

Arbitrability of Company Law Disputes

in Central and Eastern Europe

The Societas - Central and Eastern European Company Law Research Network organised a conference on October 20, 2017 on the interesting and complex issue of arbitrability in company law disputes. The geographical area covered was Central and Eastern Europe. The conference, part of a broader research project, was hosted by the Law Department of the Sapientia University, in the multicultural city of Cluj-Napoca (Kolozsvár, Klausenburg), Romania. At the conference, comparative and national reports were presented, which reflect very different attitudes towards arbitrability in the context of company law litigation. This book comprises these reports, intended to be used for continuation of the comparative research efforts in order to have a relatively clear image regarding the present status and possible future developments of this important subject.

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Edited by
Emőd VERESS

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VI. Romania

Emőd VERESS*

1. On arbitrability

1. The general rule on the arbitrability of disputes in Romanian law is contained in art. 542 of the Code of Civil Procedure, under the marginal title „Object of arbitration” and provides as follows:

„(1) Persons who have full capacity to exercise their rights may agree to settle by arbitration disputes between themselves, other than those relating to civil status, capacity of persons, inheritance, family relationships, as well to rights not at the parties’ disposal.

(2) The State and public authorities have the power to conclude arbitration agreements only if they are authorized by law or by international conventions to which Romania is a party.

(3) Public law legal persons which have economic activity included in their object of activity, shall have the faculty to enter into arbitration agreements, unless otherwise provided by law or their act of incorporation or organization.”

Arbitrability always implies the conclusion of an arbitration agreement, i.e. a separate contract (compromise)

* PhD, LL.M, professor of private law at the Sapientia University (Romania), Department of Law.

or a contractual clause (the compromise clause), which excludes the jurisdiction of state courts in favour of arbitration. The possibility to conclude an arbitration convention presupposes the fulfilment of *subjective* and *objective conditions*.

2. Subjective conditions, as they result from the provisions of art. 542 Code of Civil Procedure are the following:

- only persons with full legal capacity may conclude the arbitration agreement;
- the State and public authorities may exceptionally conclude arbitration agreements only if they are expressly authorized to do so by law;
- legal persons governed by public law having included in their scope also economic activities have the capacity to conclude arbitration conventions, unless otherwise provided by law or their act of incorporation or organization.

State-owned companies and autonomous administrations („regii autonome”, *régies autonomes*, a specific form of state-owned enterprise, of French legal inspiration, which provides essential public services on the local or national level) under art. 51 par. (2) of Law no. 15/1990 on the reorganization of state-owned economic units as autonomous administrations and commercial companies, may also conclude arbitration agreements.¹

¹ It has been rightly decided that, in the case of national companies (totally or partially state-owned joint stock companies of high importance), their ability to conclude arbitration agreements cannot be disputed because these companies „are subjects, with some exceptions, to the general legal regime for companies established under Law no. 31/1990, including the dispute settlement regime which allows access

3. The objective conditions relate to the nature of the dispute that may be subject to arbitration. Thus, the law denies arbitrability to disputes that relate to:

- civil status;
- the capacity of persons;
- inheritance;
- family relationships;
- the rights which are not at the disposal of the parties.

If the subjective and objective conditions are met, the arbitration agreement is valid and the effect of such a convention is to exclude the jurisdiction of the state courts.

to arbitration.” (High Court of Cassation and Justice, Administrative and Fiscal Section, Decision no. 3246 of June 27, 2012). Also, the possibility of submitting a dispute to arbitration does not only refer to disputes between autonomous administrations and state-owned companies. To the extent that, the legislator wished to limit the possibility of concluding a compromise clause only in the case of the contracts concluded by these two types of legal persons, it would have expressly provided for this. However, in the absence of express provisions by the legislator, the text can only be interpreted as allowing the autonomous administrations to stipulate a compromise clause in the contracts concluded with any company, regardless of the structure of the social capital (state-owned or private). In fact, Law no. 15/1990 enshrined the return to the normal legal regime of litigation also in cases in which autonomous administrations or state-owned companies are involved, since the litigation between such entities previously was the exclusive jurisdiction of the state arbitration courts, now their rights were clearly and unequivocally enshrined to resort to arbitration (High Court of Cassation and Justice, Second Civil Section, Decision no. 3090 of November 25, 2009).

2. Arbitrability of Company Law Disputes

Regarding these general rules, the question arises whether company law disputes are arbitrable or not. Legal doctrine has not – as of yet – comprehensively analysed this issue, although it is of great importance and relevance. In order to answer this question, we need to examine the legal provisions of Law no. 31/1990 on companies.

Art. 63 of Law no. 31/1990 states that „the legal actions and appeals provided by this law, which belong to the jurisdiction of the courts, shall be settled by the tribunal in whose jurisdiction the company has its headquarters.” From this legal text follow two rules of jurisdiction.

The first is an exclusive territorial jurisdiction rule. The legal actions and remedies provided by Law no. 31/1990 on companies are settled by the tribunal (comprising the second level of the Romanian system of courts) in whose precinct the company has its headquarters. The wording of the law is not ideal, because the appeal procedures are solved by the court hierarchically superior to the tribunal, respectively by the court of appeal (the third level of the Romanian system of courts).

However, *the second* rule of general jurisdiction is much more interesting keeping in mind the purposes of this analysis. The normative text can be interpreted as meaning that, by referring to applications to the jurisdiction of the courts, establishes a general jurisdiction rule, which excludes arbitrability. In this view, whenever the law determines that a particular claim belongs to the jurisdiction of the courts, it would automatically exclude arbitrability.

According to an alternative, more liberal interpretation, the cited legal text does not contain rules of general jurisdiction, but only rules of material and territorial

jurisdiction, designating the competent court, respectively the county level tribunal (and not the local court) as a court of first instance in company law disputes, and in space, the tribunal in the precinct of which the company has its headquarters. As the liberal interpretation states, these rules of jurisdiction are applicable to all cases where the parties did not wish to submit their litigation to arbitration (conditioned, of course, to the requirements imposed by the provisions of Article 542 of the Code of Civil Procedure).

The issue remains unsettled in Romanian legal doctrine and jurisprudence. Personally, I would be in favour of the second interpretation, but it seems that the first interpretation is the dominant one. However, even if this interpretation is restrictive, it leaves open at least theoretically a wide field of disputes to arbitrability. This is possible if the following conditions are met:

- a) there is an arbitration agreement;
- b) Law no. 31/1990 on companies does not reserve the litigation, depending on its subject matter, to the jurisdiction of the state courts;
- c) the subjective and objective conditions imposed by Art. 542 of the Code of Civil Procedure are fulfilled.

3. Consequences of the Restrictive Interpretation of Art. 63 of the Law no. 31/1990 on the Arbitrability of Company Law Disputes

As I have shown, according to the restrictive interpretation of Art. 63 of Law no. 31/1990, disputes for which this law provides that they are settled by (state) courts are not likely to be solved through arbitration.

Thus, in a very high number of cases, Law no. 31/1990 establishes that the jurisdiction lies with the state courts. I just mention the most important cases of this type, as an example.

3.1. Disputes Concerning the Lawfulness of the Formation of the Company

If any irregularities have been identified regarding the establishment (formation) of the company after its registration, and the company has not taken steps to resolve them within eight days from the date of discovering those irregularities, any interested person may ask the court to oblige the organs of the company to regularize them under pain of being subjected to the sanction of reimbursement of damages (Article 48 of Law no. 31/1990).

A company registered in the trade register may be declared null by the court in legally determined cases, for example if the company's prospected activity (its trade) is unlawful or contrary to public order, if there is no legal administrative authorization to set up the company (if applicable), the corporate charter (the articles of incorporation, in Romanian law also called the constitutive act) is missing or has not been concluded in authentic form when the law imposes this form etc. (Articles 56 to 59 of Law no. 31/1990).

These actions are reserved to state courts.

3.2. Controlling the Legality of the Decisions Adopted by the General Meeting

The decisions of the general meeting, or assembly (e.g. the assembly of shareholders), which run contrary to the law or the articles of incorporation may be reviewed by the courts, respectively by the initiation of an application for

annulment. The applicant may request the court, by way of the special procedure of interim or temporary injunction on application („ordonanță președințială”, a procedure similar to the *ordonnance sur requête* in French civil procedure), to suspend the enforcement of the contested decision pending a solution for the application (Articles 132-133 of Law no. 31/1990).¹

Similar provisions are included in Law no. 1/2005 on the organization and functioning of cooperatives, which, in art. 44 par. (3) provides that the decisions of the general meeting which run contrary to the provisions of Law no. 1/2005 and of the articles of incorporation may be contested before a court within 15 days from the date of their recording into the trade register, by any member of the cooperative company who participated at the general meeting and voted against it or who was absent from the general meeting; respectively par. (5) of the same article states that „the request for annulment shall be submitted to the commercial department of the tribunal in whose territorial jurisdiction the cooperative company is located”.

In this context, in the case of cooperative companies, it was decided that the request for annulment of the general meeting’s decision, based on the provisions of art. 44 par. (3) of the Law no. 1/2005 on the organization and functioning of the cooperative, falls within the jurisdiction of the tribunal

¹ If grounds for relative nullity are raised, the action may be brought within 15 days from the date of publication of the decision in the Official Gazette of Romania, Part IV (in the case of joint stock companies) or from the disclosure (in the case of limited liability companies) by any of the shareholders / associates who did not attend the general meeting or who voted against the contested motion and asked that their vote be mentioned in the minutes of the meeting. In the case of absolute grounds for nullity, the right of action is not limited in time, and the request may also be made by any interested person, for example creditors.

at the headquarters of the cooperative company and not within the competence of UCECOM¹ arbitration. The reasoning includes, among other things, that the case concerns matters relating to the organizational status of the defendant, a legal person (the cooperative company), which falls within the jurisdiction of the tribunal determined according to the place of the company's headquarters.²

Applying this interpretation to the companies regulated by Law no. 31/1990, arbitration would be excluded in the case of actions for annulment of the decisions of the general meetings.

3.3. Authorization of Convening the General Meeting by Shareholders

In the case of joint-stock companies, the board of directors or the directorate shall immediately convene the general meeting, at the request of the shareholders representing individually or jointly, at least 5% of the share capital or a smaller share if the articles of incorporation provide so and if the request includes problems which fall within the powers of the Assembly (Article 119 of Law no. 31/1990).

If the board of directors or the directorate does not convene the general meeting, the court determined according to the place of the headquarters of the company – after issuing summons to the board of directors or the directorate – may authorize the convening of the general meeting by the shareholders who have submitted a request to this effect. By the same decision, the court approves the

¹ National Union of Handcraft Cooperatives.

² High Court of Cassation and Justice, Commercial Section, Decision no. 3069 of October 11, 2007.

order of business, the date of the general meeting and will nominate a chairperson from among the shareholders.

These requests seem to be reserved for the jurisdiction of state courts.

3.4. Disputes Concerning Exclusion and Withdrawal of Associates

The exclusion of an associate from a general partnership („societate în nume colectiv”), from a limited company (commandite, „societate în comandită simplă”) or from a limited liability company („societate cu răspundere limitată”)¹ shall be ordered by a court decision at the request of the company or any associate, and by the same decision the court will also decide on the structure of participation in the share capital of the other associates (Article 223 of Law no. 31/1990).

Withdrawal of a member from a general partnership, limited company or limited liability company can be

¹ The cases of exclusion are legally determined, so it is possible to exclude from the general partnership, limited company and limited liability company: a) the associate who, defaulting on obligations, does not bring the contribution to the share capital to which he was bound; b) the general partner (whose liability is unlimited) who has become legally incapacitated; c) the general partner who intervenes in the administration of the company without written consent from the other members, uses the capital, assets or credit of the company for his own benefit or that of another person; participates, as associate of unlimited liability, in other competing companies or with the same object of activity, performs operations in his own account or that of others, in the same or similar trade; d) and most importantly in practice, the associate who is also administrator, who commits fraud at the company's expense or utilizes the company's signature or its capital for his or her own benefit (Article 222 of Law no. 31/1990). Also, these cases are applicable to the general members of the „societatea în comandită pe acțiuni” (identical to the French *société en commandité par actions*).

approved if it is well founded, by a decision of the tribunal, subject only to appeal, in which case the court will provide, by the same decision, for the structure of participation in the share capital of the other associates and in case of disagreement, the court will also establish the rights of the withdrawn associate (Article 226 of Law 31/1990).

3.5. Actions to Dissolve the Company

The dissolution of the company shall be ordered by court decision, at the request of any associate, for well-founded reasons, such as serious misconduct between associates, which impedes the functioning of the company [Article 227 letter e) of Law no. 31/1990].

The dissolution of the company by reason of the reduction of the number of shareholders below the legal minimum is ordered by the court, at the request of any interested person [Article 10 paragraph (3) of Law 31/1990].

The company's dissolution for non-observance of the legal minimum of the share capital shall be ordered by the court, at the request of any interested person [Article 10 paragraph (2) of Law 31/1990].

In all these cases, the state court must rule on dissolution.

3.6. Opposition by the Creditors of the Company

The actions (objections or oppositions) by the creditors of the company are those whereby such creditors – or any other persons injured by the members' or shareholders' decisions regarding the amendment of the articles of incorporation – request the court to order, as the case may be, the company or the associates (shareholders) to compensate them for the prejudice suffered (Article 61 of the Law no. 31/1990). By means of a special procedure

(temporary injunction on application), suspension of the decision may also be requested pending a solution to the opposition.

4. The Scope of Arbitrable Corporate Law Disputes, if we Accept the Restrictive Interpretation

In the given circumstances, the determination of the range of disputes which can be solved by arbitration raises some questions, given also the fact that many articles of incorporation of different companies contain arbitration agreements. Without exhausting all possibilities, given the judicial and arbitration practice, I believe that the following types of litigation are arbitrable.

4.1. Litigation Arising from Contracts for the Sale of Shares or Participations in Limited Liability Companies

Litigation arising from contracts for the sale of shares, respectively participations in limited liability companies is arbitrable. Thus, the arbitral tribunal decided that if, through a share purchase contract, the buyer undertook not to initiate divestment or merger operations involving the company under the pain of a penalty clause, and yet proceeds to divide the company, such a buyer must pay the penalties set in the contract.¹

However, there is a problem: what if the dispute arises not between the contracting parties, but between the trade register and the parties, for example on the legality of the

¹ Arbitration award no. 18 of February 5, 2008. Vlasov, V. A. (2010). Arbitrajul comercial. Jurisprudență arbitrală 2007-2009. Practică judiciară. Bucharest: Hamangiu, p. 197.

refusal to register the transfer of shares or participations into the trade register? In this situation, according to the restrictive interpretation, these disputes are not arbitrable.

4.2. Actions for Damages

The Romanian law on companies expressly regulates a series of civil liabilities: of the associate towards the company, of the governing / supervisory bodies' members towards the company, of the company towards the members of the governing bodies etc. I believe these actions are generally arbitrable.

Legal actions for damages in the field of company law have a general regulation in art. 155 of the Law no. 31/1990. The action against the founders, administrators, directorate and supervisory board members, as well as internal auditors or external financial auditors, for damages caused to their company in violation of their duties towards the company, can be exercised by the general assembly, which will decide with the majority provided for ordinary general meetings (see Article 112 of Law no. 31/1990). According to this legal text, „the general assembly designates the person responsible for bringing legal proceedings with the same majority.” However, in my opinion, the legislator did not intend to exclude, by reference to „legal proceedings” the possibility to settle these claims by way of arbitration, this being only a rule intended to solve the issue of representation of the company in these disputes, in the situation in which the defendant may even be the legal representative of the company.

The claim for damages from the associate who is late (i.e. in default) with his capital contribution is arbitrable. If the contribution has been stipulated in cash, this associate is required to pay the statutory interest beginning from the

day he had to make the payment, meaning that besides the legal interest, the actual damage caused by the delay must also be remedied (Article 65 of Law no. 31/1990).

The actions aimed at compelling an associate to pay damages in the event that he in a particular operation had for himself or for another's account, an interest contrary to those of the company, and yet took part in the deliberation and/or decision on this operation, if without the vote he cast the required majority would not have been obtained, are also arbitrable (Article 79 of Law 31/1990). Similarly in the case of joint stock companies, the shareholder is liable for damages if he violates the obligation to abstain when he has, in a particular transaction, either personally or as an agent of another person, an interest contrary to that of the company, and without his vote, the required majority would not have been obtained (Article 127 of Law no. 31/1990). This claim by which the company seeks compensation for the damage caused is also arbitrable.

Actions aimed at obliging an associate to return to the company the benefits and damages incurred if the associate, without the written consent of the other associates has used the capital, assets or credit of the company for his personal benefit or that of another person (Article 80 of Law no. 31/1990) can be settled by arbitration.

The claim to seek damages is arbitrable in situations when the administrator of the company had in a particular operation, directly or indirectly, interests contrary to the concerns of the company, or if he knows that his spouse, his relatives or the relatives of the spouse up to the fourth degree, included, are interested in such an operation, and did not notify the other administrators and the censors (internal auditors) about this conflict of interest situation, and took

part in the deliberations regarding this operation (Article 144-3 of Law 31/1990).

Also the action, by which the company claims damages from the director of a joint stock company organized in the unitary system and the directorate in the dualist system, who have accepted, without the authorization of the board of directors or the supervisory board respectively, the mandate of director, administrator, member of the board or supervisory board, censor or, as the case may be, an internal auditor or associate of unlimited liability in other competing companies with the same object of activity, or who have exercised the same or another competing economic activity, for their own benefit or for that of another person, is arbitrable (Article 153-15 of Law 31/1990).

The actions promoted by limited liability companies against administrators for damages are arbitrable [Article 194 paragraph (1) letter c) of Law no. 31/1990] including the situation in which they obtained without the authorization of the members' meeting, the mandate of administrator in other competing companies or with the ones conducting the same trade, respectively conducted the same kind or competing activity either for their own account, or for the account of another natural or legal person [Article 197 (2) of Law 31/1990].

In one case a service and management contract was concluded between the applicants and the defendant for the administration of a limited liability company. At the time of the conclusion of this contract the applicants did not act as associates of the limited liability company; concomitantly, an „underwriting agreement” for 70% of the share capital of the respective limited liability company was also concluded, through the issuance of new shares and the increase of the share capital, which was later materialized.

The applicants brought an action before the arbitration tribunal for damages against the administrator for breach of his contractual obligations. The defendant alleged that the applicants had no procedural capacity to act, because they did not hold the quality of associates at the time of the conclusion of the service and administration contract. The arbitration tribunal considered that there is a causal connection between the two contracts in the sense that the first contract was concluded based on the second „underwriting agreement”, the service and management contract being affected by the condition of the implementation of the second contract, i.e. the „underwriting agreement”. This suspensive condition has been fulfilled, retroactively consolidating the service and management contract. As a consequence, the defence based on the lack of the applicants’ quality of associates and therefore the impossibility to claim damages from the administrator (lack of active procedural quality or *locus standi*) was rejected.¹ Also in this case it came to be established that the penalty clause is valid even if the service and administration contract was concluded between the applicants and the defendant and not between the company and the defendant, provided that the contract was signed by all the members of the limited liability company.²

By generalizing: the litigations arising from the legal relationship between the company and the members (former members) of the governing body are arbitrable.

The actions by which the administrator is revoked by the general meeting sues for damages from the company if the

¹ Arbitration award no. 75 of April 13, 2007, in Vlasov 2011, p. 32.

² Arbitration award no. 75 of April 13, 2007, in Vlasov 2011, pp. 201–202.

revocation occurs unreasonably (Article 137-1 of Law 31/1990) are arbitrable. In this situation the arbitration agreement may be included in the company's articles of incorporation, to which the administrator adheres by accepting the appointment, or in the (mandate, management or administration) contract concluded between the company and the administrator. Similarly, these considerations also apply to dismissed directors (Article 143-1 of Law no. 31/1990), respectively in the case of the revocation of directorate members by the supervisory board, in the case of joint stock companies managed under a dualist system (Article 153-2 of Law no. 31/1990).

4.3. Other Disputes Between Associates

Disputes arising from shareholders' agreements and also disputes arising from mandate or management contracts concluded between the company and the administrator are arbitrable.

5. Conclusions

In Hungary, the new Civil Code (entered into force on 15th of March 2014 and which now includes the law applicable to companies, similar to Italy), in § 3:92 sets out the following:

„(1) Company law disputes may be settled by arbitration if the instrument of constitution or the agreement of the parties in the dispute determines such proceedings.

(2) The following are considered company law disputes:

a) litigation between the commercial company and its current or former associate, including judicial review of decisions taken by social bodies;

b) litigation between associates on the legal relation to company law;

c) litigation between the company and its manager or the member of the supervisory board, stemming from the legal report of management or supervisory board membership.”

My opinion is that the scope of company law litigations likely to be settled by arbitration is much wider than what results from the above-mentioned restrictive interpretation. A more permissive approach could also be created by interpreting the rules here analysed: if general conditions of arbitrability are fulfilled, the legal provisions referring to state courts in Law no. 31/1990 do not exclude the arbitrability of such disputes. The rules of the Romanian Civil Code on obligations (including special contracts) very frequently refer to courts, and yet these references are not interpreted as grounds for excluding arbitration. However, a legal text similar to that in Hungarian law would be necessary to facilitate the role of arbitration in the field of company law litigation.
