Banggui Jin (ed.) Cristina Elena Popa Tache (ed.)

Experientiam et Progressionem in Comparative and International Law

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Banggui Jin (ed.) **Cristina Elena Popa Tache (ed.)**

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Preface

Editors
*Professor **Banggui Jin**, Faculty of Law and Political Science of Aix-Marseille University, France*
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This volume contains the scientific papers presented at *the 2nd Conference on Comparative and International Law* that was held on 24 June 2022 online on Zoom. The conference is organized by the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: www.comparativelawconference.eu.

The scientific studies included in this volume are grouped into three chapters:

- *Contemporary Applicability Presentations in Comparative Law.* The papers in this chapter refer to: Sino-European customs protection of intellectual property rights: from upmost necessity to concrete measures; decisions rejecting requests for referral to the Court of Justice of the European Union by references for preliminary rulings, from the perspective of the European Convention on Human Rights; the role of case law in international arbitration; alternative dispute resolution in construction contracts; accelerated arbitration: an expedited method of resolving disputes; the rights of HoReCa tourists in national and European Union legislation - comparative aspects.
- *International Law and Its Modern Regulatory Powers*. This chapter includes papers on: the European problem regarding the acceptance, integration and prevention of crime towards migrants and refugees; comments on current regulatory diversity under public international law; tools for official relations in public activity - disparities in good administrative behaviour; brief considerations on the international dimension of amending an individual employment contract.
- *Some aspects regarding criminal challenges*. The papers in this chapter refer to: insurance fraud - a global problem; competition between criminal and administrative penal responsibility - questions and solutions; the principle of legality and the retroactive application of most favourable penal law as guarantees of the protection of human rights from worldwide to state level; the right to silence; opening statements in criminal procedure.

This volume is aimed at practitioners, researchers, students and PhD candidates in juridical sciences, who are interested in recent developments and prospects for development in the field of comparative and international law.

We thank all contributors and partners and are confident that this volume will meet the needs for growing documentation and information of readers in the context of globalization and the rise of dynamic elements in comparative and international law.

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CONTEMPORARY APPLICABILITY PRESENTATIONS IN COMPARATIVE LAW

Sino-European Customs Protection of Intellectual Property Rights: From Upmost Necessity to Concrete Measures

PhD. student **Rémi FOUQUE**[1]

Abstract

This study's objectives are to enlighten the joint collaboration, legal similarities and similar goals in Sino-European customs actions while fighting counterfeiting and protecting IP rights. This article will present, in a abridged fashion, the reasons that justify the upmost necessity for both the People's Republic of China and the European Union to carry out customs protection of IP rights, and its concrete measures taken in order to set it right. This study has been undertaken as an abridged detail of my forthcoming Ph.D thesis, which showcase the legal similarities of customs actions in fighting counterfeit goods trade, focusing on and comparing the legislations of France, the European Union and the People's Republic of China. Even though China has been labelled as the top global source of counterfeit products, the Chinese government and customs, deeply impacted by the scourge themselves, carried on actions to fight it and prevent it by passing adequate laws: this is the demonstration of this article.

Keywords: *customs, intellectual property, counterfeiting, Chinese law, European Union law.*

JEL Classification: K33

1. Introduction

Even though it might sound *cliché* to assume the fact that People's Republic of China is still the archetype of the « counterfeiting country », given how much counterfeit goods seized and detained of customs offices all around the world actually come from China, it would be hypocritical to say that Chinese legislation does not wave its little finger in order to reverse this very trend. In fact, as we are about to realize, China follows the same objective as its European peers in taking into account the negative effects of counterfeit goods worldwide circulation on global scale trade, legal proceedings, public health or even sustainable development. Furthermore, one can even assume that nowadays, China itself, even after harmonizing its legal rulings concerning the implication of customs in intellectual property law with other systems, such as the European Union one, suffers from the aforementioned side effects of counterfeiting,

This article will present, in an abridged fashion, the reasons that justify the upmost necessity for both the People's Republic of China and the European Union to carry out customs protection of IP rights, and its concrete measures

[1] Rémi Fouque - Faculty of Law and Political Science, University of Aix-Marseille, France, r.fouque18@laposte.net.

taken in order to set it right.

2. The upmost necessity of Sino-European customs protection of IP rights

2.1. Fighting counterfeiting effects on global trade, health and environment

2.1.1. Acknowledging the figures of counterfeiting on global trade

The figures published on September 19, 2019 by the European Commission in its report concerning customs interceptions of articles suspected of infringing intellectual property rights show a simple, yet clear observation: between 2017 and 2018, the number of seizures of goods by customs authorities increased from 57,433 to 69,354.[2] Similarly, the number of initiated proceedings following the seizure of said counterfeit goods increased significantly over the same period: 89,873 proceedings were instigated in 2018 compared to 74,706 in 2017. At the same time, if we look closer at the total amount of intercepted goods, one can see an interesting paradox. Indeed, if the total number of goods amounts to 26,720,827 in 2018 against a figure of 31,410,703 in 2017, their market value significantly differs: an amount of 582,456,067 euros in 2017 is now opposed to 738 135,867 euros, marking a difference of 200,000,000 euros.[3]

These figures may certainly appear quite indigestible and arbitrary, but nevertheless have the merit of questioning ourselves about the customs policy of the European Union. Thus, a smaller number of seized goods may mean two things: if customs authorities seize fewer counterfeit goods, this could idyllically indicate a decline in counterfeiting activities. However, it could also be an indicator of the talent of counterfeiters, so skilled that customs authorities would no longer be able to tell the difference between genuine and counterfeit products. The increase in the market value of counterfeit products between 2017 and 2018 would encourage us to fall back on the second hypothesis. Moreover, if we closely study the classification of the categories of counterfeit products established according to their value, it appears that the five most important categories are directly linked to the fashion industry, which would explain this sudden increase in one year. Thus, more than 18% of counterfeit goods are bags, wallets or handbags, less than 16% are watches or clothing, more than 10% are sunglasses, and just under 6% are sports shoes.[4]

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[2] European Commission. (2019). Report on the EU customs enforcement of intellectual property rights: Results at the EU border, 2018, p.6, consulted on: https://ec.europa.eu/taxation_customs/sites/taxation/files/2019-ipr- report.pdf

[3] *Ibid.*

[4] *Ibid.*, p.14.

Where do these counterfeit goods come from? According to the aforementioned report,50.55% of goods likely to infringe intellectual property rights come from China, while 9.66% come from Bosnia and Herzegovina and 9.43% are from Hong Kong as a Special Administrative Region of the People's Republic of China.[5] Moreover, if we look at the classification of the countries of origin of the counterfeit goods and take as a reference the total value of the said articles, and not their number this time, the observation remains fairly the same: the China remains at the top of the ranking, with a total of 62.86% of the total fraudulent goods, followed this time by Hong Kong with a figure of 16.05%.[6]

Finally, another alarming fact further accentuates the globalized nature of counterfeiting: according to a report by the Organization for Economic Co-operation and Development (OECD) on trends in the counterfeit goods trade, the peculiar kind of trading represents 3.3% of world trade, i.e. a total amount of more than 460 million euros.[7]

2.1.2. Acknowledging the consequences of counterfeiting on health and environment

According to Geoffroy Bessaud, anti-counterfeiting coordination director at Sanofi, "*the turnover generated by counterfeiting is estimated at at least 10 or 15% of the world pharmaceutical market, i.e. 200 billion dollars* », highlighting the seriousness of the phenomenon as far as drug trafficking is concerned, and its justification by its financial attractiveness. The Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending directive 2001/83/EC on the community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products, gives us the concrete definition of a « falsified medicinal product »: the first article of the directive presents three parameters which constitute a cause of confusion in the mind of the consumers, namely "*the identity*", "*source*" and "*history*" of the medicine.[8] However, although *"this definition does not include unintentional quality defects and is without prejudice to infringements of intellectual property rights"*[9], one can affirm that this so-called definition is a prelude to the implementation of the circulation on the fake drugs market. Thus, the parallel importation of drugs, via their repackaging, is a formidable vector for

[5] *Ibid.*, p.16
[6] *Ibid.*
[7] OCDE/EUIPO (2019), *Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade*, Éditions OCDE, Paris. Consulted on https://doi.org/10.1787/g2g9f533-en.
[8] Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products, article 1.
[9] *Ibid.*

counterfeiting. In fact, said repackaging of the medicinal product enables the adaptation to the legislation of the country into which it is imported: although the « Boehringer I and II » decisions issued by the European Court of Justice (ECJ) condemn it, this practice nevertheless encourages the substitution of original medicines by falsified medicines.[10]

Through their direct contact with the skin, counterfeit cosmetic products represent a risk for the health of consumers; after analyzing of samples of counterfeit cosmetics, traces of heavy metals in eyeshadows and kohl, endocrine disruptors and powerful allergens in perfumes, carcinogenic substances in beauty creams or even harmful solvents contained in nail polishes have been detected.[11] Beyond medicines and cosmetics which are far from being isolated cases, the following categories of products are the most likely to attack the health and safety of EU consumers: childcare articles, clothing, decorative articles, the sports team, vehicles and spare parts and toys.[12] The study in question also lists the various concrete risks on health, such as asphyxiation, burns, cuts, strangulation, damage to hearing and sight or even electric shock, reaffirming the seriousness of such risks.[13]

Ecologically, a large part of the counterfeit goods is made up of components that are highly harmful to the environment. In fact, the materials used to create such goods are never produced with recyclable materials, and also ignore the most basic environmental protection standards: certain batteries contain a level of mercury five times higher than the average, (the presence of this metal in too large quantities induce harmful effects on the psycho-motor development of the child, and represent a major source of pollution)[14], several watches are covered with radioactive paint, (exposure to radium causes certain risks of cancer in humans, and can contaminate plants through the soil or fish).[15] The industry of counterfeit chemicals brushes off the controls and standards required for their circulation within the European Union, thus constituting a major source of environmental pollution, as the destruction of crops in China, Russia, Ukraine and

[10] Christophe Anne, *La protection juridique des médicaments: de la recherche fondamentale au certificat complémentaire de protection*, Doctorat en Pharmacie - Université Claude Bernard, Lyon, 16 décembre 2016.

[11] Portail de la Direction Générale des Douanes et Droits Indirects: Dossier de Presse *4e Journée Nationale de Destruction de Contrefaçons saisies par la Douane*, p. 14, consulted on https://www.douane.gouv.fr/sites/default/files/espacePresse/files/dossier-de-presse-4e-journee-nationale-de-destruction-de-contrefacon.pdf.

[12] EUIPO (Juin 2019), *Qualitative Study on Risks posed by Counterfeits to Consumers*, p. 12, consulté sur https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2019_Risks_Posed_by_Counterfeits_to_Consumers_Study/2019_Risks_Posed_by_Counterfeits_to_Consumers_Study.pdf.

[13] *Ibid.*, pp. 12-13.

[14] Organisation Mondiale de la Santé, *Questions fréquentes sur le mercure et la santé*, octobre 2011, consulted on https://www.who.int/phe/chemicals/faq_mercury_health/fr/.

[15] Lanntech, *Radium - Ra: Propriétés chimiques - Effets du radium sur la santé - Effet du radium sur l'environnement*, consulted on https://www.lenntech.fr/francais/data-perio/ra.htm.

Italy due to the use of counterfeit fertilizers could be shown as a striking example.[16] In addition, the prevention of the traffic in illicit and falsified pesticides remains a major concern of the Member States of the European Union, with a view to the strengthening of sustainable development. Indeed, due to the inventiveness of counterfeiters in the creation and establishment of parallel markets for such goods, particularly via the Internet, controlling and hindering the traffic in counterfeit pesticides remains a hard task.[17] Counterfeit pesticides are shipped in unmarked and unmarked containers, and accompanied by false documents attesting to the origin, the authenticity of the said pesticides and the addresses of the depositories: the pesticides are then repackaged with tags bearing the counterfeit brands, thus deceiving the customs vigilance.[18]

In order to reconcile international trade and environmental protection, Zhixin Zheng suggests to take into account the "绿色贸易壁垒", or "green trade barriers", to regulate and better understand the traffic of goods under cover of environmental protection, which would allow better control by the customs authorities in order to curb the trafficking of polluting counterfeits.[19]

2.2. The European and Chinese plans against counterfeiting

2.2.1. The European action plan against counterfeiting

The Commission's report to the Council and the European Parliament of 22 February 2018 on the implementation of the Customs Action Plan from 2013 to 2017 is a telling example of the continuity of the anti-counterfeiting policy, as well as its blossoming rise. Indeed, visits were carried out in all the Member States between 2015 and 2017, led by two representatives of the commission and two local experts, in order to establish an effective and in-depth dialogue with the customs services responsible for implementing application of the new regulation n°608/2013.[20] The action plan also highlights the creation of a project group on

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[16] Les Entreprises du Médicament, Dossier de Presse, *Contrefaçon de médicaments, une atteinte à la santé publique*, juin 2017, p. 20, consulted on https://www.leem.org/sites/default/files/DP- contrefacon-06-07-2017.pdf.

[17] Office for Harmonization in the Internal Market, EUROPOL, *Awareness Conference on Fake and Illicit Pesticides - Report and Conclusions*, Alicante, (26, 27, 28 novembre 2012), p. 13, consulté sur https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Knowledge- building-events/1392909557_pesticides_report_en.pdf.

[18] *Ibid.*

[19] Zheng Zhixin (郑智昕), Relationship between International Trade and Environment Protection (浅析国际贸易与环境保护的关系), Around South East Asia (东南亚纵横), Volume 7, 2011, p. 68, consulted on https://core.ac.uk/download/pdf/41447809.pdf.

[20] European Commission (2018, February 22nd), *Report from the Commission to the Council and the European Parliament - Report on the implementation of the EU customs Action Plan to combat IPR infringements for the years 2013/2017*, p. 3. Consulted on https://eur-lex.europa.eu/legal-content/FR/ TXT/?uri=CELEX%3A52018DC0077.

the customs control of smaller consignments, such as small parcels and couriers recognized as potential vectors of counterfeiting, as well as the examination of the dedicated procedure.[21] The plan for enabling a better and more effective protection of intellectual property in the European Union also reaffirms its position as a stimulus for the economy within the Community territory by its way of helping small and medium-sized enterprises to enforce their intellectual property rights: the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights established harmonized rules concerning civil law systems in this area.[22]

In addition, « *the Commission will issue a Green Paper to consult stakeholders on the need for future EU action based on the best practice found in nationally financed schemes assisting SMEs to enforce their IP rights* ».[23] On the other hand, the guidelines established in 2018 of the Union's action plan coincide with a desire to solidify the new achievements of the policy, but also with the pragmatism of the magnitude of the task remaining to be accomplished, namely: "*Ensuring effective customs enforcement of IPR throughout the Union. Tackling major trends in trade of IPR infringing goods. Tackling trade of IPR infringing goods throughout the international supply chain. Strengthening cooperation with the European Observatory on infringements of IPRs and law enforcement authorities.*"[24]

Max Ballarin, Director of Customs Intelligence within the National Directorate of Intelligence and Customs Investigations, reaffirms the contribution of intelligence in curbing the scourge of counterfeiting: the strategic and tactical dimension of intelligence allows effective intervention by customs services in the field, through the granting of "*alert messages, investigation and control directives and analysis reports intended to guide the verification activity of the customs services*".[25] Following a similar standpoint, Franck Goldanel, director of Paris-Charles de Gaulle airport, reaffirms the daily collaboration of the airport services with customs, explaining that inside each passenger terminal, a team from the customs department works closely with those of "*Paris-Charles de Gaulle, the largest international hub in Europe, the leading European airport in terms of freight and the first border of the Schengen area. Customs, like all other State*

[21] *Ibid*., p.16.
[22] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan, 2014, consulted on https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0392.
[23] *Ibid.*
[24] Official Journal of the European Union, *Council Conclusions on the EU Customs Action Plan to combat IPR infringements for the years 2018 to 2022*, 2019, January 21st, consulted on https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0121(01)&rid=9.
[25] Direction Générale des Douanes et Droits Indirects, „Douane Magazine", juin 2016, n° 7, p.11, consulté sur https://www.douanemagazine.fr/wp-content/uploads/2019/04/douane-magazine-07.Pdf.

services, are required to adapt its procedures, controls, analyzes and information."[26]

2.2.2. The Chinese action plan against counterfeiting

When one reads the Communication of the State Council of the People's Republic of China on the national plan of innovation in science and technology of the thirteenth five-year plan, one of the most major and obvious objectives of the plan remains « *the constant improvement of the regulations and policies concerning scientific technological innovation, and the advent of effective protection of intellectual property* ».[27] The protection of intellectual property rights has never been so much at the heart of the Chinese government's concerns, all the more so when the "Made in China 2025" plan orchestrated by Xi Jinping and Li Keqiang was unveiled, and aimed to increase China's competitiveness in several cutting-edge sectors. At a time when the European Union and the United States are beginning to worry about the terms of technology transfers operated by China, the latter finds itself again, with the "Made in China 2025" policy, in the viewfinder of the world economy: fearing a wild armada of direct investment in China, the United States and the European Union are sounding the alarm.[28] In order to succeed in blowing a favorable wind on the spirit of creation and initiative in Chinese industry, the improvement of technological innovation at the very heart of this sector will be the consequence of better protection of intellectual property by Chinese companies. Indeed, the protection by companies of intellectual property rights will make it possible in a comprehensive and timely manner to promote the optimal allocation of resources specific to each Chinese firm.[29] In this regard, if Chinese companies undertake independent research and development, they must be up to date on the latest advances in industrial property in this area, in order to analyze the available data in a legitimate manner and in accordance with Chinese legislation: this assumption will prevent infringements of property rights intellectual property, as well as their possible abuses.[30]

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[26] *Ibid.* p. 41.

[27] Communication of the State Council of the People's Republic of China on the national plan of innovation in science and technology of the thirteenth five-year plan (国务院关于印发"十三五"国家科技创新规划的通知), 2016, July, 28th, consulted on http://www.gov.cn/zhengce/content/2016-08/08/ content_5098072.htm.

[28] Augier Laurent, *Les droits de la propriété intellectuelle en Chine au cœur de la réforme de l'Organisation mondiale du commerce*, Les Echos, 27 août 2018, consulted on https://www.leschos.fr/idees-debats/cercle/les-droits-de-la-propriete-intellectuelle-en-chine-au-coeur-de-la-reforme-de-lorganisation-mondiale-du- commerce-137375.

[29] LI Jun, (李军), *Innovative Reflexion on Customs Protection of Intellectual Property Rights in China* (中国知识产权海关保护的创新思考), „Science and Technology Economy Market" (科技经济市场), October 2018, vol.10, p. 9.

[30] *Ibid.*

It is in this regard that, in 2017, a Communication published by the general office of the State's Council concerning the major challenges of the national fight against violations of intellectual property rights, the sale and production of counterfeits and pirated goods set out the various objectives of China in order to pursue this goal. The third chapter of this communication, dedicated to "*tightening the crackdown upon the infringement upon intellectual property rights*", presents the common objectives of both the Chinese government and customs in "*strengthening administrative law enforcement in relation to trademarks*".[31]

In addition, the fourth chapter of the said Communication, entitled "Enhancing criminal crackdown and judicial protection", provides the necessity of "tightening criminal crackdown". In this regard, « *comprehensive crackdown upon counterfeiting shall be catalyzed by intelligence-oriented criminal investigation, the group battle launch and organization mode and the "integrated" combat mechanism shall be improved, and the offensives of group battles shall be enhanced, in order to hit the criminal acts of infringement and counterfeiting across the whole chain. (The Ministry of Public Security shall be responsible)* ».[32] This reaffirmation of the Chinese will to carry out a concrete action plan against counterfeiting is therefore expressed in a rather direct way.

3. The concrete measures of Sino-European custom protection of IP rights

3.1. The customs declaration and the implication of the IP right holder

3.1.1. IP right's owner customs declaration in the European Union and China

Chinese and European customs administrations both operate systems of protection of intellectual property rights, sharing many similarities despite distinct differences. In China, customs protection of intellectual property is governed by the well-named Regulation of the People's Republic of China on the Customs Protection of Intellectual Property Rights, adopted in 2003 following the movement established by joining the World Trade Organization and revised in 2010 and 2018. The second article of the said regulations specifies the type of rights protected by customs, and thus encompasses the protection of "*trademark rights, copyrights and rights related to copyright, patent rights*", also acknowledging that designs and models or utility models are included in patent rights under the

[31] Notice of the General Office of the State Council on Issuing the 2017 Major Tasks for the Nationwide Crackdown on IPR Infringements and the Production and Sale of Counterfeit and Shoddy Commodities (国务院办公厅关于印发2017年全国打击侵犯知识产权和制售假冒 伪劣商品工作要点的通知), 2017, May 4th.

[32] *Ibid.*

Patent Law of People's Republic of China.[33]

In the European Union, the Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights sets out the legislation in this area. Coincidentally, it is also the second article of the regulation which lists the terminology of the intellectual property rights protected by customs: much like Chinese law, the terms of « *trademark* », « *design or model* », « *patent within the meaning of national law or Union law* » or even « *copyright or any related right within the meaning of national law or Union law* » can be found here.[34]

Both systems base their power of action on a prior declaration provided to the customs authorities by the holder of the intellectual property right in order to facilitate the identification and apprehension of goods infringing the said right, on condition of justifying due registration with the competent national administrative authorities. In China, the holder of an intellectual property right must follow a procedure for about two months to register his request for protection with the customs administration, receiving a certificate valid for ten years and renewable at the end of the term.[35] The Article 7 of the aforementioned Regulation lists the informations that must be included in this sort of application, namely "*(1) the intellectual property right holder's name, and his place of registration or his nationality, etc.; (2) the name and contents of as well as the relevant information on the intellectual property; (3) the status of permission to exercise the intellectual property; (4) the name and place of origin of the goods for which the intellectual property right holder lawfully exercises the intellectual property, the customs of entry or exit, the importer and exporter, the main features and the price, etc. of such goods; (5) the manufacturer, importer and exporter of the goods which are known to have infringed upon the intellectual property, the customs of entry or exit, the importer and exporter, the main features and the price, etc. of such goods*".[36] The holder must also provide "*a document of proof, if any, contained in the contents of the application letter in the preceding paragraph*".[37] Given the vague nature of this request, a Chinese law firm, Simone Intellectual Property Services, (SIPS), clarified its scope of action: the right holder must, for the sake of precision, attach to his request photographs of the authentic goods and

[33] Regulation of the People's Republic of China on the Customs Protection of Intellectual Property Rights (中华人民共和国知识产权海关保护条例) - 2018 Revision, article 2.

[34] Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No. 1383/2003, article 2.

[35] Collectif Francis Lefebvre, *Chine - juridique fiscal*, Francis Lefebvre, 14 juin 2004, «867 - Protection Douanière», p. 72.

[36] Regulation of the People's Republic of China on the Customs Protection of Intellectual Property Rights, Article 7.

[37] *Ibid.*

their packaging, the list of authorized resellers and distributors, certain photographs of counterfeit goods...[38]

The Article 6 of the Regulation of June 12, 2013, fulfills a similar role for the request for protection from the European customs authorities, with a more exhaustive list than the Chinese Regulation's one, yet pursuing the same goal of establishing the most complete and effective protection of IP rights by customs.[39]

3.1.2. The IP right owner's implication in the European Union and China

We established during the previous development the absolute necessity of registering the intellectual property right with the Chinese customs authorities in order to be able to implement customs protection, thus allowing a more effective and reactive reaction against counterfeiting. We will now see how the IP right holder can obtain the seizure and detention of infringing goods without prior registration. Even if the IP right holder did not carry out prior registration with the General Administration of Customs of the People's Republic of China, he may still be able to obtain the seizure of potentially infringing goods: he will therefore have to carry out himself the investigative measures concerning suspicious goods. If the suspicion proves to be justified, the holder will declare it to customs following the dispositions of Article 13 of Regulation on the Customs Protection of Intellectual Property Rights and pay a certain deposit as security.[40] This deposit must, according to the wording of Article 14 of the said Regulations, be evaluated less than or equal to the equivalent value of the goods with regard to compensation for the loss caused by the detention or payment of disposal, storage and maintenance costs for the goods concerned.[41]

We can therefore see the additional difficulty weighing on the shoulders of the intellectual property right holder, in the event of the latter's non-registration with Chinese customs and forced to bear the burden of proof of the infringement of its rights, thus adding an additional constraint, demanding in both time and money. This situation actually pushes the holder to carry out this registration in time, especially because, since the end of 2015, he is exempt from filing fees; the detection of counterfeit products is then facilitated and the deposit of intellectual

[38] SIPS (Simone Intellectual Property Services), *PRC - Customs Recordal and Enforcement of IP Rights,* Janvier 2016, p. 2, consulted on https://sips.asia/wp-content/uploads/2017/03/prc_ customs _recordal_1-2016.pdf.

[39] Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No. 1383/2003, Article 6.3.

[40] Regulation of the People's Republic of China on the Customs Protection of Intellectual Property Rights, article 13.

[41] *Ibid.*, article 14.

property rights is capped at one hundred thousand yuan.[42]

Moreover, this state of mind, involving the holder of intellectual property rights and leading him to carry out proceedings in front of the General Administration of Customs, highlights the importance of *guanxi*, ("关系", relations) in the Chinese business world, hence the absolute necessity of establishing stable relations with organizations and administrative authorities in China.[43]

By facilitating relations between investors or by speeding up an administrative approval procedure, the concept of *guanxi* is inherent to China, and binds two people through an interpersonal relationship of trust and mutual assistance, which differentiates it from the concept of "network".[44] Thus, the care given to *guanxi*, as well as a certain Confucian logic of respect for hierarchy and authority, clarifies the imperative of registering the intellectual property rights with customs, thus providing a new indication of the particularism of the Chinese system. However, despite these additional difficulties, the substance of the action remains substantially identical between the European and Chinese systems.

3.2. Seizure for counterfeiting and the moment of inspection

3.2.1. Seizure for counterfeiting in the European Union and China

A significant difference remains between EU and China, in which the IP right holders can initiate the protection of said rights with customs administrations, whether the IP right is registered or not. For the member states of the European Union, the provisions of the first paragraph of article 17 of the Regulation of 12 June 2013 mentioned above inform us that « *where the customs authorities identify goods suspected of infringing an intellectual property right covered by a decision granting an application, they shall suspend the release of the goods or detain them* »[45]: the customs action therefore follows the registration of an application with the department concerned. However, according to the Article 18, following directly on from the above, « *where the customs authorities identify goods suspected of infringing an intellectual property right, which are not covered by a decision granting an application, they may, except for in the case of perishable*

[42] Qin Yi, *Les saisies douanières d'office en Chine*, Chine PI, 8 février 2016, consulted on https://chinepi.com/saisies-douanieres-doffice-en-chine/.

[43] Hoffmann Richard, *Differences between Intellectual Property Protection in China and the EU*, ECOVIS, 25 septembre 2014, consulted on https://www.ecovis.com/focus-china/differences-intellectual-property-protection-china-eu/.

[44] Jolly Dominique, *Sept conseils pour aborder le marché chinois*, L'Express - Roularta, „L'Expansion Management Review", n° 144, 2012/1, p. 43, consulté sur https://www.cairn.info/ revue-l-expansion-management-review-2012-1-page-42.htm.

[45] Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No. 1383/2003, Article 17.

goods, suspend the release of those goods or detain them ».[46] The customs authorities then have the possibility, still according to this same article, of subsequently asking the right holders, who are therefore not bound by a prior obligation to register, to provide them with all the necessary information allowing them to justify their action, formulating a request *a posteriori*.[47] This flexibility of the law also enables provision of assistance to the rights holder who might have failed to renew its request for intervention after one year.[48] The spirit of this disposition was confirmed by the Sintax Trading case law, which confirms the possibility for the customs authority to replace the owner of the mark, even in the absence of action by the latter, on the basis of the public interest.[49]

In China, the Regulation on the Customs Protection of Intellectual Property Rights provides in its article 12 the possibility for the holder to file a request for retention, as seen above. However, without a request for protection, there will be no possibility for customs to take precautionary measures concerning counterfeit goods: unlike in the European Union, registration of the IP right is compulsory in China with a view to a request for detention that should lead to a potential customs intervention.[50] Furthermore, the article 13 of the said Regulation provides for the requirements that the withholding request has to contain, in addition to the customs registration number, namely "*(1) the intellectual property right holder's name, and his place of registration or his nationality, etc.; (2) the intellectual property's name, contents, and relevant information; (3) the names of both the consignee and the consigner of the suspected infringing goods; (4) the name and specifications, etc. of the suspected infringing goods; and (5) the possible port and time of entry or exit of the suspected infringing goods, and the means of transportation therefor, and so on*".[51] However, even if the data relating to customs seizure seems to vary from one system to another, the goal remains fairly the same.

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[46] *Ibid.*, Article 18.

[47] *Ibid.*

[48] Delile Gérard, *Le rôle des douanes en matière de lutte contre la contrefaçon*, in Intervention des douanes en matière de prévention des atteintes aux droits de Propriété Intellectuelle - Compte-rendu de la réunion du 17 avril 2013 de la Commission de la propriété intellectuelle du barreau de Paris par Téchené Vincent - La Grande Bibliothèque du Droit, consulté sur https://www.lagbd.org/index.php?title=Intervention_des_douanes_en_matière_de_prévention_des_atteintes_aux_droits_de_Propriété_Intellectuell e_(fr)&mobileaction=toggle_view_mobile.

[49] CJEU, Judgment of 9 Apr 2014, C-583/12 (Sintax Trading), ECLI:EU:C:2014:244. « *Having regard to the foregoing considerations the answer to the questions referred is that Article 13(1) of Regulation No 1383/2003 must be interpreted as meaning that it does not preclude the customs authorities, in the absence of any initiative by the holder of the intellectual property right, from initiating and conducting the proceedings referred to in that provision themselves, provided that the relevant decisions taken by those authorities may be subject to appeal ensuring that the rights derived by individuals from EU law and, in particular, from that regulation are safeguarded.* »

[50] Collectif Francis Lefebvre, *op. cit. (Chine - juridique fiscal)*, p. 73.

[51] Regulation of the People's Republic of China on the Customs Protection of Intellectual Property Rights, Article 13.

3.2.2. Inspecting the potentially infringing goods in the European Union and China

The timing of the control of the goods by customs officers differs depending on which side one wishes to place, and whether it attests the differences in the implementation of intellectual property protection by the customs of the Member States of the EU or China: however their respective customs prerogatives are surely highlighted, as we will see.

The customs authorities of the European Union have the possibility of seizing and detaining goods entering the territory of the Union, suspected of infringing an intellectual property right.[52] Although the aforementioned regulation of June 12, 2013 sets out « *the conditions and procedures for action by the customs authorities where goods suspected of infringing an intellectual property right are, or should have been, subject to customs supervision or customs control within the customs territory of the Union* », regarding goods « *entering or leaving the customs territory of the Union* »[53], customs authorities of the European Union only actually seize and detain goods imported within the territory of the Union. Goods manufactured within a member state of the European Union are not subject to such an extensive control in practice. In addition, the differences between the legislations of the Member States of the Union, despite a concern for harmonization, contribute to the specificities: for example, German law provides that the customs authorities can only seize when a manifest and obvious violation of the intellectual property right is found, going against the provisions and practices of the Union; as for Italian law, the Penal Code provides for the destruction of the goods only at the end of the criminal proceedings initiated against the alleged counterfeiter, further accentuating the dissonance between the member countries of the European Union.[54]

In China, and unlike most other countries, the timing of the control is not an issue: in fact, customs controls of goods are systematically applied both to goods imported into the territory of the People's Republic of China, only for those originating in China and exported to the rest of the world[55]. Indeed, the expression "进出又货物", "*imported or exported goods*" is found in several articles of the Chinese Regulations, characterizing the essential nature of taking into account this

[52] China IPR SME Desk, *Intellectual Property Systems: China/Europe Comparison*, 2018, p. 2, consulted on https://www.china-iprhelpdesk.eu/sites/all/docs/publications/Intellectual_Property_Systems_China_Europe_Comparison.pdf.

[53] Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No. 1383/2003, Article 1.

[54] Petraz Davide Luigi, Van Heide Laura, Barilà Carmela, *Border Seizure in the European Union*, Iam Magazine, 2016, October 12th, consulté sur https://www.iam-media.com/border-seizure-european-union.

[55] China IPR SME Helpdesk, *Guide to Using Customs to Protect your IPR in China*, 2016, p. 1, consulted on https://www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_Customs.pdf.

criterion: this expression can be found in Article 2, Article 5, Article 16, Article 19, Article 20, and Article 21 of the said regulation. Thus, the difference in treatment of the way of inspecting goods between China and the European Union marks a certain difference in the way of understanding the fight against counterfeiting, but nevertheless further demonstrates the importance of their prerogatives.

4. Conclusion

The development carried on through this article enabled us to showcase the global nature of the counterfeit goods trade phenomenon by analyzing its figures, showing its dire consequences on both public health and environmental preservation, and the action plans decided by European and Chinese authorities in order to fight it. We have then been able to identify and bring out the concrete measures of both legal and regulatory systems in enabling IP rights protection, such as the IP right owner's customs declaration and own implication, the seizure for counterfeiting and the moment of inspection. Even though the road is still long for China to be accepted as a real and definitive actor of counterfeiting fighting on the same level as other countries, actual facts, actions and rulings seem to give us some positive clues in that sense.

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Decisions Rejecting Requests for Referral to the Court of Justice of the European Union by References for Preliminary Rulings, from the Perspective of the European Convention on Human Rights

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Abstract

References for preliminary rulings, one of the most important instruments for implementing EU law, were a legal institution analyzed only from the perspective of the EU legal order. A recent ruling of the European Court of Human Rights regarding Romania has changed this traditional perspective and positioned national court decisions on the rejection of requests for references for preliminary rulings, in the context of the right to a fair trial governed by art. 6(1) of the Convention. Although the European Convention on Human Rights does not guarantee the right to have a case referred for a preliminary ruling to the CJEU, it makes it compulsory for domestic courts to give reasons for the decisions refusing to refer questions. National courts whose judgments can no longer be challenged under national law have the obligation to give reasons for their refusal in the light of the CILFIT criteria. From the perspective of the European Convention on Human Rights, court decisions rejecting requests for references for preliminary rulings must be motivated in accordance with the standards of the fundamental right to a fair trial. The most striking practical effect of the ECtHR judgment discussed in this article will be the obligation to analyze concretely and to motivate the conditions for the existence of "acte clair". The purpose of this article is to emphasize the obligation of courts to state the reasons for their decisions rejecting requests for referral to the CJEU, in the light of both EU law and the European Convention on Human Rights. The research conducted is descriptive, explanatory and comparative, in the context of relevant case law and doctrine.

Keywords: *references for preliminary rulings, reasoning of judgments, fair trial, CILFIT criteria, "acte clair".*

JEL Classification: K33, K41

1. Introduction

References for preliminary rulings are the most important *instrument of cooperation* between the Court of Justice of the European Union (hereinafter the CJEU) and national courts, designed to ensure the consistent application of European law and to guarantee the validity of acts adopted by the institutions of the European Union. Through them, the CJEU transmits to the national courts the

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correct interpretation of the provisions of European law and ensures the observance of the *hierarchy* of the formal sources of this legal system. The regulatory framework is represented by art. 267 of the Treaty on the Functioning of the European Union (hereinafter TFEU)[2].

The admissibility of a question referred cannot be conditioned by the provisions of national law. The national judge enjoys a great power of discretion as to the need for preliminary questions, since the Court states that, once the questions referred, it is, as a matter of principle, bound to answer them. The rejection of a preliminary question as inadmissible could only be done if it is obvious that it does not relate to the reality or the subject-matter of the dispute in the main proceedings and in cases where it would make the CJEU answer general or hypothetical questions which are not related to a real internal dispute, or which would deviate the reference procedure from the purpose for which the Treaty provided it.

Courts in the Member States have the power to refer questions to the CJEU by way of references for preliminary rulings. The courts of last resort are also not obliged to refer the matter to the CJEU if the referral is not necessary for the settlement of the dispute; the Court has already ruled in an identical or similar case or the "acte clair" theory applies (*section 1*).

So far, references for preliminary rulings have been an institution inherent in the EU legal order. A recent ruling of the European Court of Human Rights regarding Romania has changed this traditional perspective and positioned national court decisions on the rejection of requests for references for preliminary rulings, in the context of the right to a fair trial governed by art. 6(1) of the Convention.

On this occasion, the ECtHR ruled that, although *the Convention does not guarantee the right to have a case referred for a preliminary ruling to the CJEU, it makes it compulsory for domestic courts to give reasons for decisions refusing to refer questions for a preliminary ruling*. It is mandatory for national courts whose judgments can no longer be challenged under national law to give reasons for their refusal in the light of the CILFIT criteria. Circumstances such as the national court's analysis of certain rules of European law relied on in the main proceedings or the fact that a lower court had reasonably rejected the preliminary ruling request in part with regard to the same questions are not such as

[2] In accordance with this provision of the Treaty, "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay".

to remove or diminish the obligation to state reasons when deciding to refuse the request for referral to the CJEU (*section 2*)

2. References for preliminary rulings - the framework for dialogue between European legal systems

Preliminary decisions have been of paramount importance for European integration. Through them, the Court of Justice not only interpreted European law and preserved its unity, but also created it to a large extent. The Court's rulings filled the gaps in written law and ensured its continuous development. "If it is not, as we would be tempted to believe, a 'government of judges', it is, following the words of Advocate General J.P. Warner, a 'jurisprudential legislation' that completes the written law and gives it its true meaning"[3]. Preliminary rulings are binding on both the referring court and all courts in the EU Member States.

By encouraging national courts to use references for preliminary rulings during the early stages of the Community construction, the European Court began to be more demanding with the observance of the conditions of admissibility by national judges. "Before the multiplication of references, the significance or usefulness of which may seem problematic, the Court has indeed been committed for several years to a clear consolidation of the conditions of admissibility"[4]. The general conditions which preliminary questions must meet in order to be admissible presuppose that the question be referred by a *court* within the European meaning of the term and be *necessary* for the national court to settle the dispute on the merits.

The reference for a preliminary ruling must include a sufficiently clear presentation of the substance of the dispute and define the internal and European legislative context within which it falls. It is desirable that the questions be asked clearly and precisely so that the European judge can give a useful answer to the national judge. The Court has ruled that it may rephrase the questions referred by the national judge, which it does quite often, and even answer questions not explicitly addressed by the referring court, if they are relevant to the settlement of the internal dispute[5]. The court declared that it had no jurisdiction to give a preliminary ruling if the proceedings had been completed before the referring court. There must be a *pending* dispute before the referring court, which is to be settled by a court decision, after taking into account the preliminary ruling. National courts may make a new reference for a preliminary ruling in the same proceedings if they consider that referral is necessary.

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[3] Jean Boulouis, *Droit institutionnel de l'Union Européenne*, 6e ed., Ed. Montchrestien, 1997, p. 234.

[4] Rostane Mehdi, *Institutions européennes*, Hachette Supérieur, 2007, p. 284. See also Paul Craig, Graine de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudenta si doctrina.*, 6th ed., Ed. Hamangiu, Bucharest, 2017, p. 577-578 and 604 et seq.

[5] *OTO*, case C-130/92, judgment of 13 July 1994, EU:C:1994:288.

A question referred for a preliminary ruling may be declared inadmissible where it is obviously unrelated to the facts or the subject-matter of the main proceedings, but also in the situations in which it would make the CJEU answer general or hypothetical questions which are not related to a real internal dispute, or which would deviate the preliminary reference procedure from the purpose for which the Treaty provided it. With these exceptions, the national judge enjoys a great power of discretion since, once the matter has been referred to the Court, it states that it is, as a matter of principle, bound to answer. "Although the national courts therefore have the widest power to seek a preliminary ruling from the Court if they consider that a case pending before them raises questions of Community law, that power is nevertheless conferred on them solely in order to enable them to resolve disputes before them [...]"[6].

The necessary or useful nature of the preliminary ruling has given rise to an interesting case law of the Court of Justice concerning the court called upon to assess this nature. Wanting to encourage the use of this instrument by national courts, but also to answer preliminary questions arising from internal disputes which had no connection with European law, the Court of Justice has attached particular importance to the assessment of domestic courts: "As the Court has consistently held [...], it is solely for the national courts before which the dispute has been brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court"[7]. As a result, the rejection of a preliminary question as inadmissible could only be done if it is clear that it has nothing to do with the facts or the subject-matter of the main dispute.

The final assessment of the necessity of the reference is made by the Court of Justice[8]. Asked by the same magistrate, after refusing to answer a question on the ground that the internal dispute was an artificial one, what the powers of the national courts are and what the powers of the Court of Justice regarding the assessment of the need for preliminary questions are, the European Court stated that preliminary rulings involved cooperation and division of functions between the European judge and the national judge. It is for the domestic courts, as they are closely aware of the dispute and are responsible for resolving it, to assess the need for a preliminary ruling. In order to enable the CJEU to fulfil its role in accordance with the Treaty, to respect its own competence and to contribute to the administration of justice in the Member States, and to enable the Member States' governments and interested parties to present their observations, national courts must explain why they appreciate the preliminary ruling as necessary. "The

[6] *Fratelli Pardini*, case 338/85, judgment of 21 April 1988, EU:C:1988:194.
[7] *Crispoltoni*, case C-368/89, judgment of 11 July 1991, EU:C:1991:307, point 10.
[8] *Foglia*, case 244/80, judgment of 16 December 1981, EU:C:1981:302.

important idea that emerges from *Foglia II* is that the ECJ has the final competence to decide on its own competence"[9].

In the interest of a useful judgment, the European Court of Justice has indicated that it is preferable that, at the time of bringing a matter before it, domestic law issues should have already been resolved. The referring court will explain the reasons why it considered that the Court's answer was necessary to resolve the dispute before it and will not merely repeat the arguments of the party requesting referral. An exhaustive presentation of these grounds is not necessary, but they must be based on the application of European rules and their relationship with national rules, especially if there is also a problem of compliance between national and European law.

The Court held that it had competence to answer a question referred for a preliminary ruling even though the referral decision had been appealed. It was shown that the Treaty conditioned its competence only on the existence of a request, without it having acquired the authority of res judicata in accordance with the rules of national law. On the other hand, if the referring court informed the Court of the appeal against its decision to refer the matter to the Court of Justice, the Court could, at the request of that court, stay the proceedings[10]. To the extent that the referral decision had been annulled by the higher court, the Court declared the proceedings as devoid of purpose[11]. In *Cartesio*, the Court of Justice ruled that "the outcome of such an appeal cannot limit the jurisdiction conferred by Article 234 EC [267 TFEU] on that court to make a reference to the Court if it considers that a *case pending* before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court"[12]. Therefore, a decision of the control court that would restrict the right of the first instance to use the instrument provided in art. 267 TFEU, by reforming or annulling the referral decision and forcing the court of first instance to continue the proceedings, is not permitted. The decision to withdraw or amend the question referred must come from the court which sent the question, after examining the judgment of the court of judicial review and the effects of that decision. The court of first instance is free to ask a new preliminary question on the same issue of law, on the occasion of the resumption of the trial after the annulment of the first referral decision in the appeal.

The admissibility of a question referred cannot be conditioned by the provisions of national law. The court ruled in this regard on the occasion of a reference from a German lower court, whose decision had been quashed by the Federal Court of Finances and sent for retrial, and the interpretation that the higher court had given to issues of law, which also represented the grounds for cassation, was

[9] Paul Craig, Graine de Búrca, *op. cit.*, p. 609.
[10] *Chanel*, case 31/68, order of 3 June 1969, EU:C:1969:21.
[11] *SABAM*, case 127/73, judgement of 21 March 1974, EU:C:1974:25.
[12] Case C-210/06, judgement of 16 December 2008, EU:C:2008:723, point 93.

mandatory for the lower court. The reference for a preliminary ruling aimed precisely at the compatibility with European law of the grounds which led to the cassation, given that the German Tax Procedure Code linked the lower court, in retrial, to the solution of the higher court on the issue of law. The Court ruled that "a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot not deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings"[13].

The European Court of Justice has no jurisdiction to rule on national law. Its competence is limited to European law. However, preliminary questions are often based on the incompatibility of national law with European law, and the CJEU rules on this issue. Indeed, the Court expresses its opinion indirectly or implicitly. Professor Jean Boulois explained the evolution through the importance of European law in resolving disputes. "In an ordinary reference for a preliminary ruling, the judge who gives the ruling is only an auxiliary whose interpretation has become necessary through a division of powers. Here, the judge ruling on the reference is no longer an auxiliary but, in reality, the chief judge, because he and only he is competent in the matter of Community law endowed with supremacy. Because of this, there is a reversal of relations between the two judges, which illustrates precisely this alteration of the usual rules."[14]

A second limitation of the Court's jurisdiction is to settle the dispute on the merits. This is another reason often cited by Romanian judges for rejecting references. In fact, the EU judge, in many preliminary rulings, provides clues and sometimes even the implicit solution to the domestic law dispute. The context in which the references for a preliminary ruling operate leads the Court to give answers not in an abstract way, but on the basis of reasoning which inevitably relates to the factual elements and legal rules according to which the dispute is settled on the merits. At the same time, it must justify the reasons for choosing one interpretation, not another. These considerations do not call into question, much less refute, the two limits of the CJEU's jurisdiction. Their purpose is to draw attention to the fact that the national court must not be formalist and that the references for preliminary rulings requested by the parties may be reworded so as to be admissible. Ultimately, it is desirable for the judge to reject a reference for a preliminary ruling on the ground that, if that is the case, it is only necessary to invoke, additionally or exclusively, the limits of a really questionable jurisdiction.

Courts have, in principle, the power to make references for preliminary rulings. The exception is represented by the courts whose decisions are not subject to appeal under domestic law. Interestingly, it is the courts which do not have the obligation to refer a matter to the CJEU for a preliminary ruling that do so most often. The courts ruling in the last instance have no obligation to refer the

[13] *Rheinmühlen-Düsseldorf/Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, case 166/73, judgment of 16 January 1974, EU:C:1974:3, point 4.
[14] Jean Boulouis, *op. cit.*, p. 328.

matter to the CJEU if the reference is not necessary for the settlement of the dispute; the Court has already ruled in an identical or similar case or the *"acte clair"* theory is applied. If a national court questions the validity of a rule of European law, referral to the CJEU is mandatory regardless of the level at which that court judges.

The *"acte clair"* theory has been subject to a restrictive view by the CJEU. The meaning that the court holds with regard to the rule of European law that it applies must be imposed clearly on the courts of the other Member States and the CJEU; the judge should take into account several language versions of the rule and the proper meaning of the legal notions with which EU law operates. Recourse to the theory of *"acte clair"* should include the reasoning for the above requirements, and not just its statement. If they decide that a reference for a preliminary ruling is not necessary in order to resolve the case, the courts must justify the lack of usefulness, which implicitly involves the interpretation of the rule of European law.

3. Approach of the European Court of Human Rights. Case *Bio Farmland Betriebs S.R.L. v. Romania*

On 13 July 2021, the European Court of Human Rights ruled on the case *Bio Farmland Betriebs S.R.L. v. Romania*, on which occasion the procedure of references for preliminary rulings specific to the law of the European Union, was approached from the perspective of art. 6(1) of the European Convention on Human Rights.

On 30 May 2013, the applicant company brought an administrative dispute action before the Timișoara Court of Appeal, seeking partial annulment of a decision issued by the Arad Agricultural Payments and Intervention Agency (hereinafter APIA Arad). At the hearing on 9 September 2013, it asked the Court to refer questions to the CJEU concerning the provisions of European law which it considered relevant to the case. The request for referral to the CJEU was rejected and the claimant's action was admitted, with the result that the administrative act was annulled for failure to state reasons. The High Court of Cassation and Justice (hereinafter the HCCJ) admitted the appeal filed by APIA Bucharest and APIA Arad, quashed the sentence pronounced by the Timișoara Court of Appeal and sent the case for retrial to the Arad Tribunal, which it considered materially competent in the first instance.

At the hearing on 5 May 2015, the claimant requested the tribunal to refer questions to the CJEU concerning the interpretation of art. 18 of the EU Regulation no. 65/2011. The court rejected this request, arguing that a national court which had not settled the case definitively might refrain from making a reference for a preliminary ruling when it considered that it might interpret the European provisions itself or if the raised European law was not relevant in the case, or the answer to the questions followed from the case law of the CJEU. At the same

time, the Arad Tribunal noted that if the national court had doubts as to the compatibility of an internal rule with a European rule, the principle of the supremacy of European law allowed it, where appropriate, to eliminate the effects of the former. It therefore considered that it was not appropriate in that case to refer the matter to the CJEU, as requested by the claimant. On the merits, the tribunal admitted the action and annulled the challenged administrative decision.

The Court of Appeal admitted the appeal of the public institutions, quashed the tribunal's sentence and sent the case for retrial to the same court. By the judgment of 9 February 2016, the tribunal rejected the claimant's action.

The applicant company appealed against that judgment, arguing, inter alia, that the judgment had been delivered in breach of art. 16 and 18 of EU Regulation no. 65/2011 and the relevant European Union legislation, which was to prevail over national law. The appellant asked the Court of Appeal to make a reference for a preliminary ruling to the CJEU, since the interpretation of the applicable legal provisions and their compliance with European law were open to further interpretation. In its judgment of 28 October 2016, the Court rejected the claimant's appeal and, with regard to the request for referral to the CJEU, it held that it was not necessary to *discuss* it. The court found, regarding the merits of the case, that the provisions of Order no. 161/2012 were not contrary to the provisions of art. 18(1) letter b) of EU Regulation no. 65/2011.

The applicant company filed an appeal for annulment against the judgment of 28 October 2016, alleging failure to state reasons in that judgment. That appeal was rejected on the ground that the court of last instance had ruled on the request for reference for a preliminary ruling, rejecting it, and that the insufficient statement of reasons for that decision did not constitute an omission leading to the annulment of the decision.

In its admissibility control, the European Court of Human Rights found that the internal dispute concerned a right of the claimant recognized by the national legal order, that it had a property interest in question and that the outcome of the dispute could have repercussions on the claimant's work by the amount of the reduction of financial aid. The dispute therefore concerned a challenge to a right which could be claimed to be recognized under national law, the claimant's complaint being admissible.

The Court began its own reasoning by referring to the case law of the CJEU on the obligation of national courts against the decisions of which there is no judicial remedy under domestic law to refer the matter to the Court for a preliminary ruling. Paragraph 48 of the ECtHR judgment seems to be derived from the decisions of the Court of Justice of the European Union. In the hypothesis described above, the national court has an obligation to refer the matter to the CJEU. This obligation is not absolute and is removed if the question referred is irrelevant, the EU provision has already been interpreted by the Court, and where the correct application of European law obviously imposes itself and leaves no room for reasonable doubt.

The Convention does not guarantee the right to have a case referred for a preliminary ruling to the CJEU, but it makes it compulsory for domestic courts to give reasons for decisions refusing to refer questions for a preliminary ruling. National courts whose judgments can no longer be challenged under national law have the obligation to state reasons for their refusal to accept the exceptions provided for in the case law of the CJEU in their case, including an implicit reasoning accepted by the Court.

Applying these principles to the specific facts of the dispute, the Court emphasized that the questions referred had been formulated precisely and in accordance with the procedures required by national law. The national court which ruled in the last instance did not expressly refer to any of the three CILFIT criteria and there were no indications that the provisions of the relevant EU law had been interpreted by the CJEU. The European Court did not identify any elements that would have supported the Romanian Government's thesis that the Court of Appeal's ruling implicitly showed that the correct application of EU law was obvious and therefore the questions were not relevant. The national court's analysis of certain European rules relied on could not make up for the lack of any explanation for the refusal to refer to the CJEU with regard to other European rules. The fact that the tribunal had examined and rejected other questions referred by the claimant–appellant could not remove the Court of Appeal's obligation to state reasons, since the questions were not identical and in any event the tribunal's decision did not fall within the CILFIT criteria. "Therefore, in the Court's view, the reasoning of the Court of Appeal's decision does not make it possible to determine whether those questions were examined on the basis of the CILFIT criteria and, if so, in the light of which criterion or criteria the court of last instance decided not to refer them to the CJEU"[15].

4. Conclusions

The ruling of the European Court of Human Rights contributes to strengthening the legal institution of references for preliminary rulings. On the one hand, their use is encouraged by the Court of Justice of the European Union, which has given the national court a wide discretion power as to their necessary nature in resolving the dispute in the main proceedings and firmly entrenched the possibility for last instance courts not to refer matters to the Court by establishing the thesis of the CILFIT criteria. From the perspective of the European Convention on Human Rights, court decisions rejecting requests for references for preliminary rulings must be motivated according to the standards of the *fundamental right to a fair trial*, and the refusal of the courts whose judgments can no longer be challenged under national law must be based on the CILFIT criteria.

The motivation of decisions is the measure of a good examination of the

[15] Par. 55.

claims and evidence produced by the parties, of the depth and quality of the judgment. It concisely expresses the intellectual value and legal force of the judgment. Being the essence and the result of an entire jurisdictional stage, the statement of reasons offers the litigants a valuable tool of verification and control of the activity carried out in that jurisdiction.

The scope of the obligation to state reasons varies according to several factors, such as the nature of the decision, the diversity of the means that may be raised, the internal legislative provisions regarding the drafting and presentation of judgments, etc. The assessment of its observance is made in *concrete* terms by the ECtHR. The Strasbourg Court examines, in essence, whether the judge has *reasonably* fulfilled his obligation to state reasons. The magistrate is not bound to respond fully to all arguments put forward by the parties. The obligation concerns clearly and precisely stated claims, supported by evidence, as well as other relevant elements, which may have had a certain influence on the settlement of the dispute. In order to meet the requirements of a fair trial, the reasons must be express and appropriate to the case. At the same time, they can be concise and even implicit as to certain arguments.

It is essential for the national judge to make references for preliminary rulings when he needs an interpretation of European law, especially if he judges in the last instance. In the context of the judgment of the European Court of Human Rights in *Bio Farmland Betriebs S.R.L. v. Romania*, the decisions by which the courts reject the requests for referral to the CJEU must be motivated in accordance with the requirements established by the ECHR regarding the fair trial. The courts whose judgments can no longer be challenged under national law are called upon to give reasons for rejection decisions in accordance with the CILFIT criteria. *The most obvious practical effect of the ECHR judgment referred to in this article will be the obligation to analyze concretely and to motivate the conditions for the existence of "acte clair".* "[...] The national court or tribunal must be convinced that the matter (*the interpretation of the European rule* – our emphasis) is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it. However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise. To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law

and in the law of the various Member States. Finally, every provision of Community law must be placed in its context and interpreted in the light of all the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied"[16].

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[16] *CILFIT*, case 283/81, judgment of 6 October 1982, EU:C:1982:335, points 16 -20.

The Role of Precedent in International Arbitration

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Abstract

Given the characteristics of arbitration as an alternative dispute resolution method — among those most relevant here being the confidentiality/privacy of the procedure and party autonomy — do previous cases have a legitimate role in deciding a dispute? And, if so, should they play an important part in the economy of the decision? Are previous awards only persuasive authority or could Arbitral Tribunals be compelled to follow the reasoning of (certain) previous arbitral awards? The answer is not clear-cut. Some Arbitral Tribunals seem to give weight to the wide adoption of a certain award. Other, seem to be influenced by their own legal background (if any) in giving more or less weight to previous cases considering that civil law and common law approaches to case law are different. The applicable law, as per the parties' choice, is an issue too. And there is also the matter of the accessibility of the awards, which depends on the type of arbitration. As a matter of public interest, for investment arbitrations there are more awards available than in commercial arbitrations (given the inherent "cone of silence" surrounding the more private latter procedure). So, which of these factors should matter more? The objective of this present paper is not necessarily to give a definite answer, but rather to raise awareness on the issue for it to be properly addressed and considered by the parties to an arbitration, beforehand.

Keywords: *case law, international arbitration, confidentiality, privacy, party autonomy, common law, civil law, persuasive/mandatory authority, precedent.*

JEL Classification: K15, K33, K39, K49

1. Preliminary considerations

The arbitration community is rather neutral as a whole towards the fact that there is no binding precedent applicable as a rule. The process is similar in this respect to how cases are decided in civil law systems — in fact one of the

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few influences of civil law on the arbitration process considering that despite being a mix of both civil law and common law[2] arbitration seems to favor the latter[3,4,5].

There are, however, voices that say that the lack of mandatory case law either has negative influences on certain aspects, such as transparency[6], or that the adoption of such rule could have a positive influence on other aspects, like "issue-conflicts", by ensuring increased impartiality[7].

The present paper will address the role of precedent not so much as to make *lex ferenda* suggestions but rather analyzing the *status quo* to discern the decision-making process of considering, or not, previous case law in arbitration. Both from the parties' and the Arbitral Tribunal's perspectives, in order to raise awareness on the importance of this issue as a factor potentially affecting the outcome of an arbitration.

2. Relevant factors

Depending on their legal background (if any), the arbitrators and parties to an arbitration will likely have an inherent tendency to rely, or not, on precedents to base their decision, and, respectively, to build their case upon. It is not usually something openly talked about as it implies a certain degree of bias and they may not even be aware of it but it is reasonable to assume that such mindset is instilled by exposure (or lack thereof) to a certain legal system or certain professional formative experiences[8].

Thus, someone with a civil law background will be less inclined to even

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[2] See Rubinstein, Javier, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective," 5 *Chicago Journal of International Law* 303, 2004.

[3] Some consider it a "lex mercatoria" of sorts, assimilating different norms but of common law development. *See* Berger, Klaus Peter "Common Law v. Civil Law in International Arbitration: The Beginning or the End?", (2019), 36, Journal of International Arbitration, Issue 3, pp. 295-313.

[4] That is despite what other seem to deem to be a historical "hostility of common law to arbitration". *Compare* Wolaver, Earl S. "The Historical Background of Commercial Arbitration." *University of Pennsylvania Law Review and American Law Register* 83, no. 2 (1934): 132–46, p. 139. https://doi.org/10.2307/3308189, last visited, June 21st 2022.

[5] There are also many common law institutions that are relied upon in arbitration, from the way a case is managed in a rather adversarial way, to discovery or privileges. Interestingly, not attorney client privilege which is also allowed in civil law.

[6] Ariz, Emily F. "Does the Lack of Binding Precedent in International Arbitration Affect Transparency in Arbitral Proceedings?", 29 *U. MIA Int'l & Comp. L. Rev.* 356, 2021.

[7] A rather contentious opinion arguing that previous extensive exposure of an arbitrator to a certain subject (even through seemingly inconspicuous activities such as academic writing) inflicts unacceptable bias. *See* Lal, Hamish, Casey, Brendan and Defranchi, Léa "Rethinking Issue Conflicts in International Commercial Arbitration", *Dispute Resolution International,* Vol. 14 No. 1 May 2020, pp. 11.

[8] Choi, Stephen, Fisch, Jill E, Pritchard, Adam C., "The Influence of Arbitrator Background and Representation on Arbitration Outcomes" (2014). Faculty Scholarship at Penn Law. 1546.

look for precedent than someone used with the common law approach, or, in the case of the arbitrators, to rely upon precedent when deciding.

Unless, of course, it is a matter of mandatory authority, which is not something often found in arbitration, save for case law applicable to certain follow up procedures in domestic courts that follow precedent (*e.g.* at the stage of setting aside an arbitral award or in enforcement of foreign arbitral awards).

But, when it is a matter of persuasive authority for the Arbitral Tribunal to consider, there are many other factors to consider in even raising the issue of precedent not to mention in deciding upon it.

The most important contributing factors are briefly addressed below.

2.1. The availability of previous awards

A well-known and sought-after particularity of international arbitration, considered to be one if its most important advantages[9], is the confidentiality/ privacy[10] of the procedure.

It is this very characteristic (along with party autonomy) that keeps awards private in many instances. And in doing so it keeps them from becoming available to the public, undermining even the idea of a precedent. Granted, previous case law usually only has persuasive authority for Arbitral Tribunals. If it were to be deemed mandatory in the future, as some advocate for[11], the issue of availability of awards and implicitly that of the confidentiality/privacy of the procedure would have to be addressed first[12].

The accessibility of the awards also depends on the type of arbitration. In investment arbitrations, for example, more awards are available due to public interest, usually with the parties' acquiescence. In commercial arbitrations there is a larger "cone of silence" surrounding the arbitral procedure.

The current consensus, however, is that confidentiality/privacy are limited and there are exceptions regardless of the type of arbitration. It is not just up to the parties to decide if an award is made public. There are "public interest" exceptions, "judicial interest" exceptions, or even "mandatory disclosures".[13] In

[9] Ong, Colin, "Confidentiality of Arbitral Awards and the Advantages for Arbitral Institutions to Maintain a Repository of Awards", (2005), 1, *Asian International Arbitration Journal,* Issue 2, pp. 169-180.

[10] Usually considered the same, privacy and confidentiality are, however, different. While confidentiality refers to the nature of the proceedings, privacy refers to the duty imposed upon the participants to not disclose to thirds parties information from a certain arbitration. See Born, Gary, "International Commercial Arbitration", Kluwer Law International 2014, p. 2388.

[11] *Supra,* notes 6 and 7.

[12] There could ways to make awards public and still preserving the confidentiality/privacy, for example by the anonymization of the details of the parties.

[13] *See* Sarles, Jeffrey W., "Solving the Arbitral Confidentiality Conundrum in International Arbitration", available online at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/no-date/solving-the-arbitral-confidentiality-conundrum-in/files/confidentiali ty/fileattachment/confidentiality.pdf, last accessed June 22nd, 2022.

fact, in some cases, the parties were compelled by domestic courts of law to publish the awards despite their objections[14] and, in certain instances, even additional information[15] on the case.

Nonetheless, the problem is that even when awards are publicly available the underlying evidence presented in the previous cases is not always (or entirely) available. So, would they show the entire picture? Would the award present the details of the case to the extent that it could be used as precedent? What if the facts of the previous case or the evidence presented in it but not available distinguishes that case from the arbitration it is invoked in? Difficult (and unadvisable) to compare situations based only on partial information. Even if the award purports to contain all the relevant details, there is no certainty since the system is not design to give deference to precedents.

2.2. Party autonomy versus the inherent subjectivity[16] of the Arbitral Tribunal

Party autonomy, as one the most important characteristics of arbitration[17] is considered a "*guiding principle*"[18] ensuring that the parties' choice is the most important factor in deciding the applicable law[19] and the procedure to be followed[20].

Still, it is not limitless.[21,22] Not only are there extrinsic factors restricting it[23] - such as mandatory rules[24] - but also the Arbitral Tribunal enjoys a certain

[14] See *e.g.* Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich, 2003 and Symbion Power LLC v Venco Imtiaz Construction Company, 2017.
[15] See Dolling Baker v. Merrett and Another, (the „Dolling-Baker" Case), 1990.
[16] Some consider that there is a certain subjectivity of the arbitrators in interpreting the applicable law. See Gaillard, Emmanuel, "The Role of the Arbitrator in determining the applicable law", Leading Arbitrators' Guide to International Arbitration, 3rd Edition, Chapter 18, 2014.
[17] Livingstone, M.L. 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?', *Journal of International Arbitration*, Volume 25, Issue no. 5, 2008, pp. 529-535.
[18] Redfern, Alan and Hunter, Martin, with Blackaby, Nigel and Partasides, Constantine, "Law and Practice of International Commercial Arbitration", 4th edition, 2004 at p 315.
[19] See also Blessings, Marc, "Mandatory Rules of Law versus Party Autonomy in International Arbitration" Journal of International Arbitration, Volume 14, Issue 23, 1997.
[20] Berman, George A., "The "Gateway Problem" in International Commercial Arbitration", 37 *Yale Journal of International Law* 1 (2012)
[21] See Pryles, Michael, "Limits to Party Autonomy in Arbitral Procedure", *Journal of International Arbitration*, Volume 24, Issue 3, 2007, pp. 327-339, Wolters Kluwer.
[22] Some however, think that there are no limits in case of the autonomous theory of the nature of arbitration. *Compare* Yu, Hong-Lin, "A Theoretical Overview of the Foundations of International Commercial Arbitration", *Contemporary Asia Arbitration Journal*, Volume 1, Issue 2, p. 255, 2008.
[23] For the relation between party autonomy and extrinsic factors limiting it see Böckstiegel, Karl-Heinz, "The Role of Party Autonomy in International Arbitration, ICDR Handbook on International Arbitration, Chapter 9, 3rd Edition, 2017.
[24] See Hochstrasser, Daniel, "Choice of Law and Foreign Mandatory Rules in International Arbitration" *Journal of International Arbitration*, Volume 11, Issue 57, 1994.

(circumscribed) freedom in interpreting the law chosen by the parties.[25]

Thus, whether a decision in a certain arbitration is based on previous case law depends both on the parties to raise (or at least accept) it as well as on the Arbitral Tribunal to accept the argument. Cannot have one without the other. The parties could invoke a certain case, but the arbitrators do not have to follow it. At the same time, given the limits of the *Iura Novit Arbiter* principle, the arbitral tribunal is restricted in considering a certain legal reasoning (such as a previous case) without the parties' consent.

And there is also the problem of the agreement between the parties. Technically, previous cases are not *law* as there is no rule of precedent in international arbitration. So, does the fact the parties quote them in submissions makes them *law* based on party autonomy? Even if only one party invokes it? Perhaps it should have more weight if both parties agree that a certain case is potentially applicable. If the parties explicitly disagree, with one party asserting that a case applies and the other that it does not, than an Arbitral Tribunal relying on such a case would (arguably) exceed its powers by not respecting the parties' (common) choice of applicable law.

Issues could also be caused by the different legal background of the parties and the arbitrators. The civil law approach to precedent is different that the common law approach, with the latter giving more deference to it. This could be a factor influencing the decision[26] if those with common law background are more inclined to invoke and accept precedent.

And if multiple contradictory cases are invoked, how would arbitrators decide which to apply if they all address the same issues?

Some Arbitral Tribunals seem to think that the more "endorsements" a previous award has, the more important for subsequent cases it should be.[27] But this is not necessarily the case as there are so many factors potentially affecting the adoption. From the parties' choice not to invoke it under the assumption that there is no rule of precedent in international arbitration, to the time a previous award was issued and/or publicly released, to the (inherently subjective) interpretation of arbitrators with a "non-mandatory case law" mindset.

Whereas some practitioners[28] consider that the switch to a State mandated arbitration "court", like the "Multilateral Investment Court" proposed by the European Commission to replace the current arbitration-based Investor State

[25] *Supra*, note 16.
[26] *Supra*, note 8.
[27] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6 – Decision on Jurisdiction and Admissibility, para 161.
[28] *See e.g.* Popa Tache, Cristina Elena, "Adapting an Efficient Mechanism for Resolving International Investment Disputes to a New Era. Vienna Investment Arbitration and Mediation Rules", in *International Investment Law Journal*, Vol.1, Issue 2, 2021, pp. 92-102.

Dispute Settlement (ISDS) system[29], would give more weight to precedent in (investment) arbitrations. However, — although apt to solve the Investor-State problems caused by the European Union (EU) legal framework[30] — if adopted in its current form, the proposal would, most likely, give rise to a regional institution since there are important international voices that have already expressed concerns for such a move[31]. In any way, the extrapolation to international commercial arbitration would probably prove complicated.

But, even if an award were universally adopted as precedent up to a point, making it "case-law", shouldn't the parties/arbitrators in (following) arbitrations still be able to choose the applicable law independently of what others (even if a majority) decided before them? It seems incompatible with the very nature of arbitration to do otherwise.

3. Conclusion

For a "rule of precedent"[32] to apply in international arbitration, some[33] say there should be "autonomy" of the arbitral decisions (as in non-revisable in any situation), "consistency" (as in legal coherence from one arbitral award to the next)[34] and "accessibility".[35] But this is not the case. There is no rule of precedent in the international arbitration *status quo*, despite the fact that arbitrators "tend to

[29] For details on the proposed Multilateral Investment Court see the European Commission's website at: https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en, last accessed August 18, 2022.

[30] Such as the United States (U.S.) who raised concerns about the proposed changes to the ISDS system. For details, see the December 2019 analysis on the "United States–United Kingdom Trade and Investment Working Group from 2018", published on the International Institute for Sustainable Development's website at https://www.iisd.org/itn/en/2019/12/17/u-s-officials-raise-concerns-over-proposed-mic-in-talks-with-the-united-kingdom-documents-say/, last accessed August 18, 2022.

[31] Some treaties signed by EU member States were deemed inoperative under the EU legal framework. In the Achmea B.V. Judgement (Case C-284/16) the Court of Justice of the European Union (CJEU) found that Romania's consent under previous BIT was inoperative after its ascension to the EU, invalidating arbitration awards rendered based on BIT signed pre-ascension to the EU. For details see the Micula Saga. (Micula v. Romania).

[32] See Béguin, Nicolas 'The Rule of Precedent in International Arbitration', *Jusletter*, (5 January 2009). Available online at https://aegis.ch/wp-content/uploads/2021/03/002-The-Rule-of-Precedent-in-International-Arbitration.pdf Last accessed June 22nd, 2022.

[33] *Idem*.

[34] Kaufmann-Kohler, Gabrielle "Is Consistency a Myth?", IAI Series on International Arbitration, No 5, p. 137, Juris Publishing, 2008.

[35] *See* Fouchard, Gaillard, Goldman on International Commercial Arbitration 184, Emmanuel Gaillard & John Savage eds, 1999, at p. 200, n. 374.

rely on previous cases"[36,37]. To change it, the arbitration community would have to override a long-standing tradition.

There is a rather widespread current of opinion[38] that this is (and should be) where the international arbitration is heading.[39,40,41] Though, in our view, despite obvious advantages, *e.g.* predictability, imposing a "rule of precedent" in international arbitration would not (necessarily) be a good thing as it would restrict the freedom of the Arbitral Tribunal to decide with a fresh mindset, undermining not only one of the most important advantages of arbitration — the very fact that it is removed from courts systems and their limitations — but one of its main characteristics, *i.e.* the parties' choice of applicable law as an assertion of party autonomy.

In the meantime, even for those neutral on this issue, the sensible approach is to raise awareness given the potential importance for the outcome of an arbitration, like the present paper aims.

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[36] Sicard-Mirabal, Josefa, "Precedential Value of International Arbitral Awards", Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015, Chapter 4, pp:72–86, DOI: https://doi.org/10.1163/9789004334557_006.

[37] Some go as far as to say that, for example, in investment arbitration arbitral precedent is the main source of international law. See Norton, Patrick M, "The Role of Precedent in the Development of International Investment Law", *ICSID Review - Foreign Investment Law Journal*, Volume 33, Issue 1, Winter 2018, pp. 280–301.

[38] Presumably, most of those supporting it have a common law background.

[39] Ford, Cameron, 'The Lost Precedents of Arbitration', (2022), 39, *Journal of International Arbitration*, Issue 1, pp. 29-60.

[40] Dhawan, Pulkit "Application of Precedents in International Arbitration", (2021), 87, *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Issue 4, pp. 550-574.

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Alternative Dispute Resolution in Construction Contracts

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Abstract

The construction domain is predisposed to disputes, due to the complexity of contractual relations and the multiple parties involved, Alternative Dispute Resolution *(„ADR"*) is used for avoiding prolonged and expensive litigation and maintaining a collaborative relationship between the parties[2]. *The construction industry is one of the best examples for ADR use, no matter if we are discussing: general procedures such as negotiation/mediation or specific tools for this field such as: early neutral evaluation, expert determination, dispute adjudication board, dispute review board, mini-trial or partnering. The purpose of this paper is to present some of the less popular construction ADR methods and their key role in dispute avoidance and minimisation of damages*. The research methods comprise a comparative analysis of legislation, doctrine and studies at an international level. The topic's practical importance is constantly increasing due to the legislative changes that lead to an increased number of construction works that require, above all, efficiency.

Keywords*: construction contracts, alternative dispute resolution, construction adjudication, expert determination, partnering techniques.*

JEL Classification: K12

1. Introduction

The construction domain and especially infrastructure contracts are predisposed to disputes[3], due to several factors[4]: complexity of contractual relations, the use of standard contracts, multiple parties involved[5], late performance, poor contract management, owner/contractor/subcontractor failing to understand or comply with its contractual obligations, errors or omissions in the contract documents, failure to make interim awards on extensions of time and compensation,

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[2] Giuditta Cordero-Moss, *International Commercial Arbitration, Different Forms and their Features*, Cambridge University Press, 2013, p. 310.

[3] Sigvard Jarvin, Yves Derains, *ICC Arbitral Awards 1974-1985*, ICC Publication nr. 433, Ed. Icc Publishing SA Paris, 1990.

[4] Pinsent Masons' and Queen Mary University of London, School of International Arbitration, *Special Report International Arbitration in Cosntruction*, 2019, available at https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey; *Readjusting Risks: CMS International Construction Survey, Londom* 2021, available at https://cms.law/en/gbr/publication/readjusting-risks-cms-international-construction-survey-2021, accessed June 5, 2022.

[5] Thomas Webster, *Handbook of ICC Arbitration, Commentary, Precedents, Materials*, Sweet and Maxwell, Lomdon, 2021, p. 32.

quality of Works.[6]

Other risks may refer to weather or unexpected site conditions[7], personnel problems, errors in cost estimating and scheduling, delays, financial difficulties, strikes, faulty materials.[8]

Understanding and managing risk is essential for wisely choosing an ADR mechanism and are the basis of a successful contract.[9]

There is a lack of an uniform approach towards ADR in construction contracts at an international level. the exception is given by the treaties regarding investments, which include, *lato sensu*, also provisions regarding the resolution of disputes in this field, only when the investment qualifies to fall under the protection of the applicable treaty.[10]

Formal Role of ADR (other than arbitration) could be diminished if parties had an adaptable ADR framework to address the evolving construction ecosystem and the transformation of the industry is needed.

Parties acknowledging ADR's potential for adaptability and innovation in managing a construction contract would meet the general purpose of dispute avoidance and offer protection against abusive ADR clauses.

2. Increased volume of construction works

We have to consider the magnitude of the construction field in the EU and in general, at an international level.

For example, the building sector is the single largest energy consumer in the EU and the EU construction sector provides 18 million direct jobs and contributes to about 9% of the EU's GDP[11].

The European Commission stated on multiple occasions that its goal is to transform the sector into one that is more resource efficient and sustainable.[12]

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[6] Marin Voicu, *Arbitrajul Comercial, Jurisprudența comentată și adnotată*, Universul Juridic, Bucharest, 2014, p. 48.

[7] Julian Bailey, *What lies beneath: site conditions and contract risk,* Society of Construction Law Paper 137. 2007.

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[9] Arent van Wassenaer, *The Big Risk Game- a simple tool to understand project risks and work together better*, Construction Law International 2009, vol. 4, no, 3, p. 1-4.

[10] Cristina Elena Popa Tache, *Legal treatment standards for international investments. Heuristic aspects*, Adjuris – International Academic Publisher, 2021, Bucharest, Paris, Calgary (E-Book), p. 73 et seq. and Cristina Elena Popa Tache, *Adapting an Efficient Mechanism for Resolving International Investment Disputes to a New Era. Vienna Investment Arbitration and Mediation Rul*es, „International Investment Law Journal", Vol.1, Issue 2, 2021, pp. 92-102.

[11] European Climate Pact, *Green Buildings,* available at https://europa.eu/climate-pact/about/priority-topics/green-buildings_en, accessed June 2, 2022.

[12] European Comission, *A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives*. Brussels 2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0662&rid=5, accesed June 25 2022.

The construction sector is undergoing major legislative changes related to the Renewable Energy Directive (RED) established a binding EU target for renewable energy.

Also, the European Climate Law[13] sets a legally binding target of net zero greenhouse gas emissions by 2050.

Moreover, on December 15, 2021, the European Commission drafted a Proposal for a Directive of the European Parliament and of the Council on the energy performance of buildings.

The "*Fit for 55*" legislative package announced in the European Commission 2021 Work Program aims to implement those objectives.

The EU Institutions and the Member States are bound to take the necessary measures at EU and national level to meet the target.

By 31 December 2023, the Commission shall establish a common European framework for renovation passports and by the next year Member States shall introduce a scheme of renovation passports.

In order to ensure an effective implementation of the provisions laid down in the Directive, the Commission supports Member States through various tools, such as the Technical Support Instrument.

The technical support relates to, for example, strengthening of administrative capacity, supporting policy development and implementation, and sharing of relevant best practices.

Ultimately, there will be a need for legislative support for the inherent disputes that will arise from all this construction works caused by buildings undergoing major renovation and creating a legal framework for ADR could be a viable option.

3. Alternative dispute resolution in construction contracts

ADR refers to non-judiciary procedures and usually consists of: (i) binding (adjudicative), (ii) non-binding (consensual) and (iii) hybrid forms.

ADR is defined by the European Commission as "*any out of court dispute resolution process which is conducted by a neutral third party, excluding arbitration*". The definition refers to either dispute resolution procedures that are entrusted by the court to a neutral or used by the parties by agreement.[14]

Arbitration is well regulated by different institutional rules, some that specifically address construction arbitration. Arbitration is the preferred method

[13] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ('European Climate Law'), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R1119, accessed June 18, 2022.

[14] European Comission, *Green Paper on Alternative Dispute Resolution*, 2002, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52002DC0196&from=EN, accessed June 12, 2022.

of dispute resolution for construction disputes[15], followed closely by adjudication (usually when compulsory such as in the United Kingdom[16]).

Also, arbitration is supported by many other instruments such as the New York Convention[17] and the Uncitral Model Law. S*oft law*[18] plays an important role as well.

Arbitration is implemented in most construction contracts as the alternative for national courts[19]: FIDIC[20], NEC, JCT[21], ICE, CECA, DBIA[22], Government Decision no. 1/2018, applicable in Romania.

Other types of ADR used in the construction field are: mediation, conciliation, negotiation, adjudication, dispute adjudication boards[23], *early neutral evaluation*, *mini-trial*, med-arb/med then arb/arb-med, voluntary settlement conference, court appointed experts, special master/settlement judge; judge pro term, trial by reference (referee), partnering, expert determination/expert witness, private judge, standing or project neutral/on site neutral, temporary judge, owner/ agency review board.

Some, such as mediation, conciliation and negotiation are generally used in multiple fields of activity and are regulated by different national laws.[24]

Negotiation implies the problem-solving efforts of the parties. Mediation and conciliation involve a third-party intervention, who assist the parties to achieve a settlement, but it does not lead to a binding decision being imposed on the parties.[25]

Mediation is described as 'facilitative' since the mediator generally

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[15] Stavros Brekoulakis, David Brynmor Thomas, *The Guide to Construction Arbitration*, „Global Arbitration Review", London, 2017, p. 81.

[16] Statutory adjudication was introduced by the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996).

[17] Rolf Schutze, *Institutional Arbitration, Article by Article Commentary*, C.H. Beck, 2013.

[18] See for example: IBA Guidelines; Unidroit Principles; ICC Technique/Checklists; CPR International Institute for Conflict Prevention and Resolution- Guidelines for Arbitrators Conducting Complex Arbitrations, American Bar Association - The Code of Ethics for Arbitrators in Commercial Disputes; International Centre for Dispute Resolution (ICDR) Guidelines for Arbitrators Concerning Exchanges of Information.

[19] Ellis Baker, Ben. Mellors, Scott Chalmers, Anthony Lavers, *FIDIC Contracts: Law and Contracts*, Informa Law from Routledge, London, 2009, p. 525.

[20] Federation Internationale des Ingineurs-Conseils, founded in Belgium in 1913, Jeremy Glover, Simon Hughes QC, *Understanding the FIDIC Red Book: A Clause-by-Clause Commentary*, 2nd ed., Sweet & Maxwell, London, 2011, pp. 16-19.

[21] The Joint Contracts Tribunal Limited, *Practice Note- Deciding on the appropriate JCT* contract, 2011, Ed. Sweet & Maxwell, London, p. 4.

[22] The Joint Contract Tribunal (JCT); the New Engineering Contract (NEC); the Civil Engineering Contractors Association (CECA); DBIA (the Design Build Institute of America).

[23] For Romania see Crenguța. Leaua, Flavius Antoniu Baias, *Arbitration in Romania, A Practitioner's Guide*, Wolters Kluwer, 2016; p. 480; Gwyn Owen, Brian Totterdill, *Dispute Boards: Procedure and Practice*, ICE Publishing, London 2007 p. 256.

[24] See for example, Mediation Law no. 102/2006, applicable in Romania.

[25] Nicholas Gould, Phillip Capper, Giles Dixon, Michael Cohen, *Dispute Resolution in the Construction Industry*, Thomas Telford Publishing, London, 1999, p. 39.

avoids expressing an opinion or recommendation. In conciliation the conciliator will evaluate the parties' cases and make recommendations based on his or her view. Conciliation is therefore described as an 'evaluative' process.[26]

Others, such as adjudication and dispute boards, are specific to the construction field. In adjudication a third party, the adjudicator, imposes a binding decision on the parties, unless or until the dispute is finally determined by arbitration.

The rest of the ADR methods bear similarities to other types of ADR, with just some detailed features that set them apart, or are a mix of two or more ADR methods. They either involve a third neutral or represent a simulation of the dispute, which allows the parties to be aware of the possible outcome.

Some arbitration institutions, such as ICC[27] Paris, have specific rules for these types of ADR (E.g. dispute boards and expert determination).

In 2016 the most popular methods to resolve disputes in construction domain were the direct negotiation, arbitration and mediation[28].

3.1. Dispute boards

Dispute boards (usually a panel of three) are set up upon concluding a construction contract, to help parties avoid or overcome any disagreements or disputes that arise during the implementation of the contract.[29]

As usual with ADR, the parties have a choice regarding the type of decision issued by the board. Dispute Boards can provide informal assistance, or they can formally issue a decision (conclusion).

Dispute Adjudication Boards (DABs) issue decisions that must be complied with immediately. On the other hand, Dispute Review Boards (DRBs) issue recommendations, leaving the parties with the choice of objecting or not. Combined Dispute Boards (CDBs) offer an even more personalized decision, upon the parties' criteria in different hypothesis.[30]

The Dispute Board is involved through the whole duration of the execution of the contract. At the beginning of the activity, after consulting the parties, a program of meetings and site visits is established. Moreover, the Dispute Board can issue conclusions on how the parties have fulfilled their obligations, adopt interim/conservative measures and in general take any other measures necessary

[26] *RICS Dispute Resolution toolkit: Construction Disputes,* available at https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/regulation/drs/toolkit/construction-disputes.pdf, accessed June 20, 2022.

[27] International Chamber of Commerce.

[28] Constanța-Nicoleta Bodea, Augustin Purnuș, *Legal implications of adopting Building Information Modeling (BIM)*, „Juridical Tribune – Tribuna Juridica", Volume 8, Issue 1, March 2018, p. 67.

[29] https://iccwbo.org/dispute-resolution-services/dispute-boards/.

[30] ICC Dispute Boards, available at https://iccwbo.org/dispute-resolution-services/dispute-boards/, accessed June 8, 2022.

for the performance of its function. The procedure is detailed in the ICC Rules.[31]

3.2. Expert determination

Experts are usually used for deciphering engineering standards, analyzing schedule delays and determining the root causes for faulty works.[32]

There are different ways in which an expert can be involved in a construction case and one of them is the procedure of an expert determination. In this case, the expert has a different role than in the case of an arbitral tribunal appointed expert or an expert consulting the parties during arbitration or another type of ADR.

In the procedure of expert determination, the dispute is entrusted to one or more independent experts who will take a decision on the subject in question (usually when disputing technical issues).

Expert determination is used when the parties want an objective assessment of the issues in dispute by a neutral third party, which has the necessary (technical) knowledge. It is a flexible, confidential, fast and less expensive procedure compared to arbitration or adjudication.

The advantages are the following: maintaining the relationship between the parties and continuing the project, limiting damages, avoiding disputes. The parties can agree that the expert's decision be final and binding.

However, the expert's decision, the same as the those obtained through other types of ADR, cannot be enforced directly, as an arbitral award.

The expert will use his knowledge in the field and is not limited by the evidence brought by the parties.

Unless the parties agree otherwise, the decision of the expert shall not be motivated.

Other features of the procedure are: (i) the procedure is confidential; (ii) the procedure is based on the agreement of the parties; (iii) there are institutions (for example ICC Paris) that have their own rules to which the parties may refer; (iv) the outcome may be a starting point for negotiations between the parties.

The parties may agree to appoint an expert from the ICC International Center to issue a binding decision or an opinion, followed, if there is the case, by arbitration[33].

The Center can supervise both the selection process and the procedure before the expert.

It is essential that the parties identify the terms of the contract or types of

[31] ICC Dispute Board Rules, available at https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/.

[32] Stavros Brekoulakis, David Brynmour Thomas, *The Guide to Construction Arbitration, Global Arvbitration Review*, Law Business Research Ltd. London, 2017, p. 84.

[33] ICC Expert Determination, available at https://iccwbo.org/dispute-resolution-services/icann-gtld-process/expert-determinations/, accessed June 6, 2022.

disputes for which they wish to determine the expert.

The expert must draw up in writing the Expert Mission, after consulting the parties (as well as in the event of any change).

The expert and the parties must make every effort to limit the duration and costs of the procedure.

A feature of the ICC expert determination is that the expert will not communicate the Report directly to the parties, who will receive the final form, agreed by the Center.

3.3. Early neutral evaluation. Mini-trial. Partnering

Early neutral evaluation is a process in which a neutral usually an attorney, hears a summary of each party's claims, analyzes documents brought to him and gives a non-binding assessment of the merits. This can then be used as a basis for settlement or for further negotiation. There are several variations of this method, their common ground being an early analysis done by a trusted professional, which avoids the event from escalading and leading to severe consequences as in the case of waiting until arbitration.

Quite similar, the ***mini-trial*** refers to the situation in which one or more parties, usually through legal or technical adviser make a presentation of their case in front of a panel. The panel generally consists of three members – a management executive from each party (with sufficient authority to reach a settlement, but who was not involved in that case), and a third party neutral who may act as a mediator or adviser.

The purpose of both is to reach a settlement on a certain issue and carry on with the project.

Partnering is a general term covering practices that are designed to promote greater co-operation between all parties involved in a construction contract with the sole-purpose of the project's being successfully finalized.

Partnering principles can be incorporated in a multiparty contract or only in some concluded between the entities involved in a construction project.

Regardless of the contractual nature of the party's obligation to cooperate for dispute avoidance, it can be difficult to enforce it in practice. The reality is that partnering can only be effective if those involved truly believe in these practices and wish for a successful outcome.[34] Those involved should have a meeting prior to concluding the contract and discuss introducing collaboration principles and their view of them.

[34] Conflict Avoidance and Dispute Resolution in Construction, 1st ed, 2012 p. 10, available at https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/construction/black-book/conflict-avoidance-and-dispute-resolution-in-construction-1st-edition-rics.pdf.

4. Conclusion

No matter the chosen type of ADR and the moment they opt for it, the parties have a contractual obligation to comply with recommendations and decisions and their agreed characteristics.

ADR, other than arbitration and adjudication can be successfully used for dispute avoidance in construction contracts. Parties should seek taking measures prior to the conclusion of the contract, and implement a customized, multi-tier and flexible ADR mechanism.

ADR options should be mixed and adapted for every case in particular and the involvement of neutral third parties should be sough as soon as an event that might cause a dispute emerges.

Moreover, the contract should stipulate concrete sanctions for parties breaching the obligation to collaborate and ways of enforcing the obligations to cooperate.

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17. The Joint Contracts Tribunal Limited, Practice Note - Deciding on the appropriate JCT contract, 2011, Ed. Sweet & Maxwell, London.
18. Thomas Webster, *Handbook of ICC Arbitration*, Commentary, Precedents, Materials, Sweet and Maxwell, Lomdon, 2021.

Accelerated Arbitration: An Expedited Method of Resolving Disputes

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Abstract

When we speak of international commercial arbitration, we refer to arbitration that has as its object the resolution of commercial disputes on an international scale, between individuals or legal entities, whether these are companies or even States. In the vast majority of situations, we are dealing with commercial relationships of the most diverse nature, including international purchase and sale contracts, large-scale contracts, and license agreements in the field of intellectual property, among others. The advantages of international arbitration lie in its effectiveness when confronted with state justice, due to the neutrality of the arbitration forum, the precise knowledge of the arbitrators, the greater flexibility of the arbitration process, confidentiality, among others. However, it turned out that, in reality, there are problems. Over the last few years, the players have expressed some concerns, especially about the costs and the extension of procedural deadlines, which has made arbitration less appealing and increasingly equated with the justice of state courts. It should be noted that medium-sized companies are the most affected, either because they do not have the possibility of accessing this form of justice, not knowing it, or because they consider it to be very costly in view of the procedural costs it entails. With the purpose of harmonizing expedited arbitration, UNCITRAL created and made available on September 19, 2021, the Expedited Arbitration Rules that can be adapt by the parties. The figure of accelerated arbitration comes, therefore, to present itself as an optimized and simplified process, showing shorter deadlines so that disputes can be resolved quickly and economically. Given the novelty and importance of the subject, we intend to reflect on this new arbitration modality and its consecration by the most prestigious arbitration institutions, e.g. international Chamber of Commerce; American Arbitration Association; Arbitration Institute of the Stockholm Chamber of Commerce; Swiss Arbitration Association.

Keywords: *accelerated; arbitration; commercial; disputes; procedural celerity.*

JEL Classification: K41

1. Introduction

Arbitration is, without a doubt, the preferred means of resolving disputes in the context of international trade.

The success of arbitration is based, mainly, on two fundamental characteristics: one is the enforceability of arbitral awards, facilitated by one of the most successful instruments in the world, the 1958 New York Convention (CNY) on

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the recognition and enforcement of foreign arbitral awards[2]. The other is the avoidability of national judicial courts, thus overcoming the lack of speed of the latter and the necessary impartiality/neutrality that the parties aim for in an international arbitration[3]. In addition to the specialized knowledge of the arbitrators and flexibility regarding the applicable law in international arbitrations.

The Queen Mary University of London, in research prior to 2021, said that arbitration, either as an autonomous option or in conjunction with another means of extrajudicial dispute resolution, was identified as the preferred mechanism for resolving international disputes.[4] In its 2021 survey, it again underlines the unquestionable preference for arbitration as a means of resolving cross-border disputes.[5]

Despite the success that has been reported, it should not be thought that refereeing is immune to criticism. The high costs of the arbitration process[6] show

[2] The CNY 1958 allows international arbitration to have a role that goes beyond the recognition and enforcement of arbitral awards. On the one hand, the Convention also regulates arbitration agreements and their effects in relation to the competence of national judicial courts to decide on the merits of the matter, excluding it. On the other hand, we can say that it operates a division of roles between the various orders in presence. The CNY assumes that international arbitration has a headquarters, a location with a specific origin and, therefore, in a way linked to national laws. Despite the criticisms, this aspect was very important to understand which national legal systems may be involved. It adopted the idea of a foreign judgment integrated in a national legal system (country of delivery of the sentence). See article V, 1 of the CNY. We cannot forget that this is an instrument with more than 135 ratifications, which reflects its acceptability and application.

[3] Gerbay, R. (2014). *Is the end nigh again? An empirical assessment of the "Judicialization" of International Arbitration.* „The American Revue of International Arbitration", Volume 25, nº 2. Center of International Commercial and Investment Arbitration, Columbia Law School, pp. 223-247; Florescu, C. I. (2020). *Emerging tools to attract and increase the use of international arbitration*, „Juridical Tribune – Tribuna Juridica", Vol. 10, Issue 2, p. 256.

[4] See the results of 2018 International Arbitration Survey: The Evolution of International, The status quo: "*97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%). "Enforceability of awards" continues to be perceived as arbitration's most valuable characteristic, followed by "avoiding specific legal systems/national courts", "flexibility" and "ability of parties to select arbitrators". "Cost" continues to be seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of power in relation to third parties" and "lack of speed". An overwhelming 99% of respondents would recommend international arbitration to resolve cross-border disputes in the future".*

[5] In particular, an overwhelming majority of the respondent group (90%) showed a clear preference for arbitration as their preferred method of resolving cross-border disputes, either as a standalone method (31%) or in conjunction with ADR (59%). Only an aggregate of 4% is equally split between 'ADR only' and 'cross-border litigation' as standalone options, while 6% indicated a preference for 'cross-border litigation together with ADR'.

[6] International arbitration should be cheaper for the simple reason that, as a rule, it is currently not possible to appeal the arbitral award. Although this factor contributes to the speed of arbitration justice and, consequently, to a greater ease in the enforceability of arbitration decisions, the main complaint about international arbitration, in the last two decades, lies, above all, in its cost, with special emphasis on the attorneys' fees for the parties, followed by experts' fees. Not forgetting the administrative costs paid upfront in institutionalized arbitrations.

the highest number of criticisms leveled at it, followed by the absence of sanctions for irregularities committed in the arbitration process, inefficiencies on the part of the arbitrators and little procedural celerity[7]. The latter has gained prominence in recent times, given the possibility of extending the deadlines provided for in many of the laws that regulate voluntary arbitration, whether from a state source or from an institutional source.[8]

In this sense, in an attempt to overcome the existing malaise regarding "traditional" arbitration, several institutions created "Fast-Track Arbitration" mechanisms. We speak, in particular, of the Swiss Rules of International Arbitration of Geneva by the Chamber of Commerce, Industry and Services (CCIG) that, incidentally, pioneered the introduction of rules for expedited proceedings.[9] Other regulations from other entities follow, albeit a little later.

It is worth noting the Arbitration Rules of the International Chamber of Commerce, ICC[10], o Rule of the Court of Arbitration of the Official Chamber of Commerce, Industry and Services of Madrid[11], Commercial Arbitration Rules and Mediation Procedures da American Arbitration Association[12] and the Rules for Expedited Arbitrations do Arbitration Institute of the Stockholm Chamber of Commerce[13].

In this scenario, the United Nations Commission for International Commercial Law, UNCITRAL, also introduced, in September 2021, the Expedited Arbitration Rules (UNCITRAL EA Rules), although it is a soft law text, aimed only at *ad hoc* arbitrations.

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[7] Chan S.C., Leng Sun, Tan, W. (2013). *Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief.* „Contemporary Asia Arbitration Journal", Vol. 6, No. 2, pp. 349-371 Available: https://ssrn.com/abstract=2397661.

[8] CFR. Portuguese Voluntary Arbitration Law (2011); Spanish Arbitration Act (2003), amended in 2011; French Civil Procedure Code, Book IV – Arbitration (amended 2011); CCI Arbitration Rules (2021); Swiss Rules of International Arbitration (2021); UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Swiss Rules of International Arbitration, Article 42. Available at: https://www.swissarbitration.org/wp-content/uploads/2021/12/Swiss-Rules-2021-EN-1.pdf.

[9] Scherer, M. (2005). *Acceleration of Arbitration Proceedings – The Swiss Way: The Expedited Procedure under the Swiss Rules of International Arbitration*, in Jörg Risse, Guenter Pickrahn, et al. (eds), SchiedsVZ. „German Arbitration Journal", Kluwer Law International; Verlag C.H. Beck oHG 2005, Volume 3 Issue 5, pp. 229-238. Available at: https://newsite.lalive.law/wp-content/ uploads/2017/07/msc_acceleration_of_Arbitration_Proceedings.pdf.

[10] ICC Rules of Arbitration, Article 30: Expedited Procedure. Available at: https://iccwbo.org/ dispute-resolution-services/arbitration/rules-of-arbitration/.

[11] The 2020 Rules apply to arbitrations commenced on or after 01 September 2020 until 01 February 2022 included, "*51. Fast Track proceedings, 1. The parties may agree to have the arbitration proceedings governed by the fast track proceedingsestablished in this article "(...).* https://www. arbitramadrid.com/wp-content/uploads/2022/01/Reglamento-CAM-2020-ENG-PDF.pdf.

[12] Commercial Arbitration Rules and Mediation Procedures, Expedited Procedures, pp. 34-38. Available at: https://adr.org/sites/default/files/Commercial%20Rules.pdf.

[13] Rules for Expedited Arbitrations do Arbitration Institute of the Stockholm Chamber of Commerce. Available at: https://sccinstitute.com/media/178161/expedited_arbitration_rules_17_ eng_ web.pdf.

In this way, we aim to achieve an efficient framework in the face of requests from players, trying to optimize the respective cost-benefit of arbitration, not neglecting the quality of decisions.

We intend to demonstrate the main guidelines of this "sub" type of voluntary arbitration, highlighting some precautions to be taken into account when choosing it.

2. Arbitration efficiency *versus* some dilemmas

The parties, in the international trade context, when intending to enter into their contractual relations, must pay special attention to the clauses relating to the resolution of future disputes that may arise from the contract. It should be noted that, most of the time, the parties do not know each other, they are not based on the same continent, and they belong to different legal systems, therefore, they must seek to prevent possible conflict situations.

Consequently, the use of arbitration, together or not with other means of extrajudicial resolution ends up promoting the desired predictability and legal certainty.

It should also be underlined the fact that the parties, normally companies (which are essentially business-to-business relationships), intend to be successful in their contractual relationships, avoiding the search for new business partners. This search, besides generating costs, also entails uncertainties. In other words, each contract presupposes its own *modus operandi*, requiring special care in the elaboration of its clauses, e.g. the prevention of possible disputes through "multi-tiered dispute resolution clauses" (escalation clauses[14]).[15]

As it has been established, mainly due to the influence of the Model Law on international commercial arbitration, the arbitration decision can only be challenged through an annulment action, making dilatory maneuvers unfeasible and, therefore, generating speed in the delivery of arbitration decisions. (Article 34 UNCITRAL Model Law on International Commercial Arbitration).

In the context of international arbitration, the issue of the law applicable to the merits of the case is also of special importance[16]. Among the various possibilities available to the international arbitrator, it is important to highlight the

[14] Kayali, D. (2010). *Enforceability of Multi-Tiered Dispute Resolution Clauses*. „Journal of International Arbitration", Volume 27, Issue 6, pp. 551-577. Available at: https://doi.org/10.54 648/ joia2010033.

[15] The escalation clause is a means by which the parties to a contract can provide that any disputes will be resolved successively by alternative means of conflict resolution. It is intended, with the hypotheses listed in this contractual clause, to resolve the dispute effectively, saving time and the psychological wear and tear that litigation entails.

[16] Lando, O. (1991). *The Law Applicable to the Merits of the Dispute.* In Sarcevic (ed.), Essays on International Commercial Arbitration, Boston, London 1991, at pp. 129 et seq. Available at: https://www.trans-lex.org/114900.

uses and customs of international trade[17] although sectorial, national rules, neutral and easily understood by operators of international trade, which, in addition to the characteristics of flexibility and adaptation to the dynamics of this type of relationship, allow for fair and equitable solutions for the parties[18].

The principle of the parties' autonomy of will in choosing the applicable law as well as some discretion left to the international arbitrator, especially in the absence of that choice, make this mode of justice one of the most appealing.[19] Added to this is the harmonized and, therefore, predictable regime regarding the recognition and enforcement of foreign arbitral awards implemented by the CNY, which is responsible for the greater success of arbitration.

In addition to the aforementioned advantages, arbitrations, especially international ones, have been increasingly prolonged in time due to the complexity of the cases, the large number of documents to be analyzed by the arbitrators and the need to hear experts and witnesses.

According to the typology of voluntary, institutional or *ad hoc* arbitration, the very course of the arbitration process and procedures will have an impact on the time of the arbitration. It should be remembered that the former has an administrative structure capable of supporting arbitration, while the latter assumes that all procedural activity is incumbent upon the parties, their representatives or whomever they designate for the purpose. The greater onerousness of the first is opposed to the lesser of the second.

As for this last note, excessive onerousness of arbitration, especially international, we verified that, at first, the situation depends on the chosen entity, on the administrative costs to be paid to the arbitration administrator, then assuming a special expressiveness in the expenses with the travel of the various parties involved in the process and their respective fees. In *ad hoc* arbitration, of course, the cost will depend on the place chosen for its proceedings, plus the costs of lawyers, arbitrators and administrative support expenses. The latter are of lesser

[17] We are referring to *lex mercatoria*. Berthold Goldman defined it as a set of customary principles and rules, spontaneously created in the context of international trade, without reference to a particular system of any national law.

[18] Fiorati, J. J. (2004). *A lex mercatoria como ordenamento jurídico autônomo e os Estados em desenvolvimento*. „Revista de Informação Legislativa", Volume 41, nº 154, pp. 17-30.

[19] UNCITRAL Model Law on International Commercial Arbitration. *Article 28. Rules applicable to substance of dispute: (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. (3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so. (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction*.

importance when compared to institutional arbitration[20].

We are facing therefore a favorable environment for the emergence of a more agile arbitration, in terms of time and costs.

3. Expedited arbitration

We note that arbitration has lost much of its splendor, especially in the last two decades, even though it is an effective means when compared to state courts.

Expedited arbitration, by the way, does not appear as a means of extrajudicial resolution different from ordinary or traditional arbitration. When talking about expedited arbitration, it is intended to emphasize, above all, the reduction of costs and time.

Alongside these concerns, we cannot minimize another, no less important, which is based on the quality of arbitration. The expectations of all stakeholders, as well as the parties, are based on the search for a fair and equitable solution. In short, the motto should be guided by increasing the efficiency and quality of the arbitration process[21].

The expression "expedited arbitration" presupposes exactly what the term arbitration means - an alternative way of resolving private disputes between one or more people, previously designated by agreement of the parties[22] -, with an increase in the possibility of speeding up and simplifying the procedural aspects of arbitration. Speed is intended, but at the same time respect for certain standards of procedural guarantees. It should be noted that this is not an urgent procedure, to be carried out by an urgent/emergency[23] arbitrator or to request provisional and injunctive measures from a state court in support of the arbitration[24].

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[20] Morton, P. (2010). *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?* „Arbitration International", Volume 26, Issue 1, 1 March 2010, pp. 103-114. Available at: https://doi.org/10.1093/arbitration/26.1.103.

[21] Esplugues Mota. C. (2020). *Los trabajos de la CNUDMI en materia de arbitraje acelerado y el mantra de la celeridade. Psicoanálisis del Arbitraje: Solución o Problema en el Actual Paradigma de Justicia.* Editora Silvia Barona Vilar. Editorial Tirant lo Blanch; N.º 1 edición.

[22] Mimoso, M.J. (2009). *Arbitragem do Comércio Internacional, Medidas Provisórias e Cautelares.* Editor: Quid Juris.

[23] The emergency arbitrator, as a rule, is appointed by the arbitration institution itself and has jurisdiction to enact provisional and precautionary measures. Once the arbitral court is instituted, the functions of the emergency arbitrator are extinguished due to its provisional nature and precariousness. Cfr ICC Rules of Arbitration, Article 29: Emergency Arbitrator: *1) A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules* (…).

[24] Casey, B., Lal, Hamish (2020). *Ten Years Later: Why the 'Renaissance of Expedited Arbitration' Should Be the 'Emergency Arbitration'*, „Journal of International Arbitration", Volume 37, Issue 3, pp. 325-340. Available at: https://doi.org/10.54648/joia2020015.

Expedited arbitration, as the expression suggests, is related to the arbitration's limited duration, of the stages of the arbitration procedure, with restrictions on documents, hearings, maximizing the electronic means of communication[25]. These factors are necessarily linked to another aspect of the matter, which we cannot fail to emphasize, the lower complexity of the disputes to be considered.

In short, issues where hearings can be dispensed, with probative elements in a smaller number, especially in the case of testimonial or expert evidence.

It can easily be concluded that the workload will decrease, both for the arbitrator, who becomes the only one, and for the other intervening parties, resulting in greater benefits for the parties, namely greater speed and lower costs. However, we have some skepticism in claiming that it will diminish the arbitrator's work. The latter becomes unique, and although the questions submitted are of lesser complexity and value, it does not mean that the former should not be concerned with the quality of the content of the decision to be made.

Certainly, the appointed arbitrator will do justice to the precise technical knowledge required by the dispute and the institution where the arbitration will take place will charge lower costs, especially in terms of the arbitrator's fees.

It should be noted that the parties and the chosen arbitration institution may agree to the expedited procedure for a complex issue, but which, even so, is consistent with the *modus operandi* of the former. Everything will be in being able to compress deadlines and steps, without jeopardizing the quality of the decision and respect for procedural principles.

It is now necessary to highlight some notes on some arbitration regulations, especially from institutions with great prestige in international arbitration, which have established expedited arbitration, in order to understand their guidelines.

It was in the 2004 version of the *Swiss Rules of International Arbitration* that rules on "Expedited Procedure" in arbitration were introduced for the first time.

The parties are required to agree or that the value of the case does not exceed one million Swiss francs, unless relevant circumstances dictate otherwise. Arbitration proceedings must be conducted in accordance with the general rules contained in the Swiss Rules, bearing in mind that for expedited arbitration, deadlines can be shortened, namely for the appointment of arbitrators and for the parties to present the respective procedural documents. Unless the parties agree that the dispute be decided based on documentary evidence, the arbitral court will hold a single hearing for the cross-examination of witnesses and experts, as well as for oral argument. The award will be rendered within six months from the date

[25] Esplugues Mota. C. (2022). *Cinco cuestiones diferentes y una misma institución: algunas claves en torno al futuro del arbitraje comercial internacional/ Five different issues and the same institution: Thinking of the future of international commercial arbitration*. „Revista Cubana de Derecho", Volume 2, nº 1, pp. 410-439. Available at: https://revista.unjc.cu/index.php/derecho/article/view/121/196.

on which the institution forwarded the case to the arbitral court, and may, in exceptional circumstances, be extended. The arbitral court shall state the reasons upon which the award is based in a summary process, unless the parties have agreed that the award is not reasoned.

The *Arbitration Rules ICC*, as of 2017, provide an expedited procedure that provides for simplified arbitration with reduced fee scales.

In accordance with the 2021 rules, the ICC has expanded the scope of application of the provisions regarding expedited arbitration, *cf.* article 30 and annex VI, increasing the threshold for their automatic application from US$2 million (in the 2017 rules) to US$3 million.

A sole arbitrator may be appointed, notwithstanding any provision contrary to the arbitration agreement or taking into account certain characteristics of the case.

After the constitution of the arbitral court, neither party may make new claims, unless authorized to do so by the arbitral court. The conference on the conduct of the procedure must take place within a maximum period of 15 days from the date on which the case file is sent to the arbitral court. The arbitral court shall adopt such procedural measures at its discretion, as it deems appropriate. In particular, the arbitral court may decide, after consulting the parties, not to allow documentary production requirements or to limit the number, extent and scope of written submissions and written testimony (both for witnesses and experts).

The period within which the arbitral court must render the final arbitral award is six months from the date of the conference on the proceeding's conduct.

The *Rules of the Court of Arbitration of the Official Chamber of Commerce, Industry and Services of Madrid* also foresee expedited arbitration. It reiterates what we have already seen in other regulations, the possibility of appointing a single arbitrator, unless the arbitration agreement provides otherwise. The deadlines for the arbitrator or arbitrators' appointment may be shortened. If the parties request evidence other than documentary evidence, the court will only hold one hearing for the production of evidence and oral conclusions.

The arbitral court shall decide within four months of the defense's filing or the deadline's expiry for filing it. This period may be extended by another two months. Accelerated arbitration can be applied, by decision of the Court, in all cases where the procedure does not exceed 600,000 Euros. This will occur whenever, due to the circumstances, the use of traditional arbitration is not imposed.

The *Commercial Arbitration Rules and Mediation Procedures of American Arbitration Association, AAA*, provide that expedited procedures can be applied to any dispute not exceeding US$75,000, providing for the possibility of appointing a sole arbitrator. In the accelerated procedure, the award must be rendered within 45 days of the appointment of the arbitrator (Rules E-7 and E-9 AAA).

The *Rules for Expedited Arbitrations of the Arbitration Institute of the*

Stockholm Chamber of Commerce are an alternative to the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, SCC Rules and are found in a separate document.

In short, the parties may agree that the accelerated rules should be applied whenever the dispute does not exceed a certain amount or allow the SCC Institute to decide which rules should be applied taking into account the complexity of the case. They provide for limitation of procedural documents, indicating that documents must be concise and presented within a short period of time. Oral hearings are an exception and may take place as prescribed in the rules. The judgment must be rendered within a period of three months and its reasoning depends on the request of a party.

We could not finish this incursion through the main arbitration regulations that enshrine the possibility of expedited arbitration without referring to the *Expedited Arbitration Rules (2021).*

It is a soft law instrument aimed at accelerated *ad hoc* arbitrations, containing sixteen articles, incorporated as an appendix to the UNCITRAL Arbitration Rules (2013). The latter provide in their article 1 that the Expedited Arbitration Rules (2021) contained in the appendix will apply to arbitration whenever the parties so agree. Its application depends on the amount of the dispute or other established criteria, as mentioned in the aforementioned arbitration institutions' regulations. In order to carry out an expedited arbitration, attention must be paid to the complexity of the case, the parties involved, the amount in question and the possibility that the award can be handed down within six months from the date of establishment of the court, unless otherwise agreed by the parties. Procedural deadlines are compressed. As an example, the period of 15 days counted from the constitution of the arbitral tribunal for the defendant to deduct its defense, can be extended or reduced if the court so deems it. The arbitrator must be unique and appointed by mutual agreement by the parties. We note that the parties and the arbitral court have a general obligation to act "expeditiously", encouraging the use of "any technological means". All this should not, however, jeopardize the principle of due process of law, so that the possibility of enforceability of the arbitral award is not jeopardized[26].

Taking into account what is established in the main instruments, we will say that the main characteristics of expedited arbitration are the mandatory appointment of a sole arbitrator; shortened procedural deadlines; restriction of the number of documents and their extension; possibility of waiving hearings; allowing, if it proves to be reasonable, the resolution of the case based on documents

[26] Pettibone, P. J. (2021). *Due Process Considerations in Expedited Arbitrations*. „Indian J. Arb. L.", 10, pp. 175-183. Available at: https://scholar.google.pt/scholar?q=DUE+PROCESS +CONSIDERATIONS+IN+EXPEDITED+ARBITRATIONS&hl=ptPT&as_sdt=0&as_vis=1&oi=scholar.

and written allegations; use of technological means; summary reasoning of decisions, among others[27].

The accelerated procedure undoubtedly contributes to increasing the time and cost-effectiveness of arbitration and, as such, makes it more appealing.

It will be necessary to ponder about the fulfillment of procedural guarantees and the quality of the content of the decision, otherwise its efficiency may be compromised and the decision may be annulled or recognition denied[28].

The reference to the sole arbitrator is a constant, which is understandable, although relevance should be given to the parties' autonomy in this regard. If this does not happen, the imposition may be seen as a violation of the principle of the parties' autonomy, which is, in fact, a stronghold of international contracting and of the means of resolving out-of-court disputes, with all the legal implications that it entails[29].

The compression of deadlines for due diligence's implementation, procedural deadlines, may interfere in the analysis of the situation and, therefore, may constitute a basis for challenging the decision[30].

We believe that, in each case, all factors must be considered, not just the value and low complexity of the case, as other circumstances may justify a collective court, or even the acceptance of more evidence and more hearings.

4. Conclusions

Accelerated arbitration emerged from the need to overcome some vicissitudes that have been pointed out to arbitration.

In this regard, the high costs involved and the lack of a quick procedure for low-complexity disputes stand out, especially when we think of small and medium-sized companies with less financial capacity.

With expedited arbitration, it is intended to implement shorter deadlines, facilitating the resolution of disputes faster and at lower costs.

The period for the constitution of the arbitral tribunal until the rendering of the decision is established, usually, between three and six months.

It is common to establish a value for expedited arbitration, providing that matters up to that value can go directly to expedited arbitration, unless the parties have ruled out this possibility or the arbitration center in question, or even the

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[27] Chahine, J.H. (2020). *Fast track arbitration: a time-efficient procedure that could hinder the award?* In Jus Mundi Blog. Available: https://blog.jusmundi.com/fast-track-arbitration-a-time-efficient-procedure-that-could-hinder-the-award/.

[28] Heitzmann, P. (2017). *The 2017 ICC Expedited Rules: From Softball to Hardball?* „Journal of International Arbitration", Volume 34, Issue 2, pp. 121-148. Available at: https://doi.org/10.54648/joia2017009.

[29] Lucy Reed (2010). *More on Corporate Criticism of International Arbitration.* In Kluwer Arbitration Blog. Available at: http://arbitrationblog.kluwerarbitration.com/2010/07/16/more-on-corporate-criticism-of-international-arbitration/.

[30] Heitzmann, P., *op. cit.*, p. 145.

arbitral court, has decided that the case, due to its complexity and circumstances, cannot be considered in accordance with the canons of expedited arbitration.

This type of arbitration is aimed at disputes that do not imply a great appreciation of evidentiary elements, and all parties must carefully consider the circumstances of the case, not neglecting the arbitration rules in question.

In this "sub-type" of voluntary arbitration, the various stages foreseen for traditional arbitration may occur, provided that the deadlines can be compressed in the name of greater procedural speed. All of this will inevitably have repercussions on the *modus vivendi* of all the protagonists involved in the arbitration, causing an assertive focus on conflict resolution[31].

It should also be noted that the parties must agree on expedited arbitration (opt-in) or may decide to exclude it whenever the arbitration rules of the chosen institution provide for its automatic application (opt-out).

To conclude, notice the numbers presented by the ICC in 2020 *"The 2020 figures confirm ICC Arbitration suitability for disputes of all sizes. While the average amount in dispute among the 1,833 pending cases at the end of 2020 was US$ 145 million, 38% of newly registered cases involved an amount in dispute not exceeding US$ 3 million – the new threshold for the automatic application of the expedited procedure under the 2021 Arbitration Rules*". (ICC Dispute Resolution Statistics published, 2020).

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HoReCa Tourism Rights in National and European Union Law - Comparative Aspects

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Abstract

In the tourism sector, especially in the HoReCa industry, the protection of the rights of customers-tourists consuming hotel services and products, is of particular importance. safety (including food). In the legislative context, mainly at the level of the European Union and at national level, a number of measures are accepted and implemented with the help of various legal instruments, in order to protect the rights of consumers, including alternative dispute resolution methods.

Keywords: *tourist, European consumer, European institutions, hotel services/ products, alternative dispute resolution methods.*

JEL Classification: K22, K33

1. Introduction. Preliminary details

The term "HoReCa" is the abbreviation for the following three words: hotels, restaurants, and cafes/catering. It is used in the hospitality industry, in the tourism sector, and mainly describes activities related to hotel services. The growth of the HoReCa industry, within the tourism sector[2], has been achieved especially through the hotel service providers, in their relationship with customers, final beneficiaries-consumers tourists.

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[2] Since 1st of December 2009 the entry into force of the Treaty on the Functioning of the European Union (TFEU) 2012/C 326/01 published in Official Journal C 326, 26/10/2012, in accordance with the provisions of art. 6 (letter D) and art. 195 Title XXII of the TFEU, at the level of the European Union regulates the tourism policy, this field thus benefiting from its own legal basis. In this regulatory context, HoReCa implicitly enjoys official recognition, provided that it also benefits from non-reimbursable funding programs (including post Covid 19). Thus, Article 6 (d) of the TFEU provides: "The Union shall be competent to carry out actions to support, coordinate or supplement the action of the Member States. By their European purpose, these actions have the following areas: (a) the protection and improvement of human health, (b) industry, (c) culture, (d) tourism, (e) education, training, youth and sport, (f) civil protection; (g) administrative cooperation..." and art. 195, Title XXII on Tourism, of the TFEU, provides: "1. The Union shall complement the action of the Member States in the field of tourism, in particular by promoting the competitiveness of Union undertakings in that sector."

2. The rights of the consumer tourist, beneficiary of hotel services, in the context of the administrative law of the European Union

The rights of the tourist consuming hotel products and services, refer to accommodation and/or public catering as well as other services specific to them, in relation to the hotel (as a structure of tourist reception with accommodation function[3]).

These result from service contracts[4] concluded between the provider of tourist services and products namely the hotel - as a professional, legal person and their beneficiary - the tourist.

In the context of national law, the rights of the tourist, as a consumer-citizen of a member state of the European Union (EU)[5], in relation to hotel services are the following:

2.1. The right to apply to the National Authority for Consumer Protection (ANPC)

The consumer tourist, a natural person, addresses the ANPC[6], through a petition (notification/complaint/request/proposal).

In this sense, the hotel provider - as an economic operator, has the obligation to display at the reception, the contact details[7] of the National Authority for Consumer Protection (ANPC).

The petition is formulated and sent in writing (including by electronic

[3] According to the provisions of the Methodological Norms of 2013 on the issuance of certificates of classification of tourist reception structures with accommodation and public catering functions, of tourism licenses and patents, issued by the National Authority for Tourism, published in the Official Gazette of Romania no. 353 bis of 14.06.2013 with subsequent amendments and completions.

[4] See, Crenguța Leaua, *Business Law, General Notions of Private Law*, Universul Juridic Publishing House, Bucharest, 2012, p. 38 et seq. In the same vein, see Ioana-Nely Militaru, *Business Law, Introduction to Business Law. Legal business report. The contract.* Universul Juridic Publishing House, Bucharest, 2013, p. 140 and following.

[5] Elise Nicoleta Valcu, *Sustainable development and sustainable tourism in the European Union*, „The Annals of the Stefan cel Mare University of Suceava. Fascicle of the Faculty of Economics and Public Administration", vol. 9/2009, Issue Special, (ISSN 2066-575X), p. 123 et seq.

[6] The National Authority for Consumer Protection (ANPC), in accordance with the provisions of art. 2 of the Government Ordinance no. 27 of January 30, 2002 on the regulation of the activity of solving petitions published in the Official Gazette of Romania no. 84 of February 1, 2002, with subsequent amendments and completions as well as those of art. 2 point 2 of the Government Ordinance no. 21 of August 21, 1992 on consumer protection, published in the Official Gazette of Romania no. 208 of March 28, 2007, republished with subsequent amendments and completions (O.G. 21/1992).

[7] In this sense, the telephone number called "Consumer Telephone - 0040219551", the address and telephone/fax numbers of the county commissariats for consumer protection in whose territorial area the economic operator is located, as well as the address of the ANPC website: http:// www.anpc.gov.ro/.

means of communication[8]) to resolve its conflict/dispute with the hotel.

In this way, the consumer tourist[9] goes through the preliminary procedure of amicably resolving his dispute with the professional hotel provider.

If, however, he does not reach an agreement with the provider, he submits his petition to ANPC.

The petition shall be registered in its own name and shall be accompanied by all the supporting documents (for example: tax receipt, bill, contract, invoice, etc.).

The manner in which the consumer tourist addresses petitions regarding the hotel products and/or services offered by the hotel, is regulated by the provisions of art. 1 point 1 of Order no. 72/2010[10].

Therefore, ANPC[11] in its capacity of state authority, *as a public service*, has the following attributions:

- receives and resolves petitions of individuals- as consumer customers, regarding the violation of their rights,

- forward the petitions for settlement to other legal authorities (according to their competences, in accordance with the law),

- has the role of mediator between hotelier - hotel service provider and client - consumer tourist.

The petition contains issues regarding one of the following legislative provisions:

1. Government Ordinance no. 38/2015 on the alternative settlement of disputes between consumers and traders[12].

This refers to the out - of - court settlement of national and cross - border disputes resulting from sales or service contracts.

The contracts are concluded between a trader operating in Romania and a consumer resident in the European Union.

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[8] Government Ordinance no. 27/2002 regarding the regulation of the activity of solving the petitions, published in the Official Gazette of Romania no. 84 of 01.02.2002 with subsequent amendments and completions (OG 27/2002).

[9] Consumer - any natural person or group of natural persons constituted in associations, as defined in art. 2 point 2 of OG 21/1992,

[10] Order no. 72/2010 of the President of the National Authority for Consumer Protection regarding some consumer information measures, with subsequent amendments and completions, published in the Official Gazette of Romania no. 937 of 22.12.2014 (Order 72/2010).

[11] In accordance with Art. 3 paragraph 1 letter u) of the Government Decision no. 700/2012 on the organization and functioning of the National Authority for Consumer Protection published in the Official Gazette of Romania no. 491 of 18.07.2012, as well as with those of art. 4.4 of the General Procedure of 2021 of ANPC regarding the settlement of consumer complaints regarding non-conformity of products/services, according to https://anpc.ro/galerie/file/544/2021/PROCEDURA_GENERALA_PRIVIND_REZOLVAREA_RDLORLATRONRORLATROCRO.pdf, accessed on 28.02.2022.

[12] Government Ordinance no. 38/2015 on the alternative settlement of disputes between consumers and traders, published in the Official Gazette of Romania no. 654 dated 28.08.2015 (OG 38/2015).

Extrajudicial settlement is carried out with the help of an entity (operating in Romania) that applies alternative methods of resolving disputes/ disputes, and which proposes or thus imposes a solution.

2. Emergency Ordinance no. 34/2014[13] on consumer rights in contracts concluded with professionals[14].

It also regulates the rights of tourist consumers in contracts with hotel service professionals to ensure a higher level of (European) consumer protection.

2.2. The right to benefit from the alternative dispute resolution (ADR) procedure within ANPC

The Alternative Dispute Resolution Directorate (named SAL) within the National Authority for Consumer Protection (ANPC)[15], is the institution that applies the procedures for out-of-court settlement of national and cross-border disputes, resulting from hotel service contracts.

These contracts are concluded between a hotel trader - who operates in Romania and a consumer tourist - resident in the European Union.

For the HoReCa sector, the SAL is thus a mechanism for alternative methods of resolving national and cross-border disputes, subsidiary to the judiciary.

In this regard, ANPC, in partnership with the Romanian Ministry of Economy, Energy and Business Environment, is carrying out the project "Strengthening the capacity to regulate, implement, evaluate and carry out dispute resolution activities carried out by entities coordinated by the Ministry of Economy, Energy and Business Environment and the National Authority for Consumer Protection"[16].

Therefore, the consumer tourist, who is facing a problem related to the purchase of hotel products/services, following the conclusion of the contract for

[13] Emergency Ordinance no. 34/2014 on consumer rights in the contracts concluded with professionals as well as for the amendment and completion of some normative acts, with subsequent amendments and completions, published in the Official Gazette. 427 of 11.06.2014 (OUG 32/2014).

[14] In accordance with art. 2 point 2 of OUG 34/2014, professional means "any natural or legal person, public or private, who acts in his commercial, industrial or production activity, artisanal or liberal, in connection with the contracts that fall under the scope of this ordinance as well as any person acting for the same purpose, in his name or on his behalf ".

[15] In accordance with the provisions of article 3 paragraph h) of the OG 38/2015, "Alternative dispute resolution entity, hereinafter referred to as SAL entity- a structure that provides for the resolution of a dispute through an ADR procedure and which can work within the National Authority for Consumer Protection, within a central public authority or an autonomous administrative authority with responsibilities in the field of consumer protection ...".

[16] https://anpc.ro/articol/1529/proiectul--consolidarea-capacit--ii-de-reglementare--implementare--evaluare--i-derulare-a-activit--ilor-de-solu-ionare-entity-litigation accessed on 28.02.2022, http://www.economie.gov.ro/cod-sipoca-720-mysmis-2014-129982, accessed on 28.02.2022.

the provision of hotel services, accesses the alternative dispute resolution methods (ADR)[17]. These are done using the SAL procedure.

The ADR methods[18] are applied in relation to the hotel traders, who carry out their activities in Romania, and in connection with which ANPC is competent.

With their help, the consumer tourist's complaint, filed against the hotel traders is solved through the intervention of SAL.

The SAL procedure[19], accessed under the conditions provided by Government Ordinance 38/2015, is resolved in a fair, impartial, independent, prompt, effective, fair and transparent manner.

The SAL procedure is voluntary and free of charge for the consumer tourist.

This represents *the collaboration between the public and private sectors*, regarding the resolution of the complaints of tourists consuming hotel products and services.

If the consumer tourist does not accept the solution proposed by the SAL, it does informs him/her about the administrative and judicial remedies (with the help of the court) that he/she has at his/her disposal to resolve the dispute.

2.3. European legal instruments applicable under the ADR procedure

In order to protect the common interests of (European) consumers, we find a series of European Union (EU) regulations that guarantee more efficient and less expensive solutions.

Among them, we list the following: Decision no. 20/2004/EC[20], Recommendation 98/257/EC[21] as well as Council Resolution 2000/C 155/01)[22], which details the principles to be applied in ADR procedures.

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[17] ADR- stands for "alternative dispute resolution".

[18] For example, the ADR methods are: arbitration, mediation/conciliation, negotiation, mini-process, neutral listener, executive evaluation, evaluation expert, the European Ombudsman, complaints commissions. For details, see Julian D.M. Lew, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International BV, 2001, pp. 8-11. In the same vein, see Born B. Gary, *International Arbitration: Law and Practice*, Wolters Kluwer Law & Business International BV, The Netherlands, 2012, pp. 7-8.

[19] According to https://anpc.ro/articol/935/ce-inseamna-sal, https://anpc.ro/galerie/file/diversefg/ProceduraSAL2.pdf, accessed on 27.02.2022.

[20] Decision no. Regulation (EC) No 20/2004/EC of the European Parliament and of the Council of 8 December 2003 laying down a general framework for the financing of Community actions in support of consumer protection policy for the years 2004-2007 published in the Official Journal of the European Union L 005/1, 32004D0020.

[21] European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes published in the Official Journal L 115, 17/04/1998 P. 0031 – 0034.

[22] European Council Resolution of 25 May 2000 on a Community - wide network of national bodies for the out-of-court settlement of consumer disputes, published in Official Journal C 155, 06/06/2000 P. 0001 – 0002.

In the same vein, Directive 2009/22/EC[23] corroborates existing legislation at both EU and national level.

It introduces the notion of "cessation actions", initiated by consumer tourists, against commercial operators from other countries, which violate the relevant legal provisions.

These actions are brought before the competent courts at national level.

Directive 2013/11/EU[24] also gives consumers the right to turn to competent bodies to provide services in terms of alternative dispute resolution.

These relate to purchases of hotel products/services made online or offline, both nationally and cross-border, resulting from the contractual relationship with hotel service providers (enterprises).

At the same time, Regulation (EU) no. 524/2013[25], allows the online settlement of disputes regarding the acquisition of hotel, national and cross-border hotel products/services.

This is facilitated by a dispute resolution platform, made available to consumer tourists as well as EU traders.

Therefore, ANPC, with the help[26] of the SAL Directorate, performs, through various methods (such as mediation, arbitration or ombudsman institution), the alternative settlement of disputes within HoReCa, between consumer-tourists and hotel trade.

Thus, *we propose to name the SAL Directorate, as a mediator[27] between the hotel service provider and the consumer tourist, which fulfills the specific attributions, with the help of ADR methods.*

We believe that all these legal instruments protect the legal and economic interests of (European) tourists consuming hotel services and products.

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[23] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on cessation actions in the field of consumer protection, published in the Official Journal L 110, 1.5.2009, pp. 30–36.

[24] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution in consumer matters and amending Regulation (EC) No. 882/2004 2006/2004 and Directive 2009/22/EC, published in the Official Journal L 165, 18.6.2013, pp. 63–79.

[25] Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on the online settlement of consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Consumer SOL Regulation) published in Official Journal L 165, 18.6.2013, pp. 1–12.

[26] In accordance with the provisions of point 38 of the Regulation on the organization and functioning of the central structure and of the subordinated structures of the National Authority for Consumer Protection (ANPC) approved by the Order of the President of ANPC no. 487/22.10. 2020. See in this sense https://anpc.ro/galerie/file/544/2020/OPANPC_nr._487_din_22.10.2020_ROF.pdf accessed on 17.03.2022.

[27] See, Bantekas Ilias, *An introduction to international arbitration*, Ed. Cambridge University Press, United Kingdom, 2015, p. 7-10.

3. Conclusions

With the help of the regulation and implementation of these legal instruments, both at European Union and national level, we believe that the ways to protect consumer tourists will be improved.

European legal provisions on hotel services/products cover both e-commerce and physical transactions. At the same time, it ensures the protection of health and safety (including food), regardless of the travel destination of tourists consuming hotel services and products, within the European space.

All this is aimed at protecting the interests of consumers, human health as well as promoting the best possible functioning of the EU market. This is also increase the detection capabilities, prevention and deterrence of ways of breaking the law.

Disputes between the contracting parties shall also be settled amicably by means of alternative settlement methods (ADR).

In this context, the mentioned ADR methods are necessary to improve the application of EU and international law, in conjunction with the legal provisions of domestic law.

The application of ADR methods in HoReCa also ensures the guarantee of compliance with legality, confidentiality and celerity of these forms of alternative jurisdiction to court proceedings, which derogate from common law.

Therefore, *we consider that the use of these ADR methods, in carrying out the procedures regarding the protection of the rights of tourists consuming services/products within HoReCa,* constitutes a guarantee of the respect of their rights and freedoms, even more so in a European context.

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INTERNATIONAL LAW AND ITS MODERN REGULATORY POWERS

The European Problem Regarding the Acceptance, Integration and Prevention of Crime Towards Migrants and Refugees

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Abstract

The Migration in a global perspective is contemporary of the Human life, with the most different motivations, in each time and place, within the specific legal frameworks depending on the State law and the International Law. Consequently, in the human global mobility there are different positions and possibilities to these human beings by political, social, economic, and cultural powers. The continuous research is an academic and scientific need, being focus on the global migration and refugees, considering the international legal meaning. There are Regions and States where the Migrants and Refugees are welcome, accepted, and integrated, not only by the legal point of view but the governs behaviors, public policies, social reception, economic and financial support/investment, but in contrast, there are completely opposite positions generating serious problems since the denial to the abandon of millions of human beings. Since the Arab Spring, the reality for millions of Refugees is dramatic by the violation of the Human Rights, the International Law, and States Fundamental Rights. The Opinion Public Opinion is vulnerable to the manipulated information in different States, so it has provoked the discrimination, rejection, and violence against Migrants and Refugees. However, it´s basic to understand the serious context as there are international movements, involving International organized crime acting with Migrants and Refugees – human trafficking, smuggling, exploitations, violence, and all kind of violations. The International Security – legal, protection and criminal (re)action, police authorities – between States and International Organizations have developed different reactions. This is a serious and difficult problem needing a permanent effective work of all structures to protect millions of Human beings. The European Union, working together the international community, as well as with the most different movements – public and/or private – need to develop a concerted and strategic work receiving and integrating the Refugees, which measures must cover and protect all in Europe, regardless their origin.

Keywords: *migration, refugees, international (re)action, human rights, international security.*

JEL Classification: K33, K38

1. Introduction

This paper aims present the research in international and European Union

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context of the Migrants and Refugees, starting with the study and data interpretation of the world difference of the income *per capita*, the measures to improve or promote the Quality of life to everyone, based on the protection and guarantee of the Human Rights and the Fundamental Rights in European Union. So, it´s important to be aware of the two different and permanent Migration flows in European Union area: The internal Migration flow, meaning, mobility according to the principle of the movement freedom of the persons; and the Migration flows from other states to European Union. Regarding the income differences of the salary conditions in European Union, there are different realities between the European Union State Members which is one of the motivations to migrate to the "Internal Migrants" (from one to another EU State Member). However, there are millions of human beings arriving from the most different States to the EU State Members, being International Migrants. There are different elements, from in the most recent official publications, demonstrating that these have a lower salary comparing to the rest of the migrants, so a lower quality of life and living in poverty situation. In fact, these International Migrants choose the European Union to have a better quality of life, than in their origin States, and the biggest migration flows happen mainly due the war, extremely poverty or no survival conditions. So, within it is created a *melting pot* of cultures. Consequently, due their vulnerability and all constraints, violence and discrimination, there is several conditions promoting the implementation and action of the International Organized Crime. So, the serious numbers of the illegal Migration, as one of the most profitable crimes that are out of control, although all serious problems created to the States and to millions of human beings.

Migration is a phenomenon that is almost contemporary with Humanity, continuous and involving all States and Societies around the world. The International Law include the most different legal documents, institutional procedures, and obligations to States and social life. Nowadays it is considered as a priority to a great number of States as an element of Security internal and within the international community, but the reality is that is so serious, complex and difficult to control that the problems faced by the Migrants are bigger in the most different perspective, since the legal (or not) role they assume in mobility, the vulnerability as being victims of the most different and hard crimes.

2. Quality of life, income *per capita* and the political (re)action

According to the "*Worldwide Governance Indicators*"[3] the World Bank presents a block of important elements as the political stability by the government implementation of the need measures to promote economic development, controlling the inflation rate, preventing and avoiding the risk factors – in short and long-term – and promoting the attractive markets. In this context, the positive

[3] See https://www.worlddata.info/quality-of-life.php.

concerns are stated in the *Gross Domestic Product*, the balanced budget, or a surplus. However, the unemployment rate of each State and the social protection, as the old-age pensions are other crucial element. Finally, by the political economy analysis, the currency reserves are an important element to understand the promotion of the quality of life.

Focusing on the political stability when based on dictatorial/ authoritarian systems and principles are dangerous and a threat to the fundamental rights of the citizens. By the other side, according to the International Law, the governments should approve and implement laws and procedures with the *rule of law* and the regulatory quality. The world needs to promote a democratic system, the respect of the Human Rights, avoiding and combating all violation and crimes against societies, which are constraints to the development of the States and the quality of life. This is a question of International Security.

In this scope, the health must be a priority to all governments aiming to prolong the life expectancy, so since the nutrition, the number of doctors and the specialties need to have a structured system able to reply to the social needs and number of inhabitants, as the easy and free charge of the access to the National Health System.

Concerning the safety, as one of the most relevant elements of any State and basilar to the quality of life, unfortunately there are different states where the there are no safety, for society and with the worst consequences, there is a difficult or even impossible generation of the conditions to promote quality or, in worst situations, the survival.

According to the *Agenda 2030 and the Sustainable Goals of United Nations*, as well as the international treaties and International Relations, the position and action of the International Organizations, as the relevant bilateral States relationship, all reflect the real needs and the most dangerous for the Humanity survival, as the Climate Change. Governments have the responsibility to implement laws, procedures and (re)actions to avoid all damages and threats to the Humanity survival. So, the Climate must be in the equation of all needs/ position/action, in order to provide quality of life.

Concerning the cost of living is basic regarding the annual income average within the quality-of-life promotion in each State. Since the taxes paid and the income tax rates in each State must be political and governmentally strictly managed to have enough support internal and in the international rules and legal context. It has to be considered the State expenses and the support to answer to the needs of the society, within the World Bank´s rules – lower expenses, higher investment.

Regarding the respect of the Human Rights, the quality-of-life promotion in each State must respect the difference and equity regarding the international law and implemented in each legal system. Considering the *Migration* – regular, irregular, refugees, seeking of Asylum – the quality of life must aim to achieve

the equity and integration respecting the legal concerns and the promoting a serious prevention and combat seriously the most difficult problems that these International Migrants face around the world.

Regarding the world data, in following table it´s possible to identify the *25 States* where there is higher level of *quality of life* evaluated in 36 factors divided into 7 main areas, including the resident's income and pay taxes:

Rank	Country	Stability (15%)	Rights (20%)	Health (15%)	Safety (10%)	Climate (15%)	Costs (15%)	Popularity (10%)	Total (100%)
1	Australia	86	92	87	100	90	23	41	**75**
2	Macao	89	71	100	90	48	75	44	**74**
3	Hong Kong	76	85	100	95	49	60	41	**73**
4	San Marino	81	82	91	80	62	60	48	**73**
5	Switzerland	91	99	93	99	34	42	46	**73**
6	Malta	86	72	91	89	75	39	44	**71**
7	Singapore	83	89	79	100	45	57	39	**71**
8	Luxembourg	93	99	85	100	25	46	42	**71**
9	Japan	87	86	92	95	58	26	36	**70**
10	Bermuda	89	78	96	76	68	34	35	**70**
11	Spain	63	73	87	92	74	41	60	**70**
12	Canada	85	92	78	97	33	36	62	**69**
13	Portugal	79	77	82	91	68	43	37	**69**
14	Austria	83	91	97	98	27	35	47	**69**
15	New Zealand	90	100	81	99	35	27	39	**69**
16	Cyprus	70	68	77	90	75	53	50	**69**
17	Germany	81	94	96	94	21	43	42	**69**
18	South Korea	81	75	92	92	56	42	39	**69**
19	Norway	88	99	90	99	16	39	37	**69**
20	Sweden	87	99	85	96	20	39	39	**68**
21	France	72	83	91	91	41	28	71	**68**
22	Finland	85	100	87	93	17	44	32	**68**
23	Denmark	86	100	85	95	17	35	45	**67**
24	United States	63	81	71	86	66	38	67	**67**
25	Netherlands	84	98	83	96	20	38	36	**67**

Table 1 – Quality of Life in the World.
Source: Worlddata.info (https://www.worlddata.info/quality-of-life.php)

Hereby the results of the public policies, governmental action to promote the best conditions within the circumstances, being certain that all these States have a large way to develop measures and procedures to answer to the social needs, to prevent social and economic problems and to promote the need development in their own country with the inner consequences in the international community.

However, analyzing the quality of life take us to study the cost of living as one of the most important elements to the political powers legal and action, as well as to understand the real social conditions life and the problems that society face to live or survive.

Following we have the list of the average cost to an index elaborated consider the monthly income calculated from the gross national income *per capita*, being important to have in mind that, if the monthly income is higher, people can

afford, if it is lower the cost of living would be translated to poverty and hard conditions to population live or even survive.

Rank	Country	cost index	Ø Monthly income	Purchasing power index
1	Bermuda	157.6	9,353 USD	111.1
2	Switzerland	144.7	6,885 USD	89.0
3	Cayman Islands	138.0	5,333 USD	72.3
4	Israel	132.5	3,551 USD	50.1
5	Iceland	126.9	5,201 USD	76.7
6	New Caledonia	125.8	1,101 USD	16.4
7	Turks and Caicos Islands	124.6	2,521 USD	37.9
8	Norway	123.8	6,524 USD	98.6
9	Barbados	121.5	1,196 USD	18.4
10	Denmark	121.1	5,251 USD	81.1
11	Ireland	120.6	5,479 USD	85.0
12	Australia	117.8	4,473 USD	71.1
13	New Zealand	114.3	3,463 USD	56.7
14	Luxembourg	114.0	6,759 USD	111.0
15	Sweden	109.8	4,504 USD	76.7
16	Finland	109.3	4,150 USD	71.1
17	United Kingdom	107.5	3,319 USD	57.8
18	Canada	105.5	3,628 USD	64.3
19	Japan	103.7	3,363 USD	60.7
20	United States	100.0	5,345 USD	100.0
21	Netherlands	99.8	4,256 USD	79.8
22	Belgium	98.2	3,817 USD	72.7
23	France	97.5	3,292 USD	63.2
24	Austria	96.7	4,030 USD	78.0
25	Germany	92.1	3,960 USD	80.4

Table 2 – Cost of Living and purchasing power related to average income (Source: worlddata.info - https://www.worlddata.info/cost-of-living.php)

This cost of living index, based in OECD, World Bank, IMF and Eurostat data, allows to understand where the quality of life related to the cost of living is a priority for the governments and legal, economic and political position is to promote its development, but to other States this is the biggest problem that is not being faced as it would be and the reality is a "sick economy" and a social decay.

3. Migrants and refugees in European Union: analyze of the circumstances

There is an unambiguous problem that European Union is facing regarding the flows, the acceptance and integration of Migrants and Refugees, and the challenge to prevent the crime towards the millions who are arriving, living or in mobility in their different State Members. According to the *Atlas of Migration 2021* "at the end of 2020, there were an estimated 281 million people around the world who had migrated from one country to live in another. Many millions more moved within their countries of origin, migrating from villages and towns to rapidly growing cities. Migration has continued to be a policy priority for Europe.

The EU has had to respond to several crises, whether in the case of people fleeing Afghanistan, crossing the Mediterranean Sea, or camping out in the cold at the EU's external borders. At the same time, it has also sought to create more pathways for legal migration because, in the words of Commissioner for Home Affairs Ylva Johansson, '*Europe needs talent … So, Europe can have the skills we need to face the future. And to help us manage migration to Europe, in an orderly way*."[4]

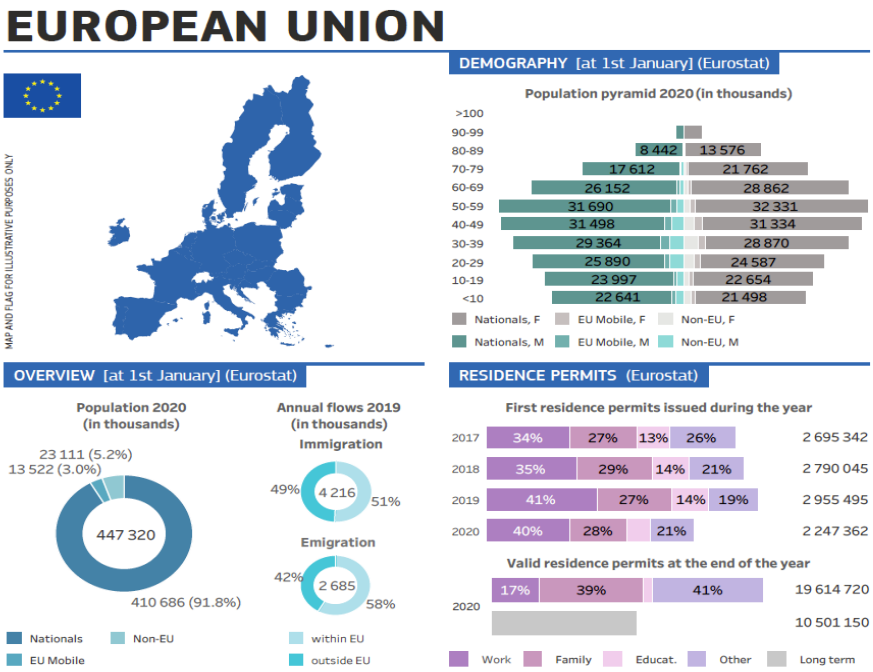


Table 3 – European Union Overview of population, demography and Residence Permits in 2020.
Source: Tarchi, D., et al. (2021) Atlas of Migration.

The Eurostat data of European Union demography shows that the population in 2020 was more than 447 thousand, where the immigration – European citizens mobility/migration within different European state member was 51% of the annual flows and the Migrants arriving from most different foreigner States 58%. Regarding the demography, as it is stated, there is serious ageing.

Obviously, the next update of these data will be higher so, the problem is harder and more serious to millions of human beings. If the *Application for Asylum* in European Union has decrease in 2020, due the most different happenings

[4] Tarchi D., Sermi F., Kalantaryan S., McMahon S., Kaslama P., Alvarez Alvarez M., Belmonte M., *Atlas of Migration 2021*, Publications Office of the European Union, Luxembourg, 2021, doi:10.2760/979899, JRC127608.

around the world have increase the flows as the Irregular Migration in last two years, mainly in 2022. Meaning there is another problem that have been growing and mainly without the need control e prevention: the International Organized Crime against the Migrants. This is not a European Union phenomenon but worldwide and the context is being favorable due the vulnerabilities of the millions in transit and the fragile circumstances they left their own States and their real needs. This has been taken in account by the European Union and their State Members but the control, prevention and combat with the effectiveness need is far away from the real problems and the development of the means and execution of the most different and complex crime committed.

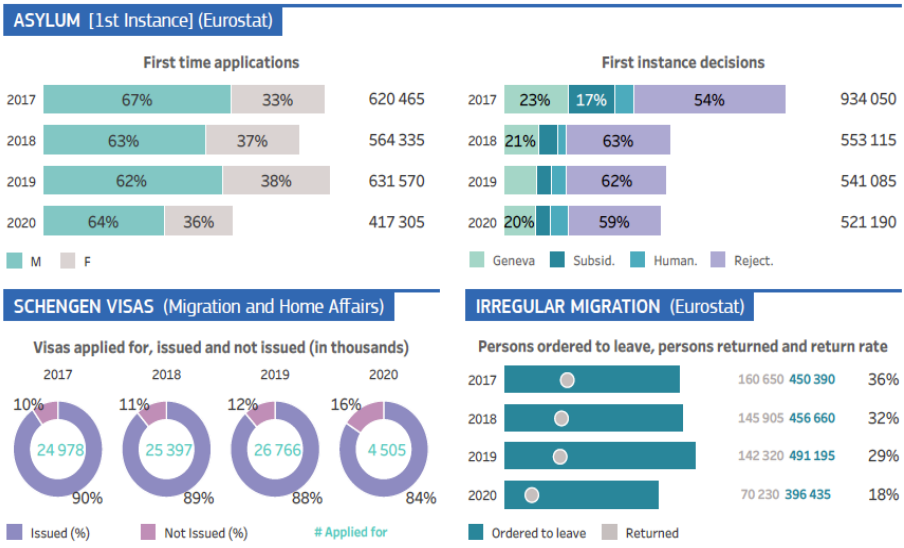


Table 4 – Asylum, Schengen Visas and Irregular Migration in European Union
Source: Tarchi, D., et al. (2021) Atlas of Migration.

The following two tables present the data related to the Naturalization, the Social Inclusion, Education, and the Labour Market in European Union. This is basilar to this research as the Social Inclusion, the Integration and the Education promotion and implementation is the illustration of the problem affecting the society where the citizenship faces different challenges, where the European Union has focused their attention, laws, and recommendations, but the most affected are the Migrants and the Refugees don´t have the protection and integration according to the International and European Law as well as each State member law. Consequently, more than governments position and behavior to solve this problem, it´s being worst the challenge due the many constraints within the International Relations, the Economy, conflicts, and wars around obliging millions to Migrate or arriving in European Borders in Refugee situation.

If there has been a variation of the Naturalization in European Union,

since 2016 till 2019, in fact the numbers are higher representing a regulation of more than 700 thousand. However, the social inclusion, the most important element we consider is the risk of poverty or social exclusion. This is the serious problem threating the societies, mainly the non-European Union Citizens, so the Migrants and Refugees.

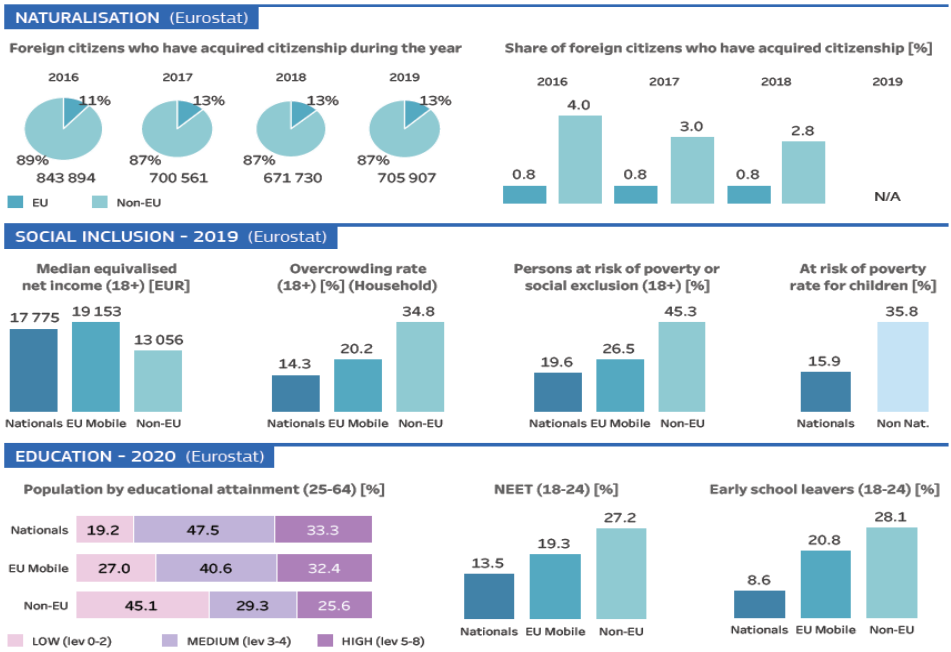


Table 5 – Naturalization, Social Inclusion and Education in European Union
Source: Tarchi, D., et al. (2021) Atlas of Migration

As the Europol data, the higher rate of unemployment in European Union related to the level of educational (15-64 age average) is representative the need of action aiming the real protection of the millions human beings suffering. This is the bases of the incrementing of the poverty, the situation of the loose conditions to have the minimum of the quality of life, and vulnerable to the illegal contexts.

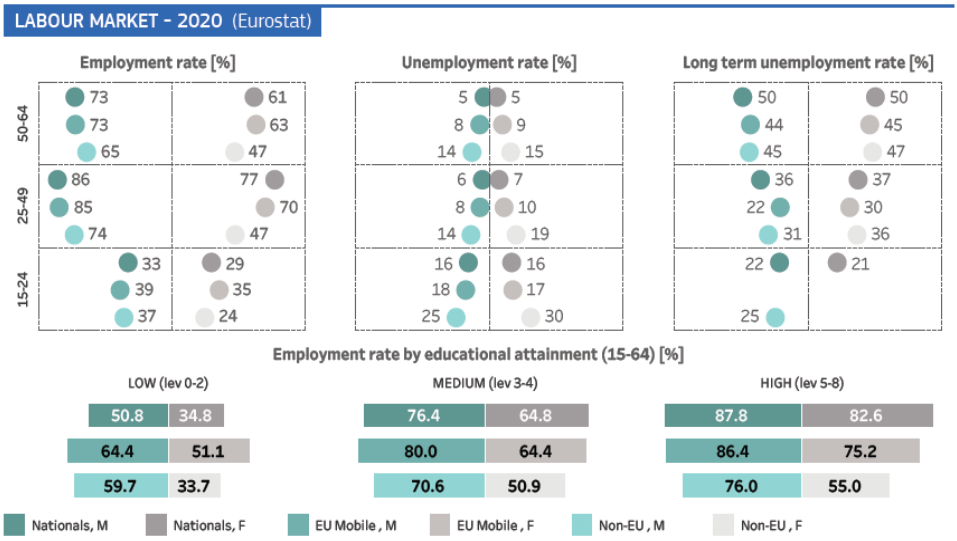


Table 6 – Labour Market in European Union
Source: Tarchi, D., et al. (2021) Atlas of Migration

4. International migration overview and the international crime: (re)action and legal protection

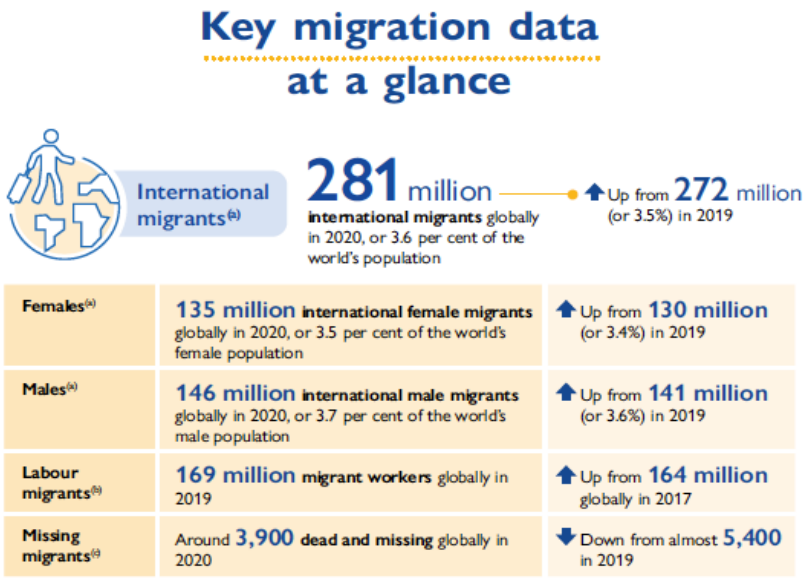


Table 7 – Key Migration data at a glance.
Source: McAuliffe, M. and A. Triandafyllidou (eds.), 2021. World Migration Report 2022. IOM

As stated, "*increased competition between States is resulting in heightened geopolitical tension and risking the erosion of multilateral cooperation. Economic, political and military power has radically shifted in the last two decades, with power now more evenly distributed in the international system*."[5]

The official global numbers of International Migrants – 281 million in 2020 – representing an increase of the flows. The "UNHCR estimates that in 2020, 28 countries reported at least one naturalized refugee (compared with 25 countries in 2019), with a total of almost 34,000 naturalized refugees for the year – a notable decrease from the nearly 55,000 newly naturalized refugees in 2019, but still an increase when compared with the 23,000 reported in 2016. In 2020, 85 per cent of naturalizations occurred in Europe, the majority of which (approximately 25,700 refugees) were in the Netherlands. Second and third placed were Canada (approximately 5,000) and France (approximately 2,500). In 2020, approximately 34,400 refugees were admitted for resettlement globally, representing a huge decrease from 2019, when over 107,700 were resettled. The key resettlement countries were the United States and Canada, with around 9,600 and 9,200 refugees respectively, and an extremely sharp decrease from the previous year of 27,500 (United States) and 30,100 (Canada). The European Union resettled a total of 11,600 refugees. Syrians were the key beneficiaries, accounting for one third of resettled refugees, followed by Congolese (12%)."[6]

The danger is a reality, there is an emergent action by the legal rules (international and national laws), the Governments must assume their responsibility in connection with the International Institutions. The movement of the Migrant glows are more and more controlled by the Artificial Intelligence. So, the migration cycle is understandable as following:

[5] McAuliffe, M. and A. Triandafyllidou (eds.), 2021. *World Migration Report 2022.* International Organization for Migration (IOM), Geneva.
[6] Ibid.

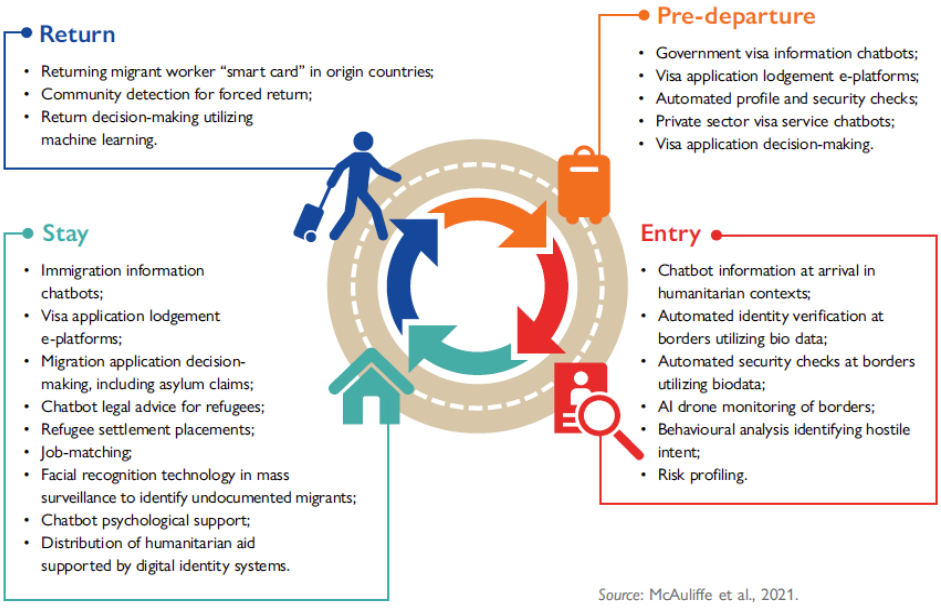
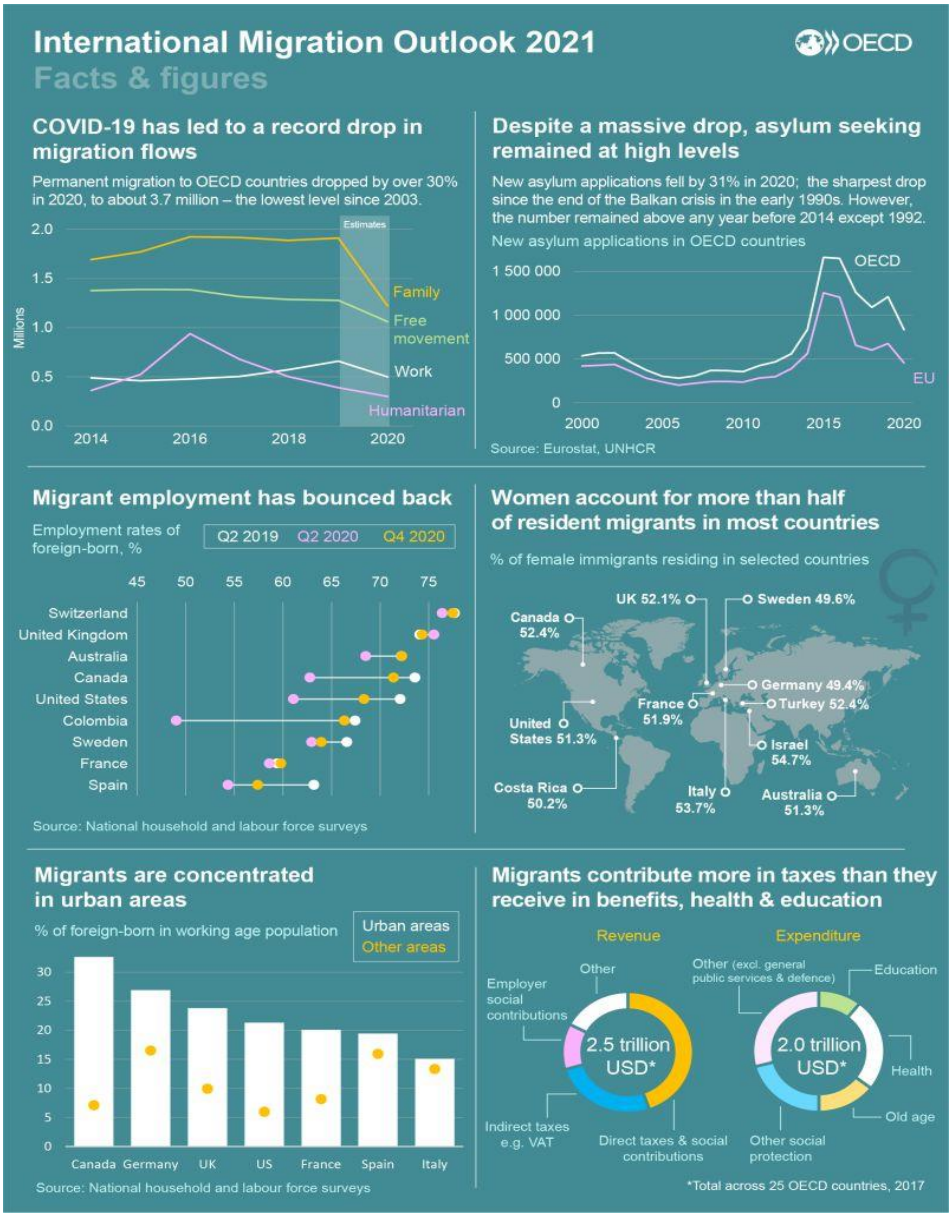


Table 8 – Artificial Intelligence and Migration

However, "*Trafficking of migrants has made horrific headlines in recent years, with migrants sold at slave markets, tortured for ransom and exploited across a range of industries. Organized crime groups traffic migrants in virtually every country today*." The global scope of this crime reflects broader challenges. Victims are often from disadvantaged socioeconomic backgrounds and/or lower-income countries and are usually trafficked to richer countries where traffickers obtain the highest financial returns on their exploitation. Human trafficking is therefore explicitly recognized as a development challenge in the 2030 Agenda for Sustainable Development, which refers to the eradication of forced labour, modern slavery and human trafficking in its Target 8.7.2 Sustainable development and counter-trafficking are interrelated; *eradicating trafficking requires poverty eradication (goal 1), gender equality (goal 5), increased opportunities for decent work (goal 8) and access to justice (goal 16)*. The interlinkages between human trafficking and development are complex, as trafficking finds its roots to a certain extent in inequality and constitutes, by the same token, an obstacle to the development and well-being of societies in terms of the denial of people's human dignity."[7]

The "Human trafficking challenges migration governance at global, regional and national levels, as trafficking risks for migrants are greater when migration is unsafe, disorderly and/or irregular. *Irregular migration can be unsafe*,

[7] Ibid.



with lower access to protection and support networks and greater risks of trafficking. To "prevent, combat and eradicate trafficking in persons in the context of international migration" is thus central to the Global Compact for Safe, Orderly and Regular Migration as set out in Objective 10, in addition to other *Global Compact* objectives that are relevant to counter-trafficking. Target 10.7 of the Sustainable Development Goals, which seeks to achieve safe, orderly, regular,

and responsible migration, also recognizes that realizing the benefits and full potential of migration while addressing human trafficking risks requires well-managed and well-governed approaches to migration and human mobility."[8] The scenery in 2021 was as follows:

Table 9 – International Migration Outlook (2021) - OCDE[9]

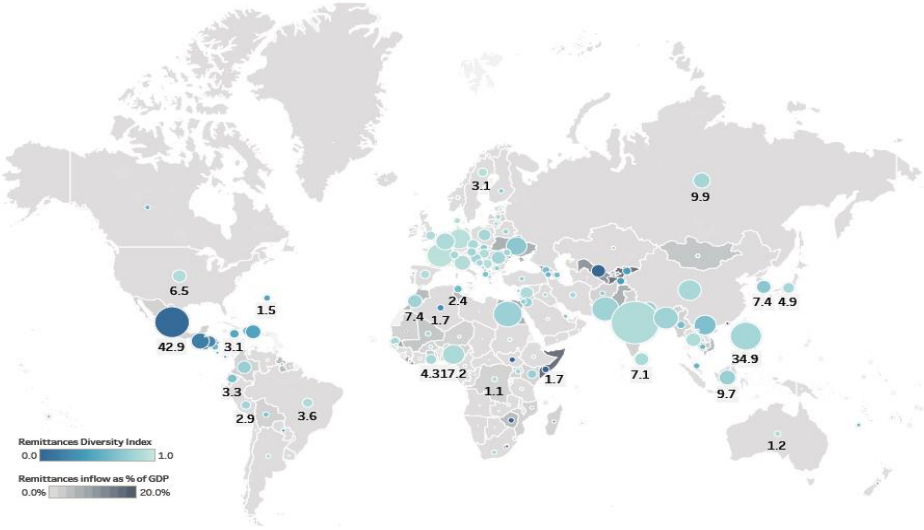


Table 10 - Migrant Remittances as a percentage of GDP increase (background colors) and in billions of US Dollars (circles), by state in 2020. The diversity of colors shows the diversity of remittances from the index 2018[10]

As we can see from the above statistical data, in most regions of the world, International Migrant Remittances have been recovering pre-pandemic values, albeit gradually. There has been an increase between 5% and 10% in Asia and the Pacific (excluding China), which is very representative of the important contribution to the economic development of this region. Thus, this positioning of Remittances within the Macroeconomy is evidence of the active participation of International Migrants for their work and consequent cooperation to overcome the most serious problems that have affected the global society since 2020 in the World Economy. We can say that Remittances are an important global economic

[8] Ibid.

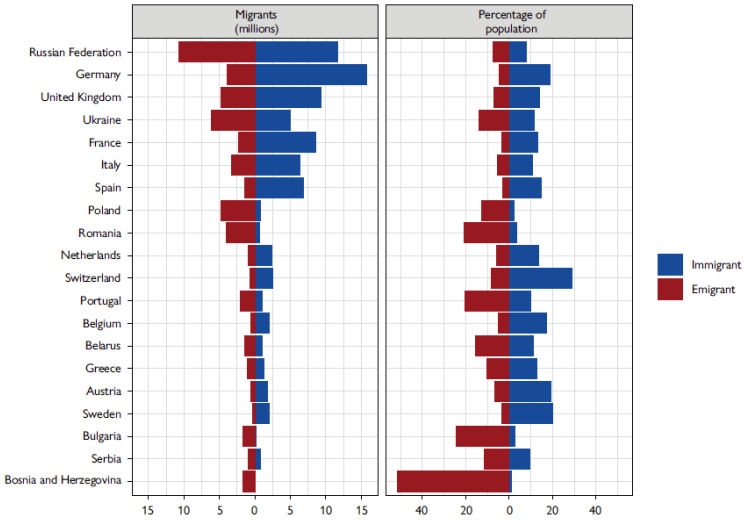
[9] OECD (2021), *International Migration Outlook 2021*, OECD Publishing, Paris, https://doi.org/10.1787/29f23e9d-en**.**

[10] Tarchi D., Sermi F., Kalantaryan S., McMahon S., Kaslama P., Alvarez Alvarez M., Belmonte M. (2021). *Atlas Of Migration 2021*. Publications Office of the European Union, Luxembourg, 2021. p. 507. His map shows where there was less diversity in the receipt of remittances, such as in Central America, South Sudan or Uzbekistan. It also reveals that there was greater diversity of remittances received in India, Nigeria and Ghana.

lever in the strategy of World Economic Relations, among all its actors, especially those who have international political, economic-financial, and legal responsibilities and powers.

Moreover, especially during the biennium 2020-2021, the key issues of multiple support actions by States and the International Community focused on supporting International Migrants and their families, supported by governmental economic-financial policy strategies and programs, but fiscal stimulus. In some states, these actions were accompanied by exceptional employment support measures aimed at overcoming unemployment rates and the risk of poverty that had increased exponentially. Such measures - conjunctural political-legal - were initially implemented in the United States of America, with results considered positive, and were replicated in different European States, especially within the European Union, based on the mission to overcome the emerging and urgent need for economic recovery.

As we can see in the next table, several Eastern European States, such as the Russian Federation, Ukraine, Poland or Romania, have the highest rates of emigrants within the region, with Russia being the State with the highest rate, with about 11 million, followed by Ukraine, with 6 million emigrants. These migratory flows are marked mostly by motivations arising from experiences of war conflicts, that is, mostly in exceptional conditions of flight and in search of survival, but also and largely by the search for better living conditions, which we



Source: UN DESA, 2021.
Note 1: The population size used to calculate the percentage of immigrants and emigrants is based on the UN DESA total resident population of the country, which includes foreign-born populations.
Note 2: "Immigrant" refers to foreign-born migrants residing in the country. "Emigrant" refers to people born in the country who were residing outside their country of birth in 2021.

Table 11 - Top 20 de European Migrant States (Immigrants and Emigrants) - 2020[11]

[11] McAuliffe, M. and A. Triandafyllidou (eds.). (2021). *World Migration Report 2022*. International Organization for Migration (IOM), Geneva. p. 89.

define as regular motivation to migrate. About the motivation and legally valid reasons for International Migrants to have a residence permit in the European Union, at the end of 2020 the data reveal that: 39% Family; 17% Work; 9% Asylum; 3% Education and 32% for other various reasons.

5. Conclusions

There are much more information, details, and data we research, but regarding the *scenery* we present in this paper, the conclusions are simple but really alarming to those human being who decide or are obliged to move to another State – Migrants or Refugees. Although all evolution regarding the legal protection – in most different states and in the international law, the international organized crime acting against migrants is growing with serios problems to all elements involved. Meaning that International and National Security must be a priority of the governments, international institutions and the effectiveness of the criminal investigation and police authorities.

There is a serious emergency of the equity implementation, specially between natives and migrants and/or refugees. It´s crucial to denounce all violation, discrimination, racism or violence to be possible to the police authorities act and consequently the judicial systems function.

In a globalization context we live, the mobilities have to be protected always within the legal systems.

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6. Worldwide Governance Indicators. (2022), https://www.worlddata.info/quality-of-life.php.

Comments on Current Regulatory Diversity under Public International Law

PhD. **Cristina Elena POPA TACHE**[1]

Abstract

The crises generated by the Covid-19 pandemic have become a major problem in front of which the states have started to reflect their interests as well as possible. Developments in this area are aimed at deepening bilateral and multilateral cooperation in various areas affected by global crises. The dynamics of international relations were mainly due to the adaptation of regulations to changes in interdependent relations between states and the diversification of their concerns, including for contemporary challenges such as those given by pandemics. Instruments specific to public international law are brought into the spotlight in cases such as pandemic prevention, preparedness and response or in areas such as artificial intelligence or financial technologies. In the face of these challenges, public international law manifests its regulatory function. However, not all states react at the same rate. It is difficult to predict how and if this goal will be achieved, so we will follow the significant developments in the near future. To make this article we used a fundamental research method (directed for the purpose of knowledge) on the part of research that identifies relevant issues, with prospective ramifications and identification of features that promote the coherence of hypotheses. The notions we referred to will be exposed by using the most efficient methods, such as exploratory, descriptive but also explanatory.

Keywords: *pandemic, treaties, human rights, industry, international relations.*

JEL Classification: G23, G29, E59, K33

1. Preliminaries

"All relative rights, far more numerous than fundamental rights, are born through treaties which aim to establish binding relations between States."[2]

The conclusion of treaties is the very basis of international law, ordering and influencing international relations. It channels states' expression of consent to *be bound* by treaties and defines the commitments they undertake. However, the national procedures by which states express their consent vary considerably, depending on the constitutional, legal and political conditions reflecting the history of each state[3]. As a result, a treaty is a complex process, as the "life" of a

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[2] See Jan de Louter, *Le droit international public positif*, Vol. I, Oxford, 1920, pp. 466, 467, *apud* G. Meitani, *Curs de droit international public*, Ed. Al.T. Doicescu, 1930, p. 166.

[3] Council of Europe, CAHDI (2000) 13 Final (Committee of Legal Advisers on Public International Law), *Expression of Consent by States to be Bound by a Treaty Analytical Report and Country*

treaty means specific procedures relating to its conclusion, modification, termination, invalidity, effects or interpretation. All these are notions developed by the law of treaties, a discipline that contains in its entirety, according to Professor Ion Gâlea, "rules about rules", with specific sources marked by: treaties, custom, general principles of law, and ancillary, doctrine and jurisprudence[4] .

When international law reflects the values of the international community in a broad sense, it can have a transformative effect on international relations and help to revise situations of hegemony and domination. In particular, the Treaty intervenes to protect the fundamental values of the international community (universal values - peace, freedom, social progress, equal rights, human dignity).

The establishment of these values has generated some discussion which has attracted the attention of the International Law Commission. The reference to the "fundamental values of the international community" has given rise to much debate in plenary meetings within the International Law Commission (ILC). Recently, the ILC Committee considered that, in its analysis of *peremptory norms of general international law (jus cogens)*, the reference should be retained as it is essential to the very concept of peremptory norms of general international law (*jus cogens*) and that this observation should provide an explanation of the values. The Committee has, however, attempted to address members' concerns by splitting the provision into two separate sentences. The first referred to the fundamental values of the international community and the second to the universal applicability and hierarchical superiority of peremptory norms over other rules of international law[5].

Concepts relating to the identification of peremptory norms, the consequences of peremptory norms, criticisms of peremptory norms, the relationship

Reports, Secretariat memorandum Prepared by the Directorate General of Legal Affairs, Strasbourg, 23 January 2001, p. 3.

[4] Ion Gâlea, *Treaty Law*, Ed. C.H. Beck, Bucharest, 2015, pp. 1-9.

[5] See, International Law Commission, seventy-third session (first part), Provisional summary record of the 3582nd meeting held at the Palais des Nations, Geneva, on Tuesday, 17 May 2022, on *Peremptory norms of general international law (jus cogens) (continued), Report of the Drafting Committee and Succession of States in respect of State responsibility (continued)*, p. 3. With this document. Some doubts were expressed in the Committee as to whether the adverb "hierarchical" was confusing and whether it was not already implicit in the adjective "superior". The phrase had nevertheless been retained because it appeared in the various instruments cited in the commentary, but the order of the sentence had been reversed so that it referred first to universal applicability and then to hierarchical superiority. The Committee considered various proposals for further distinguishing the provision from the following two draft conclusions by referring in the title to the characteristics, purpose or description of mandatory rules. Finally, the word "general" was simply removed. The title therefore read "The nature of mandatory rules of general international law (jus cogens)". Neither the title nor the content of draft conclusion 3, which defined peremptory norms of general international law (jus cogens) and followed the text of Article 53 of the 1969 Vienna Convention on the Law of Treaties, was changed. The Committee also decided to leave it in Part I in order to confirm its overall applicability to the whole set of draft conclusions.

between peremptory norms and certain areas of international law, and the peremptory status of certain rules of international law will always be the subject of debate. Mankind has always been confronted with various problems whose solution has been found in inter-state cooperation, the most common of which are armed conflicts. As a result, there were periods when peace treaties were frequently concluded. Today, against the backdrop of health and economic crises, all subjects of international law are seeking solutions adapted to the phenomenon of globalisation. For example, in the absence of specific regulations on the response to pandemics, states have acted by assimilating the pandemic to a war situation. This has led to negotiations at the level of the World Health Organisation for the adoption of an international law instrument on specific measures relating to pandemics. Issues such as pandemics, wars, climate change mitigation, sustainable exploitation of blue (marine) economy resources and international security in the 22nd century, lead to a trend towards the adoption of international instruments proposing policy solutions to these challenges.

In one of my articles, I showed the scope of practice in dealing with the stages of drafting a new treaty: negotiating, drafting and producing the text[6]. Procedurally, a particularly important role is played by discussions on preparations for negotiation and for identifying highly effective solutions whereby the State concerned by the process of adopting a particular international instrument could influence and find effective solutions in drafting and resolving the differences that inherently arise in the making of multilateral treaties.

The negotiation procedure documents (finalized by the draft structuring the treaty text, including the title, preamble, final clauses, *testimonium*, and signature block) are followed by the process of preparing and producing a treaty text for signature, including adoption, translation, formatting, binding and sealing, full powers regime, as well as how to produce them and when it is permissible to waive them[7].

As J.M. Brown notes, international treaty negotiations are interdependent with domestic politics. It is within this framework that domestic interest groups are mobilised, groups that may support political parties that are about to promote the ratification of a treaty, but which may also harm national interests. Powerful interest groups can exert strong influence or no influence at all, and this mechanism translates into a kind of exercise aimed at achieving their political ideals[8] .

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[6] Cristina Elena Popa Tache, *On the drafting and adoption of an international instrument on pandemics, under the auspices of the World Health Organization*, „Revista Universul Juridic" no. 6/2022, online, available here: http://revista.universuljuridic.ro/despre-elaborarea-si-adoptarea-unui-instrument-international-privind-pandemiile-sub-egida-organizatiei-mondiale-sanatatii/.

[7] See Barrett, J., & Beckman, R., *Making a New Treaty: Negotiation, Drafting and Production*, in Handbook on Good Treaty Practice, Cambridge: Cambridge University Press, 2020, pp. 158-202.

[8] Brown, Joseph M., and Johannes Urpelainen, *Picking Treaties, Picking Winners: International Treaty Negotiations and the Strategic Mobilization of Domestic Interests*, „The Journal of Conflict Resolution", vol. 59, no. 6, ed. Sage Publishing House,2015, pp. 1043-73, JSTOR,

In this programme of treaty "life", there are differences of pace which can generate certain problems of adaptation and standardisation, issues often raised by the doctrine. "Jurists, who are more independent than politicians, take great pains to adapt their knowledge to the new realities".[9]

This pace (speed) of negotiations and treaty-making in certain areas of interest is also driven by the advent of new information and communication technologies. The speed of this speed and the pace of development of new information and communication technologies, amplified in their scale by the recent health crisis which has moved humanity towards replacing face-to-face social interaction with technology. In 1930, Meitani wrote: "Today, with the discovery of the telegraph, the note is often replaced by the telegram, because instructions can be acquired much more quickly by means of it."[10] Such notes can be found in almost all works, including contemporary ones where the focus is now on the digital boom.

Whereas before, the process of negotiation and signature, for example, was slow, the evolution has been upwards towards the proliferation of international instruments, and this has become a trend of the current international community (for bodies, characteristics and evolution in a broad sense). These movements are interlinked with the evolution of law in general and, in particular, with the unprecedented changes in public international law.

Right is inner tension. (...) In the quest for the new, law itself is characterised by a constant change of forms. Even the fundamental institutions of law have often changed their appearance. (...) Law is not eternal and universal. It is neither fact nor absolute thought. It is a contingent relationship, variable over time and space. Law is a product of history.[11]

2. Which sectors are seeing a proliferation of treaties?

In this chapter, it is easy to understand that the discussions are around the health, digital, strategic, economic sectors, as well as around everything to do with human rights or innovation. From a strategic point of view, unprecedented solutions are emerging, such as the search for a peace solution in the case of the Russian-Ukrainian war, where discussions have considered, among several options, the conclusion of an individual international guardianship agreement between Romania and Ukraine for the wartime management of the Snake Island.

On the other hand, against the backdrop of the health crisis this time

http://www.jstor.org/stable/24546320, accessed 24.05.2022, *apud* Cristina Elena Popa (Tache), *op. cit.* Revista Universul Juridic no. 6/2022, online.

[9] See Nicolae Titulescu, *Diplomatic Documents*, Ed. Politica, Bucharest, 1967, pp. 846, 848, 849.

[10] G. Meitani, *Course on Public International Law*, Ed. Al.T. Doicescu, 1930, p. 168.

[11] Vasile V. Georgescu, *Law and Life. Notes for a vitalist conception of law*, Ed. Foundation for Literature and Art "King Carol II", Bucharest, 1936, pp. 76, 78 and 79.

around, it was possible to see how governments responded to the COVID-19 pandemic by declaring states of emergency and restricting individual freedoms protected by international law.

The solution chosen by states was generally to adopt emergency measures as a precaution against human rights conventions. Despite these precautions, the measures adopted have been assessed critically. Problems with the system have surfaced, recent developments have been noted which have exacerbated these problems, and as a result a series of reforms have been proposed in five areas - incorporation, engagement, outreach, timing and scope.[12]

As has been noted, our economic, health and legal systems have been challenged to respond quickly and effectively to the immediate threat of COVID-19. While restrictions began to rapidly intensify around the world, severely curtailing most of our contemporary freedoms, their future human rights implications remained in the background rather than at the forefront of the pandemic response. Levels of restrictions have fluctuated repeatedly from relaxation to tightening, signalling a potentially long-lasting securitisation of the health sector. While the initial response was probably in line with the permitted human rights derogations, long-term limitations present the danger of permanently narrowing the scope of certain rights (new forms of surveillance and fluctuating limitations of rights are envisaged).

It has been argued that, although not the first area of contemporary life to be secured, health may become a trigger for the normalisation of a wide range of multiple exceptional measures, justifying compromises in rights, particularly in areas related to the right to privacy. The renewed sense of danger seems to exacerbate activity in ways similar to securitisation in other areas - creating acceptable trade-offs that allow the acceptance of limitations that would otherwise be considered problematic[13] .

In point, the following can be stated:

2.1. Negotiations for the search for the most appropriate international law instrument within WHO on pandemic prevention, preparedness and response

According to information provided by WHO, the World Health Assembly (hereafter: WHA) met in a special session, the second since WHO was founded in 1948, and adopted a single decision entitled: "The World Together". In December 2021, by decision SSA2(5) (2021), the World Health Assembly, at its second special session, established, in accordance with Rule 41 of its Rules of

[12] Helfer, L. (2021) *Rethinking Derogations from Human Rights Treaties*, „American Journal of International Law", 115(1), 20-40, Ed. online by Cambridge University Press: 15 January 2021.
[13] See Dorota Anna Gozdecka (2021) *Human Rights During the Pandemic: COVID-19 and Securitisation of Health*, „Nordic Journal of Human Rights", 39:3, 205-223, Ed. Taylor & Francis Online.

Procedure, a subdivision of WHO - an intergovernmental negotiating body open to all Member States and Associate Members ("INB") to elaborate and negotiate a convention, an agreement or other international instrument of WHO on pandemic prevention, preparedness and response, for adoption in accordance with Article 19 of the WHO Constitution or such other provisions of the Constitution as may be deemed applicable and appropriate by that body. In the historical trajectory of multilateral attempts at codification, there has unquestionably been a need for codification of certain types of international relations within the overall framework of international cooperation. A multilateral treaty is a complex instrument, both formal and substantive. However, in the face of these uncertainties, the very short deadlines prescribed by the WHO are opposed. Will WHO member states have the speed of reaction to defend their own positions and interests?[14]

At the level of practical applicability, experts have predicted that, in the face of the inherent difficulties that arise amid the negotiation of a multilateral international instrument, the most realistic course of action would be to amend a key international instrument on international health, rooted in the WHO Constitution: the *International Health Regulations* (2005), which were established "to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are proportionate and limited to public health risks and that avoid unnecessary interference with international traffic and trade". As indicated in a previous paper, the predictions are that this Regulation will eventually be amended and supplemented if negotiations on the ambitious plan to adopt a new multilateral international instrument[15] fail.

2.2. In business and the economy, which are also in crisis at present, the focus is still on human rights

We can see how, as digitisation intensifies, many states are having to develop new legislation to protect sensitive data belonging to individuals or institutions. The protection takes place in order to prevent their use for malicious or even illegal or commercial purposes or against their use in unauthorised surveillance of individuals (or the masses) by the state or other natural or legal persons who might have this interest. In this way, privacy and data protection will become a standard in cross-border trade and investment, as many commercial transactions require cross-border data flows that meet minimum legal requirements" (UNCTAD, 2019[16]). From this point of view this standard is not only preferred by the population but is also pursued by international investors who expect to find in host countries the best standards for their investments. Experts

[14] Cristina Elena Popa Tache, *op. cit.,* Revista Universul Juridic no. 6/2022.
[15] Ibid.
[16] UNCTAD (2019). Digital Economy Report 2019. Available from https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2466, accessed on 08.07.2022.

believe that investors and consumers are likely to start attaching greater importance to privacy and data protection as a fundamental human right and to censure companies operating in countries that do not provide adequate privacy and data protection[17] .

But human rights in the relationship: economy-digitalisation, is not just about data protection. In this context, we recall a groundbreaking agreement: *Digital Economy Partnership Agreement* (hereafter: DEPA) - the first Digital Economy Partnership Agreement signed in June 2020. It reaffirms "the importance of corporate promotion, social responsibility, cultural identity and diversity, environmental protection and preservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge." In the same vein, problems arise where human rights and freedoms may conflict with the acceptance and use of digitisation.

An example might be the religion or denomination of certain groups of individuals that prohibits them from using modern digital means (as they refuse to take medication, for example). Similarly, cultural or traditional differences may require more attention from digital service providers. The history of the investment system has seen opposition to certain types of investment, which leads us to think now about strategies for reconciling the discrepancies that can arise from relating the freedom of human belief to certain ideologies and a certain qualification of foreign investment; at one time, Canada and France, for example, invoked cultural criteria to prevent the American entertainment industry from entering these countries and dominating their national entertainment industries.

The danger of domination of national digital industries is seen to be very seriously considered, especially as issues of national security may overlap here, and the limits of national security and safety are set by domestic regulation and may relate to certain human rights[18]. All these situations can become contemporary issues of digital manifestation because, isn't it, "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to

[17] See Satyanand, Premila Nazareth, (2021), *Foreign Direct Investment and the Digital Economy*, ARTNeT on FDI Working Paper Series, No. 2, July 2021, Bangkok, ESCAP. Available at: https://artnet.unescap.org/fd, accessed on 08.07.2022.

[18] In Romania, proposals for new national security laws are generating a wave of criticism from civil society. They are incompatible with democracy and reminiscent of the dark days of communism. This draft law continues to stir up much controversy. The Romanian Intelligence Service would become a national authority including in the field of interception of communications. The draft also states that "within the Service, activities may be set up financed entirely from its own revenues" and the service is authorised "to request data, regardless of the form in which it is stored, information and, where appropriate, objects from natural and legal persons, under the conditions of this law". The draft, which is close to adoption, expands the list of threats to national security: it would include organised crime and actions or inactions targeting the administration, health, education, cultural heritage, critical communication and information technology infrastructures, as well as Romania's "national financial, economic, energy, scientific(!) and research interests". For more details, see: https://romania.europalibera.org/a/31878826.html, accessed 11.07.2022.

change his religion or belief, and freedom to manifest his religion or belief (...)[19]". In this context, the Digital Economy Partnership Agreement is a first step. Singapore, New Zealand and Chile signed the world's first digital trade treaty - Digital Economy Partnership Agreement (DEPA) - in June 2020. DEPA is pioneering because it creates international rules and practices for cross-border business in the digital economy, anchored by strongly stated sustainable development goals. In its opening, the Agreement stresses "the importance of the digital economy in promoting inclusive economic growth... in particular Goal 8 and Goal 9". Meanwhile, we have seen the intentions of China, South Korea and Canada to join DEPA along with joining the Comprehensive Regional Economic Partnership (PRCE), driven by the growing importance of digital trade and its evolution leading to cooperative efforts in scientific research and international education.

The doctrine highlighted that the new digital trade is the future of trade and investment, and has a shaping, highly effervescent role in the global economy. It is focused on blockchain, artificial intelligence and internet technologies to guide the expansion of e-commerce and cross-border payments, issues that highlight the priority of mapping new trade technologies including cloud services, DLT and 3D printing[20] .

2.3. Another dynamic example is the FinTech sector

Financial technologies - due to their ubiquity in various economic, political, social or geographical planes - have demonstrated the need for a good use of public international law, the nature and structure, sources and subjects of international law, issues of liability or jurisdiction. As a consequence, for the security of financial transactions and in the spirit of cooperation, States are resorting to new treaties, containing in particular precise provisions regulating FinTech. This is not without its difficulties because for FinTech's expanding internationally the regulatory approaches of different jurisdictions can create additional obstacles, even against the background of the emergence of international Fintech Bridges agreements, which we discussed at length in a previous article[21].

At that time, I presented the example of Singapore (considered, according to World Bank estimates, to be the world's most important logistics hub and a leading global financial centre). In Singapore, the Monetary Authority of Singapore (MAS) has signed 36 FinTech Cooperation Agreements (CA) with international counterparts to promote cooperation and innovation in financial services

[19] Universal Declaration of Human Rights of 10 December 1948, United Nations, published in the December 10, 1948, Bulletin.

[20] Michael A. Peters, *Digital trade, digital economy and the digital economy partnership agreement (DEPA),* Educational Philosophy and Theory, ed. Taylor& Francis Online, 2022, DOI: 10.1080/00131857.2022.2041413

[21] See Cristina Elena Popa Tache, *How are financial technologies regulated by treaty law*? in "Pandectele Române" no. 2/2022, Ed. Wolters Kluwer, p. 75.

in those markets. In 2017, such documents were signed between Singapore (through MAS) and France (through the Autorité de Contrôle Prudentiel et de Résolution (ACPR) and the Autorité des Marchés Financiers (AMF).

Another example is the UK-Australia FinTech Bridge signed by the Government of Australia and the Government of the United Kingdom on 22 March 2018. These bilateral treaties set out the terms under which the parties will share information on emerging trends in FinTech, potential joint innovation projects and regulatory issues related to innovative financial services.

It is observed, against the background of the diversification of sectors in which special regulatory treaties appear, an expansion of international law given the diversity of international actors. phenomenon that will also be observed in international financial technology law[22]. From the perspective of the subjects of international law, the attribute of state sovereignty gives them equality in the regulatory decision (rule-making). As mentioned in the previous article referred to, any state can share policy and regulatory expertise and engage in identifying and addressing emerging issues to ensure that competition and innovation are not unnecessarily constrained.

Collaboration between traditional subjects of public international law enhances trade and investment flows between their markets. The creation of international law rules involves the same states or international organisations that become the addressees of the rules they have developed. The legislative function cannot be exercised by another body with legislative powers distinct from and superior to states[23].

It is common for the processes of elaboration of international law rules by states to take place in international organisations and conferences organised for this purpose[24].

2.4. Peacekeeping strategies

Alongside a possible individual Romania-Ukraine trusteeship agreement for NATO administration of the Serpent Island, several initiatives from the major powers in support of peacekeeping have been noted. One of these initiatives is

[22] This is reminiscent of the alternative name for international law proposed in the 1980s by D. Carreau: that of international company law, a name that would be more appropriate than ever in the current context of the emergence of the FinTech phenomenon (e.g.), against the backdrop of the changes in the regulation of contemporary international law. Dominique Carreau, *Droit international*, Ed. Pedone, Paris, 1986, pp. 24-36.

[23] See R. M. Beșteliu, *Public International Law*, Vol. I, 3rd ed. C.H. Beck, Bucharest, 2014, p. 4.

[24] For example, the Monetary Authority of Singapore (MAS) and Magyar Nemzeti Bank (MNB) signed a Cooperation Agreement (CA) in 2020 to strengthen cooperation in FinTech innovation between Singapore and Hungary. The signing took place at the Budapest World FinTech Festival, organised in partnership with the Singapore FinTech Festival 2020. See Cristina Elena Popa Tache, *Public International Law and FinTech Challenge*, „Perspectives of Law and Public Administration", Volume 11, Issue 2, June 2022, pp. 11-15.

based on the legal possibility of amending existing treaties by adapting them. E.g., the New START Treaty which entered into force on 5 February 2011.

Under the treaty, the United States and the Russian Federation have had seven years to comply with the core limits of the Strategic Offensive Arms Treaty (until 5 February 2018) and are then obliged to maintain these limits for as long as the treaty remains in force. strengthens US national security by imposing verifiable limits on all intercontinental nuclear weapons deployed by Russia.

The United States and the Russian Federation have agreed to extend the treaty until 4 February 2026. The treaty imposes the following limits to be respected by the parties: it limits all deployed Russian intercontinental nuclear weapons, including every Russian nuclear warhead that is loaded on an intercontinental ballistic missile that can reach the United States in approximately 30 minutes. It also limits Avangard and Sarmat, the Russian Federation's two most operationally available long-range nuclear weapons, from reaching the United States.

According to available data, the extension of New START ensures that we will have verifiable limits on the main Russian nuclear weapons that can reach US territory for the next five years. Each side has the flexibility to determine its own force structure, subject to central limits. The New START Treaty gives the United States the flexibility to deploy and maintain U.S. strategic nuclear forces in a way that best serves U.S. national security interests.

The Treaty contains detailed procedures for implementing and verifying the core limits on strategic offensive weapons (discussed above) and all treaty obligations. These procedures cover the conversion and disposal of strategic offensive weapons, the establishment and operation of a database of information required by the treaty, transparency measures, a commitment not to interfere with national technical means of verification, the exchange of telemetry information, the conduct of on-site inspection activities, and the operation of the Bilateral Consultative Commission (BCC)[25] .

2.5. Another sector where there is activity in terminating, amending or concluding new treaties is international investment

Here we illustrate the evolution in the attitude of Latin American countries towards international investment law. In the 1990s, these countries became parties to numerous bilateral investment treaties (BITs) and acceded to the Washington Convention. Recent negotiating practices are examples of a new generation of investment treaty negotiations, including the revision of the main clauses of

[25] Source is U.S. Department of State, information available here: https://www.state.gov/new-start/, accessed 15.07.2022, or see Amy F. Woolf, Specialist in Nuclear Weapons Policy, *CRS Report Prepared for Members and Committees of Congress, Congressional Research Service* dated February 2022, available here: https://sgp.fas.org/crs/nuke/R41219.pdf, accessed 15.07. 2022.

the MERCOSUR Protocol, which reveals the intention of member states to drastically reduce the severe limitation of the scope of treatment and protection to be granted to foreign investors, referring here to the pandemic period[26].

In this context, I also recall the Comprehensive Investment Agreement between China and the European Union, which is currently being (re)negotiated. Thus, the 35th round of negotiations on the EU-China investment agreement took place on 7-11 December 2020 via videoconference. At that time, discussions focused on outstanding issues, namely market access issues, the institutional framework of the agreement and sustainable development, in particular the dispute settlement mechanism and labour. Negotiations were concluded in principle on 30 December 2020[27]. With the Russo-Ukrainian war, the ratification of the previously much welcomed EU-China Comprehensive Investment.

Agreement does not look likely to happen any time soon. Amid political tensions with the West, China has found it easier to strengthen economic ties through the Regional Comprehensive Economic Partnership (RCEP) - arguably the largest free trade agreement in world history - which is estimated to add $500 billion to global trade by 2030. In a speech in early March announcing his annual work report to lawmakers, Chinese Premier Li Keqiang made no mention of trade agreements with the U.S. or the EU. The EU-China investment agreement has gone through a difficult journey since negotiations concluded in December 2020, and the end point of that journey is not in sight[28]. A resolution of some diplomatic tensions is now expected.

3. Remarks

In response to global crises, most countries have adopted special measures to protect national economies and public health. Many of these measures, if they do not fall within one of the exceptions to state responsibility and may take the form of violations of human rights regulations, or of foreign investors, for example. In the face of these findings, the focus is on the structural implications of large-scale pre-emptive defence based on the idea of "exceptionalism". It argues that the pandemic reveals the structural weakness of the exception-oriented justification paradigm in international economic law[29].

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[26] See Mara Valenti, *New Trends in International Investment Law Treaty Practice: where does Latin America stand?*, in Seqüência (Florianópolis), n. 79, p. 9-26, Aug. 2018, Ed. Stricto Sensu Graduate Program in Law of the Federal University of Santa Catarina (PPGD/UFSC).

[27] For more information see: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541 and https://ec.europa.eu/trade/policy/in-focus/eu-china-agreement, accessed 15.07.2022.

[28] William Yuen Yee, *Is the EU-China Investment Agreement Dead? The 2020 deal, already on ice, might be finally dead after China's refusal to condemn the Russian invasion of Ukraine*, article published in The Diplomat, 26.03.2022.

[29] Arato, J., Claussen, K., & Heath, J. (2020). *The Perils of Pandemic Exceptionalism.* „American Journal of International Law", 114(4), 627-636, published online by Cambridge University Press: 20 October 2020.

At the theoretical level, in general, these developments, regardless of the topic of interest, have been anticipated in the literature[30]. The problems generated by pandemics, being characterised by global pervasiveness, have come under the regulatory scope of international law. Static approaches to public international law have begun to be rejected, giving way to the realities of legal phenomena occurring between relevant actors that arise in new situations requiring the need for regulation and thus the regulatory function of public international law is activated. As specialists have noted, this field cannot be considered a pre-existing legal order waiting to be applied in cases where normative guidance is needed[31].

It is public international law that determines the outer limits of each state's jurisdiction. This argument is accompanied by the example of the Permanent Court of International Justice (PCIJ) which, in its decision in the Lotus case, ruled that *States have the power to prescribe all conduct affecting them*[32].

We note from this that each state has the right to regulate, as customary international law does not limit a state's sovereign power in this regard. The very way in which the international community operates can help to regulate the problems generated by global crises in the most appropriate way. If interpreted narrowly and formally, the notion of international community encompasses the specific diplomatic circles, international organisations and international legal institutions in which the elite of international law practitioners act and produce international legal norms. Broadening this important notion to incorporate the wider community of scholars, public and popular debates about global justice, and denunciations of conditions of inequality, privilege and injustice, seems to be a pending task for reconfiguring the mechanisms governing the production of international justice in world politics.

The inclusion of different legal traditions in the values of the international community, including, for example, the rights of indigenous communities, is a crucial condition for the historical transformation of the international system. Progress only occurs when more attention is paid to notions such as: legal plural-

[30] Le Fur Louis, *Précis de droit international public*, Series: Petits précis Dalloz, Paris, 1931, p. 6.
[31] See R. Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, Collected Courses of the Hague Academy of International Law, Volume 230, Martinus Nijhoff Publishers, The Hague/Boston/London, 1991, p. 25, apud Carmen Moldovan, *Public International Law*, University Course, Ed. Hamangiu, 2015, p. 3.
[32] S.S. "Lotus" case, 1927 P.C.I.J. (ser. A) No. 9, at 18. Although in the wake of the Lotus case, the Court did not recognize the principle of territoriality as a limit on state jurisdiction, it nevertheless accepted the prohibition of the exercise of power by one state in the territory of another state as a matter of customary international law, but accepted (by distinguishing between "jurisdiction to prescribe" and "jurisdiction to enforce") that states have the capacity to legislate or take administrative or criminal action with respect to events occurring outside their territory. See Lehmann, Matthias, *Global Rules for a Global Market Place? - The Regulation and Supervision of FinTech Providers*, „Boston University International Law Journal", Vol. 37, 2019; European Banking Institute Working Paper Series 2019 - no. 45, p. 138, http://dx.doi.org/10.2139/ssrn.3421963, accessed 09.05.2022.

ism; practical legitimation of the principles of sovereign equality and multilateralism; the construction of global justice; concrete and practical legal innovation; and connecting global politics with legal debates.

Therefore, international lawyers and scholars in the fields of international law and international relations should not be seen as formal actors involved in the production and deliberation that takes place in the routines, corridors, courses and discussions involving international organisations and international legal institutions, but expectations converge towards interconnection and cooperation, in the spirit of strengthening the values of legal pluralism.

So, the evolution of the subject matter covered by this article depends only on the way in which states will engage institutionally, politically and legally in the process of regulation and implementation of the new generation of treaties.

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Tools for Official Relations in Public Activity - Disparities in Good Administrative Behaviour

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Abstract

The present research aims at the need to take up the example of the provisions of the European Code of Good Administrative Behaviour at the level of public administration of the member countries[3]. In fact, the activities performed by civil servants or contractual staff in the public power regime, more precisely in the segment of law enforcement, in the segment of public service provision, have the same legal regime seen through the angle of interest of the citizen of the same member state as the citizen of the Union, or of any legal person. Any communication at official level has as its central point certain principles and limits imposed for reasons of private interest and categorical public interest. However, employees of the national public administration, viewed individually in conjunction with their own duties, have not implemented the procedural principles set out in the practice of the Court of Justice of the European Union with regard to 'limits' and do not have a methodology to follow in identifying a balance between the permitted degree of transparency of their work in relation to citizens' requests. At the same time, the way of decent expression of the justified impartial attitude in the legal and efficient solution of requests in the daily work with the public, has not implemented the standards of good administrative conduct aimed at guaranteeing the efficiency of the work and the quality of public service at the same time. The implications of this study aim to outline the essence of the obligation to adopt a Code of Good Administrative Behaviour at the level of each Member State, based on the citizen's right to good administration, on the case law of national and European courts and on the practical explanation of convergent coordinating lines such as, for example: legality and proportionality or the clear absence of abuse of power and honesty.

Keywords: *relationship, abuse of power, good administrative behaviour.*

JEL Classification*:* K23

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[3] The Decision on the Code of Good Administrative Conduct published in the Official Journal of the European Union No. 2011/C 285/03, states in the introduction: "On 6 September 2001, the European Parliament approved the resolution ratifying the Code of Good Administrative Behaviour with which the institutions and bodies of the European Union, their administrative departments and officials in contact with individuals must comply".

1. Introduction. Why is a National Code of Good Administrative Behaviour necessary?

It can be stated without a doubt that a civil servant continually assimilates through daily experience various ways of communicating with the citizen, new experiences that are decisive in ensuring the preventive nature of suspicions regarding his own conduct. The doctrine takes into account and invokes the signals received from citizens, civil society, media institutions and investigative bodies regarding the consequences of situations that have resulted in a breach of the rules of professional ethics. But should the civil servant not be understood and helped to behave appropriately? And shouldn't this consideration be a starting point in the perception of the reasoning already demonstrated time and again by various final court rulings which state that a public responsibility, not properly dealt with, can lead to being placed in a grey area, subject to interpretation?

As early as 2000, Recommendation No. 10/R of the Committee of Ministers of the Member States[4] was drawn up with a view to the drafting and, consequently, the adoption of national codes of conduct for the activities of all those working in a public authority or institution, including those working in private institutions providing public services such as the medical sector, since the medical service is a public service. Today, in 2022, in Romania we do not have such a Code of Good Administrative Behaviour for all categories of staff involved, a guide summarising good practices defined efficiently and in correlation with the desired result, methodologies that guarantee minimum complications. And certainly, this code is necessary, as demonstrated by the fact that the definition of abuse and negligence in the service is still in the area of "attempts"[5], so that the Criminal Code is in line with the considerations of the decisions of the Romanian Constitutional Court. Moreover, reality "strikes", and thus calls for ways to ensure a balanced conduct that officials should follow with prior information to the public, reality calls for the provision of guidelines to professionals to give content to good practices. At the same time, the ethical incidents encountered in the course of their work make it necessary to constantly rethink and improve the "custom" that must be in place in the workplace.

As an addition that deserves further attention, we note that an institution such as the European Ombudsman[6], emphasises by its effective involvement in updating the European Code of Good Administrative Behaviour adopted by the European Parliament, noting that the work of many European civil servants is

[4] The document is available at: https://www.cna.md/public/files/legislatie/rec_2000_10_cod_conduita_funct_public.pdf, accessed 23 May 2022.

[5] The document is available at: https://www.just.ro/proiectul-de-lege-pentru-modificarea-si-completarea-legii-nr-286-2009-privind-codul-penal-si-proiectul-de-lege-pentru-modificarea-si-completarea-legii-135-2010-privind-codul-de-proced/, accessed 23 May 2022.

[6] Regarding the organization and functioning of the European Ombudsman, see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 802-806.

characterised by integrity, dedication and humanity" and that the Code "is intended to support the efforts of European civil servants through the exchange of best practice and the promotion - both within and outside the institutions - of a harmonious European administrative culture, focused on the needs of the citizen, a culture in which civil servants are attentive to and learn from their interaction with citizens, businesses and stakeholders. As regards the prevention of an unfavourable deontological stamp on the Romanian civil servant, we did not identify in the research undertaken that the Ombudsman at national level has taken similar action by initiating such actions. However, he can be consulted from the position of the initiators of draft legislation or can choose the method of following up petitions submitted by citizens to the Ombudsman.

2. Objective and effective communication

At an attitudinal level, effective communication involves the perception by the citizen of respect as part of the relationship with the official. Respect must be owed by the official regardless of the citizen's reputation in the community, and it must be conveyed at the same time through the conduct presented in the relationship, through evidence of good faith and fairness communicated, through the tone and expression specific to a professional in public service. At the same time, the civil servant must, during the exchange of messages, from the angle of the authority of the function, signal without any power of silence and effectively, the certainty of an impartial attitude and the fair way of ensuring a legal solution to citizens' requests. It is the responsibility of the official to ensure that any message is not distorted or damaged in the course of the relationship, and if this has occurred, to intervene urgently, decently, respectfully and emphatically, in order to restore it to the framework established by the will of the legislator and to ensure that the person in front of him or her understands the limits of this framework. For example, in connection with the proposed reformulation of Article 298 of the Criminal Code, the offence of negligence in office is defined as "the act of a public official who, through negligence, in the exercise of his duties, fails to perform an act provided for by a law, a government ordinance, an emergency government ordinance or another regulatory act which, at the time of its adoption, had the force of law, or performs it in violation of such a legal provision". This definition by reference to the right of the individual to complain of damage to his or her legitimate interests in the case of a misrepresented message, may lead to an unfavourable career inquiry as a civil servant.

And this example brings us to the requirement of a similar behaviour on the part of the citizen, because in this way we have a civilised and dignified balance of communication, which ensures a projection of ideas and demands through the viewpoint of the civil servant.

In actual practice, situations differ according to the external environment, the problems of the day or the citizen's life pattern, and the official must manage

his or her internal power of reaction very well in conjunction with the legal possibilities for action. Here, in such a context, good administrative practice should point to the legal ropes and these should in turn be reflected in the organisation's internal procedures. This correlation would result in a conscious and automatic pre-processing of the "response" given by the official to a particular situation in which he may find himself during the exercise of his duties.

More specifically, it would be good to know how to react as part of one's duty to combat and stop a manifestation of discrimination between several citizens, applicants, who are in front of you, or even how to intervene objectively in an international activity to promote an image favourable to the institution of which you are a member. These are examples that make a National Code of Good Administrative Behaviour an imperative, and these examples can continue with a focus on ways of protecting the privacy of public servants.

At the same time, communication must be managed in accordance with an overall strategic plan for the organisation's specific activity. If such a plan does not exist, communication is conducted randomly; if positive effects arise as a result of such a process, then they are entirely coincidental. The most common mistake made in this context is the so-called technical myth. It is believed that communication supports, especially if it is the latest information technology, are sufficient to ensure a permanent, smooth and efficient communication process, practically even passive research. However, this rarely happens.

3. Legality and proportionality in the conduct of officials - the limits of passive investigation by investigative bodies

How should an official respond to a challenge aimed at intentionally inducing the official to commit an offence, in fact what the ECHR practice defines as an unfair act, an action carried out strictly for the purpose of securing evidence?

In fact, the answer can only be one, namely that the way an official reacts must be the same for any provocation, because after all, he never knows who exactly is in front of him, and he has a duty of honesty in the exercise of his office. Although this answer seems already mapped out, the practice of the courts as explained and explained creates loopholes for the official to interpret, which for some of them automatically imports a mindset that assumes that the masked thief even caught can be acquitted.

From the considerations set out in the reasoning of a court judgment handed down in a case pending before the Timisoara Court of Appeal, in relation to all the officials in the case, it is concluded that three police officers who admitted the charges received suspended sentences while the other fourteen who did not admit the charges were acquitted[7]. We therefore ask rhetorically but grounded

[7] See Constitutional Court Decision No. 392/2017 on the exception of unconstitutionality of the provisions of Article 248 of the Criminal Code of 1969, Article 297 para. (1) of the Criminal Code

in the actuality of the civil servant's senses, if this is correct, but more importantly what is the message being conveyed? Probably the officials who have confessed regret it and are suffering the consequences of a conviction, its professional effects and the opprobrium of their colleagues who have not confessed. So, what is the moral?

From the point of view of any civil servant, what is the morality established by the court ruling in question, what is the sum of the convictions transmitted to the civil servant regarding the unlawful behaviour that characterised the relationship with the citizen, with the community? Taking from the decision of the Timisoara Court of Appeal, we note: "The Court finds that the constituent elements of the offence of bribery are not met for the acts held against the defendants, since they were not committed with a free conscience, i.e. with the form of guilt provided for by law, since the decision to receive or accept money was taken following an active provocation on the part of the undercover investigators. On the basis of the principle, *in dubio pro reo*, the Court holds that, if the undercover investigators had not acted in the manner described, the defendants would not have received the money in question."

Are we to infer, therefore, that the same free conscience of those who admitted the fact, was not necessary to be taken into account by the judges, the principle *in dubio pro reo* not having the status of "truth in action" also with respect to them[8]? We understand that the judge had to balance two types of conduct, one of which had a special status, and that"... under the substantive test of provocation … must verify whether the prosecuting authorities behaved in an essentially passive manner in relation to the reasons they had for initiating the investigation, as well as the conduct of the prosecuting authorities during the investigation". But, although it is noted that "the initiative belonged on each occasion to the investigators or the collaborator, who showed a provocative attitude by insisting on the remittance of the money", the end result was the acceptance of the money by all.

4. Conclusion

From a perusal of the contents of the European Code of Good Administrative Behaviour, we conclude that this document contains only general rules, often referred to as "canons" and less often as "rules of procedure". For this very reason, and depending on the problems of each Member State, it is appropriate to promote individual codes which not only define standards or criteria, which not only set out the procedures for accountability, but which also offer good practices

and Article 132 of Law No. 78/2000 on the prevention, detection and punishment of corruption, published in the Official Gazette of Romania, Part I, No. 504 of 30 June 2017.

[8] "Justice is truth in action" - Benjamin Disraeli - Britain's first and last Jewish Prime Minister (February - December 1868 and February 1874 - April 1880).

for dealing with specific situations such as those arising from the case law developed in this area. In fact, it is important that, by going through such material, the professional perceives the "challenge" at the level of its content understood by the courts, just as it is important to understand what role a certain attitude can play in the formation of a direct and immediate causal relationship.

Finally, for the civil servant, the code must be a real handbook of good practice case law covering, at the level of the public institution or public interest, the range of managerial control and strategic management, and, at the level of the civil servant, guaranteeing the presentation of a modern system of communication and professional training whose continuity is correlated with case law.

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Brief Considerations on the International Dimension of Amending an Individual Employment Contract

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Abstract

The aim of the paper is to analyse how the legal institution of the modification of the individual employment contract is regulated in (comparative) international law – so as to facilitate labour mobility and remove restrictions based on nationality or other specifically national reasons. The desire to highlight the features of amending an individual employment contract was motivated by the fact that labour mobility – with migration as the main outcome – has a particular impact on the development of the labour market. In order to achieve the objective of analysing various legal systems from a comparative perspective – with a view to identifying the specific features – it should be pointed out that adapting a work activity to technological or economic change may require changes to the individual employment contract under which that activity is carried out, given the inherent dynamism of employment relationships.

Keywords: *individual employment contract; modification; international labour law; European Union acts; comparative law.*

JEL Classification*:* K31

1. Introductory issues

This section analyses the specificity of the rules under the International Labour Organisation (hereafter abbreviated to ILO) umbrella in order to identify whether they are also transposed in this matter – of the modification of the individual employment contract – in the similarity of the regulations.

At the international level, the ILO is the specialised labour institution of the United Nations system, established in 1919 by the Treaty of Versailles.

The ILO Constitution – its fundamental act – enshrines, from the very first sentence of its preamble, the mission of this important organisation with a universal vocation, namely to contribute to the establishment of a lasting peace, which can only be based on social justice[2].

It can be concluded that the ILO has a general competence in the field of labour and social security[3].

In the following we will highlight certain aspects concerning the elements

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[2] Popescu, A., 2008. *Dreptul internaţional şi european al muncii.* 2nd ed. Bucharest: Publishing House C.H. Beck, p. XVIII.

[3] Ibid, p. 33-49.

of the individual employment contract (which may be subject to modification) in the texts of the ILO Conventions and Recommendations.

Article 3 of Convention No. 1/1919 concerning hours of work in industry provides that: „The limit of hours of work laid down in Article 2 may be exceeded in the event of an actual or probable accident, or if urgent work has to be done on plant or equipment, or in case of force majeure, but only so far as is necessary to avoid serious interference with the ordinary work of the undertaking."

Article 5 (1) of Convention No. 30/1930 concerning working hours in commerce and services states that: „In the event of general interruption of work due to a public holiday or accident or force majeure, the daily working time may be increased in order to make up the hours of work not worked due to such causes, provided that the following conditions are met: the hours not worked shall be made up on not more than 30 days in a year and in any case within a reasonable time; the increase in the number of hours in a day shall not exceed one hour; the working time per day shall not exceed 10 hours."

Article 8 (1) (a) of Convention No. 106/1957 on weekly rest in commerce and services provides that: „Temporary, total or partial exceptions – including suspension or reduction of the rest period – may be made in each State by the competent authorities or in any other manner which is approved by the national authorities and is consistent with national law and practice: in the event of an actual or impending accident, force majeure, or where urgent work on goods or equipment has to be carried out, but only to the extent necessary to avoid serious interference with the normal work of the undertaking; where work is carried out under pressure due to exceptional circumstances in such a way that the employer cannot normally take other measures; to avoid loss of perishable goods."

Art. 9 (1) (c) of Convention No. 153/1979 concerning working hours and rest periods in road transport provides that: „The competent authority or body in each country may allow temporary exceptions for the extension of driving time and the extension of continuous working time and the reduction of daily rest periods, but only for the period necessary for the performance of indispensable work: in case of accident, breakdown, unforeseen delays, disruption of services or interruption of traffic; in case of force majeure; in case of urgent and exceptional necessity for the proper functioning of public utility services."

The Night Work Convention No. 171/1990 stipulates that workers who become unfit for work during the night must be transferred, if possible, to a similar post.

Convention No. 175/1994 on part-time work states that, by agreement of the parties, an employee working part-time may be transferred to full-time work or vice versa.

Paragraph 30 of Recommendation No. 110/1958 on plantations states that the working time limit laid down in paragraph 29 – respectively, as a general rule, 8 hours a day and 48 hours a week – may, with certain exceptions listed therein, be extended beyond the ceilings mentioned in the event of an actual or impending

accident or where work on plant or equipment is necessary, and in the event of force majeure, but only to the extent necessary to avoid serious consequences for the day-to-day running of the undertaking. Similarly, the above limits may be exceeded if the aim is to prevent the loss of perishable goods or materials subject to rapid deterioration.

Recommendation No. 161/1979 on working time and rest periods in road transport provides in paragraph 26 (1) that „the competent authority or body in each country may permit, as temporary exceptions, but only for such time as is necessary for the performance of indispensable work, the extension of working hours, the extension of driving periods and the reduction of rest periods in the event of: actual or possible accident; unforeseen delays; in case of force majeure; in case of urgent work to provide utilities in the public interest".

Paragraph 5 (2) of Recommendation No. 178/1990 on night work states that: „In occupations involving special hazards or heavy mental or physical strain, overtime work by night workers before or after a daily period of work including night work shall not be permitted except in case of force majeure or in case of an actual or impending accident." Paragraph 6 (a) of the same ILO Recommendation states that „where shift work includes night work, in no case shall two consecutive full shifts be performed except in case of force majeure or in the event of an actual or imminent accident".

In conclusion, it should be pointed out that, from the point of view of the above mentioned rules – which become applicable during the performance of the individual employment contract and lead to the amendment of the agreement in question – the ILO has confined itself to outlining (non-institutionalised) ways of amending contractual elements.

The ILO has therefore resorted only to the general, express legal framework of amendment – a legal institution specific to the performance of the individual employment contract.

Although the ILO has not succeeded in outlining the defining elements of the legal institution of the modification of the individual employment contract through the above-mentioned rules, these regulations are intended to prevent abuses on the part of the employer in relation to the employees involved in the execution of the individual employment contract.

In order to achieve this aim, the possibility of modifying certain contractual elements is expressly provided for, however, not arbitrarily, but only under expressly prescribed conditions, namely: a general interruption of work due to a public holiday (therefore, there cannot be a partial interruption of work and the cause of this impediment can only be a public holiday); an accident or a case of force majeure.

There are also some references to amending an individual employment contract in acts adopted at EU level, as follows: Directive 97/81/EU on the Framework Agreement on part-time work states that, by agreement of the parties, an employee working part-time may be transferred to full-time work or vice

versa; Directive 99/70/EU concerning the Framework Agreement on fixed-term work provides that, by agreement of the parties, in so far as there are vacancies in the establishment concerned, an employee working under a fixed-term contract may obtain employment of indefinite duration.

In addition to the rules mentioned above, the case law of the Court of Justice of the European Union also clarifies the concept of „*posting*".

In the Van der Vecht decision (No. 19/67), it is pointed out that the only essential condition defining the concept of posting is that the employee remains subject during the posting to the authority of the undertaking which posted him and sent him to another Member State. The continued subordination or relationship of authority between the undertaking of origin and the employee characterises the institution of posting.

In the same sense, in the Manpower case (No. 35/70), the Court held that sending a worker on mission to carry out temporary work in a Member State, where the temporary employment undertaking carries out its activities in another Member State, is treated as posting.

The rules contained in Directive 96/71/EU on the posting of workers in the framework of the provision of services[4] applies to undertakings established in a Member State which, in the framework of the transnational provision of services, post employees on a temporary basis to the territory of a Member State: on their behalf or under their direction, under a contract concluded between the posting undertaking and the recipient of the service; to an establishment or undertaking belonging to the group; as a temporary (interim) employment undertaking or an undertaking which has made an employee available to a user undertaking.

The condition required in all these cases is that there must be an employment relationship between the posting undertaking and the employee for the duration of the posting.

Certain criteria determine the existence of a direct relationship between the posting undertaking and the posted worker: the employment contract remains enforceable between the two contracting parties; the posting undertaking must retain the power to determine the *„nature"* of the work performed by the posted worker, in general terms – which is aimed at determining the end product of the work or the basic service to be provided; the obligation to pay the worker is that of the employing undertaking, the one ordering the posting, regardless of who is actually paying; the decision to terminate the employment contract by dismissal must remain an exclusive decision of the undertaking ordering the posting.

In addition to the temporary nature of the posting and the fact that it cannot be used to replace a worker, the characteristic features of such a normal measure are: the continuity, during the period of posting, of the worker's subordinate relationship with the posting undertaking; the performance of work for the benefit of the undertaking which posted him.

[4] Gâlcă, C., 2005. *Reorganizarea întreprinderilor*. Bucharest: Publishing House Rosetti, p. 80.

Posting is a temporary measure which, according to Article 3 (6) of the Directive, may be ordered for a period of one year. When calculating the period of posting, account must also be taken of the period of postings already completed by the employee to be replaced.

Posting is unilaterally ordered by the employer, temporary, compulsory for the employee concerned – changing only the place of work, with no reference to the possibility of changing, even exceptionally, the type of work.

If the posting measure is used, the employer is obliged to inform the employee posted from one State to another in writing as soon as possible, but no later than one month after the date on which the measure takes effect.

Such promotion of services in a transnational framework requires fair competition and measures guaranteeing respect for employees' rights. The transnationalisation of employment relationships raises questions about the law applicable to these employment relationships. According to Article 34 of Regulation (EU) No. 593/2008 on the law applicable to contractual obligations (Rome I), the rule on individual employment contracts should be without prejudice to the transposition of the immediately applicable rules of the country to which a worker is posted. Employees should not be deprived of the protection afforded to them by rules from which no derogation may be made by agreement or rules from which derogation may be made only for their benefit (Article 35 of the Regulation).

With regard to individual employment contracts, if the employee is expected to return to work in his home country after performing his duties abroad, work performed in another country is considered temporary. The conclusion of a new employment contract with the original employer or with an employer belonging to the same group of companies as the original employer should not imply a change in the status of an employee temporarily performing work in another country (Article 36 of the Regulation).

Directive 96/71/EU set out to establish a minimum set of mandatory protection rules to be respected in the host country by employers posting employees to carry out work on a temporary basis. Thus, Member States must ensure that, irrespective of the law applicable to the employment relationship, the undertakings concerned guarantee employees posted to their territory the terms and conditions of employment laid down in laws, regulations, administrative provisions or collective agreements or arbitration awards of general application in the State where the work is carried out, as regards: maximum working periods and minimum rest periods; minimum paid annual leave; minimum rates of pay, including overtime pay; conditions of hiring-out of employees, in particular for employment intermediaries; safety, health and hygiene at work; protective measures applicable to the terms and conditions of employment of pregnant women, women who have recently given birth, children and young people; equal treatment for men and women and other non-discrimination provisions.

In order to enable rights relating to terms and conditions of employment to

be enforced, it must be possible for legal proceedings to be brought in the Member State to which the employee is posted, without prejudice, where appropriate, to the possibility of legal proceedings being brought in another State.

In conclusion, it should be pointed out that – as regards the legal institutions through which an individual employment contract may be modified during its performance – the relevant European Union regulations refer mainly to the institution of posting.

The completion of the internal market provides a dynamic framework for the transnational provision of services, prompting an increasing number of undertakings to post employees to perform work on a temporary basis in a Member State other than that in which they normally carry out their activities.

2. Analysis of the legal institution of the modification of the individual employment contract in comparative law

The aim of this section is to carry out a detailed survey of comparative law regulations, presenting a global picture of the concept analysed in a series of countries considered to be representative at EU level and worldwide. The research of comparative law elements is not limited to a descriptive presentation, but, in the end, conclusions are formulated that concern all the states analysed and that constitute a solid support for subsequent proposal of *lege ferenda*.

Due to the orientation towards flexible forms of work provision, it is of particular importance to know how the modification of the individual employment contract is regulated in comparative law.

It is also a requirement of any scientific (research) approach to ensure knowledge of the realities not only internally but also externally (in comparative law).

France. During the execution of the individual employment contract, the legal institution of modification of the individual employment contract may intervene, which concerns the essential elements of the individual employment contract (such as salary, type of work, place of work, working time); modification of the individual employment contract may only intervene with the employee's consent**.**

As regards pay, the difficulties arise from the fact that pay can be set both by individual employment contract and by collective agreement, internal regulation, law or unilateral commitment by the employer.

Changes to pay as set out in the individual employment contract require the agreement of the parties, whereas changes to or cancellation of pay elements not set out in the employment contract do not constitute a change to the contract and can be made without the employee's agreement. This is subject to the rules for revision or cancellation of collective agreements and internal rules.

Any change to the salary set by the individual employment contract re-

quires the agreement of the parties, whether it is an increase or decrease. Similarly, any change in the structure of the salary or the method of remuneration (fixed, proportional, percentage, commission) cannot be made without the employee's agreement, even if it may seem more advantageous.

If the parties to the individual employment contract do not agree on a change in salary, the employer is not entitled to set the salary unilaterally, but a judge is required to decide on the matter on the basis of the criteria laid down in the individual employment contract and the agreements concluded in previous years.

Therefore, a contractual clause, even if it exists, does not allow the employer to unilaterally change the salary provided for in the individual employment contract. In order to be valid, the clause providing for variation of the salary laid down in the individual employment contract must be based on objective factors which are independent of the employer's will; it must not be due to inherent risks of the undertaking and must comply with the legal provisions.

Per a contrario, the employer may unilaterally change or cancel elements of pay which are not laid down in the individual employment contract but in a collective agreement, internal regulation, law or unilateral commitment by the employer.

With regard to the nature of the work, this may be a simple change in job duties, with no change in hierarchical and salary level or professional qualifications. In this case the measure may result from a unilateral decision by the employer. It is essential to bear in mind that the employer may make such changes to job duties unilaterally, bearing in mind that, subject to abuse of power, the management of his own human resources is his exclusive prerogative.

However, the employee has the right to refuse to carry out a task which does not correspond to his professional qualifications, given that changing the nature of the work requires the employee's consent.

With regard to working time, the laws on working hours and the working schedule of employees (daily schedule, annual schedule and management schedule) stipulate that the legal provisions must be laid down in individual employment contracts (the employment contract must specify the number of hours and the distribution of these hours), which means that any change in these elements entails a change in the individual employment contract.

With regard to the way in which working time is modified, the case law distinguishes between modification of working hours and modification of the duration of working hours.

A change in working hours, consisting of a new distribution of working hours during the day, with the actual working time and pay remaining the same, is simply a change in working conditions which the employer can make unilaterally under his organisational power.

A change in the length of working hours, involving a change from night to

day working hours or vice versa, requires an amendment to the individual employment contract and the employee's agreement. If the night shift is incompatible with urgent family obligations (in particular bringing up a child or caring for a disabled person), the employee may refuse the change, but this refusal cannot constitute grounds for dismissal.

With regard to the place of work, the following problem should be highlighted: the concrete (detailed) determination of the place of work leads to the characterisation of this clause as an essential element of the individual employment contract.

Mentioning the place of work is of informative value, unless it is stipulated in a clear and precise clause that the employee will perform his work exclusively at that place.

There are two types of clause: either to establish the place, and in the event of a change the individual employment contract will also be amended, or to stipulate mobility, and in the event of a change it will be a simple application of the clause.

The distinction between these types of clauses depends on whether the individual employment contract contains a geographical mobility clause. If such a clause is provided for in the contract, it applies without the employee being able to object. Consequently, refusal to execute a mobility clause constitutes a misconduct which may justify possible dismissal.

The change of place of work must be taken into account objectively and it is for the court to decide whether the place to which the employee intends to move belongs to a different geographical area from the one in which he is currently working and whether or not his move therefore requires amendment of the contract.

In the case of a change of geographical area, this is a change to the individual employment contract and requires the employee's agreement. If the geographical area does not change, it is a change in working conditions which the employee is not entitled to refuse.

The employer is obliged to provide the employee with a document (a notice) showing the changes to the employment contract as soon as possible – and at the latest in the month following the change. Changes may be for personal or economic reasons.

Where the change is due to a personal reason (e.g. incapacity), case law has established that it is the employer's duty to make as precise and fair an offer as possible, informing and consulting the employee.

The employee must be given a reasonable time to consider the practical consequences of the change and make an informed decision.

If the employee accepts the proposed changes, an additional contract should be signed. Tacit acceptance is not valid (it should be pointed out that, in principle, silence does not amount to consent and the principle of *qui tacet consentire videtur* does not apply). Acceptance of the change cannot result solely

from continued work (even if the employee does not protest in any way). A conditional response also amounts to a refusal.

If the modification of the individual employment contract is based on an economic cause (for example, technological changes, restructuring, financial difficulties, etc. – text taken over by the Romanian legislator in Article 65 of the Labour Code), the employer must comply with the following procedures: inform each employee in writing of the change, specifying that the period for reflection is one month; if no reply is received within the prescribed period, it is assumed that the employee has accepted the change.

An employer who has not complied with these formalities cannot claim either refusal or acceptance by the employee.

If the employee does not accept the modification of the individual employment contract, his refusal will not be considered a misconduct. However, just as the employee has the right to refuse to amend the individual employment contract, the employer also has the right to dismiss the employee.

Whether or not the modification of the individual employment contract is justified and the dismissal of the employee who refuses will also be justified. The reason for dismissal is the immediate cause, namely the employee's refusal to accept the modification of the individual employment contract, but the refusal itself is not a real and serious cause for dismissal since the employee has the right to refuse the modification; therefore, the real cause of dismissal, namely the cause of the modification, must be identified in order to determine whether or not the dismissal itself is justified.

If the employee refuses to accept the change in working conditions, the following distinction is made: if the employee refuses what is still at the draft stage of change and takes the initiative to terminate the individual employment contract, he is considered to have resigned; if he refuses a precise and firm proposal to change the working conditions and terminates work, he cannot be considered to have resigned, but can be dismissed.

The employer must follow the procedure for disciplinary dismissal. Dismissal is justified if there is a genuine and serious cause. The fact that the employee does not accept the change in working conditions is in principle serious misconduct, which deprives him of severance pay and notice. But, as the case law shows, in order to accept or reject an action as serious misconduct, account is taken of the employee's length of service, the loss of certain benefits and the employer's attitude.

The assessment is made on a case-by-case basis, depending on the particular circumstances.

Germany (*Dossiers Internationaux Francisc Levebre, Allemagne*, 2000: 353-354)**.** Although there is no comprehensive codification of labour law in Germany, it is nevertheless clear from the legal rules on the legal relationship between employees and employers that, in the course of the performance of the individual employment contract, the contractual provisions may be amended –

only by agreement between the parties. This legal institution may also result from the employee's tacit acceptance of new working conditions (e.g. change of place of work, position or working hours).

Sending the employee to work in another country or performing tasks for less pay requires the express agreement of the employee, unless these changes were provided for in the original contract.

The law obliges the employer who makes technical changes that may affect the employee's working conditions and/or existing contract to inform and consult the employee on the measures that may be taken if the employee's skills are not compatible with the new working conditions.

A substantial change in working conditions or other contractual arrangements for a period of more than one month requires the agreement of the works council concerned, which may reject the changes.

If the employee refuses to accept the change proposed by the employer, the employer can use a special procedure called „dismissal on grounds of modification", whereby the existing individual employment contract is terminated and the employee is offered another contract in which the changes become contractual provisions.

In turn, the employee can use the legal provisions for dismissal, but has little chance of success if the changes proposed by the employer are due to objective circumstances, such as economic difficulties.

Bulgaria. In the course of its performance, as a rule, the individual employment contract may be amended, according to Article 118 of the Labour Code, only by the (written) consent of the contracting parties, for a limited or unlimited period. Exceptionally, the employer may unilaterally amend the contract[5].

Moving the employee to another job in the same establishment without changing the type of work or the salary is not considered as a case of modification of the individual employment contract.

The employer may unilaterally, in case of necessity, assign the employee to work temporarily in a different job in the same or another establishment (but in the same locality) for a period of up to 45 calendar days in a year.

These changes in the performance of the individual employment contract must be made with due regard for the professional qualifications and health of the employee concerned.

Czech Republic[6]. During the performance of the individual employment contract, the contractual elements may be modified only by agreement of the contracting parties. Such an amendment can only be made in writing.

According to Article 41 of the Labour Code, the employer is obliged to move the employee to another place of work if: the employee has, due to a long-

[5] See https://www.ilo.org/dyn/natlex/natlex4.listResults?p_lang=en&p_country=BGR&p_count=1382&p_classification=10&p_classcount=12 [Accessed at 04 June 2022].

[6] See https://www.ilo.org/dyn/natlex/natlex4.countrySubjects?p_lang=en&p_country=CZE [Accessed 04 June 2022].

term deterioration in his state of health (proven by a medical certificate), lost the ability to work in the previous place of work; the employee has suffered an accident at work or an occupational disease, thus becoming incompatible with the job previously held; because of pregnancy, the woman is no longer able to work under the previous conditions; in accordance with the provisions of a medical provision, it is necessary to protect the health of other employees against infectious diseases; such a duty results from a final decision of a court or administrative agency; according to a medical certificate, the employee can no longer perform night work; such a request is made by an employee who is pregnant or breastfeeding; similarly, a woman who has given birth and works at night may also request such a measure for a maximum period of 9 months (calculated from the birth of the child).

The employer may also unilaterally change the type of work in the event of force majeure or as a measure to protect the employee.

In the **United Kingdom** of Great Britain and Northern Ireland, the common law system has been used by the courts as a tool for extending protection to employees while the current government has generally leaned towards protecting the interests of employers[7].

The legal regime applicable to labour relations is regulated by several documents, the main ones being: the Wages Rights Act (1996); the Labour Act (1989); the Employer's Compulsory Liability Insurance Regulations (1998).

During the execution of the individual employment contract, any modification of the contract requires the express or tacit agreement of both parties.

It is even difficult, in a normal situation, to impose changes to the individual employment contract. However, if such a modification is necessary, there must be solid arguments to demonstrate the effectiveness of the contract.

The employer does not have the right to unilaterally amend the individual employment contract unless this right is expressly provided for in the content of the contract[8].

If, although the right to unilaterally amend the individual employment contract is not expressly provided for, the employer nevertheless imposes such a measure, such a manifestation of will is equivalent to termination of the contract.

In this situation, the employee may either resign or continue working under the new conditions, bearing the loss suffered.

Republic of China[9]. During the execution of the individual employment contract, its modification is determined by amendments to the legal framework,

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[7] See Hough, Barry and Spowart-Taylor, A., *A common law agenda for labour law*. In: „Web Journal of Current Legal Issues", 1999 ; Vol. 2. pp. 1-25.

[8] See Simon Honeyball, John Bowers, *Textbook on Labour Law*, Oxford University Press, 2002, p. 67.

[9] See Mary Gallagher, John Giles, Albert Park, Meiyan Wang, *China's 2008 Labor Contract Law*, The World Bank Development Research Group, Human Development and Public Services Team, July 2013, https://openknowledge.worldbank.org/bitstream/handle/10986/15902/WPS6542.pdf?sequence=1&isAllowed=y, p. 74-75.

to the contractual content (certain provisions need to be included) or by circumstances beyond the control of the contracting parties.

Such amendments – from an objective point of view – appear necessary given that the execution of the contract becomes impossible within the parameters initially set.

The amendment of the individual employment contract is necessary in order to adapt the contractual elements to the new circumstances. Thus, the new contractual content must be in accordance with the will of the parties.

The amendment of the individual employment contract may be caused by: a reduction in the work tasks or responsibilities of the post; an extension or reduction in the duration of the individual employment contract; a change in the employee's duties; an increase or reduction in the employee's remuneration.

In addition, the individual employment contract may be amended, with the agreement of the contracting parties, when one of the following events occurs – with the effect of making it impossible for either the employer or the employee to perform the contract on the terms originally agreed: the establishment changes its production lines or adjusts its production level to adapt to changes in the market; the employee suffers an accident at work or becomes unfit which results in the inability to fulfil the responsibilities undertaken; some of the original provisions of the individual employment contract conflict with new legal regulations; force majeure.

The amendment of the individual employment contract concerns the rights and obligations of the contracting parties and inevitably affects their interests.

Amendments to contractual elements must comply with the following requirements: they must fall within the scope of the amendments permitted by the relevant legal rules and regulations; they must be made promptly, as the contracting parties must propose and make the necessary amendments to the contractual elements; they must be in accordance with the contractual content; these amendments can only be made, as we have seen, by agreement between the contracting parties.

In the procedure for amending the individual employment contract, the party proposing the variation of contractual elements may be obliged to pay compensation. Thus, except in cases where there is a partial or total renunciation of responsibilities, a contracting party must be liable to pay compensation to the party affected by the loss caused by the change.

It is essential to bear in mind the following aspects: the contractual terms – which have not been amended after the conclusion of the individual employment contract – must remain valid; if the form of ownership changes – at the level of the employer – or if the unit is transferred to another division or unit, then the contracting parties must terminate the employment contract and conclude a new one – even if the related rights and obligations have not changed. The contracting parties cannot amend the individual employment contract simply by substituting the name of the new employer or the new form of ownership. However, there

should be no recourse to the conclusion of a new individual employment contract if only the legal representative of the employer changes.

In conclusion, the modification of the individual employment contract can only be made by agreement of the parties – an agreement made through consultation, based on the principle of equal rights and mutual benefits.

Per a contrario, within this legislative framework, the elements of the individual employment contract cannot be modified unilaterally.

The regulatory system in the **United States of America** is characterised by the fact that it allows the parties, during the performance of the individual employment contract, by contractual clauses to define the modification of the individual employment contract.

From the analysis of the provisions of several individual employment contracts (which we have undertaken in relation to legal documents – in the sense of *instrumentum probationis* – obtained from employers – legal persons), it can be concluded that two general ways of amending the contract are enshrined, namely either by agreement of the parties or by unilateral will of the employer – party to the individual employment contract.

Bilateral amendment of the individual employment contract involves an agreement between the employee and the employer which must be signed by both parties (written form is required *ad validitatem*). This agreement increases the workload or revises existing contractual elements.

Unilateral modification, as a temporary and compulsory measure for the employee, can be made on the employer's initiative and must be signed by the employer alone.

The cases in which the individual employment contract may be unilaterally amended by the employer are as follows: in the event of organisational changes within the establishment, in which case the employer is nevertheless obliged to notify the employee in writing of the changes made; where there is a written document authorising the employer to amend the individual employment contract in this way, but without affecting the purpose for which it was concluded; where a clause known as an „*optional clause*" authorises such an amendment (some contracts may contain a clause giving the employer the right temporarily to amend elements of the individual employment contract); as a measure prompted by the employer's increased workload.

In conclusion, in this system of law, too, the rule is that the individual employment contract is amended by agreement between the parties; unilateral amendment is exceptional and is only ordered in certain cases expressly provided for in the individual employment contract.

3. Conclusions

Legally, unilateral modification of the individual employment contract takes place within a fairly rigid framework. The current Romanian Labour Code

has made a shift in favour of the employee, restricting even more than in the past the employer's ability to amend the individual employment contract.

Unilateral modification of the individual employment contract by the employee is not possible, given the employee's subordination to the employer. Instead, the employer may unilaterally amend the individual employment contract under the conditions and within the limits set by the Labour Code.

During the performance of the individual employment contract, the legal institution of modification may intervene, on which the following conclusions can be drawn – with reference to comparative law aspects.

The documents of the International Labour Organisation only refer to the possibility of amending the individual employment contract, but do not specify the legal institutions through which this amendment could be made.

At European Union level, it can be concluded from an analysis of the existing regulations that, as regards the possibility of amending the individual employment contract, a distinction must be made between: situations in which the individual employment contract may be amended by the legal institution of posting of employees in the context of the provision of services, as provided for in the relevant Directive No. 96/71/EU; and cases in which, without using the legal institution of posting, the individual employment contract may be amended, by virtue of the principle of freedom of contract, by agreement between the parties.

It is clear from the comparative law rules that the dynamics of the individual employment contract must be recognised.

The legal systems comprise different legal regulations, respectively: there are countries which have institutionalised forms of amendment of the individual employment contract – by delegation, secondment, transfer - and countries which have non-institutionalised forms of amendment of the contractual terms – thus recognising only generically the possibility of amending an individual employment contract (e.g. France, Germany, UK); as a rule, amendment of an individual employment contract is by agreement of the contracting parties – unilateral amendment of the contractual terms is possible only by way of exception; there are also cases where an individual employment contract can only be amended by agreement of the contracting parties – unilateral amendment of the contractual terms is excluded (e.g. Germany); as a rule, amendments to contractual elements are made by express agreement of the contracting parties. By way of exception, the amendment of the individual employment contract may result from the employee's tacit acceptance of new working conditions (e.g. Germany, the United Kingdom); in most countries, the cases in which the individual employment contract may be amended unilaterally are expressly provided for in the legislation applicable to legal employment relationships (e.g. force majeure, as a measure to protect the employee). However, there are also situations in which the contracting parties have the right to determine cases of unilateral amendment of the individual employment contract by negotiation – i.e. in the individual employment contract

(e.g. the United Kingdom); a special view of the legal institution of amendment of the individual employment contract can be found in France. Thus, before 1996, a distinction was made between substantial changes to the individual employment contract for which the employee's agreement was absolutely necessary and non-substantial changes which the employer could make unilaterally.

Since 1996, case law has abandoned the old way of differentiating between changes to the individual employment contract and a new one, distinguishing between changes to the individual employment contract and changes to the terms and conditions of employment. Similar to the French legal regulation which distinguishes between the modification of the individual employment contract and the modification (only) of the working conditions, we consider that the express establishment of this distinction by the provisions of the Labour Code is justified. In the French system, this option allows for objective assessments, with the judge assessing the changes on the basis of the situation of the establishment and not that of the employee.

A distinction should therefore be made between: the unlawful nature of the employer's measure, if its unilateral manifestation of will is intended to modify an essential element of the individual employment contract (salary, place of work, type of work); the lawful nature of the measure, in principle, if the subject of the measure is aspects which go beyond the "hard core" of the employment relationship, for example: working hours, meal breaks.

It should be emphasised that this differentiation may concern all the hypotheses of modification of the individual employment contract.

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SOME ASPECTS REGARDING CRIMINAL CHALLENGES

Insurance Fraud - A Global Problem[1]

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Abstract

Fraud is closely monitored by insurance companies as well as by state bodies set up to enforce the law and take measures to prevent antisocial acts. If in other countries the fight against insurance fraud is regulated by specific laws, in Romania there are still incipient phases because people are not aware of the size of the phenomenon and the consequences. As regards the way in which insurance fraud is regulated, it differs depending on the need to introduce regulations in this area. We found the existence of uneven criminal provisions and sanctions, which differ from country to country. The purpose of this article is to compare the laws in the field of combating insurance fraud.

Keywords: *legislation, insurance, unification, sanctions, anti-fraud solutions.*

JEL Classification: K14, K33

1. Introduction

Fraud is closely monitored by insurance companies as well as by state bodies set up to enforce the law and take measures to prevent antisocial acts. If in other countries the fight against insurance fraud is regulated by specific laws, in Romania there are still incipient phases because people are not aware of the size of the phenomenon and the consequences. As regards the way in which insurance fraud is regulated, it differs depending on the need to introduce regulations in this area. We found the existence of uneven criminal provisions and sanctions, which differ from country to country. The purpose of this article is to compare the laws in the field of combating insurance fraud. As a research topic, we will consider the criminal law of several European countries for which the issue of insurance fraud is currently particularly relevant or where special legislation in the field of criminal liability for insurance fraud has been proposed. Below we have compared the legislation of countries such as Germany, France, Austria, and Italy.

2. The insurance fraud

In Romania, the insurance fraud is investigated according to art. 245 of the Penal Code, which reads as follows: "(1) The destruction, degradation, disuse,

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concealment, or alienation of property insured against destruction, degradation, wear, loss or theft, in order to obtain for another, the sum insured is punishable by imprisonment from one to five years. (2) The deed of the person who, for the purpose provided in par. (1), simulates, causes, or aggravates injuries or bodily injuries caused by an insured risk, shall be punished by imprisonment from 6 months to 3 years or by a fine. (3) Reconciliation removes criminal liability"[3]. From the analysis of the legal content of the crime, it has two variants of incrimination: a basic variant provided by art. 245 para. 1 Penal Code and an attenuated variant provided in paragraph 2. At the same time par. 3 contains elements that refer to the cause of removal of criminal liability and that exist in the situation where reconciliation occurs between the parties. If we refer to the level of gravity established abstractly for the crime of deception in the variant from art. 244 of the Penal Code, it is noted that the variants are on the same plane. The legislator's choice to create a separate charge of insurance fraud is justified by the fact that the effectiveness of general prevention is higher to the extent that there is a separate regulation[4].

If we refer to art. 245 of the Penal Code, we find that the main element that makes the difference between the deception from art. 244 Penal Code and this is the premise situation. The offense necessarily presupposes the pre-existence of an insurance contract. In this case, the offense can only be committed in the context of the alleged conduct of an insurance business. Considering the way in which the two normative variants are formulated, I consider that they follow the classical systematization in the field of civil law, in which the insurances are classified according to the object to which they refer in goods and personal insurances. In the case of personal insurance, the insurer is obliged to pay the insured amount when the insured event occurs. The insured amount will be paid to the insured or designated beneficiary, and when the insured dies and no beneficiary is named, the insured amount will be paid to the heirs of the insured, as beneficiaries. It is possible for the insured to name the beneficiary at the time of the conclusion of the contract or during its performance by a written statement communicated to the insurer or by will.

Life insurance can take the form of life insurance or accident insurance. If the insurance is made in case of death, the contract can be concluded for a certain period, and the insurer would pay the amount if the death occurred in this time until the end of the life of the insured. Asset insurance refers to either individual assets or groups of assets and future assets may be insured. In this context, the insured's obligation is to maintain the insured property in good condition and in accordance with the legal provisions, to prevent the insured risk.

The insurer has the right to verify the way in which the insured property is maintained, and the insured amount cannot exceed the value of the property

[3] *Legea nr. 286/2009 privind Codul Penal*, Ed. Universul Juridic, Bucharest, 2021.
[4] E. Safta Romano, *Contracte civile*, Ed. Polirom, Bucharest, 1999, p. 257.

because this would stimulate the interest of the insured to produce the event. Following the analysis, we can state that in the case of the crime from art. 245 para. 1 Criminal Code it is a question of a goods insurance, while at par. 2 is a personal insurance.

In Germany, as in other European countries, most offenses are recorded in the car insurance sector. Analyzing Germany's criminal law in the field of criminal liability for insurance fraud, I noticed several issues. Germany's criminal law actually provides for two criminal regulations to establish liability for insurance fraud. The general rule on fraud covers most insurance fraud offenses. However, the special rule on fraud involves a less severe penalty than the general criminal rule on liability for fraud[5]. Thus, the German legislature refers to the most dangerous cases of insurance fraud under the general rule of fraud.

The penalty for such an act can be up to 10 years in prison, while the liability for abuse in the insurance industry cannot exceed 3 years in prison. In France, criminal law does not cover a specific offense against insurance fraud. However, there is a general belief that France is a leader in Europe in the effectiveness of organizing the fight against insurance fraud. There is no legal definition of insurance fraud in France, and French criminal law does not have a special regulation on liability for insurance fraud.

Thus, criminal liability for fraud is established by the general rule of law. The Penal Code regulates forgery in writing and fraud. Fraud is the most common crime in insurance fraud cases, which is characterized by a desire to obtain undue or higher compensation than is normally due, through fraudulent maneuvers performed in bad faith to deceive the insurer. The fraud is punishable by imprisonment for up to 5 years and a fine of 375,000 euros according to art. 313.1 of the French Criminal Code[6]. It should be noted that in France an attempted fraud is equivalent to the same sanctions as a successful fraud. It should be noted that French criminal law provides for less severe penalties compared to German criminal law. Analyzing the French criminal law in the field of liability for insurance fraud, it can be noticed that there is a lack of differentiation of criminal liability and that it is not considered by the French legislator as a crime with a higher degree of danger. In addition to criminal sanctions, Article L113-8 of the Insurance Code provides for the nullity of the insurance contract in the event of a false statement. The contract will be declared void, the insured will have to reimburse the indemnities offered by the insurer for damages prior to the false declaration for a period of two years.[7]

Continuing the comparison, we have considered Austrian criminal law in

[5] *German Penal Code*, available at: https://www.gesetze-im-internet.de/stgb/__263.html, accessed on: 12.05.2022.

[6] *French Penal Code*, available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006418192/, accessed on:12.05.2022.

[7] *Insurance fraud*, available at: https://detective-rif.com/service/escroquerie-assurance/, accessed on 11.05.2022.

the field of insurance fraud. The criminal law of this country is closely linked to the criminal law of Germany. Austrian criminal law contains a special provision which provides for liability for various fraudulent abuses related to insurance activities. Unlike German criminal law, this rule contains a significant list of facts. Austrian criminal law provides much lighter penalties for insurance fraud.

The most severe punishment is imprisonment for up to 6 months. Such sanctions are less severe compared to the criminal laws of Germany and France. For serious cases of fraud, the criminal law provides for a more severe sentence that can lead to 10 years in prison[8]. Next, we look at Italian criminal law in the field of criminal liability for insurance fraud. Incriminations in the field of insurance are found in art. 640 and 642 of the Italian Criminal Code. According to art. 640 of the Italian Penal Code, a person who by cunning or deception, misleading someone, obtains for himself or for others an undeserved benefit to the detriment of someone, is punishable by imprisonment from 6 months to 3 years and a fine of 100,000 to 2 million Italian pounds. Also in art. 642 regulates the fraudulent destruction of one's own property and the fraudulent mutilation of one's own person according to which the one who, for the purpose of obtaining for himself or for others the indemnity of an insurance or in any case an advantage deriving from an insurance contract, destroys, spreads, damages or hide things that belong to him, falsify or modify a policy or the documents necessary for the conclusion of an insurance contract, shall be punished by imprisonment from 1 to 5 years.

Those who cause personal injury for the purpose mentioned above are punished with imprisonment from 6 months to 3 years or aggravate the consequences of personal injury caused by an accident or report an accident that did not occur or destroy, falsify, alter, or provide evidence or documents. related to the accident. If the offender realizes the intention, the punishment is increased.

The provisions of this article apply even if the crime is committed abroad, to the detriment of an Italian insurer, which operates in the territory of the state. The offense is punishable by a complaint from the injured party[9]. Analyzing the provision of the criminal law rule of Italian law on liability for insurance fraud, it is observed that three types of facts related to insurance fraud are established: destruction or damage to the insured property; intentional cause by harming the life and health of an insured person and falsifying documents concerning the insured case. The Italian Criminal Code specifies that he is criminally liable even if the act was committed outside Italy, but the Italian insurer has harmed. With regard about matters relating to the penalty for insurance fraud, the Italian legislature is pursuing the main trends in the legislation of European states.

The most severe punishment is imprisonment for up to 5 years. It is noteworthy that with the development of the insurance market, the increase in the

[8] *Austrian Criminal Code*, available at https://www.jusline.at/gesetz/stgb/paragraf/146, accessed on 12.05.2022.

[9] *Italian Criminal Code*, available at https://www.brocardi.it/codice-penale/libro-secondo/titolo-xiii/capo-ii/art642.html, accessed on 03.05.2022.

number and share of compulsory insurance, the motivation of people to defraud insurers to obtain unfair patrimonial benefits has also increased, which is why regulations have been created in most countries on fraud. insurance.

To argue that fraud can be identified and completely prevented is absurd. Insurance fraud has come along with insurance.

An old story told among the employees of an insurance company says: "Once, in a village, at the house of the richest man, he drew an elegant barge from which descended a distinguished and well-dressed gentleman. He entered the landlord's house and offered to set fire to his house, after which he told all the villagers that he was not worried because he was cautious and insured himself for the fire at an insurance company owned by that distinguished gentleman. The landlord received the money in advance for certainty and carried out the scenario set up together with the representative of the insurance company. After the incident, he built two houses, one for himself and one for his son. People from the village and the surrounding area rushed to the insurance company where they insured their homes influenced by the benefit of the insurance observed in the case of the householder." However, the insurer recovered its investment by increasing the insurance contracts but created the premises for committing insurance fraud. Unexpectedly or not, history is repeating itself and the employees of the newly established insurance companies in many situations encourage the insured to recover the insurance premium with the help of real damages.

A multitude of professional associations and authorities aiming to prevent and combat insurance fraud in various countries set out in their activity reports considerable sums which are equivalent to the budgets of the richest countries in the world[10].

Identifying fraud is a comprehensive process without having a formula set in advance, as only limited data and information are known. The identification of fraud has as possible causes: the incident; the complaint; the experience of the investigator; correlation of different information; detailed verification of supporting documents; reconstruction of the facts; confrontation of statements. Unfortunately, the detected fraud mechanisms are no longer used by criminals, who are one step ahead of the investigators, who specialize along the way[11].

Detection is an important concept in fraud investigation because the speed with which fraud is detected and how it is detected can have a significant impact on the size of the fraud. It is also essential to prevent fraud because organizations can take steps to improve the way they detect fraud, which increases staff's perception that fraud will be detected and could lead to discouragement of bad behavior in the future. The basis for the effective detection of fraud is the knowledge of the most common methods by which fraud is discovered. Despite

[10] Bogdan Manole Decebal, *Controlul în asigurări*, Ed. Casa Cărții de Știință, 2005, p. 109.
[11] Ibid, p. 110.

the increasingly sophisticated methods of detecting fraud available to organizations, advice has been the most common way in which fraud has been discovered.[12]

The 2020 report issued by the Association for the Examination and Certification of Fraud (ACFE) shows that the detection of fraud was possible because of the following causes: through advice (43%); through internal audit (15%); others (6%); by mistake (5%); external audit (4%); examination of documents (3%); supervision (3%); notified by law enforcement (2%); by IT control (2%); confession (1%). The same report shows who reports fraud: employee (50%); customer (22%); anonymous (15%); sales agent (11%); other people (6%); competitor (2%); owner (2%)[13].

The large number of possibilities through which undeserved amounts can be obtained from insurances paid based on insurances are an alarm signal for stopping the phenomenon. The management of insurance companies must effectively organize the prevention and control of fraud. A first precautionary measure may be to conclude collaborative agreements on issues of control and mutual provision of specific data concerning persons who attempt or have succeeded in fraud. It calls for the creation of an independent body specializing in preventing and combating potential offenders. Insurance companies can be shareholders in this entity.

Fraud prevention measures can be achieved through stricter internal control, checking the CVs of new employees, regular audit of fraud, establishing anti-fraud policies, the willingness of companies to take cases to court, training courses for employees, anonymous fraud reporting mechanisms and workplace supervision[14].

A special law has been in place in the US state of Nebraska to combat insurance fraud. The working group consisted of members of the insurance industry, law enforcement, prosecutors, the Insurance Department, the Attorney General, the Bar Association, regional and national insurance organizations, and insurance experts. Through their collective efforts, the Insurance Fraud Act came into force, which came into force on September 13, 1995.

The purpose of the Insurance Fraud Act is to combat the problem of insurance fraud in Nebraska by detecting insurance fraud; development of fraud prevention programs; investigation of suspicious insurance claims; criminal prosecution of persons who commit insurance fraud; obtaining a refund of fraudulently obtained benefits. The goal is to reduce the amount used to pay for fraudulent applications. The Insurance Fraud Act provides immunity from liability for any person or entity who reports suspicious insurance fraud with unintentional

[12] The Association of Certified Fraud Examiners (ACFE), *Report to the nations. 2020 Global study on occupational fraud and abuse*, 2020, p. 18, available at: https://acfepublic.s3-us-west-2.amazonaws.com/2020-Report-to-the-Nations.pdf, accessed on: 02.05.2022.
[13] Ibid, p. 19.
[14] Bogdan Manole Decebal, *op. cit.*, p. 116.

fraudulent intent or bad faith. The law on insurance fraud gives the insurance agent immunity from the insurer. Insurance companies are immune from liability when they communicate with each other about suspicious damage and insurance activity. This benefits not only insurance companies but also the authorities.

The Law on Insurance Fraud establishes 12 separate acts that constitute insurance fraud. These 12 violations are set out in the insurance code and repeated in the criminal code. The law on insurance fraud follows the same classification of crimes as theft. Any violation of less than $ 500 is an offense, and any violation of $ 500 or more is a felony. Instead of prosecution, the imposition of civil fines is another remedy that can be used in an insurance fraud investigation.

A person or entity who is found to have committed a fraudulent act of insurance by a court following an action brought by the director of insurance is subject to a civil sanction. The civil penalty for the first violation will not exceed $ 5,000, $ 10,000 for the second violation and $ 15,000 for each subsequent violation. The costs and expenses incurred in any investigation arising from a breach of the Insurance Fraud Act may be claimed in any court decision. Any costs recovered (from investigations) will be refunded to the fund from which the costs were incurred. Restitution may be ordered to compensate the victim[15].

3. Conclusions

In Europe, the needs of the insurance market to be protected from fraud have led to the formation of professional anti-fraud associations to prevent and eliminate fraud. States have established administrative authorities to verify, prosecute and sanction abusive methods of insurers, as appropriate. Some examples are in Italy the administrative entity is called "The Institute for the Supervision of Private Insurance and Collective Interest" (PICI) and is regulated in the Private Insurance Code[16]; In Denmark, the authority responsible for monitoring and control in the field of insurance is the "Financial Supervisory Authority", in the Belgian system, the supervision is performed by the Banking, Finance and Insurance Commission (B.F.I.C) established in 2004[17].

In Romanian law, this entity is the Financial Supervisory Authority (F.S.A) whose duties are prudential supervision of the capital market, the area of private pensions and the insurance market.

In Romania, ACADA was created - the Association for Anti-Fraud Cooperation in the Field of Insurance, which is dedicated to those who want to report

[15] Department of insurance. Nebraska, available at: https://doi.nebraska.gov/consumer/creation-insurance-fraud-prevention-division, accessed on: 03.05.2022.

[16] R. Pellino, P. Pellino, S. Sorgi, *Capire le assicurazioni private*, Ed. Il Sole 24 ore, Milano, 2006, p. 22 et seq.; S. Lanna, *Diritto delle assicurazioni private*, Editorial group Esselibri-Simone, Milano, 2006, p. 36 et seq. *apud.* V. Nemeș, *Dreptul Asigurărilor*, Ed. Hamangiu, 5th ed., Bucharest, 2021, pp. 1, 2.

[17] M. Fontaine, *Droit des assurances*, 3e ed., Ed. Larcier Bruxelles, 2006, p. 41 et seq. *apud*. V. Nemeș, *op. cit.*, p. 2.

insurance fraud[18]. Current insurance fraud prevention and control techniques are applied through routine operational control through on-the-spot analysis, expertise and research of information provided by policyholders or injured parties and control based on investigative techniques.

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Competition between Criminal and Administrative Responsibility - Questions and Solutions

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Abstract

This article aims to present the essence of the Ne bis in idem principle from a doctrinal point of view, while at the same time emphasizing the more important practical issues in its application. The study also includes a synthesized comparative analysis of the case law of the Court of Justice of the EU, the ECtHR and some national courts. In the comparative analysis these questions are considered in particular - what are the criteria for assessing whether an administrative proceeding is defined as criminal and what are the most common hypotheses of competition between criminal and administrative penal responsibility against the same person for the same act. As a result of the research, some controversial questions regarding the applicable legal responsibility in cases of concurring facts were answered.

Keywords: *ne bis in idem principle, concurring facts, administrative penal responsibility, proceedings with a criminal character, res judicata.*

JEL Classification*:* K14, K23

1. Introduction

The right of a person not to be prosecuted and punished twice for the same crime is a classic principle of criminal procedure law of double significance. On the one hand, it prevents abuses of the right to punishment (ius puniendi) and, on the other hand, guarantees legal certainty and the stability of the force of *res judicata*.

The *ne bis in idem rule* existed in customary law and was later found in the legal systems of ancient Greece and ancient Rome. The *Justinian Corpus Iuris Civilis*[2] contains an explicit text according to which the same person should not be charged again with a crime for which he has already been acquitted. The rule "*not twice for the same thing*" has been adopted in the continental legal system and at present is considered one of the norms with fundamental importance that is included in many national and international legal instruments.

Over the years the principle *ne bis in idem* takes on different dimensions and following the contemporary law it is applied not only in engaging criminal responsibility but also in administrative penal responsibility, including in cases

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[2] Corpus Iuris Civilis states: „48.2.7.2. (2) The Governor should not permit the same person to be again accused of crime of which he has been acquitted."

of competition between these two types of legal responsibility. In this sense, it can be said that nowadays European jurisprudence is at a crossroads between administrative penal and criminal justice.[3]

At the same time, the achievements of EU law[4], as well as the case law of the *Court of Justice of the EU (CJEU)* and the *European Court of Human Rights (ECtHR),* allow the Member States to derogate from the *Ne bis in idem principle* in individual cases.

The legal research of this paper is focused on the essence of the *Ne bis in idem principle,* the accepted jurisprudence criteria for assessing the criminal character of the proceedings and the most common hypotheses of competition between criminal and administrative penal responsibility against the same person for the same act. As a result of the comparative analysis, some controversial questions regarding the applicable legal responsibility in cases of concurring facts were answered.

2. Criteria for applying the *Ne bis in idem principle* in proceedings with a criminal character

The prohibition on retrial and punishment of the same person for the same act is intended to prevent duplication of criminal proceedings with the same subject and subject matter. The *ne bis in idem* rule is an essential element of the right to a fair trial within the meaning of Article 6, §1 of the *European Convention on Human Rights (ECHR),* and beyond the exceptions set out in Article 4, § 2 of Protocol № 7 to the ECHR, any restrictions on its operation are incompatible with its unconditionally obligatory character.

In *Interpretative decision № 3 of 2015*[5] *the Supreme Court of Cassation of Bulgaria* emphasizes that the effect of this rule should be manifested only in hypotheses of the identity of the subject - the perpetrator of the violation - in two proceedings with a criminal character. The assessment should be made by the competent decision-making authority, based on the so-called "*Engel criteria*" (also known as the "*Engel test*"), defined in the decision of the *European Court*

[3] See Sofia Mirandola and Giulia Lasagni, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, Eucrim, Issue 2/2019, pp. 126-135, https://doi.org/10.30709/eucrim-2019-009, last accessed on 30.06.2022.

[4] More specifically Article 54-58 of the *Convention implementing the Schengen Agreement of 14 June 1985*; Art. 7 (2) of the *Convention on the protection of the European Communities' financial interests*; Art. 10 (2) of the *Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.*

[5] Interpretative decision № 3/2015 at the General Assembly of the Criminal Board of the Supreme Court of Cassation of Bulgaria is available online at: http://www.vks.bg/talkuvatelni-dela-osnk.Html.

of Human Rights (ECtHR) on the case *Engel and Others v. the Netherland*[6]. Currently, these criteria are a well-established standard for assessing the criminal character of the charge in each specific case under the case law of the ECtHR.

According to Engel's criteria, the competent judicial authority should examine the existence of the following legal facts:

1. Legal qualification of the act under national law. Although derived as a first criterion, it is not crucial for defining the proceedings as criminal[7]. In this sense, the Bulgarian Supreme Court of Cassation points out that a proceeding can be considered criminal even when the act is not qualified as a crime under national law if the examination of the other two criteria leads to the conclusion that there are grounds for a criminal charge.

2. Legal nature of the violation. In this case, the assessment is focused on which public relations are specifically violated by the act and to what extent they have been negatively affected by it. As is well known, the legislature defines crimes as acts with the highest degree of public danger, compared to other offences. Respectively, these are offences that radically threaten or violate public interests and values of paramount importance for the normal existence of any society such as national security, the rule of law, fundamental rights and freedoms of citizens. The Bulgarian Supreme Court of Cassation points out that inherent to the engagement of criminal responsibility is the infringement of a legal norm that is aimed at an unlimited number of addressees.

3. Legal nature and severity of the punishment provided for in the relevant norm. The latter criterion requires verification of the similarity in the penalties provided for the relevant violations. While administrative penalties are usually characterized by less intensity and severity, affecting mainly the property sphere of the offender, the repressive, preventive, corrective and in some cases restorative objectives[8] are essential characteristics of all criminal penalties and that is the reason for their greater severity. In this sense, the type of punishment is determinative of qualifying the legal character of the proceedings. For example, the imposed but also the possible punishment of imprisonment, in principle, determines the criminal nature of the proceedings unless it leads to a serious violation of the rights of detainees. In legal doctrine is stated that recoursing to such a punitive measure as deprivation of liberty "constitutes a restrictive effect on a fundamental subjective right - the right to liberty has a legally established purpose and basis. The effective realization of the objectives of the penal measure is achievable by establishing obligations, prohibitions and factual restrictions, in

[6] See Judgment 8 of June 1976 of the European Court of Human Rights. The document is available online at: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-57479%22]}; last accessed on 20.06.2022.

[7] See case C-261/09 - *Mantello*, Judgment of 16 November 2010, EU: C: 2010: 683.

[8] More about the restorative function of criminal penalties see Chankova, Dobrinka. *Restorative Justice as a New Response to Crime - the Modern Vision and Bulgarian Dreamers and Opponents*, in „Balkanistic Forum", SWU – Blagoevgrad, ISSN 1310-3970 (Print), 2535-1265 (Online); 2021, № 3, pp. 344-35.

compliance with the imperative - no one can be deprived of liberty in an "arbitrary manner."[9] Next, the significant amount of property penalties or sanctions subject to entry into the criminal records also indicates the presence of a criminal charge within the meaning of Art. 6, § 1 of the ECHR.

For the applicability of Art. 6, § 1 of the ECHR and Art. 4 of Protocol № 7, it is sufficient that the act meets only one of the above criteria for the imposition of a criminal charge. The second and third criteria are considered alternatively but can be assessed cumulatively if their independent analysis is not sufficient to form a clear and reasonable conclusion.

Next, in assessing the application of the *Ne bis in idem principle*, the competent decision-making authority should determine both the identity of the person and the subject matter in the two competing proceedings. The assessment of the "idem" element is one of the most controversial aspects of the principle. According to the Bulgarian Supreme Court of Cassation instructions, the deciding authority must verify both the existence of identical facts in terms of the time, place, and circumstances of the act and the unity of the decision based on which the perpetrator has committed the specific illegal behaviour. This means that the presence of concurring facts is required simultaneously on the objective and on the subjective side of the committed act which is the subject of the criminal proceedings under consideration[10].

The Bulgarian Supreme Court of Cassation explicitly accepts that the *Ne bis in idem principle* is not only an absolute obstacle to re-sentencing the same person for the same act but also an absolute prohibition for the second criminal prosecution of a person who has already been convicted or acquitted of the same act[11]. It is considered that the protection of the principle takes effect from the moment of entry into force of the first procedural act which finally resolves a legal dispute regarding the specific act. Moreover, neither the type of final procedural act - penal decree, court decision, sentence, ruling on termination of criminal proceedings, nor its nature - convicting or acquittal, for exemption from criminal liability by imposing an administrative penalty, are relevant. The *Ne bis in idem principle* also apply when a pre-trial criminal proceeding is finally terminated in respect of the same facts.

It must be noticed that with the adoption of Interpretative Decision № 3/2015 the Bulgarian Supreme Court of Cassation made the necessary unification

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[9] See Станин, Манол. *Относно понятието „Лишаване от свобода"*, електронно списание „Право, Политика, Администрация", Том 6, Брой 1/2019 г., с. 2-8 (Stanin, Manol. Regarding the concept of "Deprivation of liberty", electronic magazine "Law, Politics, Administration", Volume 6, Issue 1/2019, pp. 2-8), quoted on page 3; available online at: https://lpajournal.swu.bg.

[10] See Judgments of the ECtHR in the cases of *Sergey Zolotukhin v. Russia*, available online at: https://hudoc.echr.coe.int/fre?i=001-91222; *Tsonyo Tsonev v. Bulgaria*, available online at: https://hudoc.echr.coe.int/fre?i=001-113777.

[11] See Judgments of the ECtHR in the cases of *Franz Fischer v. Austria*, available online at: https://hudoc.echr.coe.int/fre-press?i=001-59475; *Nikitin v. Russia*, available online at: https://hudoc.echr.coe.int/fre?i=002-4292.

of Bulgarian case law with the practice of the ECtHR and the CJEU. This has ensured greater legal certainty, proportionality and efficiency of justice by ending the vicious practice of duplicating criminal sanctions as a result of two separate proceedings with a criminal character.

According to the cited interpretative decision, the issue of competition between the criminal and administrative penal liability of the same person for the same act should be distinguished in two main directions: at the level of procedural guarantees preventing a violation of the *Ne bis in idem principle* and given the procedural means by which a violation of the principle already committed can be compensated.

3. Legislative decisions to overcome the competition between criminal and administrative penal responsibility at the national level

Following the established legal doctrine and the case law in Bulgaria, *the Ne bis in idem principle* is applied not given the legal qualification of the prosecuted act but because of the deed itself. Moreover, the observed in practice cases of duplication of administrative penal and criminal proceedings against the same person for the same deed are mainly due to errors in the legal classification of the act as an administrative violation, resp. as a crime. A direct consequence of this is the incorrect determination of the type and nature of the proceedings, including the competence of the authorized authority.

The current Bulgarian legislation provides a concrete permit which excludes the possibility of repeating proceedings with criminal character against the same protected object[12]. Firstly, the principle of primacy of criminal responsibility before administrative penal responsibility undoubtedly eliminates the danger of duplication of court proceedings. This is because by prosecuting and punishing crimes the state provides the highest degree of the legal protection of the most important public relations and, accordingly, criminal repression has the most intense effect on the perpetrator's personality. In this sense, the established rule directly reeds that when a committed act is a subject of initiated criminal proceedings, the possible administrative penal proceedings are not instituted or the one that has already been instituted is terminated.

Consequently, under the current Bulgarian jurisprudence, the principle of primacy of the criminal before administrative penal responsibility is practically applicable only to hypotheses when none of the two competing proceedings is initiated or if initiated none of them is not completed by the force of res judicata. On the other hand, there are cases in which administrative penal responsibility is realized with the force of res judicata before criminal responsibility for the same

[12] Currently, directly related to the application of the Ne bis in idem principle in competition between administrative penal and criminal liability are these provisions: Article 24, para. 1, item 6, item 8a; Article 24, para. 4; Article 25, item 5 of the Bulgarian Criminal Procedure Code and Article 17, 33 and 70 of the Bulgarian Administrative Violations and Penalties Act.

concurring facts.

The ECtHR case study[13] concludes that when a state explicitly acknowledges a violation of the ECHR and takes "appropriate and sufficiently favourable measures to neutralize it", the person concerned loses the status of a "victim" of this violation. In this sense, a person who has been re-prosecuted after having already completed administrative penal proceedings for the same deed can be compensated by eliminating objectively and lawfully all illegal consequences of the violation of the *ne bis in idem* rule. This could be achieved by repealing the incorrectly issued procedural acts, terminating the incorrectly instituted second proceedings with a criminal character or terminating the execution of the unjustifiably imposed repeated punishment, etc.[14]

The consequences of repeated criminal prosecution of the same person for the same deed, for which a final administrative penal proceeding has been conducted (and it has a criminal character in the sense of the ECHR) can be eliminated by consistent application of a system of legal institutes regulated by current Bulgarian legislation:

- termination of the second-in-time criminal proceeding initiated or conducted against the same perpetrator for the same deed after the completion of administrative penal proceedings of a criminal character, resp. revocation of the judicial acts ruled on it and its termination on the grounds of Art. 4, § 1 of Protocol № 7 and pursuant Art. 24, para. 1, item 8a of the *Criminal Procedure Code of Bulgaria*[15];

- resumption of the finally completed administrative penal proceedings in the presence of the prerequisites of Art. 70, para. 2 of the Bulgarian *Administrative Violations and Penalties Act*[16], annulment of the procedural acts issued on it and its termination on the grounds of Art. 33, para. 2 of the same legal act, in connection with Art. 25, para. 1, item 5 of the *Criminal Procedure Code of Bulgaria*;

- resumption of the terminated criminal proceedings on the grounds of Art. 422, para. 1, item 3 of the *Criminal Procedure Code of Bulgaria* or revocation of the prosecutors' decree for the termination of the criminal proceedings by the order of Art. 243, para. 10 of the *Criminal Procedure Code* and conducting the criminal proceedings after the removal of the procedural obstacle under Art. 4, § 1 of Protocol № 7.

- termination of the initiated second-in-time criminal proceedings on the

[13] See ECtHR cases *Nikolova and Velichkova v. Bulgaria, § 49 – 64; Constantinescu v. Romania, § 40 – 44; Brumarescu v. Romania,* Great chamber, *§ 50; Oleksy v. Poland (decision on admissibility); Moskovets v. Russia, § 50; Guisset v. France, § 66 –70.*

[14] See ECtHR decisions in cases *Hakka v. Finland; Tomasović v. Croatia, § 31; Muslija v. Bosnia and Herzegovina, § 37; Generoso Zigarella v. Italy (decision on admissibility).*

[15] The cited provisions of the Criminal Procedure Code of Bulgaria are currently active and effective from 05.11.2017, as amended and promulgated in State Gazette, № 63/2017.

[16] The cited provisions of the Bulgarian Administrative Violations and Penalties Act are currently active as amended and promulgated in State Gazette, № 109/2020.

grounds of Art. 4, § 1 of Protocol № 7 and under Art. 24, para. 4 of the *Criminal Procedure Code of Bulgaria*, resp. annulment of the judicial acts ruled on it, in the cases when the opportunity to a resumption of the administrative penal proceedings of a criminal nature is finally missed (most often due to the omission of procedural deadlines) or resumption is impossible due to lack of legal grounds for this.

These are rational and effective legal solutions, already experienced in the Bulgarian case law that could be regulated in the national legislation of other countries as well[17]. Moreover, given the ECHR universal standards, the termination of the second-in-time proceeding, regardless of whether it is criminal or administrative of a criminal nature, is the only procedural instrument for effectively overcoming the consequences of violation of one of the fundamental human rights - the right to a fair trial.

4. A new approach to the application of the N*e bis in idem principle* in the case law of the EU Court of Justice and the ECtHR

Given the increased social demands for greater efficiency, proportionality and fairness in the administration of justice, the two leading European courts - the ECtHR and the CJEU, have changed to some extent their approach to the scope of protection provided by the *Ne bis in idem principle* over the last decade, especially when two or more state jurisdictions are concerned.

This is clear in several decisions, such as the ECtHR decision on the *case A and B v. Norway*[18], followed by several CJEU decisions from 2018 - *Luca Menci, C-524/15*[19]*; Garlsson Real Estate SA and others*. C-537/16[20]*; Enzo Di Puma and the National Commissioner for the Society and the Exchange (Consob), C-596/16 and C-597/16*[21], related to the so-called dual enforcement regimes, which are widespread in the Member States, especially in the field of economic and financial crime. The analysis of the case law of the ECtHR and the CJEU reveals that both European courts allow to some extent such duplication of criminal proceedings.

Moreover, the CJEU has stated in several judgments (*Gözütok and Brügge C-187/01 and C-385/01, Van Esbroeck C-436/04, Gasparini C-467/04,*

[17] For comparison, Art. 10 of the current *Criminal Procedure Code of Romania* provide similar legal grounds for termination of criminal proceedings: "Criminal action cannot be initiated, or carried out in case it has already been initiated, in the following cases:"… b[1]) the deed does not present the degree of social danger of an offence; c) the deed was not been committed by the accused person or defendant; d) the deed lacks one of the constitutive elements of an offence; e) one of the cases that annul the criminal nature of the deed is present."

[18] See ECtHR Judgment of 15 November 2016 on the case available online at*:* https://hudoc.echr.coe.int/tur?i=001-168972*;* last accessed on 30.06.2022.

[19] The CJEU Judgment is available on ECLI: EU: C: 2018:197.

[20] The CJEU Judgment is available on ECLI: EU: C: 2018:193.

[21] The CJEU Judgment is available on ECLI: EU: C: 2018:192.

Bourquain C-297/07, Kossowski C-486/14) that Article 54 of the *Convention implementing the Schengen Agreement of 14 June 1985* explicitly implies that "the Contracting States have mutual trust in each other's criminal justice systems and that they recognise the criminal law in force in the other States even when the outcome would be different if their national law were applied."[22]

It is important to emphasize that at the EU level, the prohibition of the *ne bis in idem* is not considered an absolute procedural right. The possibility to restrict the right not to be prosecuted or punished twice under Art. 50 of the *Charter of Fundamental Rights of the European Union*[23] was first adopted by the CJEU in *the Spasić case* (Case C-129/14 PPU)[24], concerning the transnational dimension of the rule "not twice for the same thing". Such a restriction is considered lawful, as long as it meets the requirements specified in Art. 52, para 1 of the *EU Charter of Fundamental Rights*, according to which the restrictions on the rights must: 1) be provided by law; 2) respect the fundamental content of the same rights and freedoms; 3) be necessary for the light of the principle of proportionality and 4) meet the objectives of common interest recognized by the EU or the need to protect the rights and freedoms of others.

In interpreting the criteria for admissible limitation of the principle, the CJEU also takes into account the case law of the ECtHR. However, this does not mean that the case law of the ECtHR is automatically accepted by the court in Luxembourg. An objective review of the case law shows that, in the last decade, the CJEU has repeatedly reaffirmed the need to develop an autonomous view of the rights enshrined in the EU Charter. This thesis is confirmed in all three decisions of 2018[25], where is stated a new approach to the application of the *Ne bis in idem principle.* There, again, the CJEU clearly recalls that the ECHR "does not constitute, as long as the European Union does not accede to it, a legal instrument which is formally incorporated into EU law". It follows that issues related to the status of fundamental rights in the EU will be addressed, if not exclusively, then largely in the light of the fundamental rights guaranteed by the EU Charter.[26]

In recent years, some interpretative differences in the case-law of the two European courts are recognised, concerning the interpretation of the "bis" element about double criminal and administrative criminal proceedings. The exception within the scope of Art. 50 of the EU Charter of Fundamental Rights

[22] See the document of Eurojust "*The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union*", updated until September 2017, available online at*: https://curia.europa.eu/jcms/jcms/Jo1_6308/ecran-d-accueil*, last accessed on 30.06.2022.

[23] OJ C 326, 26.10.2012, p. 391–407.

[24] The CJEU Judgment is available on ECLI: EU: C: 2014:586.

[25] See CJEU cases: Luca Menci, C-524/15, Garlsson Real Estate SA and others, C-537/16 and Enzo Di Puma and the National Commissioner for the Society and the Exchange (Consob), C-596/16 and C-597/16.

[26] See Helmut Satzger, *Application Problems Relating to "Ne bis in idem" as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR*, in Eucrim, Issue 3/2020, pp. 213 – 217, https://doi.org/10.30709/eucrim-2020-018, last accessed on 30.06.2022.

was introduced by the CJEU in 2013. In fact, in *the Fransson case (C-617/10, judgment of 26 February 2013)*, the Court stated that dual systems could not be regarded as a violation of *ne bis in idem*, as long as the other penalties were effective, proportionate and dissuasive.

By its decisions in four cases - *C-524/15, Menci; C-537/16, Garlsson Real Estate and others; Joined Cases C-596/16 and C-597/16, Di Puma and Zecca*, the Court of Justice has ruled that *the ne bis in idem principle* may be limited to protect the European Union's financial interests and markets. The request was made by the Italian competent authorities in the context of the application of the VAT Directive[27] and the Financial Markets Directive[28]. In its judgments, the CJEU states that "criminal proceedings or sanctions" and "administrative proceedings or sanctions of a criminal nature" could be cumulated for the same act in the situations in question. And such a cumulation of proceedings and sanctions is, in its essence, a restriction on the *Ne bis in idem principle*.

The CJEU clarifies that such restrictions must be justified and follow EU law. In this regard, the CJEU states that national legislation allowing the accumulation of criminal proceedings and sanctions must meet concrete requirements:

- to pursue an objective of common interest which may justify such a cumulation of proceedings and sanctions, and those proceedings and sanctions must have complementary objectives;
- to establish clear and precise rules that allow the legal entity to foresee which actions and omissions may be subject to such cumulation of proceedings and sanctions;
- to ensure that the proceedings are coordinated with each other in order to limit to the strictly necessary additional burden on the persons concerned from the cumulation of proceedings, and
- to ensure that the total burden of all penalties imposed is reduced to what is strictly necessary, given the gravity of the offence concerned.

It is in the jurisdiction of each national court to determine whether those requirements are met in the particular case and to ensure that the specific burdens resulting from such cumulation are not excessive for the person concerned given the gravity of the offence committed. Finally, the CJEU considers that the requirements of European Union law for the possible cumulation of proceedings and criminal sanctions guarantee a level of protection of the *Ne bis in idem principle* which does not infringe the level of protection guaranteed by the ECHR.

[27] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, *OJ L 347, 11.12.2006*, p. 1–118.

[28] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJ L 96, 12.4.2003*, p. 16–25.

5. Conclusion

The coincidence of legal conclusions in the case law of the CJEU and the ECtHR, on the one hand, and the differences in the interpretation of the individual elements of the *Ne bis in idem principle,* on the other, ultimately lead to constructive results, expressed in the imposition of new understandings and interpretations, adequate to the changing social necessities. The ECtHR practice has consistently confirmed the understanding that not all administrative penal proceedings can be equated to criminal proceedings, but only those that have a criminal nature and as such are a special case of administrative penal proceedings.

It could be summarized that with the abovementioned decisions from 2018, the CJEU establishes some basic criteria for the scope of protection provided by the *Ne bis in idem principle*. However, there is still no specific, predictable and universally valid standard for the European countries concerning the procedure they should follow in cases of competing criminal proceedings.

Undoubtedly, the contradictory jurisprudence is also the result of different interpretations of the various elements of the *Ne bis in idem principle* in each country which is caused by the lack of harmonization between national criminal justice systems. States have the right to a domestic assessment of the limits and grounds for the application of the prohibition of double punishment, which inevitably creates a risk of non-compliance with the *res judicata* of foreign procedural acts. A direct consequence of this is the duplication of proceedings with criminal character in the jurisdictions of several countries, which is an adverse effect not only in terms of the rational use of time and resources but also given citizens procedural rights and the main objectives of justice in general.

However, the various legislative initiatives at the national and international level aimed at accepting stable legal guarantees for the correct application of the *Ne bis in idem principle* in all types of criminal proceedings, following the already established European standards, should be reported as a positive trend.

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The Principle of Legality and the Retroactive Application of the More Favourable Criminal Law as Guarantees of the Protection of Human Rights Worldwide at the State Level

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Abstract

This research aims to carry out a study on the evolution of the principle of legality in the international context, starting from the initial meaning of nullum crimen sine lege and arriving at its approach as a genuine human right. The research is carried out as a result of the analysis of conventions, pacts, books and jurisprudence of international bodies. Theories regarding the application of this principle by international tribunals will be identified, as well as the exceptional situations that led to its violation. This study also aims to address the issue of retroactive application of more favourable criminal law at European level. In this respect, it will be examined whether or not its application contravenes the provisions of the European Convention on Human Rights.

Keywords: *principle of legality, retroactivity of the more favourable criminal law, European Convention on Human Rights, European Court of Human Rights.*

JEL Classification*:* K14, K33

1. Introduction

The principle of legality is not only a basic principle of criminal law, it has also turned into a human right, being contained in the most important international and regional conventions with regard to human rights[2]. This principle has therefore been adopted and transposed into domestic law by almost all the states of the world[3], thus becoming a guarantee of respect for the freedom of the citizen. It follows from this guarantee that the criminal law must comply with certain requirements in order to be applied. First of all, this must be *pravevia*, prior to the commission of the act, which prevents its retroactive application. Secondly, the law must be scripta, written, that is, to provide for the elements of the deed, in this way prohibiting the analogy for facts that are not expressly provided for by law. Thirdly, it must be quarrelsome, the criminal patterns must be clear

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[2] Universal Declaration of Human Rights, European Convention on Human Rights, International Covenant on Civil and Political Rights, American Convention on Human Rights, African Charter of Human and Peoples' Rights, Charter of Fundamental Rights of the European Union, Arab Charter of Human Rights.

[3] All states that are part of the United Nations except Bhutan and Brunei.

and precise. Also, the law must be strict and formal, that is, interpreted in accordance with the will of the legislator and adopted under the conditions of the Constitution.

"*Nullum crimen, nulla poena sine lege*" emerged as a cry of liberal revolutions against the abuse of power and judicial arbitrariness that prevailed in the Old Regime. Specifically, that principle arose in response to the need to limit the sovereign exercise of jus puniendi, in order to elevate it to the level of a fundamental right and to confer legal certainty in the criminal sphere, thus enabling individuals to know the extent of coercive force, that is to say, the scope of the prohibited conduct and its correlative legal consequences.

This principle has its origins in the principles of the rule of law, that is to say, in the doctrine of the separation of powers in the State, as illustrated by Montesquieu[4], the judiciary being deprived of any other power than that of guaranteeing equal and impartial justice, an obligation which belongs to the judge who represents the very 'mouth of the law'. In this way, it was given the legislative power in the criminal sphere with regard to ensuring the freedom of all citizens in the face of possible abuses of the executive and judicial powers. This ensures a stronger political legitimacy of the acts incriminated by the state and a strengthening of the ban on intervention of the other powers[5]. Therefore, the principle of legality is understood as a democratic guarantee consisting in the drafting of laws by the Parliament, the constitutional body within which the state and democratic character converge, thus ensuring the participation of citizens in public matters of greater importance[6].

In the field of legal certainty, the principle of legality is the principle which governs criminal law and is characterised as the instrument necessary to ensure equal, impartial and effective justice. This principle is the most important of the principles underlying the rule of law, since it controls and limits state power by regulating general and abstract rules. The aphorism of "*Nullum crimen, nulla poena sine praevia lege poenali*" is nothing more than the submission and observance of the law by citizens, thus ensuring their freedom and safety in the face of possible abuse by the state.

The outlining of the emergence of the principle of legality was born during the Enlightenment period. Therefore, the main merit of laying the foundations of liberal criminal law and stating legality is of Cesare Bonesana, Marquis of Beccaria, who wrote in his work, "On Crimes and Punishments" of 1764, in chap-

[4] Montesquieu, *Despre spiritul legilor*, Ed. Antet, Bucharest, 2011, p. 106.
[5] Giorgio Marinucci, Emilio Dolcini: *Manuale di diritto penale, Parte generale*, 4 edizione, Giuffre, Milano, 2012, p. 36-37.
[6] Eduardo Ramon Ribas: *Interpretación extensiva y analogía en el derecho penal*, "Revista de Derecho Penal y Criminología", 3.ª Época, Numero 12 (julio de 2014), p. 111-164, p. 113, the document is available online at https://revistas.uned.es/index.php/RDPC/article/view/24523, accessed on 15.06.2022.

ter III, that "The first consequence of these principles is that only laws can establish punishments according to crimes, and the fall to do so is only the legislator, which represents the whole of society united by social contract; no magistrate (who is in turn part of society) can, in compliance with the judiciary, apply punishments to a member of the same society [apart from those provided for and ordered by law]. But a penalty increased in relation to the limits set by law constitutes a just punishment plus another punishment; therefore, a magistrate cannot, whatever the pretext invoked - the zeal or the public good - increase the punishment imposed on a criminal citizen [7]."

Subsequently, the great penalist Johann Paul Anselm Ritter von Feuerbach in his 1801 Treaty on Criminal Law summed up the content of the principle of legality in *nullum crimen, nulla poena sine lege*, that is, there is no crime and punishment without law. The same author elaborated the theory of psychic coaction according to which punishment[8] appears as a psychological co-action so that citizens no longer commit illicit acts. They are possible as a result of the prediction of the criminalized actions, that is, the law contains both the facts and the punishments.

After Cesare Beccaria's primitive formulation of the principle and Feuerbach's citation of the principle, Beling developed the consequences of legality and defined typicality in his work entitled "The Theory of Crime". According to him there is no crime without typicality[9].

With the passage of time the principle of legality advanced being defined by the most complete and correct Latin aphorism "*nullum crimen, nulla poena sine lege praevia, scripta, stricta et certa*". Thanks to evolution, this principle incorporates four guarantees[10] that find full application in the democratic states of Continental Europe.

[7] Cesare Beccaria, *Despre infracțiuni și pedepse*, Ed. Humanitas, Bucharest, 2007, p. 53.
[8] Paul Johann Anselm Ritter von Feuerbach, *Tratado de derecho penal comun vigente en Alemania, Codigo penal para el Reino de Baviera*, Traducción al castellano de la 14^ edición alemana (Giessen, 1847), por Eugenio Raúl Zaffaroni e Irma Hagemeier, Editorial Hammurabi S.R.L., Buenos Aires 1989, p. 63.
[9] Kai Ambos*: 100 AÑOS DE LA "TEORÍA DEL DELITO" DE BELING ¿Renacimiento del concepto causal de delito en el ámbito internacional?*, "Revista Electrónica de Ciencia Penal y Criminología", 2007, p. 2, the document is available online at http://criminet.ugr.es/recpc/09/ recpc09-05.pdf, accessed on 10.06.2022.
[10] Luis Arroyo Zapatero, *Principio de legalidad y reserva de la ley en materia penal*, "Revista Expandía de Derecho Constitucional", Año 3, Número 8, Mayo-agosto 1983, p. 11, the document is available online at https://dialnet.unirioja.es/servlet/articulo?codigo=249711, accessed on 10.06. 2022.

2. Principle of legality in the trial of the International Criminal Tribunals in Nuremberg, Tokyo, the former Yugoslavia and Rwanda

After the Second World War, all the achievements regarding the universal recognition of the principle of legality as the limit of *jus puniendi*, obtained after the Period of the Enlightenment, suffered severe paralysis. Following the ex-post creation of the Nuremberg (1945) and Tokyo (1946) Tribunals, the principle of legality, and specifically the guarantee of the existence of a *lex praevia*, was overtaken by the need to punish the atrocities that took place during the totalitarian regimes of that time. It should be noted that, until then, the notion of the crime of aggression was linked to the persecution of states and not to a personal responsibility, as defined in the Geneva Convention of 1864. Therefore, the jurisdiction of the aforementioned courts to impose sanctions for so-called crimes of aggression to individuals was at odds with the requirement of legality.

One of the first resolutions of the Nuremberg International Criminal Court on the subject took place on 19 November 1945, when the defence filed a motion aimed at calling into question the criminal nature of the assault. In essence, it was argued that, under the international law of the time, aggression was not a criminal offence and therefore no criminal provision could be applied retroactively. However, as is already known, the Court rejected this approach, without further discussion[11], on the formal argument that Article 3 of the Charter itself resolved the discussion, when the truth was that many of the conduct which was established as offences provided for by the London[12] Charter and for which the defendants were convicted, did not constitute a criminal offence under the international law in force at that time, nor under German law[13].

All the criticisms that have been made against the Nuremberg trial can easily be reduced to two, namely: (1) the fact of having been a justice of the victors towards the losers, that is, of not really having been an impartial tribunal of a genuine international character, and (2) the failure to observe the principle of legality, in particular, of what relates to criminal non-retroactivity. In that regard, Luis Jiménez de Asúa argues that „the definitive obstacle for justice conducted in Nuremberg to be considered valid in law stems from the breach of the principle of *nullum crime nulla poena sine praevia lege* and from having unduly given

[11] Javier Dondé Matute: *Principio de legalidad penal: Perspectivas del derecho nacional e internacional*, Editorial Porrua, Mexico, 2010, p. 248.

[12] Adopted on 8 August 1945, the document is available online at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf, accessed on 28.02.2022.

[13] For example, in one of the cases, the Court stated that "the ex post facto rule, correctly understood, does not constitute a legal or moral barrier to the promotion of an action", to see Javier Dondé Matute, *Principio de legalidad penal: Perspectivas del derecho nacional e internacional*, Editorial Porrua, Mexico, 2010, p. 252.

retroactive effect to a criminal law of extremely serious importance"[14].

More recently, and with some condescension, it is stated that the principle of legality was not a binding international norm at that time, as it is today, becoming a norm of customary international law[15].

The same thing happened with the Tokyo Tribunal, in which convictions were handed down on the basis of facts which were criminalised ex post in its Rules and which were not in force at the time of the events.

Unlike the Nuremberg and Tokyo Tribunals, which were of a military nature and represented a justice of the victors, towards the end of the twentieth century tribunals for the former Yugoslavia and Rwanda were established, which were in line with the requirements of the principle of legality.

They took into account in their status the principles of international criminal law of the time, such as the Geneva Convention of 1949 and the Convention for the Prevention and Punishment of the Crime of Genocide of 1948[16]. In this regard, the statutes of the International Criminal Tribunal for the former Yugoslavia state in Article 6 that the court shall have jurisdiction only in respect of natural persons, which is reaffirmed in Articles 2 to 4, in which there is always talk of persecution of the 'people' and never by groups or organisations. In addition, Article 7 establishes that those guilty of committing some of the offences referred to in Articles 2 to 5 shall be individually liable for their actions For its part, the Statute of the International Criminal Tribunal for Rwanda provides in Article 5 shall have jurisdiction over 'natural persons' and in paragraph 1 of Article 6, it is established that „The person who planned, instigated or ordered the commission of some of the offences referred to in Articles 2 to 4 of this Statute, or has committed or otherwise assisted in the planning, his preparation or execution, he shall be individually liable for the offence in question"[17].

Over time, the principle of criminal legality has become a basic pillar of the rule of law and the internal system of fundamental rights. Having established itself as a vital concept of national legal systems, it was integrated into the international scene, especially by international human rights law, which enshrined it as an inalienable subjective right of every individual, both universally and nationally.

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[14] Luis Jiménez de Asúa: *Tratado de derecho penal*. Tomo II, 2ª edicion, Editorial Losada, Buenos Aires, 1950, p. 1283.

[15] Kenneth Gallant: *La legalidad como norma del derecho consuetudinario internacional: la irretroactividad de los delitos y de las penas*, UALR – William H. Bowen School of Law Legal Studies Research Paper No. 12-02, the document is available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016294, accessed on 20.05.2022.

[16] Christian Eduardo Bello Gordillo, *La ley penal en el tiempo, Fundamentos, alcances y límites de vigencia,* Tesis para optar al grado de doctor, Universidad de Sevilla, Sevilla, 2017, p. 80.

[17] United Nations Statute of the International Criminal Court for Rwanda, adopted by Resolution 955 of 8 November 1994.

3. The principle of legality in the Universal Declaration of Human Rights

At the international level, we notice that the transcendental importance of the principle of legality has naturally led to the main Charters and Declarations of Human Rights offering it protection.

After the Nuremberg trial, the Universal Declaration of Human Rights incorporated, on December 10, 1948, in Article 11 para. (2) international law and the general principles of law as sources of criminal law[18], thus justifying the judgments of the above-mentioned Tribunals. In this respect, Article 11 para. (2) states that "No one shall be convicted of acts or omissions that were not punishable under national or international law at the time of their commission. Nor will a heavier penalty be imposed than that applicable at the time of the commission of the offence." The reasoning behind this regulation was based on the resolution of the League of Nations and the Pact of 1928 which, together with the general customs and principles of law, were "sufficient" to protect the principle of legality, at least in its manifestation of de *nullum crimen sine lege*, which was considered the only one worthy of protection. In the same way, the International Covenant for Civil and Political Rights adopted by Resolution 2200A (XXI) of the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976 established in Article 15: "1. No one shall be convicted of acts or omissions which did not constitute a tortious act, according to national or international law, at the time they were committed. Also, a more severe punishment will not be imposed than the one that was applicable at the time of committing the crime. If after committing the crime, the law provides for the application of a lighter punishment, the offender must benefit from it."

3.1. Principle of legality in the European Convention on Rights

Inspired by the Universal Declaration of Human Rights, the Council of Europe adopted the European Convention on Human Rights on 4 November 1950. Thus, Article 7 of the European Convention on Human Rights occupies a prominent position in the guarantee system of this international act stipulating in para. (1) that "No one shall be convicted of an act or omission which, at the time of the commission, did not constitute a criminal offence under national or international law. Nor can a more severe penalty be imposed than that applicable at the time of committing the offence."

In parallel with the entry into force of the Convention, on September 3, 1953, the Foundations of the European Court of Human Rights are laid. It has

[18] Article 15 para. (2) of the 1966 International Convention on Civil and Political Rights of New York maintains the same direction: "Nothing in this article precludes the trial or condemnation of any individual for acts or omissions which, when committed, were regarded as criminal acts, according to the general principles of law recognized by all nations".

played a very important role in delimiting the meanings of the principle of legality as governed by Article 7 of the European Convention on Human Rights. On a functional level, this principle has been repeatedly considered by the Strasbourg Court to be the citizen's guarantee that he will not become the victim of possible abuses of excessive regulation. From a structural point of view, the principle of legality obliges the predictability and accessibility of the law, which are the guarantees of knowledge of the incrimination at the time of committing the act[19]. The principle of *nullum crimen sine lege* is therefore recognised by the European Court of Rights as "an essential element of the rule of law", thus occupying "a prominent place in the system of protection of the Convention"[20]. It is one of the few articles that directly concerns the field of substantive criminal law.

In the jurisprudence of the European Court of Human Rights regarding art. 7 of the Convention, reference is made to the requirements of accessibility and predictability. These two requirements overlap, and for the criminal rule to be predictable to the citizen, he must first have access to it, being necessary for it to be publicly available[21]. As regards foreseeability, the Court has laid down certain criteria for determining whether or not that criterion is satisfied, such as the content of the text, the field concerned and the number or qualities of the addressees. It has also been established that the foreseeability of the law does not prohibit the person involved from turning to counsellors to assess the consequences that could result from the performance of an act, as in the case of ordinary professionals to be prudent in their profession, with the expectation that they will exercise special diligence in assessing the risks arising from their behaviour[22]. In this case, as the European Court of Human Rights has also held in *Cantoni v. France*, foreseeability is a standard of conduct which implies a particular or practical knowledge of situations which are legally alleged and which may vary depending on the existence or lack of training. As evidenced by *Streletz, Kessler and Krenz v. Germany and K.-H.W. against Germany*[23], what matters to the Court is legal and not factual predictability.

The principle of legality falls within the scope of Article 15 of the same Convention, so that it assumes the character of indestructibility because it is not

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[19] Christian Eduardo Bello Gordillo: *La ley penal en el tiempo, Fundamentos, alcances y límites de vigencia*, Tesis para optar al grado de doctor, Universidad de Sevilla, Sevilla, 2017, p. 83.

[20] Case *Liivic v. Estonia*, the document is available online at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-93250%22]}, accessed on 28.05.2022.

[21] Case *G. v. France*, the document is available online at https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22G.%20v.%20France%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57968%22]}, accessed on 28.05.2022;

[22] *Contoni v. France* case, the document is available online at https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22cantoni%20france%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58068%22]}, accessed on 28.05. 2022.

[23] *Streletz, Kessler and Krenz v. Germany* case and *K.-H.W. v. Germany* case, the document is available online at https://jurisprudentacedo.com/Streletz-KesslersiKrenzc.-Germania-si-K.-H.W.-c.-Germania-Principiul-legalitatii-incriminarii-si-pedepsei-penale.-Succesiune-de-state.html, accessed on 28.05.2022.

subject to exceptions even in the event of emergency and crisis situations. Article 7 focuses its scope of guarantee primarily with a view to prohibiting the non-retroactivity of the new criminalisation and the pejorative changes[24], without making express reference to the principle of retroactivity of the more favourable criminal law.

However, the European Court of Human Rights has always held that the defendant's right to benefit from the more favourable law that came into force after the commission of the act cannot be included in the sphere of human rights.

With regard to the temporal application of the criminal law, the Court held that non-retroactivity was well founded (cases *S.W. v. the United Kingdom*[25] and *C.R. v. the United Kingdom*[26]) and the requirement of retroactivity of the favourable law (*Achour v. France*[27]), rejecting its application in procedural law[28].

On this point, art. 7 para. (1) has been the subject of a very prominent implementation activity, in which two lines can be distinguished. On the one hand, an express prohibition of retroactivity for the legislature, as a limit to the temporary conflicts of the rules and a prohibition of hidden retroactivity addressed to the judge, as a limit to the interpretative changes in the case-law, the latter anchored in the canon of predictability[29].

As regards the retroactivity of the more favourable criminal law, the European Court's orientation seemed reinforced on the conviction that Article 7 did not contain any provision similar to Article 15 of the International Covenant on Civil and Political Rights, which explicitly refers to that principle.

3.2. The principle of legality in the inter-American system

In the inter-American system, the principle of legality is a complex guarantee in that obliges and restricts the three powers of the State. In this sense, the executive cannot create new criminal patterns by means of decrees. So, a punishment is only legitimate if it finds its applicability in a law, in the formal sense.

[24] *Kokkinakis v. Greece* case, the document is available online at https://hudoc.echr.coe.int/eng#{%22itemid%22: [%22001-57827%22]}, retrieved 28.05.2022.
[25] Case *S.W. v. U.K.*, the document is available online at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57965%22]}, accessed on 05.06.2022.
[26] Case *C.R. v. U.K.*, the document is available online at https://www.womenslinkworldwide.org/observatorio/base-de-datos/c-r-v-reino-unido, accessed on 05.06.2022.
[27] *Achour v. France case*, the document is available online at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-72927%22]}, accessed on 05.06.2022.
[28] Javier Dondé Matute, *El principio de legalidad penal: Perspectivas del derecho nacional e internacional*, Editorial Porrua, Mexico, 2010, p. 238.
[29] Luis María Díez-Picazo, Adán Nieto Martín, *Los derechos fundamentales en el derecho penal europeo*, Editorial Civitas, Navarra, 2010, p. 281.

On this point, there is a close connection between Articles 9 and 30 of the American Convention on Human Rights. According to art. 30[30], the restrictions allowed on the exercise of the rights and freedoms recognized by the Convention may be applied only on the basis of laws.

The Inter-American Court of Human Rights has ruled in accordance with Article 30 of the Convention that the protection of human rights implies that the state acts that fundamentally affect them do not remain at the arbitrariness of public power, but that certain guarantees are regulated that do not allow the violation of the inviolable attributes of the person. Such a guarantee is that the legislative powers of each country comply with the constitutional provisions when adopting a new law.

Even in this legal system, laws cannot be drafted in any form. In this context, too, the legislature must comply with the obligations imposed by the principle of legality. It will use clear and precise terms so that the judge can give effect to the normative act. It can be noted that even in the inter-American system, the law must be strict.

In *Castillo Petruzzi v. Peru*[31] and *Lori Berenson Mejia v. Peru*[32], the Inter-American Court of Human Rights recognises the need for precise description of the facts and the use of unambiguous language in the definition of crimes as an application of the principle *nullum crimen nulla poena sine lege praevia*. In *Baena Ricardo and Others v. Panam*a[33] and *Ricardo Canese v. Paraguay*[34], it argues that the criminal law must meet the requirement of the lex praevia criterion.

4. Retroactivity of the more favourable criminal law

Although the retroactive application of the more favourable criminal law is a necessary derivation of the principle of legality, the European Convention on Human Rights does not stipulate it directly, which is criticized by specific doctrine[35]. With regard to that shortcoming, the Court acknowledged in the recitals

[30] *American Convention on Human Rights (Pact of San Jose)*, the document is available online at https://www.corteidh.or.cr/tablas/17229a.pdf, accessed on 10.06.2022.
[31] Case *Castillo Petruzzi v. Peru*, the document is available online at https://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf, p. 40, accessed on 10.06.2022.
[32] Case *Lori Berenson Mejia v. Peru*, the document is available online at https://www.corteidh.or.cr/docs/casos/articulos/seriec_119_esp.pdf, p. 77, accessed on 10.06.2022.
[33] *Baena Ricardo and others v. Panama* case, the document is available online at https://www.corteidh.or.cr/docs/casos/articulos/Seriec_72_esp.pdf, accessed on 10.06.2022.
[34] *Ricardo Canese v. Paraguay* case, the document is available online at https://www.corteidh.or.cr/docs/casos/articulos/seriec_111_esp.pdf, accessed on 10.06.2022.
[35] Enrique Gimbernat Ordeig, *Estudios de Derecho Penal*, Editorial Tecnos, Madrid, 1990, p. 27.

to *Scoppola v. Italy*[36] that the retroactive application of the more favourable criminal law has become a fundamental principle of criminal law. Prior to that ruling, the Strasbourg Court concluded in paragraph 68 of the statement of reasons in *Berlusconi and Others v. Italy*[37] that "the principle of retroactive application of the lighter penalty forms part of the constitutional traditions common to the Member States". In support of that, the Court has also held in paragraph 69 of that ground of reasoning that "it follows that that principle must be regarded as forming part of the general principles of Community law which the national courts must observe when applying the national legislation adopted for the purposes of implementing Community law". In *Gragnic v. France*, the Court understood that, according to the European Convention on Human Rights, the retroactive application of a subsequent law presupposes the application of a milder punishment to the person who had been convicted of sexual abuse.

A special mention must be made for pronouncements relating to the retroactive application of the law. In this respect, *Puhk v. Estonia*[38] presents the situation of a person who has been convicted of failing to keep accounting records of a company, which was criminalised by a subsequent law, on the pretext that the criminal conduct continued even after the entry into force of the new regulations. The European judicial court concluded that unfavourable legislation had been applied retroactively.

On the other hand, it should be noted that in *Rohlena v. Czech Republic*[39], the Court held that it was not a case of retroactive application of the criminal law unfavourable in convicting a person for committing a continued offence of domestic abuse for acts committed before and after its entry into force, arguing that these actions were previously punishable by virtue of other types of crime and that the sentence was foreseeable.

On a more cursory reading of these two cases, we might think that the European Court of Human Rights contradicts itself in its reasoning. If in the case of *Puhk v. Estonia* the Court established that there had been a violation of Article 7 of the European Convention on Human Rights for the retroactive application of criminal law, in the case of *Rohlena v. the Czech Republic*, however, it seems that it has changed its mind and considered that it does not constitute such an infringement, despite the fact that it was a clear assumption of legal retroactivity.

The Strasbourg Court correctly held in the case of *Puhk v. Estonia* that with the entry into force of the new rule criminalising conduct, the acts committed

[36] Case *Scoppola v. Italy*, the document is available online at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-1334%22]}, accessed on 12.06.2022.

[37] Case *Berlusconi and others v. Italy*, the document is available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002CJ0387&from=EN, p. 30, accessed on 12.06.2022.

[38] Case *Puhk v. Estonia*, the document is available online at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-23059%22]}, accessed on 12.06.2022.

[39] Case *Rohlena v. Czech Republic*, the document is available online at https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-4993215-6126724%22]}, accessed on 12.06.2022.

subsequently could have been sanctioned without any problem associated with the retroactive application of the law. So, the European court understood that there was a unit of acts and that the crime must be understood as a continuous one. It is precisely that criminal continuity that leads to the recognition of the infringement of Article 7. For its part, in relation to *Rohlena v. the Czech Republic*, the integration of the criminal unit into various typologies of continuous crimes is, at the very least, questionable[40].

Given these motivations, what conclusion can be drawn? Is it a retroactive application of criminal law or not contrary to the Convention? The European General Court may have weighed the protected legal assets harmed in these two situations and that it, in an effort to do substantive justice in each specific case, has delivered disparate resolutions on the retroactive application of criminal law in accordance with the provisions of the Convention. This does not excuse the inconsistency that exists in its pronouncements and the lack of stability of legal certainty. Legal retroactivity cannot be subject to any opportunity criterion that can be used in a discretionary manner by the highest guarantor of human rights in the European sphere.

Once again, it seems that the European Court of Human Rights has not properly addressed the cases. Therefore, instead of determining whether or not the retroactive application of the law complies with the Convention, it preferred to resort to alternative lines of argument. With the contradictory results which I have identified in the abovementioned case-law, I consider that, for reasons of legal certainty, an express ruling is required on the legal viability of the retroactive application of the criminal law in relation to Article 7 of that convention.

5. Conclusions

Therefore, the principle of legality is an important pillar in the international system for the protection of human rights, based on the need to stop the abuses of states by regulating as clearly and completely as possible the sanctioning perception[41]. In this respect, the exercise of the right to sanction by the rule of law (*jus puniendi*) is limited by the content of the laws and constitution of a State, which effectively establish a solid legal certainty.

The principle of legality designates the law as a configurator of the criminal system, since its objective is to create criminal patterns and establish punishments. This is also the reason why no other acts are incriminated and no additional sanctions are applied outside those established by the criminal law in force.

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[40] Javier Garcia Roca, Pablo Santolaya, *La Europa de los derechos. El Convenio Europeo de los Derechos Humanos*, Editorial Centro de Estudios Políticos y Constitucionales, Madrid, 2014, p. 406.

[41] Luis María Díez-Picazo, Adán Nieto Martín, *Los derechos fundamentales en el derecho penal europeo*, Editorial Civitas, Navarra, 2010, p. 259.

This principle presupposes the exhaustive determination of criminal offences, which turns it into one of the main guarantees of respect for human dignity and freedom, which can be limited criminally only in the case of the commission of an act expressly sanctioned by the criminal law.

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The Right to Silence

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Abstract

The right not to incriminate yourself is not expressly enshrined in the European Convention on Human Rights. This right also includes other names, such as the right to silence, which is a component of the general privilege against self-incrimination. Although the right to silence protects the suspect/defendant from a verbal expression of his / her guilt, the privilege against self-incrimination is more extensive, as it covers the use of other means of proof that can be obtained from the suspect/defendant by coercion, as well as the provision of data or incriminating information to the judiciary. The purpose of this study is to analyze the right to silence from the perspective of national and international law in relation to the provisions of Romanian law, international regulations, as well as the jurisprudence of the European Court of Human Rights. One of the research methods I propose to use is the comparative method, by addressing aspects of comparative law in order to highlight the similarities and differences aimed at regulating and applying this right on non-self-incrimination in Romanian and foreign legislation and jurisprudence. Through the logical research method, I aim to outline and issue valuable reasoning regarding the legal regime applicable to the subject that is the object of study of my research.

Keywords: *right to non-self-incrimination, right to silence, privilege against self-incrimination, European Court of Human Rights.*

JEL Classification: K14, K33

1. Introduction

The reason or motive for choosing this topic was on the one hand the need to deepen the topic on the rights of the suspect/defendant/witness not to incriminate himself in criminal proceedings, as well as knowledge and understanding of new criminal procedural regulations on this right through the study how to enshrine them in other legal systems, either European or international. Thirdly, through this study I want to understand the way in which this right is reflected in the jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union, as well as in the Romanian and foreign jurisprudence.

The subject under analysis first attracted the attention of the US authorities, which is why, over time, there have been numerous cases in Anglo-Saxon jurisprudence that have dealt with the issue of privilege against self-incrimination

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in the broad sense.

The European Court in Strasbourg, through its jurisprudence, reflected in its decisions the European vision of this institution.

The European Court sees a double reason for this institution, on the one hand, the protection of the accused against abuse of power, and on the other hand, the fair settlement of cases and the protection of the prestige of justice in general, by avoiding possible judicial errors.

Returning to the American jurisprudence, there is an evolution of the way of looking at the grounds underlying this procedural guarantee, and which concerns the person's right to self-determination, the authorities being stopped from limiting the person's free will and access to privacy of her thoughts.[2]

Through a brief analysis of the bibliography related to the topic, we realized that the topic regarding the privilege against self-incrimination was not researched closely, as there are not many studies on the chosen issue, which is why this study is intended to be an in-depth presentation. and exhaustively the provisions of the Romanian Code of Criminal Procedure which give efficiency to the privilege against self-incrimination.

Through this study we would respond to a suite of problems found in practice and especially in academia: the lack of adequate scientific material designed to meet the requirements of timeliness and accuracy of information; the lack of a synthetic material exactly designed to meet the requirements of relevant practitioners; lack of a unitary information base in the matter.

This paper aims at an in-depth investigation of the legislation in force, of the relevant Romanian or foreign doctrine, as well as the jurisprudence of the Constitutional Court, the High Court of Cassation and Justice, as well as other courts in Romania, European and international jurisprudence.

In this sense, this paper aims at an analysis of the way in which this right is reflected in different legislative systems, as well as the way in which the current normative provisions have been capitalized in the jurisprudence of the Romanian courts.

Another envisaged objective is to follow the implications of the jurisprudence of the ECHR, the law of the European Union and the jurisprudence of the Court of Justice of the European Union on the trial of criminal disputes in which this right is invoked considering that in accordance with the provisions of art. 148 paragraph (2) of the Romanian Constitution revised in 2003 transposes into practice the principle of applying with priority the provisions of the constitutive treaties of the European Union, as well as other binding Community regulations, in situations where they conflict with the provisions of domestic law. In the same sense, art. 20 para. 2 of the Constitution, according to which, the international regulations on human rights have priority, unless the Constitution or domestic

[2] Voicu Puşcaşu, *Dreptul la tăcere şi la neautoincriminare. Ratio essendi,* „Analele Universităţii de Vest Timişoara, seria Drept", No. 2/2014, p. 49.

laws contain more favorable provisions.

Formulation of proposals of *lege ferenda* in order to clarify some unclear, equivocal or contradictory legislative aspects, controversial in doctrine and which generate in practice difficulties of interpretation and application of the law.

My concerns include identifying, analyzing and capitalizing on innovative issues that can contribute to improving the law on the application of the privilege against self-incrimination in national law.

One of the research methods I propose to use is the comparative method, by addressing aspects of comparative law in order to highlight similarities and differences aimed at regulating and applying this right on non-self-incrimination in Romanian and foreign legislation and jurisprudence.

The comparison of the legal systems of the various states, of their features, branches, institutions and norms proved to be extremely fruitful in the methodological process of studying the legal phenomenon.

The specific purposes of the comparative method are determined by the relationships between the objective properties of the compared categories. Along with the comparison, other tools of logic are necessarily used: classifications (classifying typologies), divisions, definitions, analogies.

Through the logical research method, I aim to outline and issue valuable reasoning regarding the legal regime applicable to the subject that is the object of study of my research.

Law is an eminently deductive science. Both in its theoretical constructions - obtained from close to close - and in legal practice, the need for argumentation is presented as a sine qua non requirement. Deductive knowledge also starts in law from the premise that nothing can be deductive except starting from previous principles.

The logical method is very useful in any act of scientific thinking. In law, it is a totality of specific methodological and gnoseological procedures and operations, which creates the possibility of capturing the structure and dynamics of the necessary relationships between different components of the legal system of a society.

In essence, we aim to:

1. Analysis and direct interpretation of legal norms according to the principles and means of interpretation enshrined in the general theory of law;

2. Identification and research of reference works on the privilege against self-incrimination in order to identify the main doctrinal opinions proposed for each chosen research topic;

3. Analysis of the judicial practice of national and international courts;

Through a brief analysis of the bibliography related to the topic, we realized that the topic regarding the privilege against self-incrimination was not researched closely, as there are not many studies on the chosen issue, which is why this study is intended to be an in-depth presentation. and exhaustively the provisions of the Code of Criminal Procedure which give effect to the privilege against

self-incrimination.

Through this study we would respond to a suite of problems found in practice and especially in academia: the lack of adequate scientific material designed to meet the requirements of timeliness and accuracy of information; the lack of a synthetic material exactly designed to meet the requirements of relevant practitioners; lack of a unitary information base in the matter.

2. General considerations regarding the right against self-incrimination: components, terminology and legal nature

2.1. Components

The right not to incriminate yourself is not expressly provided for in the European Convention on Human Rights. This right also includes other names, such as the right to silence, which is a component of the general privilege against self-incrimination. of other means of proof that can be obtained from the suspect/ defendant by coercion.

In essence, this right or privilege is defined as the right of the individual or person not to incriminate himself or to remain silent and not to contribute anything to his own incrimination, being a specific right to criminal proceedings.[3]

The component elements of this right include:

- the right of the suspect/defendant not to make any statement regarding an act attributed to him or an accusation brought against him, without previously being able to impute his insincerity as an aggravating circumstance;

- the freedom of the suspect/defendant to answer or not, knowingly, all questions (the right to total silence) or only some questions (the right to partial silence).

These two components are imperative rules of the procedure for the administration of evidence, and the right not to testify against oneself, not to incriminate oneself, as an element of the right to a fair trial, both materially and procedurally, is a human right. fundamentally, with a constitutional basis and in international human rights law.

The psychological literature shows that the defendant must be allowed to defend himself intelligently or cunningly, to retract his confessions or to deny the deed - this psychoanalytic and psychological approach remains par excellence the ground on which the rights and freedoms of the person are fully respected.[4]

According to Alan Dershowitz, the phrase "you have the right not to make

[3] Chiru Ioan Alexandru, *Dreptul la tăcere*, article published on the avchiru.ro website, accessed on 10.09.2021.

[4] Nicolae Mitrofan, Voicu Zdrenghea, Tudorel Butoi, *Psihologie judiciară*, Ed. Șansa, Bucharest, 1992, p. 52.

statements" is the most well-known phrase emanating from the American Constitution.[5] And according to Henry Friendly, rather than a right - the right to silence is a privilege against forcing a person to speak. The distinction is not just semantic; it extends to the depths of the problem.[6]

Silence in your own trial also gives you the right not to be convicted using your own statements against you.[7]

The right not to incriminate yourself, the right to silence are considered a protection, a guarantee that is based on the right to a fair trial. In the jurisprudence of the ECHR, this right is considered to be a guarantee granted to the accused in the name of the right to a fair trial, the right to liberty and human dignity.[8]

The European Court has ruled that, although art. 6 par. 2 of the Convention does not expressly include this right, these are generally recognized and accepted international rules, which are the essence of the notion of a fair trial enshrined in art. 6. Therefore, it cannot be said that this right is included in the right not to be subjected to torture, inhuman or degrading treatment or the right to freedom of expression.[9]

By virtue of the right to silence, the person summoned before the judicial bodies is free to give or not to give statements according to his own procedural interest.

Of course, the suspect or defendant could refuse to answer any question, but not without taking the risk of discrediting.[10]

Thus, the right to silence presupposes both the right not to testify against oneself and against the other participants in the commission of the crime. The lack of cooperation of an accused with the judicial bodies does not result in any possible sanction addressed to him.

The obligation to testify against one's will, under the compulsion of a sanction or other form of coercion, constitutes an interference in the negative aspect of the right to freedom of expression that must be necessary in a democratic society.[11]

The right to silence is also a component of one of the most important principles of criminal proceedings - the presumption of innocence is a guarantee

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[5] *Is there a right to remain silent**?** Coercive interrogation and the fifth amendment after 9/11 xvii (2008)* quoted in the article Tracey Maclint, *The Right to Silence v. The Fifth Amendment*, University Chicago Legal Forum, vol. 2016, available on the website: https://chicagounbound.u chicago.edu/cgi/viewcontent.cgi?article=1569&context=uclf.

[6] *Idem.*

[7] Brennan J. quoted in Barbara Ann Hocking & Laura Leigh Manville, *What of the right to silence: still supporting the presumption of innocence, or a growing legal fiction*, „Macquarie Law Journal", vol. 1, no. 1, 2001, accessed on http://www5.austlii.edu.au/au/journals/MqLJ/2001/3.html, p. 91.

[8] Chiru Ioan Alexandru, *op. cit.* (2021).

[9] Voicu Puşcaşu, *Dreptul la tăcere şi la neautoincriminare*, Ed. Universul Juridic, Bucharest, 2015, p. 138.

[10] Gheorghiță Mateuț, *Procedura penală. Partea generală*, Ed. Universul Juridic, Bucharest, 2019, p. 517.

[11] *Idem.*

of its observance[12] and the observance of this right is closely related to respect for human dignity, protecting the person from being harmed. important mental choices.

The principle of human dignity is provided both in art. 11 para. 1 of the Penal Code, as well as in art. 22 of the Romanian Constitution and art. 3 of the European Convention on Human Rights. This principle finds its application, mainly, in the matter of appreciating the legality and loyalty of the administration of the evidence, being eloquent in this sense the provisions of art. 101 C.pr.pen. which provide for the prohibition imposed on judicial bodies to use means of coercion to obtain evidence.

Thus, the real theme that supports the guarantee of the right to silence and non-self-incrimination concerns precisely the observance of the human person's freedom of will, whether he has the quality of witness, suspect or accused, in criminal proceedings, against the fundamental human right to self-determination and respect. The supreme value inherent in any human being -, dignity, this being the foundation of those fundamental values which, in criminal procedure, give rise to a first-rate procedural guarantee.[13]

The principle of the presumption of innocence governs the entire criminal process, being its substantive rule that materializes in a constitutional guarantee. The presumption of innocence becomes a requirement of a fair trial, with the greatest application in criminal matters.[14]

The presumption of innocence protects the fundamental human rights to liberty and dignity in the face of accusations against him. The presumption of innocence confirms our confidence in humanity; it reflects our belief that people are decent and obey the law, being basic members of the community until proven otherwise.[15]

In the same vein is the case law of the Strasbourg court, according to which the right to self-incrimination and the right to silence are a direct consequence of the presumption of innocence and, at the same time, these rights have an independent existence, arising from the fairness of the proceedings. hair. 1 in art. 6 of the Convention (*Saunders v. The United Kingdom*, para. 68; *Heaney and McGuiness v. Ireland*, para. 40).[16]

In *Saunders v. The United Kingdom*, the European Court held that the right to non-self-incrimination was a constituent element of the requirement of procedural fairness, enshrined in para. 1 in art. 6 of the Convention, also showing

[12] Decision no. 236/2020 of the Constitutional Court of Romania, published in the Official Gazette no. 597/08.07.2020, par. 36.
[13] Voicu Puşcaşu, *op. cit.* (2015), p. 129.
[14] Gheorghiță Mateuț, *op. cit.* (2019), p. 70.
[15] Eileen Skinnider & Frances Gordon, *The right to silence – international norms and domestic realities*, Sino canadian international conference on the ratification and implementation ofhuman rights covenants, Beijing, 25-16 october 2001, https://icclr.org/wp-content/uploads/2019/06/Paper 1_0.pdf? x37853, p. 10, last accessed on 19.04.2021.
[16] Decision no. 236/2020 of the Constitutional Court of Romania, par. 36.

that, from the point of view of the right to non-self-incrimination, which requires the prosecution to prove its arguments without resorting to evidence obtained by coercion or oppression, this right is closely linked to the presumption of innocence (para. 69).

In *John Murray v. The United Kingdom*, the Court examined the petitioner's allegations of infringement of the right to silence and non-self-incrimination from both a par. 1, as well as par. 2 of art. 6 of the Convention invoking a violation not only of the general fairness of the trial, but also of the rule according to which the prosecution must prove its claims without the support of the accused, a specific guarantee of the presumption of innocence.

In these conditions, the Constitutional Court of Romania in decision 236/2020, found that the right to silence and the right not to contribute to one's own incrimination are both a direct consequence of the presumption of innocence and a guarantee of the fairness of the procedure, enshrined in hair. 1 and 2 of art. 6 of the Convention, provided that par. 1 contains guarantees of the accused in criminal matters, and the scope *rationae personae* of par. 2 in art. 6 of the Convention has a wider scope, including the witness.[17]

The doctrine[18] emphasized that the specificity of this means of proof is determined by the central position of the suspect or defendant in criminal proceedings; although presumed innocent, the person suspected or accused of committing a crime is in an intermediate state between innocence and guilt, a state that could be characterized as the temporary and ambiguous state of the one who is neither innocent nor guilty.[19]

Regarding the right to silence[20], it was stated that: "the interrogated defendant has no obligation to speak. He may simply refuse to answer. His right to silence derives from the presumption of innocence and from the principle of the integrity of the human person. It is an essential form of individual freedom. The pursued person has the right not to reveal from the circumstances of the deed only those that he deems useful for his defense".[21]

The privilege against self-incrimination is materialized in the rights of a procedural or material nature granted to the person suspected of committing a crime. This privilege includes several components, the most important of which is the right of the person (witness, suspect, defendant) not to testify, or as it is also called "the right to silence of the accused." Then, the privilege against self-incrimination also includes the right of the same persons, not to contribute in any

[17] *Idem, par. 37.*
[18] Vintilă Dongoroz a.o., *Explicații teoretice ale Codului de procedură penală român*, Ed. Academiei, Bucuharest, 1975, p. 187.
[19] Charles Lazerges, *La présomption d'innocence en Europe*, „Archives de politique criminelle" no. 26/2004, p. 135.
[20] *Invoking the Right to Remain Silent*. Findlaw. https://www.findlaw.com/criminal/criminal-rights/invoking-the-right-to-remain-silent.html.
[21] Raoul Declerq, *Le droit au silence,* Centre Interuniversitaire de Droit Comparé, Bruxelles, 1974, p. 623.

way, to their own accusation; that is, the right of the accused not to provide data, incriminating information to him, the right of the accused not to be obliged to adduce evidence in order to incriminate him, the right of the accused not to be tried on the basis of evidence obtained in violation of the privilege against self-incrimination.

The privilege against self-incrimination protects the person from abuse of power and loss of dignity and freedom - in fact, these axioms are the central thesis of the privilege.[22] The privilege ensures a balanced balance between the rights and powers of the state and the rights and interests of citizens.

The right to silence and non-self-incrimination is not absolute. In particular situations, the defendant's silence may have unfavorable consequences for him. In order to establish whether art. 6 of the Convention by the fact that silence may have unfavorable consequences for the accused, all circumstances must be taken into account, in particular in view of the weight given by the national courts in assessing the evidence and the degree of coercion inherent in the situation.

On the one hand, a conviction should not be based solely or mainly on the accused's silence or his refusal to answer questions or testify. On the other hand, the right to remain silent cannot prevent the silence of the person concerned from being taken into account, in situations which clearly require an explanation on his part, in order to assess the evidence in the file. It cannot therefore be argued that a defendant's decision to remain silent throughout the criminal proceedings must necessarily be without implications. In this respect are the judgments in *Averill v. The United Kingdom* and *Telfner v. Austria*, in which the idea was emphasized that, in certain circumstances, the defendant's silence could be interpreted, within certain limits, against him.

The Strasbourg court also held that the circumstances in which the accused's passivity was manifested and not the nature and gravity of the offense of which he was suspected would count, the general requirements of fairness of procedure remaining valid regardless of the type of offense Germany.

2.2. Terminology

Despite the international recognition it enjoys, the right to silence is not defined in any of the normative acts, national or international, that enshrine and recognize it.[23]

The right to silence - one of the most important rights guaranteed to the suspect in a criminal case; as a right which guarantees the observance of the presumption of innocence and, at the same time, which guarantees the avoidance of

[22] Adrienne Stone, *Case Note. Environment protection authority versus Caltex Refining Co Pty Ltd corporations and the privilege against self-incrimination*, published on http://www.unswlawjournal.unsw.edu.au/article/environment-protection-authority-v-caltex-refining-co-pty-ltd-corporations-and-the-privilege-against-self-incrimination-case-note/, p. 630, last accessed on 10.10.2021.
[23] Voicu Puşcaşu, *op. cit.* (2015), p. 129.

any arbitrariness in the administration of criminal justice.

It has multiple meanings: the right not to give statements, the right to silence, the right not to give statements against one's own person, the right not to incriminate yourself.[24]

The right to silence and non-self-incrimination could be considered partial synonyms, meaning the right not to testify against oneself. Even the Black's Law Dictionary defines the right to non-self-incrimination as the constitutional right of an accused or witness (...) which guarantees that person that he cannot be compelled by the state to testify if his statement can lead to an accusation "criminal proceedings against him".[25]

The right to non-self-incrimination is the consequence of the presumption of innocence which confers on the suspect or accused the prerogative of the right to silence, but also, in addition, the right of the witness, suspect or accused not to be compelled to give statements with potential self-incrimination (in the case of the witness) or produces evidence against him in the case of the suspect or accused) evidence that does not have an existence or possibility of judicial administration independent of his will.[26]

Consequently, the right to silence can be defined as that consequence of the presumption of innocence which entails the prerogative of the suspect or accused person to remain silent, not to make statements throughout the criminal proceedings or only at certain moments of them, to does not answer any of the questions addressed to it or only to a part of them, at its free choice, without being subject to coercion or oppression or unfair investigative procedures.[27]

The right of a person not to incriminate himself may also have a limited meaning, in which case he will refer to any evidence other than the statements obtained from the suspect or accused of non-compliance with his freedom of will or choice.[28]

Self-incrimination involves one's own or another person's exposure to a criminal charge or the danger of involvement in criminal proceedings.[29]

The privilege against self-incrimination presupposes the right of a person not to give incriminating statements against himself.[30]

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[24] Por Osa Otero Sandra, *The right to remain silence (to not testify)*, published on 19.06.2020 on https://www.ilpabogados.com/en/the-right-to-remain-silence-to-not-testify, last accessed on 19.09. 2021.

[25] Voicu Puşcaşu, *op. cit.* (2015), p. 134.

[26] *Idem*, p. 136.

[27] *Idem*, p. 136.

[28] *Idem*, p. 136.

[29] *Black's Law Dictionary*, 5th ed., West Publishing Co., 1979. p. 690; Larry J. Siegel & John L. Worrall, *Essentials of criminal justice*, 10th edition, Cengage Learning, Boston, 2016, p. 75.

[30] From "Self-Incrimination, Privilege Against" see Steven Gifis, *Barrons Law Dictionary*, 2nd ed., Barron's Educational Series, 1984, p. 434.

Invoking the Fifth American Amendment[31] presupposes a person's refusal to make statements for fear that those statements will not be used against him.[32] However, statements made by one person may be used against others.[33]

2.3. Legal nature of the right to silence

The right to silence - a component of the privilege against self-incrimination is a subjective right, of a civil nature, but also a procedural guarantee that guarantees that the accused does not contribute to his own accusation.

The right to non-self-incrimination is a generic category, and the right to silence is a species of it.[34] The relationship between the two notions is more difficult to circumscribe, the right to non-self-incrimination being born as a protection against the obligation to take an oath, the right to silence having a broader category.[35] Although apparently the two notions are partially synonymous, the right to non-self-incrimination still encompasses a wider range of rights than the right to silence; in other words, the right to non-self-incrimination in a narrow sense means the right to silence, in a broad sense, encompasses other rights that an accused person can exercise in order not to contribute to his or her own incrimination.

The right to silence and non-self-incrimination does not represent a right with absolute value, being a procedural right, limited to the criminal procedural guarantees recognized by art. 6 of the Convention on Human Rights, which has this relative character, allowing its holder to waive it, but also the judiciary to bring certain harm in duly justified situations, which respects a fair relationship of proportionality between the restriction of this right and the purpose pursued.[36]

In another view, it is shown that the right to silence would correspond to a fundamental human right, with a constitutional basis and in international human rights law.[37]

The right to silence is an implicit negative right to the right to free speech.

3. Conclusions

The right to silence has traveled a difficult path to be received in the laws

[31] *The 5th Amendment of the U.S. Constitution:* https://constitutioncenter.org/interactive-consti tution/amendment/amendment-v.

[32] *Ohio v. Reiner*, (2001), *Hoffman v. U.S.*, (1951); *Counselman v. Hitchcock*.

[33] Nick Thornton, *The right to remain silent and what it means, they didn't read me my rights so the case should be dismissed, right*? published on https://www.fremstadlaw.com/remain-silent-means/, last accessed on 19.06.2021.

[34] Voicu Pușcașu, *op. cit.* (2015), p. 134.

[35] *Idem*, p. 134.

[36] *Idem*, p. 140.

[37] Anastasiu Crișu, *Drept procesual penal. Partea generală conform noului Cod de procedură penală*, 4th edition revised and updated, Ed. Hamangiu, Bucharest, 2020, p. 347.

and jurisprudence of the countries of the common law system, and later in the continental legal systems. Even in states with a common law system, the right to silence is received or applied differently, for example in the UK unfavorable conclusions can be drawn for the accused, while in other states no guilty conclusions can be drawn from the mere silence of the accused.

On the other hand, Romania, in its short history of regulating the right to silence for about 19 years, is at the beginning of the road. The doctrine and jurisprudence should provide a detailed analysis of this right, related to the examination of legal regulations and their application to specific cases.

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Opening Statements in Criminal Procedure

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Abstract

Before proceeding to the presentation of concrete evidence, according to the CPL, opening statements must be presented. The trial begins with the opening statements. The plaintiff speaks first, then the defence counsel or the defendant. However, the defendant shall have the right not to give an opening statement. The earlier procedural provisions stipulated that the main trial begins with the reading of accusation. The provision of the CPL which is now in force provides for opening statements and stipulates that the main trial begins with the holding of opening statements. According to the principle of officiality, the charge expresses the function of prosecution - nemo iudex sine actore. Since the legislator relates the initiation of the main trial with the opening statements, and since the public prosecutor gives the opening statement first, it is implied that in that case he reads the bill of indictment. Something like that indirectly results in the case where after the plaintiff's opening statement, the presiding judge shall ask the defendant if he or she understands the accusation. In the opening statements, the parties may present which are the decisive facts they intend to prove, they may speak about the evidence that will be presented and establish the legal issues that are going to be subject of deliberation. In this regard, the parties in the opening statements can refer to admissible evidence, the law in force and can use tables, diagrams, transcripts of tapes allowed by the court, summaries and comparisons of evidence if they are based on admissible evidence, as well as enlargement of their specimens to demonstrate or present to the court as an illustration. In the opening statements, presentation of facts regarding any prior convictions of the defendant shall not be permitted as part of the statements nor shall the parties not be allowed to comment on the allegations and proposed evidence by the other party.

Keywords: *opening statement, criminal procedure, criminal law, evidence.*

JEL Classification**:** K14

1. Opening statements

The main hearing shall commence with opening statements by the parties. The plaintiff shall speak first, followed by the defense counsel or the defendant[3]. In their statements, the parties may present which are the decisive facts they intend to prove, they may speak about the evidence that will be presented and establish the legal issues that are going to be subject of deliberation. Considering

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[3] Criminal procedure law of R. N. Macedonia, Official gazette No. 150 from 18 November 2010 (article 379 par.1).

the fact that opening statements are first address of the parties to the court, it is the most important part of the trial. Research show that at least 80 percent of jurors in USA reach a decision about the case based on the persuasion of opening statements.[4]

Aristotle taught that a speaker's ability to persuade an audience is based on how well the speaker appeals to that audience in three different areas: **logos, ethos, and pathos**. Considered together, these appeals form what later rhetoricians have called the rhetorical triangle. This has to be part of an opening statement as a speech to.

As a new phase within the main hearing, parties of the trial are still struggling to understand the importance of the first address to the court, the impression and support that you need to gain from public, considering that the main hearing-trial, is central phase of the criminal procedure where all the principles of the criminal procedure are respected.

Since the legislator relates the initiation of the main trial with the opening statements, and since the public prosecutor gives the opening statement first, it is implied that in that case he reads the bill of indictment. Something like that indirectly results in the case where after the plaintiff's opening statement, the presiding judge shall ask the defendant if he or she understands the accusation.[5]

2. What are the goals of the opening?

2.1. Comprehension

After hearing your opening statements, the judges should understand what the case is about. Comprehension requires good organization, simple words, and understandable delivery. It is recommended to avoid technical terms if you can, but if you have to use terms of art or technical terms, stop and explain them. Think of yourself as a teacher who cares passionately about the story you are telling. Using charts, photos or tangle evidence can help you show what happened and why and make it understandable.

2.2. Credibility

If you do a good job in explaining the case understandably, memorably, and persuasively, you have taken the first step toward establishing your credibility. People are more likely to believe folks who seem to know what they are talking about. So, you must *master the subject matter*: the facts, the law, and any technical subject covered by the experts. The Rule of Authority will be in play,

[4] James F. McKenzie, *Eloquence in Opening Statement*, „Trial Diplomacy Journal", Spring 1987, p. 32; Donald E. Vinson, *Jury Psycology and antitrust Trial Strategy*, „Antitrust Law Journal", Vol. 55, No. 3/4, 1986, p. 591.

[5] Ejup Sahiti, Ismail Zejn, *Criminal Procedure Law*, Skopje, 2017, p. 251.

so become an authority on all aspects of the case.

Even though you are not allowed to say it out loud, you want your demeanor/your presence to say:

- I have studied the law and the facts and I know what they are.
- The witnesses I call will tell the truth.
- The law and fundamental justice are on our side.

To accomplish this, you must earnestly believe in your case and be able to communicate that in your words, your gestures, and your demeanor in the courtroom.

2.3. Identification

What is called "The Golden Rule" in American courts says that you are not allowed to explicitly ask the judge or the jury to put themselves in the place of one of the parties. But it does not force you to keep them from thinking that: *But for the grace of God go I.* The ability to imagine ourselves in someone else's situation is the foundation of all justice.

It is improper to appeal directly to passion or prejudice in the opening or the closing, but this does not mean that you can't set what we will call "emotional hooks."

What we are talking about here is really making a *connection* with the judge. One way is through the "Rule of Liking." We tend to find those who are more likeable, more credible. Is the party that you represent likeable? What can you do to make the client more presentable, more believable? What basic values does your client have that will help him to connect? What about the witnesses you call, especially the experts? And finally, do you present a likeable, sincere character that the judge and the jury will want to pull for?

2.4. Support

Probably your most important goal in the opening is to make judges want to find in your favor; to hope that the evidence supports your side.

Once someone starts to lean one way or the other, they begin to interpret and filter information the way they are leaning. This is a well-understood psychological principle called *"confirmation bias"* You tend to interpret what you see and hear as supporting the direction you are already leaning. So, your task is to identify those factors in the case that make jurors want your side to win.

2.5. Impact

Finally, you want your opening to make a lasting impact on judges. You want vivid images that linger during the testimony and guide jurors as they deliberate.

In order to create those lasting impacts, we need to structure and organize the opening statements.

3. Structure and organization

To be effective, an opening statement should be thought of much like a speech: it has to be well organized, easy to understand, and easy to remember: understandable, memorable, and persuasive.

3.1. Primacy and recency

The first principle in organizing any speech, including an opening, is something that orators have known for thousands of years. The Roman Senator and writer, Cicero, wrote more than 2,000 years ago:

"Indeed, a case is in real trouble if it does not seem to be gaining the upper hand with the very first words."

The Ideal Orator. Cicero knew that you have people's attention at the beginning, but you can lose it fast, if what you are saying is not interesting and worth hearing.

He also introduced the concept of *primacy and recency*, which recognizes that people pay attention best at the beginning and at the end of a speech: *therefore, just as the best speaker, so the strongest point in a speech should always come first, provided that, in both respects, another principle is observed at the same time, namely, that some of our excellent resources should also be reserved for the end.*

The Ideal Orator. What this means in an opening statement is that you want to start with a bang and end with a bang. You want to say something powerful and important at the beginning and at the end.

Here are some of the ways that you can start with a powerful beginning:

a. Start with a theme. A powerful theme is one of the best ways to make the right kind of memory. The best themes not only are memorable, but they also help form the right way to look at the case. You want a repeatable phrase that is mentioned several times in the opening and will return in the final argument to drive home the point.

Themes turn complex facts into simple universal concepts. Good themes are simple, universal, and timeless. They are about people, their motives, and how life actually works. Good themes catch the ear, make a vivid connection, and send a clear message.

You can think of themes as: "This case is about…." But don't be limited by completing that sentence. They can be short phrases such as: *taking responsibility*; *playing by the rules*; *changing the rules after the game starts*; *stacking the deck*; *placing corporate profits before community health or safety*; *haste makes waste*.

They can also be rhetorical questions: "Why did he take matters into his own hands?" "What did he have to gain?"

b. Start with an emotional hook. An article about how emotional hooks in the first sentences of U.S. Supreme Court briefs not only helped win the case; but how these powerful emotional hooks written by the winning lawyers actually ended up in the opinions handed down by the Supreme Court. The Supreme Court actually adopted these powerful phrases in the published opinions.[6]

One way to set an emotion hook is to **start with a crisis**.

Every case has a crisis of sorts. If it didn't, there probably wouldn't be a case. A crisis can be the emotional hook that pulls jurors into the case. It can also be the first snapshot in a series that will add up to the total picture of injustice.

For example, let's take a look at the opening statement in *United States v. McVeigh*[7], the murder trial inhorrific Oklahoma City bombing case. The Oklahoma City bombing was a domestic terrorist truck bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, on Wednesday, April 19, 1995.

168 people were killed, including men, women, and children, some who were as young as two years old that were there in a daycare center on the second floor.

The person who detonated the bomb was a man named, Timothy McVeigh, a so-called patriot who hated the federal government.

The lead prosecutor was an experienced attorney named Joseph Hartzler. How do you think Hartzler started his opening statement?

Do you think he started with the years that McVeigh spent planning the attack?

No; he started his opening with a story about the morning routine of a little boy named Tevin Garret. He wasn't even two years old yet; Tevin was only 16 months old at the time—just a toddler.

His mother woke him up on that sunshiny day, gave him a hug, got him dressed, gave him some breakfast and got him ready for daycare.

That morning Tevin and Mrs. Garret left the house about 7:15 to go downtown to Oklahoma City. Mrs. Garret did not work in the Murrah Federal Building. She worked across the street in the General Records Building.

She pulled into the lot of the federal building, and she went upstairs to the second floor with Tevin because Tevin attended the daycare center on the second floor of the federal building. When she went in, she saw two other boys already there, two and three years old.

When she turned to leave to go to work, Tevin as sometimes happens

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[6] Maureen Johnson, *You had me at hello: examining the impact of powerful introductory emotional hooks set forth in appellate briefs filed in recent hotly contested U.S. Supreme Court decisions*, „Indiana Law Review", 49:397, 2016, p. 435.

[7] *United States v. McVeigh*, No.96-CR-68,1997 WL 198070 at *25(D.Colo.Apr.24,1997) (opening statement of Joseph Hartzler).

with small children, cried and clung to her. One of the other boys, who was three, came up to Tevin and patted him on the back, and comforted him as his mother left.

As Helena Garrett left the Murrah Federal Building to go to work across the street, she looked back up to the second floor. There were plate glass windows where the kids could run up to those windows and press their hands and faces to the glass to say good-bye to their parents.

Standing there on the sidewalk, it was almost as if you could touch the children. But none of the parents of any of those children ever touched those children while they were alive again…

And that is how Joseph Hartzler started the trial in the *McVeigh* case.

That is how Hartzler set the emotional hook and how he had the jurors leaning his way from his very first words.

4. Chronology and point of view

Opening of Hartzler underlined two other things that did made his opening so effective: his use of chronology and point of view. Chronology is a way of structuring the opening so that you start at the beginning and move forward with events in chronological order.

But with *every* chronology every story told chronologically you have to pick a beginning and an ending. Hartzler didn't pick the time when McVeigh started planning this horrendous mass murder. He picked the start of the day of the bombing for one of the innocent families, whose lives he destroyed.

Hartzler certainly looped back eventually to other events that he needed to prove his case, but he started with something that was memorable, understandable and persuasive.

Let's focus on Hartzler's point of view in his opening story. His *point of view* was not that of the killer, McVeigh, or the police, or any of the witnesses. It was the point of view of two of the victims: a toddler and his mother who didn't even work in the building. He started with something that invoked a powerful picture of injustice that the jurors could visualize and would invoke an emotional response.

Start with a story. Another way to have a powerful and memorable beginning is to start with a story.

Stories. Stories go deeper than the law. Stories have been used since the beginning of time to make sense of the world. We use stories to pass information. We use stories to explain important principles and to deal with conflicts. Every story has a morale, and the audience knows what the morale of the story is, without having to be told. In other words, we use stories to understand.

If you are going to be an effective trial lawyer, you have to know the basic elements of a story and some ideas for how to tell one.

Elements of a story. The story has the following elements:

1. Stories have beginnings and endings. Remember the Hartzler opening in the *McVeigh* case. Where to start and stop is up to you, but it will be influenced by the point of view and the point of the story you tell.

2. There is a setting in time and place. Just like a great historical novel or a Shakespeare play, there is a setting and a time that is important in your story.

3. The events involve people. Actors in the story are who make things happen or keep them from happening. They respond to forces that act on them and participate in the events as they unfold.

Your job is to make the characters come alive; and, to make the hero of the story (who will be the party you represent), credible and likeable so that the jurors will want to root for him or her.

4. The events lead to a conflict. Just as with a movie or a detective novel, a conflict occurs that is the central plot of the story. How the conflict is portrayed is determined by the themes and theories that you will employ in telling the story.

5. The conflict progresses to a crisis. The crisis is often the most important part of the plot. The story builds in tension and the efforts are made to resolve the crisis.

6. The crisis is resolved. How the crisis is resolved in a trial, is not up to you; the jurors will decide the resolution. But you paint the story so that the good guys will win, and the good guys in *our* stories are, of course, represented by us.

Story Logic. Here we need to **distinguish between chronology and plot**. Chronology is the historic sequence of events in order as they happened. The plot is the sequence of events in the story that the author arranges. You don't create the facts and you can't invent evidence. But it is your role as an advocate, as the storyteller, to arrange the events to suit the story that you want to tell.

A well-told story is like a great symphony. When you get to the end, it feels very satisfying. It feels like there has been a natural progression to the ending, which completes and finishes the work in a way that seems the best and only way it could have come out.

So, how do you tell a story that progresses naturally to ending that given the story closure and meaning? How do you progress to the ending where it feels like that is the only correct outcome?

You use something called *story logic*. By using story logic, from the very first word in the story, every movement of plot works in anticipation of its ending.

That is why when you are constructing a story, you decide the ending first and then construct the plot by working backward from the ending choosing the facts and evidence that will progress naturally and inevitably to that ending.

The plot builds upon the events and heads toward a culmination—an ending that events anticipate.

5. End memorably

Remember earlier, we said with the principle of primacy and recency,

you want to begin and end with a bang. Like that great symphony, it should be powerful, memorable, maybe dramatic, maybe even something that makes the jurors uncomfortable.

Remember what Joseph Hartzler started with in his opening in the *McVeigh* case: the innocence and suffering of little children that McVeigh caused. Later in the opening he recounts that McVeigh considered himself a patriot, and when he was arrested by police, he had quotes from the American Revolutionary War and Hartzler had earlier read some of these quotes to the jurors.

Here is how Hartzler ended his opening: *You will hear evidence in this case that McVeigh like to consider himself a patriot, someone who could start the second American Revolution. The literature that was in his car when he was arrested included some quoted statements from . . . people who played a part in the American Revolution… McVeigh… took these statements out of context, and he did that to justify his antigovernment violence.*

Well, ladies and gentlemen, the statements of our forefathers can never be interpreted to justify warfare against innocent children. Our forefathers didn't fight British women and children. They fought other soldiers. They fought them face-to-face and hand to hand. They didn't plant bombs and run away wearing earplugs.

Hartzler concludes the opening with a powerful image tying in themes that he mentioned at the beginning of the opening: innocent children killed, revenge against the government, and cowardice.

Preparing a powerful opening. What should you include in your opening and how should you prepare it to make sure it will be understandable, memorable and persuasive?

5.1. Make a list of good and bad facts

An easy way to start is to make a list of the good facts and bad facts in your case. Under the heading "Good facts" make a list of all the facts that support your case; under "Bad facts" list all the ones that do not. Highlight the ones that are important. The highlighted ones will be the foundation of your opening.

Deal candidly with weaknesses and avoid overstating the evidence. Opening statements require candor about all the evidence, not just the evidence that helps your case. A common mistake of inexperienced lawyers is to ignore the evidence that hurts you. What you don't want to hear is opposing counsel in his opening say: "What the prosecutor failed to mention in his opening is…"

- dealing candidly with weaknesses minimizes their impact and maintains your credibility before the jurors.

- minimize the unfavorable evidence, even embracing it, and making it part of your story.

- put the unfavorable evidence in the middle of the story, after starting

strong, will prevent the jurors from leaning the other way.[8]

5.2. Develop a theory of the case

What do we mean by a theory of the case?

Your theory of the case is simply a logical, persuasive story about what really happened. It must be consistent with the credible evidence and with the juror's perception about how life works.

It provides a comfortable viewpoint from which the jurors can look at all of the evidence - and if they take that viewpoint, it should lead them to decide the case in your favor.

Your theory combines the undisputed evidence with your version of the disputed facts that you will present in the trial.

You can have more than one theory, but be careful. Having inconsistent theories usually results in disaster - and the main reason is credibility.

For example, take the story about the defense lawyer who used every theory he could think of - the shotgun approach - to defending his client's case:

The plaintiff, a farmer who grew a patch of cabbages behind his house, had a neighbor who kept a goat in his backyard. One day the goat broke loose, got into the cabbage patch, and ate all the cabbages while digging up and ruining the rest of the garden. The farmer sued the owner of the goat for his lost cabbages.

Here is how the defense lawyer responded in his opening statement:

The farmer had no cabbages.

If he had any cabbages, they were not eaten.

If the cabbages were eaten, it was not by a goat.

If the farmer's cabbages were eaten by a goat, it wasn't the defendant's goat.

If it was the defendant's goat, he was insane.

And if the goat wasn't insane, the cabbages were rotten.

So, be careful about having too many theories or theories that are inconsistent.

Here is another example from a murder case. The theory that the defendant's lawyer will choose is dependent on both the contested and the uncontested facts:

In this case, the prosecutor will present evidence that after a violent argument, the victim was shot by a man some witnesses will identify as the defendant.

As defendant's counsel, your theory could be one of the following:

Defendant did not do the shooting (misidentification);

[8] Ejup Sahiti, *E drejta e procedures penale*, Prishtina, 2005, p.134. Fact that have to be proven in procedure are called, legally relevant facts. Legally relevant facts, indications facts and supporting facts has to be proven firstly.

Defendant did the shooting, but it was done to defend himself (self defense);

Defendant[9] did the shooting, but the circumstances do not make it murder (manslaughter or lesser charge).

How do you develop a theory of the case?

a. Review the elements of the claim or defense;

b. Analyze how you intend to prove or disprove each of the elements through testimony or exhibits;

c. Analyze the contradictory facts that your opponent will use to determine the key issues that will be disputed at trial;

d. As we've discussed, review the evidence and identify each side's strengths and weaknesses.

5.3. Develop a theme

As we discussed earlier, developing a theme may be the most important ingredient of an effective opening.

Themes should be morally and emotionally compelling. They should appeal to the jurors' sense of fairness and justice. Good themes must be consistent with the attitudes that jurors have about people, events, and life in general.

In the *McVeigh* trial, one of Joseph Hartzler's themes was that Timothy McVeigh was a child killer who cowardly ran away with headphones on.

5.4. Prepare adetailed outline, practice, make a one-page outline

Now you are ready to write out a detailed outline to organize the structure of your opening. But the more satisfied and familiar you get with the structure, the less you should depend on the notes. Eventually, the script should evolve into slides with minimal words on each slide or a one-page outline that only lists the topics that you plan to cover. In other words, your visual cues for the opening provide the structure of the presentation. That way, you allow yourself the liberty of delivering the opening in the way that you speak conversationally - that is with spontaneity and feeling. Preparation allows you to converse with the jurors and to improvise, while removing the fear caused by being unprepared.

6. Use visual aids

One of your goals of the opening is to help the jurors visualize the evidence you will be presenting to them. In this day and age, there is no excuse for not using visual aids in modern courtrooms. Studies confirm that people learn

[9] Ejup Sahiti, Ismail Zejneli, *E drerjta e procedures penale e R. Maqedonise*, Skopje, 2017, p. 96, Skopje Defendent is the subject of procedure against whom the criminal charges are filled. Defendent in criminal procedure is equel party with public prosecoutor.

best and remember information best from a combination of seeking and hearing.

For example, use a timeline of events (when timing is important), a diagram of the scene, or exhibits that will help jurors understand the evidence.

Examples: $PM_{2.5}$drawing, power plant animation.

Do's and Don'ts

1. Argument. How forceful can you be in your opening? Although it is prohibited to argue inferences from the evidence in the opening, the rule is typically loosely enforced. Most experienced judges and trial lawyers expect opening statements to go beyond a roadmap of the facts and include stories that present themes and inferences that are technically not evidence.

So that you won't be surprised, find out from other lawyers or from the court in the pretrial conference what the court's view is on the opening statement regarding permissible argument.

2. Mentioning inadmissible evidence. Lawyers are limited in the opening to discussing only the evidence that they have a good-faith belief is admissible.

3. Mentioning unprovable evidence. Opening statements cannot mention unprovable evidence. A lawyer who mentions a fact in the opening statement is then obligated to present evidence of the fact during trial. If you can't prove it, you can't mention it. For example, if you know that a fact is unprovable because a necessary witness is unavailable, you can't mention it in the opening.

4. Mentioning the opponent's case. Prosecutors cannot comment on the defense's case or suggest that the defense has a burden of proof.[10]

5. Personal opinions. Lawyers are prohibited from stating explicitly their personal opinions in the case. This is a somewhat difficult concept, since in any good opening statement, the jurors should be fully aware of your opinion in the case. In enforcing this rule, judges listen for key phrases such as "I believe," "I think," and "you must." To avoid an objection being sustained, do not use the pronoun *I* and when asking jurors to do something, avoid the pronoun *you*.

6. Appeals to sympathy or prejudice. Direct appeals to sympathy or prejudice are improper at any time. Direct attacks on the character of the parties and witnesses are improper in the opening.

7. Explaining what an opening is or that it is not evidence. *"This is what lawyers call an opening statement."* You don't need to explain that you are about to give an opening statement. The judge will just have done that. It wastes precious time at the beginning when you are in the "primacy and recency" zone—when you have the jury's undivided attention. *"Nothing I say is evidence."* The judge will already have instructed the jury that the opening is not evidence. Why would you want to undercut your credibility and confirm that the jury can disregard everything you say. The jury knows that you are a lawyer for one of the parties. They will be disposed to listen to you unless you instruct them otherwise.

[10] *Criminal procedure law of R. N. Macedonia*, Official Gazette No. 150 from 18 November 2010 (article 379 par. 4).

8. Criminal record of the defendant. Presentation of facts regarding any prior convictions of the defendant shall not be permitted as part of the statements.[11]

7. Conclusion

Opening statements is the most important part of the trial. It is considered a map for the main hearing in which direction the parties will „walk". To have a effective opening statements, lawyers must be seriously prepared, to be proactive in collecting and presenting evidences, to know all the evidences regarding the case, even of the opposite parties. Determining the theory of the case and having rhetorical and persuasive skills are important to. In order to have effective opening statements, you have to be: short, understandable, creative, persuasive and based on evidences.

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[11] *Criminal procedure law of R. N. Macedonia*, Official Gazette No. 150 from 18 November 2010 (article 379 par.3).