AT A CROSSROADS: THE CASE OF `PATHOLOGICAL ARBITRATION CLAUSES` WHICH DETERMINE A JURISDICTIONAL FIGHT

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Abstract

The so-called 'pathological arbitration clauses' are ambiguously drafted arbitration agreements which disrupt the setting in motion of an arbitration proceeding. A particular situation is the case where parties refer both to the jurisdiction of the arbitration tribunals and to that of the domestic courts in their contracts, without giving further detail. Such agreements may be interpreted in different ways and they currently cause controversy among several theorists and practitioners. However, in recent years the arbitration tribunals strive to maintain the validity of the defective arbitration clauses by preferring an interpretation which gives effect to the clauses over one which does not. Our paper briefly examines this kind of defective arbitration clauses and the solutions provided by doctrinaires and courts. In the end, we assess the issue and attempt to establish the parties' true intention in order 'to remedy' the pathology.

Keywords: *pathological arbitration clauses, defective arbitration agreements, defective clauses, arbitration problems, jurisdictional fight.*

1. Introduction

The *'pathology'* of arbitration clauses is, unfortunately, an "evergreen" phenomenon. It is neither new nor uncommon for law practitioners to encounter hypotheses when parties insert ill-drafted arbitration agreements which generate confusion surrounding the setting in motion of an arbitration proceeding. The ambiguity of such contractual terms is rarely intentional. It is true that in certain hypotheses the contractual party who drafts the arbitration clause voluntarily refers to equivoque arbitration procedures or to the jurisdiction of domestic courts in order to discourage the other party to follow the arbitration path. However, in most cases, parties do not act in bad faith. Instead, they usually lack basic knowledge for drafting contractual terms and do not incorporate the arbitration agreements generally recommended by international arbitration courts.

In my opinion, which may be slightly different to the ones of other law theorists, *'pathological arbitration clauses'* are not to be confused with null or void clauses. The latter are terms that deviate from one or more of the validity conditions.

Being accepted as a distinct agreement, separate from the underlying agreement[1], the arbitration clause must comply with the essential validity requirements of any contract. Under Romanian law[2], a contract is valid when the parties have the required capacity to conclude it, their consent is freely and validly expressed, respectively the agreement has a specific and lawful subject, a legal and moral aim and a proper form.

Furthermore, any arbitration clause concluded under Romanian law shall comply with the following additional validity requirements:

a) The contracting parties shall have full exercise of their rights[3];
b) The potential litigation considered by the arbitration clause shall be arbitrable[4];
c) The agreement to arbitrate must be concluded in written form[5].

In most cases, *`pathological arbitration clauses`* are valid agreements, which comply with all the legal requirements highlighted above, but their wording is faulty and they may lead to legal effects other than the ones envisaged by parties at the time of conclusion of the contract.

Stricto sensu, from a practitioners' perspective[6], `pathological arbitration clauses` are defective arbitration agreements of the following types:

a) Clauses where the agreement to arbitrate is absent or equivoque;
b) Clauses which are not clear in terms of the rules to be followed in the event of arbitration;
c) Ambiguous arbitration agreements that do not clearly designate the place of arbitration or the arbitrators;

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[1] See Article 550 paragraph (2) of the Romanian Code of Civil Procedure (Law no. 134/2010 regarding the Romanian Code of Civil Procedure, as republished in the Romanian Official Journal no. 247/2015 and last amended on March 24th 2017).

[2] See Article 1179 of the Romanian Civil Code (Law no. 287/2009 regarding the Civil Code, as republished in the Romanian Official Journal no. 505/2011 and last amended on March 24th 2017).

[3] See Article 542 of the Romanian Code of Civil Procedure.

[4] See Article 1112 of the Romanian Code of Civil Procedure.

[5] See Article 548 paragraph (1) of the Romanian Code of Civil Procedure.

[6] From a theoreticians' perspective, see Jacques Beguin, Michel Menjucq, *Droit du commerce international (International Trade Law)*, Lexis Nexis Publishing House, Paris, 2011, p. 1092 and Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, New York, 2009, pp. 146-149.

d) Arbitration agreements that name arbitrators who are now deceased, incapable or refuse to act;
e) Agreements that provide unreasonably short deadlines in the arbitration procedure;
f) Arbitration clauses which contain various internal contradictions *etc.*

Among these kinds of ill-drafted terms, one of the most encountered `pathological clauses` are the so-called *`optional arbitration agreements`*[7] where parties are allowed to choose between an arbitration tribunal and a domestic court of law for settling a potential dispute.

The current paper briefly covers the issue of *`pathological optional arbitration agreements'*, due to the wide variety of interpretation problems they raise in practice.

This matter is not new to doctrinaries. Actually, the term *`pathological clauses`* ('clauses pathologiques`) was introduced 44 years ago by a French law theorist named Frédéric Eisemann[8]. There is also a rich jurisprudence related to this legal phenomenon. However, the issue still determines many controversies in practice and is not sufficiently debated in the Romanian legal literature.

The aims of this article are to raise awareness on defective arbitration agreements in order to limit the common occurrence of improper drafting and, respectively, to provide remedies for the *`pathology`* of *`optional arbitration clauses`*, being inspired by international doctrine and case law.

2. The Pathology of Optional Arbitration Clauses

2.1. General Remarks

Both law theorists and practitioners expressed various opinions concerning the hypothesis of ill-drafted *`optional arbitration agreements`*.

Among the most frequently encountered types of *`pathologies`*, I have considered the following to be examined by the current article:

a) The case where parties incorporated two jurisdiction clauses with different provisions, respectively: *(i)* an arbitration clause according to which all disputes arising under it shall be settled by an arbitration tribunal and *(ii)* a jurisdiction clause which established that all litigation shall be solved exclusively by a particular domestic court or courts.
b) The hypothesis where parties referred to both the jurisdiction of a particular arbitration tribunal and the one of national courts within the same clause, without giving priority to any of them;
c) The situation where parties incorporated an alternative jurisdiction clause which stipulates that in the event of litigation they shall submit it to arbitration or to national courts.

In all three cases the contracting parties refer both to arbitration and to the jurisdiction of national courts without giving priority to one or another. In such cases, arbitrators have the task to determine the parties' true intention. Commonlly, courts are in favour of saving to the arbitration agreement. However, sometimes the contradiction is so flagrant, that the respective clause or clauses are held void[9].

In the following sections I have grouped the main doctrinary and jurisprudential orientations into three categories, namely:

I. Opinions in favour of arbitration, according to which the claimant has the right to choose between the two types of jurisdiction;
II. Opinions which favour the exclusive competence of ordinary courts of law in case of ambiguity;
III. Opinions which consider that both jurisdiction clauses should be held ineffective.

2.2. Opinions in Favour of Arbitration

At present, a number of courts from many jurisdictions, including Romania, favour the enforceability of arbitration agreements by using the principle of effective interpretation provided by Article 4.5 of the 2016 UNIDROIT Principles[10].

The principle was also incorporated in the Romanian Civil Code[11]. According to Article 1268 paragraph (3), clauses shall be interpreted so as to be effective, rather than not to give any effect[12].

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[7] To a certain extent, the phrase `optional arbitration agreements`is inaccurate. Actually, either party has the option to choose between arbitration or ordinary courts when the other party is pasive. Under these considerations, theorists proposed a different term for describing such clauses, respectively *`non-mandatory arbitration agreements`* (*E.g.* see Gary B. Born, *International Commercial Arbitration, Volume I. International Arbitration Agreements*, Wolters Kluwer International, 2014, p. 789). However, I consider that the latter descriptive phrase is not the appropriate one for describing the defective agreements envisaged by this article because it also designates other types of ill-drafted clauses, such as hypotheses where parties provide that they *`may`*resort to arbitration in case of litigation, not being bound by their arbtration agreement.

[8] See Frédéric Eisemann, *"La clause d'arbitrage pathologique"*, published in Commercial Arbitration Essays in Memoriam Eugenio Minoli, Unione Tipografico-editrice Torinese, Torino, 1974. According to Frédéric Eisemann, back then honorary Secretary General of the International Chamber of Commerce from Paris, the term `pathological arbitration clauses` designates arbitration agreements that contain defects which may disrupt the smooth progress of the arbitration procedure.

[9] Emmanuel Gaillard, John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Citic Publishing House, 2003, p. 270

[10] The Principles of International Commercial Contracts (hereinafter reffered to as `the UNIDROIT Principles` is a document elaborated under the auspices of the International Institute for the Unification of Private Law which intends to help harmonize international commercial contracts law. The last edition of this code of contractual practices was last published in 2016. According to Article 4.5 of the UNIDROIT Principles 2016, *"Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect"*.

[11] Law no. 287/2009 regarding the Civil Code, published in the Romanian Official Journal no. 409/2011.

[12] For a detailed presentation of this principle, see Dragoş-Alexandru Sitaru, *Dreptul comerţului international. Tratat.Partea Generală (International Trade Law. General Part)*, Universul Juridic Publishing House, Bucharest, 2017, pp. 534-535.

In Romania, under an extensive doctrinary interpretation[13], it was held that if parties did not intend to submit their dispute to be settled through arbitration, they would have ignored any possibility of solving the litigation by an arbitration court. By considering the hypothesis of arbitration, both parties expressed a *"stronger consent"* in favour of arbitration than the one according to which any litigation falls under the competence of ordinary courts jurisdiction. The latter is, nonetheless, implied in the absence of an arbitration agreement.

Romanian courts also provided an extensive interpretation, in line with the one expressed by Romanian doctrine. In one case[14], the court established that in the presence of an alternative arbitration clause with the following content: *"Any disagreement between parties concerning the execution of the current contract shall be settled amiably. In the event that is not possible, the litigation shall be solved by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania or by a competent court, in accordance with the Romanian law"*, the non-competence defence raised by the defendant is overruled. The court grounded its decision on the principle of effective interpretation and the rule which states that a contract shall be interpreted according to the common intention of the parties, both provided by the Romanian Civil Code. Furthermore, the tribunal stated that by not giving effect to the arbitration agreement, the settlement of the dispute will be unjustifiably delayed and the parties' right to a speedy trial will be violated. Thus, the court decided that the claimant was entitled to resort to arbitration without seeking the subsequent consent of the defendant.

In another relevant case[15], a Romanian arbitral court decided that when the parties established that potential disputes arising from their contracts shall be resolved either by an arbitral tribunal, either by an ordinary court, then the claimant gains the right to choose between the two jurisdictions in the event of litigation.

A similar approach is found in a more recent arbitral award[16]. The court held that the alternative feature of the `optional arbitration agreement` means that any party is allowed to designate the competent court. The claimant's option does not need to be validated by the defendant, so if he filed a petition for legal action at the Bucharest Court of Arbitration, then the respective arbitral tribunal becomes competent to settle the dispute. Likewise[17], when the parties incorporated an alternative jurisdiction clause without establishing any criterion concerning the priority of competence, the right to choose between jurisdictions belongs to the claimant.

Another arbitral court[18] explained that by requiring a separate agreement in case the arbitration clause does not specify who has the right to choose between the two jurisdictions and does not impose certain conditions for the exercise of the respective right would be the equivalent of rendering the arbitration clause ineffective. Once the claimant submitted the case to an arbitral tribunal, the arbitration clause became valid.

Otherwise, if the action was filed to an ordinary court of law, then the latter would become competent to settle the dispute between the contracting parties[19].

The Romanian courts' interpretation is also encountered in foreign jurisdictions.

In the United States of America there is an extensive case law regarding this legal issue. Under the Federal Arbitration Act (hereinafter abbreviated as *`the U.S. F.A.A.`*)[20], courts generally gave effect to `optional arbitration agreements` by stating that they permit

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[13] See Viorel Roș, *Arbitrajul comercial internațional (International Commercial Arbitration)*, Regia Autonomă Monitorul Oficial Publishing House, Bucharest, 2000, p. 158.

[14] See the Bucharest Court of Appeals (Curtea de Apel București), Judgement of April 24th 2002 from Case File no. 390/2001, in Mesagerul economic, a publication of the Chamber of Commerce and Industry of Romania, no. 32 from August 11th 2002 *apud* Giorgiana Dănăilă, *Procedura arbitrală în litigiile comerciale interne (Arbitration Procedure in Domestic Commercial Litigation)*, Universul Juridic Publishing House, Bucharest, 2006, p. 97. Similarly, see the reasoning of the Bucharest Court of Appeals in Award no. 144 of September 28th1999 from Case File no. 92/1998.

[15] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award no. 124 from July 22nd 1999. Similarly, see the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award no.145 from December 27th1996. Both decisions are published in excerpt in *Jurisprudența Comercială Arbitrală (Arbitral Commercial Jurisprudence) 1953-2000*, edited by the Chamber of Commerce and Industry of Romania, Bucharest, 2002, p.10.

[16] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 283 from November 25th 2009, published in Vanda Anamaria Vlasov, *Arbitrajul comercial. Jurisprudență arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Arbitral Jurisprudence 2007-2009. Judicial Practice)*, Hamangiu Publishing House, Bucharest, 2010, pp. 8-9.

[17] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 21 from February 7th 2008, published in Vanda Anamaria Vlasov, *op.cit.*, pp. 9-10. For a similar point of view, see the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 233 from November 16th 2007, published in Vanda Anamaria Vlasov, *op.cit.*, pp. 10-11.

[18] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 274/2006 from Case File no. 116/2006, published in the Romanian Journal of Arbitration (Revista Română de Arbitraj) no. 4 (8), October-December 2008, edited by the Chamber of Commerce and Industry of Romania, Rentrop & Straton Publishing House, Bucharest, pp. 45-46.

[19] See, for instance, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 250/2007 from Case File no. 236/2007, published in the Romanian Journal of Arbitration (Revista Română de Arbitraj) no. 3 (7), July-September 2008, edited by the Chamber of Commerce and Industry of Romania, Rentrop & Straton Publishing House, Bucharest, pp. 64-65.

[20] The United States Arbitration Act, more commonly referred to as the Federal Arbitration Act or FAA, was first enacted on February 12th 1925 and is currently part of the Code of Laws of the United States of America, the official compilation and codification of the general and permanent federal statutes of the United States (Title 9, Section 1-14).

either party to initiate the arbitration procedure, which afterwards becomes mandatory for both parties[21].

The English courts usually adopted a similar point of view. In a case[22] where parties incorporated, in two different articles of their contract, an arbitration agreement and a clause which provided for the exclusive jurisdiction of the English courts, the High Court maintained the arbitration clause by rulling that *"the reference to English courts applied only to incidents arising during the conduct of the arbitration"*.

French courts were also *in favorem validitatis* of the arbitration agreement.

According to the Paris Tribunal of First Instance[23], an equivoque arbitration clause shall be interpreted by considering that if the parties did not want to settle their potential disputes through an arbitration procedure, then they would have refrained from mentioning the possibility of arbitration by incorporating an arbitration clause in their contract. By doing so, they understood that they shall submit, on a prioritary basis, any disputes arising from their contract to the arbitral tribunal.

In another case[24], the Paris Court of Appeals held that in contracts containing an `optional arbitration clause`, the jurisdiction clause which attributes the competence of ordinary courts of law is subordinated to the arbitration agreement and is inserted by parties *"to cover the eventuality that the arbitral tribunal is unable to rule"*.

Another example is given by the jurisprudence of the International Court of Arbitration attached to the International Chamber of Commerce from Paris (hereinafter referred to as *`ICC Arbitration Court`*). In an award[25] made by this arbitration tribunal, a clause which stipulated that *"an arbitral tribunal sitting in Algiers would resolve disputes in first and last instance"* and a second clause which stated that *"in last instance"* the Algerian courts have exclusive jurisdiction was interpreted as meaning that the arbitration agreement is effective and the latter provision refers *"only to the recourse available under Algerian law against awards made in Algeria"*.

2.3. Opinions That Favour the Exclusive Competence of Ordinary Courts

There are, however, cases where `pathological arbitration agreements` were considered optional, in the sense that the ordinary courts of law became competent in case of ambiguity and the parties were required to arbitrate only when they subsequently concluded a separate agreement to arbitrate.

In Romania, there were law theorists[26] who stated that according to its "normal meaning" the optional contractual clause puts the arbitration tribunals and ordinary courts on an equal footing. The exercise of the right to choose between the two jurisdictions is, nonetheless, subordinated to the subsequent agreement to arbitrate that shall be concluded by the two contracting parties.

In the Romanian jurisprudence there was a case[27] concerning the interpretation of an arbitration agreement incorporated into a contract which stipulated that *"all potential litigation between parties shall be solved amiably; otherwise, the litigation shall be settled by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania or by an ordinary court"*.

The claimant submitted a dispute related to the underlying contract to the arbitration tribunal, but the defendant alleged that the parties are not bound to arbitration unless they conclude a subsequent agreement to arbitrate. The court agreed with the defendant by reasoning that, by using the conjunction *"or"*, the contracting parties did not establish a clear hierarchy between arbitration and the ordinary procedure. It ended by stating that the exercise of the option is subordinated to the subsequent consent of the two parties. Thus, this consent not being obtained, the agreement to arbitrate is not held effective.

In my opinion, such interpretations are in flagrant contradiction with the principle *in favorem validitatis* of the arbitration agreement. When parties referred even marginally to arbitration, they took into account the possibility of arbitration at the moment they concluded the underlying contract. If these agreements were meant only to establish the parties' duty to negotiate the settlement of their potential dispute through arbitration in the future, then these contractual terms would be ineffective, not serving any purpose.

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[21] See Gary B. Born, *op. cit.*, p. 789.

[22] See The English High Court of Justice, *Case Paul Smith Ltd. v. H&S International Holding Inc*. (1991), in XIX Y.B. Com. Arb. 725 (1994) *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 271.

[23] See the Paris Tribunal of First Instance (TGI Paris), Decision from February 1st 1979, *Techniques de l'ingenieur*, in Revue d'Arbitrage no. 101, 1980 *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., pp. 270-271.

[24] See the Paris Court of Appeals, Decision from November 29th 1991, *Case Distribution Chardonnet v. Fiat Auto France*, in Revue d'Arbitrage no. 617 (1993) *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 271. Similarly, see The French Cour of Cassation, *Case Brigif v. ITM-Entreprises*, in Revue d'Arbitrage no 544 (1997), with the comments of Daniel Cohen, in *Arbitrage et groupes de contrats*, *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 271.

[25] See ICC Arbitration Case No. 6866 of 1992, published in the ICC Bulletin, Vol. 8, No. 2, 1997, available online at *htttp://library.iccwbo.org/dr-awards.htm* (Last consulted on April 4th 2018).

[26] See Octavian Căpățână, *Convenția arbitrală deficitară (Defective Arbitration Agreement)*, in Revista de drept comercial (Commercial Law Journal) no. 12/1999 *apud* Viorel Roș, *op. cit.*, p. 158.

[27] See Bucharest Court of Appeals, Judgement no. 179 from November 15th 1999 in Case File no. 250/1998, not published, available in excerpt in Giorgiana Dănăilă, *op.cit.*, p. 96.

2.4. Opinions Which State That Both Jurisdiction Clauses Should Be Held Ineffective

These opinions are rather isolated, being rarely encountered in practice. However, there were cases when both jurisdiction clauses were considered ineffective.

For instance, there was a French court[28] which held that the arbitration agreement, which expresses the will of the contracting parties to give the arbitrators the power to settle their dispute, clearly excludes the intervention of the state judge. Thus, the respective clause is certainly in contradiction with the clause conferring jurisdiction to the Paris Commercial Court. Consequently, the disputed jurisdiction clauses are irreconciliable and shall be deemed not written. Pursuant to the rules of civil procedure law, the litigation was placed within the jurisdiction of the commercial court of the place where the defendant had its headquarters.

In another interesting case[29], the ICC Arbitral tribunal considered that by means of a clause incorporated in their contract, the parties wanted to *"preserve"* an alternative that allows them to choose between a consular and an arbitral jurisdiction. However, if there is any doubt related to the content of the respective jurisdiction clause, it shall be interpreted *contra proferentem*. In this hypothesis, the arbitration agreement drafted by the claimant being ambiguous, the arbitral tribunal considered it was not competent to settle the respective dispute.

3. Conclusions

To sum up, this paper presents the issue of *`pathological`* clauses where the contracting parties refer both to the jurisdiction of arbitration tribunals and national courts without giving priority to one or another.

Doctrinaries and practitioners expressed several opinions concerning the hypothesis of such defective agreements, which can be grouped into three categories, namely:

I. Opinions in favour of arbitration, according to which the claimant has the right to choose between the two types of jurisdiction;
II. Opinions which favour the exclusive competence of ordinary courts of law in case of ambiguity;
III. Opinions which consider that both jurisdiction clauses should be held ineffective.

Each category has many followers. However, the opinions which are in favour of arbitration are the dominant ones, while the opinions that held the jurisdiction clauses ineffective are rather isolated.

I rally with the first category. In my opinion, there are three main principles that shall be observed when interpreting any *`pathological`* arbitration agreement.

Firstly, courts need to establish the genuine intention of parties at the moment they drafted the respective agreement. In order to achieve that, they need to examine all relevant circumstances, including the ones provided by Article 4.3 of 2016 UNIDROIT Principles, especially the preliminary negotiations between parties, their practices and conduct subsequent to the conclusion of the contract. By doing so, practice showed me that this would reveal previous actions which may give us valuable hints that parties wanted to submit their potential disputes to arbitration.

Secondly, if the true intention cannot be accurately established, the arbitration agreement shall be always interpreted *in favorem validitatis*. If parties referred to arbitration in their contracts, it would be irrational to consider that they did not take into account the possibility to resort to arbitration in case of a potential dispute at the moment of conclusion of the respective contracts. Parties incorporate clauses in their contracts with the will to make them effective.

Thirdly, this kind of jurisdiction clauses is generally encountered in commercial contracts. When interpreting commercial law rules we need to be flexible and to observe the principle of celerity. By refusing to recognise the competence of the arbitration tribunal that was appointed by the claimant, the procedure length is considerably increased, which is contrary to the parties' right to a speedy trial. Therefore, the claimant shall have the right to choose between the two jurisdictions given to him as option.

In the end, I hope this paper raises awareness on the phenomenon of *`pathological optional arbitration agreements`*, which are rarely discussed by theorists, even if they are commonly encountered in practice, and it serves as an inspiration for future research on this issue, by considering a more extensive jurisprudential approach.

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[28] See *Case Epoux Saadi v. Huan*, C. Paris, November 22nd 2000, in Alexis Mourre (ed.), *Les Cahiers de l'Arbitrage (Arbitration Notebooks)*, Gazette Du Palais, Edition Juillet 2002, p. 294.

[29] See Partial Judgment from 2006 from ICC File no. 13921, in Charles Kaplan, Alexis Mourre (ed.), *The Paris Journal of International Arbitration (Les Cahiers de l'Arbitrage)*, L.G.D.J. Publishing House, Paris, May 2010, pp. 91-93.

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