Principles and rules applicable in the international arbitration: aspects of comparative law

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Abstract.
This article analyses various categories of rules applicable in international commercial arbitration through the prism of international regulations and comparative law. These are the principles that guide both the procedure in state courts and in the alternative procedure, which is arbitration, and which ensure the respect of the universally recognized right to a fair trial. Also, there are the technical rules of procedure that the arbitrators must follow in the settlement of the dispute, starting with the establishment of the arbitral tribunal and up to the pronouncement of the arbitral award. These rules are established on the basis of the arbitration agreement, in accordance with the legal regulations contained, in particular, in the codes of civil procedure or special laws on arbitration, as well as in accordance with the provisions of the arbitration regulations. Finally, there are rules that the arbitrators apply to resolve the merits of the dispute; these are either the provisions of the law that the parties have chosen or, in the absence of the choice, the arbitrators will apply the law designated by the conflict law rules that they will consider appropriate in the case.

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The principles applicable to the international arbitration procedure

Arbitration, although it is an alternative way of private justice, must ensure a series of guarantees related to the universally recognized right to a fair trial. Comparative law indicates that national regulations require arbitration to be guided by the same principles that are also applicable in the case resolution process by state courts, with some exceptions that are determined by the specific nature of arbitration.

Thus, in France, art. 1466 paragraph 2 of Code of Civil Procedure [1], with reference to domestic arbitration, states that certain guiding principles of the process, applicable primarily to state jurisdictional courts and listed at the beginning of Code of Civil Procedure (Book 1, Title 1, Chapter 1), must also be respected by arbitral tribunals. These are, mainly, the adversarial principle (art. 16) and the rules regarding the right to defense (art. 18-20). On the other hand, regarding international arbitration, art. 1510 paragraph 2 of French Code of Civil Procedure, expressly stipulates that „whatever procedure is chosen, the arbitral tribunal guarantees the equality of the parties and respects the adversarial principle”.

In the legislation of the Republic of Moldova, Law 23/2008 of the Republic of Moldova on Arbitration (hereinafter - Law 23/2008) provides that „the basic principles of arbitration are: a) respect for fundamental human rights and freedoms; b) legality; c) freedom of arbitral agreements; d) setting up arbitration in accordance with the agreement of the parties; e) adversarial principle; f) respecting the right to defense; g) confidentiality” (art. 4) [2].

As far as international arbitration is concerned, Law 24/2008 of the Republic of Moldova on International Commercial Arbitration [3] (hereinafter - Law 24/2008), which reproduces almost exactly the provisions of the UNCITRAL Model Law on International Commercial Arbitration (1985) [4], mentions only one principle, that of the equality of the parties: „during the entire arbitration procedure, the parties shall be treated with equality and each party shall be given a full opportunity of presenting his” (art. 18).

It is necessary to emphasize that, although Law 24/2008
does not expressly stipulate this, the procedure in international arbitration must be guided by the general principles of the civil process enshrined in the Code of Civil Procedure of the Republic of Moldova [5] (hereinafter – CCP RM). Non-compliance with these principles is sanctioned by the annulment of the arbitral award. Thus, among the reasons on the basis of which an arbitral award can be annulled, is stated the case where “...the arbitral award violates the fundamental principles of the legislation of the Republic of Moldova or good morals” (art. 480 letter h) CCP RM).

In this sense, in the Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova regarding the application by the courts of the legal provisions to the resolution of some issues in the examination of the disputes in which the parties concluded the arbitration agreement no. 2 of 30.03.2015: it was ruled that „the fundamental principles of the RM legislation...” inter alia, „...can be derived ... from the Code of Civil Procedure – especially art. 4 - 12 .....” As an example, the following principles can be used, which could be included in art. 480 paragraph (2) letter h) CCP: the adversarial principle; the principle of equal rights of the parties; the principle of impartiality; the principle of availability of rights of the participants in the process and others” [6].

It is important to note that the specific nature of arbitration requires certain derogations from the principles enshrined in the CCP RM. Thus, the principle of the public character of judicial debates (art. 23 CCP RM) is replaced by the principle of confidentiality, which is a basic one of all alternative means of disputes resolution. In the same way, in the arbitration procedure, the principle of immediacy and orality in judicial debates is not applicable (art. 25 CCP RM), because in international arbitration, the written procedure is often used.

In comparative law and international arbitration jurisprudence, a series of principles have been established that have crystallized in the practice of international arbitration. For example, in France, as part of the reform of arbitration regulations, which took place in 2011 [7], a series of rules were introduced, the origin of which is...
jurisprudential. Thus, art. 1464 paragraph 3 of Code of Civil Procedure requires the parties and the arbitrators to act quickly in the conduct of the procedure. Consequently, the parties must not unnecessarily prolong the process by using dilatory means (moyens dilatoires – fr.), i.e. arguments that do not advance the procedure, but are invoked only to gain time and delay the proceedings [8]. The same text states the obligation of the parties to respect the obligation of loyalty between them, i.e., to behave in good faith and fairness, despite the litigation that opposes them.

Nothing prevents the rules of the permanent arbitration institutions from stipulating the principles according to which the arbitration procedure will take place. According to the Rules on International Commercial Arbitration Procedure of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Republic of Moldova (hereinafter – Rules of ICAC CCI RM) [9], “the arbitration procedure shall be conducted on the basis of the principles of availability, adversarial proceedings, equal and impartial treatment of parties to the dispute. The parties and their representatives must conduct themselves in good faith in fulfilling their procedural rights, not to admit abuse of these rights and to respect the deadlines for their fulfilment” (art. 40).

The law applicable to the arbitration procedure (lex arbitri)

The conduct of the arbitration takes place, based on the arbitration agreement, in accordance with the legal regulations contained, in particular, in the codes of civil procedure or in the special laws on arbitration, as well as in accordance with the provisions of the arbitration regulations (if the dispute is settled by an institution of permanent arbitration). At the same time, when resolving disputes, the arbitrators are guided by the customs of international trade (lex mercatoria).

Based on the contractual nature of arbitration, the ground of the arbitration procedure is the arbitration agreement. In most sources of arbitration regulations, the principle of autonomy of will of the litigating parties in determining the arbitration procedure is enshrined, according to which the
arbitration is organized and conducted according to the arbitration agreement.

In this sense, the Geneva Convention on International Commercial Arbitration of 1961 [10], in art. IV, paragraph 1, letter b), iii, states that the parties to an arbitration agreement are free to „lay down the procedure to be followed by the arbitrators“. National legislations develop this basic rule. Thus, Law 23/2008 states: ”...the parties can establish, respecting public order and good morals, as well as the imperative provisions of the law, through an arbitration agreement or through a written document concluded later, either directly or with reference to a certain regulation having as object of the arbitration, the rules for setting up the arbitration; appointing, revoking and replacing arbitrators; the term and place of arbitration; the rules of procedure that the arbitration must follow in settling the dispute; the rules of arbitration expenses and the distribution of these expenses, the content and form of the arbitration decision; other rules regarding the proper conduct of arbitration“ (art. 3. of Law 23/2008).

If the parties did not agree on the arbitration procedure, or failed to provide for certain aspects of the conduct of this procedure, the arbitral tribunal intervenes. Thus, according to Law 24/2008, „the parties are free to agree on the procedure that the arbitral tribunal will follow in resolving the dispute“. At the same time, the law states that, „in the absence of the agreement of the parties, the arbitral tribunal can ... carry out the procedure and resolve the dispute in the way it considers appropriate“ (art. 19 of Law 24/2008). We find the same provisions in other national systems which, either have adopted the UNCITRAL Model Law on International Commercial Arbitration by incorporating it into their domestic law, as, for example, Australia did, in the International Arbitration Act 1974 as amended [11], or which have based their rules on this model law, e.g. Canadian Commercial Arbitration Code (art.19) [12].

If the disputing parties refer their dispute to an arbitral tribunal constituted within a permanent arbitration institution, the settlement of the dispute usually takes place according to the procedure established by the regulation of
the institution, in particular, if the parties refer to that regulation in the arbitration agreement. However, even if the parties did not expressly refer to the regulations of the permanent arbitration institution, according to a common approach in most regulations and usages in the matter, choosing the permanent arbitration institution as the forum for resolving the dispute, the parties chose to be judged according to the rules the institution designated, in accordance with its regulations, by the arbitrators nominated from the list of this institution. Art. 419 para. (2) of the Code of Civil Procedure of Romania expressly states: “...by designating a certain institutionalized arbitration as being competent in the settlement of a certain dispute or type of disputes, the parties automatically opt for the application of its rules of procedure” [13]. In the same sense, art. 48 para. (1) of the Rules of ICAC CCI RM provides: “...the rules of procedure of these Rules shall apply to the settlement of the dispute in accordance with the arbitration agreement. If in the arbitration agreement no reference is made to these Rules, then those rules shall be applied according to the agreement of the parties. In the absence of such an agreement, the rules are applied on the decision of the arbitral tribunal on the basis of the voluntary consent of the parties to submit the dispute to the Arbitration Court, taking into account the circumstances of the case”.

Nothing prevents the parties from opting for the procedural rules of an institutional arbitration even in an ad hoc arbitration. In both cases, by nominating the arbitral institution, the parties implicitly agreed to the regulation and its procedural rules so that, in the spirit of such an interpretation, the provisions of the arbitration agreement are supplemented with those of the arbitration rules of the chosen institution. Moreover, the arbitration agreement can be compared with adhesion contracts.

In a generally recognized sense, the law applicable to the arbitration procedure is not confused with the law applicable to the substance (merits) of the dispute. More than that, in the doctrine it was stated that this law is not confused with the law of the seat of the arbitration. Only the law of the place where the arbitral award is likely to be

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the subject of an appeal for annulment of the arbitral award or of the place where the recognition and enforcement of the award is requested, have the vocation to impose imperative rules of procedure that count for the rules applicable to the procedure [14. p.650].

Hence, the connection between the law applicable to the arbitration procedure and the law of the seat of the arbitral tribunal cannot be denied, at least based on the provisions of international conventions on the matter. First of all, it should be noted that the annulment appeal, as a rule, is submitted to the competent court at the seat of the arbitration. Therefore, the arbitrators must take into account the legal requirements of the place of the seat of arbitration, since the violation of some procedural principles constitutes grounds for the annulment of the award in question. Second, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 allows a state to refuse recognition and enforcement of a foreign award if it finds, "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (art. V, paragraph 1, letter d) [15].

A controversial and widely debated aspect is the connection between the rules of the arbitration procedure and the rules of civil procedure established for common law courts. National legislations enshrine different approaches to this subject.

The legislation of the Republic of Moldova does not expressly require the application of the provisions of the Code of Civil procedure in the arbitration proceedings (subject to the provisions with the value of principles, see above). However, the application of the rules of the CCP RM can be provided for in the regulations of the permanent arbitration institutions but the headquarters in our country. Thus, the ICAC CCI Statute states: "the organization and administration of an arbitration process by the Court of Arbitration and the settlement of disputes by the constituted arbitration tribunal are regulated by the Regulations of the Court of Arbitration, which is supplemented as necessary with the provisions of international law in the case, as well as
with those of the Civil Procedure Code of the Republic of Moldova to the extent that they are compatible with arbitration” [16].

In France, the law states: “…unless the parties have agreed otherwise, the arbitral tribunal establishes the arbitral procedure without being obliged to comply with the rules established for the state courts” (art. 1464 French Code of Civil Procedure). So, we can state that in the French legal system, by the will of the legislator, the rules of arbitration procedure are detached from the Code of Civil Procedure.

On the other hand, in Romania the interference between the rules of arbitration procedure and those established in the Code of Civil Procedure is quite important, at least in ad hoc arbitration. Thus, art. 576 Code of Civil Procedure of Romania states that the parties may establish, in the arbitration agreement, the rules of procedure applicable to the arbitration or may empower the arbitrators to establish these rules. These rules are supplemented, if necessary, with the provisions of the Civil Procedure Code. When the parties resort to institutionalized arbitration, the procedural rules of institutionalized arbitration shall apply, and in all other cases, the arbitral procedure shall be that established by the Code of Civil Procedure.

The law applicable to the substance of the dispute (lex causae)

The European Convention on International Commercial Arbitration (Geneva, 1961) states: “…the parties shall be free to determine the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages” (art.VII).

The same rules are stipulated in many national legislations, including Law 24/2008 (art.28). Likewise, the rules of arbitration institutions usually contain the same rules. For example, the Rules of ICAC CCI RM establishes: “the arbitral tribunal shall settle the dispute on the basis
of the norms of law determined by the parties as being applicable to the merits of the dispute. Any choice by the parties of the law of a particular State is considered to refer to the substantive (material) law of that state and not to its conflicts of laws rules. In the absence of such an agreement, the substantive law determined in accordance with the conflict of law rules which the tribunal shall consider appropriate for the resolution of the case shall be applied. The decision on the applicable law must be taken in accordance with the circumstances of the disputed legal relationship and take into account the customs and commercial practices and the international arbitration practice in the field.” (art. 43 Rules of ICAC CCI RM).

From the cited provisions it follows that the determination of the law applicable to the substance of the dispute can be done in two ways: by the agreement of the contracting parties, or, in the absence of such an agreement - by the arbitral tribunal.

**Determination of the law applicable to the international commercial contract by agreement of the parties.** In the arbitration regulations, it is often stated that, when resolving the dispute, the arbitral tribunal is guided by the clauses of the contract, which were the basis of the litigious legal relations. That is why in the resolution of the dispute in substance, the arbitrators are guided by the law that the parties have chosen to govern the respective contract (lex contractus). Therefore, in principle, the law applicable to the substance of the dispute (lex causae) is the law applicable to the contract (lex contractus).

By virtue of the principle of contractual freedom, the parties to an international commercial contract, in the presence of several "conflicting" laws applicable to their contract, can choose a system of law that they consider more convenient to govern all of their legal relations (electio juris clause), respectively formation, effects, execution and extinguishment of contractual obligations. By using the electio juris clause, the parties avoid the uncertainties caused by a conflict of laws due to the international nature of the contract.

The will of the parties, thus expressed, fulfills the function of a principle, called lex voluntatis, or the freedom
of choice principle. This principle is based on the reasoning that, since contracts are the expression of the will of the parties, it is normal to allow the parties to express their will regarding the law applicable to their contract. By virtue of the principle of freedom of choice, the parties to an international commercial contract, in the presence of several "conflicting" laws applicable to their contract, can choose a legal system that they consider more convenient to govern all of their legal relations (electio juris clause). This possibility granted to the parties to choose the applicable law is, in principle, recognized, with some exceptions, traditionally and consistently by almost all legal systems; it is as well stated in the main instrument for the unification of Private International Law. The freedom of choice principle is also enshrined in art. 2616 of the Civil Code of the Republic of Moldova [17] which essentially reproduces the rules of the Regulation (EC) no. 593/2008 of the European Parliament and of the Council of June 17, 2008 regarding the law applicable to contractual obligations [18] (Rome I Regulation). According to these regulations, a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

Determination of the law applicable to the international commercial contract by the arbitral tribunal. If the parties have not designated the law applicable to the international commercial contract, this task falls to the arbitral tribunal, which, for this purpose, will usually resort to conflict rules. The arbitration rules grant wide discretion to the arbitrators regarding the choice of conflict of law rules, using generally accepted wording that the arbitrators will apply the law designated by the conflict rule that they consider appropriate in the case. In this context, the question arises of knowing which methods the arbitrators must use to determine the law applicable to the substance of the dispute. Approaches in comparative law are different on this subject.

For example, in Switzerland, the Federal Law on Private International Law of 1985 establishes a rule specific to
international commercial arbitration: The arbitral tribunal rules according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case is most closely related ties (art. 187) [19].

On the other hand, in French doctrine it has been stated that, despite an old concept, such as that the arbitrators are required to apply the conflict rules of the seat of arbitration, the arbitrators conducting the arbitration procedure in France are not required to apply the conflict rules applicable by state jurisdictions, nor the specific rules of international commercial arbitration. Moreover, arbitrators are free to resort or not to resort to conflict rules [14 p.880-891].

If the arbitrators resort to the conflict rules, they apply either the cumulative method, or the method of the general principles of private international law, or the method of free choice of the conflict rule.

The cumulative method consists in the simultaneous application of conflict rules from all legal systems that are related to the case being examined. The disadvantage of this method is that conflict rules in different legal systems can lead to divergent results.

The method of general principles of private international law consists in extracting some common or generally accepted principles from the main systems of private international law. For this purpose arbitrators refer both to international arbitral jurisprudence and to the main international conventions, in force or not, which unify the conflict rules (e.g. the Rome Convention of 1980, see below).

Finally, one can resort to the direct method, which consists in the fact that the arbitrators choose the applicable law without referring to a conflicting rule. The arbitrators decide, perhaps, that a certain, more modern legal system is better adapted to the contract in dispute.

In this vein, the doctrine revealed that law and comparative jurisprudence indicate that arbitrators enjoy a wide freedom in this regard. In the presence of the multitude of conflict of laws methods and rules, which makes the designation of the applicable law uncertain, to facilitate this task, a series of international instruments enshrine a
series of common principles and rules. In this context, the Rome Convention of June 19, 1980 on the law applicable to contractual obligations (Rome Convention), ratified by all EU member states and entered into force on April 1, 1991, should be mentioned. The Rome Convention was replaced by the Rome I Regulation. In art. 4 of the Rome I Regulation (these provisions were taken over in art. 2618 of the Civil Code of the Republic of Moldova), a series of special rules relating to some categories of contracts are established. At the same time, the Regulation establishes a general presumption: to the extent that the law applicable to the contract has not been chosen by the parties, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

Conclusions

Arbitration is governed by several categories of rules. Primo, they are the rules with the value of principles that guide both the procedure in state courts and in the alternative procedure, which is arbitration, and which ensure the respect of the universally recognized right to a fair trial: the equality of the parties, the adversarial principle, the right to defense, the independence of judges / arbitrators etc. Secundo, there are the technical rules of procedure that the arbitrators must follow in the settlement of the dispute, starting with the establishment of the arbitral tribunal and up to the pronouncement of the arbitral award. These rules are established on the basis of the arbitration agreement, in accordance with the legal regulations contained, in particular, in the codes of civil procedure or special laws on arbitration, as well as in accordance with the provisions of the arbitration regulations. At the same time, when resolving disputes, the arbitrators are guided by the customs of international trade (lex mercatoria). Tertio, the are legal rules that the arbitrators apply to resolve the merits of the dispute; these are either the provisions of the law that the parties have chosen by virtue of the principle of lex voluntatis, or, in the absence of the choice of applicable law by the parties, the arbitrators will apply the law designated by the conflict law rules that they will consider appropriate in the case.
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