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DOCTORAL THESIS

- SUMMARY -

PRIVATE INTERNAL ARBITRATION IN REGULATION OF THE PRESENT ROMANIAN CIVIL PROCEDURE CODE

(Note: given the restrictions determined by the "limited size" of "Summary" this only includes a general description of judicial problems in the doctoral thesis, without doctrinaire and jurisprudential analysis)

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PLAN OF THE DOCTORAL THESIS

CHAPTER I
GENERAL ASPECTS REGARDING PRIVATE ARBITRATION

SECTION 1.1.
THE CONCEPT OF PRIOR ARBITRATION

1.1.1. *Preliminary notes*

The development the arbitration knew in the past decades, the speed with which it expanded, from the field of commercial law in general and of the international commerce, in particular, where it is mainly applied, also to other fields makes it a viable alternative to state law, which is more and more expensive and particularly, less and less expedient.

Arbitration is not only an institution of Greek-Roman laic origin. It is also referred to in religious documents.

In France, in the Middle Ages, arbitration is frequently mentioned in foyers.

Presently, the arbitration is an institution found in all European countries, in the American ones and in almost all African and Asian countries even if, sometimes, the internal laws are not favourable to it.

The arbitration is not a substitute of state law, and it also doesn't aim to prejudice its field. Between arbitration and state law there is no relation of competition, but of completion, integration of the range of Civil Codes of solving litigations. In any Civil Code, compared to state jurisdiction, the arbitration has incontestable advantages.

1.1.2. *The notion of private arbitration*

Etymology and history make "arbitrator" and "arbitration", words coming from the same family, have the meaning and connotations related to "impartiality", "measure", "safety", "will", "decision" and "assessment".

In the current language, the term "arbitration" has the meaning of solving a litigation by an arbitrator or leading a sports competition, also by an arbitrator.

In the legal language, in absence of a meaning established by the lawmaker, the doctrine in the field offers to the notion of "arbitration" various definitions.

In substance, "arbitration" is a "private jurisdiction with contractual origin".

Art. 541 paragraph (1) Civil Procedure Code evokes "the essential elements", which can be used in order to outline a "definition" for private arbitration: "contractual nature"; "alternative jurisdiction"; "non-state jurisdiction"; "private nature". Another "essential" aspect is the "nature of the litigations" which could be solved in this Civil Code.

In relation to us, private arbitration could be defined as the "non-state and conventional alternative form of solving litigations, except the particular cases provided by law, provided with the observance of public order and good morals by the arbitrators assigned by the litigant parties or by a permanent arbitration institution.

Finally, there are various "forms of arbitration": *ad-hoc* arbitration and institutionalized arbitration; commercial arbitration and arbitration in terms of labor litigations, equity arbitration (*ex aequo et bono*) and strict law arbitration (*stricto iuris*); internal and international arbitration.

SECTION 1.2.
THE LEGAL NATURE OF THE PRIVATE ARBITRATION

In relation to the "legal nature" of arbitration, in the doctrine appeared three thesis: "jurisdictional"; "contractual"; "dual".

The arbitration involves two elements: the "contractual" and the "jurisdictional" one.

In the regulations prior to the creation of the arbitration court and the beginning of its activity prevail the regulations which establish or evoke the "contractual" nature of arbitration. Instead, in the regulations which hand over the activity of the arbitration court and its completion by arbitral decision prevail the provisions establishing or evoking the "jurisdictional" nature of arbitration. "The hybrid nature" of arbitration cannot be contested.

Under the influence of the present Civil procedure code, the acceptable solution is that arbitration has a "dual nature", a contractual one, through its origin, and a "jurisdictional" one, through the procedure according to which is performed and, especially, through the decision issued by the arbitration court.

SECTION 1.3.
THE EVOLUTION IN TIME OF THE ESTABLISHED REGULATIONS OF PRIVATE ARBITRATION

1.3.1. *The private arbitration in ancient times*

Traces of arbitration can be identified even in ancient times. So, the "Iliad" and Aristotle's "Rhetoric" are evoked in the specialty literature.

In Roman Law, "the arbitration contract" was a convention, different from nominate or innominate contract. The *ex compromissio* arbitrator was no longer appointed by the magistrate, by appointed by the parties of the litigation.

1.3.2. *The private arbitration in the old Romanian laws*

In Romania, the arbitration is evoked for the first time in the "Legal manual of Andronache Donici" in Moldavia, since 1814. Subsequently, this is found in the "Calimach Code" in 1817 (Moldavia) and the "Caragea Code" of 1818 (Walachia). These regulations have taken over mostly the experience of Greek and Roman legal experts in terms of arbitration.

1.3.3. *The private arbitration in the regulation of the 1865 Romanian Civil Procedure Law*

Following the pattern of the French Civil Procedure Code of 1806 and of the one of the Geneva Canton in 1819, the Romanian Civil Procedure Code in 1965 has regulated the "private arbitration" in Book IV (art. 340-371), which had the marginal name "about arbitrators".

The provisions of Book IV of the old Civil procedure code have been applied until the establishment of the communist regime, when their liberal principles entered in conflict with the precepts of socialist law.

For almost five decades, until 1993, the provisions of Book IV in the old Civil procedure code have not been applied anymore, without being formally revoked. The incidence of the established regulations of arbitration has been reduced to the segment of external commerce reports, the only arbitration institution in Romania being the Arbitration Chamber attached to the Chamber of Commerce and Industry of the Socialist Republic of Romania.

The actual operation of arbitration was performed since 1993, when Book IV of the old Civil procedure code was substantially amended by point 20 of Law no. 59/1993 for the amendment of the Civil Procedure Code.

Currently, the Civil Procedure Code regulates the following aspects regarding arbitration: general provisions (art. 541-547); the arbitration convention (art. 548-554); the arbitrators (555-570); the arbitral procedure (art. 571-607); the dissolution of the arbitral decisions (art. 608-613); the performance of the arbitral decision (art. 614-615); the institutionalized arbitration (art. 616-621).

SECTION 1.4.
SEPARATING THE PRIVATE ARBITRATION FROM OTHER LEGAL INSTITUTIONS

The separation of arbitration from other judicial institutions is of considerable interest, practical as well as theoretical. Generally, the separation between the various legal institutions is performed based on scientific criteria. Concretely, in the case of arbitration, the main criteria are the "existence of a litigation" and "the will of the parties ". Together with these "main" criteria, there are also other criteria used, called "auxiliary", such as the background check of the claims, in order to establish if they are grounded and the incumbency of the arbitrator's decision for the litigants.

Usually in the doctrine, the separation is performed between the arbitration, on one hand, mandate, transaction and mediation, on the other hand.

SECTION 1.5.
ADVANTAGES AND DISADVANTAGES OF THE PRIVATE ARBITRATION

Advantages: the private arbitration evokes the idea of partnership between the litigation parties; as the arbitral justice is performed through arbitrators assigned by the litigants, it has a high degree of trust in relation to the state one; the liability of the arbitrators for damages produced to the parties determine from them a greater diligence for correctly solving the litigation; as the arbitration procedure is essentially confidential, which is pretty important especially in the relations between professionals; the arbitration procedure has the chance to eliminate the useless, obstructive or redundant procedural issues; it increases the chances to correctly solve the litigation as, by compromise or through the

arbitration clause, the litigants can establish that the litigation between them is solved by equity; the arbitration expenses are borne according to the convention of the parties, circumstance which highlights the idea of partnership of the arbitration; the arbitration procedure is distinguished by expedience; the arbitration procedure has the same guarantees as the one performed in front of the court of law; the arbitration procedure has great flexibility.

Disadvantages: the witnesses are not heard under oath; the arbitration court cannot use constraint means and can't apply sanctions to witnesses or experts; the insurance and temporary measures, as well as establishing de facto circumstances, in case of resistance, can be decided only by the court of law which would have had the competence of solving the litigation of the parties hadn't appealed to arbitration etc.

CHAPTER II
ORGANIZATION OF THE PRIVATE ARBITRATION

SECTION 2.1.
ORGANIZATION OF THE PRIVATE ARBITRATION BY THE PARTIES

Under the marginal name, "organisation of the arbitration by the parties", art. 544 Civil Procedure Code, establishes the main rules regarding this arbitration mean: the arbitration is organized and performed according to the arbitration convention; under reserve of compliance with the public order and good morals, as well as of the imperative provisions of the law, the parties can establish by arbitration convention or by written document concluded subsequently, the later once the arbitration court is established, either directly, or by reference to a certain regulation having as subject arbitration, the regulations regarding *the formation of the arbitration court*, the appointment, the dismissal and replacement of the arbitrators, the term and place of arbitration, the procedural regulations that the arbitration court must follow in judging the litigation, including possible preliminary procedures for solving the litigations, the division of the arbitral expenses among the parties and, in general, any other regulation regarding the good performance of the arbitration. In absence of these rules, the arbitration court can establish the procedure that shall be followed as he thinks more appropriate. If neither the arbitration court has established these regulations, the provisions established by the Civil procedure code shall be applied.

SECTION 2.2.
ORGANISATION OF THE INSTITUTIONALIZED ARBITRATION

2.2.1. *Preliminary notes*

Art. 616-621 Civil Procedure Code form Title VII of Book IV (about arbitration) and have the marginal name "institutionalized arbitration". Practically, it regulates the following aspects: the notion of institutionalized arbitration (art. 616); the choice of institutionalized arbitration (art. 617); the arbitrators (art. 618); the arbitration rules (art. 619); the arbitration expenses (art. 620); the refuse to solve the litigation (art. 621).

2.2.2. *The notion of institutionalized private arbitration*

According to art. 616 paragraph (1) thesis I Civil Procedure Code, the institutionalized arbitration is that form of arbitral justice which is established and operates permanently attached to an internal or international organization or institution or as independent public interest non-governmental organisation, according to the law, based on the independent regulation applicable in case of litigations submitted to be solved according to an arbitration convention.

In the doctrine it was assessed that an arbitration, in order to be qualified as "permanent arbitration institution" must meet the following requirements: have in its object of activity the provision or also the provision of "arbitration services", we complete, private; have a pre-established functional structure, with a continuous or virtually continuous, with independent management and staff, as well as an independent material base enough to provide private arbitration services; have in independent organisation and operation regulation, as well as own arbitration rules.

In relation to us, we define the "institutionalized arbitration" as the "form of arbitration jurisdiction with permanent and non-profit activity, which operate attached to a Romanian public or private law legal person or as independent legal person based on an independent regulation, applicable to all litigations submitted to it to be solved ".

2.2.3. *Choosing the institutionalized private arbitration*

Art. 617 Civil Procedure Code, under the marginal name "choice of the institutionalized arbitration ", provides that the parties, by arbitration convention, can submit their litigations to a certain arbitration court belonging to institutionalized arbitration [paragraph (1)]. In case of contradiction between the arbitration convention and the regulation of the institutionalized arbitration it refers to, the arbitration convention shall prevail [paragraph (2)].

For the choice of the institutionalized arbitration we are interested not only in "the agreement of the litigants" but also "the agreement between them and the arbitration institution ". Considering the "preparatory nature" of the litigant's convention, the arbitration institution cannot accept the organization of the arbitration in absence of their agreement. In case the arbitration institution is notified directly by the litigants for the organization of the arbitration, it has the obligation to assess, as applicable, if their approval exists or not.

The agreement of the parties for assigning the arbitration institution has as effect "the contractualization" of its regulation. As a consequence, the failure to comply with the rules in the regulation of the arbitration institution can bring the contractual civil liability of the party concerned. In relation to this, the French doctrine expressed itself in a case.

The litigants are not compelled to refer to an arbitration institution, eventually to one in whose territorial jurisdiction the respondent party has its domicile, residence or head office. Indeed, in case of the arbitration organized by the parties, art. 569 Civil Procedure Code decides unequivocally that "the parties establish the place of arbitration". Instead, in the case of institutionalized arbitration, art. 617 paragraph (1) Civil Procedure Code provides that "the parties can agree for the arbitration to be organized by a permanent institution", without establishing any criteria in relation to the choice of that institution.

In principle, there is the problem of the legal remedy in case the litigants do not get to an agreement in relation to the "assignment of the permanent arbitration institution". In this case, the only legal solution is for the interested party to refer to the competent court of law to solve the litigation. A solution which orders the party, even by legal decision, to refer to certain permanent arbitration institutions seriously and obviously disregards the "voluntary nature" of the arbitration.

SECTION 2.3.
REPRESENTATION OF THE LITIGANTS IN FRONT OF THE ARBITRATION COURT

In general, in case of litigations submitted to arbitration, the parties exercise their procedural rights directly or through a defender or legal counsellor. Also they can be assisted by other specialists.

Practically, art. 546 Civil Procedure Code, under the marginal name "representation of the parties", establishes the following rules: in arbitral litigations, the parties can make requests and can perform their procedural rights personally or through representative. They can be assisted by other specialists.

SECTION 2.4.

THE INTERVENTION OF THE COURT OF LAW IN THE ARBITRATION PROCEDURE

Art. 547 Civil Procedure Code, under the marginal name "intervention of the court of law", establishes the following rules: in order to remove the obstacles which might arise in the organization and performance of the arbitration, as well as to perform other responsibilities which belong to the court of law in the arbitration, the interested party can notify the court in whose jurisdiction the arbitration takes place; the court shall solve the case in the panel provided by law for the court of first instance; the court shall solve these emergency requests and mainly through the procedure of presidential ordinance, the decision not being submitted to any remedy at law.

In the old regulation, art. 342 of the Romanian Civil Procedure Code of 1865 provided that, in order to remove the obstacles which might arise in the organization and performance of the arbitration, the interested party can notify the court of law, which in absence of the arbitration convention, would have been competent to judge the litigation on the substance, in first instance.

CHAPTER III
THE ARBITRATION CONVENTION

SECTION 3.1.
PRELIMINARY NOTES

Art. 544 paragraph (1) Civil Procedure Code establishes that the arbitration is organized and performed according to the "arbitration convention", as well as the elements of the arbitration convention. The arbitration convention can be concluded either in the form of an "arbitration clause", registered in the main agreement or established by a separate convention the agreement refers to, or under the form of "compromise".

SECTION 3.2.
the arbitration clause

3.2.1. *General information*.

Art. 550 Civil Procedure Code, under the marginal name " arbitration clause", establishes the main rules applicable to it. So, through the arbitration clause the parties agree that the litigations which shall arise from the agreement which stipulates it or in relation to it are solved by arbitration, showing, under the sanction of nullity, the method for appointing the arbitrators. In the case of institutionalized arbitration it is enough to refer to the institution of the procedural laws of the institution which organizes the arbitration; the validity of the arbitration clause is independent of the validity of the agreement in which was registered; in case of doubt, the arbitration clause is interpreted in the meaning that it is applied to all misunderstandings deriving from the agreement or from the legal report it refers to.

Through the arbitration clause, the parties establish that the possible disputes resulting from the agreement concluded between them or in relation to it, to be solved through private arbitration. Practically, "the arbitration clause" is shown as a "compromise under suspensive condition" to interfere in a litigation and assign the arbitrators of the arbitration court'.

The main feature of the "arbitration clause" is its "anteriority" in relation to the moment "of appearance of the litigation" between the contracting parties.

In relation to its legal nature, "the arbitration clause" is a "reciprocal clause" meaning that when a litigation appears from the contract or in relation to the contract where it is entered, it brings forth mutual and interdependent rights and obligations for both parties.

3.2.2. *The validity conditions of the arbitration clause*

In the meaning of the arbitration clause, formulated before a litigation appears, its object is stipulated in the generic terms, meaning is formed of the "litigations which shall arise from the agreement in which it is stipulated or in relation to it ".

The object of the arbitration clause is materialized after the litigation appears and the arbitration court is notified by the interested party.

In terms of validity conditions of the arbitration clause, the "written form" and the "specification of the means for assigning the arbitrators" are analyzed ".

SECTION 3.3.
THE COMPROMISE

3.3.1. *Preliminary notes*

By compromise, the parties agree that a litigation interfered between them shall be solved by arbitration showing, under sanction of nullity, the object of the litigation and the names of the arbitrators or their appointment method in case of ad-hoc arbitration. In the case of institutionalized arbitration, if the parties have not chosen the arbitrators or their appointment method, this shall be performed according to the procedural rules of the related arbitration institution. The compromise can be concluded only if the litigation interfered between the parties is already on the dockets of another court.

"The compromise", being a form of the "arbitration convention has some similarities but also differences in relation to "the arbitration clause".

The compromise, being in itself an agreement, must meet all the requirements of art. 1166-1323 Civil Code for the contract, in general. Beside these requirements, art. 551 Civil Procedure Code requires also the cumulative compliance with two special requirements: indicating the subject of the litigation; indicating the name of the arbitrators or their assignment methods.

The specialty literature evokes certain definitions that the jurisprudence or the doctrine in the European countries give to compromise and which have been,

in a certain way, inspiration sources for the regulatory content of art. 551 Romanian Civil Procedure Code. So, in the French doctrine, compromise is considered a judicial convention *sui generis*. Alternatively, in the Swiss jurisprudence, compromise is seen as a "procedural agreement" submitted to public law.

3.3.2. *Indicating the object of the litigation*

In the absence of a legal specification and even of doctrinaire preoccupations to establish its significance, fundamentally we have to establish the meaning of the expression "object of the litigation ".

In the doctrine it was established that the "object of a litigation" which shall be solved by arbitration is not different, in relation to the determination terms, by the object of a litigation referred to a court of law.

On the other hand, as already specified, the arbitration is not allowed in case of litigations regarding the civil status, the capacity of people, the hereditary dispute, the family relations as well as the rights in relation to which the parties cannot decide. Also, the litigation regarding "the rights in relation to which the parties cannot decide" cannot be submitted to arbitration ".

3.3.3. *Indicating the arbitrators*

In the case of *ad-hoc* arbitration the arbitrators can be assigned either by indicating their "name", either by " appointment method ". Instead, in the case of institutionalized arbitration, if the parties have not chosen the arbitrators and have not established their appointment method, this shall be performed according to the procedural rights of that arbitration institution. The failure to mention the names of the arbitrators or their appointment method brings the nullity of the compromise.

In relation to the possibility to assign as an arbitrator a "collective person" (legal persons) things are separated, as art. 555 Civil Procedure Code categorically provides that an arbitrator can be any natural person which has full capacity to exercise.

SECTION 3.4.
COMMON REQUIREMENTS FOR THE VALIDITY OF THE ARBITRATION CONVENTION

3.4.1. *General information*

"The arbitration convention", independently of the form it gas, "arbitration clause" or "compromise" must comply with certain substance and form requirements. Also, in the same context, it is necessary to analyze aspects related to "the arbitration convention" in general, as well as the nullity of the arbitration convention, the caducity of the arbitration and the evidence of the arbitration convention. For reasons related strictly to systematization of the paper, we analyze in the same context also the compromise during the judgement of the litigation by a court of the law.

3.4.2. *Background conditions of the arbitration convention*

Essentially, "the arbitration convention" is a "contract". As a result, it is absolutely natural that in the context of a paper dedicated to "private arbitration" to analyse, even if only synthetically, "the essential conditions for the validity of an agreement, meaning: the ability to contract; the valid consent of the parties which commit; a determining, possibly licit object; a valid cause of the obligations.

3.4.3. *The nullity of the arbitration convention*

The nullity of the arbitration convention can appear from various reasons. According to the Civil procedure code, the following are reasons for the nullity of the arbitration convention: the failure to comply with the written form and to indicate the method for the appointment of the arbitrators. Also, the disturbance of peace and good morals brings the nullity of the arbitration convention. Obviously, these are "special" and "explicit reasons" of nullity for the arbitration convention.

Besides these reasons, there are other "general" ones stipulated by the Civil Law for any legal act, such as failure to comply with the legal provisions regarding the exercise ability or the vitiation of the consent of one of the parties.

3.4.4. *The caducity of the arbitration*

3.4.5. *The proof of the arbitration convention*

Under the nullity sanction, the arbitration convention is concluded in writing, and in relation to a litigation related to the transfer of the property right and/or establishing another real right on a real estate, it is concluded in an authentic notarial form, under the sanction of absolute nullity. Practically, the proof of the arbitration convention is performed with the document concluded for this. Except the case stipulated by art. 548 paragraph (2) Civil Procedure Code, in which the form of the "authentic notarial document" is imposed, "any

type of document" is admissible. Consequently also the legal provisions regarding the beginning of a written proof are applicable in the matter.

3.4.6. *The compromise during the lawsuit of a litigation*

SECTION 3.5.
THE EFFECTS OF THE ARBITRATION CONVENTION

3.5.1. *General information regarding the effects of the civil legal action*

In this context we analyze: the principal of the binding force of the legal act; the principle of unilateral irrevocability of the bilateral legal act; the principle of relativity of the civil legal act; exceptions from the principle of relativity of the effects of the legal act.

3.5.2. *Particular aspects regarding the effects of the arbitration convention towards the parties*

In relation to the arbitration convention, the law does not establish special rules in relation to its effects, and for these reasons, the rules of common law are totally applicable. Anyway, the conclusion of the arbitration convention excludes the competence of the courts of law for the litigation subject to it.

Also, the arbitration convention is "unseverable". As a result, in the absence of a contrary agreement, its annulment or expiry is related to the whole litigation, and not only a part of it.

SECTION 3.6.
LITIGATIONS WHICH CAN BE ARBITRATED

3.6.1. *General information*

The litigants do not have the discretionary option, meaning they have the possibility to submit any kind of litigation to arbitration, independently of its nature. In reality, and in this field, the freedom of will is limited by "public order" and "good morals".

3.6.2. *Litigations which cannot be submitted to arbitration*

Together with the litigations whose settlement by arbitration disregards the "public order" and "good morals", also the litigations regarding "civil status",

"the capacity of people", "the hereditary dispute", "the family relations" as well as "the rights in relation to which the parties cannot decide" are excluded.

Also the doctrine analyzes other categories of litigations, such as the followings: litigations for which there is a special legal procedure; criminal litigations; litigations subject to administrative law; litigations regarding the administrative-contravention liability; fiscal litigations; litigations regarding copyright and related rights; litigations related to invention patents.

CHAPTER IV
THE ARBITRATION COURT

SECTION 4.1.
PRELIMINARY NOTES

The arbitration can be entrusted to one or more people, invested by the parties to judge the litigation and issue a final and mandatory decision for them. The sole arbitrator or, according to the case, the appointed arbitrators are the arbitration court.

According to the present regulation, there is no longer the issue of a certain priority between the "unipersonal arbitration" in relation to the "collegiate arbitration" or otherwise.

The entrusting of arbitration is performed through the "the arbitration convention".

The litigants are the ones which, on one hand, decide if the litigation shall be submitted to arbitration and, on the other hand, if the arbitration shall be performed by one or more arbitrators. These rules are incidental also in the case of "institutionalized arbitration ".

Independently of the method used to appoint the arbitrators, they must accept in writing the task and communicate the acceptance to the parties.

In the doctrine, in principle, there was the issue of "the nature of the arbitrator position" concluding that, even if appointed by the parties or by one of them, he cannot be considered a "representative" of the parties.

SECTION 4.2.
THE PERSONS WHICH CAN BE AN ARBITRATOR

4.2.1. *Requirements for a person to be an arbitrator*

Any natural person with a full exercise capacity can be an arbitrator. The only conditions are for the person to be a natural person and have full capacity of exercise. Still, there are laws which forbid certain persons with various "public positions" or to occupy other positions or perform a series of public and private activities, such as the one of arbitrator.

By their convention, the litigants can decide to exclude certain persons or categories of persons from being an arbitrator for solving the litigation between them. So, the following cannot be an arbitrator: the person under tutelage or guardianship; the person convicted to the accessory or complementary criminal penalty of having a position, performing a profession or a job or the activity used for performing the offence; "the person declared bankrupt".

4.2.2. *The number of arbitrators*

The parties establish if the litigation is judged only by the sole arbitrator or by various arbitrators, which always have to be an uneven number. If the parties had not established the number of arbitrators, the litigation is judged by 3 arbitrators, one appointed by each of the parties and the third, the referee, assigned by the two arbitrators. Presently, the referee has the same "power" as the other two arbitrators, "its role" being to achieve "the majority" in adopting the arbitral decision.

4.2.3. *The appointment of arbitrators*

In principle, the arbitrators are appointed, revoked or replaced according to the arbitration convention. In case the sole arbitrators or, according the case, the arbitrators have not been appointed by the arbitration convention and the appointment method has not been provided, the party which wants to submit to arbitration shall communicate to the other party, in writing, to perform their appointment. The party to which the communication was sent must sent, in turn, the answer to the appointment proposal of the sole arbitrator or, according to the case, the name, first name, residence and, as much as possible, the personal and professional information of the arbitrator assigned by it.

4.2.4. *Particularities regarding the arbitrators in the case of institutionalized arbitration*

In the case of "institutionalized arbitration", one can prepare optional lists of people which can be arbitrators or referees, but which do not have a mandatory nature. If the parties do not reach an agreement related to the sole arbitrator or when a party does not appoint the arbitrator or when the 2 arbitrators do not reach an agreement regarding the referee, the appointment authority is the president of institutionalized arbitration. So, also in case of institutionalized arbitration, the principle is the appointment of the arbitrators by the litigants, through arbitration convention.

SECTION 4.3.
THE ROLE OF THE ARBITRATORS

4.3.1. *The legal nature of the arbitrator's role*

The arbitrators have a "jurisdictional position" of "conventional nature".

4.3.2. *Accepting the arbitrator task*

The position of arbitrator is optional. Consequently, it seems absolutely natural for the arbitrator to have the possibility to accept or, on the contrary, refuse this task.

4.3.3. *The power of the arbitrators*

In principle, "the powers" of arbitrators are the ones of the judges. Still, given the conventional nature of the arbitration, the powers of the arbitrator having also some important derogations.

4.3.4. *Termination of the arbitrator's role*

The identification of the reasons which determine the termination of the arbitrator position is important because, usually, from this date, the arbitration convention stops being effective. Practically, after this date, in order to apply for arbitration, the litigants must conclude a new arbitration convention.

The termination of the arbitration task takes place by: recusation, reversion, abstention, receding, death, as well as in any case when the arbitrator is prevented from complying with his task.

In the specialty literature there have been identified also other reasons which determine the termination of the arbitrator's task, namely: the communication of the arbitral decision by the parties; the court of law considered the litigation for judgement; the arbitrator did not perform his task as he gave up the appointment of arbitrator, either by failure to attend the judgement of the litigation, or by failure to issue the arbitral decision in the term provided by law or by the arbitration convention; the death of the arbitrator; the prevention of the arbitrator; the abstention of the arbitration; the object of the litigation disappeared.

4.3.5. *Liability of the arbitrators*

The arbitrators are liable, according to the law, for the prejudice produced if: after the acceptance, they give up their task; without a justified reason they do not attend the judgement of the litigation, or they do not issue the decision in the term established by the arbitration convention or by the law; they do not comply

with the confidential nature of arbitration, publishing or revealing data which they acknowledge as arbitrators, without the authorization of the parties; in bad faith or gross negligence, they do not comply with any other debts they have.

In relation to the "legal nature of the arbitrators' liability", we are tempted to consider we are talking about "civil liability ".

SECTION 4.4.
THE COMPETENCE OF THE ARBITRATION COURT

4.4.1. *Preliminary notes*

The main effect of the arbitration convention is to submit the litigations or litigation between the parties to the arbitration court for settlement and, in correlation, to avoid the competence of the courts of law.

The arbitration court has a "general competence" and a "determined competence" (special) in relation to (a) certain litigation(s), virtual or real, evoked or indicated in the arbitration convention.

4.4.2. *The content and limits of the arbitration competence*

The competence assigned to the arbitration court through the arbitration clause is similar to the material competence assigned to the courts of law by art. 94 and following Civil Procedure Code

The assessment "of the competence limits for the arbitration court" can be achieved, in a "wide sense" (*lato sensu*) and in another "limited" on (*stricto sensu*). So, it is possible for the court of law or the arbitration court, notified by a preliminary request, to assess in a wide sense the intention of the parties to avoid, generally, "any litigation" from the competence of the court of law. Instead, the assessment *stricto sensu* of the competence limits for the arbitration court is necessary, most of the times, to avoid the dissolution of the arbitral decision by reasons of *ultra petita* or *plus petita*.

If the parties have not provided otherwise, the arbitration court must issue the decision within 6 months from the date it was established, under sanction of arbitration caducity. Currently, we know three methods for extending the term of the arbitration: by agreement of the parties, through motivated decision of the arbitration court and of the court of law.

The termination of the competence o the arbitration court can interfere before the completion of the arbitration term and also for other reasons: in case of recusation, reversion, abstention, receding, death, as well as in any case when the arbitrator is prevented from complying with his task.

SECTION 4.5.
THE COMPETENCE CONFLICTS IN TERMS OF ARBITRATION

4.5.1. *Preliminary notes*

The possible "competence conflicts" can only appear between the state jurisdiction and the arbitration jurisdiction. The separation of the competence of the arbitration court from the one of the courts of law is assumed from the principle according to which, the conclusion of the arbitration convention excludes the competence of the courts of law for the litigation subject to it.

4.5.2. *Excluding the competence of the courts of law*.

The conclusion of the arbitration convention excludes the competence of the courts of law for the litigation subject to it.

The competence of the arbitration court is separated, in its legal and general framework, by the agreement of the litigants and, correlatively, this competence has as effect the avoidance of the litigations subject to it by competence of the courts of law.

In principle, given the conventional nature of the arbitration, the arbitration competence cannot be extended to people which are not parties in the arbitration convention.

The possibility of the parties to give up the arbitration competence is the natural consequence of their freedom of will in conventional matters. The renunciation of the party or parties to the arbitration competence can be explicit or silent.

The lack of competence of the court of law because there is an arbitration convention which can be invoked by the interested party by way of a procedural exception for the litigation on its dockets, which must be invoked *in limine litis*, meaning until the conclusion of the debates and hearing the merits.

The competence conflict between the arbitration court and one court of law is solved by the court of law superior to the one in conflict.

4.5.3. *Checking the arbitration competence*

At the first hearing with a fully compliant procedure the arbitration court has the obligation to check its own competence of solving the litigation. If the arbitration court decides it is competent, it registers this in a court resolution, which can dissolve only the annulment action introduced against the arbitral decision. If, on the contrary, the arbitration court decides it is not competent to solve the litigation notified, it declines its competence through a decision against which no appeal of annulment can be made.

The check of the arbitration court's competence can be performed also as a result of the non-competence exception made by the parties or only by one of them, invoked when the merits are submitted.

The arbitration court decides in relation to its competence by a resolution, which can be dissolved only by an annulment action introduced against the arbitral decision.

The court of law, notified with an action in relation to which an arbitration convention was concluded, shall check its own competence and shall declare itself incompetent only if the parties or one of them requests this, invoking the arbitration convention. In this case, the court shall give up its competence in favour of the organization or institution where the institutionalized arbitration operates which, according to the grounds of the decision to decline, shall take the necessary measures for establishing the arbitration court. In case of ad-hoc arbitration, the court shall reject the demand as not being the competence of the court of law.

CHAPTER V
ARBITRATION JUDGEMENT

SECTION 5.1.
COMMON PROCEDURE RULES

5.1.1. *General information*

The arbitration judgement is performed according to the procedural rules established in the arbitration convention or by the arbitrators. These rules are amended, if applicable, by the provisions of the Civil Procedure Code established for private arbitration.

In the arbitration procedure there is the incumbency of proper compliance with the following main principles of the civil trial: no judge, in the case arbitrator, can refuse to issue a decision invoking the reason that the law does not have provisions, is unclear or incomplete; the performance of the procedural rights in good faith, according to the purpose for which they have been recognized by the law and without affecting the procedural rights of another party; guaranteeing the right to defence; audi alteram partem; vocality; continuity; compliance by the judge (arbitrator) with the main principles of the civil trial; the attempt to reconciliate the parties; the settlement of the litigation by the judge (arbitrator) according to the rightfully applicable rules; the obligation of the judge (arbitrator) to prevent any mistake in finding out the truth in the case, in order to issue a solid and legal decision; establishing the legal qualification of the offences by the judge; the interdiction for the judge (arbitrator) to change the name or legal grounds in case the parties, in virtue of a explicit agreement regarding rights they can have, according to the law, have established the legal qualification and the rightful reasons for which they decided to limit the debates, if in this manner they do not affect their legitimate rights or interests; the obligation of the judge (arbitrator) to issue an opinion about everything requested to him, but without exceeding the limits of the appointment, beside the cases in which the law decides otherwise; the obligation of the people present at the proceedings (arbitration proceedings) to show the due respect to the court (arbitration court), without affecting the performance of the proceedings (arbitration proceedings).

5.1.2. *Procedural rules applicable to institutionalized arbitration*

By exception, in case the parties submit to institutionalized arbitration, if not agreed otherwise by the parties, the procedural rules in force for institutionalized arbitration at the moment of its notification shall be applied.

5.1.3. *Notification of the arbitration court*

The procedural act with which the arbitration court is invested with a claim is the "arbitration request". The arbitration request is equivalent to "the suing request ".

Independently if mentioned in an "unilateral act" or in a "bilateral act", the arbitration request must have the "written form" and must include the data mentioned by art. 571 Civil Procedure Code

By exception from common law, in the arbitration procedure the plaintiff has the obligation to send to the respondent, as well as to every arbitrator, a copy of the arbitration request and of the attached documents.

In the arbitration procedure, within 30 days from receiving the copy of the arbitration request, the respondent has the obligation to submit a statement of defence.

In relation to the counterclaim in arbitration matters, art. 574 Civil Procedure Code establishes the following procedural rules: if the respondent has claims against the plaintiff, deriving from the same legal relation, he can make a counterclaim; the counterclaims shall be introduced in the term for filing the statement of defence or the latest until the first hearing where the respondent has been legally summoned, and must comply with the same conditions as the main request.

In the common law, as well as in matters of arbitration, the submission of the counterclaim is "optional".

In relation to "common law", in the arbitration procedure, the counterclaim has significant peculiarities.

SECTION 5.2.
ACTUAL ARBITRATION JUDGEMENT

5.2.1. *Communication of the procedural actions*

The communication between parties or to the parties of the documents of the litigations, of the subpoena, of the arbitral decision and of the court resolutions is performed by certified mail with declared content and

acknowledgment receipt. The notification of the parties in relation to other measures taken by the arbitration court can be also performed by telefax, electronic mail or other means which ensure the delivery of the document and its acknowledgment receipt. The documents can also be handed personally to the party, under signature. The communication proofs are submitted to the file.

5.2.2. *Checking the file*

Before the expiry of the term for submitting the statement of defence, the arbitration court checks the stage of preparation of the litigation for debate and, if he considers it necessary, he shall decide the proper measures to complete the file.

The checks of the court must regard especially the compliance of the plaintiff with the validity requirements for the arbitration request and also, if the respondent has prepared a statement of defence and/or counterclaim, if these also comply with the legal requirements. Also, the arbitration court has the obligation to check the documents attached to the arbitration request, to the statement of defence and to the counterclaim, as applicable. Obviously, in case of establishing certain irregularities, the arbitration court shall decide the necessary measures to remedy them.

After this check and, if applicable, after completing the file, the arbitration court establishes the term for debate of the litigation, and decides to summon the parties.

5.2.3. *The summoning term*

Between the date of receipt of the subpoena and the debate term there must an interval of at least 15 days. This term is established in the interest of the respondent and has the role to offer him the possibility to prepare the defence.

5.2.4. *Checking the competence of the arbitration court*

At the first hearing with a fully compliant procedure, the arbitration court checks its own competence to solve the litigation. If the arbitration court decides it is competent, it registers this in a court resolution, which can be dissolved only by the avoidance action introduced against the arbitral decision. In exchange, if the arbitration court decides it is not competent to solve the litigation notified, and declines its competence by a resolution, against which it cannot make an avoidance action.

5.2.5. *The participation of the parties to the arbitration procedure*

Unlike "third parties", in case their participation to the arbitration procedure has established an explicit regulation, in the case of "litigants" we do not find any text which explicitly provides this. Moreover, the participation of the parties to the arbitration procedure can be assumed, consequently, by the various texts of the Civil Procedure Code.

The failure of the legally summoned parties to appear does not prevent the debate of the litigation, except for the case in which the absent party shall request, within 3 days before the date for which the debate was established, its postponement for thorough reasons, notifying the other party, as well as the arbitrators, in the same term. The assessment of the reliability of the reasons of absence of one of the parties, as well as of the reasons for which the absence justify the postponement of the debate is the exclusive competence of the arbitration court, its decision not being submitted to any remedy at law.

By exception, the failure of the party to appear in the term for which it was summoned can determine "the postponement of the debate", if the following conditions are cumulatively met: the absent party has asked for the postponement; the postponement request was introduced in the arbitration court at least 3 days before the compliance of the term established for the debate of the litigation; the postponement was requested for solid reasons; the absent party has notified the other party and the arbitrators about its postponement request at least 3 days before the date initially established for the debate of the litigation.

In case "both parties are absent from the arbitration procedure on the term on which they have been legally summoned", although they have been legally summoned, the arbitration court shall solve the litigation, beside the case in which the postponement has been requested for solid reasons.

The arbitration court can decide to judge the litigation in absence of the parties, if any of the parties has requested in writing for the litigation to be settled in its absence, based on the evidence on file.

5.2.6. *The participation of third parties to the arbitration procedure*

Third parties can participate to the arbitration procedure according to art. 61-77 Civil Procedure Code, but only with their approval and with the approval of all the parties. Still, the accessory intervention is admissible also without the observance of these conditions.

5.2.7. *Insurance measures in the arbitration procedure*

During the arbitration, any of the parties can request to the arbitration court to agree with insurance measures and temporary measures in relation to the subject of the litigation and establish certain de facto circumstances.

5.2.8. *The evidence and their submission in the arbitration procedure*

As in any other civil trial, and in terms of arbitration, the evidence is absolutely necessary for the court of law to know the real de facto state between the parties in litigation.

From the purpose of the arbitration one can assume that the de facto situation which must be proved is related to de facto circumstances such as: the existence of the agreement which generated the litigation, the quality of party in the agreement of the people which appealed to arbitration, the existence of the goods subject to the litigation submitted to arbitration etc.

Given the plurality and complexity of the problem usually arose by the civil litigation in general and by the private ones, especially, in the procedures which have as subject solving such litigations it is possible to use all the evidence means approved by the law.

In a phrasing which has already become a classic, art. 591 Civil Procedure Code provides that the assessment of the evidence is performed by the arbitrators according to their own opinion.

The evidence which have not been requested through the arbitration request or through the statement of defence can no longer be invoked during the arbitration, with some exceptions (the need for the evidence results from the amendment of the request; the need to present the evidence results from the judicial investigation and the party could not have foreseen it; the party demonstrates to the court that, from solid reasons, it could not propose in time the evidence requested; the submission of the evidence does not lead to postponing the settlement of the litigation; there is the explicit approval of all parties).

The arbitration court shall approve the evidence submitted only if it decides they are "useful", "relevant" and "conclusive". In the doctrine it was correctly signalled that the text analysed does not also consider the ""credible" nature of the evidence submitted by the parties.

In principle, the submission of the evidence is performed in the session of the arbitration court. This can decide for the submission of the evidence to be

performed in front of the referee or, with the approval of the parties, in front of an arbitrator from the arbitration court.

In order to solve the litigation, the arbitration court can require the parties written explanations in relation to the object of the request and the facts of the litigation and can decide the submission of any evidence provided by the law.

5.2.9. *The language in which the arbitration procedure*

The debate of the litigation in front of the arbitration court is performed in the language established by the arbitration convention or, if nothing has been provided in relation to this or no subsequent agreement was concluded, in the language of the contract in relation to which the litigation appeared or, if the parties do not agree, in an international language established by the arbitration court. If a party does not know the language in which the debate is performed upon the party's request and expense, the arbitration court shall ensure the services of a translator. The parties can participate at the debates with their translator.

The specialty literature has criticized the regulatory solution regarding the "language of the arbitration".

5.2.10. *The place of performance of the arbitration procedure*

The parties establish the place of arbitration. In absence of such a provision, the place of arbitration is established by the arbitration court.

SECTION 5.3.
INTERRUPTION AND SUSPENSION OF THE ARBITRATION PROCEDURE

5.3.1. *Preliminary notes*

Some of the possible incidents which shall be solved during the arbitration are prior to the opening of the arbitration procedure, having as subject litigious matters which have appeared between the parties before their appearance in front of the arbitration court. So, any exception regarding the existence and validity of the arbitration convention, the formation of the arbitration court, the limits of the arbitrators' tasks and the performance of the procedure until the first hearing when the party has been legally summoned must be made within this term, if a shorter term has not been established.

5.3.2. *Cases of interruption and suspension of the arbitration*

The specialty literature analyzes the following cases of interruption or suspension of the arbitration procedure: when, during the arbitration, in relation to an arbitrator interferes the recall, abstention, receding, death as well as any other case in which the arbitrator is prevented from complying with its task and if the substitute, in turn, is prevented to comply with his task; the arbitration term is suspended during the judgement of a recusation request and, obviously, of an abstention request which is actually a self-recusation; the death of one of the parties, if the action is transferable to its successors, determines the suspension of the arbitration procedure until the date they enter the case; the settlement of a harmful issue also determines the suspension of the arbitration procedure, provided the solution given in relation to it can influence the decision of the arbitration court; the suspension of the arbitration procedure during the period of settlement of the avoidance action for the reason provided by art. 594 paragraph (1) lit. a) merged with paragraph (5) Civil Procedure Code

The interruption or suspension of the arbitration procedure is reflected accordingly also on the term of the arbitration, independently if it is legal or established conventionally or even by the arbitration court.

The procedural acts performed during the "interruption" of the arbitration procedure are considered void, because they are the product of a "pseudo arbitration court". Instead, the acts performed during the "suspension" of the arbitration procedure maintain their validity, provided the party in favour of which they have been performed "confirms" them explicitly or silently.

SECTION 5.4.
SOLVING THE LITIGATION BASED ON THE APPLICABLE LEGAL REGULATIONS OR IN EQUITY

5.4.1. *Preliminary notes*

The arbitration court solves the litigation according to the main agreement and to the *applicable legal* regulations. Still, based on the explicit agreement of the parties, the arbitration court can solved the litigation *in equity*.

5.4.2. *The assumption regarding the settlement of the litigation according to the applicable legal regulations*

The assumption regarding the settlement of the litigation according to the applicable legal regulations actually expresses the common rule. Finally, the arbitration court has the obligation to settle the litigation it has been appointed to

solve according to the legal regulations, meaning neither by opportunity or in equity. Otherwise the arbitration, as well as state justice, would degenerate into the arbitrary, which is inadmissible.

Instead, "the arbitration in equity" remains the exception and, as all exceptions, must result from the explicit will of the parties and, anyway, must be of strict interpretation and application.

5.4.3. *The power of the arbitrators which solve the litigation according to the applicable legal regulations*

The arbitrator authorized by the parties to solve a litigation, in absence of an explicit convention regarding its settlement in equity, shall apply the legal regulations in force. In fact, the will of the party is legally assumed in order for the arbitration court to proceed in this manner

Finally, in this case, the arbitrator is in the same situation as the judge. So both must comply, at the same time, with the imperative and with the dispositive provisions. Also, both must consider the provisions of the agreement where that litigation originated.

Still, between the situation of the arbitrator and the one of the judge there is, on one hand, a limitation of his power in relation to the rightful regulation and, on the other hand, an expansion of his power.

5.4.4. *The power of the arbitrators which solve the litigation in equity*

The settlement of the litigation in equity can be related only to its substance.

Still, in relation to the settlement of the substance as well as in relation to the procedure, as such, the arbitrator do not have unlimited liberty, under the equity principle. So, as specified before, also in this case, the arbitrators have the obligation to comply with the "public order" and "the imperative provisions of the law".

CHAPTER VI
THE ARBITRAL DECISION

SECTION 6.1.
THE LEGAL NATURE AND DRAFTING OF THE ARBITRAL DECISION

6.1.1. *The legal nature of the arbitral decision*

The arbitral decision "is the jurisdictional action of the arbitration court through which, in the limits of the arbitration convention, of public order and good morals, they solve the litigation submitted by the parties ".

On the other hand, in the doctrine, in relation to the legal nature of the arbitral decision, at least four theses have been outlined, and specifically: the arbitral decision, as final product of a compromise, has a conventional nature or is a *sui generis* act with a contractual nature; the arbitral decision is a jurisdiction act with private origin; the arbitral decision has a jurisdictional nature, but only after it is consolidated by *exequatur*; the arbitral decision has a jurisdictional nature.

It seems that the final thesis has become the dominant one.

6.1.2. *The preparation of the arbitral decision*

In all cases, the issuing must be preceded by the secret deliberation of the arbitrators, in the manner established by the arbitration convention or, in its absence, by the arbitration court. The actual deliberation method is achieved according to the agreement of the litigants through the arbitration convention or, in its absence, as the arbitration court shall decide. Independently of the variant chosen, all arbitrators must attend the deliberation. Also, in case the court is composed of various arbitrators the decision is taken by the majority of votes.

"The issue of the arbitral decision" is an operation different from the "deliberation".

As a result of the deliberation, the arbitration court has to prepare a "minute" which shall include, briefly, the content of the decisions's enactment terms and in which the minority decision shall be shown, if applicable.

SECTION 6.2.
THE FORM, CONTENT AND OBJECT OF THE ARBITRAL DECISION

6.2.1. *The form of the arbitral decision*

In relation to the "form of the arbitral decision, this is drawn up "in writing". The requirement of the written form is necessary to express more specifically what has been found and decided by the arbitration curt, as well as to enforce it as faithfully as possible. Also the written form is claimed also by the possibility to annul it by promoting the avoidance action.

In relation to the "legal nature", the document in which the arbitral decision is registered meets all the requirements to be considered an "authentic document ".

6.2.2. *The content of the arbitral decision*

The arbitral decision must include: the names of the members of the arbitration court, the place and date of issue of the decision; the names and first names of the parties, their domicile or residence or, as applicable, the name and head office, name and first name of the parties' representatives, as well as of other people which have attended the debate of the litigation; the arbitration convention according to which the arbitration was performed; the object of the litigation and the abbreviated claims of the parties; the de facto and de jure reasons of the decision and in case of the arbitration in equity, the reasons which set out the solution in this respect; the enactment terms; the separate and rival opinion, if applicable.

6.2.3. *Clearing, completing and correcting the arbitral decision*

In case explanations are needed in relation to the meaning, extent or application of the decision's enactment terms or it includes contrary provisions, any of the parties can request the arbitration court to clear the enactment terms or remove the contrary provisions. If, by the decision issued, the arbitration court neglected issuing an opinion in relation to a head of claim, on a related or incidental request, any of the parties can request its amendment. The explanation or amendment request is presented within 10 days from the date or receipt of the decision and is solved by the arbitration court, with the summoning of the parties. The material errors in the text of the arbitral decision or other obvious errors which do not change the substance of the solution, as well as the calculation errors can be corrected, by resolution, upon request of any of the parties or ex officio. The explanation or amendment decision or the correction resolution is issued immediately and is part of the arbitral decision.

6.2.4. *Communication of the arbitral decision*

The arbitral decision is communicated to the parties within a month from its date of issue. Upon request of any of the parties, the arbitration court issues a proof regarding the communication of the decision.

SECTION 6.3.
EFFECTS OF THE ARBITRAL DECISION

6.3.1. *General information regarding the effects of legal decisions*

Given the numerous "common elements", we have recalled the effects of legal decisions, and specifically: the recall of the court; the res judicata; the executory power; the probative force; the incumbency and opposability of the decision.

6.3.2. *Particular aspects of the effects of arbitral decision*

As I have already specified, in principle, the arbitral decision has the same effects as the legal decision. Nevertheless, the arbitration decision also has certain peculiarities. So, the most important one is that the arbitration decision is not the consequence of a public service, such as "justice", but of the activity of an arbitration court, established by will of the litigants and which often judges according to the regulations pre-established by the parties or even by itself. Being an act coming from an authority with private jurisdiction, the arbitral decision cannot be performed by constrain without the authority of the courts of law.

SECTION 6.4.
ANNULMENT OF THE ARBITRAL DECISION

6.4.1. *Preliminary notes*

The civil procedure code establishes only one remedy at law against the arbitral decision, respectively "the annulment action". *Per a contrario*, it is inadmissible to promote any remedy at law from the common law administrative court, independently if it is ordinary (appeal) or extraordinary (second appeal, revision or contestation in annulment).

6.4.2. *Legal nature of the trial in the annulment of the arbitral decision*

Under the influence of the Civil procedure code, the former Supreme Court of Justice, issuing its opinion about a second appeal in the interest of the

law in relation to the nature of the avoidance action, it found that certain courts of law have considered that the avoidance action of the arbitration decision is a "main action" and have judged it in the court of first instance, issuing "sentences". Other courts, settling these actions in first instance, have issued "decisions". Moreover, some courts, considering that the avoidance action is a "remedy at law", have judged it as "appeal courts". Finally, there have been courts which considered that the avoidance action is a "remedy at law" which must be solved by the "immediately superior court", the one which would have been normally competent in absence of the arbitration convention. These courts have solved the avoidance action in the panel provided by law for the judgement of the "second appeal".

The former Supreme court has rallied to this final solution.

And according to the present Civil procedure code there is the doctrinal tendency to remove the action for the avoidance of the arbitration appeal convention and establish "similarities between it and the second appeal ".

Still, even some of the authors in the case have noted that, even if there are similarities between the reasons to avoid the arbitration convention and the reasons of second appeal, these are not identical. Also, it is impossible to explain logically and legally the "second appeal to the second appeal".

Actually, the avoidance action for the arbitral decision is a "main legal control action". Consequently, any similarity between this action, on one hand, and the appeal or second appeal, on the other hand, is an useless doctrinal or jurisprudential step.

6.4.3. *Reasons of the avoidance action*

The reasons of the avoidance action of the arbitral decision are provided in an explicit and limiting manner by the Civil procedure code and can be grouped in the following categories: absence, nullity or inefficiency of the arbitration convention; the organization and operation of the arbitration court is not according to the arbitration convention; the legal procedure has not been performed according to the arbitration regulations; the arbitral decision itself does not comply with the legal provisions.

6.4.4. *Restrictions regarding the admissibility of the nullity suit*

One can no longer invoke as reasons for the avoidance of the arbitral decision the irregularities which have not been claimed or remedied in the manner provided by art. 604.

We reaffirm that, according to art. 592 Civil Procedure Code, any exception regarding the existence and validity of the arbitration convention, the formation of the arbitration court, the limits of the arbitrator's tasks and the performance of the procedure until the first hearing to which he party has been legally summoned must be made, under penalty of preclusion, within this term, if no shorter term has been established. Also, any requests and documents shall be submitted within the first hearing to which the parties have been legally summoned.

6.4.5. *The procedure for solving the avoidance action of the arbitral decision*

The avoidance action can be analyzed as a "right of the litigants", which cannot be given up in advance.

The object of the avoidance action is usually the arbitral decision which settled "the merits of the litigation". Nevertheless, also other arbitral decision which, even if they don't solve the merits, are related to other "litigious aspects" can be subject to this action.

The avoidance action is introduced to the court of appeal within a month from the date of communication of the arbitral decision.

The competence to judge the avoidance action belongs to the court of appeal in whose jurisdiction the arbitration took place.

The court of appeal judges the avoidance action in the panel provided by law for the trial of first instance. The judgement of these requests by a panel formed by only one judge supports the conclusion that the avoidance action of the arbitration decision is not a "remedy at law ".

The statement of defence is compulsory.

The court of appeal can suspend the execution of the arbitral decision against which the avoidance action was introduced.

The court of appeal, solving the avoidance decision of the arbitral decision, can decide to reject or approve it.

The rejection of the avoidance request of the arbitral decision can be decided because it is not considered solid, as well as because it is not considered legal. In case of rejection of the request, the arbitral decision is consolidated and produces all the effects according to the law.

Instead, in case the avoidance request is approved, the court of appeal shall annul the arbitration decision and, as applicable, shall either send the case

to be judged by the competent court to settle it, or shall send the case to be rejudged by the arbitration court, if at least one of the parties explicitly requires this.

6.4.6. *Execution of the arbitral decision*

The arbitral decision is willingly accomplished by the party against which it was issued, immediately or within the term shown in it.

By exception, the arbitral decision is a writ of execution and is enforced exactly as a legal decision.

CONCLUSIONS

As stated in the doctrine of the field, "the liberty of the forms" is a form (manner) of liberty (p.n.)[1]. Indeed, there are relatively few other "legal institutions beside "private arbitration" which materialize in such a "persuasive" manner the escape from the "universal constrictor" (binding) and, most often, the "implacable" (without alternative) manner of the legal form (civil trial).

Nevertheless, "the liberty of forms", promoted by the legal institution of "private arbitration" does not mean "easiness" or, otherwise said "facile". On the contrary, such as, probably, it resulted also from the analysis object of the present doctoral thesis, "the private arbitration" is much more complex than it seems at first sight and much more difficult to apply than, most often, practiced.

In addition to the provisions of the doctrine in the civil field, the "complexity" and "difficulty" of the private language come, most likely, from its immanent conditions and, particularly: the possibility of the litigants to choose their judges; the organization by the parties of the arbitral procedure, as such.

To these notorious "difficulties" we add the possible (or certain) reluctance of the "Romanian litigant" (mostly prone to dispute) to the valences of the "agreement", including in "litigious matters".

Anyway, the "complexity" and "difficulty" of the private arbitration are obscured by its indisputable advantages, from which we mention, also in this context "the pacifist will" of the litigants, the "discretion" in solving a temporary dispute and "promptness" in solving the litigation between them.

From the will to have a comprehensive, and especially convincing "presentation" of the "valences" or private arbitration in Romania's legal system, the doctoral thesis proposed is structured in six chapters, as following: Chapter I (general aspects regarding private arbitration), Chapter II (organization of the private arbitration), Chapter III (the arbitration convention), Chapter IV (the arbitration court); Chapter V (the arbitration judgement) and Chapter VI (the arbitral decision). Actually, we have chosen this structure from the belief that, by complying with the "succession" of the provisions of the Civil procedure code established for private arbitration, we facilitate the legible presentation of the vast theoretical and practical problems which accompany this legal institution.

[1] See I. Deleanu, *op. cit.*, p. 441.

Our analysis is mainly founded on the logical and legal, systematic and systemic approach of the regulations of the present Civil procedure code established for "private arbitration". In this respect, our (scientific) approach targeted the interpretation of the legal regulations established for "private arbitration" as well as the identification of legal inaccuracies, and also the substantiation of some relevant *de lege ferenda* proposals to eliminate them. Without the intent to take credits which are not ours, we consider that the proposed paper can constitute a "discussion base" for possible future doctrinaire actions on this theme.

Also, without necessarily proposing a comparative analysis, under numerous aspects we have found the existence of regulatory differences between the procedure of private arbitration and the common law administrative procedure, given that those differences are not determined by the "specificity" of this special procedure. In the context we underline the "acute" absence of a text in the present Civil procedure code which, as a principle, establishes the quality of "common law" for the procedure of private arbitration of the regulations in the Civil procedure code established for the administrative procedure.

For the scientific substantiation of the doctoral thesis, our scientific action is according to the doctrinaire options expressed by leading scientific personalities in the field of the "civil procedural law science", as well as the outstanding university teachers I. Leș, I. Deleanu, O. Căpățână and I. Băcanu.

Also, without exaggerating, we have used some papers of foreign doctrinaires, especially from France (given the "union" between the legal systems of the two countries). In this respect, we mention M. de Boisséson, Ph. Fouchard, E. Gallard and B. Goldman.

Finally, we express our belief that the "proliferation of private arbitration" in Romania is not related so much to the "legal framework" which, in any way, is generous, but especially to a certain level of the "civic and legal culture" of the Romanian litigant.