

## Research Article

# GENERAL ALTERNATIVE AND CONTRACTUAL JURISDICTION IN MOLDOVA AND ROMANIA BASED ON THE ALTERNATIVE PROCEDURAL RIGHT OF PARTIES

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Submitted on 8 Jun 2023 / Revised 28 Jun 2023 / Approved **3 Jul 2023**

Published: **1 Aug 2023**

**Summary:** 1. Introduction. – 2. Alternative general jurisdiction in the Republic of Moldova and Romania based on the parties' restricted alternative procedural rights. – 3. General contractual jurisdiction in the Republic of Moldova and Romania based on the full alternative procedural law of the parties. – 4. The limits of exercising the alternative procedural right of the general jurisdiction in the Republic of Moldova and Romania. – 5. Result and conclusion

**Keywords:** jurisdiction, alternative, contractual, jurisdictional, procedural law

## ABSTRACT

**Background:** The legal institution that delimits the powers of judicial bodies to resolve legal cases is the general jurisdiction. This interbranch institution which incorporates legal norms of several branches of procedural law that interact with one another. Within this jurisdiction, different types of competences exist, including alternative general competence and contractual general competence. This article aims to highlight the particularities of these types of general competence, starting from the alternative procedural right regulated in the legislation of both the Republic of Moldova and Romania.

**Methods:** *The results were obtained through applying various knowledge methods: synthesis,*

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**Author,** responsible for writing and research. **Competing interests:** Any competing interests were included. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations. **Translation:** The content of this article was translated with the participation of third parties under the authors' responsibility.

**Managing editor** – Mag Polina Siedova. **English Editor** – Julie Bold.

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**How to cite:** A Prisac 'General Alternative and Contractual Jurisdiction in Moldova and Romania Based on the Alternative Procedural Right of Parties' 2023 3 (20) Access to Justice in Eastern Europe 167-178. <https://doi.org/10.33327/AJEE-18-6.3-a000316>

analysis, and comparison. The latter was particularly instrumental in highlighting the regulatory framework of alternative and contractual general jurisdiction in both the Republic of Moldova and Romania. This involved exploring the arguments that these jurisdiction types in the alternative procedural right, identifying the limits and conditions governing their exercise, and examining specifics of their regulation in each country. Additionally, the principles governing alternative and contractual general jurisdiction were also highlighted.

**Results and Conclusions:** *This article successfully distinguished between alternative general jurisdiction and contractual general jurisdiction, recognising them as two distinct types of general jurisdiction. This inability to recognise their difference has led to confusion and incorrect application in the judicial practice of the rules regarding the general competence of judicial bodies. The particularities of exercising the right to choose the jurisdictional body were highlighted both under the regulations regarding the alternative general competence and the contractual one.*

*Finally, the study concludes with recommendations to ensure the correct application of these types of general competence in practice. It has been argued that the right to choose the jurisdictional body by virtue of general alternative and contractual jurisdiction constitutes a procedural right, not a substantive one. Proposals have also been proposed to amend the law, improving the alternative general jurisdiction and contract regulations.*

## 1 INTRODUCTION

The general jurisdiction of the judicial bodies constitutes one of the most important procedural legal institutions as it initially determines the appropriate procedural approach for defending individuals' rights and legitimate interests. This delimits the powers of the judicial bodies in the settlement of civil cases. Without this legal institution, any form of defence of civil rights would be incomplete. General jurisdiction encompasses several types, including exclusive general jurisdiction, conditional or imperative general jurisdiction, alternative general jurisdiction, contractual general jurisdiction, and general jurisdiction in the case of related claims. The following two types of general competence have drawn our attention: alternative general competence and alternative general competence. The scientific problem we aim to address is the analysis of the general alternative and contractual jurisdiction in the regulations of the Republic of Moldova and Romania, starting from their connection with the alternative procedural law of litigants as an expression of the interbranch nature of the general jurisdiction. This connection highlights the interbranch nature of general jurisdiction and sheds light on the purpose of this kind of competence. This view complements the views of some authors who consider that the regulations regarding the competence of jurisdictional bodies are determined by a metamorphosis of civil justice and the existence of multiple paradigms of justice.

This work aims to argue that the right to choose the jurisdictional body for the settlement of the dispute constitutes an alternative procedural right regulated by the rules of general alternative and contractual jurisdiction in the legislation of the Republic of Moldova and Romania. Notably, the interdisciplinary nature of this legal institution has yet to be the object of thorough research in the specialised literature. Thus, to achieve this, the structure of the work was divided into two main sections one dedicated to the analysis of the alternative procedural law regulated by the rules of general alternative jurisdiction and another section focusing on the analysis of the alternative procedural law regulated by the rules of general contractual jurisdiction.

In the framework of the work, national and international normative provisions were synthesised to elucidate that the right to choose the judicial body constitutes a procedural right. To highlight the procedures for regulating this procedural right in the legislation of the

Republic of Moldova and Romania, some legislative provisions of these countries, which are not without imperfections, were analysed under a comparative aspect.

For the correct application in practice of the regulations regarding general alternative and contractual competence, recommendations were formulated regarding the interpretation of these legal norms and proposals for amending the legislation in this area were put forward.

## 2 ALTERNATIVE GENERAL JURISDICTION IN THE REPUBLIC OF MOLDOVA AND ROMANIA BASED ON THE PARTIES' RESTRICTED ALTERNATIVE PROCEDURAL RIGHT

In the specialised literature, the concept of alternative general jurisdiction is defined as the jurisdiction that allows the resolution of certain legal cases by several jurisdictional bodies provided by law at the discretion of the interested person.<sup>2</sup> However, we propose a deeper examination of this concept by considering its connection with the alternative procedural law of litigants as an expression of the interbranch character of the general jurisdiction, determined by a contemporary movement of the multiple paradigms of justice.<sup>3</sup> Our belief is that this right is restricted as the defendant does not enjoy the same freedom of choice as the plaintiff in selecting the jurisdictional body.

Regarding the connection between alternative general competence and alternative procedural law, we found no explanations in the specialised literature. Regarding the alternative procedural right, we find approaches only in relation to certain procedural-legal institutions or types of procedure. Particularly, we find that this right is an integral part of the discretionary right, which is also utilised in procedural-legal regulations and is defined in the specialised literature as the totality of the factors from the substantive and procedural law norms, which allow legal subjects to make a lawful, fair, equitable decision in accordance to their will, left by the legislator of their free choice.<sup>4</sup>

Similarly, we consider that this alternative procedural right revives the idea of 'procedural autonomy' in selecting the jurisdictional body,<sup>5</sup> albeit with certain conditions and limitations, as well as the exclusive competence of certain jurisdictional bodies. Exceeding the limits of this right also constitutes a violation of jurisdiction.<sup>6</sup>

In our view, one of these conditions is that this alternative procedural right of alternative general jurisdiction can only be exercised if the law provides for at least two jurisdictional bodies to which the person can address for the settlement of the civil case. Such, for example, exists in Art. 29 para. (6) from the Law of the Republic of Moldova No. 1245 of 18 July 2002 regarding the preparation of citizens for the defence of the Motherland<sup>7</sup>, which stipulates the

2 Alexandru Cojuhari și Elena Belei (eds), *Drept procesual civil: Partea Generală* (Tipografia Centrală Chișinău 2016) 144.

3 Alan Uzelac and Cornelis Hendrik van Rhee, 'The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms – Unity and Diversity' in A Uzelac and CH (Remco) van Rhee (eds), *Transformation of Civil Justice: Unity and diversity* (Springer 2018) 3, doi: 10.1007/978-3-319-97358-6\_1.

4 Avornic Gheorghe și Postovan Dumitru, 'Reglementarea juridico-procesuală a "Dreptului-Discreționar"' (2012) 1 (136) *Revista Națională de Drept* 6.

5 Anthony Arnall, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 (1) *European Law Review* 52.

6 Călin-Silviu Săraru, 'Competence Determined Strictly by the Law and the Discretionary Power of Public Administration' (2017) 1 (7) *Juridical Tribune* 250.

7 *Legea Republicii Moldova nr 1245 din 18 iulie 2002 'Cu privire la pregătirea cetățenilor pentru apărarea Patriei'* [2002] *Monitorul Oficial al Republicii Moldova* 137-138/ 1054.

alternative general competence. But Romanian Law No . 446 of 30 November 2006 regarding the preparation of the population for the defence of the homeland<sup>8</sup> provides for the exclusive competence of the commission for analysing appeals regarding recruitment-incorporation established at the county level, respectively, of the municipality of Bucharest. But these Romanian legislation regulations provide the general imperative (conditional) jurisdiction for the court.

According to Art . 29 para. (6) from the Law of the Republic of Moldova No . 1245 of 18 July 2002 regarding the preparation of citizens for the defence of the Fatherland, 'Citizens can challenge the decision of the recruitment-incorporation commission in the State Commission for Incorporation, or they can challenge it in court, in the manner established by law, within 10 days from the date of its communication. The execution of the disputed or appealed decision is suspended.' Likewise, Point 1 of the Regulation of the State Commission for Incorporation, approved by the Decision of the Government of the Republic of Moldova No . 387 of 17 May 2010 concerning the State Commission for Incorporation<sup>9</sup>: 'The State Commission for Incorporation (hereinafter - the Commission) is established for the purpose of coordinating the activity of the recruitment-incorporation commissions, exercising control over the implementation of the incorporation of citizens of the Republic of Moldova in the military service in the term, in the short-term and in the civil (alternative) service (hereinafter - the incorporation) and the examination of the appeals submitted by the citizens.' Consequently, these provisions stipulate two jurisdictional bodies that the interested person can choose to challenge the decision of the recruitment-incorporation commission: the State Commission for Incorporation and the court. Had the regulation established that first, the decision of the incorporation recruitment commission be challenged in the State Commission for Incorporation before proceeding to court, in this case, this scenario would represent a case of general imperative (conditional) jurisdiction.

It is worth noting that the rules on alternative general competence are not applied when the law designates two jurisdictional bodies empowered to defend a person's rights, freedoms and legitimate interests. Still, the option to choose between them does not belong to the litigant. In such cases , the rules regarding the alternative general jurisdiction are not applicable as the jurisdictional bodies, in the cases provided by the law ex officio, establish their jurisdiction ex officio. For example, we are not in the presence of genuine legal norms of alternative general competence in the case provided by Art . 69, para. (7) of the Civil Code of the Republic of Moldova states: 'Any person can invoke the existence of instructions for protection. The court or, as the case may be, the guardianship authority will examine ex officio the records provided in paragraph. (5) of the Civil Code.'<sup>10</sup> In this scenario, regarding the verification of the registration of the instructions regarding contractual protection measures, the law provides two jurisdictional bodies competent to defend rights, freedoms and legitimate interests: the court and the authority tutelary, but their powers are established by these two bodies ex officio depending on the specific case.

Furthermore, a specific regulation regarding the alternative general jurisdiction is stipulated in Art . 50 para. (13) from the Law of the Republic of Moldova No. 1134 of 02 April 1997 concerning joint-stock companies.<sup>11</sup> It states that, 'Dodging the decision, as well as the

8 Legea României nr 446 din 30 noiembrie 2006 'Privind pregătirea populației pentru apărarea patriei' [2006] Monitorul Oficial al României 990.

9 Hotărârea Guvernului Republicii Moldova nr 387 din 17 mai 2010 'Cu privire la Comisia de Stat pentru Încorporare' [2010] Monitorul Oficial al Republicii Moldova 78-80/458.

10 Codul civil al Republicii Moldova nr 1107 din 6 iunie 2002 [2002] Monitorul Oficial al Republicii Moldova 82-86/661.

11 Legea Republicii Moldova nr 1134 din 02 aprilie 1997 'Privind societățile pe acțiuni' [1997] Monitorul Oficial al Republicii Moldova 38-39/332.

decision of the company's board regarding the refusal to include the issue in the agenda of the annual general meeting of shareholders or candidates in the list candidacies to be submitted to the vote for the election of the management and control bodies of the company can be challenged in the management bodies of the company and/or in court.' We consider the respective provisions to be specific, considering that one of the bodies to resolve the appeal is a body that is part of the same company in which the violation of the right is invoked, i.e. the management bodies of the company, which would raise doubts as to whether it is a regulation regarding the alternative general competence or the imperative general competence. In our view, these provisions refer to the alternative general competence given the conjunctions 'and/or' are used in the choice of these two bodies, and the appeal does not impose a consecutive order of addressing these bodies.

In our opinion, the basis for exercising this alternative procedural right of the litigant is the *electa una via non datur recursus ad alteram* principle. This principle derives from a Latin expression used to denote the limitation of the right of those who will address justice when the law indicates two or more competent courts to choose and notify only one of them through their action. *Stricto sensu*, [...] aims to extinguish the right of option; once you have chosen one way, namely the jurisdiction of a court, you are not allowed to resort to another.<sup>12</sup> The given principle was developed in ECtHR jurisprudence in the case of *Lorgulescu v. Romania*<sup>13</sup>, which as a whole ruled that as long as a person found a solution to his dispute before an administrative court, the state is not obliged to allow him to use another way of jurisdictional appeal.<sup>14</sup> So, if by virtue of the general alternative competence, the litigant has chosen to address another judicial body provided by law rather than the court for the defence of their legitimate rights and interests, they are no longer entitled to claim access to justice for the resolution of their litigation. The litigant will only be entitled to challenge the decision of the jurisdictional body they initially chose in the court of law. This principle exists to protect the security of the legal relations on which an administrative judicial body has exposed itself.

Therefore, in the example mentioned above from Art . 29 para. (6) from the Law of the Republic of Moldova No . 1245 of 18 July 2002 regarding the preparation of citizens for the defence of the Fatherland, if the decision of the incorporation recruitment commission is challenged in the State Commission for Incorporation, the recruit will already be deprived of the right to address the court against the decision of the recruitment commission incorporation. However, the decision of the State Commission for Incorporation can be challenged in court in the administrative litigation procedure only on the grounds of its illegality.

Another situation arises when submitting an appeal, according to Art . 29 para. (1) from Romanian Law No . 446 of 30-11-2006 regarding the preparation of the population for the defence of the homeland, which states: : 'Recruits can appeal against the decisions of the recruitment-incorporation commissions to the commission for analysing appeals regarding recruitment-incorporation, established at the county level, respectively of the municipality of Bucharest.'<sup>15</sup> Therefore, these provisions stipulate the general imperative (conditional) competence of the court because, after the examination of the appeal by the commission for the analysis of appeals regarding recruitment incorporation established at the county level,

12 'Electa una via non datur recursus ad alteram' (*LegeAZ/Dictionar juridic*, 2022) <<https://legeaz.net/dictionar-juridic/electa-una-via-non-datur-recursus-ad-alteram>> accessed 15 May 2023.

13 *Lorgulescu v Romania* App no 59654/00 (ECtHR, 13 January 2015) <<https://hudoc.echr.coe.int/?i=001-68131>> accessed 15 May 2023.

14 'Iorgulescu contra României – Acces la justiție. Electa una via' (*LegeAZ*, 2022) <<https://legeaz.net/hotarari-cedo/iorgulescu-contra-romaniei-n02>> accessed 15 May 2023.

15 *Legea României nr 446/2006* (n 8).

the decision of this commission will be able to be contested in the court of law. The competence of courts has priority in relation to other jurisdictional bodies, and all normative acts, including international acts, provide for the priority of courts. In particular, such a priority is stipulated in Art . 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>16</sup>, because the state's coercive force is imposed through national courts.

In some cases within the judicial practice of the Republic of Moldova, the choice of a judicial body other than the court, under the alternative general competence for dispute resolution, is mistakenly regarded as a preliminary procedure. This practice is erroneous because, under alternative general jurisdiction, the litigant can go directly to the court or another jurisdiction provided by law. Addressing this body of jurisdiction does not constitute a prior procedure because the litigant has not chosen the court.

For example , in a case examined in the administrative litigation procedure, pending before the Chisinau Court, Rîșcani headquarters, in the request for a summons against the response of the State Commission for Incorporation, it was ruled to leave the appeal unexamined due to the expiry of the legal appeal deadline. The period deadline was 10 days from the date of communication of the decision of the incorporation recruitment commission. Although, in the end correctly, the Chisinau Court, Rîșcani headquarters rejected the action brought against the State Commission for Incorporation, however, in the reasoning of the court decision<sup>17</sup>, it erroneously mentioned among the arguments (in point 34) that the decision of the recruitment-incorporation commission in the State Commission for Incorporation can be challenged both in preliminary proceedings and directly in court.

Although the *electa una via non datur recursus ad alteram* principle requires that if the litigant has already found a resolution to their dispute before an administrative court, they may no longer be entitled to claim the realisation of the right of access to justice for the resolution of the same dispute. However, there is an exception. The right to enjoy a judicial review over the decision issued by the administrative court or another jurisdictional body that does not fully meet all the conditions of a true court of law is not forfeited. This right was elucidated, in practice, in the jurisprudence of the ECtHR in the case of *Fischer Against Austria*<sup>18</sup>, by which it was ruled that the decision of an authority that does not meet the requirements of being a court can be the subject of a judicial review carried out by a court that has the right to examine both factual and legal issues. Therefore, if the jurisdictional body, other than the court, has issued the decision on the litigation, upon its appeal, the court will be entitled to examine the validity and legality of this jurisdictional body within the limits provided by law.

A similar approach is found in Art . 6 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women concerning access to employment, vocational training and promotion, and working conditions<sup>19</sup>, which states : 'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.' Thus,

16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) -<[https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards)> accessed 16 June 2023.

17 Dosar nr 3-3074/19 (Judecătoria Chișinău sediul Rîșcani, 16 decembrie 2019) <[https://jc.instante.justice.md/ro/court-decisions?dossier\\_number=3-3074/19&type=Civil&apply\\_filter=1](https://jc.instante.justice.md/ro/court-decisions?dossier_number=3-3074/19&type=Civil&apply_filter=1)> accessed 01 June 2023.

18 *Fischer v Austria* App no 16922/90 (ECtHR, 26 April 1995) <<https://hudoc.echr.coe.int/eng?i=001-57916>> accessed 15 May 2023.

19 Council Directive 76/207/EEC of 9 February 1976 'On the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions' <<http://data.europa.eu/eli/dir/1976/207/oj>> accessed 16 June 2023.

if the litigant approaches another jurisdictional body than the court and does not obtain a favourable solution, they have the right to contest the decision of this jurisdictional body in a court of law.

### 3 GENERAL CONTRACTUAL JURISDICTION IN THE REPUBLIC OF MOLDOVA AND ROMANIA BASED ON THE FULL ALTERNATIVE PROCEDURAL LAW OF THE PARTIES

Based on the general contractual competence, both parties have the right to choose the jurisdiction for resolving the dispute, including in the framework of an assisted negotiation.<sup>20</sup> These jurisdictional processes can fall under different procedural law frameworks since general jurisdiction constitutes an inter-mural legal institution. This comprehensive alternative procedural right of the parties was predominantly highlighted in the second generation of arbitration, where jurisdiction of arbitrations could be addressed.<sup>21</sup> Thus, based on the provisions of the general contractual jurisdiction, parties, through a contract, lawfully choose the jurisdictional body for the resolution of the dispute that has arisen or that may arise in the future. Therefore, the alternative procedural right of the parties in the regulations of general contractual jurisdiction is comprehensive, as it involves the will of both parties in choosing the jurisdictional body, which not has an advisory function<sup>22</sup> but also has the authority to resolve disputes. This extension of rights instils confidence in the impartiality and independence of this judicial body chosen by the parties to the dispute.

In Art. 541 para. (1) of the Civil Procedure Code of Romania<sup>23</sup>, arbitration is defined starting from the specifics of the alternative general competence, compared to the legislation of the Republic of Moldova, which is reluctant in this regard. According to Art. 541 para. (1) of the Civil Procedure Code of Romania, arbitration is considered an alternative jurisdiction with a private character. This denotes that arbitration, as jurisdictional authority, exists within the framework of general contractual jurisdiction.

In the civil procedural legislation of the Republic of Moldova, this right to choose the jurisdiction of some jurisdictional bodies is only evident within the scope of general contractual jurisdiction. As for jurisdictional jurisdiction, the parties do not possess this right, as Article 41 of the Code of Civil Procedure of the Republic of Moldova,<sup>24</sup> known as 'contractual jurisdiction' was excluded from Art. 41 on the amendment and completion of the Civil Procedure Code of the Republic of Moldova.<sup>25</sup> We believe this exclusion was probably driven by the state's policy in regulating jurisdiction, aiming for stability in determining which court has jurisdiction to hear the civil case. However, general contractual competence was preserved as it covers a wider scope than jurisdictional competence, including arbitration, which, if excluded, would bring about the principles accepted in a democratic society.

- 20 Alessandro Ferrara, 'Moral Duties and Juridical Duties: The Ambiguity of Legal Ethics Considered Through the Prism of Kant's Metaphysics of Morals' (2022) 23 (1) *German Law Journal* 127, doi: 10.1017/glj.2022.5.
- 21 Gary Born, 'A New Generation of International Adjudication' (2012) 61 (4) *Duke Law Journal* 819.
- 22 Fátima Castro Moreira, 'The Advisory Role of International Courts in the Evolution of Human Rights Law' (2022) 12 (4) *Juridical Tribune* 443, doi: 10.2139/ssrn.4314117.
- 23 Codul de procedură civilă al României nr 134 din 1 iulie 2010 [2015] *Monitorul Oficial al României* 247.
- 24 Legea Republicii Moldova nr 244 din 21 iulie 2006 'Pentru modificarea și completarea Codului de procedură civilă al Republicii Moldova' [2006] *Monitorul Oficial al Republicii Moldova* 178-180/814.
- 25 Codul de procedură civilă al Republicii Moldova nr 225 din 30 mai 2003 [2003] *Monitorul Oficial al Republicii Moldova* 111-115/451.

The general contractual jurisdiction is based on the comprehensive alternative procedural right of the parties, but its existence is that this possibility is expressly provided by law. In the domestic specialised literature, this type of general contractual competence has manifested in two cases<sup>26</sup>: 1) under the Law on Arbitration No. 23 of 22 February 2008<sup>27</sup>, and 2) when the law provides for the exclusion by a contract of the jurisdiction of the courts and the choice of the non-jurisdictional form of defence of rights.

For example, according to Art. 757 para. (3) lit. a) from the Civil Code of the Republic of Moldova<sup>28</sup>, the pledge creditor may choose to obtain possession of the property without resorting to court proceedings if the pledge debtor has consented, in the pledge contract or otherwise, to the pledge creditor obtaining possession of the property without recourse to court proceedings or, in the case of a mortgage, if the pledge contract the mortgage was vested with an enforceable formula according to Art. 759 of the Civil Code of the Republic of Moldova.

Regarding the second case, we must mention that it raises many questions about whether it pertains to general contractual competence. These questions arise in connection with the fact that by investing the contract with an enforceable formula, no other jurisdictional body is chosen to resolve the dispute, which is particularly specific to general jurisdiction. In this case, only the court procedure for the defence of the right to claim is avoided. Consequently, it can be argued that this situation represents a comprehensive procedural right of the parties to evade the court procedure by investing the contract with an enforceable formula through the mortgage contract. However, it does not fall under the purview of general contractual jurisdiction since there is no contractual choice between two or more jurisdictional bodies. However, the bailiff does not resolve the dispute; rather, they merely execute the obligation born from a contract invested with an enforceable formula.

The prevalence of general contractual competence becomes evident when parties choose to settle the civil case through arbitration, typically based on a compromise or compromise clause. So, in our view, the parties' full alternative procedural right to settle the case through arbitration is seen in the arbitration or compromise clause.

The issue of whether the alternative right to choose arbitration as a civil procedural right or not could also raise questions. From our standpoint, this right constitutes a civil procedural right as it allows parties to choose between the judicial procedure and other procedures involving other jurisdictional bodies. We also note that the provisions of Art. 81 para. (1) of the Civil Procedure Code of the Republic of Moldova implicitly assigns the right to resort to arbitration for the resolution of the dispute to the category of procedural rights. However, Art. 81 para. (1) of the Civil Procedure Code of the Republic of Moldova lists all the civil procedural rights that must be expressly mentioned under penalty of nullity in a power of attorney issued to the legal entity's representative or in the mandate issued to the lawyer. This perspective is argued by us starting from the provisions of Art. 185 para. (1) lit. e) from the Code of Civil Procedure of the Republic of Moldova, which provides that the judge, during the preparation of the case for judicial debates, explains to the parties the right to resort to arbitration for the settlement of the dispute and the effects of such an act. Thus, being explicitly explained by the judge in an already filed civil case, the right to resort to arbitration, once exercised, will have certain legal consequences for the ongoing civil case (as per Art. 267 letter e) of the Code of Civil Procedure of the Republic of Moldova), which characterises it as a civil procedural law.

26 Cojuhari and Belei (n 2) 145.

27 Legea Republicii Moldova nr 23 din 22 februarie 2008 'Cu privire la arbitraj' [2008] Monitorul Oficial al Republicii Moldova 88-89/314.

28 Codul civil al Republicii Moldova nr 1107 (n 10).



## 4 THE LIMITS OF THE EXERCISE OF THE ALTERNATIVE PROCEDURAL RIGHT OF GENERAL CONTRACTUAL JURISDICTION IN THE REPUBLIC OF MOLDOVA AND ROMANIA

Is it necessary to be analysed, and what would be the limits of exercising this right when settling the civil case in arbitration? We consider that the limits of the full alternative procedural right of the parties would be the arbitrability of the dispute itself, which meets a totality of requirements and criteria to determine the dispute that can be settled by arbitration. Additionally, this alternative procedural right also extends to administrative arbitrability, applicable in cases related to the conclusion of administrative contracts.<sup>29</sup> These limits, in particular, are set out in Art . 3 of the Law on Arbitration No . 23 of 22 February 2008. In other words, the elements involved in general contractual competence, when parties opt to settle the case through arbitration, interact in tandem : 1) the full alternative procedural right of the parties; 2) arbitration clause or compromise; 3) arbitrability.

The exercise of the right to choose arbitration for dispute settlement should be exercised within certain limits, because its use contrary to the purpose would constitute a so-called national '*forum shopping*,'<sup>30</sup> which would signify an abusive choice of the jurisdictional body, contrary to the intended purpose of this right. While general contractual competence can constitute allows for an escape from the jurisdiction of a judicial body, it is subjected to certain limits. However, at the present moment, even in the international arena, there is a tendency to escape from the jurisdiction of international courts<sup>31</sup>, but even this practice is subject to certain limits within public international law.

The analysis of the limits concerning the choice of arbitration should be analyzed through the prism of the principles, which, in our view, are the basis of the general contractual competence. The proclamation of a principle of law, even if it refers to a jurisdiction based on principles or general provisions, still remains a formal interpretation and not a normative act, as the judge announces rather than imposes the law.<sup>32</sup>

We consider that one of these principles is the *electa una via non datur recursus ad alteram* principle, which was defined in this paper together with the analysis of the alternative general competence. This principle restricts the right of parties to address when the law indicates two or more competent courts and mandates only choosing and notifying one.<sup>33</sup> Interestingly, the specialised literature does not analyse the respective principle in the context of this procedural law as an alternative to the choice of arbitration. In our view, this principle is intrinsic to the alternative procedural right of the parties and the general contractual competence as a whole, as it facilitates the choice of arbitration over traditional judicial procedure, although it is considered appropriate to analyse it due to it remaining implicitly incorporated in the legislation of the Republic of Moldova.

29 Bárbara Magalhães Bravo and Fátima Castro Moreira, 'Scope and Limits of the Administrative Act Arbitrability' (2019) 9 (1) Juridical Tribune 6.

30 Katarzyna Gajda-Roszczyńska, 'Abuse of Procedural Rights in Polish and European Civil Procedure Law and the Notion of Private and Public Interest' (2019) 2 (3) Access to Justice in Eastern Europe 71, doi: 10.33327/AJEE-18-2-3-a000013.

31 Phedon Nicolaides, 'Escape from the Jurisdiction of the Court of Justice: A Good Reason to Quit the European Union?' (2018) 25 (1) Maastricht Journal of European and Comparative Law 7, doi: 10.1177/1023263X18760550.

32 Oksana Shcherbanyuk, VÑ-talii Gordieiev and Laura Bzova, 'Legal Nature of the Principle of Legal Certainty as a Component Element of the Rule of Law' (2023) 13 (1) Juridical Tribune 22.

33 *Electa una via* (n 12).

We consider that the *electa una via non datur recursus ad alteram* principle underlies the concept of general contractual competence, particularly in cases involving an arbitration agreement. This is evident in the provisions of Art. 9 para. (1) from the Law of the Republic of Moldova regarding arbitration No. 23 of 22 February 2008, which stipulates: ‘The court where the action regarding the dispute that is the object of an arbitration agreement is filed, at the request of a party made no later than its first statement on the merits of the dispute, removes the request from the role and sends the dispute to arbitration unless the court finds that the agreement is null, invalid or unenforceable.’

So, upon concluding an arbitration agreement, the parties have chosen a jurisdictional body, i.e. arbitration, which prevents either party from turning to the court or to another jurisdictional body. However, this ground of inadmissibility does not operate by law but must be invoked as a procedural exception by the interested party in court. The given exception can be invoked no later than the defendant’s first statement on the merits of the litigation, aligning with the provisions of Art. 267 lit. e) from the Civil Procedure Code of the Republic of Moldova, which means that the defendant can raise this exception only in the phase of preparing the case for judicial debates.

Also, the basis of the general contractual competence in the case of arbitration is the principle of double competence, also known as ‘competence-competence’<sup>34</sup>, which complements the *electa una via non datur recursus ad alteram principle*. According to the specialised literature, the principle of dual competence grants the arbitrator the authority to rule on their own jurisdiction to hear the dispute and the validity of the arbitration agreement. The Law of the Republic of Moldova on arbitration reflects this principle, allowing the arbitrator to decide on their competence in deciding the dispute and, in relation to this, the validity of the arbitration agreement (Art. 27).

Notably, finding the nullity of the contract does not necessarily imply the nullity of the arbitration agreement inserted in the contract. The decision by which the arbitration is declared competent cannot be challenged in court except concurrently with the final decision on the merits of the dispute.<sup>35</sup> So, through this principle, an interaction is achieved between the full procedural right of the parties to choose arbitration with the very competence of arbitration to rule on the arbitrability of the dispute. At the same time, it ensures that the arbitration exercises control over the parties’ compliance with their general contractual responsibilities.

Another essential limitation of the right to choose arbitration under general contractual jurisdiction is that public authorities do not possess this right and cannot avoid the rules on national jurisdiction, particularly those concerning exclusive general jurisdiction. This limit exists in most states following the continental law system, including Romania<sup>36</sup> and the Republic of Moldova.

34 Andrei Munteanu, ‘Arbitrajul ca organ de jurisdicție’ in S Vladica si al (eds), Rolul instituțiilor democratice în asigurarea protecției drepturilor și libertăților fundamentale ale omului: masă rotundă, Chișinău, 8 decembrie 2020 (AAP 2021) 109.

35 Ion Buruiană, ‘Invocarea excepției de incompetență în cadrul procedurii arbitrale’ (2012) 1 Relații internaționale. Plus 151.

36 Catalin-Silviu Săraru, ‘Arbitration Settlement of Disputes Concerning Administrative Contracts in Romania’ (2018) 8 (Spec) Juridical Tribune 227.

## 5 RESULTS AND CONCLUSION

Based on the points mentioned above, we affirm that the litigant's right to choose the jurisdictional body is a procedural right, not a substantive right. This right originates from various branches of procedural law and is governed by national and international normative acts, which contain both substantive and procedural law norms.

The limits of exercising this right are the following principles: 1) the *electa una via non datur recursus ad alteram principium*; 2) the principle of double competence. While these limits may differ within each member state of the European Union, the essence of this procedural right remains the same.

To ensure a coherent regulation of general jurisdiction, particularly in the regulations of the Civil Procedure Code of the Republic of Moldova, which have a common law character, and to provide clarity on the court's approach when a dispute falls under an arbitration agreement, we propose adding a *lege ferenda provision* to the Civil Procedure Code of the Republic of Moldova, similar to Article 33<sup>2</sup> of the Civil Procedure Code of the Republic of Moldova. This addition would state, 'In a civil case under the jurisdiction of the court, the request will be removed from the list and sent for settlement in arbitration if one of the parties requests this at the of preparing the case for judicial debates unless the court determines that the arbitration agreement is null, invalid or unenforceable.' We consider such a regulation opportune and beneficial for the Civil Procedure Code of Romania.

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