

# Procedural Unilateralism in Civil Justice: The One-Sided Courtroom and the Limits of Adversarial Principle

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## **Abstract**

*This study examines the departures from the natural and traditional multilateral structure of the adversarial principle in civil proceedings, with a particular focus on determining the conditions under which an initially unilateral procedure remains compatible with fair trial guarantees and those under which it amounts to a genuine exclusion of the opposing party. The research combines doctrinal, logical and comparative methods, using Romanian civil procedure as the primary reference point and testing it against French, Portuguese, German, common-law and transnational procedural models. The analysis distinguishes apparent unilateralism from true unilateralism. The study finds that unilateral procedures are justified only by strict reasons such as urgency, preservation of evidence, surprise, efficient judicial administration or the structurally non-contentious nature of the application. It identifies the derogatory legal regime governing such procedures. Their legitimacy depends on enhanced procedural compensatory safeguards designed to preserve the essence of adversarial participation, characterized by narrowly construed grounds of application, heightened judicial scrutiny, temporal limitations, a reinforced judicial role, strict proportionality, prompt disclosure, effective review. The study's implication is normative and methodological: unilateralism should be treated not as a procedural shortcut, but as a narrowly confined derogation requiring rigorous justification and effective subsequent adversarial control.*

**Keywords:** procedural unilateralism; adversarial principle; civil justice; ex parte proceedings; compensatory safeguards.

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## 1. Prolegomena

### 1.1. The Adversarial Principle

The adversarial principle has, first of all, an epistemic function: it prevents a single perspective from being transformed into the official version of reality<sup>2</sup>. Without hearing the other party, the procedural configuration risks being constructed from a single angle, incomplete or strategically oriented<sup>3</sup>. In the case law of the European Court, this requirement is not reduced to a merely decorative formality: what matters is that the party knows the elements capable of influencing the decision and can decide for itself whether they call for a response<sup>4</sup>.

In its classical meaning, the adversarial principle expresses, in its typical form, the dialogic structure of contentious proceedings<sup>5</sup>: two antagonistic procedural positions, advanced by holders of divergent interests, are subjected to reciprocal scrutiny before the court. From this perspective, procedural truth is neither delivered by one of the parties nor intuited by the judge in isolation; rather, it is constructed critically, through the confrontation of opposing submissions, evidence and arguments<sup>6</sup>.

In the British model described by Lord Reed, the hearing lies **at the heart** of adversarial procedure: the judge decides by assessing the competing evidence and arguments of the parties, and the system is built on the premise that **"nothing**

<sup>2</sup> In an extra-legal register, but useful for understanding the risk of the single perspective, see Marija Gjorgjieva Dimova, "Audiatur et altera pars! (Ex-centrism in Macedonian Novel)," *Fluminensia* 33, no. 1 (2021): 241, 253, <https://doi.org/10.31820/f.33.1.4>. The source is used here only as a methodological analogy: an ignored perspective may destabilize the claim of a dominant version to exhaust the reality of the facts.

<sup>3</sup> See, on the connection between *audiatur et altera pars*, multiperspectivity, and the formation of judgment, Dennis Pausch, "Audiatur et altera pars? Multiperspektivität als narratives Prinzip bei Sueton," in *Suétone narrateur: Biographie und Erzählung in De vita Caesarum*, ed. Edoardo Galfré and Christoph Schubert (Berlin/Boston: De Gruyter, 2024), 21–24, <https://doi.org/10.1515/978311333939-002>; for a historical illustration of the risks inherent in a unilateral perspective, see Teresa Bałuk-Ulewiczowa, "Audiatur et Altera Pars: The Polish Record of the Działyński Embassy of 1597," *British Catholic History* 33, no. 4 (2017): 501, 503, 515, <https://doi.org/10.1017/bch.2017.23>. The English sources present the audience granted to Paweł Działyński by Elizabeth I as an embarrassing episode for Poland-Lithuania, whereas the Polish perspective preserved in *Mercurius Sarmaticus* reveals a less humiliating and more diplomatically functional episode.

<sup>4</sup> See *Nideröst-Huber v. Switzerland*, no. 18990/91, §§ 24, 29–31 (ECtHR, February 18, 1997), ECLI:CE:ECHR:1997:0218JUD001899091; and *Beer v. Austria*, no. 30428/96, §§ 17–20 (ECtHR, February 6, 2001), ECLI:CE:ECHR:2001:0206JUD003042896.

<sup>5</sup> Elena Belei, in Elena Belei, coord., *Drept procesual civil. Partea generală* [Civil procedural law. General part], 3rd ed. (Chișinău: Lexon-Prim, 2024), 105.

<sup>6</sup> *Ex parte Lloyd* (1822) Mont. 70, 72 n., cited in Andrew Langdon, "The Adversarial System," in *Practical Advocacy in the Crown Court*, ed. Mary Cowe and Susan Cavender (Bloomsbury Professional, 2020), 57, recording the formula that "truth is best discovered by powerful statements on both sides of the question."

**is decided" until oral argument has been heard**<sup>7</sup>. This perspective must, however, be regarded *cum grano salis* in our system of law, where written procedure, the role of the judge and the regime of remedies - including the limits of appellate review - give the adversarial principle a physiognomy less dependent on orality. Lord Reed does not refer to unilateral procedures, but his observation sets a useful comparative benchmark: if the classical form of adversarial procedure presupposes the confrontation of the parties' arguments before the judge, procedures in which the court initially examines only the submissions or material of one party must be treated as functional and strictly justified departures from adversarial debate, not as ordinary means of capitalizing adversarial debate. This paper analyses the legal regime of civil procedures in which the court determines, temporarily or structurally, an application in the absence of the procedural opponent's participation or, in non-contentious matters, in the absence of a determinate procedural opponent. The research problem is not the mere lack of simultaneity in the debate, but the identification of the limit beyond which an initially unilateral procedure ceases to be a derogation compatible with a fair trial and becomes a true procedural exclusion.

The novelty of the study lies in proposing a **taxonomy** of procedural unilateralism accompanied by appropriate procedural safeguards: apparent unilateralism, in which adversariality is merely sequenced; **structural** unilateralism, in which the absence of initial or simultaneous adversariality flows from the law or from the very nature of the procedure; and **conjunctural** unilateralism, in which the procedure remains adversarial as a model but, *in concreto*, is conducted in the absence of the party who was lawfully summoned. Within structural unilateralism, the study distinguishes between the *ex parte* form, in which the opponent exists but is temporarily excluded, and the structurally **non-contentious** form, in which there is no determinate procedural opponent. The research uses the doctrinal, logical and comparative methods, taking Romanian civil procedure as its principal point of reference and testing its solutions by reference to French, Portuguese and German law, common-law procedures and transnational procedural standards.

## 1.2. Unilateralism vs. Multilateralism

Romanian civil procedural law enshrines a dialogic conception, which this study expresses through the rule of multilateralism. **Multilateralism** means the dialogic structure of the procedure, in which the material capable of influencing the court's decision is accessible to both parties before it is jurisdictionally capitalized, through knowledge, observations, challenge and supplementation.

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<sup>7</sup> Robert Reed, Lord Reed of Allermuir, "Oral Hearings in the United Kingdom Courts: Past, Present and Future," speech delivered at the Legal Training and Research Institute of Japan, November 29, 2023, 1, 10, Supreme Court of the United Kingdom, accessed June 13, 2026, [https://supremecourt.uk/uploads/speech\\_231129\\_reed\\_c6c3c2d800.pdf](https://supremecourt.uk/uploads/speech_231129_reed_c6c3c2d800.pdf).

From this rule there has been established the **exception** of procedural **unilateralism**, in which the emphasis falls - at least in its first phase, and sometimes even entirely before the first-instance court - on its monological nature: there is a single "voice"; even if it is not "heard" in the proper sense, it emerges from the content of the claim or, as the case may be, of the request submitted.

### 1.3. Apparent Unilateralism: the Sequencing of Adversariality

The adversarial principle does **not** require every procedural step to take the form of immediate *inter partes* **confrontation**. Such an understanding would be not only excessive, but also unsupported: many procedural acts are prepared, filtered, produced or processed by the court or by its auxiliaries, without this automatically giving rise to a problem of unilateralism. Doctrine shows - in its analysis of German civil procedure - that the procedure remains adversarial even if the judge plays the principal role in gathering and filtering evidence, while the lawyers supervise, guide and complete that activity<sup>8</sup>. This observation may be generalized: the non-adversarial part of a procedural sequence does not, in itself, exclude adversariality, provided it is followed or accompanied by the parties' effective possibility to guide, control and challenge the outcome of the operation<sup>9</sup>.

**Expert evidence** is an eloquent example, but not an isolated exception. The expert is selected and instructed by the court, yet this operation is carried out with particular care for the protection of the parties' interests<sup>10</sup>. The parties are **not absent** from the taking of expert evidence: they have the right to participate in setting the objectives, to file documents, to be summoned in order to participate directly in on-site findings, to observe the operations performed in their presence, subsequently to submit objections to the expert report, to request clarifications or supplementation of the report, or even to ask for a new expert examination. The **only** sequence that does **not take place** in the parties' **presence** is the internal operation of technical **analysis** and **drafting** of the report. That, however, is not a judicial debate conducted in secret with one of the parties, but the court auxiliary's own intellectual activity.

The same distinction also operates in the field of digital evidence: **cyber-navigation**, by which the judge obtains information directly by accessing online content, is not problematic because of the court's initiative, but because of any solitary use of the information obtained online<sup>11</sup>. It does **not** slide into **unilater-**

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<sup>8</sup> John H. Langbein, "The German Advantage in Civil Procedure," *University of Chicago Law Review* 52, no. 4 (1985): 824, 826, 829, <https://doi.org/10.2307/1599518>.

<sup>9</sup> Langbein, "German Advantage in Civil Procedure," 829.

<sup>10</sup> Langbein, "German Advantage in Civil Procedure," 835.

<sup>11</sup> Lurdes Varregoso Mesquita, "Justiça Digital para Todos? Prova Eletrônica, Eficiência e Vulnerabilidade" [Digital justice for all? Electronic evidence, efficiency and vulnerability], *Revista*

**alism** insofar as it is conducted within a framework accessible to the parties, enabling them to observe, **discuss** and **challenge** the verification<sup>12</sup>.

More generally, the unilateral character of a procedure should **not** be **equated** with the **absence** of simultaneous participation by both parties at **every procedural step**. The decisive **criterion** is different: if the relevant procedural element enters - before being relied on by the court - a **circuit accessible to both parties** - knowledge, observations, supplementation, challenge - we are not dealing with unilateralism properly so called. Unilateralism properly so called arises only when **one** party is **excluded** from the information, operation or argument capable of influencing the decision, without a real and useful possibility of reaction. The adversarial principle therefore does not require absolute simultaneity, but effective bilateral control over the relevant procedural material.

What is essential is that the element on which the judge relies in the decision should previously have been opened to adversarial debate. This conclusion is also confirmed in the analysis of transnational rules of civil procedure, where the fairness of adjudication is linked not only to the impartiality of the court, but also to the existence of a genuine opportunity "to be heard" and to the procedure's capacity to allow the establishment of the relevant facts<sup>13</sup>. In this respect, the effect of the French principle of contradiction is precisely to prevent the judge from taking into consideration, for the purposes of the decision, anything that has not been submitted to the parties' adversarial debate<sup>14</sup>.

#### 1.4. Particular Features of Procedural Unilateralism

The incidence of the adversarial principle must be assessed by reference to the **stage** and **specific** nature of the procedure. Thus, in urgent or conservatory procedures, the guarantee of adversariality is not identical with an obligation to submit the application to prior adversarial debate between the parties in all cases; it may also be realized through effective subsequent review, if that review enables the affected party to challenge the measure and reopen discussion of its grounds. As will be seen, what is specific to *ex parte* **structural unilateralism** is that the affected party exists, but is kept outside the initial phase of the procedure: it **does not know** of the judicial step taken, has no access to the material filed by the

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*Eletrônica de Direito Processual* 27, no. 1 (January–April 2026): 542, <https://doi.org/10.12957/redp.2026.95756>.

<sup>12</sup> Mesquita, "Justiça Digital para Todos?," 542.

<sup>13</sup> Russell J. Weintraub, "Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure," *Texas International Law Journal* 33 (1998): 416, where the author identifies among procedural-fairness factors the "opportunity to be heard" and "factfinding capacity."

<sup>14</sup> John Anthony Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure," *International and Comparative Law Quarterly* 52, no. 2 (April 2003): 282–83, <https://doi.org/10.1093/iclq/52.2.281>.

applicant and cannot, before the measure is ordered, respond<sup>15</sup>, challenge or supplement that material. The court thus rules on the basis of a single factual and legal version<sup>16</sup>, which requires stricter scrutiny of the legal basis, concrete necessity, risk of abuse and proportionality of the measure.

The difference does not lie in the application of the adversarial principle in favour of the **applicant**, but in the fact that **only** the applicant has, in the initial phase, the possibility to present its **version** through the **application** seising the court.

Because it departs from the deep reasons of debate - reasons specific to the rule of law - this exception must have multiple, serious and well-articulated justifications. Accordingly, unilateralism must remain an **exception**<sup>17</sup>, subject to **strict interpretation and application**.

Structural unilateralism has, in all cases, its **source** in the **law**. This statement also holds true where the law gives the court discretion to decide the case without summoning the parties. The reason is that the circumstances in which proceedings may be determined without summoning the parties are laid down by law; where the law allows such an option, only the discretionary determination of whether the parties should be summoned or not lies with the judge.

In these procedures, the active role of the judge does not replace adversariality; it operates as a **compensatory safeguard** for the temporary absence of adversarial debate. Precisely because the court rules, in the initial phase, only on the basis of the application and the material supplied by the applicant, it must check with heightened rigor the legal basis of the measure, its concrete necessity, the risk of abuse and the proportionality of the interference.

### 1.5. The Source of the Absence of Adversariality: Structural Unilateralism and Conjunctural Unilateralism

In the case of unilateral applications, the absence of adversariality is **structural** (1.5.1), whereas in the case of contentious proceedings that become "non-adversarial" because they are conducted in the absence of the defendant who was lawfully summoned, that absence is merely **conjunctural**<sup>18</sup> (1.5.2).

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<sup>15</sup> Marie-Anne Frison-Roche, *Généralités sur le principe du contradictoire: Étude de droit processuel* [General considerations on the adversarial principle: A study in procedural law] (Paris: LGDJ, 2014), 129.

<sup>16</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 129–30.

<sup>17</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 129.

<sup>18</sup> Loïc Cadet and Emmanuel Jeuland, *Droit judiciaire privé* [Private judicial law], 5th ed. (Paris: Litec, 2006), § 643, 416, cited in Lionel Miniato, *Le principe du contradictoire en droit processuel* [The adversarial principle in procedural law] (Paris: LGDJ, 2008), § 219, 199.

### 1.5.1. Structural unilateralism

Structural unilateralism should be understood as the absence of initial or simultaneous adversariality where that absence results from the **legal configuration** of the procedure or from the legal **nature** of the **application**, and not from the passivity of a party who has been lawfully summoned. It may concern either the **temporary exclusion** of an affected person in *ex parte* procedures, or the very **absence** of a determinate procedural **opponent** in structurally non-contentious procedures or incidents. In both hypotheses, unilateralism is not an accident in the conduct of the case, but a feature of the procedural model established or accepted by law.

This type of unilateralism has two distinct forms. (a) The first is *ex parte* structural unilateralism and presupposes that an affected party exists, but is temporarily excluded from the initial phase of the procedure so that the measure is not deprived of useful effect; (b) The second is structurally **non-contentious** unilateralism, which does not presuppose a temporarily excluded opposing party, but rather the absence of a determinate procedural opponent; here, adversariality between opponents is not deferred, but an application is determined which, by its nature, is not built on the opposition between adverse claims.

### 1.5.2. Conjunctural unilateralism

Conjunctural unilateralism arises within **contentious**, adversarial proceedings which, *in concreto*, come to be conducted **without the participation of the defendant** who was **lawfully summoned**; it results from the **conduct** of the **absent party** or from the circumstances that led to the non-appearance of the lawfully summoned party<sup>19</sup>. In this latter case, the opposing party exists, has been duly summoned to the proceedings and has had a genuine opportunity to put forward its defence, but fails to avail itself of that opportunity. Therefore, the absence of a lawfully summoned defendant does not transform the procedure into a unilateral procedure in the proper sense. It produces, at most, a **factual** unilateralism, not a structural one. The decisive criterion remains the regularity of notification and the existence of an effective possibility of defence: if the defendant was lawfully summoned and had a real chance to participate, adversariality is not suppressed, but unused by the party who is absent.

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<sup>19</sup> See Vitalie Moscalciuc, “Garanțiile procesual-civile ale reclamantului la examinarea cauzei în lipsa pârâtului” [The claimant’s civil procedural guarantees in the examination of the case in the defendant’s absence], *Legea și Viața* (November 2019): 37–41. The author emphasizes that default adjudication presupposes proper notification and a genuine opportunity to defend, while Article 6 ECHR guarantees a real possibility to present one’s case rather than physical presence as such.

## 1.6. Statement of Reasons

The law may enshrine unilateralism having regard to the **specific nature** of the case or to an **interest** which, under the conditions strictly provided by law, temporarily **prevails** over adversariality<sup>20</sup>.

These justifications derive from: 1) the **urgent** nature of the procedure; 2) preservation of the **surprise** effect, including through the initial confidentiality of the procedure as a requirement of effectiveness; and 3) the need to ensure the effective functioning of the public service of justice<sup>21</sup> in **non-contentious** matters.

Some applications may be supported by not merely one, but even **two** such justifications. This is the case with applications for attachment and garnishment as conservatory measures, whose primary rationale is to preserve the surprise effect vis-à-vis the debtor, procedural expedition being only a secondary consideration<sup>22</sup>.

## 2. Analysis of Exceptions to the Rule of Procedural Multilateralism

### 2.1. Urgency of the Procedure

French law contains provisions according to which the rules relating to adversariality are not applicable in certain matters in cases of urgency or exceptional circumstances. In situations of exceptional urgency, the judge must be able to intervene before it is too late, before it is no longer truly useful to do justice<sup>23</sup> and, therefore, to decide very quickly<sup>24</sup>. The need for urgent determination of the procedure would not provide the time necessary for the procedure to be conducted - realistically - in an adversarial manner<sup>25</sup>. Having regard (i) to the short time available and (ii) to the absolute necessity of taking a decision, urgency imposes an "inversion of legal values"<sup>26</sup>. It has been considered that the effects are twofold because, while certain provisions tend to exclude application of the adversarial principle, others make an adapted application of the

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<sup>20</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 129.

<sup>21</sup> Lionel Ascensi, *Du principe de la contradiction* [On the adversarial principle] (Paris: LGDJ/EJA, 2006), § 444, 248; Frison-Roche, *Généralités sur le principe du contradictoire*, 129.

<sup>22</sup> Constitutional Court of Romania, Decision no. 166 of March 22, 2005, *Official Gazette of Romania*, Part I, no. 372 (May 3, 2005).

<sup>23</sup> Olivier Lecucq, "Réflexions générales sur le respect du contradictoire dans les procédures d'urgence" [General reflections on respect for the adversarial principle in urgent proceedings], in *Le principe du contradictoire dans le procès administratif* [The adversarial principle in administrative proceedings], coord. J. Gourdou, O. Lecucq, and J.-Y. Madec (Paris: L'Harmattan, 2010), 63.

<sup>24</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 131.

<sup>25</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 132; Ascensi, *Du principe de la contradiction*, § 99, 62.

<sup>26</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 131.

principle<sup>27</sup>.

The urgency of the situation requires procedures **adjusted** to situations of this nature<sup>28</sup>. It is natural that, in urgent circumstances, the applicable law should not be the same as that applicable in ordinary times and, on the contrary, that in such circumstances it should be highly **specific**<sup>29</sup>, in which respect adversariality may suffer because of the **compression** of time.

To illustrate the foregoing, the urgency generated by the "danger in delay" underlies the granting of an application for *preservation of evidence* without summoning the parties, where the court considers - in light of the circumstances of the case - that summoning them would compromise the effectiveness of the measure<sup>30</sup>. Here the logic of procedural expedition of procedure is beyond doubt and follows from the requirements of Article 359 of the Romanian Code of Civil Procedure: the existence of a danger that the evidence may disappear or become difficult to take in the future. In French law, measures of instruction *in futurum* are examined in the same evidentiary and preventive key: they allow the preservation or prior producing of evidence before the commencement of proceedings, when litigation is still merely possible<sup>31</sup>. Where - under that legal system - the applicant resorts to the non-adversarial form, that route is subsidiary and may be used only in cases of "strict necessity to derogate from adversariality"<sup>32</sup>. On this basis, it may be argued that the problem is not the anticipatory character of the measure, but the separate justification of the departure from adversariality. Therefore, the anticipatory character of the measure is not, in itself, problematic; what becomes problematic is the non-adversarial mode of obtaining evidence where the derogation from adversariality is not justified by a **strict, duly reasoned necessity**, or where the measure exceeds the limits of loyal, legally admissible and circumscribed inquiry<sup>33</sup>.

The determination of an application for a *presidential ordinance*, exceptionally without summoning the parties, is also grounded in the urgency of taking the measure requested<sup>34</sup>, and not in the surprise effect vis-a-vis the

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<sup>27</sup> Ascensi, *Du principe de la contradiction*, § 99, 62.

<sup>28</sup> Lecucq, "Réflexions générales," 63.

<sup>29</sup> Lecucq, "Réflexions générales," 64. The author gives a suggestive French example—when a house is on fire, one does not ask a judge for authorization to send the firefighters—referring to Government Commissioner Romieu.

<sup>30</sup> Romanian Code of Civil Procedure, art. 360(5).

<sup>31</sup> François-Xavier Gosselin, Yves Le Marrec, and Pol De Kervenoael, "Les mesures d'instruction in futurum. Analyse de la jurisprudence des Cours d'Angers et de Rennes," *Revue Juridique de l'Ouest*, no. 2 (1987): 155–56, <https://doi.org/10.3406/juro.1987.1484>.

<sup>32</sup> Nathalie Bruché and Cédric Porin, "Instruire le dossier pour établir les faits: le rôle actif du juge," *Le Droit Ouvrier*, no. 789 (April 2014): 248, <https://doi.org/10.3917/drou.789.0247>. The authors discuss Article 145 of the French Code of Civil Procedure, which permits, before trial, legally admissible investigative measures where there is a legitimate reason to preserve or establish proof of facts on which the resolution of a dispute may depend.

<sup>33</sup> Bruché and Porin, "Instruire le dossier," 251–53.

<sup>34</sup> Liviu-Alexandru Viorel and Alin Stamatoiu, "Ordonanța președințială în Noul Cod de procedură

defendant; this conclusion follows from Article 999(2) of the Code of Civil Procedure, which links determination without summons to particular urgency<sup>35</sup>. In this case, urgency is a constitutive condition of admissibility, the judge having the difficult task of identifying the fair balance between the claimant's interest in obtaining the provisional measure with speed and preventing damage to the defendant through determination without summoning him<sup>36</sup>.

Also, for reasons of urgency, *suspension* of the proceedings whose transfer is requested may be ordered, for well-grounded reasons, without summoning the parties before the first hearing<sup>37</sup>: summoning them could delay the measure until the main proceedings had already been determined.

## 2.2. The Surprise Effect and the Risk of Procedural Pressure

A second justification for not summoning the parties must be found in the objective **effectiveness**<sup>38</sup> of the measure. In this hypothesis, the surprise effect is the requirement of the measure's useful effect; the pressure exerted on the targeted party is an inherent risk which justifies stricter judicial scrutiny: prior notification would allow the person concerned to neutralize precisely the result that the measure seeks to preserve.

French doctrine identifies, in the same logic, the hypothesis in which the effectiveness of the judicial measure depends on the initial confidentiality of the procedure, examples being seizures and inspections<sup>39</sup>.

The notions of "secrecy" or "confidentiality" are only partly adequate. In these procedures, the purpose is not secrecy as an autonomous value, but preservation of the surprise effect: prior summoning of the opponent could allow the removal of assets, emptying of accounts, destruction of evidence or depriving the measure of content<sup>40</sup>. Precisely for this reason, **attachment**<sup>41</sup> and garnishment as

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civilă. Elemente de continuitate și de noutate. Propuneri de lege ferenda," *Revista Română de Drept Privat*, no. 2 (2013): 172.

<sup>35</sup> Dan-Mihail Gavriș, commentary on Article 999, in Gabriel Boroș et al., *Noul Cod de procedură civilă. Comentariu pe articole. Vol. II: art. 456–1134*, 2nd rev. and supplemented ed. (Bucharest: Hamangiu, 2016), 867. On particular urgency under Article 999(2), see Gabriel Boroș and Mirela Stancu, *Drept procesual civil. Vol. 2: Judecata în căile de atac; proceduri speciale; executarea silită*, 6th rev. and supplemented ed. (Bucharest: Hamangiu, 2023), 366.

<sup>36</sup> Paul Piperea and R. Dan, in Gheorghe Piperea et al., *Noul Cod de procedură civilă. Note, corelații, explicații* [The New Code of Civil Procedure. Notes, correlations, explanations] (Bucharest: C.H. Beck, 2019), 1815–16.

<sup>37</sup> Romanian Code of Civil Procedure, art. 143(1), second sentence.

<sup>38</sup> Viorel Mihai Ciobanu, *Tratat teoretic și practic de procedură civilă. Vol. I. Teoria generală* [Theoretical and practical treatise on civil procedure. Vol. I. General theory] (Bucharest: Național, 1996), 127.

<sup>39</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

<sup>40</sup> Helder Martins Leitão, *Dos princípios básicos em processo civil* [On the basic principles in civil procedure], 3rd ed. (Porto: Almeida & Leitão, 1999), 68.

<sup>41</sup> Portuguese Code of Civil Procedure, art. 393(1) ("Examinadas as provas produzidas, o arresto é

conservatory measures – the typical examples – are determined in first instance court without summoning the parties, not as a mere technique of acceleration, but as a means of preventing the risk of conduct consisting in removing, concealing or diminishing the debtor's assets<sup>42</sup>. British doctrine also emphasizes, however, their nature as **powerful tactical pressure** instruments capable of forcing the defendant to provide security or accept an unfavourable settlement<sup>43</sup>. It is readily apparent that the initial unilateralism of conservatory measures is not entirely "neutral"<sup>44</sup> or "innocent", since the measure may produce a **dissuasive** effect and procedural pressure. Therefore, the procedure without initially summoning the defendant must be deemed as an exception with potential for procedural pressure, not as a simple technical instrument for preserving enforcement.

In the common-law tradition, the same logic appears paradigmatically in the Anton Piller order: the defendant is not notified so that the evidence will not be **destroyed, concealed or moved** before it is preserved<sup>45</sup>. Initial unilateralism does not suppress adversariality, but saves its object, because without evidence the subsequent debate would become purely formal<sup>46</sup>.

### 2.3. The Structurally Non-Contentious Nature of the Application and the Sound Administration of Justice

*Non-contentious* applications are a **common** feature of many continental judicial systems<sup>47</sup>; they are viewed sometimes through the lens of public authorities' assistance in the creation of individual rights<sup>48</sup>. In non-contentious procedure, **unilateralism** has a **different structure** from that found in urgent or

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decretado, sem audiência da parte contrária, desde que se mostrem preenchidos os requisitos legais").

<sup>42</sup> Mihaela Tăbărcă, *Drept procesual civil. Vol. 3: Căile de atac; procedurile speciale* [Civil procedural law. Vol. 3: Remedies; special procedures], 2nd ed. (Bucharest: Solomon, 2017), 453; Constitutional Court of Romania, Decision no. 166 of March 22, 2005, *Official Gazette of Romania*, Part I, no. 372 (May 3, 2005).

<sup>43</sup> Filip Saranovic, "Jurisdiction and Freezing Injunctions: A Reassessment," *International and Comparative Law Quarterly* 68, no. 3 (July 2019): 643, <https://doi.org/10.1017/S0020589319000265>.

<sup>44</sup> A. Spătaru, "Asigurarea acțiunii civile" [Securing the civil action], in *Analele științifice ale USM. Lucrări studențești* [Scientific Annals of Moldova State University. Student papers] (2020), 139, describing measures securing the civil claim as imposing "limitations, prohibitions or obligations" on the defendant.

<sup>45</sup> Jeffrey Berryman, *The Anton Piller Order—A Civil Search Warrant* (paper presented at the American Bar Association International Law Section Conference, Washington, DC, April 5–8, 2011), 22, <https://doi.org/10.2139/ssrn.3309879>.

<sup>46</sup> Berryman, *Anton Piller Order*, 22.

<sup>47</sup> James E. Pfander and Daniel D. Birk, "Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction," *Yale Law Journal* 124, no. 5 (2015): 1407, <https://yalelawjournal.org/article/non-contentious-jurisdiction>.

<sup>48</sup> Walter Neitzel, "Non-Contentious Jurisdiction in Germany," *Harvard Law Review* 21, no. 7 (May 1908): 477.

conservatory procedures. There is **no temporarily excluded opposing party**; rather, by the very nature of the application, there is no determinate procedural opponent. The court does **not** settle a **conflict** between **opposing claims**<sup>49</sup>, but verifies the fulfilment of the legal requirements for configuring, authorizing or declaring a legal situation. Accordingly, the absence of adversariality in this field is **consubstantial** with non-contentious procedure<sup>50</sup>, and the principal guarantee does not consist in subsequently restoring a bilateral debate, but in the active **role of the judge**, in the verification of the relevant facts and in the protection of persons whose rights or interests may be affected.

Certain *ex parte*/non-contentious procedures in the United States federal system, in which the petitioner seeks the court's intervention without identifying a determinate procedural opponent, confirm that the absence of an opponent is not, in itself, incompatible with the adversarial system<sup>51</sup>. Separately, where an *ex parte* procedure affects the interests of a determinate person, it must observe a strict balance of fairness and proportionality, remain - in the field of provisional measures affecting a determinate person - an **exception** reserved for **urgent** necessity<sup>52</sup>, and the affected party must be able to **respond as soon** as possible thereafter<sup>53</sup>.

Thus, the distinctive feature of proceedings concerning non-contentious applications at first instance is that the court may dispense summoning the parties only within the limits laid down by law, including where the law itself leaves it to the court to decide whether the application should be examined with or without summoning the parties<sup>54</sup>.

For example, the following are determined within non-contentious procedure: (i) the **application for approving the enforcement** by the enforcement court<sup>55</sup>, which falls within the category concerning the granting of judicial authorizations<sup>56</sup>; (ii) the application for **setting an earlier date** for the

<sup>49</sup> Romanian Code of Civil Procedure, art. 527; French Code of Civil Procedure, arts. 26–27.

<sup>50</sup> Lionel Miniato, *Le principe du contradictoire en droit processuel* [The adversarial principle in procedural law] (Paris: LGDJ, 2008), § 219, 198.

<sup>51</sup> Pfander and Birk, “Article III Judicial Power,” 1346.

<sup>52</sup> ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (2004), principles 5.8 and 8.2, <https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/>.

<sup>53</sup> Kangnikoé Bado, Aluisio Gonçalves de Castro Mendes, and Stefan Huber, “Procedural Rights, Principles, and Approaches Influencing the Structure of Civil Litigation,” in *Comparative Procedural Law and Justice*, ed. Burkhard Hess et al., Part VI, chap. 1 (2024), para. 7, <https://www.cplj.org/publications/6-1-procedural-rights-principles-and-approaches-influencing-the-structure-of-civil-litigation>.

<sup>54</sup> Delia Narcisa Theohari, in Gabriel Boroi, Octavia Spineanu-Matei, and Alexandru Constanda, *Noul Cod de procedură civilă. Comentariu pe articole. Vol. II: art. 527–1134*, 2nd rev. and supplemented ed. (Bucharest: Hamangiu, 2016), 265.

<sup>55</sup> Nicolae-Horia Țiț, *Executarea silită. Partea generală* [Enforcement proceedings. General part] (Bucharest: Hamangiu, 2016), 198; Boroi and Stancu, *Drept procesual civil*, vol. 2, 569.

<sup>56</sup> Romanian Code of Civil Procedure, art. 527.

hearings<sup>57</sup>; (iii) **conflicts of jurisdiction**<sup>58</sup>; and (iv) the **preliminary screening and regularisation** of the statement of claim under Article 200 of the New Code of Civil Procedure, which - where applicable - has a non-contentious physiognomy in the phase prior to communication of the application to the defendant, being therefore exempted from application of the adversarial principle<sup>59</sup>, a procedure in which the objection of specialized jurisdictional incompetence may also be raised (material procedural or functional<sup>60</sup>).

### 3. Compensatory Safeguards

In a modern conception, adversariality cannot be understood as an isolated mechanism, but as part of a fragile procedural balance between the rights of the parties, the effectiveness of the measure and the authority of the court. Therefore, initial unilateralism is admissible only if the imbalance it produces remains **temporary**, proportionate and susceptible to effective **subsequent review**; where the measure creates consummated effects or a procedural advantage impossible to neutralize, subsequent adversariality no longer restores the balance, but merely confirms its rupture.

In structural *ex parte* procedures, the affected party must subsequently receive access to the material relied upon and a real possibility to challenge the grounds of the measure within an adversarial framework. In structurally non-contentious procedures, the safeguard is not expressed by reintroducing an absent opponent, but by the **active role** of the judge, by full verification of the legal requirements and by protection of interested persons or of those whose rights may be affected.

In *ex parte* procedures, adversarial debate is **not**, in principle, **suppressed, but deferred**<sup>61</sup>. In structurally non-contentious procedures, the issue arises differently: a contentious debate between opponents is **not postponed**; rather, the **absence** of a determinate procedural opponent is compensated by the **active role** of the judge and by protection of interested persons.

Consequently, the law has devised **palliatives**<sup>62</sup>, such as the correlative

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<sup>57</sup> Romanian Code of Civil Procedure, art. 230, second sentence.

<sup>58</sup> Gheorghe-Liviu Zidaru, commentary on Article 135, in Viorel Mihai Ciobanu and Marian Nicolae, coords., *Noul Cod de procedură civilă: comentat și adnotat. Vol. 1: art. 1–526*, 2nd rev. ed. (Bucharest: Universul Juridic, 2016), § 5, 554.

<sup>59</sup> Belei, *Drept procesual civil. Partea generală*, 105.

<sup>60</sup> For the rationale of the solution, see Liviu-Alexandru Viorel and G. Viorel, “Noi realități procesuale în procedura de judecată. Unele modificări ale NCPC aduse prin intermediul Legii nr. 138/2014,” *Juridice.ro*, October 20, 2014, accessed November 30, 2024, <https://www.juridice.ro/342383/noi-realitati-procesuale-in-procedura-de-judecata-unele-modificari-ale-ncpc-aduse-prin-intermediul-legii-nr-1382014.html>.

<sup>61</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

<sup>62</sup> Henri Motulsky, *Droit processuel* [Procedural law] (Paris: Les Cours de droit, 1973), 148, cited in Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

expansion of the judge's powers (3.1) and the availability of a remedy (3.2).

It may readily be observed that, where the law admits the unilateral character of the procedure for well-grounded reasons, it surrounds it with **numerous rules** designed either to **compensate** for the **absence of debate** or to allow **subsequent adversarial review**<sup>63</sup>.

### 3.1. The Correlative Expansion of the Judge's Powers. Particularities in Non-Contentious Matters

In French law, it is held that, in non-contentious procedure, the law grants the court powers of initiative that are binding on the party and on third parties, in such a way that, in this field, one may speak of an **exclusion of the principle of party disposition**<sup>64</sup>. The adversarial principle - always necessary, but sometimes inapplicable - is **replaced by the inquisitorial** character of the procedure, which means that the two rules are not antinomical, but tend toward the same result, namely the establishment of the truth<sup>65</sup>. Thus, where the persons concerned are not summoned, the judge's role is reinforced<sup>66</sup>. The same occurs as in the hypothesis in which a party is present, but is so powerless before a strong and uncooperative opponent that the judges are obliged to ensure the adversarial process themselves<sup>67</sup>. The reinforcement of the active role must not, however, be understood as being oversized to the point of transforming the parties into auxiliaries in the search for truth<sup>68</sup>.

In our system of law, the issue is not the exclusion of the principle of **party disposition**, but rather its limitation; indeed, the court's active role **compensates** for the **lack of adversariality** and for the lack of publicity of the hearing<sup>69</sup>.

In non-contentious procedure, the structural absence of an opponent requires a **modification** of the **judge's role**<sup>70</sup>. Thus - within such procedures - the court cannot rely on an "opposing party" (for the good reason that it does not exist, author's note L.-Al. Viorel) in developing the factual register<sup>71</sup>. Precisely for that reason, it is natural that the structural unilateralism of the procedure should be compensated by an active role of the judge in screening the facts and

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<sup>63</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 134. For comparison, French Code of Civil Procedure, art. 17.

<sup>64</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

<sup>65</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

<sup>66</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

<sup>67</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

<sup>68</sup> Volodymyr Kroitor and Valeriy Mamnitskyi, "Adversarial Principle under the New Civil Procedure in Ukraine," *Access to Justice in Eastern Europe*, no. 4(5) (2019): 32, <https://doi.org/10.33327/AJEE-18-2.4-a000021>.

<sup>69</sup> Theohari, commentary in *Noul Cod de procedură civilă*, vol. II, 265.

<sup>70</sup> Pfander and Birk, "Article III Judicial Power," 1407.

<sup>71</sup> Pfander and Birk, "Article III Judicial Power," 1407.

the legal requirements of the application. A **link** may thus be established between the **unilateral** character of non-contentious procedure and the **correlative expansion of the judge's active role**<sup>72</sup>. For example:

a) The rules concerning **summons** are **specific**: (i) if the law requires it, the petitioner and the persons indicated by law shall be summoned; (ii) if the law does not require it, the court shall assess whether the application is to be determined with summons or without summons [Article 532(1)];

b) The court is entitled to order, even of its **own motion**, measures that may prove useful for the case<sup>73</sup>. Legal literature states that measures ordered by the court of its own motion should not previously be submitted to the petitioner's discussion; however, if the petitioner is present, he or she may express a point of view concerning them<sup>74</sup>. In my view, if the petitioner is present, it is not sufficient that he or she be able to express a point of view; the court **must** effectively submit to the petitioner's **debate** the measures it intends to order of its own motion.

c) The court may **hear any person who could provide clarifications** in the case, as well as those whose interests would be affected by the decision<sup>75</sup>. It is readily apparent that third-party interests are thus protected in a specific manner<sup>76</sup>.

It may therefore readily be observed that the **strengthening** of the **active role** represents the fundamental **safeguard** at the first-instance stage against **arbitrariness** within the unilateralism specific to non-contentious procedure.

## 3.2. The Availability of a Remedy Governed by Adversariality

### 3.2.1. The Power of Adversariality in the Remedy

In *ex parte* procedures, the remedy has a direct compensatory function. Precisely because the judge's active role **reinforces** and does **not replace** the **debate** between the parties, the law attaches to a unilateral procedure the possibility of a **remedy**, opening a second channel in which the parties may **express their positions**<sup>77</sup>.

By contrast, in structurally non-contentious procedures, the function of the remedy is different: it does not restore deferred adversariality, but reviews the legality and effects of the decision, especially where interested persons are involved.

<sup>72</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 132; Ascensi, *Du principe de la contradiction*, 198.

<sup>73</sup> Romanian Code of Civil Procedure, art. 532(2), first sentence.

<sup>74</sup> Theohari, commentary in *Noul Cod de procedură civilă*, vol. II, 266.

<sup>75</sup> Romanian Code of Civil Procedure, art. 532(2), second sentence; French Code of Civil Procedure, art. 27.

<sup>76</sup> Ascensi, *Du principe de la contradiction*, 198.

<sup>77</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

In *ex parte* procedures based on the surprise effect, the affected person can benefit from adversariality only after the measure has achieved its useful effect<sup>78</sup>.

From this perspective, the French Code of Civil Procedure enshrines, in a more **general** and more **explicit** wording than Romanian law, the guarantee of an appropriate remedy against a measure ordered without the knowledge of the affected party. In this respect, Article 17 of that Code provides that "where the law permits or necessity requires that a measure be ordered without the knowledge of a party, that party has an appropriate remedy against the decision that adversely affects it".

The heuristic deficiency of the unilateralism specific to first-instance proceedings must be compensated by rules enabling the reintegration of the dispute into a debate<sup>79</sup>. If the judge who determined the case at first instance had before him or her a **single version** (i.e. that of the claimant), then, depending also on the first-instance solution, at least **two** versions appear in the remedy. Thus, the exercise of that remedy does indeed **allow** the judge to **assess** the situation **better**<sup>80</sup>.

### 3.2.2. The Correlation Between the Absence of Adversariality in the Unilateral Phase and the Adversarial Nature of the Subsequent Phase

Scope of application is:

**i) Contentious procedures:** temporal deferral. Insofar as a decision taken within an initially non-adversarial procedure is called into question, the remedy has a legal nature different from that ordinarily made available to the parties<sup>81</sup>.

Doctrine states that adversariality is "**restored**"<sup>82</sup> in the remedy. Although the statement is suggestive, it is **fragile**, because adversariality did **not exist** in the **first place** (during first instance) in order to be able of being "restored".

Nor is it rigorous to describe all unilateral procedures as forms of "**temporary suspension**" of adversariality because, as will be seen, the unilateral phase may produce **reputational**, economic or procedural effects that are difficult to reverse. In fact, what occurs is a **return** to the **ordinary situation**, involving - in the terms of one foreign author - the "**resurrection**" of **adversariality**<sup>83</sup>. In urgent or conservatory procedures, what occurs is, more precisely, a **temporal deferral** in the hearing of the opponent: the opposing party exists, but is not heard

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<sup>78</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 129.

<sup>79</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

<sup>80</sup> Ascensi, *Du principe de la contradiction*, § 352, 199.

<sup>81</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

<sup>82</sup> Ciobanu, *Tratat teoretic și practic de procedură civilă*, vol. I, 127.

<sup>83</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 134.

before the measure is adopted, precisely in order not to compromise its useful effect. This deferral is not, however, innocent. It may become a genuine **amputation** of adversariality where the *ex parte* measure produces **substantial economic, reputational**<sup>84</sup>, financial<sup>85</sup> or procedural effects that are **difficult to reverse** before the affected party can be heard, or where the subsequent remedy is late, formal or incapable of reopening discussion of the grounds and proportionality of the measure. In the Romanian legal system, insofar as **security** exists and is deposited, it may **mitigate** - at most *ex post* and within the patrimonial limits of the deposit - the consequences of a measure ordered unjustifiably; it does not, however, transform the subsequent hearing into a sufficient guarantee and does not, by itself, repair the deficit of adversariality produced during the interval in which the measure was enforceable without the affected party having been able to be heard.

**ii) Non-contentious procedures.** In non-contentious matters, the appeal has special features that differentiates it from the legal regime of the other cases of unilateralism of the first-instance procedure. Thus: (i) in the appeal, the appellant and the persons summoned before the first-instance court will be summoned, the argument being that Article 534 of the Code of Civil Procedure contains no provisions derogating from the obligation to summon, of the kind provided in Article 532(1), second sentence, of the Code of Civil Procedure<sup>86</sup> (which refers to the right of the judge hearing the application at first instance to assess whether or not to summon the parties); insofar as parties with opposing interests exist in the appeal, the adversarial principle will apply<sup>87</sup>. As has been observed, the remedy in non-contentious matters gives effect rather to the protective function of adversariality than to its supposed heuristic function, there being no guarantee that this remedy was regulated for the purpose of discovering the truth<sup>88</sup>.

Having regard to the foregoing, the situation of the appeal in non-contentious procedures differs from that encountered in *ex parte* procedures. In this

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<sup>84</sup> For reputational risk associated with *ex parte* conservatory measures, see Saranovic, “Jurisdiction and Freezing Injunctions,” 643. Discussing *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), Saranovic notes that publicity concerning the order appeared before the *inter partes* hearing and could have damaged the defendant’s reputation.

<sup>85</sup> See Magdalena Söllner, “Die prozessuale Waffengleichheit im einstweiligen Verfügungsverfahren” [Procedural equality of arms in preliminary injunction proceedings], *StudZR Wissenschaft Online*, no. 1 (2022): 4, 11–12, <https://doi.org/10.11588/srzwo.2022.1.89853>. Söllner explains that the affected party may already suffer considerable economic harm before opposition is determined and that a later opportunity to be heard is not, by itself, a sufficient cure where the interim effects continue to operate.

<sup>86</sup> Dan-Mihail Gavriș, commentary on Article 534, in Boroi et al., *Noul Cod de procedură civilă*, vol. II, 269; V. Belegante, commentary on Article 534, in Viorel Mihai Ciobanu and Marian Nicolae, coords., *Noul Cod de procedură civilă: comentat și adnotat. Vol. 2: art. 527–1134*, 2nd rev. ed. (Bucharest: Universul Juridic, 2016), § 8, 36.

<sup>87</sup> Gavriș, commentary on Article 534, 269; Belegante, commentary on Article 534, § 8, 36.

<sup>88</sup> Ascensi, *Du principe de la contradiction*, § 352, 199.

field, it is **not** rigorous to speak of a temporal **deferral** of **adversariality**, because the procedure is not built on the opposition between adverse claims. There is **no** temporarily **excluded opposing party**, but rather the structural absence of a determinate procedural opponent. The court is not called upon to settle a conflict between subjects with opposing procedural interests, but to check fulfilment of the legal conditions for authorizing, declaring or configuring a legal situation.

In this hypothesis, the central safeguard does **not** consist in the possibility of a **subsequent bilateral debate**, but in the **intensification of the judge's active role**: verification of the requirements of the application, requesting any necessary clarifications and protecting the persons whose rights or interests may actually be affected by the decision. The remedy may subsequently introduce elements of adversariality, especially where interested persons are involved, but such adversariality is contingent and derivative, not constitutive of the procedure. It does not transform the non-contentious procedure into contentious proceedings properly so called, but operates as a mechanism for reviewing the legality and effects of the decision.

### 3.2.3. The Characteristics of the Remedy Governed by Adversariality

The remedy represents a **specific manifestation** not so much of the right of action as of the right to **adversariality**<sup>89</sup>.

In the remedy, the voice of the affected person or of the party absent from the initial sequence appears for the first time, thereby enabling the **inaugural monologue** to be **transformed into an adversarial debate**, written and, as the case may be, oral.

Having regard to the **specific** features of the hypothesis analysed and to the procedural **stage** at which the measure intervenes, the guarantee of adversariality cannot be reduced to the mere formal existence of a remedy.

In the logic of international procedural guarantees, the effectiveness of the remedy<sup>90</sup> presupposes at least three **requirements**: **informing** the party, **understanding** the grounds of the measure and the real possibility of being **heard**<sup>91</sup>.

<sup>89</sup> Frison-Roche, *Généralités sur le principe du contradictoire*, 134.

<sup>90</sup> See Belgian Court of Cassation, C.20.0045.N, September 4, 2020, ECLI:BE:CASS:2020:ARR.20200904.1N.3. The court held that Article 6(1) ECHR does not preclude proceedings initiated by unilateral application where absolute necessity requires it, provided that the procedure is authorized by law and the interested person has the possibility of lodging an opposition in order to safeguard his or her rights.

<sup>91</sup> Felipe de Andrade and Geert Van Calster, "Due Process—Protecting the Right to Fair Trial of Foreign Defendants in Cross-Border Proceedings: Comparing Practices, Investigating Conflicting Principles, and Searching for Common Standards," in *Comparative Procedural Law and Justice*, ed. Burkhard Hess et al., Part XIV, chap. 5 (2024), para. 16, <https://www.cplj.org/publications/14-5-due-process-protecting-the-right-to-fair-trial-of-foreign-defendants-in-cross-border-proceeding-s-comparing-practices-investigating-conflicting-principles-and-searching-for-common-standards>.

Without this triad, initial unilateralism no longer operates as a mere temporal deferral of adversariality, but turns into a true amputation of it.

The affected party must receive sufficient information concerning the measure, its grounds and the manner of challenging it, and must subsequently be able to discuss all relevant elements that underpinned the initial solution.

At this stage, adversariality has a **concentrated** function of review. It does not merely allow the late expression of the absent party, but introduces into the procedure the first factual and legal counter-narrative concerning the measure ordered unilaterally. The targeted party may show what was missing from the applicant's initial version, what elements were presented incompletely, what evidence or circumstances were ignored and why the measure was unnecessary, disproportionate or abusive.

Consequently, a remedy governed by adversarial safeguards is not a mere formal review of the initial decision, but an assessment of whether the procedural imbalance created by the unilateral phase can still be **effectively cured**. If the remedy allows genuine reconsideration of the grounds of the measure and neutralization of the effects produced, the initial unilateralism remains a temporal deferral of adversariality. If, conversely, review intervenes too late or can no longer remove the procedural advantage created, subsequent adversariality no longer restores the balance, but merely confirms belatedly its rupture. In certain hypotheses, this remedy is the first and only effective chance for the targeted party to transform a decision taken with a single voice into a judgment with two perspectives.

#### 3.2.4. Adversariality Does Not Always Produce Reparatory Effects

Even where the remedy is governed by adversariality, the unilateral phase may produce effects that are **difficult to reverse**. In this respect, in one case, although the *ex parte* order was subsequently set aside, the publicity occurring before the adversarial procedure could have affected the defendant's **reputation**<sup>92</sup>. Consequently, the guarantee of subsequent hearing must **not** be **overestimated**: it is necessary, but it does not always neutralize the harm caused by the measure initially ordered in a non-adversarial context.

#### 3.2.5. The Mechanical, Formal Perspective

It is clear that the parties may rely on what is already in the case file.

Thus, they may, as the case may be, maintain or re-invoke the **grounds** and **arguments** put forward in the statement of claim or, respectively, **retained in the decision**, so that they may be analysed again by a new court (i.e. the court

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<sup>92</sup> Saranovic, "Jurisdiction and Freezing Injunctions," 643, discussing *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela SA* [2008] EWHC 532 (Comm).

determining the remedy).

This is a mechanical, formal perspective. As will be seen below, the essence of the added value brought by adversariality in the remedy does not lie in this, but in the new elements.

### 3.2.6. The Creative Perspective

The legal consequences of adversariality become visible in the remedy through the introduction, for the **first time**, of an adverse **perspective** on the measure ordered unilaterally. This is not an unlimited novelty of the procedural framework, but the entry into the adversarial circuit of **defences, arguments, counter-arguments** and, as the case may be, evidence or relevant circumstances which the first-instance court did not have before it because of the unilateral character of the procedure. Even if it is not in itself a new element, **orality** is an additional means of **persuasive use** of these elements.

From the perspective of the *initial applicant*, the remedy may allow the **development** and **refinement** of the arguments supporting the favourable solution delivered at first instance or, conversely, the **rebuttal** of the reasons for which the application was dismissed. From the perspective of the *party targeted by the measure*, the remedy has a more markedly **compensatory function**: that party may **challenge** the **conditions** of the **derogation** from adversariality, the existence of **urgency** (insofar as the unilateral nature of the procedure was grafted onto it), the **necessity** of the **surprise** effect, the **proportionality** of the measure, the **fairness** of the applicant's presentation, the **evidentiary** material considered by the court and the concrete consequences of the measure ordered.

Consequently, the elements introduced in the remedy may concern not only the merits of the initial solution, but also the very legitimacy of the unilateral procedure. The affected party or the absent party may offer **alternative factual explanations**, invoke valuable **legal defences** not examined, propose **rebuttal evidence**, subsequent relevant circumstances or the existence of less intrusive measures. In this sense, the remedy does not simply repeat the first-instance trial, but opens the **first real moment of confrontation** between the applicant's version and the affected party's version.

The issue concerns **not** so much the **double degree of jurisdiction** as the scope of **devolutive** review and the effectiveness of the subsequent remedy. The fact that certain defences or arguments are raised for the **first time** in the remedy is not, in itself, problematic: that is precisely the **compensatory** function of the remedy in initially unilateral procedures. The limit appears when those elements exceed the procedural framework allowed or when the remedy intervenes too late to influence effectively the legal situation produced by the measure.

#### 4. Conclusions

Procedural unilateralism designates the situation in which the procedure is conducted, at the initial stage or at the moment when the relevant procedural material is used, **without the participation** of the procedural **opponent** or, in non-contentious matters, in the **absence of a determinate** procedural **opponent**. It constitutes a **derogation** from the **multilateral** structure of **adversariality**, but not every absence of debate has the same legal significance. **Structural** unilateralism, generated by the legal regulation or by the nature of the procedure, must be distinguished from the **conjunctural** situation in which the procedure remains adversarial as a model, but the lawfully summoned party does not participate although it had an effective possibility of defence.

The main object of the study is **structural** unilateralism. It does **not**, however, have a **unitary** configuration: in the *ex parte* form, the procedural opponent exists but is temporarily **excluded**, so that the derogation requires strict justifications and effective subsequent review; in the structurally non-contentious form, the absence of adversariality flows from the absence of a determinate procedural opponent and from the **non-contentious** nature of the application or procedural incident.

The justifications for structural unilateralism group around **three** main **reasons**. The first is **urgency**, including the need to preserve evidence where there is a danger of its disappearance or of its later difficult administration. The second is the objective **effectiveness** of the measure, where prior information of the person targeted could deprive the measure of useful effect; in this hypothesis, the surprise effect justifies the derogation, while the pressure exerted on the affected party remains a risk requiring heightened scrutiny, not an autonomous purpose. The third is the structurally **non-contentious** nature of the application or procedural incident, connected to the sound administration of the public service of justice. These reasons do **not** have the **same intensity**: urgency compresses the time of debate; preservation of evidence protects the evidentiary material; the surprise effect prevents neutralization of the measure; and the non-contentious character explains the absence of a determinate procedural opponent.

The practical result of the research is a five-step evaluation grid: express legal basis, concrete necessity, strict proportionality, **reinforced active role** and an effective **subsequent adversarial compensatory remedy**. In the absence of these conditions, unilateralism is no longer a legitimate procedural technique, but a form of procedural imbalance.

The study's contribution lies in proposing a more demanding standard of judicial review for procedures conducted without summoning the parties and in identifying the minimum safeguards that should accompany measures ordered *ex parte*, should the legislature choose to clarify the matter in general terms. The practical result of the research consists in a **five-element** control **grid**: a clear

legal **basis** for the derogation, concrete **necessity**, strict **proportionality**, a **reinforced active role** of the judge and, in certain cases, an effective subsequent **adversarial compensatory remedy**. In the absence of these requirements, unilateralism no longer functions as a legitimate procedural technique, but as a form of procedural imbalance.

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