

Globalization, Transnational Litigation and Elements of Fair Trial, the Romanian perspective

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Introduction

Our modern society and our legal system as well, are going through a constant change. The interdependence of economical, political and social relations is generating new connections among individuals, states and international organizations, redefining the old, classical concepts of the state and the sovereignty of national law. The borders among states and legal systems are gradually evaporating and we are slowly approaching an age of social, economical, legal and political interdependence. The global process generating the substantial changes was named by the modern scholars' globalization. Globalization is a concept which is hard to define in a comprehensive way. There are many different definitions of globalization, according to the one of these definitions globalization (or globalisation) describes the process by which regional economies, societies, and cultures have become integrated in a global network of political ideas through communication, transportation, and trade. The term is most closely associated with the term of economic globalization: the integration of national economies into the international economy through trade, foreign direct investment, capital flows, migration, the spread of technology, and military presence.¹ However, globalization is usually recognized as being driven by a combination of economic, technological, socio-cultural, political, and biological factors.² In fact the most characteristic properties of globalization are: greater movement of people, goods, capital and ideas due to increased economic integration which in turn is propelled by increased trade and investment.

Globalization is a phenomenon characterized by constant change, change in politics, in economy and substantial change in the legal architecture of our societies as well. The world's legal architecture is slowly changing from its modern state into a new post-modern state enhanced by globalization and the fast development of modern IT technologies. Globalization is in fact a set of phenomena which is transforming our world by leading it from segmentation to

¹ Bhagwati, Jagdish (2004). In Defense of Globalization. Oxford, New York: Oxford University Press.

² Sheila L. Croucher. Globalization and Belonging: The Politics of Identity in a Changing World. Rowman& Littlefield. (2004). p.10.

intermingling, from separation to transitivity, from a territory-based organization to decentralization, from a state-centered configuration to a less state-centered arrangement.³

Globalization is changing the contours of law and is creating new global legal institutions and norms. The spectrum of law-makers is widening, since national and regional legal systems increasingly interfere. The imminent growth of cross-border transactions, economic and political interdependence creates an urgent need for adaptation and development. Probably the most relevant example for a constant change in our modern legal system is the European integration and the creation of the European Union. The European Union (EU) is currently the most important economical and political union of 27 member states. The European Union has developed a single market through a standardized system of laws which apply in all member states. It ensures the free movement of people, goods, services, and capital,⁴ enacts legislation in justice and home affairs, and maintains common policies on trade. In order to function this system needs and adequate and efficient legal background. Common policies, which are the essence of multinational integration, are based on common legislation. The foundations of the European Union are special laws, based on the treaties, called "acquis communautaire". These special laws are superior to the national law, even the constitutional law of the Member States, whether national legislation predates or postdates European legislation. These special laws have direct applicability influencing in a direct manner the national legal system of every member state.

Law has traditionally been the province of the nation state, whose courts and enforcement agents enforced the legal rules. We can state that our societies are entering in the age of the "globalization of the law". It is true that globalization of law is a recent trend in the development of the law and legal systems throughout the globe but it is a significant process which currently appears inevitable. The creation of supranational and international organizations, inter-governmental legal institutions, and the development of private international law and international procedural law are unprecedented in our modern history. The national governments influenced by the urgent need to adapt to the new realities of globalizes trade and global market, modify their legal systems making them compatible with the international needs. The growing interdependence of the states in the economic, political, and social sphere creates the necessity for an adequate international private law and procedural law system. The interconnections between the states shifted the focus of the law from local – to regional, international level.

Because of the strong interconnections among the states, companies and individuals, international conflicts are inevitable. The question raised is, if the existing legal systems,

³Jean-Bernard Aub (2007). Is legal globalization regulated? Memling and the business of baking camels. Utrecht Law Review.

⁴ European Commission: "The EU Single Market: Fewer barriers, more opportunities", Europa web portal. Retrieved 27 September 2007.

procedural rules can still guarantee the procedural equity and material justice. There is an urgent need for adaptation and development, the question is if the current law system can adopt as fast as the current globalization process is developing. Globalization and the proliferation of technological advances such as the Internet have catapulted private civil disputes to the forefront of international jurisprudence.⁵ In order to assure procedural equity and material justice in transnational disputes we need to adapt our procedural rules and fundamental principles to the new realities of our globalizing world.

As individuals, companies and corporations transcend the national borders and the economical interdependence expands the number of international, transnational conflicts, disputes will increase substantially. The current legislation is not sufficiently developed in order to be capable of responding to the informational, legislative, and dispute settlement issues facing a modern, global market economy. The need for modernization and adaptation was identified by many scholars. This task will necessarily involve careful reflection on local-traditional law systems, and basic principles of law and on the new necessities imposed by the economical, social and political demands.

Fundamental procedural principles

In this study I'm focusing on the procedural principles from the point of view of civil and commercial law. In recent decades we have witnessed the growing interdependence of national and regional economies, international litigation remains a domain characterized by legal risk. In contrast to the international harmonization of substantive law, rules of civil procedure in many jurisdictions remain characterized by idiosyncrasies that, while understandably reflecting local legal cultures, present significant obstacles to the unwary foreign litigant.⁶ When we analyze the basic principles of transnational civil litigation we must mention the project initiated and finalized by The American Law Institute (ALI) and UNIDROIT (The International Institute for the Unification of Private Law, based in Rome). This was an ambitious project to produce both a set of principles and model rules for use in international civil litigation. The idea was conceived by

⁵ See ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 90 (2003) ("[A]s a result of lack of uniformity at the levels of procedural law, substantive principle, and choice of law rules throughout the international legal system, very different results may obtain in the resolution of any given legal dispute according to the forum in which that dispute is tried."); Kevin M. Clermont & Theodore Eisenberg, Exorcising the Evil of Forum-Shopping, 80 CORNELL L. REV. 1507, 1508 (1994) [hereinafter Clermont & Eisenberg, Exorcising Evil] ("Venue is worth fighting over because outcome often turns on forum."), - Emil Petrossian* II. IN PURSUIT OF THE PERFECT FORUM: TRANSNATIONAL FORUM SHOPPING IN THE UNITED STATES AND ENGLAND, 40 Loy. L.A. L. Rev. 1257 (2007).

⁶ Clifford R. Einstein / Alexander Phipps: The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales, UNIFORM LAW REVIEW REVUE DE DROIT UNIFORME, NS - Vol. IX 2004-4.

Geoffrey Hazard, an USA law professor, and Michele Taruffo, an Italian comparative lawyer.⁷ The Rules contained in the study seek to correct the imbalance that has emerged in recent decades between the harmonization of the substantive private law applicable to manifold international commercial transactions as compared to procedural law in the same area.⁸ The Rules' purpose is primarily to provide an efficient and fair procedure for transnational cases. The authors' intent was for the draft Rules to apply in ordinary national courts, replacing domestic procedural rules whenever the plaintiff and defendant are nationals of different States or whenever property in one State is subject to claims (ownership or security interests) asserted by a party from another State. In such transnational cases today one of the hardships - and hence one of the risks of international commerce - occurs when a party is forced to prosecute or defend its interests under a foreign procedural system containing elements that seem arbitrary or unfair.⁹ In May 2002 leading English judges and commentators attended a conference on the draft principles and rules of international civil litigation.¹⁰ Zuckerman has summarized the discussion. Zuckerman questioned whether this project's aim in achieving procedural uniformity, at least in commercial matters, might not be deleterious¹¹: Plurality of procedure encourages experimentation and promotes evolutionary progress. Jurisdictional competition could encourage efficiency and lead to improvement in dispute resolution. It might, therefore, be better to direct the efforts in this area not so much towards a united procedural system for transnational cases but towards establishment of general normative standards that allow for considerable variations. Community of general standards would facilitate easier mutual recognition of judgments and . . . enable different jurisdictions to and their own way of providing adjudication that is effective and attractive . . .¹² The American Law Institute (ALI) and UNIDROIT (The International Institute for the Unification of Private Law) elaborated a set of basic principles regarding the following aspects of procedure: independence, impartiality and qualifications of the court and its judges, jurisdiction over

⁷ Neil H Andrews: English Civil Procedure: A Synopsis" (Kyoto Lectures 2006) (2008) 25 Ritsumeikan Law Review (Kyoto, Japan) 1-38.

⁸ Clifford R. Einstein / Alexander Phipps: The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales, UNIFORM LAW REVIEW REVUE DE DROIT UNIFORME, NS - Vol. IX 2004-4.

⁹ Geoffrey C. HAZARD, et al, "Transnational Rules of Civil Procedure: Rules and Commentary", 30 Cornell International Law Journal (1997), 493 at 493-494. - Clifford R. Einstein / Alexander Phipps: The Principles and Rules of Transnational Civil Procedure and their Application to New South Wales, UNIFORM LAW REVIEW REVUE DE DROIT UNIFORME, NS - Vol. IX 2004-4.

¹⁰ Organized by the Neil Andrews in conjunction with the British Institute of International and Comparative Law: the papers are published in M Andenas, N Andrews, R Nazzini (eds) The Future of Transnational Commercial Litigation: English responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure (2003, British Institute of Comparative and International Law; re-printed, 2006).

¹¹ Neil H Andrews: English Civil Procedure: A Synopsis" (Kyoto Lectures 2006) (2008) 25 Ritsumeikan Law Review (Kyoto, Japan) 1-38.

¹² Neil H Andrews: English Civil Procedure: A Synopsis" (Kyoto Lectures 2006) (2008) 25 Ritsumeikan Law Review (Kyoto, Japan) 1-38.

parties, procedural equality of the parties, right to engage a lawyer, due notice and right to be heard, languages, prompt rendition of justice, provisional and protective measures, structure of the proceedings, party Initiative and scope of the proceeding, obligations of the parties and lawyers, multiple claims and parties; intervention, amicus curiae submission, court responsibility for direction of the proceeding, dismissal and default judgment, access to information and evidence, sanctions, evidentiary privileges and immunities, oral and written presentations, public proceedings, burden and standard of proof, responsibility for determinations of fact and law, decision and reasoned explanation, settlement, costs, immediate enforceability of judgments, appeal, lis pendens and res judicata, effective enforcement, recognition, international judicial cooperation.¹³ To set up and identify a set of basic principles guiding the act of justice would be a great achievement and the work done by the ALI and UNIDROIT is an important step toward achieving this goal. I believe that the process of unification of procedural law will be a long term project, the first step needs to be the creation of a set of rules, a set of basic principles applicable to every court simplifying the process, to make them time and cost efficient, to minimize the risks and to guaranty the right to a fair trial.

The right to a fair trial

The rights associated with a fair trial are explicitly proclaimed in Article 10 of the *Universal Declaration of Human Rights*, the *Sixth Amendment to the United States Constitution*, and *Article 6 of the European Convention of Human Rights*, as well as numerous other constitutions and declarations throughout the world. In the present study we must limit our focus to the study of principles relevant for the civil and commercial litigation. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. The right for a fair trial is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR),¹⁴ which provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁵ We cannot analyze the principle of the right to a fair trial without mentioning the provisions of art. 6 of the European Convention on Human Rights and Fundamental Freedoms. The European Convention on Human Rights and

¹³ ALI / UNIDROIT Principles of Transnational Civil Procedure - The text of the Principles and the accompanying commentary were adopted by the American Law Institute (ALI) in May 2004 and by the International Institute for the Unification of Private Law (UNIDROIT) in April 2004.

¹⁴ International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

¹⁵ Lawyers Committee for Human Rights: WHAT IS A FAIR TRIAL? - A Basic Guide to Legal Standards and Practice (2000).

Fundamental Freedoms is a treaty signed in 1950 by the ten members of the Council of Europe. The European Convention on Human Rights and Fundamental Freedoms is the most important instrument of international law to emanate from the Council of Europe. The Convention can be raised as an argument in any court at any stage of a "normal" case or it can be used as the foundation for an action in which case the process is to be by way of judicial review or appeal.

Article 6 of the European Convention on Human Rights states that:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice ...*¹⁶

The first paragraph of Article 6 applies to both civil and criminal proceedings, but the second and third paragraphs apply only to criminal proceedings. Article 6 guarantees the *right to a fair and public hearing* in the determination of an individual's civil rights and obligations or of any criminal charge against him. The Court, and previously the Commission, has interpreted this provision broadly, on the grounds that it is of fundamental importance to the operation of democracy. In the case of *Delcourt v. Belgium*, the Court stated that: in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision.¹⁷ Since 1953, the Convention has experienced phenomenal growth in its stature in at least three respects.

- First, the substantive rights have been augmented by a number of Protocols.
- Second, the number of states adhering to the Convention has grown, especially in recent years with the accession of many Eastern European states.
- Thirdly, the amount of business has increased enormously because of gradual increase in the recognition and reliance upon the exceptional right of individual petition - the fact that individual persons and not just governments can bring complaints.¹⁸

¹⁶ The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.

¹⁷ Nuala Mole and Catharina Harby: *The right to a fair trial, A guide to the implementation of Article 6 of the European Convention on Human Rights*, Human rights handbooks, No. 3, Directorate General of Human Rights Council of Europe F-67075 Strasbourg Cedex © Council of Europe, 2001, 2006 1st edition 2001; 2nd edition, August 2006 Printed in Belgium

¹⁸ The European Convention on Human Rights – UK Law Online (1998)

We can see that Article 6 offers a frame of the basic elements of a fair trial, without being comprehensive. The historical experience shows us that it is very hard to create a legal system, a set of basic principles which are accepted and applicable in every country. The challenge is to create such rules and principles that are compatible with the cultural, political and legal traditions` diversity of the countries, offering an adequate protection in case of transnational conflicts.

The right to a fair trial, the Romanian perspective

In the implementation of the principles of fair trial Romania uses several levels: constitutional, supra-constitutional and jurisprudential through the decisions rendered by the Constitutional Court, since the beginning of its work (June 1992). The Romanian constitutional concept is to create a binary category system that includes two sets of sources: the national level and the international level.¹⁹ The sources of Romanian law are: the Romanian Constitution; laws adopted by the Parliament (constitutional laws, organic laws and ordinary laws); governments normative acts (ordinances, emergency ordinances, decisions); acts issued by the central government administration (minister's orders, instructions and regulations); acts issued by the local government administration (County Council, Local Council); EU legislation (Regulations, Directives); international treaties. The Romanian legal framework includes the following legal instruments: the Constitution is Romania's supreme law, the organic law regulates areas of high importance to the State, the ordinary law regulates all other areas which are not covered by organic law, the ECHR case-law and EU courts' case-law. The Romanian hierarchy of norms is as follows: the Romanian Constitution is at the top of the hierarchy of norms, all other pieces of legislation and norms must comply with it; organic law is in second position in the legal hierarchy, ordinary law is the third legal norm.²⁰ Regarding the applicability of international treaties and principles into the Romanian law system, the Romanian legislation has implemented constitutional guaranties. According to Article 20 of the Romanian Constitution- International treaties on human rights: constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a part of. Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions.

¹⁹ Dr. Florin Bucur Vasilescu: Dreptul la un proces echitabil (Right to a fair trial), source: <http://www.ccr.ro>.

²⁰ European Justice: Romanian legal system and an overview of Romanian law.

Also, Article 11 of the Romanian Constitution states that the treaties ratified by the Parliament are part of the domestic law: (1) The Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to. (2) Treaties ratified by Parliament, according to the law, are part of national law. (3) If a treaty Romania is to become a party to comprise provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.

Through these regulations all provisions relating to the right to a fair trial contained in international agreements and treaties enjoy a special treatment, offering an adequate protection for the subjects of law. On the other hand, constitutional provisions include specific clauses which ensure the appropriate framework for citizens to assure the access to justice and the right to a fair trial. According to Article 21 of the Constitution - Free access to justice, every person is entitled to bring cases before the courts for the defense of his legitimate rights, liberties and interests, the exercise of this right shall not be restricted by any law, all parties shall be entitled to a fair trial and a solution of their cases within a reasonable term, administrative special jurisdiction is optional and free of charge. Article 21 offers a general description of the basic principles of free access to justice and the right to a fair trial. The Romanian legislators introduced Art. 21, to offer constitutional protection of the rights, liberties and interests of the individuals and to assure the adequate protection of the right to a fair trial. In order to assure the applicability of the treaties of the European Union and the laws of the European Union the legislators introduced a special article, Article 148 in the Romanian Constitution - Integration into the European Union. Through these provisions the constituent treaties of the European Union, as well as the other mandatory community regulations have precedence over the opposite provisions of the national laws. Article 148 of the Romanian Constitution - Integration into the European Union states that: (1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented. (5) The Government shall send to the two

Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

In order to assure the proper administration of justice and to assure the rights to a fair trial the Romanian constitution offers several constitutional guaranties in Chapter VI - Judicial authority. Article 124 of the constitution states that justice shall be rendered in the name of the law and justice shall be one, impartial, and equal for all and above all judges shall be independent and subject only to the law. To assure the adequate administration of justice, judges are appointed by the President of Romania, judges are irremovable, according to the law, the appointment proposals, as well as the promotion, transfer and sanctions against judges shall only be within the competence of the Superior Council of Magistracy, under the terms of its organic law. The office of a judge shall be incompatible with any other public or private office, except for academic activities. Justice shall be administered by the High Court of Cassation and Justice, and the other courts of law set up by the law. The jurisdiction of the courts of law and the judging procedure shall only be stipulated by law. The High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence. It is prohibited to establish extraordinary courts of law. By means of an organic law, courts of law specialized in certain matters may be set up, allowing the participation, as the case may be, of persons outside the magistracy (Article 126 of the Romanian Constitution). Judicial independence is protected in another way through the separation of powers. Moreover, the independence of justice and the right to a fair trial is protected through the jurisdiction of the Constitutional Court. Article 2 paragraph 2 of Law No. 47/1992 on the Organization and functioning of the constitutional court of Romania states that the provisions of normative acts which violate the provisions and basic principles of the Constitution are considered unconstitutional and after the unconstitutional character was declared by the Constitutional Court, they will not produce legal effects. It is certain that most of the laws relating to protection of the necessary conditions for achieving a fair trial can be found in legal documents inferior to the constitutional law, especially Law No. 92/1992 on judicial organization, Law No. 47/1992 on the organization and functioning of the constitutional court of Romania and civil procedure code. Thus, besides the fact that they repeat some of the constitutional texts, they contain provisions designed to strengthen the independence of the judiciary system and ensure a fair trial.²¹ Law No. 47/1992 on the organization and functioning of the Constitutional Court contains significant provisions regarding the fairness of the process in terms of unconstitutionality in solving the type of control exercised subsequently, at the request of the parties or the public prosecutor.

As we can see Romania has adapted a series of rules, legal principles offering legal, constitutional protection to assure the proper administration of justice and the right to a fair

²¹ Dr. Florin Bucur Vasilescu: Dreptul la un proces echitabil (Right to a fair trial), source: <http://www.ccr.ro>.

trial. The constitution of Romania is part of the 1980 Hague Convention of 25 October 1980 on International Access to Justice. Romania has also ratified the European Convention on Human Rights and it is bound to secure to everyone, within its jurisdiction, the rights and freedoms defined in Section I of the Convention, among them the right to a fair trial. Romania is full member of the Council of Europe and has participated in its efforts in the field of international law (international acts and treaties, ECHR case law) designed to enhance the international judicial assistance. Two of the most important acts adopted by the Council of Europe in this regard are the European Convention on Information on Foreign Law, 7 June 1968, London and the European Agreement on the Transmission of Applications for Legal Aid, Strasbourg, 1977.²²

Romania's entry into the European Union in 2007 has had a significant influence on its domestic policy and legal system as well. As part of the process, Romania has instituted reforms including judicial reform and increased judicial cooperation with other member states. The integration has an immediate effect on the improvement of access to justice and on the right to a fair trial. One of the most important European legal act applicable to Romania in this field is the Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. Currently in Romania the rights and obligations of the foreign litigant are duly considered, and the elements of the trial proceedings are examined closely from two directions, a national one and an international perspective.

As an overall assessment of the Romanian realities we can conclude that there are sufficient means of ensuring an effective transnational litigation for any civil or commercial process, the basic principle of the right to a fair trial is guaranteed by the constitution and other specific laws. However we must state that there is plenty of room for improvement and development in this field. The challenges are visible and the need for adaptation is evident, this is why we can see a constant development in the field of transnational litigation.

²² Rus L. I. Sergiu-Leon: International Judicial Assistance in Civil and Commercial Matters (a summary of the doctoral thesis), source: <http://doctorat.ubbcluj.ro>