

Principles of law applicable to the arbitration proceedings

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Most sacred of all courts is the
*"tribunal which the litigants appoint
in common for themselves, choosing
certain persons by agreement."*²

Abstract

The essential characteristics of the arbitration are its private nature, voluntary and confidential, which at first glance may give the impression of an institution less "endowed" with strict rules of substantive and procedural law. Parties are free to choose or even to develop rules that may constitute into an arbitration proceeding, compulsory for the parties and arbitrators, respected and applied by them.

This contractual freedom of parties is protected, but also limited by a number of principles of law which the legislator deems essential to a right judgment, either in court or in arbitration.

The study objectives are the following: to identify the principles of law applicable to the arbitral procedure and their implementation.

To achieve those objectives it is used the method of analysis and synthesis, the comparative method, the historical-legal method, the sociological method, the dialectical method and the systematic method.

Combining theoretical and practical issues, the work will be of great use to the research, higher education, but not least, and to the practitioners.

Keywords: *principles of law, arbitration, arbitral proceedings; Romanian Code of Civil Procedure, international conventions.*

JEL Classification : K41

1. Introduction

Commercial arbitration is defined as "the institution in which the party authorized to the extent permitted by law, one or more individuals, in the given circumstances, to settle a legal dispute that precludes litigation by taking it away from the jurisdiction of the courts"³.

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² Plato, *Legile*, Publisher IRI, Bucharest, 1995, p. 181.

³ Ion Dealeanu, Sergiu Deleanu, *Arbitrajul intern si international*, Rosetti Publishing, Bucharest, 2005, p. 10.

National arbitration institution is regulated within the Book IV and international arbitration institution is regulated in the Title IV of Book VII of the Romanian Code of Civil Procedure.

Romania has signed the multilateral international conventions that regulates arbitration, both before the Second World War and afterwards; in this respect, Romania joined the Protocol with respect to arbitration clauses concluded at Geneva on 24 March 1923, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, the European Convention on International Commercial Arbitration, done at Geneva on 21 April 1961, the Washington Convention on the settlement by arbitration of disputes relating to foreign investments completed in 1965, the Moscow Agreement on the settlement of that arbitration of disputes arising from civil law relations of economic and scientific-technical cooperation within CMEA, completed in 1972, the Rules of Arbitration of the United Nations Commission on International Trade Law adopted by the UN General Assembly in 1976, recommended to be used to resolve disputes arising from contracts in international trade relations.

Commercial arbitration institution is one of current and future. In 1998, while organizing a meeting in New York to celebrate the forty years since the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it was considered that the role and importance of commercial arbitration increases, and at another meeting, this time in Vienna, in 1999, it was concluded that increasingly more states apply the law - model on commercial Arbitration adopted by UNCITRAL in 1985.

Recent statistics show increasing trend of disputes that are entrusted to the Court of Arbitration; thus, the International Court of Arbitration in London faced during 2007 - 2008 with an increase of 55% of disputes that had to resolve, and in 2009 recorded an increase of 14%. The same scenario can be found and the International Court of Arbitration in Paris and Switzerland, first recorded in 2008 with 11% more cases, and in 2009, 23% more Swiss Court had an increase of 15% in 2008, and in 2009, 53%. International Court of Arbitration in Dubai in 2009 and has doubled the number of disputes settled from 2003, and it seems that Asia enjoys the same confidence in resolving disputes by arbitration.

Through this paper we intend to research and analyze in a comprehensive manner the principles applicable to arbitration proceedings.

In achieving the purpose of this paper, we will cover the following main objectives: (i) identification of the applicable principles of the arbitration procedure; (ii) the manner of their application.

Since the research objectives require a detailed and complex investigation of the principles applicable in the arbitration procedure, the methodology used involves both methods, borrowed from other areas of research and their own methods of legal research. Therefore, achieving the proposed objectives, I use the method of analysis and synthesis, comparative method, historical and legal method, sociological method, the dialectical method and the systematic method.

One of the research methods used in the development of "Principles of law applicable to the arbitration procedure" is the content analysis method, applied in a manner appropriate to research in social and human sciences, legal sciences research, respectively. It was used mainly qualitative analysis, rather than quantitative, with little statistical data analysis in addition the quantitative analysis.

Preliminary stage of the research consisted in selecting main bibliographical sources, using the criterion of representativeness, the relevance criterion and the criterion of homogeneity (choice of materials on the basis of comparable characteristics). The materials analyzed underlying of the objectives pursued through research on the principles of law applicable to arbitration proceedings.

Bibliographic sources used for the research are both primary sources and secondary sources and tertiary. In the category of primary sources mention: legislative documents, national and international, national and international jurisprudence. Secondary sources used are varied, from reproductions and translations to treaties, monographs, textbooks, courses, articles and studies. As tertiary sources, we used dictionaries, encyclopedias and other collections of secondary sources.

The stage of exploitation the materials chosen underlying the research itself. Depending on the objectives (those mentioned above), material recovery varies from- presentation and analysis of theoretical concepts to the presentation and interpreting the context of facts and events, to critical operation, in a comparative approach to legal regulations or otherwise.

2. Principles of law applicable to the civil procedure vs. principles of law applicable to the arbitration proceedings

The essential characteristics of arbitration are its private nature, voluntary and confidential, which at first glance may give the impression of an institution less "endowed" with strict rules of substantive and procedural law. Parties are free to choose or even to develop rules that may constitute into an arbitration proceeding, compulsory for the parties and arbitrators, respected and applied by them.

However, this contractual freedom of parties is protected, but also limited by a number of principles of law which the legislator deems essential to a right judgment, either in court or in arbitration.

International conventions in matters of arbitration do not provide general principles on which an arbitral tribunal complies when deciding dispute arbitration, leaving that power to the states. However, there are certain provisions that can be interpreted as fundamental principles in the matter to arbitration.

Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴, concluded in 1958, in the art. 5 paragraph 1) states that may be refused the recognition and the enforcement of an arbitral award

⁴ Published in the Official Bulletin no. 19 of July 24, 1961.

pronounced in another state if the party against whom the enforcement is requested the recognition and the enforcement it proved that: the parties who signed the arbitration agreement are affected by a incapacity, according to their applicable law or the convention concluded is not valid under the law applicable or under the law of the country where the award was made. The interpretation of this article - art. 5 para. 1) pt. a), it appears that according to the New York Convention, recognition and enforcement of a foreign arbitral award may be refused if it violates the principle of the role of the judge in finding the truth, so referred by the Romanian Code of Civil Procedure of 2010⁵ (hereinafter, RCCP), in art. 575 in conjunction with art. 22 para. 2) which provides that a judge has a duty to prevent any mistake regarding finding the truth in question, taking into account the facts and applying the law correctly for the purpose for a thorough and legal ruling.

A second reason for refusing the recognition and the enforcement of a foreign arbitral award under art. 5 para. 1) pt. b) of the Convention is based on the fact that the party against whom it was invoked was not properly informed of the appointment of arbitrators or of the arbitration proceedings or the party was otherwise unable to present his case. Therefore, this ground for refusal the recognition and the enforcement may be construed as a violation of the second law principles such regulated RCCP of 2010: art. 575 in conjunction with art. 8, the principle of equality, which implies that each party in the arbitration process has guaranteed the exercise of procedural rights, equally and without discrimination, and art. 575 in conjunction with art. 13, according to which right of defense is guaranteed, and the parties have the opportunity to propose evidence, to make defenses, to submit in writing and orally his claims.

Another reason for refusal of recognition and enforcement of the award is that, according to the art. 5 para. 1) p. c) of the Convention, the arbitral award refers to another dispute, which is not mentioned in the arbitration agreement or the award contains provisions that go beyond the stipulations of the arbitration agreement. Therefore, the court cannot recognize and enforce an arbitral award such as this because the legal basis of the recognition, the arbitral award, was pronounced with the violation of the law. This latter reason may be assimilated to the breach of the principle of the role of the judge in finding out the truth, namely, art. 575 in conjunction with art. 22 para. 2) which states that the judge has the obligation to prevent any mistake regarding the finding out the truth in question, taking into account the facts and applying the law correctly for the purpose of a thorough and legal ruling.

Failure to follow the procedure agreed by the parties on the composition of the arbitral tribunal or on the resolution of the dispute is another reason for refusing the recognition and the enforcement of the foreign arbitral award, as stated in the art. 5 para. 1) d) of the Convention. Thus, the arbitral award delivered in such circumstances violates a fundamental principle, namely, the understanding of the parties regarding the constitution of the arbitral tribunal, respectively of the arbitral

⁵ Law no. 134/2010 of the New Civil Procedure Code, in force since 15 February 2013.

proceedings, regulated both by the international conventions and by the national legislation. RCCP regulates this principle within the art. 576 para. 1), stipulating that within the arbitration agreement, the parties may establish rules of procedure governing the arbitration or the arbitrators can be empowered by the parties in this regard.

The last three grounds for refusal of recognition and enforcement of foreign arbitral award provided by the New York Convention, namely, art. 5 para. 1) e) - the sentence is not yet binding for the parties or has been canceled or suspended, and the art. 5 para. 2 pt. a) - the inarbitrability of the dispute or the violation of the public order under the state law in which is required the recognition and the enforcement of the foreign arbitral award, may be interpreted as a violation of the role of the judge in finding out the truth, that is the art. 575 in conjunction with art. 22 of the RCCP.

The European Convention on International Commercial Arbitration of the Geneva⁶ (hereinafter, Geneva Convention), concluded in 1961, it provides no fundamental principles applicable to the international arbitration. But, the art. 9 stipulates a number of reasons that can be the basis of cancellation the arbitral award, reasons that can be interpreted as violations of principles of law applicable to the international arbitration.

Thus, the art. 9 para. 1) a) states that the annulment of the arbitral award in one of the Contracting States shall constitute grounds for refusal of recognition and enforcement in another Contracting State if the parties of the arbitration agreement were, under to their applicable law, under some incapacity or the arbitration agreement is not valid under the applicable law or the law of the country where it was issued. We can assimilate this reason to the breach of the principle of the role of the judge in finding out the truth, art. 575 in conjunction with art. 22 para. 2) of the RCCP, which provides that "the judge has the duty to insist by all the legal means to prevent any mistake regarding the finding out the truth in question, based on establishing facts and applying the law correctly in order to a thorough and legal ruling."

The next reason for the cancellation of the arbitral award is governed by art. 9 para. 1), b), and states that the part that supports the annulment of the arbitral award was not properly informed about the appointment of the arbitrator or of the arbitration proceedings or was unable to present his case.

The same circumstances that can be the basis of cancellation of the foreign arbitral award within the art. 9 para. 1), b) of the Geneva Convention we encounter in the art. 5 para. 1) pt. b) of the Convention from New York, and can be interpreted as a violation of two law principles such regulated by the RCCP of 2010: art. 575 in conjunction with art. 8, the principle of equality, which implies that each party in the arbitration shall be guaranteed the exercise of the procedural rights equally and without discrimination, and art. 575 in conjunction with art. 13,

⁶ Published in the Official Bulletin no. 12 of 25 June 1963.

the right to defense is guaranteed and the parties have the opportunity to propose evidence, to make defenses, to submit in writing and orally his claims.

Within the art. 9 para. 1), c), d) of the Geneva Convention states the following reasons for the refusal of the recognition and the enforcement of the foreign arbitral award: the foreign arbitral award refers to another dispute, which is not mentioned in the arbitration agreement or the award contains provisions which go beyond the stipulations of the arbitration agreement, and failure to comply with the procedure agreed by the parties on the composition of the arbitral tribunal or on the dispute resolution.

Thus, the state court cannot recognize and enforce the foreign arbitral award that refers to another dispute not submitted to arbitration or that contains provisions that go beyond the stipulations of the arbitration agreement, the legal basis for this recognition - arbitral award, was delivered in violation of the law. This latter reason may be assimilated to the breach of the principle of the judge's role in finding out the truth, namely, art. 575 in conjunction with art. 22 para. 2) of RCCP.

Regarding the letter d) of the art. 9 para. 1), the failure to comply with the procedure agreed by the parties on the composition of the arbitral tribunal or on the resolution of the dispute, the foreign arbitral award delivered in such circumstances violates a fundamental principle, namely, the understanding of the parties regarding the constitution of the arbitral tribunal, respectively of the arbitral proceedings, governed by both international conventions and by the national legislation. The RCCP regulates this principle within the art. 576 para. 1), which states that under the arbitration agreement, the parties may establish rules of procedure governing the arbitration or the arbitrators can be empower by the parties in this regard.

The Washington Convention on settlement relative investment disputes between States and Nationals of other States⁷, done in 1965, aims to the establishment of the International Centre for Dispute regarding investments. The methods by which the international legal institution may terminate the disputes between the parties are: the conciliation and the arbitration.

Under this convention we find provisions of the request for arbitration, of the Arbitral Tribunal's powers and the functions of the arbitrators, the foreign arbitral award, the interpretation, the revision and the annulment of the award, the recognition and the enforcement of it, the replace and the challenge of the arbitrators, the costs of the arbitration procedure, the place of the arbitral proceedings.

For all these rules, some can be interpreted as fundamental principles, though not stated so *in terminis*. Within the art. 42 para. 2) of the Convention states that: "The court cannot refuse to hear on the pretext of the lack or the obscurity of the rules of the law." Therefore, the arbitral tribunal shall receive and resolve the requests for arbitration if they are in their jurisdiction law. This motivation "of the lack" or "of the obscurity of the rules" no empowers the Court to refuse the request

⁷ Published in the Official Bulletin no. 56 of June 7, 1975.

for arbitration. Within the Romanian Civil Procedure Code we find a similar principle, if not identical, art. 575 in conjunction with art. 5 para. 2), according to which, the arbitral tribunal cannot refuse to judge on the grounds that the law does not provide, is unclear or incomplete.

Another part of the doctrine, which we join, believes that these fundamental principles are "mandatory provisions of the law, in the sense regulated by the art. 608 para. 1) c) of the Romanian Code of Civil Procedure, and their violation constitute grounds for action for annulment of the arbitration award."⁸

There are also authors which states that the previous regulation on the fundamental principles of the arbitral process, namely, the art. 358 of the Romanian Code of Civil Procedure of 1865, was succinct, but effective, because the sanction of nullity of the arbitral awards that violated those principles were explicit⁹. In the Romanian Civil Procedure Code of 1865 was applied the arbitration judgment the following principles: the principle of equal treatment, the principle of the rights of defense, the adversarial principle.

We will briefly examine each fundamental principle of arbitration proceedings, as they are regulated under the Romanian Code of Civil Procedure of 2010.

The principle regarding the duty of receipt and solving the requests provided by the art. 575 in conjunction with art. 5 para. 2) of the Romanian Code of Civil Procedure order the following: "(2) No judge may refuse to judge on the grounds that the law does not stipulate, is unclear or incomplete."

So, the judges are required to settle all claims that are within their competence, and cannot justify a refusal on the grounds that the law "does not provide, is unclear or incomplete." If they face the shortcomings of the law, and cannot appeal neither to the usages nor the statutory similar provisions, they have the duty to resolve the application received; they will apply the general legal principles, given course to the circumstances of the case and the equity requirements.

The doctrine states that the public order and those that interests the authority that must have the justice, requires settling claims based on general principles of the law, when judges are confronted with shortcomings of law, with the lack of usage¹⁰. Also, the "effectiveness" of the right of access to justice cannot depend on the passivity, on the incompetence or on the superficiality of the legislator, so that each of the terms of the law requires, in specific forms, the contribution of the judge to the completion."¹¹

⁸ Gheorghe Piperea & al., *Noul Cod de procedură civilă. Note. Corelații. Explicații*, Publishing C. H. Beck, Bucharest, 2012, p.613.

⁹ Radu Bogdan Bobei, *Arbitrajul intern și internațional. Texte. Comentarii. Mentalități*, Publishing C. H. Beck, Bucharest, 2013, p. 116.

¹⁰ Nicolae Popa, Mihail-Constantin Eremia, Simona Cristea, *Teoria generală a dreptului*, ed. 2, Publishing All Beck, Bucharest, 2005, p. 259.

¹¹ Ion Deleanu, *Tratat de procedură civilă*, Vol. I, Legal Universe Publishing, Bucharest, 2013, p. 207.

The principle of equality provided by the art. 575 in conjunction with the art. 8 of the RCCP of 2010 provides: "In civil proceedings, the exercise of the procedural rights is guaranteed equally and without discrimination." The Romanian legislator guarantee the exercise equally and without discrimination the procedural rights within the institution of arbitration, as it is guaranteed in the public justice. In this regard, the Constitution states in the art. 16 para. 1) that all citizens are equal before the law and before the public authorities, without any privilege or discrimination, and within par. 2) of the same article points out that no one is above the law.

The parties of an arbitration agreement request to a court of arbitration to settle their dispute. These parties are guaranteed equally exercise of the procedural rights without discrimination, so they have the right to propose the same evidence (witness testimony, documentary evidence, expertise, etc.), are entitled to the same defense, to the same remedies.

The art. 586 of the Romanian Code of Civil Procedure provide that the parties have a duty to prove the facts on which it bases the claim or the defense. Also, in order to resolve the dispute between the parties, the arbitral tribunal may require the parties, written explanations regarding the subject of the application and the facts of the dispute, and may order any evidence provided by law.

Some of the literature criticizes the regulation of the principle of equality in matter of arbitration because it is made by referring to the principle of equality from civil matters, arguing that "it would have been more appropriate maintaining autonomous regulation of this principle."¹²

The principle of the right of disposal of the parties within arbitration is regulated by the art. 575 in conjunction with the art. 9 of the Romanian Code of Civil Procedure. According to the art. 9 of the Romanian Code of Civil Procedure, this principle implies that: para. 1) "civil process can be started at the request of the party concerned or, in specifically cases, provided by law, at the request of another person, organization or a public authority or institution, or of public interest". Alin. 2) "The purpose and the process limits are set by the applications and the defenses of the parties. "Alin. 3) "Under the law, the party may, where appropriate, waive to the trial application or claimed right itself, can recognize the claims of the opposing party, can consented with the other party to put an end, in whole or in part, the process, may waive review procedures or to enforce an injunction. It also can dispose of his rights in any other way permitted by the law. "

Applying this principle in the matter of arbitration, the parties are that who through arbitration agreement may submit a request for arbitration to the arbitral tribunal. According to the art. 545 Romanian Code of Civil Procedure, the parties may choose either arbitration organized by a permanent arbitral institution or other entity or a natural person.

The object of arbitration and the process limits are set by the applications and the defenses of the parties, but also by the law. Thus, the art. 542 on the subject

¹² Radu Bogdan Bobei, *op. cit.*, p. 117.

of arbitration from the Romanian Code of Civil Procedure states that may be subject to settlement by arbitration all disputes, except those relating to marital status, capacity of persons, the succession debate, the family relationships and the rights which the parties cannot dispose. Since we are talking about an "alternative jurisdiction with private character", it must comply with the law, and the rules derogating from the common law must not be contrary to the public order and the provisions of the law.

The literature distinguishes between inarbitrable litigation in consideration of their relationship to the public policy and inarbitrable litigation because it violated a rule of public policy¹³. In the category of inarbitrable disputes in consideration of their relationship with the public policy enters disputes concerning marital status, individuals' capacity, the debate succession, the family relationships and the disputes regarding rights to which the parties cannot dispose. Other disputes are inarbitrable because it violated a rule of public order.

How can parties draw the limits of the arbitration proceedings? The complainant and the defendant in the arbitration process have the opportunity, at any time during the arbitral proceedings, to waive the request for arbitration, the claimed right itself, can recognize the claims of the opposing party, can consent with the other party to put an end, in whole or in part, to the process, may waive to the review procedures, to the enforce an injunction, under the provisions from the art. 609 and art. 614 of the RCCP of 2010. Also, the party can dispose of his rights in any other way permitted by law, as required by art. 575 in conjunction with art. 9 of the RCCP of 2010.

The principle of obligations of the parties in conducting the arbitration process provided by the art. 575 in conjunction with art. 10 of the RCCP of 2010. Article 10 of that code provides that: para. 1) "The parties are obliged to fulfill the procedural documents in the conditions, order and terms established by the law, or by the judge, to prove their claims and defenses, to help the deployment of the process without delay, pursuing so, its completion" and par. 2) "If a party has a form of evidence, the judge may, at the request of the other party or of its own motion, order the appearance thereof, under penalty of a judicial fine."

If in the principle discussed previously we talked about the rights of the parties, their correlation lies and a number of obligations, namely: in the arbitration process, the parties are required to comply with the procedure established by them or by the law, to resolve the dispute, therefore have a duty to fulfill all the conditions pleadings, in order and in schedule. Also, the plaintiff and the defendant have the burden of proof to support the claim or the defense.

In order to deliver as soon as possible an arbitration award (arbitration institution advantage vs. state court), the parties of the arbitration process have the duty to contribute to the deployment without delay of the arbitral process, which, unlike the civil one, must meet the deadline agreed by the parties or determined by the law, according to the art. 567 and art. 568 of RCCP of 2010.

¹³ Ion Deleanu, Sergiu Deleanu, *op. cit.*, p. 82.

The arbitral tribunal can settle the dispute between the parties only after secret deliberations of the arbitrators, deliberation which discusses all the evidence adduced by the parties or required by the courts and administered in hearings, according to art. 588 para. 2) of the RCCP of 2010.

This principle shall be completed with the art. 586 of the RCCP of 2010, according to which, each party has the burden of proving the facts on which it bases the claim or the defense. Also, in order to settle the dispute, the arbitral tribunal may require the parties, written explanations on the subject of the application and the facts of the dispute, and may require any evidence provided by the law.

The assessment of that evidence is done by the arbitrators according to their beliefs as required by the art. 591 RCCP. Alin. 2 of art. 10 of the Code provides that, where a party has a form of evidence, the judge may, at the request of the other party or of its own motion, order the appearance of it, under penalty of a judicial fine. Moreover, in the art. 588 para. 2) of the Romanian Code of Civil Procedure stipulates that the arbitral tribunal may order the appearance of evidence when it is owned by one party.

The principle of good - faith in the arbitration is governed by the art. 575 in conjunction with art. 12 of the RCCP. Within the art. 12 of the Code it is stated that: para. 1) "The procedural rights must be exercised in good faith, according to the purpose for which they were recognized by the law, without violating the procedural rights of another party". Paragraph 2) complements and stipulates that: "The party who exercises their procedural rights in an abusive way held liable for material and moral damages caused. It may be obligated, according to the law, to pay a judicial fine". In para. 3), it is mentioned that: "Also, the party that does not fulfill its procedural obligations in good faith, responds according par. (2).

The principle of good faith is primarily regulated by the Constitution, under the art. 57, according to which, citizens must exercise their rights and freedoms in good faith, without violating the rights and the liberties of others.

The arbitration matters fully enjoy the government of good faith as a general rule¹⁴, which gives the participants' contemporary legal relations confidence, saving us from procedures slaughtered the Romans, used to do when concluded private legal relations, such as pacts, contracts, agreements or fidejussion agreements. In this respect, Titus Liviu mentions in his work on the history of Rome, "Ab urbe condita", that in the archaic ages, the Romans brought a pig as a sacrifice to Jupiter, symbolizing the guarantee of their beliefs, but also the guarantee of the divine redemption of sin violation of doubt, and as they hit the slaughtered pig, Jupiter will turn against them with reprisals¹⁵.

According to the principle of good faith in the arbitral process, the parties are obliged to exercise their procedural rights in good faith, for the purposes recognized by the law without violating the procedural rights of other party. Thus,

¹⁴ Diana Loredana Hogaș, *Principle of good - faith in arbitration*, European legal studies and research, Legal Universe Publishing, Bucharest, 2012.

¹⁵ Valeriu Ciucă, *Bona fides in a new hermeneutics*, "Hermeneia" Magazine, Iasi, 2009, p. 25.

this principle also watches over the respecting of the principle of equality of the parties in the arbitral process.

The para. 2) of the art. 12 of the Romanian Code of Civil Procedure emphasizes that, if either party improperly exercises its procedural rights and not within the scope provided by the law, the parties will be held liable for material and moral damage caused. Also, they risk a judicial fine.

The literature has pointed out that the commission of an abuse of procedural law involves two constituent elements, namely a subjective element and an objective element. The subjective element involves exercising in bad faith the procedural rights, so that the other party feel tease or feel obligated to conclude a transaction, although it would not like this, or in order to reduces the possibilities of its defense, or to simply delay the procedural rights violation of the opposing party. The objective element is manifested by breaking the purpose laid down by law regarding the procedural rights.¹⁶

But not only in the matter of arbitration, the procedural rights must be exercised in good faith, but also in the procedural obligations, as governing the art. 575 in conjunction with art. 12 para. 3) of the RCCP of 2010. So, either party does not fulfill in good faith its procedural obligations, is likely to respond for the material and moral damage caused, which can add a judicial fine.

The principle of the right of defense in the arbitration proceedings is stipulated under the art. 575 in conjunction with art. 13 of the RCCP of 2010, and orders that: "para. 1) The right to defense is guaranteed. Para. 2) The parties are entitled, throughout the trial, to be represented or, where appropriate, assisted under the conditions provided by the law. On appeal, the parties' claims and conclusions can be made and sustained only by attorney or, where appropriate, legal counsel, unless the party or its representative, spouse or relative up to the second degree inclusive, is degree in law. Alin. 3) The parties shall have the possibility to participate in all phases of the implementation process. They can take note of the information package, to propose evidence to make their defense, to submit their claims in writing and orally, and to exercise the legal remedies of attack, under the conditions provided by the law. Para. 4) The court may order the appearance in person, even when they are represented. "

The right to defense is guaranteed by the Constitution, which in art. 24 stipulates that the right to defense is guaranteed and that the parties have the right to be assisted by an attorney, elected or ex officio, throughout the process.

In the literature it is considered that the right to defense is one of the cardinal principles of the institution of arbitration, and the rules in force on this principle, with reference to art. 575 in conjunction with art. 13, hardly appropriate.¹⁷

¹⁶ Viorel Mihai Ciobanu & Marian Nicolae (eds.), *New Code of Civil Procedure. Commented and Annotated*, Vol. I, Legal Universe Publishing, Bucharest, 2013, p. 32.

¹⁷ Radu Bogdan Bobei, *op. cit.*, p. 117.

Application of the right of defense in matter of arbitration emphasizes that: although the parties resort to alternative justice of the state, private, the parties' right of defense is guaranteed.

According to the art. 546 RCCP of 2010, in the litigations submitted to arbitration, the parties may be assisted by legal advisers, lawyers, and other specialists. The parties also have the right to know the contents of the file, the procedural documents being communicated in accordance with art. 577 of RCCP of 2010. They are entitled to bring evidence, according to the art. 586 and the art. 587, they have the right to defense, to present their submissions both in writing and orally, and also may submit claims for challenge the arbitrators, according to the art. 563 of RCCP, but also requests for clarification, completion and correction of the arbitration award, under art. 604 of RCCP. The parties may appeal the arbitration award with action for annulment when it considers ungrounded and unlawful, according to art. 608 of the code above. As it considers in the doctrine, this principle is a "synthesis of procedural rights which the parties have (...) "¹⁸.

The adversarial principle in the matter of arbitration is regulated by the art. 575 in conjunction with art. 14, and provides that: "Paragraph 1) The court may determine any application until the citation or appearance of the parties, unless the law provides otherwise. Para. 2) The parties must make known to each other and in a timely manner, directly or through the court, where appropriate, the pleas of fact and law on which it bases its claims and defenses, and the evidence they intend to use, so that each of them be able to organize the defense. Para. 3) The parties are required to expose the facts to which they refer in their claims and defenses correctly and completely, without distorting or omitting the facts which are known. The parties have the obligation to display their own point of view, to the opposing party, claims relating to the relevant factual circumstances concerned. Para. 4) The parties have the right to discuss and argue any issue of fact or law raised in the process, by any participant in the trial, including the court *ex officio*. Alin. 5) The court is obliged, in any process, all the parties' to submit in the discussion of the parties all the claims, exceptions and circumstances of fact or of law. Alin. 6) The court will base its decision only on grounds of fact and law, on the explanation or evidence which were submitted previously on contradictory debate."

If in the civil process, the contradictory is seen as "the engine of the court because the process evolves through successive contradictions until the injunction, which will remove the contradiction"¹⁹ in the arbitral process, this principle retains the same role.

The application of the adversarial principle in matter of arbitration involves, first, the summoning of the parties or their appearance, before that the arbitral tribunal rule on the application, as required the art. 577 of RCCP, unless we have other legal regulations, such as, for example, the request of judging in *absentia*, according to the art. 583 of RCCP, the absence of a party, according to art. 584 of the Code, the absence of both parties, the same code.

¹⁸ Viorel Mihai Ciobanu & Marian Nicolae (coord.), *op.cit.*, p. 37.

¹⁹ *Idem*, p. 38.

Secondly, this principle implies the exercise of the procedural rights by the parties, so they have to make known "each other and timely", directly or through the arbitral tribunal, the pleas of fact and of law that underlie the claim or the defense, and also the evidence that they will use throughout the process. This rule is closely related to the following principles: the principle of the right of defense, the principle of equality and the principle of obligations of the parties.

Thirdly, it can be seen that within the art. 575 para. 3) in conjunction with art. 14, provides that both the complainant and the respondent have the obligation to "expose the facts to which they refer on their claims and defenses correctly and completely, without distorting or omitting the facts which are known". So, the parties must demonstrate good faith when they motivate their claims or defenses in fact. Also, parties' rests the obligation to respond, to express his point of view when the opposing party makes statements relating to the relevant factual circumstances concerned.

Fourthly, another important aspect concerning the application of the adversarial principle is that any matter, whether of fact or law raised during the arbitration procedure by any participant, even by the arbitral tribunal, shall be brought before parties, discussed and argued by them.

Finally, all the claims, exceptions and factual circumstances or circumstances of law, shall be subject to discussion of the parties, the arbitral tribunal having this obligation according to the art. 575 para. 5) in conjunction with art. 14 of the RCCP.

Last regulations prescribed by the art. 14 of the RCCP, with a particular importance, refers to the arbitral award, which may be based only on reasons of fact and law, on the explanations or evidence, submitted to the adversarial debate.

The principle of orality in arbitration matters is required by the art. 575 in conjunction with art. 15 of the Romanian Code of Civil Procedure. We have the following regulation: "The processes are debated orally, unless otherwise provided by law or when the parties expressly request the court that the judgment be made only on the basis of the submitted documents."

So, in the arbitral proceedings shall apply the principle of orality, without which, as pointed out by the doctrine, there would be neither "effective contradictory" of the debates nor the "optimal exercise of the defense rights." Also, through this principle, the arbitrators may manifest the active role in resolving the dispute.²⁰

There are also legal stipulations which require that certain documents be made in writing. The reasons would be that otherwise could not be exercised the control of their legality. In this sense, we can give some examples: the request for arbitration, according to the art. 571 of Romanian Code of Civil Procedure, the respondent plea, according to the art. 573 of the same code, the counterclaim, art. 574 of the same Code, the arbitral award, according to the art. 603 of the Code.

²⁰ Viorel Mihai Ciobanu & Marian Nicolae (coord.), *op.cit.*, p. 42.

But, as outlined in the literature, there are a number of procedural acts which although are orally, then the acts are recorded in a document, such as the hearing of witnesses, the hearing of the experts, the demand for challenge, the interrogation of the parties and others.

The principle of direct administration of evidence, applicable in matters of arbitration, stipulates in the art. 575 in conjunction with art. 16 of the RCCP. It provides that: "The evidence is administered by the court that give the injunction in the case, unless otherwise provided by law."

The arbitral tribunal has the obligation to manage the evidence required by the parties or ex officio in the arbitral process in order to more accurate knowledge of the facts and legal situation, to give a solid and legally arbitration award.

This principle is strengthened by the regulation provided by the art. 588 para. 1) of the RCCP, which provides that the hearing of evidence is made in the arbitral hearing session, in front of a presiding arbitrator or a member of the composition of the arbitral tribunal, but only with the consent of the parties.

The continuity principle in the arbitration proceedings is legislated by the art. 575 in conjunction with art. 19 of the RCCP, and dispose the following: "The judge empowered to solve the case can be replaced in the process only for compelling reasons, under the law."

According to this principle, the arbitral tribunal composed of arbitrators chosen by the parties or by the arbitral institution, or appointed by the court, can be replaced throughout the arbitral process only for compelling reasons, regulated by law. In this sense, art. 565 of the RCCP provides that if the arbitrators waive their assumed duty unjustifiably, after accepting the task they respond, under the law, for the damages caused.

Also, in the art. 562 of the RCCP are governed the grounds for challenging the arbitrators, reasons that questions their independence and impartiality. Also, in the art. 564 of the same Code, it is provided that in the event of challenge, revocation, abstention, renunciation, death, and in any other case in which the judge is unable to perform the task, and his alternate is in the same impossibility, it will proceed to the replacement of the arbitrator under the provisions laid down for the appointment of him.

The principle of respect for the fundamental principles in matter of arbitration is governed by the art. 575 in conjunction with art. 20 of the Romanian Code of Civil Procedure, and states that: "A judge has the duty to ensure the respect and respect himself the fundamental principles of civil proceedings, under penalties provided by the law."

So, applied to the arbitration institution, this principle states that the arbitrators has the obligation to respect the fundamental principles himself, and also has the duty to ensure the compliance of other participants. The violation of these principles, by the arbitrator or by other participants gives rise to penalties provided by the law.

This principle takes the form of a "guarantor" of respect for the fundamental principles, which regulates both the civil and arbitration proceedings.

The principle of reconciliation of the parties in the arbitration proceedings is provided by the art. 575 in conjunction with the art. 21 of the RCCP, and has the following legal text: para. 1) "The judge will advise the parties of the dispute to an amicable settlement through mediation, according to the special law." Paragraph 2) "Throughout the process, the judge will attempt reconciliation, giving them necessary guidance, according to the law."

So, although we talk about arbitration as a private voluntary jurisdiction, along the judges, the arbitrators have the duty to advise the parties to an amicable settlement of the dispute through mediation. Also the arbitrators, to the same extent as judges, will attempt the reconciliation of the parties throughout the course of the arbitral process.

Law no. 192 of 2006 amended by Law no. 115 of 2012, as amended by E.O. no. 90 of 2012, provides for certain litigation the obligation to inform about the benefits of the mediation. In this respect, the art. 2 para. 1) of that law provides that: "If the law does not provide otherwise, the parties, natural or legal persons, are required to attend the information meeting on the benefits of mediation, including, if necessary, after the start of a process before the competent courts, in order to resolve the conflicts on this path in civil matters, family, and other matters, as provided by the law."

This article was declared unconstitutional by the Constitutional Court through decision no. 266 of 2014, which states that: "(...) The Court notes that, as shown in the corroboration of the art. 2 para. 1) with para. 12) of Law no. 192/2006, for addressing to the court with a request for summons for the litigation matters specified in the art. 601 para. 1) a) -f) of the Law cited above, the legislator imposed on litigants a new obligation, namely, to address previously to a mediator, to inform him of the advantages of mediation. In these circumstances, the Court finds that the introduction of mandatory information on mediation is inconsistent with the art. 21 of the Fundamental Law. "

The Constitutional Court holds that "the participation at the information meeting will no longer be an obligation for the parties, but rather a voluntary option of the interested persons to resort to such alternative method, voluntary, for conflict resolution. Thus, the Court finds that the plea of unconstitutionality of the art. 601 of Law no. 192/2006 is unfounded."

The principle of the role of the judge in finding the truth in the arbitral proceedings is regulated by the art. 575 in conjunction with the art. 22 paragraph 1), para. 2), para. 4), para. 5), para. 6) of RCCP, which order the following: par. 1) "The judge decide the dispute according to the rules of law applicable to him." Alin. 2) "The judge has the duty to insist, by all legal means, to prevent any mistake regarding finding the truth in question, based on establishing facts and the correct application of the law, in order to pronouns a legal and solid injunction. In this purpose, with regarding the situation of the facts and the legal motivation which the parties rely on, the judge is entitled to demand the parties to explain, orally or in writing, to put in debate of the parties any factual or legal circumstances, even if are not mentioned in the summons or in the respondent plea,

to order the evidence it deems necessary, and other measures provided by law, even if the parties resist. Alin. 4) "The judge gives or restores the legal classification of the acts and facts to be decided, even the parties have given another denomination. In this case, the judge is obliged to discuss with the parties the precise legal classification." Para. 5) "However, the judge cannot change the name or the legal basis, if the parties, by virtue of an express agreement on the rights that, by law, can dispose, established the legal classification and the pleas in law on which agreed to limit the debates, if this does not violate the rights or interests of others. "And, a final paragraph, para. 6) "The judge must rule on everything that was requested, without exceeding the limits of the investiture, except cases where the law provides otherwise."

If in the civil procedure under the law, the judge has an active role in finding the truth, in arbitration proceedings, this role is played by arbitrator. The arbitrator must resolve the dispute under the rules of applicable law, but must consider the procedural rules established by the parties, if any, or the arbitral procedure provided by the institution of arbitration, when the parties have recourse to the institutionalized arbitration, as required by the art. 576 of RCCP.

Also, the art. 575 Romanian Code of Civil Procedure in conjunction with the art. 22 para. 1) is completed by the art. 601 of the same Code, which provides that the arbitral tribunal shall decide the dispute under the main contract and the applicable law, but based on the explicit agreement of the parties, the arbitral tribunal may settle the dispute in fairness.

According to the art. 575 para. 2) in conjunction with the art. 22 of the RCCP, the arbitrator has the duty to insist, by all legal means to prevent any mistake that could overshadow the truth, based on facts and determining the correct application of the law, with the goal of obtaining an arbitration award solid and legal, as required by the art. 603 of RCCP.

The arbitrator has the right to request explanations to the parties, oral or written, on the factual and legal grounds raised by the parties. He also has the right to put into the discussion of the parties (applying the principle of contradiction) any circumstances not mentioned in the summons or in the respondent plea, to order the administration of evidence which it considers necessary, but may take any other measures provided by law, in despite the opposition of the parties.

Another form of manifestation of the active role of the arbitrator in finding the truth is provided by the art. 575 in conjunction with art. 22 para 4) of the RCCP, according to which, the arbitrator gives or restores the legal classification of the acts and deeds to be decided on the arbitration process, even if the parties have given another denomination. The new accurate legal classification must be brought into question of the parties.

However, there is an exception under the art. 575 in conjunction with the art. 22 para. 5), the arbitrator will not change the qualification or the legal basis of the acts, if the parties have expressly agreed on the rights they can dispose, and established the qualification and the pleas in law on which agreed to limit the debates, but only if this not violate the rights or interests of others.

Romanian Code of Civil Procedure regulates through the art. 22 paragraph 6) the obligation of the judge to limit the delivery of an injunction only to what was requested, without exceeding the limits of his investment, except in the cases provided by law. The arbitrator has the same obligation under art. 575 in conjunction with the art. 22 para. 6). In addition to this principle are the regulations stipulated by the art. 608 para. 1) f), which provides that the arbitral award may be challenged by annulment if the arbitral tribunal ruled on some things that were not requested or gave more than was requested.

The last fundamental principle in matters of arbitration is regulated by the art. 575 in conjunction with the art. 23 of the Code of Civil Procedure - the principle of proper respect for the justice, and dispose the following: para. 1) "Those present at the hearing are bound to manifest due respect for the court and not to disturb the smooth conduct of the hearing." para. 2) "The President ensures that the order and solemnity of the meeting are respected, for this purpose may take any measure covered by law."

Although arbitration is an alternative jurisdiction, private and voluntary, which often has its own rules of organization, in the case of institutionalized arbitration, the legislator did not overlook the fact that in the arbitration are done acts of justice. Thus, the participants, "the audiences", precariously since we are under the sway of confidentiality, must manifest due respect for the arbitral tribunal hearings. So, that "must stand up and remain in this position until President invite them to take place; the participating persons at the hearing shall have a decent behavior and outfit (...) "²¹.

If in the public court, the president is responsible for supervising of the compliance of the order and solemnity of the hearing, in the case of the arbitral tribunal, I believe that this task belongs to the presiding arbitrator. He will have the duty to take any measure covered by law, to preserve the solemnity of a court hearing.

3. Conclusions

The regulation of the principles applicable to the arbitration proceedings by the Romanian legislator is further proof that, the institution of arbitration, although private and alternative, offers the necessary guarantees for a solid and legal arbitration award. The compliance and the application of these principles by arbitrators provide the legal security of the international trade relations, but not only.

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²¹ Viorel Mihai Ciobanu & Marian Nicolae (coord.), *op.cit.*, p. 61.

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