

TAKING OF EVIDENCE IN ARBITRATION

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ABSTRACT: *If arbitration is to be regarded as a swift dispute resolution instrument, then the difference between the state courts procedure and the arbitral procedure must reside, primarily, in a more effective and speedier way of taking evidence, since taking evidence is the most time consuming of all the phases of a litigation. This paper examines the extent to which the Romanian Lawmaker have met such requirements of taking evidence, when providing new arbitration rules in the recently adopted Code of Civil Procedure.*

KEY WORDS: *Arbitration, Evidence, Arbitration Rules, Disclosure of Documents.*

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1. INTRODUCTION

Arbitration is considered as being a modern and efficient way to solve disputes that arise out of construction, conclusion or performance of various civil or commercial contracts. Such generally accepted assertion is based on a long time internationally accumulated experience that recommend arbitration to be preferable to the state jurisdiction, taking into account its well-known and largely promoted characteristics: simple procedure, short terms and cost effectiveness.

Arbitration, as any other dispute resolution mechanism, is based on a procedural structure that encompass different phases, out of which the taking of evidence is, by far, the nexus that links the entirety of the procedural threads. Unfortunately, it is, also, the most time consuming procedural activity that encumbers the efficiency and costs of the procedure – concepts that the litigating parties endear so much.

Therefore, in order to promote the arbitration, both the lawmaker and the permanent arbitral institutions are expected to continuously improve their regulations in regard of the proficiency of taking of evidence, designing new and adequate instruments to speed up, simplify and reduce the cost of this procedure.

The Romanian lawmaker, adopting a new civil procedure code² (NCPC) has given a revised shape to Book IV of the code, entitled “On Arbitration”; the regulation of arbitral proceedings brought by NCPC is, in this aspect, very close to that of the departed Code of

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² Law 134/2010 regarding the Civil Procedure Code that came into force in 15 February 2013, as thereafter amended.

Civil Procedure of 1865, but, in relation to the taking of evidence, has a few innovative features that will be hereafter highlighted.

Likewise, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania has, recently, adopted new procedural rules (hereinafter referred to as the Bucharest Rules) that are, also, addressing the taking of evidence with an aim to improve the effectiveness of the arbitration procedures.

This paper will examine the most relevant provisions of the new civil procedure code that address the taking of evidence in arbitration proceedings and will compare this recent approach with other well-known instruments of taking evidence, adopted and/or promoted by internationally reputed entities that organise arbitration proceedings.

2. INTERNATIONAL EXPERIENCE

(1) IBA Rules. The importance of a swift and efficient manner of taking evidence in arbitration led the International bar Association to adopt their quite famous Rules on the Taking of Evidence in International Arbitration (hereinafter referred to as IBA Rules).

As mentioned in the revised IBA Rules (Edition 2010), these Rules aim to provide the parties and the arbitrators with an instrument that will ensure an “efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings”.³

The IBA Rules incorporate some particular features that provide efficacy to the taking of evidence procedure:

- The Arbitral Tribunal is consulting the parties and is encouraging them to agree, as soon as possible, on the scope, timing and manner of taking the evidence;
- The evidentiary documents will be provided by the parties, to the Arbitral Tribunal and to the other party, at the time ordered by the Arbitral Tribunal; likewise, within the time ordered, any party may submit a request to produce a document (disclosure of documents) to the Arbitral Tribunal and to the other party and the requested party will produce such document, unless its objection to produce such document is sustained by the Arbitral Tribunal;
- Any witness of fact on whose testimony one party relies will be identified and a witness statement will be submitted to the Arbitral Tribunal and to the other party, within the time ordered; evidentiary hearings will be organised only if so requested by one of the parties or ordered by the Arbitral Tribunal;
- Party-appointed experts and the subject-matter of their testimony will be identified and expert reports will be submitted to the Arbitral Tribunal and to the other party, within the time ordered; if so requested by a party or ordered by the Arbitral Tribunal, the expert will have to appear at the evidentiary hearing;
- The Arbitral Tribunal may decide to appoint an expert to provide an independent report, based upon the documents and information provided by the parties;

³ IBA Rules, adopted by a resolution of the IBA Council on 29 May 2010, Foreword, p. 2

- Evidentiary hearings will be organized and exclusively conducted by the Arbitral Tribunal if requested by a party or deemed to be necessary by the Arbitral Tribunal;
- Admissibility, relevance, materiality and weight of evidence will be determined by the Arbitral Tribunal, who may decide to exclude from evidence or production any document, statement, oral or written testimony for lack of sufficient relevance to the case or materiality to its outcome or for any other legal or reasonable impediment, privilege, burden or prohibition.

This pragmatic and logically organised approach makes the IBA Rules one of the most used mechanisms of taking the evidence in the international arbitral community and a source of inspiration for many rules and regulations regarding the arbitration.

(2) *UNCITRAL Model Law and UNCITRAL Rules*. The UNCITRAL Model Law on International Commercial Arbitration (the Model Law) was adopted in 1985 and has been revised in 2006. The law aims to contribute to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations, by offering a model that may be acceptable to States with different legal, social and economic systems.⁴

The UNCITRAL Arbitration Rules (UNCITRAL Rules) have been adopted in 1976 and were revised in 2010, being designed to be used in a wide variety of circumstances, covering a broad range of disputes.⁵

The UNCITRAL Modern Law and the UNCITRAL Rules cover various aspects of the arbitration progression, starting with the arbitration agreement and ending with the recognition and enforcement of the arbitral awards.

Specific features regarding the taking of evidence, as part of the conduct of arbitral proceedings, are provided both by the Model Law and the UNCITRAL Rules:

- The parties may submit with their statements all relevant documents or may add a reference to the documents or other evidence they will submit;
- If any party fails to produce documentary evidence, within the period of time determined, the arbitral tribunal may continue the proceedings and make the award on the evidence before it;
- Unless otherwise agreed by the parties, the arbitral tribunal (a) may appoint one or more independent experts to report to it on specific issues to be determined by the arbitral tribunal and (b) may require a party to give the expert any relevant information or documents or to provide any goods or other property for his inspection;
- Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them;
- Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party;

⁴ United Nations General Assembly Resolution 40/72 (11 December 1985).

⁵ United Nations General Assembly Resolution 65/22 (UNCITRAL Arbitration Rules as revised in 2010)

- The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent State court's assistance in taking evidence (Article 27 of the Model Law);
 - The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

The Model Law and the UNCITRAL Rules make a distinction between experts presented by the parties or appointed by the arbitral tribunal: while the first may be any individual, even a party to the arbitration or a person related to such a party, the second must be an independent person, which is requested to submit to the arbitral tribunal a statement of his or her impartiality and independence.

(3) *Practical Issues.* In international arbitration, the taking of evidence is preceded by the identification of the facts in dispute, by that the frame of the whole arbitral process being simplified. At that time when the Arbitral Tribunal and the parties have a clear picture of the facts at issue they may focus on those instruments of evidence that are the most appropriate to attest the arguments provided in the opening written statements of the parties. Therefore, usually, the initial written statements of the parties will be accompanied by the essential documents that the parties intend to rely; the parties will provide the bulk of their documentary evidence as well as written testimonies of witnesses of fact immediately after the Request for Arbitration and the Answer to the Request or Counterclaim have been exchanged.

Evidence is crucial for the outcome of the litigation, but getting valuable evidence is not easy, since the parties are unwilling to submit documentary evidence that is conflicting with their processual stand. Therefore, usually, the voluntary production of documents is completed by the disclosure procedure, including the obligation of any party, upon the request of the other party, to submit to the file documents that it is reluctant to disclose, due to their unfavourable effect.

In order to avoid any abuse, such a request for production of documents shall identify, as much as possible, the requested documents and shall display the legitimate interest of the requesting party as well as the value or the merits of the document for the resolution of the litigation.

It is worth to mention that in order to grant institutional weight to the disclosure procedure or to the document request procedure, most of the relevant international arbitration rules edited by reputed arbitration courts, institutes or associations deal with these special evidentiary issues, which are either not addressed by all applicable rules of civil procedure or are regulated in a great variety of solutions (Blackaby, et al., 2009).

3. THE NATIONAL APPROACH - NCPC

(1) *The Burden of Proof.* Article 586 NCPC embraces the classic principle "Onus probandi incumbit actori", stating that every party must prove the alleged facts invoked in its claim or defence. That means that, since parties are entitled to establish the factual and legal frame of their litigation, they are also the ones interested to prove any issues of fact invoked in their argumentation.

The application of this principle is not absolute, since the arbitral tribunal, in its strive to establish the truths, is also entitled to ask the parties for written submissions and

explanations, regarding the relief sought and the facts at issue and, consequently, may order production of any means of evidence provided by the law.

This means that the arbitral tribunal, although it was not expressly requested, may ask a party to disclose documents allegedly found in its possession, may ask the parties to present fact witnesses' testimonies, and may name an independent expert to draft a report on the facts at issue.

Usually, the party that relies on a document will produce such document but may, also, ask the arbitral tribunal to order a third party, either natural or legal person, to produce such a document.

Consequently, the arbitral tribunal may ask, for instance, public authorities to submit written information regarding their acts and actions relating to the arbitral dispute that may be relevant for the outcome of the arbitral proceedings. It is worth to note that this legal provision mentions only the right of the arbitral tribunal to issue a request for information, although the corresponding provision regulating the common civil procedure (Art. 255(4) NCPC) also mentions the possibility of the court to order the public authority to submit a written document found in its possession. Of course, this limitation is significant, as long as the public authority may understand or construe a document in a different manner than the arbitral tribunal or the parties, by that distorting the procedural value of the submitted information.

The requested public authorities may reject such requests only on solid a limited grounds, when national defence, public security or diplomatic relationships are affected by provision of such information (Article 298(2) NCPC).⁶ If the public authority refuses to provide the requested information, although no such sensitive reason is at stake, the arbitral tribunal may ask the court that has jurisdiction at the place of arbitration to order the public authority to comply with the information request, notifying the management of the public authority about the consequences of disrespecting the court order (Article 590(2) NCPC). Actually, this provision of the NCPC is not providing direct means for obtaining the requested information but, if the public authority persists in its demeanour, the court may apply a judicial fine.

The arbitral tribunal may also ask a third party to appear at a hearing as a fact witness and to produce a document that is, allegedly, found in his/her possession. Such a third party may refuse to produce the document if it is relating to intimate issues regarding his/her dignity or private life, if it is legally classified as a secret act or if the document may serve to the indictment of the third party, his/her consort or close relatives.

(2) Taking and Assessment of Evidence

(2.1) As a rule, the claimant has to *propose* the evidence, indicating the documents and other evidence on which it relies, through the request for arbitration; equally, the defendant must do the same through its statement of defence (Article 587(1) NCPC). This constraint aims to make the parties and the arbitral tribunal aware, at an early stage, about the evidence on which the parties rely, allowing them to review and asses such evidence and to prepare for the oral hearings.

⁶ It is worth mentioning that, according to this special provision of NCPC (Article 590) the public authority may not invoke, as a ground to reject the request of the arbitral tribunal, the fact that the information may be classified as a secret or may concern intimate aspects of the private life of a party or a third person, defences that may be received when the information is held by a private person.

Article 587 NCPC does not identify the means of evidence that the parties may rely on; however, according to Article 250 NCPC, applicable in the common proceedings, the evidence may consist of documents, testimony of witnesses, assumptions, questionnaires, confessions of a party, expert reports, material evidence and other means allowed by the law.

If the parties fail to provide the required information regarding the evidence on which they rely, as directed by Article 587(1) NCPC, they will not be allowed to invoke such evidence throughout the entire arbitral proceedings, except for cases when: (a) the necessity of taking that evidence results either as a consequence of the amendment of the request for arbitration or during the arbitral inquiry, and could not be foreseen by the party; (b) the party was objectively impeded to produce such documents in due time; or (c) the taking of evidence will not postpone the arbitral proceedings or all parties agree to the taking of evidence.⁷

To restrict in such a way the production of evidence may be not a wise approach, since the arbitral tribunal will be aware of the facts of issue that it will need to identify and straighten out only upon the exchange of the first written statements of the parties. Therefore, a double round of evidentiary documents' production will be more appropriate: the first round of documents' delivery will accompany the request for arbitration and the statement of defence and the second round will be meant to reinforce the parties view on the identified disputed facts, including a disclosure of unfavourable documents retained by one party.

(2.2) The assessment of the utility, relevance and conclusiveness of the evidence proposed or required by the parties belongs to the arbitral tribunal that has exclusive jurisdiction on those issues (Article 587(2) NCPC).⁸ Moreover, the assessment of the weight of the evidence is made by the arbitrators in accordance with their inner beliefs (Article 591 NCPC).

On the other hand Article 254 NCPC, regulating the taking of evidence in the common procedure, addresses the admissibility of evidence⁹ and establishes the rule that the judge assesses the submitted evidence freely, in accordance with his own beliefs, unless the law establishes its evidentiary force.

This means that the arbitral tribunal may exclude any evidence that is not, according to its convictions, relevant to the case at hand or is not legally admissible, and will ponder the weight of the approved and submitted evidence based upon its materiality and conclusiveness; the arbitral tribunal may also request the parties to produce further evidence or may ask public authorities or institutions to provide information and documents material to the case.

If a party is in possession of specific evidence then the arbitral tribunal, at the request of a party or of its own motion, may order the party to present such evidence; if the party

⁷ For details, see above, Section III, point 9.2.

⁸ Art. 587(2) NCPC replicates the provisions of Art. 9 (Admissibility and Assessment of Evidence) of the IBA Rules, stating that: "*The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.*"

⁹ The admissibility of evidence concerns, primarily, the requirement that no legal impediment will obstruct the submission of such evidence; for example, the testimony of a fact witness against the content of an authentic act is not admissible (Art. 309 NCPC).

fails to do so in the time limit set up, the arbitral tribunal may request the tribunal determined in accordance with the provisions of Article 547 NCPC to apply the sanctions provided for by Article 187 NCPC; furthermore, the arbitral tribunal may construct such inaction as evidence against that party.

This provision stands, in the new Civil Procedure Code, for the whole disclosure of documents procedure so extensively regulated by other national civil procedure rules and, especially, by international arbitration rules. Definitely, here is a ground for massive improvement that may be brought, especially, through rules issued by the arbitration courts belonging to institutional arbitration.¹⁰

The disclosure procedure or the mandatory production of documents should be regulated according to the following main features:

- A request to produce documents held by the other party or a third party should identify the requested documents or the category of documents;
- The request should also provide the evidential value of the document, i.e. the relevance of the document for the outcome of the litigation;
- Failure of the party to produce the requested documents should be accepted only if solid reasons are provided and attested; otherwise, the defaulting party failure should be interpreted as evidence against such party, an option that is similar with the solution adopted by the NCPC in relation to the failure of the party to respond to the questionnaire (Article 295).

(2.3) To ensure an orderly procedure, the law permits the arbitral tribunal to consult with the parties in order to establish deadlines for the submission of the approved evidence. This provision of Article 587(2) NCPC may be quoted as a case management measure, allowing the arbitral tribunal to establish a timetable for the taking of evidence, and in doing so simplifying and accelerating the whole arbitral procedure.

As a rule, after the expiry of such time limits, the approved evidence that was not submitted in due time will be disregarded unless the arbitral tribunal determines that such evidence is critical for the correct resolution of the arbitral dispute. In fact, this provision of the law is a special application of Article 254(2) NCPC that establishes that if the evidence was not provided by the parties in due time, it will be further admitted only if the taking of that evidence is deemed necessary during the arbitration.

(2.4) The taking of evidence is conducted by the arbitral tribunal during the hearings scheduled for that purpose. In this respect, the Romanian law maintains a conservative approach, failing to provide adequate measures for the communication of evidence directly between the parties or between the scheduled arbitration hearings, which would accelerate the whole procedure.

The arbitral tribunal may decide that the taking of evidence will be conducted by the chairman of the tribunal or, if the parties agree, by one of the other arbitrators. This will avoid any procedural delay due to the absence of one of the arbitrators during the scheduled evidentiary hearings.

(2.5) In arbitration, fact witnesses and expert witnesses will be heard without provision of oath; in fact, the expert witnesses rarely submit oral testimonies, being required instead

¹⁰ Unfortunately, the new arbitration rules adopted by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (the Bucharest Rules) are not making any significant difference in this field, adopting a conservative approach of the taking of evidence.

to provide expert reports that are communicated to the parties; if the parties raise objections to the ascertainment of the expert, the arbitral tribunal may decide to order an oral (cross-) examination of the expert or the provision of a supplementary report, drafted by the same expert.

The testimony of the fact witnesses and experts may be heard, at their request or with their consent, at their domicile or at their office. Such measures, rarely used, are indicated when the witnesses or the experts are elderly or ailing persons and cannot attend the hearing, or when their appearance at their office or place of work is significant for the weight of their testimony.

Whenever the arbitral tribunal needs further clarification regarding the testimonies or reports provided, it may address inquiries and questions to the fact witnesses and experts, ordering them to provide a written answer within a time limit set out by the tribunal (Dănăilă, 2006).

(2.6) The arbitral jurisdiction is based on the parties' will and agreement. Therefore, the arbitral tribunal lacks one of the components of the state court jurisdiction: *imperium*, the power to constrain, belongs only to the judges of the state courts.

Consequently, Article 589(3) NCPC provides that the arbitral tribunal cannot constrain the fact witnesses and the experts to do something and cannot apply sanctions to such persons if they disrespect its orders. In order to ensure that orders that have not been complied with are carried out, the arbitral tribunal may ask the tribunal determined in accordance with the provisions of Article 547 NCPC to apply the sanctions provided for by Article 187 NCPC (including financial penalties).

Such punitive measures may be applied (a) to fact witnesses that fail to appear in front of the arbitral tribunal or refuse to provide the required testimony or (b) to experts that fail to provide a report in the time limit set out by the arbitral tribunal.

(2.7) The newly revised arbitration procedure encompassed by NCPC entirely failed to address one of the most efficient instruments of taking the evidence, i.e. the inspection of the documents by a party-appointed expert or by a tribunal-appointed expert. When confronted with the obligation to disclose documents held in their possession the parties tend to avoid such obligation invoking, usually, the large amount of required documents that are impossible to displace and to be submitted to the file. For such situations, the inspection of such documents by an expert or by the parties themselves may save time and costs, since the parties, out of the bulk of the inspected documents will focus on the relevant ones that will be thereafter, subjected to the disclosure procedure.

4. THE NATIONAL APPROACH – THE BUCHAREST RULES

The Bucharest Rules do not provide significant consideration to the taking of evidence, the only provision dedicated to the matter being Article 57, which take over and resume the spirit of the NCPC.

There is, nevertheless, one provision that may be construed as an encouragement, for the parties and the arbitral tribunal, to confer the required weight to the taking of evidence: Article 57(7) of the Bucharest Rules states that the parties may agree upon the evidence to be provided to the court and upon the way of taking such evidence.

This is a reflexion of NCPC provisions (Articles 366-368) that allow the parties, during the common procedure administered by the state courts, to directly manage the taking of evidence through their own counsels.

That means that, according to Article 57(7) of the Bucharest Rules, the parties may agree upon the duration and the time schedule of the taking of evidence, agreement that will be submitted, for approval, to the arbitral tribunal. According to the law, such agreement is valid as long as does not concern rights that the parties may not dispose of, does not make impossible or difficult the proof of acts or facts alleged by the parties or does not contravene to the public policy and or to moral standards.

5. CONCLUSIONS

Taking of evidence is the paramount feature of the civil process. Proving the facts at issue was always the key concern of the courts and of the parties and, consequently, the lawmaker, the courts and the scholars gave, always, great consideration to that aspect of the process, aiming to improve the efficiency and to reduce the duration of this procedure.

From this perspective, one may ascertain that the reform of the Code of Civil Procedure did not make spectacular improvements in the taking of evidence procedure, especially in the field of arbitration, where some legal applicable rules are even more restrictive than those which apply to the state courts' processes.

Anyhow, taking into account that the arbitration is, essentially, a facultative jurisdiction and that the will of the parties is prevalent, even in procedural issues, the fact that the parties may decide, themselves, upon the manner and time of taking evidence throws a bright light on the future of this part of the arbitration process.

Since, always, one of the parties will be reluctant to provide evidence requested by the other party, it will be, mainly, the burden of institutional arbitration to develop efficient rules of disclosure or of producing evidence held by another party or by third parties. Inspection of documents by the requesting party or by an expert may, also, be an efficient way to address this practical issue.

In this regard, the IBA Rules and the UNCITRAL Rules may be models that, providing that there is an agreement of the parties, any arbitral tribunal may use to speed up and to improve the efficacy and value of taking evidence.

