



The Duality of the Exclusive General Jurisdiction of Courts and other Jurisdictional Bodies in the Republic of Moldova

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Abstract: The exclusive general jurisdiction of the courts delimits the powers of this public authority from other jurisdictional bodies to examine legal cases by expressly determining that these disputes will be resolved only by the courts. In this article, this kind of competence is studied starting from the legislation of the Republic of Moldova. Studying the regulations of this kind of competence is necessary because it is regulated in several legislative acts, both by procedural law and by substantive law. But in some cases, it is not clear whether a phrase in the law, which stipulates the exclusive jurisdiction of the court, refers only to its competence or to arbitration by expressing the will of the parties to legal relations. It is worth noting that the legislation of the Republic of Moldova admits the duality of the exclusive general jurisdiction of the court in the sense that the reference to a court is also a reference to an arbitration or another body of jurisdiction. This work is useful to determine the jurisdictional body competent to solve a certain civil case when there are different interpretations which body can solve the civil case. In particular, the given article comes to comment on art. 15 para. (4) of the modernized Civil Code, which entered into force on 01.03.2019. Until this date there was no clarity whether the reference in the law to a court of law also constitutes a reference to other jurisdictional bodies such as arbitration. Different interpretations could be made by those who had to apply the law. But with the introduction of art. 15 para. (4) of the Civil Code, these interpretations can be excluded because these provisions admit that the referral to the court also constitutes the referral to other jurisdictional bodies.

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The exclusive general competence represents that type of the institution of general competence that contains the apparently simplest formula for delimiting the powers of the jurisdictional bodies: the express stipulation by law of the jurisdictional body specifically empowered to resolve a certain legal case. However, the issues raised in the doctrine and the current legislation indicate a high level of complexity of the

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exclusive general jurisdiction, and the uncertainty regarding the determination of the jurisdictional body empowered to resolve the civil case is encountered in judicial practice. This should not be ignored in the manner in which the point was ruled. 66 of the Decision of the Constitutional Court for the control of the constitutionality of some provisions of the Code of Civil Procedure of the Republic of Moldova no. 225-XV of May 30, 2003 (Report no. 21a/2012): no. 14 of November 15, 2012, in which it was mentioned that in order to file a civil action in the court of law, it is necessary to respect only the jurisdiction. However, this omission is unacceptable, being the observance of the rules regarding general competence, as well, constitutes a component of the right to action.

We raise the issue of an uncertainty related to a duality of competence because at the present moment, in the legislation of the Republic of Moldova, the indication of a judicial body to resolve a civil litigation does not mean every time that only this body is empowered to examine this case. Thus, in relation to the court and arbitration, the following was mentioned in the local specialized literature: "Indicating in the law the competence of the courts to settle civil disputes in the broad sense should not have any impact on their arbitrability. We believe that the express indication in art. 10 para. (1) of the Civil Code of the Republic of Moldova, the judicial way of settling civil disputes in a broad sense is understood as being possible to settle disputes in the same civil matter and by arbitration (by concluding an arbitration agreement). Following this logic, the same interpretation will be applied in other cases, when the law establishes the court as the competent authority for resolving disputes. This extensive interpretation, at the same time, creates the risk that disputes that by their object cannot be arbitrable will also be considered arbitrable (Martin, 2018, pp. 36-42). "So, when the court is expressly mentioned in the law as being competent to examine a certain civil case, this reference assumes that it also refers to the competence of other jurisdictional bodies to resolve this case. So, the problem raised by us points to the duality of the exclusive general jurisdiction, which does not only express the jurisdiction of the court to resolve a certain dispute.

In particular, the common features of the activity of the courts and of the arbitration determine this duality, these being:

- both processes are governed by the same fundamental principles: equality of the parties in the process, adversariality, respect for the right to defense, etc.;
- both the judge and the arbitrator are vested with the power to issue binding decisions, susceptible of enforcement;
- both procedures have the same purpose: resolving disputes arising from international commercial relations (Băieșu, 2014, p. 6).

This duality of the exclusive general competence, at the present time, comes from the global tendency to favor arbitration, as a way of solving civil and commercial disputes. However, this duality could not be easily accepted by those who were going to apply the law because the extensive interpretation of the provisions regarding the exclusive general jurisdiction could lead to errors regarding the assignment for examination of a dispute under the jurisdiction of a judicial body. The respective errors should be ascertained following a hierarchical judicial control, by those who interpreted the rule regarding exclusive general competence restrictively. So, the respective duality had a period of uncertainty in the Republic of Moldova until the introduction by Law no. 133 of 15-11-2018 regarding the modernization of the Civil Code and the modification of some legislative acts, the provisions of para. (4) from art. 15 of the Civil Code of the Republic of Moldova, which expressly regulated this duality of the exclusive general jurisdiction of the courts. The provisions of art. 15 para. (4) of the Civil Code of the Republic of Moldova provides: "References in this code to a judge or a court are also references to other competent jurisdictional bodies under the law, and references to the legal provisions of civil procedure are references and to the rules of procedure of the respective competent jurisdictional bodies." These regulations implicitly give appreciation to the phrases in the civil law that refer to the court that empowers it to resolve a certain dispute as those phrases that simultaneously empower the arbitration as well as other jurisdictional bodies to resolve the respective dispute. In the Civil Code of the Republic of Moldova, the following phrases of this kind are used: "the court obliges him" (art. 15, paragraph (3) of the Civil Code of the Republic of Moldova); can be challenged in court (art. 15, paragraph (3) of the Civil Code of the Republic of Moldova); declared null and void by the court (art. 17 para. (1) of the Civil Code of the Republic of Moldova); the court can (art. 26 para. (2) of the Civil Code of the Republic of Moldova); the minor can be limited by the court (art. 27 par. (3) of the Civil Code of the Republic of Moldova); the court establishes (art. 27 para. (4) of the Civil Code of the Republic of Moldova); the court decides on it (art. 40 par. (2) of the Civil Code of the Republic of Moldova); can be challenged in court (art. 55 paragraph (5) of the Civil Code of the Republic of Moldova); the court can revoke (art. 66 par. (5) of the Civil Code of the Republic of Moldova); the court can modify or cancel the instructions (art. 69 para. (8) of the Civil Code of the Republic of Moldova); the court pronounces the resolution (art. 75 paragraph (2) of the Civil Code of the Republic of Moldova); the trustee can be revoked only by court decision (art. 80 par. (4) of the Civil Code of the Republic of Moldova); the court can revoke the powers of attorney (art. 83 para. (1) letter c) of the Civil Code of the Republic of Moldova); the court will establish a measure (art. 83 paragraph (4) of the Civil Code of the Republic of Moldova); the court may establish (art. 97 para. (1) of the Civil Code of the Republic of Moldova); the disappearance is declared by the court (art. 165 paragraph (1) of the Civil Code of the Republic of Moldova); they can ask the

court for the designation (art. 177 para. (7) of the Civil Code of the Republic of Moldova); the court reduces the amount (art. 200 par. (5) of the Civil Code of the Republic of Moldova); the court dissolves the legal entity (art. 224 para. (1) of the Civil Code of the Republic of Moldova); can be declared null and void by the court (art. 337 paragraph (1) of the Civil Code of the Republic of Moldova); the court can maintain the documents (art. 338 para. (1) of the Civil Code of the Republic of Moldova); the court to order the registration (art. 430 para. (1) of the Civil Code of the Republic of Moldova); the court, at the request of the local public administration authority, may order, as the case may be, the alienation of the property (art. 539 para. (2) of the Civil Code of the Republic of Moldova); they can ask the court to share the property (art. 553 para. (1) of the Civil Code of the Republic of Moldova); the court can pronounce a decision that takes the place of the contract (art. 653 paragraph (2) of the Civil Code of the Republic of Moldova); the court determines which assets could be pledged (art. 710 of the Civil Code of the Republic of Moldova); by addressing the court (art. 751 paragraph (6) of the Civil Code of the Republic of Moldova); the court will establish in the court decision (art. 962 para. (4) of the Civil Code of the Republic of Moldova); the compensation can be pronounced by the court (art. 975 paragraph (1) of the Civil Code of the Republic of Moldova); can ask the court to issue a decision (art. 1000 par. (1) of the Civil Code of the Republic of Moldova); the determination is made by court decision (art. 1007 paragraph (7) of the Civil Code of the Republic of Moldova); the court pronounces the resolution (art. 1230 para. (1) of the Civil Code of the Republic of Moldova); established by court decision (art. 1469 paragraph (1) of the Civil Code of the Republic of Moldova); on the basis of a court decision (art. 1587 para. (2) of the Civil Code of the Republic of Moldova); the reward is divided by the court (art. 1960 paragraph (3) of the Civil Code of the Republic of Moldova); the court can compel reparation (art. 2002 paragraph (2) of the Civil Code of the Republic of Moldova); by court decision (art. 2025 para. (1) of the Civil Code of the Republic of Moldova); it is determined by the court (art. 2037 paragraph (1) of the Civil Code of the Republic of Moldova); the court orders (art. 1000 para. (1) of the Civil Code of the Republic of Moldova); the court can determine (art. 2053 para. (4) of the Civil Code of the Republic of Moldova); by virtue of the final court decision (art. 2071 par. (1), letter b) of the Civil Code of the Republic of Moldova); the court can decide (art. 2123 par. (1) of the Civil Code of the Republic of Moldova); the court can exclude (art. 2135 of the Civil Code of the Republic of Moldova); can be submitted through court (art. 2364 para. (1) of the Civil Code of the Republic of Moldova) annulled by the court (art. 2504 para. (2) of the Civil Code of the Republic of Moldova).

Although, the provisions of art. 15 para. (4) of the Civil Code of the Republic of Moldova stipulates that the references in the Civil Code of the Republic of Moldova to a judge or a court are also references to other competent jurisdictional bodies

under the law, however from the phrases mentioned above they refer to a court, systemically interpreted cannot be considered as references to other jurisdictional bodies and, including, to arbitration. We have underlined all the phrases that, in our opinion, do not constitute references to other jurisdictional bodies. We could consider the ununderlined ones to implicitly imply referral to other jurisdictional bodies than the court. Our opinion is based on the fact that, following a systemic interpretation, the underlined phrases do not admit the competence of other jurisdictional bodies than the courts, because by their nature they belong to the nature of a public authority which is the court and they cannot be resolved by arbitration, an administrative body or another judicial body. For example, the provisions of art. 97 para. (1) of the Civil Code of the Republic of Moldova, stipulates: "the court may establish, by court decision, provisional protection in respect of the person who, pursuant to art. 65 para. (1), needs temporary protection or representation for the fulfillment of only certain legal acts. "This provision was grouped by us above by underlining in the category of phrases that do not allow jurisdictional bodies other than the court to resolve this civil case regarding the establishment of a judicial protection measure, as this issue is to be resolved only by a public authority as the court of law, which results from the very name of the 4th Subsection "Common Provisions regarding judicial protection measures." So, following a systemic interpretation of the provisions of art. 97 para. (1) of the Civil Code of the Republic of Moldova we establish that they cannot be applied in the sense of art. 15 para. (4) from the Civil Code of the Republic of Moldova. Therefore, the provisions of art. 15 para. (4) of the Civil Code of the Republic of Moldova bring a long-awaited novelty for the exclusive general competence of the courts, but these are to be perfected in order to delimit phrases that refer to a court but which do not also constitute references to other jurisdictions of phrases that a dual character.

Starting from the mentioned, we propose by law to supplement the provisions of art. 15 para. (4) of the Civil Code of the Republic of Moldova with the following sentence: These provisions are not applicable which, interpreted systematically, do not allow the settlement of the civil case by a jurisdiction other than the court."

The issue of the duality of exclusive general jurisdiction is often treated broadly in order to illegally traffic in judicial practice with the powers of courts and other jurisdictional bodies. Thus, in the case that was resolved by the decision of the Chisinau Court, Rîșcani village of 19.10.2022 (file no. 3-2254/2021), the court annulled the decision of the National Anticorruption Center by which it was penalized for committing the contravention provided in art. 313 of the Misdemeanor Code, although initially an administrative procedure was filed against the person suspected of committing the misdemeanor. The person in respect of whom the contraventional decision was issued contested the contraventional sanctioning decision in the administrative litigation procedure on the grounds that initially an

administrative procedure was filed, but in the end, it was sanctioned contraveniently. The court admitted the plaintiff's action and annulled the decision on the contravention sanctioning the plaintiff on the grounds of uncertainty created by the investigating officer because he initially filed an administrative procedure and finally issued a decision on the contravention sanction.

The case indicated above points us to the fact that by virtue of an uncertain duality of competence, errors can be committed regarding the general competence of the jurisdictional bodies, which leads the legislator to stipulate exact delimitation criteria through exact legislative formulations. In this sense, it should be noted that in the specialized literature of Italy it was mentioned that the jurisdiction of the courts and the administrative jurisdiction are to be strictly delimited (Cesare, 2019, p. 110). So, in the third Book of the Administrative Code entitled "Administrative Litigation Procedure" it is to be stipulated the prohibition of filing an administrative procedure that will ultimately be completed as a contravention procedure. Therefore, we propose by law *ferenda* to be completed art. 189 of the Administrative Code with a new paragraph, para. (4), which provides the following: can be challenged in the administrative litigation procedure and the contravention sanctioning acts, if initially an administrative procedure was filed.

Another aspect of the duality of exclusive general jurisdiction is the current trend in widening the jurisdiction of courts in some civil cases. In particular, we draw attention to those presented by the author Volcovschi Victoria, who mentions: "In a series of cases, the jurisdiction of the courts in the settlement of civil cases is broadened, assigning them the functions of the executive power." The author refers, in particular, to the fact that in the bankruptcy procedure, the courts were empowered with a series of administrative duties directly related to the economic management of bankrupt organizations, such as examining the request for application of the reorganization procedure, examining the application for admission, to confirm and implement the reorganization plan (Volcovschi, 2003, p. 39). We support this opinion, but the expansion of the jurisdiction of the court or its restriction is to be done on the basis of the law, by excluding *lato sensu* interpretations, which may have the effect of interfering with the competence of administrative bodies or other jurisdictional bodies. In the same way, the duties of the court cannot be taken over by certain persons who contribute to the administration of justice. For example, in the civil case pending before the Chisinau Court of Appeal no. file 2a-653/08 in which it was decided to demolish the attic, a decision was issued on 01.11.2016 regarding the explanation of the decision regarding the explanation of the meaning of the phrase "demolition of the attic", if it also includes the demolition of the entire second level with the attic. But by concluding the explanation of the decision, the Chisinau Court of Appeal ordered that the interpretation of this notion is within the competence of the bailiff. We

consider that such inactions of the court of appeal illegally restricted the jurisdiction of the court to the detriment of the debtor, leaving room for arbitrary interpretation by the bailiff. Thus, practices make the act of justice ineffective, leaving uncertainty in its application.

In our view, a specific feature of the exclusive general competence, which constitutes an inverse characteristic of the dual nature of this kind of competence, is that it cannot be regulated in the sense of restricting the inherent powers of the jurisdictional body regarding the solution regarding the merits of the case. The provisions and assumption of the rules of exclusive general jurisdiction may only contain a reference to a judicial body that will resolve the dispute, but without limiting or expanding the powers of the judicial body related to the solution of the merits of the case. In this sense, it is worth mentioning the provisions of the Constitutional Court Decision no. 18 of 03-07-2018 of the Republic of Moldova regarding the exception of unconstitutionality of some provisions of the Law on Advocacy no. 1260 of July 19, 2002, which declared unconstitutional the text "in the part related to the procedure for organizing the exams. The qualification granted cannot be disputed" from article 43 para. (4) from Law no. 1260 of July 19, 2002 regarding the legal profession, because the control of the decisions of the Licensing Commission of the legal profession by the administrative litigation court must be full, in fact and in law with regard to any aspect (procedural or substantive). These provisions violated the provisions of art. 20 of the Constitution of the Republic of Moldova in the sense of art. 6 § 1 of the European Convention on Human Rights, which guarantees the right of access to a court to defend a person's civil rights.

Starting from the example given above, we can state that in order not to affect the efficiency of the activity of defending the rights and legitimate interests of the judicial bodies, it is unacceptable that the regulations of the exclusive general jurisdiction selectively restrict the powers of this body to give a full solution, in fact and in law on any aspect, whether procedural or substantive. Moreover, in the case of the courts, the right to access to a court will be affected because this body established by law must have all the prerogatives to give a fair solution.

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