THE EFFICACY OF THE ARBITRATION CLAUSE IN A SIMULATED ACT

Tudor Vlad RĂDULESCU*

Abstract

The article focuses on the effects that an arbitration clause can still produce when it is contained in a simulated operation, whether it is in the apparent act or in the secret one, depending on the forms of simulation.

Keywords: *simulation, arbitration clause, relativity of contracts, overt act, ccovert agreement.*

1. Introduction

The material aims to address the issue of compatibility between the arbitration clause and the operation of simulation. More specifically, to answer two problems that could arise if the parties, chosing to hide the true legal relationship between them, have concluded a secret act, known only by them, and a public act, ostensible, enforceable against third parties, where they chose to introduce an arbitration clause.

Thus, the two problems can be summarized as follows: 1. the action for declaration of the simulation will be the jurisdiction of the courts or of an arbitral tribunal? and 2. if disputes are in relation to the performance of the obligations arising from the covert contract, the one taking effect between the parties, the competence will belong to the courts or to the arbitral tribunal?

The above problems may arise, as we have shown, where the parties have included the arbitration clause only in the content of the public act, and not in the secret one, and shall be established to what extent this clause will be more effective, or, in in other words, what is the relation between the arbitration clause and the avert contract between the parties: of independence or dependence?

To provide an answer to these problems, we will do a review of the two institutions meeting at issue: **the simulation**, exception to the enforceability of documents to third parties, but especially viewed from the perspective of relativity and enforceability if the effects of contracts between the parties, and the arbitration agreement, disguised under the mantle of **arbitration clause**, first seen individually, and then we will review to what extent the second one can somehow influence the action for declaration of the simulation or general or material jurisdiction where there occur issues in the execution of rights and obligations arising between the parties.

2. Some consideration regarding the legal operation of simulation

Without trying, in these lines, to formulate a new theory on simulation, or to fully resume the existing one, we only intend to draw some determining elements of this operation in order to create an overview of the issue, which is the subject of the article.

Thus, the simulation could be defined[1] as the legal operation whithin which, through a public legal act, but apparent, is created a new legal situation than the one established by a hidden legal act, secret, but real, called inappropriate and secret[2].

To understand the definition given above, we consider necessary to explain certain terms used in explaining the concept.

The secret act is the one expressing the real intention of the parties and establishes the true legal relationship between them; to be valid, the secret act shall meet only the substantive and validity requirements of the civil legal act, and not the formal ones, as evidenced by the interpretation *per a contrario* of the dispositions of art. 1289 para.2 Civil Code.[3]

The public act is the one creating the appearance and that is concluded for this purpose, i.e. to hide reality under its lying mantle; its existence is essential to the existence of the simulation[4]. As concerns this act, it is necessary to be fulfilled both the substantive conditions (capacity, consent, object and cause) and the formal ones,

* Tudor Vlad Rădulescu, PhD Student, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **tradulescu@yahoo.com**).

[1] For further definitions of this legal transaction, proposed by doctrine and jurisprudence, particularly the ones previous to the current Romanian civil code, see F.A.Baias, *Simulaţia. Studiu de doctrină şi de jurisprudenţă*, Editura Rosetti, Bucureşti, 2003, p. 46-49.

[2] G. Boroi, L. Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil*, Editura Hamangiu, Bucureşti, 2012, p. 172.

[3] Was also expressed the opinion as meaning that the secret act, however, should also fulfill the formal conditions required by law if the simulation is achieved by interposing persons or mandate without representation, cases in which the parties of the public act are not the same with the ones of the secret act; see F.A. Baias în F.A.Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul cod civil. Comentariu pe articole*, ediţia a II-a, Editura CH BECK, Bucureşti, 2014, p. 1438.

[4] F. Baias, *op.cit.*, p. 55.

required by law. Moreover, when the secret act is a document for the validity of which the law requires compliance with a specific formal requirement (eg, donation), although this act will not take the form of the authentic document, however, for the validity of simulation, as a legal operation, the public act shall be concluded in that form, even if the law does not require, for its valid conclusion, the compliance of a certain formal condition[5] so that the secret act "borrows" the form from the public act.

2.1. The conditions of validity of the simulation

To be valid as legal operation, the simulation must meet, in an opinion, a series of conditions, that we recall hereunder: **(1)** there is a secret act; **(2)** there is a public act; **(3)** the secret act must is completed concurrently, or possibly before the conclusion of the apparent one and **(4)** both legal acts are entered into by the same parties[6].

According to another opinion[7], embraced also at the level of the latest jurisprudence of the High Court of Cassation and Justice[8], in addition to the two acts, is also necessary **(5)** the existence of the overt act, namely the intention of the parties that the legal operation produces all the legal effects specific to the simulation, *animus simulandi*, which differs from the discrepancy that may spontaneously occur between the declared will and the real intention, which will be settled through the interpretation of the contract[9].

2.2. Forms of simulation

From the point of view of the form in which can appear simulation, this legal operation can be done fictitiously, by disguise (total or partial) and by interposition of persons; legal literature[10] has made a distinction between *absolute* simulation and *relative* simulation, the latter classiffying itself in *objective simulation* (when are hidden objective elements of the act, such as the nature of the contract, its object or cause) and *subjective simulation* (in case of simulation by interposition of persons).

In its first form, of the fictitious act, the simulation means the existence of only two of its three elements, respectively the public act and the covert agreement. Thus, the parties conclude an apparent act that is nevertheless devoid of any effects through the covert agreement, the participants in the simulation remaining in the state preceding the conclusion of the public act; between the parties are not born any new rights and obligations, except those strictly determined by the will to simulate (e.g. the obligation to consent to the dissolution of the apparent act within a certain period, the right of the one who consented to simulation to receive a certain remuneration, etc.)[11]. In short, through the fictitious act, the parties „dissimulate" to conclude a legal act (aiming, most of the times, at defrauding the interests of certain categories of participants in the legal relations - creditors), in reality the act being non-existent.

The disguise, the second way to hide the reality can be total or partial, depending on the element on which the parties conclude the covert agreement. Hiding the nature of the contract representing the real intention of the parties makes the disguise to be complete, while concealing only certain elements of the secret contract will be just a partial disguise l (i.e., hiding the real price, hiding the actual date on which was concluded the secret act, hiding the way the obligation is to be executed, etc.).

Finally, simulation through the interposition of persons implies the conclusion of the public act between certain parties, while in the secret act (but also in the covert agreement) takes part a third person, who will be the real beneficiary ofthe public act, so in the patrimony of whom will be produced the legal effects of the concluded act.

2.3. Effects of simulation

In terms of the effects produced, Romanian legislature of 2009 remained faithful to the principle of neutrality of simulation, art. 1289 paragraph 1 Civil Code providing that the secret act shall take effect only between the parties and, if the nature of the contract or the stipulation of the parties does not show to the contrary, towards the universal successors and with universal title. So, simulation, as a rule, is not sanctioned, than when is pursued an unlawful cause, the secret producing effects between its parties but also to persons treated as parties, to third parties in good faith, being enfroceable onlu the public apparent act.

If one party refuses to perform its obligations arising from the secret contract, the other party may ask the court to find the simulation, and then to enforce the performance or to resort to any other remedy provided by law for non-performance

[5] Similarly, see G. Boroi, L. Stănciulescu, *op.cit.*, p. 176; contrarily, see P.Vasilescu, *Drept civil. Obligaţii*, Editura Hamangiu, 2012, p. 493.

[6] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, Editura Hamangiu, Bucureşti, 2008, p. 78; we consider that this condition must be fulfilled only if the simulation takes the form of the fictitious act and disguise, not in the case of simulation by interposing persons.

[7] L. Pop, I.F.Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile*, Editura Universul Juridic, Bucureşti, 2012, p. 223; F.A.Baias, *Simulaţia*, p. 67 şi urm.

[8] ICCJ, secţia I civilă, dec. nr.5782 din 12.12.2013, pe www.scj.ro.

[9] L.Pop, I.F.Popa, S.I.Vidu, *op.cit.*, p. 223.

[10] F.A.Baias, *Simulaţia,* p. 97 ş.u.; L. Pop, *Tratat de drept civil. Obligaţiile. Volumul II: Contractul*, Editura Universul Juridic, Bucureşti, 2009, p.619; P. Vasilescu, *op.cit.* , p. 490.

[11] F.A.Baias, *Simulaţia,* p. 99.

(exception of non-performance, enforcement in nature, rescission or termination, etc.)[12]

It is not the object of this study to treat in detail the effects produced by this legal operation, since the issue to be reached concerns only the parties of the simulation, not the third parties, either successors with particular title, or unsecured creditors, which is why regarding the effects produced, we limit ourselves to the observation made in the previous paragraph.

3. Arbitration – alternative means of dispute settlement. The arbitration clause

The code of Civil Procedure entered into force on 15.02.2013 defines, for the first time, the institution of arbitration, stating that it is an alternative jurisdiction having private nature (art. 541 para. 1 Civil Procedure Code). So arbitration is a means of settling disputes by decisions rendered by a third party that are binding on the parties[13].

Arbitration is a legal institution with a dual legal nature, both contractual and judicial. The legal basis of arbitration is the arbitration agreement, under its two forms– compromise and arbitration clause[14]. So, as has been stated in the literature[15], the term of arbitration agreement was created only to simplify the legal language, as long as an arbitration agreement stricto senso never exists. This is in fact the meaning of art. 549 para. 1 Civil Procedure Code, according to which the arbitration agreement may be concluded either as an arbitration clause in the main contract or established in a separate agreement, to which refers the main contract, either in the form of compromise.

Compromise and arbitration clause have different forms, but their purpose is the same: represent the common will of the parties to resort to arbitration proceedings for the settlement of the dispute between them. Both shall be concluded in writing, under the penalty of absolute nullity, thus being formal acts, without importance, as the document is an authentic one or under private signature. The solemnity of the arbitration agreement consists in its contents, in addition to the written form, as will be explained below.

By compromise, the parties agree that a dispute arising between them shall be settled by arbitration, the provisions of art. 551 para. 1 Civil Procedure Code concluding that, under the penalty of nullity, the parties shall show the object of the dispute and the names of the arbitrators or the manner of appointing them in case of ad-hoc arbitration.

The arbitration clause is the clause inserted in the main contract or in another contract to which the main contract refers whereby the parties establish that disputes arising from the contract where it is stipulated or in connection with it, are settled by arbitration (art. 550 para. 1 Civil Procedure Code). So, the arbitration clause concerns, unlike the compromise, *future disputes*, yet unborn, but which may arise in connection with the contract containing that clause.

According to art. 550 para. 2 Civil Procedure Code, the validity of the arbitration clause is independent of the validity of the contract where it was entered, text giving expression to the principle of autonomy of will of the arbitration clause related to the contract in which it is inserted. Thus, we can say that we are dealing with a "contract into a contract", the main agreement seeming to aliase, as if we were in the presence of two separate contracts, one etsablishing the mutual material rights and obligations of the parties, and another one agreeing on the method of settling the disputes relating to those rights and obligations[16].

Thus, it was observed in practice that the validity of the arbitration clause is not affected by the invalidity of the contract in which it has been entered, the less it will be affected if the parties, through their will, have terminated the contract in which it was provided[17].

A provision similar to the one in the Civil Procedure Code, however general, we also find in the Civil Code, which, in the section on termination, states that it has no effect on the clauses related to dispute settlement or on those intended to take effect even in case of termination. Or, among clauses peratining to dispute settlement there are, most often, the arbitration clauses.

Finally, again with reference to the arbitration clause, the Civil Procedure Code, under art. 550 para. 3 sets out a special rule for the interpretation of this clause, stating that, in case of doubt, it should be interpreted as meaning that it applies to all disagreements arising from the contract or legal relationship to which it refers. This rule of interpretation is an application of the interpretation provided by art. 1268, para. 5 Civil Code, according to which the clauses intended to exemplify or to remove any doubt on the application of the contract to a particular case, do not restrict its application in other cases that have not been expressly provided.

---

[12] L.Pop, I.F.Popa, I.S. Vidu, *Curs de drept civil. Oligaţiile*, editura Universul Juridic, Bucureşti, 2015, p. 175.
[13] F.G.Păncescu în G.Boroi (coord.), *Noul cod de procedură civilă. Comentariu pe articole,* vol. II, editura Hamangiu, Bucureşti, 2013, p. 23.
[14] G. Dănăilă, *Procedura arbitrală în litigiile comerciale interne*, editura Universul Juridic, Bucureşti, 2006, p. 42.
[15] M. Badea, *Procesul comercial cu element de extraneitate*, editura Hamangiu, Bucureşti, 2009, p. 211.
[16] G. Dănăilă, *op. cit.*, p. 53.
[17] Sentinţa nr.69 din 8.05.1998 a Curţii de Arbitraj Comercial Internaţional, în G. Dănăilă, *op.cit.*, p. 55, footnote 68.

4. The effect of the arbitration clause on the legal operation of simulation

Typically, the arbitration clause contained in contracts has a standard content, which tends to cover all disputes that may arise between the parties regarding the concluded contract.

In this regard, The Romanian Chamber of Commerce and Industry made a recommendation on the content of the arbitration clause in commercial contracts, meaning that *Any dispute arising from or in relation to this contract, including the conclusion, performance or termination thereof shall be settled through the arbitration of the Court of Internaţional Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, according to the Rules of Arbitration of the International Commercial Arbitration Court, in force, published in the Official Gazette of Romani, part I."* [18]

After reviewing some general issues regarding simulation and arbitration clause, we will try to provide answers to the questions which were the starting point of this article and that we resume hereunder:

the action for declaration of the simulation shall be the jurisdiction of the courts or of an arbitral tribunal?

and

if disputes arise in relation to the performance of the obligations arising from the secret contract, the one taking effect between the parties, their settlement competence will belong to courts or to the arbitral tribunal where the arbitration clause exists solely in the public act?

The answer to the first question can be given starting from the provisions of art. 550 para. 3 Civil Procedure Code, to which we referred above, which we consider closely related to the purpose of the action for declaration of the simulation.

Most of the time, the action for declaration of the simulation is an action-means, which is only the necessary step to reach the true contractual reality, then aiming at demanding its abolition or the performance of the obligations it has generated[19]. The action for declaration of the simulation does not aim so much at denouncing the simulation but something concrete in relation to the acts forming the simulation mechanism (simulators may pursue the enforcement or annulment of the hidden and third parties may claim being defrauded of their interests through the suspect hidden act)[20].

In these circumstances, the action for declaration of the simulation, from the point of view of the parties, may pursue, as its purpose, either to terminate the hidden contract (its cancellation, rescission or terminatio) or performance of the contractual obligations, as they have already been drawn up in the act representing the real intention of the parties. We cannot agree with the view according to which the action for declaration of the simulation is a fullu-fledged action, even if the arguments in support of this theory, from a theoretical point of view, are at least attractive, from a very simple reason, procedurally speaking: the interest.

According to art. 32 para. 1 Civil Procedure Code, the conditions governing the civil action are as follows: capacity to stand trial, standing, formulating a claim and the interest.

This latter requirement, on the interest, was defined as being the practical use pursued by the one who initiated the civil action[21], and, in order to be valid, must meet the following requirements: be determined legitimate, personal, **vested and present** (art. 33 Civil Procedure Code).

Thus, we wonder, what could be the vested and present interest of the parties to bring an action for declaration of the simulation, without a real reason, which would expose them to a prejudice if they did not resort, that time, to action (and which can relate either on the abolition of the secret act or on the obligations arising herefrom). We believe that an action for declaration of the simulation, made by one party, with a single head of claim, without invoking other claims, shall be dismissed by the court as devoid of interest. We consider that the real issue of autonomy of action for declaration of the simulation could arise if the claimant in such a request were a third party and not one of the parties, that knows very well what was the real intention and in what consisted the covert agreement, situation that yet is not covered by this study.

For these reasons, we consider that the action for declaration of the simulation, made by one party is an action that serves either as the abolition or the performance of the secret contract, in which case it would fall under an eventual arbitration clause made either in the manner recommended by the Chamber of Commerce of Romania, or in the more general way "any disputes arising in connection with this agreement shall be settled by arbitration".

As to the second issue raised, it can be summarized as follows: if the parties had agreed on an arbitration clause only in the apparent (overt) act, the legal operation of the simulation will also extend on the competence on settling any dispute concerning either enforcement or abolition of secret act, as meaning that the arbitration clause will no longer be effective?

We believe that the response relates to the legal nature of the arbitration clause, namely to its principle of autonomy to the main contract, but also

[18] www.arbitration.ccir.ro/clauzarb.htm, consulted on 19.03.2016.
[19] P. Vasilescu, *op.cit*, p. 500; for contrary opinion, see F.A.Baias, *Simulaţia,* p. 208-209, L. Pop, *Contractul,* p. 638.
[20] P. Vasilescu, *idem.*
[21] G. Boroi, M.Stancu, *Drept procesual civil*, editura Hamangiu, Bucureşti, 2015, p. 36.

to the content of the covert agreement, as a key element of the simulation.

Thus, as long as the covert agreement relates only to the elements of substantive law (i.e. the true rights and obligations of the parties that arise from the secret act), we believe that the provisions of the secret act will be completed with the ones of the public act, apparently, concerning to the jurisdiction for settling any disputes that will arise in the contract. This reasoning is all the more evident when simulation by disguise and interposition of persons, by which the parties seek, in reality, to hide certain elements of the secret act from third parties (nature of the contract, the true beneficiary of the rights, etc.), and in no way what will be the competent institution to settle its disputes.

A problem could arise in case of absolute simulation, through fictitious act, when the public act is devoid of content, is only a form without substance, the covert agreement of the parties ruling as meaning the lack of will expressed in the apparent act. In this situation, the court or the arbitral tribunal hearing the request for the performance of provisions of the secret act, should, in principle, ascertain the extent of the covert agreement, namely whether it took into account the public act in its entirety, including the clause conferring general jurisdiction or only the specific effects of the public contract signed. If such a research is not carried out, or if the court cannot conclude one way or another, we consider that the arbitration clause is integral with the other terms of the apparent (overt) act, notwithstanding the rule established by Art. 550 para. 2 Civil Procedure Code, the parties aiming by its introduction in the contract, at creating conditions to remove any doubt on the authenticity, veracity and efficiency of that agreement.

5. Conclusions

As a conclusion, we can say that in what concerns simulation, the effectiveness of the arbitration clause will always depend on the research of the covert agreement, the key element of this legal operation, which represents the real intention of the parties. We should not lose sight of the autonomy enjoyed by the arbitration clause within a contract, but this rule must be adapted to the special conditions of simulation and to the aims pursued by the parties.

References:

- M. Badea, *Procesul comercial cu element de extraneitate*, editura Hamangiu, Bucureşti, 2009;
- F.A.Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul cod civil. Comentariu pe articole,* ediţia a II-a, editura CH BECK, Bucureşti, 2014;
- F.A.Baias, *Simulaţia. Studiu de doctrină şi de jurisprudenţă*, editura Rosetti, Bucureşti, 2003;
- G.Boroi (coord.), *Noul cod de procedură civilă. Comentariu pe articole,* vol. II, editura Hamangiu, Bucureşti, 2013;
- G.Boroi, L. Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil*, editura Hamangiu, Bucureşti, 2012;
- G.Boroi, M.Stancu, *Drept procesual civil*, editura Hamangiu, Bucureşti, 2015;
- G. Dănăilă, *Procedura arbitrală în litigiile comerciale interne*, editura Universul Juridic, Bucureşti, 2006;
- L.Pop, I.F.Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile*, editura Universul Juridic, Bucureşti, 2012;
- L. Pop, *Tratat de drept civil. Obligaţiile. Volumul II: Contractul*, editura Universul Juridic, Bucureşti, 2009;
- C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, editura Hamangiu, Bucureşti, 2008;
- P. Vasilescu, *Drept civil. Obligaţii*, editura Hamangiu, 2012.