

ALTERNATIVE DISPUTE RESOLUTION IN PUBLIC PROCUREMENT CONTRACTS – ADMINISTRATIVE LAW BOUNDARIES

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Abstract: *The article discusses the developments in the field of alternative dispute resolution in construction contracts. The area attracting the attention is the debate over the use of alternative or statutory dispute resolutions in construction contracts. This article explores the new legal grounds of arbitration in the Romanian administrative construction contract. Because of the lack of quantitative data the research methodology was based on the qualitative ones and we reviewed the literature on construction contracts, the Romanian legal framework and the Constitutional Court Decisions, and the good practices in the field of alternative dispute resolution mechanisms. Finally, by taking into account the barriers of the Romanian administrative and legal systems we discuss the insufficiencies of using arbitration in administrative contracts. This paper first provides an overview of dispute-resolution methods that can be used within public construction contracts. Then reviews the possibility to use arbitration method in administrative contracts. In the end, the paper summarizes and concludes with a direction for further research and development.*

Keywords: *dispute resolution methods, arbitration, administrative contract, public system reluctance.*

1. Introduction

Durkheim¹ by arguing that people cannot cooperate and establish relationships without taking into account important social features as non-contractual conditions and organic solidarity, along with the duration and the self-interest became the first social scientist who called the attention in his work on the importance of contracts in society. To all these Pound² referring to the economic order, mention that the legal securing of promised advantages is the real trigger for a contract. But among the legal doctrinaires, since 1960³, the contract is seen as the result of negotiation limited by the legal norms which enforce the contracting parties obligations. In the

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¹ Durkheim, E., *The Division of Labor in Society*, translated by George Simpson. New York: The Free Press, 1933.

² Pound, R., *Contract* in Edwin R. Seligman (ed.), *Encyclopaedia of the Social Sciences*: 3, 1930, pp. 323-329. New York: MacMillan.

³ Mayhew, L., *Law: the legal system* in David L. Sills (ed.), *International Encyclopaedia of the Social Sciences*: 9, 1968, pp. 59-66. New York: Crowell, Collier and MacMillan. Friedman, L. M., *Contract Law in America*, Madison: University of Wisconsin Press, 1965.

same period of time, Negulescu⁴ defined the administrative contract “as the management act in which we have the agreements of the contracting parties with the purposes to create individual legal situations”. Few years before, Văraru⁵ distinguished the administrative contract, as a management act, from the administrative act given in the exercise of public power, the first one is definitive and is controlled by the civil court and not by the administrative one.

The administrative contract is an agreement in which one party is a public authority, governed by the administrative law, and its scope is to emphasize the value of public assets, the execution of public works, or accomplishment of public services or public procurement (art. 2, Law 554/2004⁶). Despite what in the Romanian administrative law history⁷ was established nowadays the administrative contract falls to the administrative court and not the civil or commercial one.

The construction contracts for public assets are recognised as being rigid because set the boundary of performance, and of conflict and dispute among the key players (public authority, designers, contractor, subcontractors, and suppliers). The recent contracting attitude in other European countries is toward the use of private-public partnerships, even so for Romania this means a revamp of contracting attitudes of the public authorities.

As Fenn et al.⁸ mentioned the construction industry has been trapped in adversarial relationship between owners and contractors, with repetitive cycle of hostilities supported by their different interests, maximum quality vs. minimum resources⁹. Contracts doctrinaires¹⁰ documented different causes for conflict's claims which the Construction Industry Institute¹¹ grouped them in three categories – people, process and project.

⁴ Negulescu, P., *Tratat de drept administrativ* [Treaty of administrative law], vol. I, ed. IV, Institutul de Arte Grafice “E. Mărvan”, București, 1934, p. 381.

⁵ Văraru, M., *Tratat de drept administrativ român* [Treaty of administrative law], Ed. Librăriei SOCEC&Co., București, 1928, pp. 186-7.

⁶ Law no. 554/2004 of the administrative litigations, published in Romanian Official Journal, Part I, no. 1154 of December 7, 2004.

⁷ Văraru, M., *op.cit.*, pp. 186-7.

⁸ Fenn, P., Lowe, D., and Speck, C., Conflict and dispute in construction, *Construction, Management and Economics*, 15(6), 1997, pp. 513–518.

⁹ Howard, W. E., Bell, L. C., and McCormick, R. E., Economic principles of contractor compensation, *J. Manage. Eng.*, 13(5), 1997, pp. 84–5.

¹⁰ Adrian, J. J., *Construction claims: A quantitative approach*, Prentice-Hall, Englewood Cliffs, N.J., 1988. Jergeas, G. F., and Hartman, F. T., Contractors' construction claims avoidance, *Journal of Construction Engineering and Management*, 120(3), 1994, pp. 553–560. Kumaraswamy, M. M., Conflicts, claims and disputes in construction. *Engineering, Construction and Architectural Management*, 4(2), 1997, pp. 95–111. Peña-Mora, F., Sosa, C., and McCone, D., *Introduction to construction dispute resolution*, Prentice-Hall, Upper Saddle River, N.J. 2003. Rubin, R. A., Fairweather, V., and Guy, S., *Construction claims: Prevention and resolution*, Wiley, New York. 1999. Semple, C., Hartman, F., and Jergeas, G., Construction claims and disputes: Causes and cost/time overruns, *Journal of Construction Engineering and Management*, 120(4), 1994, pp. 785–795.

¹¹ Construction Industry Institute, *Management of project risks and uncertainties (RS6–8)*, 1989, Austin, Tex.

Contract define obligations and rights of the contracting parties, even so contractual variations have been found to be among the most common causes of disputes in the industry¹². As project complexities increase¹³ the attempt to have a “water-proof” contract twisted it into management manual, which details the contractual procedures, inter alia, the performance, changes, payment, approval, and dispute resolution¹⁴. All these procedures are costly in time and resources, and without a monitoring plan and negotiation mechanisms the contract fail is expected. Moreover, the lack of understanding of the contract provisions and jurisdiction of legal cases is a common problem in the construction industry because most of the users do not possess a legal background¹⁵. All these issues lead to contractual conflicts and disputes which have to be negotiated within the ambits of the contracts. The frequency and severity of disputes increase the actual costs associated to the contract¹⁶. The construction industry has managed to develop and adopt many unique ways to address the potential risks of disputes¹⁷. Any procedure has to be based primarily upon contractual requirements, governmental regulation, court order, limited previous experience, or basic reactionary instinct and not on measured cost savings¹⁸.

In the industry the FIDIC (International Federation of Consulting Engineers/Fédération Internationale Des Ingénieurs-Conseils) contracts have been widely used in Europe and the Middle East under different forms that better suites the project: Red Book for construction, Yellow Book for the plant and design build, Green Book for low value projects and short period of time, and the Silver

¹² Charles, J., and Bruce, F. D., Investigation into construction disputes, *Journal of Management in Engineering*, 6(1), 1990, pp. 39-46. Zanelidin, E. K. Construction claims in United Arab Emirates: Types, causes, and frequency, *International Journal of Project Management*, 24(5), 2006, pp. 453–459. Perkins, R. A., Sources of changes in design—Build contracts for a governmental owner, *Journal of Construction Engineering and Management*, 135(7), 2009, pp. 588–593. Serag, E., Oloufa, A., Malone, L., and Radwan, E., Model for quantifying the impact of change orders on project cost for U.S. roadwork construction, *Journal of Construction Engineering and Management*, 136(9), 2010, pp. 1015–1027. Semple, C. et al. op.cit.

¹³ Kim, H., Soibelman, L., and Grobler, F., Factor selection for delay analysis using knowledge discovery in databases, *Autom. Constr.*, 17(5), 2008, pp. 550–560.

¹⁴ Cheung, S. O., Wong, W.K., Yiu, T.W., and Kwok, T.W., Exploring the Influence of Contract Governance on Construction Dispute Negotiation, *Journal of Professional Issues in Engineering Education and Practice*, October 2008, pp.391-8.

¹⁵ Chong, H. Y., and Zin, R. M., A case study into the language structure of construction standard form in Malaysia, *International Journal of Project Management*, 28(6), 2010, pp. 601–608.

¹⁶ Adrian, J. J., op.cit.

¹⁷ Harmon, K. M. J. Resolution of construction disputes: A review of current methodologies, *Leadership and Management in Engineering*, 3(4), 2003, pp. 187–201. Mix, D. M., ADR in the construction industry: Continuing the development of a more efficient dispute resolution mechanism.” *12 Ohio State Journal on Dispute Resolution*, 1997, p. 463. Peña-Mora, F., et al., 2003, op.cit. Rubin, R. A., et al. 1999, op.cit. Zack, J. G., Resolution of disputes: The next generation, *AACE International Transactions*, 1997, p. 50.

¹⁸ Gebken, R.J., and Gibson, G.E., Quantification of Costs for Dispute Resolution Procedures in the Construction Industry, *Journal of Professional Issues in Engineering Education and Practice*, July 2006, pp. 264-271.

Book for turnkey projects (engineering, procurement and construction). It is well known that in the execution and post contract stage the contracting parties have to assign competent teams to manage the contract in a proactive manner to successfully complete the project within its constraints, and the target objectives. The FIDIC suite of contracts were used by Romanian public authorities, more the red book (for the road and railway infrastructure works), until 2018 when by the Government Decision (GD) no. 1/2018¹⁹ new forms of contracts were established for the execution of constructions and for the design and execution of construction. The new templates are mandatory for works financed by public funds valued at or more than 5.548.000 Euro, and they are inspired by red and yellow books. All the other works which are valued under the amount established in the decision could be done on other templates, either FIDIC or not.

Most construction contracts contain arbitration clauses requiring the parties to refer any dispute to arbitration. In the new released FIDIC contracts (2017 edition) a claim is defined as request by one party to the other party for an entitlement or relief under the contract provisions and a dispute is any situation where a claim is otherwise rejected or ignored. Also, the Dispute Adjudication Board was changed to the Dispute Avoidance/Adjudication Board (DAB), and so the pro-active role of this board in dispute avoidance and resolution is emphasized. The main role of DAB is to prevent claims from becoming disputes.²⁰

Even if the GD no. 1/2018 was criticised for establishing a rigid template of contracts and because does not allow any change to the major provisions, we have to appreciate, in a certain measure, the content of clauses 69 and 70 introduced for better adjudication of disputes among the contracting parties. Even in the industry many other construction dispute resolution methods are established, mediation and arbitration are the only ones recognised as mandatory alternative dispute resolutions.

2. Alternative mechanisms for handling public procurement contract related disputes

In the global arena, there are various methods used to resolve disputes and some of the primary techniques are negotiation, mediation, conciliation, arbitration, litigation, and dispute review boards²¹. Dispute resolution methods are currently commonly used in the construction industry, among them only arbitration and

¹⁹ Government Decision no. 1 on the approval of general and specific conditions for certain procurement contracts related to investment objectives financed by public funds published in the Official Journal of Romania no. 26, January 11, 2018.

²⁰ Ledger, N., FIDIC Suite of Contracts: Updates to the Red, Yellow & Silver Books, London, Beale & Company, 2017 accessed on <https://www.beale-law.com/publications/636-fidic-suite-of-contracts-updates-to-the-red-yellow-silver-books.php> at 10 of September 2018.

²¹ Yates, J. K., and Smith, J.A., Global Legal Issues for Engineers and Constructors, Journal of Professional Issues in Engineering Education and Practice, July 2007, p. 205.

litigation are statutory controlled, all the others are private. This paper attempts to address this alternative mechanism focusing more on negotiation, mediation, and arbitration as dispute resolution methods.

2.1. Alternative or Legal Dispute Resolutions: Consequences and Challenges

Acknowledgement of a dispute between the contracting parties is a declaration of deep-rooted difficulties. The dispute is the solidification of a difference of opinion and/or strained relationship, a declaration that the parties are not achieving their intended goal(s)²². Any dispute has immediate and long-term consequences for the parties in dispute, it can be the catalyst for a worse relationship that inhibits the parties to reach a common agreement or it can enable the parties to work through their differences. It can make the parties to realize they are not achieving their interest(s) and to concentrate on reaching resolution. A dispute often spur the contracting parties to interact in new ways, to access new resources to resolve the disagreement. While current dispute resolution options can be successful in achieving an agreement, they are not always efficient and can still have detrimental consequences which lead the contracting parties to the trial solution.

The challenge for dispute resolution is that when it is requested the contracting parties are already unable to solve the dispute themselves and appeal to a third party, either private or statutory, which means they see this as losing or giving in to their main interest(s). Effective options are the ones which should prevent the solidification of dispute status, the expediency, and the improvement of working relationships whenever feasible²³.

Alternative dispute resolution (ADR) mechanisms have been introduced to meet the need to avoid litigation and contract withdraws. Alternative dispute resolutions arose as a response to the high cost and lengthy process associated with arbitration and litigation. Both methods involve the application of strict procedural rules and the involvement of the legal professions. The new ADR mechanisms list is comprehensive, and they are not statutory controlled²⁴.

As Cheung²⁵ stated we can establish a stair-step chart of disputes resolution methods commonly used in construction industry. The hierarchy starts with prevention mechanisms and goes up to the litigation (Fig. 1).

²² Scanlon, D., Saenz, L., and Kelly, M.P., The Effectiveness of Alternative IEP Dispute Resolution Practices, *Learning Disability Quarterly*, 2018, Vol. 41(2), pp. 68–78.

²³ Moses, P., & Hedeem, T., Collaborating for our children's future: Mediation of special education disputes, *Dispute Resolution Magazine*, 18(4), Summer 2012, pp. 4–9. Mueller, T. G., IEP facilitation: A promising approach to resolving conflicts between families and school, *Teaching Exceptional Children*, 41(3), 2008, pp. 60–67

²⁴ Tyrriil, J., Construction industry dispute resolution a brief overview. *Australian Dispute Resolution Journal*, 3(3), 1992, pp. 167-183.

²⁵ Cheung, S. O., Critical factors affecting the use of alternative dispute resolution processes in construction, *International Journal of Project Management*, Volume 17, Issue 3, June 1999, pp. 189-194.

The hierarchy starts with the prevention techniques which aims at creating teamwork and harmony, thereby preventing dispute and solving claims. Equitable risk sharing and incentive for cooperation are usually initiated for the success of partnership; even so for the administrative contracts most of them are forbidden by law and because of this most of the claims are turned into motives of disputes. Risk allocation and monitoring plans are a must, even for the administrative contracts. Once the contract has been concluded, public procurement regulations are no longer applicable. In this phase the monitor may focus only whether the contract is duly executed, while safeguarding the rights of the public authority or may see the influences produced on the goals of the organization or on wider public interest²⁶. Romanian public authorities do not have the culture of monitoring or risk allocation and many of them may face the challenge of prevention. Prevention do not guarantee the dispute elimination and the claims gathered during construction still need to be resolved.

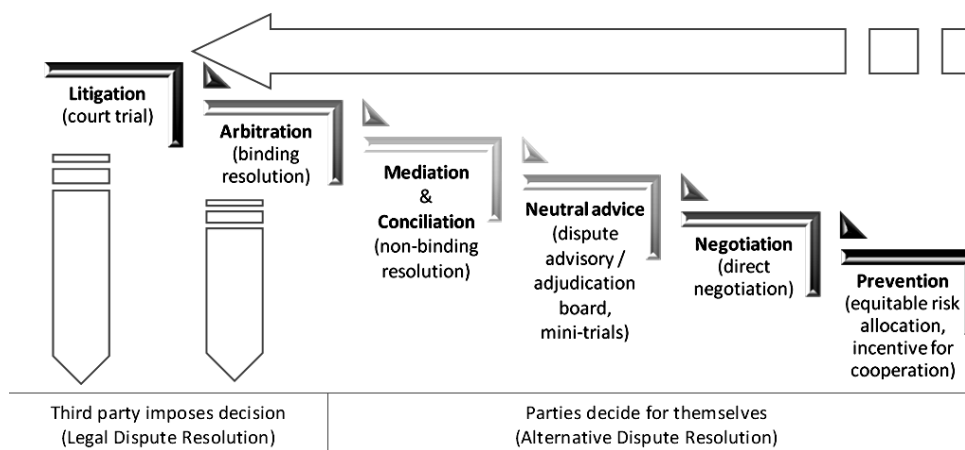


Fig. 1 Alternative and statutory dispute resolution mechanisms²⁷

The next step for solving construction issues is negotiation between the disputant parties. In this stage, the parties are free to establish the form, process and type of agreement, but the ambiguous provisions, precedent condition, frequency of claims, and the procedural requirements are direct factors for success of negotiation. In this phase cooperation, collaboration, solution orientation, problem solving and attempts to reach a solution for all involved parties are seen as

²⁶ Cărăușan, M.V., Conducting and Using Monitoring in Public Procurement Contracts, Journal of Public Administration, Finance and Law, Special Issue 3, 2017, pp. 7-16.

²⁷ Derived from Cheung S.O., 1999, op.cit., and Richter, I. E., The project neutral: Neutralizing risk, maintaining relationships and watching the bottom line, Construction and Business Review, 8(2), 2000, pp. 52-54.

priorities. Flexibility and adaptation are the main triggers of success, and are derived from the creative solutions identified by the parties. Negotiations could be conducted by the disputing parties or professional negotiators might be hired to assist parties.

If negotiation and prevention are directly dependent of the parties, and all the claims are not for the “public ears”, in the next two stages – dispute board/adviser and mediation & conciliation – a third party will be involved. Even the resolution is a non-binding one the process requires more development of historical facts, greater preparation, polemic discussions and increased costs. Dispute board has been used in Europe in the last 30 years, and are panels of independent arbitrators who are chosen by contracting parties. The independent specialists/arbitrators are hired from the beginning of the contract and they can make recommendations for settling disputes and claims on a regular basis during construction. The board/adviser(s) decisions are not binding and contracting parties can still use mediation or arbitration.

In the FIDIC contracts (2017) Dispute Avoidance/Adjudication Board is a standing institution of the contract, and any contracting party may refer to it either for assistance and/or to formally discuss. It attempts to resolve any disagreement among the parties its primary purpose is to prevent claims from becoming disputes. In order to accomplish its last purpose has the power to invite the parties to refer an issue in dispute if becomes aware of it. Unfortunately, or not, the new Romanian provision does not mention such a possibility for the contracting party, but in the same time does not deny it. Moreover, the parties can establish their own procedure for direct negotiation with or without the involvement of a third party.

Another non-binding alternative mechanisms is the mini-trial, which is voluntary, informal, and non-judicial procedure whereby the top managers of each party assume the role of panel members, often with a neutral third party to act as adviser and moderator. (Keith, 1997) In this procedure the top managers who often are not involved in the contract management are called to judge the claim/dispute in a predetermined time limit. The method used is negotiation, but after hearing the issues, the strengths and the weakness of the contract management. The main benefit is that the top management of contracting parties are involved in shaping the outcome, while avoiding the binding arbitration or litigation.²⁸ For the public sector such a mini-trial will mean that the decision to step in arbitration and/or litigation is not the one of the civil servants, but of the institution officials (elected official) – NASA successfully use this method.

Arbitration is the primary alternative to litigation when parties are unable or unwilling to solve a dispute²⁹, and it can be conducted ad-hoc or institutionally. The ad-hoc arbitration rules are established by the parties and the process takes

²⁸ Keith, F.S., Alternative Dispute resolution in Government, *Journal of Management in Engineering*, September&October, 1997, pp. 25-28.

²⁹ Idem.

place based on their will, for this the parties must have good legal knowledge. Institutional arbitration is a process whereby the parties agree to follow the rules of a particular arbitration institution and the rules usually cannot be changed by either party. Institutional arbitration advantages are that a specialised staff conduct arbitration hearings and the arbitration award binds the parties for the future. In arbitration parties exchange documentation in advance, identify witness, and proceed with direct and cross examination of the claims.

Litigation takes place when one party sues another party in a court of law within a specific jurisdiction. Litigation is a rigidly regulated process, which is subject to the rules and procedures set out by the court, characterised by a high degree of uncertainty and complexity. In litigation the parties surrender their control over the contract management and the outcome will be formally imposed by a third party.³⁰ Whilst formalised dispute resolution processes such as arbitration and litigation are useful in vindicating right and obligations, the contract performance might be affected, and the contract withdraw becomes a viable solution of the parties³¹.

Drafting of construction contract documentation is not an easy task, and a complete visualisation of all eventualities is almost impossible. Construction disputes often arise from unanticipated situations, that's why every contract should have at least one alternative dispute resolution method. The parties should choose the one which best fits their interests, and because in the paper we discuss more about the public contracts, one which best fits the public interest. For operativity the two most important resources of administrative contracts should not be forgotten: time and money.

2.2. Recent Developments in Alternative Disputes Resolutions

Unlike any other public procurement contract the construction one is not repetitive, and even involves a limited number of parties is very complex in management. Furthermore, the public construction contract encompasses an array of different relationships, and much more resources are involved for preparation, execution, and even for post-factum maintenance. The alternative dispute resolution mechanisms evolved and the new technologies provide the answer for better management of the contract.

Innovative dispute resolution mechanisms should not necessarily replace the existing ones, they should be additional. They should fill in the gaps of the current mechanisms. Recommended alternative features, most of the times, lead to effective dispute resolution practices in more appropriate conditions than the classical one.

³⁰ Cheung S.O., 1999, op. cit.

³¹ Cheung, S.O., and Chow, P.T., Withdrawal in Construction Project Dispute Negotiation, Journal of Construction Engineering and Management, December 2011, pp. 1071-9.

A prototype, namely e-DR, was developed by using Microsoft Access 2007 Developer Extensions and Runtime (nowadays other versions are available) because of its user-friendly functions and wide availability. The software focuses on one of the contractual issues identified in the construction, that is, contractual variations. Relevant tables are created within and the issues related to disputes in all the three stages of the contract management –pre-issues (pre-contract stage), con-issues (construction stage) and post-issues (work completion stage) – are put in relationships. The functionality of the data is used to prevent and to accomplish the claim before it transforms into a dispute. The application is proven to help users make more informed decisions regarding contractual circumstances in construction projects, and to get through the voluminous and complicated contract documents and provisions.

Many disputes arise because of poor communication between the contracting parties. The solely accomplishment of the rights and obligations is not enough in a public contract, the parties should communicate and most of the time not just between each other, but also with the public. Moreover, the primary condition for better monitoring is communication, and as we already mention the path of a claim to be turned into a dispute is very short. A web-based extranet can help open up communications between the parties, and even more a data warehouse will give them the safety and trust in the contractual relationship.

Even data base technology is designed more for repetitive events, because textual data are not structured the greatest concern is the visceral mismatch³². Data warehouse is a read-only database created by combining data from multiple databases for purposes of analysis and decision making³³. Data warehouse has been recognized as a type of decision support systems that efficiently collects, organizes, and stores all relevant data in support of management decisions³⁴. The contents of a data warehouse may be a reproduction of a part of some source data or the results of pre-processed queries or both³⁵. Even it is a relatively new concept³⁶, it collects methods which are used to support users in their analysis for better decision making or/and for the improvement of information resources³⁷.

³² Inmon, B., and Valente, G., A peek into the future: The next wave of data warehousing, March 3, 2010 retrieved on <http://tdwi.org/Articles/2010/02/03/Next-Wave-DW.aspx?Page=1> at September 20, 2018.

³³ Theodoratos, D., and Sellis, T., Design data warehouse, *Data&KnowledgeEngineering*, 31(3), 1999, pp. 279–301.

³⁴ Chau, K. W., Cao, Y., Anson, M., and Zhang, J., Application of data warehouse and Decision Support System in construction management, *Automation in Construction*, 12(2), 2003, pp. 213–224. Rujirayanyong, T., and Shi, J. J., A project-oriented data warehouse for construction, *Automation in Construction*, 15(6), 2006, pp. 800–807.

³⁵ Chau, K. W. et al., op.cit.

³⁶ Chong, H.Y., Zin, R.M., and Chong, S.O., Employing Data Warehousing for Contract Administration:e-Dispute Resolution Prototype, *Journal of Construction Engineering and Management*, June 2013, pp. 611-9.

³⁷ Inmon, W.H., *Building the data warehouse*, 3rd Ed., Wiley, New York, 2002. Rahman, N., Refreshing data warehouses with near real-time updates, *Journal of Computer Information System*, 47(3), 2007, pp. 71–80.

Although previous studies have identified information technology as one of the possible measures of mitigating conflicts and disputes³⁸, the application of IT in contract management in the construction industry is rather limited.

3. Enforcement of arbitration in public procurement contracts in Romania

Alternative dispute resolution mechanisms such as negotiation, mediation, mini-trials, and dispute boards are effective ways to settle construction disputes in government procurement contracts. All of them work well if the contracting parties are truly interested in coming to a settlement. A “win-win” situation is not always achieved, but because the parties contribute to the outcome, they typically do not view it as a loss, and the relationship is preserved for future contracts. We consider that the time has come to make ADR the rule, not the exception for the Romanian public construction contracts.

3.1. Grounds for Arbitration in Romania

In mediation, a neutral third party acts as an intermediary to facilitate communication between the disputing parties, and in conciliation a third party recommends a settlement after hearing arguments from each side. Both of them give to opposing parties the option of either accepting, or not accepting, the proposed settlement³⁹.

In GD no. 1/2018 mediation is established as a pre-stage of arbitration. In Romania, mediation is regulated by Law no. 192/2006⁴⁰ and represents an amicable settlement of conflicts with the support of a third specialised party (mediator). Mediation relies on neutrality, impartiality, confidentiality and on free consent of the parties in order to reach a mutually convenient, efficient and durable solution. The mediator fee is reasonable consider the nature and object of dispute.

In the clause 70 of the contract templates, established in the GD no. 1/2018, it is stated that amicable settlement, in the event of any dispute, can be the result of

³⁸ Cheung, S. O., Kenneth, T. W. Y., and Henry, S., Construction negotiation online, *Journal of Construction Engineering and Management*, 130(6), 2004, pp. 844–852. Nitithamyong, P., and Skibniewski, M. J., Web-based construction project management systems: how to make them successful, *Automation in Construction*, 13(4), 2004, pp. 491–506. Chen, J.-H., KNN based knowledge-sharing model for severe change order disputes in construction *Automation in Construction*, 17(6), 2008, pp. 773–779. Chong, H. Y., Balamuralithara, B., and Chong, S. C., Construction Contract Administration in Malaysia Using DFD: A Conceptual Model, *Industrial Management and Data System*, 111(9), 2011, pp. 1449–1461.

³⁹ Redfern, A. and Hunter, H., *Law and practice of international commercial arbitration*, Sweet & Maxwell, London, 1986.

⁴⁰ Law no. 192 on mediation and organizing the mediator profession published in the Official Journal of Romania no. 441, May 22, 2006.

either direct negotiation or through a mediator. Both parties shall attempt to resolve the dispute amicably before the commencement of the next stage – arbitration, after 90 days from the Supervisor's decision (former Engineer decision in the FIDIC contracts). If the parties establish a resolution in mediation within 30 days (from the notification of the other party) either one of them can start the arbitration procedure. Arbitration may begin within 90 days of the conclusion of the mediation or direct negotiation procedure. The general rule established by the clause is that the contracting parties before arbitration procedure must pass the amicable settlement, and only when the parties do not agree with the supervisor's decision can go directly to arbitration (clause 70.3.d).

Arbitration provides a non-judicial forum, internationally recognised, which settles disputes. In order for arbitration to take place all parties to an agreement must agree to arbitrate either by including an arbitration clause in the original contract or by an agreement that is created when a claim cannot be settled through negotiations. Some legal systems, in which the Romanian one is included – clause 70 of the contracts' templates established in the GD no. 1/2018, make it a requirement that all parties must agree to arbitration when a dispute cannot be settled through negotiation⁴¹. Parties to a contract should provide a written agreement to arbitrate at the beginning of the arbitration hearing even if they have already agreed to arbitrate by having signed a contract with an arbitration clause. Contracts usually specify an odd number of arbitrators (one or three) with diverse backgrounds. The contract, or an agreement to arbitrate, should specify the location of the arbitration proceedings by always taking into account the availability of facilities, and the availability of support of members from international arbitration institutions. For arbitration always a fee is charged, and each court of arbitration has its own fees. Arbitration awards may be given after interim measures are set. If arbitration awards are not paid it could result in a breach of contract claim.⁴² In international arbitration to the arbitration fee the translators' fee must be added to the costs of the procedure.

In the procurement contracts established by GD no. 1/2018 arbitration is done in accordance with the Arbitration Rules of the Court of International Commercial Arbitration by the Chamber of Commerce and Industry of Romania. Any contracting party can appeal to arbitration if:

(a) there is a supervisor's decision issued within the appropriate time limit for which a notification of disagreement was submitted;

(b) the supervisor did not issue the decision within the appropriate time limit and one party has notified a disagreement, and the amicable settlement have been complied;

⁴¹ United Nations Commission on International Trade Law (UNCITRAL), Legal guide on drawing up international contracts for the construction of industrial works, Vienna, Austria, 1988.

⁴² Idem.

(c) a notice of disagreement was submitted and the amicable settlement have been complied;

(d) the dispute concerns the non-compliance of the contracting parties with the supervisor's decision, which is final and binding. In this case, either party may choose to act only in the arbitration without taking into account amicable procedures;

(e) the dispute relates to non-compliance by either party with the mandatory provisions of the supervisor's decision.

The arbitrators have full authority to access, analyse and review any certificate, decision, instruction, opinion or assessment made by the supervisor relevant to the settlement of the dispute. The supervisor may be summoned as a witness and provide evidence to the arbitrator(s) on any matter of relevance to the dispute. The legal provision establish that unless the contract did not state different, disputes shall be settled by three arbitrators nominated according to the procedure of the Romanian International Court of Arbitration.

Litigation takes place when one party sues another party in a court of law within a specific jurisdiction. For Romania, the public procurement contract is an administrative act and the court of appeal is the administrative one. However in other countries, if a party sues in a court of law to secure an interim measure it could void their right to use arbitration proceedings⁴³, the Romanian regulations does not state such a possibility. Moreover, the national procedure establish the possibility to appeal at the court only for the annulment of the arbitration award, and in specific situations. We will not say more about litigation because it is a matter of research planned for another article.

3.2. Arbitration and the Romanian Administrative System Boundaries

Arbitration as all the other mechanism has, of course, disadvantages. The main one is that arbitration awards may ignore important rules of substantive or procedural law, and yet the parties may have no recourse to court action. Some critics, particularly⁴⁴, along with many Romanian lawyers, have argued that arbitration systems enables private groups to acquire vast amounts of power by formulating and promulgating rules of their own, and this is both dangerous and unconstitutional in a system where the judiciary has the legal monopoly. It should be noted, however, that arbitration is rather used to restore equilibrium when contractual agreements have broken down for one reason or another. Thus, arbitration appears to be gradually, but effectively, subsuming the work of the courts and, for this reason, it can appropriately be regarded as an important institution of dispute resolution⁴⁵. In light of its advantages, it is not surprising that

⁴³ Knuston, R. C., *FIDIC: An analysis of international construction contracts*, Kluwer Law International, The Hague, The Netherlands, 2005.

⁴⁴ Kronstein, H., *Arbitration is power*, *New York University Law Review*, 38, 1963, pp. 661-700.

⁴⁵ Carlston, K.S., *Theory of the arbitration process*, *Law and Contemporary Problems*, 17, 1952, pp. 631-651.

the system of arbitration has virtually come to replace the courts in the settlement of contract related disputes. In the construction industry, unfortunately, some parties wait until a dispute arises and then submit it to arbitration, while other cases are referred to arbitration by over-crowded courts. In the Romanian system, the Government wanted to implement arbitration in order to decrease the number of court cases and to reduce the time of dispute settlements.

The public contracting system is rooted in procurement regulations and procedures that centre responsibility on the civil servants. The contract procedure is more bureaucratic and less performance oriented. Because of the high level of public accountability and the every dime justification required for all contract settlements, civil servants are reluctant to make compromise and prefer the binding resolutions. In this situation the GD no. 1/2018 helped the public authorities to consider in the contract decision making process the costs of litigation and the staff disruption costs. Further, as Keith⁴⁶ stated the public authorities should pay attention to ADR because it might lose the efficiency of them if:

(a) does not prepare, negotiate and sign an agreement to submit the dispute to the mechanisms they choose, except arbitration and mediation, in certain limits, all the other mechanism have to be established by the contracting parties;

(b) there is a requirement to process cost-justifying paperwork by an entire line of civil servants;

(c) the outcome of the ADR is not binding and requires ratification from the top management/elected officials or other authority;

(d) civil servants are not professionalised in alternative dispute resolution and for them is an administrative burden;

(e) the arbitral tribunal award is not accepted and the dispute is taken in front of the court of justice for the annulment of it;

(f) the authority goes to the court of justice in order to justify its actions and to escape of responsibility to the Romanian Court of Accounts;

(g) the monitoring system has discrepancy and the supervisor role is not assumed, and well known by the contracting parties (the parties lose themselves in/between the contract provisions);

(h) the complexity of the contract is not fully understood by the arbitrators and mediator.

Public authorities should focus not on how to produce a favourable “winning” decision, but rather on fair and equitable treatment of its contractors.

Romania has done a huge step forward when established the ADR mechanism as mandatory for construction contracts, but some legal issues are not yet settled, and more discussions are going to be open once the first construction contracts are in force. Those which attract our attention, at the moment, is the institutionalisation of arbitration, a private institution, in an administrative contract through a Government decision, and not by Law.

⁴⁶ Keith, F.S., op.cit. p. 27.

The Constitutional Court in one of its decision (331 of April 10, 2012) mentioned that arbitration is an exception to the principle that justice is done through the courts and is an effective legal mechanism designed to ensure a more impartial, faster and less formal, confidential trial, which is finalized with an enforced judgment, arbitration award n.a.⁴⁷ Furthermore, the Romanian Civil Procedural Code in art. 542 shapes the capacity of any state and public authority to conclude arbitration conventions, if they are authorised to act in this sense *by law*. The Court established that the parties' freedom to appeal to this mechanism is reflected in the arbitration agreement⁴⁸. As long as the law does not expressly prohibit to legal entities governed by public law to appeal to arbitration institution for settling disputes that may arise as a result of the performance of a *commercial* contract and since the arbitration agreement is the will of the parties, the arbitration can be done. The Court decision and the Civil Procedural Code have, in our point of view, two major insufficiencies:

1. the Code gives the state and the public authority the capacity to conclude arbitration convention if the law authorise them, but the administrative construction contract was established by Government decision which is an administrative act with normative character, a *secudum lege* act. Is the normative character of GD is sufficient for the capacity of the public authorities to conclude arbitration convention, to this question the Constitutional Court already gave an answer in other decisions (see e.g. Decision no. 68 of February 27, 2017 published in the Official Journal of Romania, Part. I, no. 181 of March 14, 2017).

2. the Constitutional Court decision no. 331/2012 besides that mentioned the law as provider of state and public authorities right, also revealed that arbitration can be used in any commercial contract and not in any contract. This provision does not give us the possibility to include also the administrative contract in the category of commercial act. Besides, in art. 2 of the construction agreement template, the contract is recognised as being with administrative character.

By taking into account the above mentioned legal shortages we consider that the GD no.1/2018 might be called for constitutional control, and so the arbitration clause it might be declared unconstitutional. To these questions we add one more concern raised from the legal provision that establish arbitration (art. 28, Law no.335/2007⁴⁹). The Court of International Commercial Arbitration is a institution without legal personality, and it functions by the National Chamber of Commerce that organise activities of arbitration for commercial and civil disputes, domestic and international, but not for administrative ones.

⁴⁷ See also the Constitutional Court point of view stated also in the Decision no. 8 of January 9, 2007, published in the Official Journal of Romania, Part I, no. 73 of January 31, 2007.

⁴⁸ See also the Constitutional Court point of view stated also in the Decision no. 870 of June 23, 2011, published in the Official Journal of Romania, Part I, no. 520 of July 25, 2011.

⁴⁹ Law no. 335/2007 of the Chambers of Commerce of Romania published in the Official Journal no. 836 on December 6, 2007, amended and supplemented by Law no. 39/2011 published in the Official Journal no. 224 on March 31, 2011.

As we expose above, the Romanian administrative system has to deal, besides the management challenges, civil servants reluctance and de-professionalization, with the constitutional and legal recognition of arbitration as a reliable alternative dispute resolution for construction contract.

4. CONCLUSIONS

This paper has proposed a comprehensive analysis of the alternative dispute resolution based on the Romanian legal framework and system boundaries. Because most construction projects are monitored by very sophisticatedly prepared conditions of contract, conventional negotiation are far from real life situations. The influence of contract management by the alternative dispute resolution was explored and we found a large array of mechanisms, and each one of them tries to help the parties to have a “water proof” contract. All the presented mechanisms have been proved in other countries and international institution to be effective in preventing and handling disputes. The main criticism in the alternative dispute resolution researches is the lack of quantitative data, and unfortunately this was one of our research limit. Future research should include surveys’ responses and quantitative data from contracting parties and third parties. Follow-up and follow-along research are on our future research agenda, especially because there are clauses in the GD no. 1/2018 that can cause legal issues in the future. Furthermore, because the duration of the legal dispute settlement was not one of our concerns we did not try to find an answer, even the new legal provision said it brings a reduction. For that we intend to extend the research to the arbitration principles, benefits, and duration in order to know whether Government have had any success in decreasing the number of lawsuits.

The Government had a swift and profound impact on efforts made to use arbitration in the public procurement contract. Furthermore, the Constitutional Court will soon rule on the constitutionality of the efforts to allow or limit the use of arbitration. At the same time, public authorities continue to address attempts to avoid arbitration.

Arbitration stands as an important mechanism for handling contract related disputes. It is thought to be more flexible than the court of law, but not as flexible as the alternative dispute resolution. Arbitration is a mechanism for handling disputes in a society that is increasingly organized, and which is in need of more effective agencies of social control.

Resolving construction disputes is a difficult task, especially when the available resources are limited, the legal norms are not enough clear, and the dispute is complex. In the attempt to overcome the shortcomings of litigation and arbitration the use of ADR mechanisms in construction is a must. By focusing on the critical attributes, alternative dispute resolution methods can be kept simple, inexpensive and effective.

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