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# CONSIDERATIONS ON PROBATION IN INTERNATIONAL COMMERCIAL ARBITRATION

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**ABSTRACT:** *A general rule of international trade arbitration is that all the parties have to prove their affirmations. Moreover, it is a consecrated right of the arbitral tribunal to ask for any other evidence in a determined period of time. The regulations referring to the administration of evidence stipulate that these should remain at the discretion of the arbitral tribunal, which has the opportunity to apply a flexible procedure for stating the situation of fact. The efforts to eliminate the existing differences between different legal systems have concretized lately by the creation of an international legal system for processes in international trade arbitration. This study aims to analyze the probation in international commercial arbitration, considering the provisions contained in the relevant regulations of the arbitration institutions and the opinions expressed by the Romanian and foreign legal literature but also by the relevant case law.*

**KEY WORDS:** arbitration, probation, procedure, arbitral tribunal, evidence.
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The general rule in the international commercial arbitration is that each party must prove its allegations. In this sense, there are the provisions of Article 27, paragraph 1 of the UNCITRAL Rules, according to which each party shall have the burden of proving the facts on which it relies on, to support its claim or defense. However, at any time during the proceedings, the arbitral tribunal may require the parties to present documents or any other evidence within a certain period of time also set by the arbitral tribunal.

In terms of taking evidence, Article 57 of the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania[1] provides that each party has the burden of proving the facts underlying its claim or defense in litigation. However, in its active role, the arbitral tribunal is entitled to require written explanations on the claim of the parties and the facts of the litigation and may order the taking of evidence as provided by the law.

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[1] Published in the Official Gazette of Romania, Part I, no. 613 of 19 August 2014.

Stringent provisions are contained in these rules regarding the proposal of evidence. Thus, according to Article 57, paragraph 2 the evidence may be submitted no later than the first day of the trial. The proposal of evidence can be made by the parties, by arbitration claim or by counterstatement or other pleadings, filed prior to the first day of the trial and communicated to the other party. If the evidence was not required in these circumstances, the evidence could not be raised during the arbitration proceedings, except in the cases where the need of evidence arises from the debates or by taking evidence does not cause delay in resolving the dispute.

The two exceptional cases are justified on the grounds that the penalty of forfeiture of one party from the right to propose evidence must be based on its procedural fault, which in both cases can not be accepted (Leș, 2011).

In addition to these cases, the Article 254, paragraph 2 of the Code of Civil Procedure provides other three objections that justify the possibility to invoke of new evidence during the arbitration: when the need of evidence arises from changes in the claim, when the party demonstrates to the arbitral tribunal that, for solid justified reasons, it could not propose within the settled term the required evidence and in case there is express consent of all parties.

Within the contents of the Rules of the International Court of Arbitration in Paris no express provisions concerning the burden of proving exist, however the French doctrine states that each party must present evidence to support its claims (Béguin & Menjucq, 2005). Likewise, paragraph 5 of the Article 25, within the contents of the same rules, provides that during the course of the proceedings, the arbitral tribunal may require any party to provide additional evidence.

The object of proof is made up by the acts and deeds generating rights and obligations with respect to the conflict that broke out between the parties (Leș, 2011).

The ongoing deeds, *ie* those which are considered by the law existing and on which the judge cannot admit or order evidence and the notorious facts cannot be considered as evidence. Regarding the latter, the arbitral case law revealed that the events of force majeure which are notorious, such as the existence of a state of war in a certain area of the world, may be considered by the arbitral court regardless of any evidence taken in the trial if they are known and if they are not disputed by the parties[2].

Regarding the principle "*iura novit curia*", under which it is assumed that the judge knows the legal rules so that they can not form the object of proof, an opinion highlighted that in the international arbitration the principle must be applied with more caution since not in every situation it may be assumed that arbitrators know profoundly the law or the laws applicable to the dispute (Kurkela, 2003). The doctrine has argued, however, that the application of this principle in international arbitration is inadmissible because the arbitral tribunal does not have a forum, so that it must be considered that all the laws are foreign laws and their content should be determined as if they were an element in fact (Gaillard & Savage, 1999).

The admissibility of evidence is subject to different rules in different legal systems.

[2] See Decision of the Court of Appeal Bucharest no. 21/1976, cited by (Sitaru, 2008).

Within the Romanian law, the evidence must meet the following conditions (Sitaru, 2008): legality, credibility, relevance and their conclusiveness.

The first condition, that of legality, has in view the need that by submitting the evidence, the imperative provisions of the legal system which establishes *lex causae* should not be violated.

The second condition aims at verisimilitude of the evidence, which is expressed in the idea that the evidence must make the deed claimed believable (Leș, 2011).

The third condition, namely the relevance of the evidence implies the idea that this should relate to the lawsuit and the test that it must be included in circumstances that are likely to lead to solving the case in question (Boroi & Spineanu Matei, 2011).

The need for such conditions and the prior verification of their fulfillment by the arbitral tribunal is not required in the common law system where the basic rule is that each party is entitled to present evidence that it considers necessary to prove its cause (Rubino-Sammartano, 2001).

In international commercial arbitration the rules of procedure for the taking of evidence are at the discretion of the arbitral tribunal, which has the possibility to apply a flexible procedure that establishes the facts (Moses, 2008).

The UNCITRAL Rules do not contain provisions relating to the submitting of evidence.

In their turn, the Rules of Arbitration of the International Court of Arbitration in 2014 only provide that evidence taking will be made during the meeting of the arbitral tribunal and the witness or expert hearing will take place without the oath.

The arbitral tribunal does not have the possibility to take coercive measures against witnesses or experts. In case for the taking of evidence there is the need for assistance by the court, the arbitral tribunal may address to the court at the headquarters of arbitration, which applies its own law. However, Article 57, paragraph 8 of the Rules allows the arbitral tribunal to order the reduced fee for the expert if it seriously and unreasonably delayed in filing the expert report or committed other evident acts to delay in acting accordingly.

The Rules of the International Court of Arbitration in Paris contain succinct provisions relating to the taking of evidence, stating that the hearing of the witnesses or experts shall be made in the presence of the parties or in their absence, if the parties have been legally summoned.

The efforts to eliminate existing differences between different legal systems have resulted, in recent years, in the establishment of an international system of rules for the performance of the international commercial arbitrations, as well as the International Bar Association Rules[3] for taking the evidence.

The International Bar Association Rules related to the taking of evidence in international arbitration, such as stated in the preamble thereof, are intended to ensure the

[3] The International Bar Association was established in 1947 as a worldwide organization of the law practitioners of the Bars and Law Associations. The International Bar Association has the role of influencing the development of the international reform of law and of shaping the future of the legal professions worldwide. The Association is made up of more than 40,000 members: lawyers and companies with a great experience in ensuring the legal assistance worldwide. See http://www.int-bar.org

development of an efficient, economical, and lawful trial for the taking of evidence in international arbitration, especially between parties belonging to different legal systems. The rules are intended to supplement the legal and institutional provisions, ad hoc, and other rules that apply to arbitral process performance, designed to be used along with them (Jenkins & Stebbing, 2006).

The parties and the arbitral tribunal may adopt the International Bar Association Rules in whole or in part to apply them to their arbitration procedures or they can modify or use them as a guide for creating their own procedures. The rules are not intended to limit the flexibility that is inherent, the parties and the arbitral tribunal being free to adapt them to the circumstances of each arbitration.

The arbitral tribunal shall consult the parties before proceeding to the taking of evidence on the scope, timing and manner of the taking of evidence, including in relation to: the preparation and submission of the Witness Statements and Expert Reports; the taking of oral testimony at any Evidentiary Hearing; the requirements, procedure and format applicable for drafting the documents; the level of confidentiality protection to be afforded to evidence in the arbitration; the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence. (Article 2, paragraph 2 of the International Bar Association Rules – 2010).

However, the court is encouraged to submit to the parties as soon as they see appropriate, any matter which the court deems relevant to the outcome of the case and for which a preliminary determination would be indicated, as provided by the same rules.

In International Commercial Arbitration documentary evidence is considered the most valuable evidence (Sitaru, 2008).

Documents as evidence are statements of the parties with respect to certain acts or legal acts made in writing (Leș, 2011). Article 265 of the Romanian Code of Civil Procedure of 2010, republished, defines the documentary evidence as any writing or other record that contains information about a legal action or act, regardless of material support or manner of preservation and storage. The legal literature (Reghini, et al., 2008) highlighted indisputable advantages provided by such evidence: they are easy to be maintained, hard to become perishable and easy to be administered in a litigation; being drawn up before the arising of the conflict between the parties, they have a higher degree of reliability and accuracy compared to statements made by witnesses or parties in the trial; probative value of the documents can not alter in time.

Regarding the documentary evidence, it is important the period of time within which the documents may be submitted to the arbitral tribunal, the conditions to be met and the possibility of the arbitral tribunal to compel the parties to submit certain documents in their possession to the case file.

The UNCITRAL Rules do not provide imperatively that the parties should submit with the statement containing their claims and defenses all the written documents, only to the extent this is possible. (Article 20, paragraph 4)

According to Article 27, paragraph 2 of the Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry, the demand for arbitration shall be accompanied by documentary evidence that will be submitted in original copy or certified copy by the party. If the documents are drafted in a foreign language, the Secretariat of the Arbitration Court, ex officio, shall require the party to

submit a translation in Romanian or, where appropriate, in a foreign international language, the translation being performed also by the Secretariat Court of Arbitration if the costs are supported by the party.

Rules of the International Court of Arbitration in Paris do not provide a deadline for the submission of documents as it will be determined by the arbitral tribunal. The French doctrine highlighted that the international commercial arbitration tends to avoid taking severe measures against parties where they do not submit documents or other evidence in due time (Gaillard & Savage, 1999).

The written submission of the parties shall be accompanied by the copies of essential documents underlying its claims or defense as provided by Article 15.6 within the Rules of the International Court of Arbitration in London.

For the delivery of a fair award in the trial, the arbitration rules provide that written evidence must be submitted in sufficient copies to be communicated to all parties and arbitrators.

Thus, in terms of number of copies, the documents shall be submitted on paper in the number of copies related to the number of defendants, plus one copy for the case file and for each arbitrator as provided by the Rules of Arbitration of the International Commercial Arbitration Court in 2014. The communication of documents may also be accomplished by electronic means.

Similar provisions are contained in the Rules of the International Court of Arbitration in Paris providing in the Article 3, paragraph 1 that all documents will be made by the parties in a sufficient number of copies to be filed to each party, plus one copy for each arbitrator and one for the Secretariat.

Article 1.2. within the Rules of the International Court of Arbitration in London provide that the claim for arbitration with the enclosed documents shall be submitted in two copies in case one arbitrator shall be appointed and four copies in case three arbitrators shall be appointed.

The communication of documents to arbitrators and to the other parties in the trial must be achieved simultaneous and in the same form, either directly or through the arbitration institution (Gaillard & Savage, 1999).

One of the matters examined in the legal literature is the possibility of the arbitral tribunal to order the parties to submit to the case file certain documents in their possession.

Regulations in this respect can be found in the content of international conventions. The Washington Convention of 1965 provides that unless the parties agree otherwise, the Tribunal may, at any stage of the proceedings call upon the parties to produce documents or other evidence. For the category of documents there is no further clarification, therefore it has been held that the arbitral tribunal has a discretionary power in this regard (Costache, 2010).

The UNCITRAL Rules, within Article 24, refer in general terms to this matter by providing that the arbitral tribunal shall decide whether it is necessary for the parties to submit additional documents and shall set the necessary time to accomplish this. The UNCITRAL Model Law, in the contents of Article 26 regarding the expertise, contains some provisions relating to the right of the arbitral tribunal to compel the parties to submit documents to the case file. According to this article, unless the parties agree otherwise, the

arbitral tribunal may require a party to make available any necessary documents for inspection.

Article 57, paragraph 4 of the Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania contains provisions that allow the arbitral tribunal to order the taking of any evidence as provided by the law, deemed useful and relevant to the case.

Romanian Code of Civil Procedure of 2010, republished, provides in Article 586, paragraph 2 that in order to resolve the dispute, the arbitral tribunal may order the taking of any evidence provided by law.

Throughout the process, the arbitral tribunal may order any of the parties to submit additional evidence to the case file, including written documents as provided by Article 20, paragraph 5 of the Rules of the International Court of Arbitration in Paris.

The Rules of the International Court of Arbitration in London provide that judges have the possibility to order the parties to submit to the file any documents or to submit copies of the documents in their possession. The English arbitration of 1996 grants the arbitral tribunal broad powers to require the submission of documents by the parties. According to Article 34, paragraph 2, letter d) of the Arbitration Act, unless there is a contrary agreement of the parties, the arbitrators will decide whether and which documents will be submitted by the parties and in what stage of the litigation.

Article 1696, paragraph 1 of the Belgian Judicial Code of 19 May 1998 provides that the arbitral tribunal is entitled to order each party to submit to the case file the documents in its possession.

Similar provisions are found in the Japan Arbitration Law no. 138 of 2003 in the Article 32, paragraph 3 which refer to the ability of the arbitral tribunal to proceed with the inspection of documents in the possession of a party, but with the obligation to notify the party in advance.

Much more explicit in what concerns the arbitrators' authority to require production of documents, even by a person who is not party in the case, is the Federal Act on arbitration of the United States. According to the provisions of Section 7 of this Act, the arbitrators may summon any person as a witness requiring the witness to provide in this regard books, records or other documents that may constitute evidence in the file.

Most national laws contain provisions regarding the possibility of arbitral tribunal to order the parties to submit documents, which is limited only by the agreement of the parties and by the compliance with the principle of equality and the right to a fair trial (Born, 2009). Even where there are no express provisions in this regard, it is considered that such a possibility should be explicitly recognized (Born, 2009).

One issue discussed in the legal literature is whether the arbitrators have the ability to impose fines to the party who fails to submit a document requested by the arbitral tribunal in due time (Gaillard & Savage, 1999).

Some laws expressly provide the authorization or on the contrary the prohibition of the arbitral tribunal to order the application of fines.

Thus, the Article 1709 of the Belgian Judicial Code of 19 May 1998 states that judges may order fines for the party which does not comply with its provisions.

On the contrary, Swedish Law on Arbitration 1999 held in section 25, paragraph 3 that judges may not impose conditional fines or use compulsory measures to obtain requested evidence.

Of course, if the arbitrators face a refusal of the parties to submit the requested documents, they can draw conclusions resulting from such an attitude, by "applying fines" to the party in discussion through the award given on the merits (Gaillard & Savage, 1999).

International Bar Association Rules from 2010 included in Article 3 provisions concerning the taking of evidence with written documents. This article refers to three categories of documents: documents available to either party; documents that one of the parties wishes to use in the trial but can not because the documents are in the possession, custody or control of another party; documents that neither party submitted nor want to submit to the case file, but which are considered relevant by the arbitral tribunal.

International Bar Association Rules of 2010 provide as a general principle that each party must submit to the case file the documents they consider relevant in supporting its position, principle found in both the common law system and the civil law system.

Documents shall be filed within the time period established by the arbitral tribunal. The International Bar Association Rules – 2010 have opted for a provision such as to maintain maximum flexibility for the parties and for the arbitral tribunal[4].

In the international commercial arbitration there is the possibility of the Parties to submit written testimony of the witnesses, which does not exclude their hearing orally by the arbitral tribunal during the proceedings (Gaillard & Savage, 1999).

Regarding the testimonial evidence there is the question of the conditions under which the evidence is taken within the arbitral tribunal, whether the parties may be witnesses or whether witnesses are questioned under oath.

The UNCITRAL Rules provide in the Article 27, paragraph 2 that the witnesses who are presented by the parties to testify on any issue of fact or expertise may be any individual, even if the individual is a party to the arbitration or in any way related to a party.

The Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry contain express provisions regarding the possibility of hearing the witnesses of the parties, but in the light of the Romanian Code of Civil Procedure of 2010, republished, such a possibility cannot be acknowledged.

According to Article 20.3 of the Rules of the International Court of Arbitration in London, unless the arbitral tribunal would decide otherwise, the testimony of a witness may be presented by a party in written form either as a signed statement or as a sworn affidavit.

Parties are entitled to request that a witness, on whose testimony another party seeks to rely on, and to be heard before the arbitral tribunal. If such a request is accepted by the

[4] See *Commentary on the revised text of the of the 2010 International Bar Association Rules* relating to the taking of evidence, drawn up by the team that drafted the rules in 1999 and by the sub-committee that revised them in 2010, published on http://www.ibanet.org.

court but the witness fails to appear for the hearing without good reason, the arbitral tribunal may take into consideration his written testimony, or, exclude the same altogether, as provided by Article 20.4 of the same rules. According to Article 20.5 of the Rules of the International Court of Arbitration in London the witness may be asked questions by each of the parties under the control of the arbitral tribunal, which can also put questions at any stage of his evidence.

In some legislation, such as, for example the Italian legislation, for a long time, the simultaneous hearing of two witnesses was practiced, under oath, so they can hear each other's response, also being asked to justify for any differences in response (Rubino-Sammartano, 2001).

It was considered that such a procedure can be a useful tool for assessing the testimony of witnesses, which requires a careful preparation and a long period of time (Born, 2009). Thus, the arbitrators must know in detail the case file, as their role is to coordinate the dispute (Mistelis & Lew, 2006).

As to who can be heard as witnesses, in some states the parties may also have the capacity of witnesses, while in others such a possibility does not exist (Gaillard & Savage, 1999).

The legal doctrine has argued that in the international commercial arbitration any person may testify, including the parties, unless they agree otherwise (Moses, 2008).

In this sense, Article 20.7 of the Rules of the International Court of Arbitration in London, states that any individual shall be treated as a witness, notwithstanding that the individual is a party to the arbitration, or was or is an officer, employee or shareholder of any party. Therefore, the fact that the person concerned should have an interest in the trial does not prevent it to testify.

The Rules of the International Court of Arbitration in Paris do not contain provisions relating to the matter in question, but according to Article 25, paragraph 2, the arbitral tribunal has the opportunity to hear the parties in person if any of them requests so or if the court decides so. Therefore, there is a clear distinction between hearing the witnesses and hearing the parties, hence the parties can not testify in their own case.

If the parties intend to testify in their own case, unless otherwise agreed, it is more cautious to give up on attending the debate so as to eliminate the risk that their application would be deemed inadmissible (Gaillard & Savage, 1999).

Under some legislations and rules of arbitration, witnesses may be heard under oath, while others expressly prohibit the hearing in this way by the arbitral tribunal. In the case law of international commercial arbitration, the witness is often required to state the truth being informed of the consequences brought by perjury (Jenkins & Stebbings, 2006).

The Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania from 2014 provide that the hearing of the witnesses is not made under oath.

The arbitrators may not administer oaths or truth affirmations as provided by Article 25, paragraph 3 of Swedish Law on arbitration in 1999.

In accordance with the provisions of other legislations, arbitrators may require the testimony of the witnesses to be taken under oath[5].

[5] See Article 1696, paragraph 1 of the Belgian Judicial Code – 19 May 1998.

The Arbitration Act of 1996 provides the possibility of the arbitrators to take evidence under oath. Without this formality, the witness can not be held liable for perjury (Born, 2009).

In other countries, such as Switzerland, the crime of perjury is a criminal offense whether or not the witness has testified under oath, while in Austria the perjury before the arbitral tribunal is not considered criminal offence, even if the witness is under oath (Rubino-Sammartano, 2001).

If there is no legal basis for criminal liability for witnesses, the legal literature considers the possibility to draw in civil liability for damages, if the damage occurred on one of the parties due to negligence in presenting the facts at the hearing (Rubino-Sammartano, 2001).

There are legislations, such as the legislation of USA, where the witnesses have immunity and can not be held accountable for their testimony (Jan van den Berg, 2003).

Regarding the recording of the witnesses' depositions, there are also differences between common law system and the civil law system. In general, in the common law system the depositions of witnesses are entirely steno graphed, while in the civil law system written notes including abbreviated depositions are prepared (Born, 2009).

Provisions relating to witness testimony may be found in Article 4 of the Rules of the International Bar Association – 2010, entitled "Witnesses of Fact" in order to distinguish them from the expert witnesses.

Article 4.1. provides that each party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony. The provision is generally confirmed in the contents of most arbitration rules, aiming to inform the opposing party on the identity of witnesses so that it would not to be taken by surprise and so that it may prepare the defense evidence[6].

Regarding the range of persons who can act as a witness, Article 4.2 enshrines a wide possibility in this regard. Thus, any person can be a witness, even a party to the arbitration, a party's officer, employee or other representative.

Regarding the preliminary hearing, the article 4.3 expressly stipulates that it shall not be improper for a party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and discuss their prospective testimony with them. (Article 4.3 of the Rules of the International Bar Association)

The arbitral tribunal may order each party to submit within a specified time the written statements of witnesses, except for those whose presence can not be ensured.

The provisions of Article 4.4. are designed to ensure the timeliness process of the arbitral process. Thus, both the opposing party and the arbitrators are able to prepare the hearing of the witnesses and make in this way a selection of their own witnesses and issues that they wish to present. In this way the testimony of witnesses will not have a long life and its questioning by the arbitrators and the other party may begin immediately.

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[6] See *Commentary on the revised text of the of the 2010 International Bar Association Rule*s relating to the taking of evidence, drawn up by the team that drafted the rules in 1999 and by the sub-committee that revised them in 2010, published on http://www.ibanet.org, p. 14.

If the witnesses' statements are recorded, either party may, within the time set by the arbitral tribunal, submit additional or revised statements, including statements from people who were not originally designated as witnesses, requiring that they contain elements to respond to the statement of the other party.

If a witness whose appearance was requested fails to appear without a valid reason, the arbitral tribunal shall disregard the written statement, unless, in exceptional circumstances, the arbitral tribunal decides otherwise, as provided by Article 4.7. The justified absence of the witness may lead to the consideration of the testimony, but his credibility will certainly be affected by the lack of a direct hearing (Born, 2009).

The International Bar Association Rules also contain provisions regarding the examination of witnesses by the arbitral tribunal in the Article 8 entitled "Evidentiary hearing".

At the time set by the arbitral tribunal, each party shall inform the arbitral tribunal and the other parties on whose witnesses' hearing they desire. The hearing of the witnesses will be made only at the request of the parties or of the arbitral tribunal. The witness shall appear in person, unless the arbitral tribunal shall authorize for the witness to be heard through videoconferencing or other similar technology.

Further particulars on this issue are contained in the "Commentary on the revised text of the International Bar Association Rules on the taking of evidence". The hearing of witnesses via videoconference may be permitted based on an application containing the reasons for which a particular witness cannot appear personally, assuming the conclusion of a protocol. The Court's decision will depend, among other things, on the arguments contained in the application and the protocol possibility to maintain equality and justice between the parties. However, the technology used will have to ensure proper quality of the transmission and will include a safety plan for when there is a technical problem. Also, the signed protocol would have to ensure that the witnesses testified under the same conditions they would have had if they were before the arbitral tribunal.

During the course of hearings, the arbitral tribunal leads the debates, with the capacity to limit or exclude any question or any answer and any testimony of a witness, if it considers that the question, answer or witness is irrelevant, useless for any of the reasons specified in Article 9 of the Rules which relate to the admissibility and relevance of evidence.

The Article 8.3 of the International Bar Association Rules also contains express provisions regarding the hearing of witnesses by the arbitration tribunal.

Usually, it will proceed to the hearing of the plaintiff's witnesses, followed by the hearing of the defendant witnesses. After hearing the witnesses, each party will address the witnesses questions in the order determined by the arbitral tribunal. The party which initially presented the witness will have the opportunity to ask further questions about the issues raised in the content of the interrogation of the other party, after the latter had the opportunity to ask questions.

It can be seen that the procedure for the hearing of witnesses departs from the traditional method used in the civil law system in which witnesses are usually heard by the arbitral tribunal, and only afterwards by the parties. Of course, this kind of hearing method requires thorough knowledge of the case.

If the arbitration is held in different phases, the parties may agree that the arbitral tribunal proceed with the hearing of witnesses separately for each aspect apart. This order can be changed by the arbitral tribunal ex officio or at the request of the parties, so that witnesses could be heard all at once or by using the confrontation procedure.

Before proceeding to the examination of the witness, the witness will state, in a manner deemed appropriate by the arbitral tribunal that he or she is committed to telling the truth. If a written statement was previously filed by a witness, he would have to confirm it. The parties may agree and the arbitral tribunal may order that a witness statement shall serve as direct testimony.

The expertise is a means of evidence which the parties or the arbitration tribunal may use in case there is the need to clarify certain factual circumstances with specialized knowledge in a particular field of activity (Leș, 2011).

The appointment of experts in international commercial disputes may be essential for the parties to be able to substantiate the claims, most cases necessarily requiring the participation of an expert. However, the legal literature has emphasized that the arbitral tribunal should exercise caution since the appointment of an expert is likely to attract increased expenditure (Tweeddale & Tweeddale, 2007). Moreover, the arbitral tribunal must ensure that the appointed expert is impartial.

Article 26 of the UNCITRAL Model Law provides that the arbitral tribunal has the possibility, unless the parties agree otherwise, to appoint one or more experts to prepare a report on certain issues expressly mentioned. The parties shall provide the expert with all the relevant information, documents or goods that need to be investigated. After preparing his or her report in writing or orally, there is the possibility of hearing the expert at the request of one party or of the arbitral tribunal.

The UNCITRAL Rules provide in Article 29, paragraph 1 that the arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal.

Before accepting their appointment, the experts shall communicate to the arbitral tribunal and to the parties a description of the qualifications they hold and a statement regarding their independence and impartiality. Within the time ordered by the arbitral tribunal, the parties will draw up any objections regarding the expert's qualifications, impartiality or independence and the arbitral tribunal shall decide promptly whether to accept such objections. After the appointment of the arbitrators, a party may object only if the reasons were known by it afterwards. (Article 29, paragraph 2 of the UNCITRAL Rules)

In order to conclude the expertise, the parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision. (Article 29, paragraph 3 of the UNCITRAL Rules)

Upon the receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties so that they can express in writing their opinion. The parties shall be entitled to examine any document on which the expert has relied on his or her report, as provided by Article 29, paragraph 4 of the UNCITRAL Rules.

Also, according to Article 29, paragraph 5 of the rules, at the request of any party, the expert, after the delivery of the report, may be heard at a hearing where the parties shall have the opportunity to interrogate the expert.

The Rules of Arbitration of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania do not contain detailed provisions relating to the appointment of experts, stating only that the challenge of experts is subject to the Code of Civil Procedure relating to the challenge of judges.

No doubt that the evidence approval is to be made under contradiction terms by complying with the rights of the parties in litigation. A decision of the Court of the International Commercial Arbitration noted that the report prepared by a foreign expert who was not appointed in accordance with the provisions of the arbitral body apprised with the resolving of the litigation can not be considered as valid evidence[7].

According to Article 25, paragraph 4 of the Rules of the International Court of Arbitration in Paris, after consultation with the parties, the arbitral tribunal may appoint one or more experts, define their terms of reference and receive their reports. However, at the request of a party, the parties shall be given the opportunity to question at a hearing set by the court.

Besides this method of appointing the experts, along with the International Court of Arbitration in Paris there is another center for expertise operating which provides three distinct services: expert proposal, their appointment and the preparing of the expertise. The areas where the experts are working are ranging from accounting and contractual issues to the assessment of industrial processes and equipment, these are mentioned in the Rules for Expertise in force, on 1 January 2003.

By a decision of the International Court of Arbitration in Paris (Rubino-Sammartano, 2001) a case was solved in which the parties had provided in their contract that in case there is any divergence related to the conformity of goods, the buyer shall appoint an expert whose decision will be binding for the parties. In as far as the conclusions of the expertise were unfavorable for the vendor, he challenged them, arguing that they are not binding on the parties only in the pre-arbitral phase and not in the arbitration proceeding. The arbitral tribunal ruled that the expert's conclusions were binding on the parties.

Regarding the conclusions of the expert appointed in the arbitration proceeding, another decision of the International Court of Arbitration in Paris noted that these conclusions are to be assessed freely by the arbitral tribunal (Rubino-Sammartano, 2001).

The French legislation on international arbitration contains no provisions relating to the burden of proving with the expertise, but this possibility is recognized implicitly (Gaillard & Savage, 1999).

Rules of the International Court of Arbitration in London contain provisions related to expertise. According to Article 21 of these rules, unless the parties have decided otherwise in writing, the arbitral tribunal may appoint one or more experts to report on objectives determined. Experts must be and remain impartial and independent of the parties throughout the arbitral proceedings.

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[7] See Award no. 12 of 11 January 1980, in *Jurisprudența comercială arbitrală 1953-2000,* Bucharest, 2002, p. 43.

The experts also may require either party to disclose any relevant information and to provide access to any relevant documents, goods, samples, property or site for inspection.

Unless the parties agree otherwise in writing, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report to the arbitral tribunal and the parties, participate in one or more hearings at which the parties shall have the opportunity to question the expert on his report and to present expert witnesses in order to testify on certain issues (Article 21.2. of the Rules of the International Court of Arbitration in London).

The Arbitration Act of 1996 provides in Article 37, paragraph 1, the right of the arbitral tribunal to appoint experts. In applying this provision, the judge often appoints a person as an expert, but there is also the possibility that the parties reach an agreement regarding the expert, taking into consideration, of course, the need to respect the independence and impartiality (Harris, et al., 2007).

Similar provisions are found also in the contents of the Section 25, paragraph 1 of the Swedish law on arbitration which entered into force on 1 April 1999.

Article 34 of the Japanese Law on Arbitration no. 138 of 2003 provides that the arbitral tribunal may appoint one or more experts to appraise any aspect important to resolving the case and present their findings in writing or orally. Paragraph 2 of the same article provides that for the expertise to be completed, the arbitral tribunal may require the parties to submit to the expert any relevant information and to allow access to any documents or assets of the parties.

Also, if a party so requests and the arbitral tribunal considers it necessary, after filing the written report, the expert shall participate in an oral hearing, as provided by Article 34, paragraph 3 of the abovementioned law. During the hearing, each party has the right to ask questions and to present personally appointed experts to testify about certain elements of the case.

**CONCLUSIONS:**

In the International Commercial Arbitration each party bears the burden of proving the facts underlying its claim or defense in the dispute, the arbitral tribunal being also entitled to order ex officio the taking of evidence which it considers necessary. However the parties have the freedom to choose the applicable rules regarding the evidence. One of the disadvantages that may arise in arbitration is the lack of the possibility for the arbitral tribunal to order the taking of coercive measures, being necessary to ask the competent court assistance, which would result in a prolonged litigation settlement. The flexibility that characterizes the arbitration procedure is reflected in terms of probation. Thus, many of the rules of Arbitration provide that witnesses and experts shall be heard without oath. Even in such situations, it is estimated that there is the possibility of attracting liability for damage caused to witnesses, where they have given inaccurate or incomplete statements during hearings.

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