THE PRINCIPLES GOVERNING ARBITRATION OF INTERNATIONAL TRADE LITIGATIONS

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ABSTRACT: *The institution of the international commercial arbitration is continuously expanding, preferred by the majority of the business parteners worldwide as a way of resolving their ongoing issues. Although arbitration is characterized by flexibility, certain fundamental principles which ought to be respected, are provided by most legislations and statutes of the arbitration institutions. The purpose of the study is to analyze these principles, as provided by internal and international regulations.*

KEYWORDS: i*nternational commercial arbitration; the principle of contradictoriality; the principle of confidentiality.*
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Unlike the French Civil Procedure Code, which refers expressly to the principles governing the civil proceedings when speaking about arbitration procedure[1], pursuant to art. 358 par.1 of the Romanian Civil Procedure Code, arbitration is governed only by three fundamental principles : the equality of the parties, the right of defense and the principle of contradictoriality.

The necessity of complying with these rules is also provided by art. 6 of the Arbitration Rules of the International Court of Arbitration, under the sanction of nullity.

UNCITRAL model law[2] expressly states the necessity to comply with the principle of equality of the parties alone[3]. This principle is found in the majority of the national laws[4]. Also, pursuant to art. 15, pct. 2 of the Rules of the International Arbitration Court in Paris, the arbitration court must act in a fair and impartial manner, ensuring that each of the parties has an effective possibility to present his case.

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[1] Art. 1460 of the French Civil procedure Code. See http://www.lexinter.net/NCPC/l'instance_arbitrale.htm

[2] United Nations Commission for International Trade Law (UNCITRAL in English and CDNUCI in French) was established in 1966 and its purpose is to ensure the harmonization and the progressive unification of the international trade law, especially by passing new international conventions, law models and uniform laws. UNCITRAL has 36 members, chosen by the General Assembly in such a manner that they represent different geographic zones around the world and the main economic and legal systems. See http://www.uncitral.org.

[3] Art. 18 of UNCITRAL model law.

[4] Art. 18 of Australian Law on International Arbitration, art. 26 of the Egyptian Law on Civil and Commercial Arbitration no. 9/1997.

Similar provisions are contained by art. 33 par.1 of the English Law on Arbitration of 1996 and by art. 14.1 of the Rules of the International Arbitration Court in London. Moreover, the English law sets forth a specific requirement, that the arbitration court follows a procedure adapted to the particular circumstances of the case, avoiding delays and unnecessary costs in reaching a solution and ensuring an equitable trial. Other principles established by the English Law on Arbitration of 1996, include the freedom of the parties to choose the applicable rules to their case and the minimal intervention of the national courts in such cases[5].

The principles of contradictoriality, of the equality of the parties, of the impartiality of the arbitrators and of freedom of decision must be respected during arbitration, pursuant to art. 21 par. 3 of the Brazilian Law on Arbitration nr. 9306/1996.The right to be heard, as an essential rule during arbitration, is established by art. 25 of the Swiss Convention on International Arbitration of November 27th 1969. Pursuant to this article, the parties are allowed to present their *de facto* and *de jure* arguments, to have sufficient time to know all the documents in the brief, to attend the hearings where evidence is presented or witnesses are heard and to be represented or assisted by a chosen representative.

The principle of the equality of the parties is of utmost importance, an essential rule established both by the Romanian Constitution[6], as well as by the Universal Declaration of Human Rights[7] and other treaties and conventions regarding human rights.

The requirements of this principle during arbitration imply that all parties enjoy the same procedural rights, as well as ensuring a balance between their procedural positions.

In a decision of France Court of Cassation[8] it was noted that the principle of «equality of weapons » implies the possibility for each of the parties to be heard by a judge in a manner that does not place one party in an obviously unfavorable situation compared to the other. Therefore, this principle is not observed when a party is not permitted to bring essential evidence in support of its claims. The French doctrine and case law underline the fact that the principle of equality is not arithmetic, hence only a significant « breach » in the equality of the parties may be considered.[9]

Thus, a breach of this principle was alleged when one of the parties did not benefit from the same number of days as his opponent to present its supporting documents in court. As showed in the decision issued on January 22nd, 2004, Paris Appelate Court considered that such a situation does not represent a breach of the principle of the equality of the parties, on the grounds that a difference of 7 days in favor of a parties does not confer a decisive advantage, although this party benefits of a longer period of time to prepare its defense.

The principle of right of defense is established by the Constitution[10] in the Romanian legal system, and the necessity of its practical application results from the declarations and treaties regarding fundamental human rights.

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[5] Section 1 of Part 1 of the English Law on Arbitration, 1996.

[6] Art. 16, par.1.

[7] Art. 1 of the Universal Declaration of Human Rights "All human beings are born free and equal in dignity and rights".

[8] Nr. 09-13712 of April 13th 2010. See http://www.legifrance.gouv.fr

[9] Eric Loquin „De la bonne gestion de l'instance arbitrale par les arbitres" în RTD Com. 2007, p. 689.

[10] Art. 24, par. 1

The right of defense has been analyzed in two senses : material and formal. [11] In material sense, the right of defense is established in various parts of the Civil Procedure Code, such as : the right of a party to know the claims and defenses of the other party (art. 355-358[1] C.Proc. Code) ; subpoenaing the parties for the hearings (art. 358[2] – art. 358[4] C.Proc. Code), the right to present evidence (art. 358[10]- art. 358[11] C.Proc.Code).In formal sense, the right of defense allows the litigant parties to hire a qualified defender.

In our legal system it is not mandatory for the parties to hire a qualified defender to assist them before the Courts. Arbitration is no exception. Pursuant to art. 64 par.1 of the Arbitration Rules of Arbitration Rules of the International Court of Arbitration, the parties may attend the hearing in person or through a legal representative and may be assisted by attorneys, counselors, interpreters or other persons[12].

We need to specify that in other legal systems, it is mandatory for the parties to hire a qualified defender for certain categories of litigations.

The principle of contradictoriality guarantees the parties the possibility to discuss and argue any factual or legal aspect of the arbitration. In the Romanian procedural law, this principle is specifically stated in art. 129 par. 2 of the Civil Proc. Code.

The fundamental requirement of contradictoriality is that no order shall be entered without prior debate of the parties. It has been said that this principle is the mere «engine of the courts », the contradictoriality both opposing and reuniting the litigating parties, since none of the them can take any action in court without the other's knowledge[13].

The principle of contradictoriality requires the court of arbitration to ensure that each of the parties has the possibility to exert its processual rights, to present and supports its claims in fact and in law. No exception to the procedure shall be resolved by the court of arbitration before a contradictory discussion of the parties.

The French Civil Procedure Code sets forth that the necessity of ensuring the compliance with this principle means that the parties have early knowledge of the opponent's factual and legal arguments and evidence, in order to prepare proper defense. A court order can only be entered based on the evidence, the claims and the documents brought by the parties, which have been discussed during public hearings. This principle is breached if the order is fundamented on elements on which the parties have not expressed their position[14].

A decision of the French Court of Cassation[15] has confirmed the decision of the Appelate Court of Paris that voided an arbitration award because one of the parties had

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[11] Ioan Leş „Civil procedure law treatise", Ed. All Beck, Bucureşti, 2002, p. 49.

[12] Art. 18 of the French Civil procedure Code. As a de lege ferenda proposal regarding the provision that would make it mandatory for the parties of the arbitration to be assisted by a attorneys or legal counselors, see Şerban Beligrădeanu „Discussions on aspects regarding conventional representation and assistance of the parties during institutional-jurisdictional arbitration of the International Court of Arbitration near the Chamber of Industry and Commerce of Romania", Romanian Private Law Journal nr. 4 of 2009, p. 25.

[13] Viorel Mihai Ciobanu „Practical and theoretical treatise of civil procedure", vol. I, Ed. Naţional, Bucureşti, 1997, p. 126.

[14] Decision of September 11th, 1997 of Paris Appelate Court, nr.95/80006 of General repertoir. See http://www.arbitrage.org/fr/publications/jurisprudence_cap1c_19970911.pdf.

[15] Decision of March 25th, 1999 of the Court of Cassation, Civil Section, case of Gobitta c/ Sté Holding Mouret, published in Buletin II, nr 55, p. 40

been heard as witness. The grounds of the decision included the fact that this circumstance is in itself a violation of the right to defense and of the principle of contradictoriality.

The dissenting oppinion of a French author[16] is that such an approach is somehow extreme. It was argued that the procedural flaw in this case consisted of the fact that the arbitrators heard one of the litigating parties as a third-party able to provide information in an objective manner. Hence, although such a possibility is not expressly stated in the French Civil Procedure Code, we need to note that the arbitrators are not bound by these legal provisions, only by the principles of the civil process. In this particular case, concludes the author, the principle of contradictoriality would have been breached only if the other party had not acknowledged the deposition of the other party as a witness.

In the Romanian legal literature[17] it has been expressed that simply stating the essential rules within the Civil Procedure Code is not limitative, but shall be completed with the other fundamental principles of the civil process, if compatible with the arbitration procedure.

We appreciate that the principle of availability needs to be respected during arbitration as well. In the meanwhile, the Civil Procedure Code draft expressly states that this fundamental principle is to be applied to arbitration also[18].

The availability, in a material sense means that the parties can dispose of the subject of the dispute according to their interests, and, in procedural sense means that the subjects of arbitration may employ all the processual possibilities allowed by law[19].

In particular, during arbitration, the principle of availability gives the parties the possibility to take certain procedural actions[20], such as: filing the arbitration request, establishing, pursuant to the arbitration agreement, the processual frame of the case, appointing the arbitrator, making incidental requests, quit claiming the action or the right itself, the right of the losing party to seek annulment of the arbitration award, the right of the winning party to enforce the arbitration award.

The limitation of this principle is given by the content of the arbitration agreement which sets forth the procedural frame of the litigation.

The principle or orality is tightly linked to the principle of contradictoriality and lies in the possibility of the parties to orally present their claims, explanations, to debate upon the evidence, to invoke certain irregularities and to draw conclusions on all factual and legal circumstances of the case.

Pursuant to art. 24 of UNCITRAL model law, the arbitrators shall decide whether hearings are necessary for handling the evidence or for the oral presentation of the parties' claims.

Pursuant to art. 58 of the Rules of the International Court of Arbitration, although it allows that certain phases of the procedure be completed via correspondence, hearing the witnesses and the experts, as well as the final conclusions, must be completed verbally.

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[16] Eric Loquin „Droit de la defense et principe du contradictoire. Violation. Audition d'une partie en qualité de sachant. Libre discussion des parties. Moyen inopérant." în RTD Com. 2000, p. 334.
[17] Giorgiana Dănăilă „Arbitration of internal commercial litigation", Ed. Universul Juridic, Bucharest, 2006, p. 119.
[18] Art. 546, par. 2 of the Civil Procedure Code draft.
[19] Ioan Leş „Civil Procedure Code. Commented articles", Ed. All Beck, Bucureşti, 2005, p. 402.
[20] Georgiana Dănăilă, ibid., p. 126.

Hence, these provisions establish an attenuate form or the principle of orality during arbitration.

We consider that the compliance with the principle of contradictoriality, as stated in the Civil Procedure Code and in the Rules of the International Court of Arbitration, can only be met if the debate on the merits of the case is made orally, even if for certain phases only.

The principle of the active role of the judge, as it appears in our civil procedure, manifests itself through the following duties and prerogatives of the Court : the obligation to establish the necessary grounds for the trial, as well as enforcing and respecting the principle of contradictoriality and the other principles of the civil process[21]; the judge has the obligation to submitt *ex officio* to the debate of the parties any factual or legal circumstance which may lead to a solution, should they not be mentioned in the complaint or the answer[22]; the judge has the right to request oral or written explanations from the parties regarding the factual situation or the supporting legal arguments, the Court may order the parties to produce the evidence it deems necessary, overruling a potential disagreement of the parties[23]; the Court has the obligation to offer guidance to the parties when not represented or assisted by an attorney[24] etc.

Some of the provisions of the Rules of the International Court of Arbitration plead for a recognition of the active role of the arbitration court. As an example, we can mention: the obligation of the arbitration court to respect the principle of contradictoriality, the right of defense and the equality of treatment[25]; the right of the arbitration court to request the parties to present written explanations regarding the subject of the dispute and the factual circumstances as well as to produce any legal evidence deemed necessary[26]; the right of the arbitration court to prolong the arbitration, with maximum 2 months[27].

The active role of the arbitration court is also stated in art. 19.3 of the Rules of the International Court of Arbitration of London, which gives the arbitration court the possibility to prepare a list of detailed questions that the parties must answer before the opening of the hearings.

Other specific principles of arbitration include the principle of confidentiality and the principle of flexibility of the procedure.

Confidentiality is without doubt, one of the advantages of arbitration.

In the beginning, the concept of confidentiality was associated with the private nature of the arbitration, considering it represents two faces of the same coin. Therefore, it was appreciated that the assumption that arbitration is both private and confidential in the same time is based on the fact that it would be a nonsense for the parties to be able to prevent third parties from attending the arbitration, but in the same time, to have the freedom to discuss the case with them[28].

[21] Art. 129, par. 2 of the Civil Procedure Code.
[22] Art. 129, par. 4 of the Civil Procedure Code.
[23] Art. 129, par. 5 of the Civil Procedure Code.
[24] Art. 129, par. 3 of the Civil Procedure Code.
[25] Art. 6 of the Rules of the International Court of Arbitration.
[26] Art. 66, par. 2 of the Rules of the International Court of Arbitration.
[27] Art. 53, pct. 2 of the Rules of the International Court of Arbitration..
[28] Andrew Tweeddale, Kerern Tweeddale „Arbiration of commercial disputes. International and English Law and Practice", Oxford University Press, 2007, p. 350.

Subsequently, these two notions parted, being stated that the arbitration was not confidential by nature, in absence of an express contrary agreement of the parties or provisions of the arbitration rules. Hence, the private character mainly refers to the oral procedure and implies excluding any third parties, while confidentiality is more comprehensive, extending to phases both prior and subsequent to the debates.[29].

The British jurisprudence considers the obligation of confidentiality as inherent to arbitration, while the American and Australian Courts refuse to admit such in absence of an express such convention[30].

The majority of the rules of arbitration courts establish the obligation of confidentiality, the most comprehensive regulations pertaining to the Rules of Arbitration of the World Intellectual Property Organization. Pursuant to art. 52 of these Rules, confidential information is defined as being „all information possessed by one of the parties, expressed in any form, to which the public does not have access to, of commercial, financial or industrial significance and considered confidential by the party who owns it".

The confidentiality of arbitration is regulated by the provisions of art. 73 of the same Rules[31]. In exceptional circumstances the arbitration court may use a confidentiality counselor in order to determine the confidential nature of the information and to determine the damages to be awarded if disclosed[32].

Art. 30 of the Rules of Internation Court of Arbitration in London stipulates a general obligation of confidentiality for the parties and the arbitrators[33]. The most significant sets of regulations which only comprise general references to the obligation of confidentiality are the Rules of Arbitration of the International Chamber of Commerce in Paris and UNCITRAL Arbitration Rules.

Pursuant to art. 20 (7) of the Rules of Arbitration of the International Chamber of Commerce in Paris, the arbitration court may order measures for protecting the trade secrets and confidential information, and pursuant to 25 (4) of UNCITRAL Arbitration Rules, the arbitration award may be made public only with the consent of the parties.

«The activity of the Court is confidential this must be respected by all participants, no matter what their quality is », states art. 6 of UNCITRAL model law.

The obligation of confidentiality has also been analyzed by the Romanian doctrine[34], focusing on three distinct elements : the participants to the arbitration, the arbitration procedure and the duration of this obligation.

[29] Ileana M. Smeureanu „Resolving cases through international commercial arbitration: a plea for confidentiality" Romanian Arbitration Journal nr. 1(5) of 2008, p. 43.

[30] Margaret L. Moses „The Principles and Practice of International Commercial Arbitration", Cambridge University Press, p. 49.

[31] Pursuant to these provisions „Except for the case or in the degree that an arbitration award is appealed or the enforcement of the award is commenced, no information on arbitration may be disclosed unilaterally by one of the parties or a third-party, except when ordered by law or an organ of authority, and even then providing only the information that was legally requested; when the information was presented to the Court and the other party, meaning the disclosure was made during arbitration, or was presented only to the other party, if the disclosure took place after the award was entered, it is required that the object and the motivation of the disclosure be presented."

[32] Art. 52, pt. d of the Rules of the World Intellectual Property Organisation.

[33] Pursuant to this provision, „should the parties agree otherwise in writing, they can respect the confidentiality of all arbitration awards entered in the cases they have been part of, of all the documents and private documents pertaining to the cases, unless the disclosure of such is a legal obligation imposed to protect a right or is necessary in order to enforce or appeal an arbitration award before Courts of law."

[34] Georgiana Dănăilă, ibid., p. 122.

Regarding the participants, it is considered that the obligation of confidentiality encumbers all, although it is expressly mentioned only when referring to the arbitrators, pursuant to art. 353 pct.c of the Civil Procedure Code. The obligation of confidentiality refers to the entire arbitration procedure. The Rules of the International Court of Arbitration near the Chamber of Commerce and Industry of Romania state, in art. 7, that the obligation of confidentiality encumbers the International Court of Arbitration, the courts of arbitration, as well as the staff of the Chamber of Industry and Commerce of Romania, who are not allowed to disclose or publish any information they have knowledge of due to their professions, without prior authorization of the parties.

The arbitration awards may be published in whole only with the consent of the parties. However, they may be published in part or in abstract, they may be subject to comments on legal aspects in journals, papers or collections of arbitral case law, without disclosing the names of the parties or any information that could be detrimental to them.

The brief is confidential as well, no other third party not involved in the litigation having access to it, except if the parties consent otherwise. Nevertheless, the president of the Court of Arbitration may authorize, on a case to case basis, the examination of the briefs for scientific or documentary purposes, after the awards are entered and only if irrevocable orders were entered in those cases[35].

Basically, the obligation of confidentiality is not limited in time, but it is not absolute either[36]. Hence, if the arbitration award is contested before courts of common jurisdiction, the principle of confidentiality is no longer applicable. One of the guarantees meant to ensure the observance of the principle of confidentiality is the private character of the hearings. Unlike the common processual law governed by the principle of publicity, pursuant to art. 121 of the Civil Procedure Code[37] and art. 126 of the Constitution, the arbitration debates are not public.A practical application of the privat character of the debates is set forth in art. 64 of the Rules of the International Court of Arbitration which state that the parties may attend the hearings in person or through representatives and may be assisted by lawyers, counselor, interpreters and other specialists. Should the parties and the court agree, others participants may attend the hearings as well.

Regarding the principle of flexibility of arbitration, it refers to the fact that the arbitration is characterized by elasticity and fluidity, without being bound by the rigidity of the formal rules of common procedural law, the will of the parties being the main element of the dynamics of arbitration[38].

The elasticity of arbitration resides in the lack of solemnity of the hearings, which take place in a friendly and informal setting, following a pre-established schedule[39], in an environment where the parties do not appear as implacable enemies, but as business partners encouraged by the arbitrators and by their own economical interests to find a quick and convenient solution to their issues[40].

[35] Art. 7, par. 2 The Rules of the International Court of Arbitration near the Chamber of Industry and Commerce of Romania.

[36] Andrew Tweeddale, Kerern Tweeddale, ibid.., p. 355.

[37] According to this article, „The hearings are public, except for the cases when the law provides otherwise"

[38] Georgiana Dănăilă, ibid., p. 121.

[39] Florea Măgureanu „Considerations upon the specific traits of arbitration compared to common law justice", in Romanian Commercial Law Journal, nr. 5, 2001, p. 67.

[40] Tudor R. Popescu, „International Trade Law", Ed. Didactică şi Pedagogică, Bucharest, 1983, p. 367.

The lack of formality of the procedure before the arbitration court also results from the fact that the witnesses are not deposed under oath[41].

Pursuant to the draft of the Romanian Civil Procedure Code, the principle set forth by art. 21 regarding the solemnity of the hearings, applies to arbitration as well. We consider that this principle is contrary to flexibility which is a specific trait of arbitration.

[41] Art. 67 of the Rules of the International Court of Arbitration near the the Chamber of Industry and Commerce of Romania.