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MED-ARB AND ARB-MED PROCEDURES IN CONFLICTS AMONG PROFESSIONALS IN AGRICULTURE

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Abstract: *Disputes among professionals in agronomy are generally caused by failure in performing a contract, most often the result of unclear formulations or of some flaws in drafting a contract. These arise from a failure to observe objective law, the non-satisfaction of subjective law and a failure to perform one's obligations. These are moments when Med-Arb is needed to resolve disputes and preserve business relationships between farmers. First, we must emphasize that the ADR (Alternative Dispute Resolution) phenomenon is far smaller in Romania when compared to the United States of America (a leader in the field, as previously shown), but also as to any other West European country that holds a tradition in the field. The ratio between classical state justice and alternate methods for dispute resolution is overwhelmingly in favour of the former. Thus, from data provided by the Superior Council of Magistracy, in 2014, at a national level, there were over 4,200,000 cases on the docket before courts of law and only 800-900 cases before The Romanian Court of International Commercial Arbitration. As regards mediation, The Mediation Council declared several thousand mediations carried over 2014. The purpose of this paper is to carry out an analysis on out-of-court alternatives for dispute resolution in business relationships among agribusiness professionals or between agribusiness professionals ans professionals from other fields, with whom they establish varied legal relationships.*

Key-words: *mediation; arbitration; agronomy; Med-Arb; dispute*

INTRODUCTION

Med-Arb and Arb-Med have emerged as alternate procedures for dispute resolution and in response to the inertia present in the classical system of justice. As regards the mediation procedure, itwill not be analysed in the present article, as it has been dealt with in previous ones[1]and, therefore, we shall discuss only the institution of arbitration and its importance for the business environment in agriculture. The importance of theoretical knowledge pertaining to these institutions of law, as well as the advantages of their application in circumstances arisen in conducting legal relationships among professionals in agronomy makes their learning an element that should not be neglected when modelling a sustainable strategy for each professional in agronomy and related fields.

MATERIALS AND METHODS

Regulatory documents were used in order to conduct this study, such as: laws, ordinances, resolutions or decisions; case law and legal doctrine, as well as statistical data. Their rendition is conducted via logical and rational clarifications and explanations over the content and meaning of norms, aiming at a correct knowledge thereof. As methods of interpretation we hereby mention literal or declarative interpretation, extensive interpretation, restrictive interpretation, logical interpretation, grammatical interpretation, systematic interpretation, in conjunction with other legal stipulations or the historical and teleological method of interpretation, by establishing their ends and practical usefulness contemplated by law givers upon constituting a legal rule.

RESULTS AND DISCUSSIONS

Med-Arb is an alternate procedure for dispute resolution consisting of mediation and arbitration. When resorting to the Med-Arb procedure, conflicting parties in agronomy consent to commencing the procedure with a private mediation and, if the dispute between them cannot be

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settled with an agreement, to continue with a private arbitration. Thus, in the hypothesis of a litigation bearing on the obligation to perform, in the case of a land lease contract, the lesser and the lessee, if they consent to it, shall first proceed with a mediation to settle the litigation and, if no arrangement is reached, the parties will continue with the attempt to solve the conflict via arbitration. For Med-Arb to exist, the arbiter and the mediator must be one and the same, otherwise the two procedures will be separate. In a Med-Arb procedure, the third party conducting the procedure is called Med-Arbiter[2]. The distinct feature of this procedure consists in that it prioritizes the parties' agreement; in the aforementioned case, priority is granted to the agreement between lessor and lessee and, at the end of the mediation procedure, if no such agreement has been reached (mediation agreement), the dispute shall be settled by an arbitral award. In the mediation stage, parties try to resolve their dispute according to their needs and interests, whereas in the arbitration stage, dispute resolution is conducted pursuant to legal and contractual stipulations that apply to the case[3]. Bearing this logic, it is preferred for a litigation between a vegetables farmer and the broker placing them on the market to be solved by mediation, as this procedure is known to be faster, or, in the case we presented, as it involves the vending of perishable goods, the risk of their decay and that of causing economic damages could be quickly removed via an agreement leading to conflict resolution and the continuance of business relationships between parties.

Arb-Med is an alternate procedure for dispute resolution made out of arbitration and mediation. In the Arb-Med procedure, parties consent to commencing the procedure with an arbitration and, if the dispute between them cannot be settled with an agreement, to continue with a private mediation. For Arb-Med to exist, the arbiter and the mediator must be one and the same, otherwise the two procedures will be separate. In the Arb-Med procedure, the third party conducting the procedure is called arb-mediator[4].

The Med-Arb procedure takes on many forms:
a)Non-binding Med-Arb;
b)Medaloa (Mediation and Last-Offer Arbitration);
c)Med-Arb show cause;
d)Post-arbitration mediation.

a) *Non-binding Med-Arb:*

Non-binding Med-Arb is a less common procedure where both mediation and arbitration are not procedures that conclude with a binding solution for the parties. This procedure can be useful when a solution rendered by an arbiter is accepted by the parties or it determines them to continue negotiations until reaching a solution.

b)*Medaloa:*

Medaloa is a combination between mediation and last-offer arbitration. If mediation between parties fails, the med-arbiter proceeds to a judgement, rendering a resolution that corresponds to one of the final offers of the two parties. With this, in a hypothesis of settling a conflict arisen between a manufacturer of chemical fertilizers and his buyer, a conflict whose object is the payment of indemnification for non-conforming sold merchandise, an arbitral award can force the party whose claims are unsuccessful (the manufacturer) to pay indemnification in tranches, if this was the offer formulated by him, but unaccepted by the buyer, as the offer is the only possible solution to cover the debt and satisfy the creditor's right (the buyer).

c)*Med-Arb show cause:*

2 Megan Elizabeth Telford ," **Med-Arb: A Viable Dispute Resolution Alternative"**,"IRC Press", 2000, p. 3.
3 Mihuț Gabriela Gyongy, "Amicable procedures for dispute resolution among professionals", unpublished doctorate thesis, p.40.
4 Megan Elizabeth Telford ," **Med-Arb: A Viable Dispute Resolution Alternative"**,"IRC Press", 2000, p. 3.

Similar to the classical Med-Arb procedure, Med-Arb show cause differs from it in that the arbiter renders only a draft award which is presented to the parties and the latter have an opportunity to discuss and prove the existence of incoherence or irregularities in the award and to demonstrate why the med-arbiter should not decide as comprised in the draft award. Given that in common law systems, arbitral awards can be challenged only on strict grounds such as abuse of arbitral powers, arbiter fraud etc. and the remedy at law is not easy to access, we consider that such a procedure is extremely useful both for the parties, who have a chance to be heard on the matter of the decision, and for the arbiter, who will have the conviction of having rendered a thorough and lasting award. In the hypothesis of a conflict arisen between a cereal farmer and a seed importer, a conflict having as object seed lack of quality and non-conformity, with the*Med-Arb show cause* procedure, the med-arbiter's draft can be amended by the parties so that technical indicators falling under the European legislation on varieties and seeds should be enlisted in the enacting terms of the rendered arbitral award, thus eliminating ambiguity from its content.

d) *Post arbitration mediation:*

It is a Med-Arb form that consists in a mediation conducted by the med-arbiter after the arbitration session is closed and, at the same time, before pronouncing the arbitral award. The purpose of this procedure is to offer parties a last chance to reach a mutually agreed solution. The method is very efficient since it is meant to safeguard business and personal relationships between professionals and to preserve the trust of parties who are in fact the decisive premise for the continuance of commercial relationships in agribusiness. Today, in Romania, pursuant to provisions in art. 544 par.(2) ofNCCPwhich stipulates that “Subject to the observance of public order, good morals and of the imperative stipulations of law, parties can establish, via arbitral agreement or a prior written deed, at the latest upon establishing the arbitral tribunal… any other norms regarding the good performance of arbitration”, in conjunction with art. 7 in Law 192/2006and art. 27 par.1 in the same law, parties can stipulate the Med-Arb procedure in any of the aforementioned forms, except for the non-binging Med-Arb.Mention must be made that provisions in art. 544 par.(2) of NCCP allow parties the right to decide only on issues related to the procedure, but not on the award itself. Romanian law does not contemplate any conditions on the exercise of the arbitrator position, as in Romania this activity can be exerted by any person of age[5].

Arbitration

Arbitration is an institution holding an old tradition in Romanian law. The modern regulation of arbitration was given via the Code of Civil Procedure adopted in 1865 (Book IV *On Arbitrators*, art.339-370), having as model the French Code of 1807 and the Code of Civil Procedure of the Canton of Geneva of 1849[6]. Stipulations in Book IV were applied until the communist regime came to power, when economic principles and corresponding economic laws came in conflict with the liberalism specific to Book IV and with the principle of free will of the parties stemming therefrom. In 1993, in the spirit of the new direction, Book IV in the Code of Civil Procedure was substantially amended. The main source of inspiration was the UNCITRAL Law model which, although not directly embedded in domestic law, had a substantial contribution to the

5 Mihuț Gabriela Gyongy, “Amicable procedures for dispute resolution among professionals”, unpublished doctorate thesis, p.42.

6 It was the first systematic approach on the procedure of arbitration, the first regulatory document that dedicates an entire chapter to it. Until then, rules on the matter had been formulated in regulations that capture the attention of historians of business law, such as: Donici's Manual of 1814; The Calimach Code – adopted in Moldova in 1817 – in whichart. 1828 stipulated that “litigant parties can not only agree among themselves on the object of their conflict, but they can also submit it in a good formulation to the decision of others, which then bears the name of arbitrium”;The Caragea Code –entered in force in Țara Românească and which dedicated 21 articles to arbitration, in Chapter XVIII – „For arbitration” (*eretocrisie*, as was arbitration called) andChapter XVII – “For Agreement”. The longest period in force, of almost 50 years, was held by the Calimach Code –which contained the most performing regulation.

reformin this field of law and legal institutions. The Code of Civil Procedure[7]regulates private voluntary arbitration. Rules included in the Code of Civil Procedure constitute the general law in matters of arbitration. Book IV is dedicated to arbitration.[8]

The Code of Civil Procedure is the general law for private voluntary arbitration. The notion of private voluntary arbitration incorporates domestic arbitration / international arbitration, ad-hoc arbitration / institutional arbitration, arbitration in law / arbitration in equity, commercial arbitration[9] / civil arbitration.

Arbitration is an alternative to the traditional way of solving litigation in court. It allows agronomy professionals to solve their disputes out of court, which has many advantages, such as: time saving, low expenses, low risk of losing crops / perishable goods, fruit etc. Arbitration has a contractual nature; therefore, farmers must agree toand can never be forced to subject themselves to arbitration. After having agreed to solve their dispute through arbitration, conflicting parties are free to opt from several alternative procedures or to structure arbitration proceedings as they see fit. Moreover, arbitration awards are usually enforced by the courts of law in the country.

Pursuant to art. 533, Title I, Book IV in NCCP, arbitration is defined as “an alternate jurisdiction of a private nature”. Parties in conflict and the competent arbitral tribunal are granted the freedom to establish “rules of procedure in derogation from the general law, on condition that such rules do not come against public order and imperative legal stipulations”. As regards institutionalized arbitration, it is defined as “a form of arbitral jurisdiction which is established and functions on a permanent basis attached to a domestic or international organization or institution or as a standalone non-governmental organization of public interest, established under the law, based on its own internal regulation, applicable in all disputes submitted for a solution pursuant to an agreement for arbitration” (art. 617, Title VII, Book IV, Code of Civil Procedure)[10]. Parties in arbitration proceedings can be professionals in agronomy, farmers, providers of related services, vendors of agricultural goods or produce etc. At the same time, the object of an arbitration procedure can be all those disputes arisen between professionals in agronomy and competent institutions (e.g. A.P.I.A.) in relation to rights and obligations they may hold.

Case study

Between S.C. TRADING IMPORT-EXPORT S.R.L. and THE ASSOCIATION OF AGRICULTURAL PRODUCERS ”RECOLTA ARPAȘU DE SUS” there arose a dispute on the failure of S.C. TRADING IMPORT-EXPORT S.R.L. to observe its contractual obligation to hand over 50 tractors, although the ASSOCIATION OF AGRICULTURAL PRODUCERS „RECOLTA ARPAȘU DE SUS” had performed its obligation to pay the related price. In the sale-purchase contract concluded between the parties, under art. 28, entitled “Dispute Resolution”, it was specified that “any dispute arisen between the parties in relation to contract performance, shall be settled via arbitration, before the Court of Arbitration attached to the Romanian Chamber of Commerce and Industry”.

By inserting an arbitration agreement in the contract between them, under the sanction of nullity, the parties resorted to arbitration. It is provided that “the condition for a written form of agreement is deemed as fulfilled when the resort to arbitration has been agreed by correspondence exchange, irrespective of its form, or by an exchange of procedural deeds or when the existence of

7 The New Code of Civil Procedure (NCCP)

8 Art.541-612.

9 Taking into consideration the system established through the NCCP, the analysis of the new regulation on arbitration shall be conducted from the perspective of domestic and international private voluntary arbitration that involves only professionals.

10 Mihuț Miki, The Evolution of Arbitration in Romania, International Conference of Doctorate Candidates, Timișoara, 2015, p.159.

agreement has been claimed in writing by one party and not challenged by the other". As regards compromise, the Code of Civil Procedure stipulates that it can be concluded even if parties find themselves in litigation before another court (ordinary law). Article 544 in the Code of Civil Procedure makes reference to "the efficiency of arbitration clauses": whether an arbitration procedure is concluded with or without the rendering of a decision on the matter of the cause, the arbitration clause is not affected, that is "it shall remain valid and it shall serve as grounds for any new arbitration procedure that might be initiated pursuant to it for the settlement of any litigation arisen between parties as derived from the main contract". The principle according to which "the conclusion of an arbitration agreement excludes, for the litigation that forms its object, the competence of the courts of law" is also preserved.

Legal competence is the only condition imposed by the Code (art. 547) to solicit arbitration. Thus, in the given situation, both entities in the agricultural field possess legal competence and they can sit at the arbitration procedure, as they meet the conditions stipulated in NCCP as regards civil capacity. Arbitrators must always be in odd numbers (art. 548, par. 1). If parties have not established a number of arbitrators by agreement, the litigation shall be judged by three arbitrators (article 548, par. 1). The acceptance of having been designated as arbitrator is made only in writing and it is sent to the parties by "any means that can ensure transmission of the the document text and confirmation of receipt", that is by mail, fax machine, e-mail or by another means (art. 551). In order to solve a dispute in agronomy, it is advised that at least one arbitrator should have a specialization in agronomy, for a better understanding of speciality terminology and for the understanding of established practices between litigating parties (trade practices, customs of the place etc.)

In terms of liability, arbitrators are not liable for damages, but they are liable under the law, if requirements in law are met. Article 557 (let. d) in NCCP stipulates that liability of arbitrators can be engaged "if in bad faith or by gross negligence they violate other duties that lie with them".

As regards an arbitration term, the rendering of an arbitration award is subject to a mandatory term of 6 months, under the sanction of caducity, but only if parties have not foreseen otherwise in the agreement for arbitration (art. 559). The arbitral tribunal can rule, on thorough grounding, to extend the arbitration term, only once, for 3 months at the most. In the hypothesis of the case study, resorting to this procedure and opting for a shorter term can have beneficial results for the association involved, as it can gain in a short time an arbitration award that can be enforced, in the absence of voluntary compliance, so that taking possession over the 50 tractors (in a short time – as compared to the term needed to solve the matter in court) might save the crop year.

Parties choose the language in which arbitration is to be conducted. If parties miss to foresee this issue in their agreement or they do not come to an agreement on this matter on a later date, the language of arbitration shall be the language of the contract from which the dispute has arisen or an international language to be decided by the arbitral tribunal (art. 562 NCCP). In the case before us, as the parties were Romanian legal entities, the language used in arbitration was Romanian. Taking into consideration that business relationships of large farmers and agricultural producers most often bear extraneous elements, the possibility of electing the language to conduct a procedure is a real advantage in terms of procedure expedience and costs. As regards state justice, pursuant to the law, it can only be conducted in the Romanian language, all steps in the proceedings made by a foreigner / non-speaker of the Romanian language having to be subjected to the filter of interpreters or translators, as applicable, followed by authentication of translated writs by a notary public. All these stages require substantial amounts of money and they lead to a delay in solving the dispute.

Arbitration procedure.

Referring a dispute to the arbitral tribunal. As regards the arbitration procedure (Title IV), in relation to referring a dispute to the arbitral tribunal, the application for arbitration must contain elements that identify the parties such as personal identification number, sole registration code or fiscal identification code. If the petitioner has his/her domicile (and registered office, we consider) abroad, an address for service (domicile / registered office) in Romania must also be indicated, where procedural notifications shall be communicated (art. 563, par. 1, let. a). In the proposed case, the party that referred their dispute to the arbitral tribunal wasthe ASSOCIATION OF AGRICULTURAL PRODUCERS „RECOLTA ARPAȘU DE SUS", having its registered office in Romania.

Judgement. As regards *judgement* (Chapter II under Title IV), the core principles of the civil trial are accordingly applicable to the arbitration procedure as well (art. 567)[11]. The tribunal's communication with the parties, in connection with actions undertaken by the tribunal, can be made, pursuant to the new stipulations, by fax machine, e-mail or any other means that can ensure transmission of the document text and confirmation of receipt (art. 569). As regards the checking of competence, the arbitral tribunal proceeds to such an examination "upon the first hearing date having completed the legal procedure" (art. 571, par. 1). If itdeclares itself as not competent to judge, the arbitral tribunal shall pronounce a resolution but it cannot be the object of an action for annulment (art. 571, par. 3). In the presented case, the arbitral tribunal declared itself as competent to judge. Any incident concerning arbitration, as it is regulated in the new Code, enters the competence of courts of law, more specifically under the jurisdiction of the county court in whose territory an arbitration is conducted.[12].

*Exclusive competence of arbitral tribunals***.** If one party is absent at debates, the arbitral tribunal holds an exclusive competence as regards weighing the reasons for absence and deeming them as sound, as well as if the absence of a party would give grounds to adjourn the cause; in such circumstances, the decision of an arbitral tribunal cannot be subjected to any remedy at law (art. 574). An arbitral tribunal also holds exclusive competence if, in terms of evidence, it is called upon to decide on the usefulness, relevance and conclusiveness of the evidence produced by parties. (article 579).

The hearing of witnesses and experts can also be conducted, upon their request or having their consent, at their abode or place of business. The solicitation of written information from public authorities on their deeds and actions is also stipulated (art. 582). This is another advantage. If, as regards state justice, this action cannot be accomplished otherwise than by letters rogatory and for sound reasons (the impossibility for a witness to be present in court due to medical reasons), as regards arbitration, their hearing can be conducted at their place of business / registered office / domicile. Therefore, to hear a witness who is caught up in the harvesting season of perishable goods, his/her absence from work to appear before the court in another location can result in major losses for the company. As stated before, for arbitration, such a witness can be heard in his/her location.

*Arbitration award.*The last chapter underTitle IV (Chapter IV), refers to arbitration awards. An arbitral tribunal settles a matter subjected to arbitration by rendering an award that is mandatory.

11 For example, equality of parties, the right of disposal, obligations that must be observed by parties during the civil trial, good faith, the right to defence, contradictoriness, orality, direct contact, continuity etc.

12 This provision is comprised in article 124 in the new Code, Book I, Title III (Competence of Courts of Law), Chapter III (Special Provisions).

In the cases of "clarification", "supplementation"and "arbitral award amendment", the tribunal pronounces its decision via a separate resolution in situations of clarification or award supplementation, whereas in circumstances of error correction (that is material errors that do not change the merits of a solution, as well as computation errors) is ruled by conclusion (art. 595).

In the presented case, the arbitral tribunal rendered an arbitration award in favour of THE ASSOCIATION OF AGRICULTURAL PRODUCERS "RECOLTA ARPAȘU DE SUS" by ordering S.C. TRADING IMPORT-EXPORT S.R.L. to deliver the 50 tractors, as well as to pay a penalty for the delaying in tractor delivery.

Annulment of an arbitral award.

The annulment of an arbitral award is the subject matter of Title V in the new regulation comprised in the Code of Civil Procedure[13]. As regards the competence in settling an action for the annulment of an arbitration award, according to the new regulation, this lies with the Court of Appeals in whose jurisdiction such an arbitration took place[14]. In the case studied, there was no reason to initiate an action at law for the annulment of the arbitration award.

Enforcement of an arbitration award.

The provisions in principle related to the enforcement of arbitration awards are comprised in two articles that jointly form Title VI: voluntary compliance (art. 605) and compulsory execution (art. 606). SC TRADING IMPORT-EXPORT SRL performed its obligation voluntarily. In the contrary hypothesis, pursuant to the general law, it would have been bound to the payment of damages and enforcement costs.

CONCLUSIONS

In the legal case herein presented as case study, by resorting to arbitration, the parties: THE ASSOCIATION OF AGRICULTURAL PRODUCERS "RECOLTA ARPAȘU DE SUS" and S.C. TRADING IMPORT-EXPORT S.R.L. settled their dispute in 6 months, whereas had they resorted to actions in court, the matter would have been settled in 3-5 years (taking into consideration the merits of the case and the remedy at law by appeal), which is of essence for agricultural producers given the type of activity they perform by employing tractors (tillage, sowing, harvesting etc.).

When disputes arise among professionals in agronomy, an intervention is needed from bodies that can solve the emerged issues and re-establish justice. Most of the time, matters are brought before courts of law, but lately the latter cannot cope with the large numbers of case files and work load that befall them. Farmers who have been at least once involved in settling a litigation in court are convinced that this path of settling a dispute implies lost time, means and effort, so other means, faster and more efficient, are ever more sought. Although Med-Arb and Arb-Med are not new institutions, they are gaining more ground in the practice of dispute resolution. Med-Arb and Arb-Med represent alternate out-of-court paths for dispute resolution. It is a type of justice in derogation from state justice, where parties, via an arbitration agreement, decide to solve their conflict through arbitration or mediation and not in court.

Founded on provisions in the New York Convention (1958), Arb-Med and Med-Arb have become true and efficient alternatives to state justice, having their own regulations and a standalone existence. The importance granted today to arbitration, as private justice, in other jurisdictions, is visible (USA, Great Britain, Canada, France and Germany). We must emphasize the ADR (Alternative Dispute Resolution) phenomenon is far smaller in Romania when compared to the

13 Art.608 in the Code of Civil Procedure

14 Since most arbitration awards are rendered by the Court of Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry, with headquarters in Bucharest, any eventual action for the annulment of awards rendered in organized institutionalize arbitration by this institution will be settled by the Bucharest Court of Appeal.

United States of America (a leader in the field), but also to any other West European country that holds a tradition in the field. In Romania, the ratio between classical state justice and the alternate methods for dispute resolution is overwhelmingly in favour of the former.

Causes from which this situation arises:

- The non-existence of a tradition or the short time span since some ADR methods have started to be applied in Romania. Except for arbitration, an institution that does hold a tradition in modern Romanian law, the other ADR methods are either non-regulated (because in Romania a high portion of ADR methods are non-existent both in terms of legal or other type of regulation and in practice) or they have been regulated only recently (the best example in this respect is mediation);
- The non-existence of some centres or institutions of reputation with a significant practice in ADR. Of course, there is one exception, the Court of Appeals attached to the Romanian Chamber of Commerce and Industry and the County Chambers of Commerce that engage only in arbitration, but not in other ADR methods. It is to be wished and expected for mediation practice to enhance in the following years.
- The insufficient knowledge of ADR methods, of the regulations that govern them and the advantages they can offer possessed in the Romanian business environment and by professionals (including those in agronomy), who are actors in domestic and international trade. Insufficient knowledge and understanding of a phenomenon, of an institution, naturally generates distrust. On the other hand, trust in a mechanism destined to solve a dispute in which a party is involved cannot be won otherwise than as a result of practical outcomes, of a concrete solution that such a party seeks when deciding to go on this course;
- The mindset of professionals that might resort to ADR methods – the success recorded by alternate methods of dispute resolution, except for arbitration, depends on a manifestation of will on behalf of parties involved, on their accepting a proposed solution, which is not inherently mandatory, but it becomes so only after the parties have accepted it.

There are two groups of factors that make us believe ADR will evolve in Romania:

a) The economic, legal and geopolitical background – Romania being a member state in the European Union binds it to a progression (starting with developments in law, as previously shown, down to the most insignificant operation that involves two professionals/traders in different member states) similar to the other member states, which implies, among others, the use of alternate methods for dispute resolution, as a modern and efficient means to solve disputes and, at the same time, to optimize access to justice.

b) The current level of development attained by ADR in Romania – underlining once again that arbitration is found to hold a better position as compared to the other ADR methods, the current level of ADR in Romania is incipient, minimal.

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