Art. 549 be applied), but with a unilateral deed aimed at the manner of practically exercising the right to appoint arbitrators. Only as umpires are concerned, designation of the appointing authority by the Parties is binding consensual, as it replaces all the arbitrators and not just the arbitrator responsible for the procedure's blocking. Including this case, consensus can occur until the deadline the arbitrators were to nominate the umpire.

³⁷⁾ This all the more so argument of Art. 549 of the Code of Civil Procedure is hardly identifiable under the plan of law's fundamental principles. At first glance, the provisions of this article tend to ensure balance and objectivity of the procedure. Work would still be meaningful if arbitrators would act as parties' representatives. Though, they do not act as representatives, but as neutral persons whose probity is trusted by the parties. The right of each party to appoint an equal number of arbitrators is just an additional assurance whose absence may preclude under no way the arbitral tribunal to be objective, even if one or more parties failed to nominate arbitrators. What law prohibits, indeed, is a party waiving its original right to appoint arbitrators. As long as it may appoint arbitrators mainly, it is irrelevant who it appoints as subsidiary appointing authority. Especially in commercial matters, where parties often pursue only to quickly find a solution to allow quiet resumption of legal relationships, nothing stands against a party to have full confidence in the other Party and to confer it the role of subsidiary appointing authority, as nothing precludes that, in fact, all arbitrators to be appointed under the parties' agreement (agreement whose implementation is achieved through nominations made separately by each Party).

relevant purport is Art. 540 para. 1 in the Code of Civil Procedure. It covers arbitration in general and not only institutional arbitration.

The old Code of Civil Procedure (still in force) required, simply and solely, the written form of the *ad validitatem* arbitration agreement (Art. 343 para. 1). The practice of arbitration has given this purport a broad interpretation and found that any procedural acts done in writing by the parties (e.g. arbitration proceedings brought by the plaintiff followed by the defendant's response whereby the latter fails to invoke the plea of arbitration's lack of jurisdiction), out of their corroboration ensuing sufficiently clear their intention to refer their dispute to arbitration, are sufficient to be approached as a valid arbitration agreement³⁸⁾. This solution was criticized by some of the doctrine which held that, under this broad interpretation, the written form is absolutely irrelevant³⁹⁾.

The new Code of Civil Procedure preserves integrally the old wording, but adds up a second phrase that establishes in positive law the aforementioned case law and uniform law trends. Therefore, "*the condition of written form is considered fulfilled when appeal to arbitration has been agreed by exchange of correspondence, irrespective of its form, or by exchange of procedural documents, or when its existence was alleged in writing by one of the Parties and was not challenged by the other*". Although the drafting technique is objectionable – a more nuanced provision would have been preferable, and not such a combination of the original radical provision and

³⁸⁾ In this regard, see the *arbitration award no. 57 / April 1st, 2009*, as cited in V. Babiuc, O. Capatana (coordinators), *Jurisprudență Comercială Arbitrală (Commercial Arbitration Case Law) 1953-2000*, SC Edimpres Camro SRL Publishing House, Bucharest, 2002, p. 3. This jurisprudential solution incorporates the concept of the European Convention of International Commercial Arbitration, Geneva, 1961. According to Art. 1 section 2 letter a of this international document, the term "arbitration agreement" shall mean either an arbitral clause set forth in a contract, or a compromise, the agreement or the compromise being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws. Romania has ratified this international instrument by Decree no. 281/1963, published in "Official Gazette" no. 12/June 15th, 1963.

³⁹⁾ In this context we mention an innovation of the new Code of Civil Procedure, namely Art. 541 para. (2), wording which reads: "*the existence of the arbitration agreement shall be presumed if the applicant files a request for arbitration, and the defendant does not take any objections on the first term he has been legally summoned*".

The reproduced text takes over the wording – previously regulated – set forth in Art. 14 of the Rules of Arbitration Procedure of the International Commercial Arbitration Court attached to the Romanian Chamber of Commerce and Industry ("Official Gazette of Romania", Part I, no. 197 of March 29th, 2009), wording which reads "(1) *Arbitration agreement can also result from the introduction by the plaintiff of request for arbitration and the defendant's acceptance of this request to be settled by the Court of Arbitration; (2) Defendant's acceptance may be implied, but unequivocal*". Such regulations were consistently provided in the Rules of Arbitration Procedure of the International Commercial Arbitration Court attached to the Romanian Chamber of Commerce and Industry (for example, Art. 13 of the Rules in force since April 18th, 2008 etc.).

another one subsequent that virtually empties of content the first one – the legislator’s intention is clear. It ranges on line of some principles and realities that have consistently circumscribed theory and practice of arbitration. On the one hand, we bear in mind the principle of relief of legal deeds under which should be carried out poor arbitration agreements if it can be found under reasonable basis that the parties wanted to eliminate the jurisdiction of courts and resort to arbitration, to the extent they are operational⁴⁰⁾. Arbitral tribunals will thus be bound to show flexibility and imagination to complete gaps in the covenant between the parties relating to arbitration proceedings when their willingness to appeal to such procedure is beyond doubt.

On the other hand, forasmuch as, ordinarily, arbitration is referred to by people organized institutionally linking constantly legal relationships of a certain kind and practice recourse to arbitration to resolve disputes arising from those relations, the written form of arbitration agreement is not warranted to be required with maximum rigor. A similar form is normally designed to draw non-professionals attention to the seriousness of their gesture and related risks. For professionals, such a preventive and protective measure is superfluous.

In light of the foregoing, the provision set forth in para. (2) of the same Article 540 of the new Code of Civil Procedure, under which “*if the arbitration agreement relates to a dispute on the transfer of ownership and / or the establishment of another real right on immovable property, the agreement must be concluded under authenticated notarial form, under penalty of absolute nullity*”, is at least bizarre. It can not be explained but by virtue of a logical inconsistency whose correction is urgently required *de lege ferenda*. Unparalleled in any other legislation, the purport displays a civilian tendency in a world in which the arbitration is marketed and discloses corporate interests in a context where arbitration can not ignore the effects of free competition which is bound to face.

14. It should be also reported the legislative innovation introduced under Art. 604 of the new Code of Civil Procedure, in relation to the action for annulment of the arbitration award. Therefore, according to Art. 599 para. 1, “*the arbitration award may be made void only by action for annulment*” and according to Art. 601, “*jurisdiction to hear the action for annulment falls upon the Appellate Court in the district where the arbitration took place*”. Article 604 para. (1) provides that the action for annulment shall be judged by the legal panel to hear the appeal, while Art. 604 para. 4 sets forth that “*resolutions of the Appellate Court ... are final*”.

⁴⁰⁾ Institutional arbitration is going so far to save the arbitration agreement, that when it states undoubtedly the parties’ option for a particular permanent arbitral institution, but the said institution refuses to arbitrate the dispute before it, rendering thus the agreement inoperative, the jurisdiction falls not on courts, but on *ad-hoc* arbitration. In this respect, Art. 612 of the new Code of Civil Procedure states that “*if the organization or institution provided for in Art. 607 declines to conduct arbitration, the arbitration agreement is hold valid and the dispute between the parties shall be settled according to provisions in the instrument hereby*”.

In the old Code of Civil Procedure, it was stipulated that the action for annulment is judged *in two levels of jurisdiction*. On a first level, jurisdiction fell upon the district court in which the arbitration took place, immediately superior to that which, in the absence of the arbitration agreement, should have been referred to hear the case on the merits (Art. 365 para. 1 Code of Civil procedure). Then, the relevant court decision may be challenged *only* by appeal (Art. 366 last paragraph in the Code of Civil Procedure). Pursuant to Art. 366¹ in the Code of Civil Procedure, the action for annulment was judged by the panel set for hearing in the first instance, and the appeal by the panel referred to for this remedy.

Therefore, the new Code of Civil Procedure makes the procedure on the abrogation of the arbitration award to be consumed in the Appellate Court that shall be ruled in the panel formed for appeal. Thus, the entire procedure for resolving a dispute by arbitration *simplifies and accelerates*. Such an approach is consistent with the principles of celerity and confidence⁴¹⁾ governing, among other principles, the theory of arbitration.

Amendment brought about under the new Code of Civil Procedure, although no doubt welcomed by litigants, brings back a series of dilemmas. The first dilemma concerns the nature of the action for annulment. Is this an extraordinary means of attack or an independent action⁴²⁾? As far as we are concerned, for reasons we should not resume hereunder, we chose the second option. This choice, however, opens the way to a second dilemma. If it is about a proper action, its settlement on a single level of jurisdiction, could it be constitutional? Our answer is that where and when the Constitution guarantees litigants hearing of their cases on several levels of jurisdiction, it covers disputes falling *exclusively* under the jurisdiction of public courts. Or, even if the action for annulment is independent, it is prone to the abrogation of a judicial deed due to formal or

⁴¹⁾ The dynamics of international economic relations depends on trust between the parties and this to the extent law is able to provide suitable regulations in order to accelerate shaping of legal relationships protecting those who, in good faith, have taken risks. Commercial arbitration, particularly in its international version, is or should be the generator of such a trust while meeting the exigencies of commercial celerity. For an analysis of international commercial arbitration institution's potential to generate trust, see T. R. Popescu, *Dreptul comerțului internațional (International Trade Law)*, Didactic and Pedagogic Publishing House, Bucharest, 1983, p. 35 1-352; furthermore, in terms of the impact of celerity and credit exigencies over regulations *de jure* of international trade law, see A. Severin, *op. cit.*, p. 22-61.

⁴²⁾ On the subject of the nature of the action for annulment, see G. Boroi, D. Radescu, *Codul de procedură civilă comentat și adnotat (Code of Civil Procedure reviewed and annotated)*, All Publishing House, Bucharest, 1994, p. 615, Gh. Beleiu, E. Osipenco, M. Cozmanciuc, *Desființarea hotărârii arbitrale (Abolition of the arbitration award)*, in "Law" no. 9/1995, p. 15, S. Zilberstein, I. Bacanu, *Desființarea hotărârii arbitrale*, in "Law" no. 10/1996, p. 3 1-33, VM Ciobanu, *Despre natura juridică a acțiunii în anulare (On the legal nature of the action for annulment)*, in "Law" no. 1/2002, p. 76-83. Likewise, see *Decision passed by the former Supreme Court of Justice – Joint Sections, no. V/June 25th, 2001*, published in the "Official Gazette of Romania", Part I, no. 675/2001.

radical reasons (public policy). On the other hand, it is also arguable that the right to trial in several steps is available; the interested parties may abandon it all the more so as they can forgo even the courts jurisdiction' to hear the case on the merits. If under the same system of jurisdiction it can not be waived in the abstract one or more of the steps legally required, when such systems combine, a similar waiver may be allowed. This, at least as long as the law is silent; for when it wished to prohibit it, it did so expressly⁴³⁾.

15. Finally, we fall back upon the identical provisions of Art. 608 para. 3 and 610 para. 3, with the view to add some comments on the relationship between the provisions of the new Code of Civil Procedure relating to institutional arbitration, provisions of the rules of arbitration procedure of the various permanent arbitral institutions and their application over time. The aforementioned articles provide that as to disputes subject to institutional arbitration there applies its procedural rules in force at the time of referral, unless the parties *have otherwise agreed*. This means that the rules of arbitral procedure apply, in principle, immediately.

Legal regulation cited is practical in nature, bearing in mind that from the arbitration agreement date until initiation of arbitration action it might take a very long time, and arbitrators who do not perform permanent arbitration activities could encounter difficulties in getting to know and apply rules of procedure which are no longer in force and that they have possibly not ever applied. Equally, this provision sets forth the legislator's conception according to which arbitration is primarily construed as a judicial deed and not as a contractual one. If the contractual size of arbitration would have prevailed, perhaps the solution would have been that of applying the rules of procedure valid on the date of the arbitration agreement's conclusion, the only ones the parties could know and consider the moment they decided to remove jurisdiction of state courts. In contractual matters, the principle goes that the law that governed the agreement's termination shall be all enforceable until its expiry.

But anyway, the parties may deviate from above. Both out of the literal interpretation of the reviewed purport and of its teleological interpretation, hence it appears that deviation may arise under two conditions. Firstly, such a waiver may arise only by agreement of the parties, the opposition of only one of them is sufficient. The law is clear and it sets forth the need for an "agreement" of the parties. The solution adopted by the legislator may surprise, since it is likely to strike the balance between the Parties as far as it puts only one of them to bear the negative consequences of the application of procedural rules that it was unaware of at the time it opted for arbitration and which, should it have been informed of,

⁴³⁾ On these lines, see Art. 600 of the new Code of Civil Procedure, which sets forth that "*The Parties can not waive under the arbitration agreement the right to initiate action for annulment against arbitral award*" (para. 1): "*Waiver of this right can only be made after the arbitral award is rendered*" (para. 2).

would not have them accepted. What if, in such circumstances, the other party refuses to give consent on the application of procedural rules applicable on the date of conclusion of the arbitration agreement? We hereby argue that such an attitude could be described as being in bad faith. This is particularly true the more so as the Party reprobating in unable to prove that, by accepting waiver warranted under the law, it would have anything to lose. Since, according to the rules governing execution of contracts in good faith, one Party to the arbitration agreement may not be constrained to perform the duties arising thereof (i.e., to submit a dispute to a particular arbitration procedure) if it appears clear that, should it had been aware of the applicable procedure, it would not have agreed to conclude the said convention, the arbitration court should rule invalidation of the arbitration agreement and withdraw.

De lege ferenda, it would probably be appropriate to provide that if the institutional arbitration rules of procedure effectively applicable to the dispute are different from the rules valid on the arbitration agreement's conclusion date, either Party may decline to apply the rules in force by the arbitration proceedings' time, provided that such attitude is adopted in good faith. This means that the Party wishing to avoid incidence of rules of procedure applicable by the time of the action must prove that the rules in force at the date of conclusion of the arbitration agreement were determinant in taking the decision to submit future disputes to arbitration.

Secondly, we argue that the right of parties to "mutually agree" on the application of other rules of arbitral procedure than those prevailing at the date of referral to the arbitration court can not be untied to rules. Parties have no reason to refer to other rules than those allowed for by the arbitration agreement. This may be explicit – reference to certain rules is contained in the agreement – or implicit – where the agreement referred to a particular arbitral institution, being understood that its rules shall also be considered, obviously in force on the agreement's date. Consequently, when the Parties agree on their dispute to be subject to other rules of procedure than those valid on the action's date, they may choose only rules applicable by the time of the arbitration agreement.

16. As argued in the preamble, the new Code of Civil Procedure shall enter into force under a special law, and the time until then is deemed to be employed to prepare its application promptly.

Arbitration agreements concluded today are likely to be effective under the rules of procedure circumscribed by the provisions of the new Code of Civil Procedure, i.e., rules different from the ones in force on the relevant agreement's date. Aware of this case, interested subjects of law shall keep clear to designate Romanian arbitration institutions as relevant courts, insomuch as they get wise to the existence of inconsistencies between their procedural rules and provisions of the new Code of Civil Procedure. *Therefore, we argue that harmonization of rules*

of procedure currently applied by the institutional arbitration in Romania with the new Code of Civil Procedure should be implemented immediately. Otherwise, the disadvantages ensuing from the application of rules in force by the action's date that are different from those on the arbitration agreement's date can not be avoided. Thereupon, at the expense of institutional arbitration in Romania and legitimate interests of participants in civil / commercial circuit.

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