

CONSIDERATIONS ON INTERNATIONAL COMMERCIAL ARBITRATION IN COMPETITION MATTERS IN THE EUROPEAN UNION

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ABSTRACT: *Traditionally, the arbitrability of the competition issues was subject of controversy in doctrine. Thus, in the opinion of majority, the confidentiality of the arbitration proceedings was considered inappropriate in what regards solving competition problems, given the fact that the economic policy aspects regarding competition are part of the public policy. Also, experts declared skeptical regarding the ability of arbitrators to resolve competition issues of the cases, due to their complexity. The situation has changed in the meantime and the experience of the recent years shows that arbitration in competition matters became a reality and what's more a fundamental feature of the international commercial arbitration. The arbitrability of competition issues has not been challenged, the arbitral tribunals are solving competition issues more frequently and with professionalism. These recent developments are important, especially in the context of the modernization of the application of competition law, process which had among its objectives the increasing of the importance of private application of competition law. The paper at hand analyzes the arbitrability of the competitive aspects of the cases pending before the arbitral tribunals, how frequent is the arbitration in competition matters and the role of arbitrators in the application of the EU competition rules. The authors consider that in the current context, arbitration could become an important alternative to the private application of competition law in the European Union.*

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1. INTRODUCTION

In the recent years the popularity of arbitration in general, as an alternative method for resolving conflicts arisen from contracts and that of the commercial arbitration in special, has grown¹. The above mentioned increase in popularity is among other reasons, due to the economic phenomenon of globalization² which involved the growth of the volume of international trade and the volume of commercial contracts concluded by individuals and/or legal persons. The increasing volume of international trade was felt also in the European Union, where - similarly with the situation from the international level - the phenomenon had as a consequence an increasing number of competition cases brought before the national and european courts.

This phenomenon has given rise to a large increase in the workload of the European Commission and the European Courts, due to the increasing number of business behaviors that would result in an impairment of the trade between member States, by affecting the competitive process on the internal market. The response of the EU authorities appeared as a result and it consisted in the initiation of a reform process regarding the application of the EU competition normes, a process which began with the adoption of the EC Regulation no. 1 from 2003 on the implementation of competition rules under Article 81 and 82 of the EC Treaty (now Article 101 and 102 of the Treaty on the functioning of the European Union)³.

The major innovation brought by the EU competition law reform process was the increasing of the importance of private application of competition law, by decentralizing the application of the competition normes included in the EC Treaty, by a greater involvement of national competition authorities and national courts. Another objective of the reform process was to facilitate the introduction of private actions for damages resulting from breaches of the EU competition law. The reform also brought with him the direct applicability of the two main competition rules contained in the Treaty, even of the provisions which allow the exemption from the sanction of penalties the understandings between undertakings which gave birth to net beneficial effects for consumers⁴. So the

¹ See fore more details G. Blake, "The Role of EC Competition Law in International Arbitration: a Play doer", European Business Law Review, Kluwer Law International, no. 5/2005, p. 169.

² Please see also G. I. Zekos, „The European Union’s New Competition Approach and Arbitration”, Hertfordshire Law Journal, vol. 4, no. 1 from 2006, p. 36 and also R. LeRoy Miller, *Globalization and International Trade: to Accompany Economics Today*, VIIIth edition, Harpers College Publishers, 1996, *passim*.

³ See form ore details *EC Regulation no. 1 from 2003 of the Council of the European Union from 16 December 2002*, published in OJ L1, 4. 1.2003, p. 1-25, Special edition in Romanian Chap. 8, vol.I, pp. 167-191.

⁴ Thus, the reform process has abolished the centralized system of the application of competition rules, where the major role was played by the European Commission, who was the only institution having the right to grant exemptions from the sanctions for anticompetitive agreements between undertakings. For more details regarding the reform process of the EU competition policy please see G.I.Zekos, *loc.cit.*, p. 38; I. Lazăr, „Considerations on the Role of EU’s Competition Policy in Achieving the Objectives of the Strategy Europe 2020”, *Curentul Juridic* no. 3/2010, pp.83-88; L. Lazăr, „Reformarea dreptului comunitar al concurenței – Încercare de a

question which arises is, what is the role of arbitration in this new context, i.e. that of the facilitation of the private application of the EU competition norms.

2. GENERAL CONSIDERATIONS ON INTERNATIONAL COMMERCIAL ARBITRATION AND ITS ADVANTAGES

At a first glance and after a superficial analysis of the actual regulatory framework of competition, arbitration as an alternative method of conflict resolution would have no role in the implementation of competition norms, in the new context generated by the reform process. However, providing a final answer to the question requires a more detailed analysis of the problem.

Arbitration as an alternative method of conflict resolution of disputes arising from contractual relations, represents primarily a less formal way (and of course, a more flexible way) of conflict resolution, which is based on the expressed desire of the contracting parties in the content of the arbitration clause or that of the arbitral convention, signed after the signing of the contract of whose enforcement concerns.

The definitions of arbitration refers also to the fundamental features of arbitration and emphasizes on its private character by its nature. Thus, the arbitration was considered by the authors an institution in which a third person decides regarding a dispute which takes place between two or more persons, due exercising the jurisdictional mandate which was conferred on him by the parties⁵.

Arbitration represented and it is also represents in the present the major method of conflicts resolution resulting from international commercial contracts⁶, in the first hand because of the advantages which it offers, such as celerity, reduced costs, private character and confidentiality and not least, the facilities which it offers the arbitral decision in what regards its implementation in foreign countries⁷. This last mentioned advantage is possible due to the existence of numerous different international bi- and multilateral international conventions signed in this domain, the most significant ones being as it follows: *the New York Convention signed on 10th of June 1958 regarding the recognition and implementation of foreign arbitral awards*⁸; *the European Convention on International*

asigura convergența între instrumentele de politică concurențială ale Comisiei Europene (I)", Revista Română de Dreptul Afacerilor, no. 5/2009.

⁵ Please see J. F. Poudret, S. Besson, *Comparative Law of International Arbitration*, Sweet & Maxwell Limited, London, 2007, p. 1, and also E. A. Walsh, St. Duggan, *The History and Nature of International Relations*, Ayer Publishing, Manchester, 1969, p.112; G. B. Born, *International Commercial Arbitration*, vol. II, Kluwer Law International, Alphen aan de Rijn, 2009, p. 212.

⁶ Please see E. Lecchi, M. Cover, Ch. Russel, „*Arbitrating Competition Law Cases*”, International Journal of Arbitration, Mediation and Dispute Management, February 2008, [Online] on [www.alfainternational.com/.../Arbitrating%](http://www.alfainternational.com/.../Arbitrating%20)

⁷ See G. Blake, *loc.cit.*, p. 170, and also P. Sanders, *Quo Vadis Arbitration: Sixty Years of Arbitration Practice*, Kluwer Law International, Haga, 1999, pp.3-9; J. W. Cooley, St. Lubet, *Arbitration Advocacy*, NITA, South Bend, 2003, pp. 5-8; For the advantages of other alternative methods of dispute resolution please see L. Chiriac, „*Unele observații privind instituția concilierii în procesele și cererile în materie comercială*”, Revista de drept Comercial, no. 1/2003, pp. 163-167.

⁸ Romania adhered to this convention by the Decree no.186/1961 and the contracting states are as follows: Central Africa, South Africa, Alger, Antigua&Barbuda, Saudi-Arabia, Argentina, Armenia, Australia, Austria, Bahrain, Bangladesh, Barbados, Bielorusia, Belgia, Benin, Bolivia, Bosnia-Hertzeogovina, Botswana, Brunei Darussalam, Bulgaria, Burkina Fasso, Cambodgia, Camerun, Canada, Czech Republic, Chile, Ciprus, Columbia,

*Commercial Arbitration*⁹, and the *Convention for dispute resolution regarding investments between states and nationals of other states*¹⁰.

The private character of arbitration implies that the desires of the parties are mandatory, they having the freedom to choose the arbitrators, the venue of the arbitration, as well the substantive and procedural rules which will govern the procedures before the arbitrators. That is the reason for why in our opinion arbitration serves one of the major principles of the European Union, the principle of subsidiarity¹¹.

The arbitrators expertise today is very high¹², also in what regards competition, which is one of the reasons for why arbitration has become increasingly popular in the global economy, at least in what regards international commercial dispute resolution. Thus the parties can choose particulars which are well-known for their skills and competencies in a particular matter, the parties have not need to support the risks implied by solving the case in the front of judges whose competences in a particular domain are not known by the parties.

South Korea, Costa Rica, Croatia, Cuba, Denmark, Djibouti, Dominica, Switzerland, Egypt, Estonia, Filipinas, Finland, France, Germany, Georgia, Ghana, Greece, Guatemala, Guinea, Haiti, India, Indonesia, Ireland, Israel, Italy, Jordan, Japan, Kazakhstan, Kenya, Kirghizstan, Kuwait, Lesotho, Latvia, Lebanon, Lithuania, Laos, Luxembourg, Macedonia, Madagascar, Malaysia, Mali, Maroc, Mauritius, Mauritania, Mexico, Moldova, Monaco, Mongolia, Mozambique, Nepal, Niger, Nigeria, New Zealand, Oman, Netherlands, Pakistan, Panama, Paraguay, Peru, Poland, Portugal, United Kingdom, Romania, Russia, Saint Marino, USA, Salvador, Spain, Vatican, Senegal, Singapore, Slovakia, Slovenia, Sri Lanka, Sweden, Syria, Tanzania, Thailand, Trinidad & Tobago, Tunisia, Turkey, Ukraine, Uganda, Hungary, Uruguay, Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zimbabwe.

⁹ Signed at Geneva on the 21st of April 1961 and ratified by Romania through Decree no. 281/1963. The contracting states are as follows: Austria, Belgium, Belarus, Bosnia and Herzegovina, Burkina-Faso, Bulgaria, Czech Republic, Croatia, Slovakia, Cuba, Denmark, Finland, France, Germany, Italy, Serbia and Montenegro, Poland, Romania, Spain, Russia, Hungary, Italy, Kazakhstan, Macedonia, Luxembourg, Moldova, Slovenia, Turkey and Ukraine.

¹⁰ Signed at Washington on the 18th of March 1965 and ratified by Romania by Decree no. 62/1975. Between the contracting member states we mention: Afghanistan, Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bosnia and Herzegovina, Botswana, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Cyprus, Czech Republic, Dominican Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Hungary, Haiti, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Kenya, Korea, Kuwait, Latvia, Lithuania, Luxemburg, Macedonia, Madagascar, Malaysia, Moldova, Mongolia, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Pakistan, Panama, Peru, Philippines, Portugal, Russia, Slovenia, Solomon Islands, Spain, Sri Lanka, Saint Vincent, Sweden, Sudan, Switzerland, Tanzania, Thailand, Togo, Trinidad and Tobago, Turkey, Tunisia, Uganda, Ukraine, Northern Ireland, USA, Uzbekistan, Venezuela, Yemen, Zambia, Zimbabwe.

¹¹ See for more details E. L. Cătană, *The Role of Subsidiarity in the European Administrative Space*, in L. Matei (ed.), Proceedings of International Conference "The impact of Europeanization on the public administration", Bucharest, 25-26 May 2007, Editura Economică, Bucharest, 2008.

¹² For more details regarding the arbitrators expertise and its importance please see Ch. D. Drahozal, R. W. Naimark, *Towards a Science of International Arbitration: Collected Empirical Research*, Kluwer Law International, Haga, 2005, p. 49.

3. ARBITRABILITY OF EU COMPETITION LAW ISSUES

Traditionally, the arbitrability of competition law was subject of discussions in the European and also in the American doctrine. The principal reasons invoked by the authors regarded the confidential character of arbitration, which was considered inappropriate for resolving the competition law related issues, taking into consideration the fact that competition law protects the public interest and that some business behaviors can affect the interest of a lot of people. Today, the opinion of doctrine seems to be unanimous, considering the arbitrable nature of competition law issues brought in the front of the arbitrators¹³.

On the other hand, is an undeniable fact that there is a conflict between the rules of competition law and the institution of arbitration, in terms of their nature. The rules of European competition law are, in essence, rules of public law and enjoy a supra-constitutional status¹⁴, unlike the institution of arbitration which is primarily governed by the will of the parties and/or by national regulations and bi-or multilateral international treaties. It is evident however, that the competition rules and the institution of arbitration registered a growing interest in the business environment in the last period¹⁵.

According to the unanimous opinion, competition rules fall under the rules of public policy or *Lois de police*¹⁶ (or, overriding mandatory rules), if we opt for the French term¹⁷. These rules are part of public policy and have a mandatory character and as such, there could not be exceptions from their application. Judges as the guardians of the public order are required to give decisions which do not contravene to the rules designed to protect the public order in society. The procedural mean to ensure this is the action for annulment which may be introduced whenever it is found that the arbitration decision was taken by the arbitrators without considering the mandatory norms. The reason for establishing this rule was to ensure the effectiveness of the mandatory rules, whose provisions could easily be avoided by the contracting parties by choosing the arbitration as a method of conflict resolution.

The opinion of the majority is based on a decision of the European Court of Justice in the *Eco Swiss* case¹⁸. ECJ concluded in this case, that the implementation of an arbitral award is impossible in the case of contravention of the decision with the competition norms contained in the Treaty (namely ex-article 81 of the EC Treaty and

¹³ See I. Kokkoris, I. Lianos, *The Reform of EC Competition Law: New Challenges*, Kluwer Law International, Alphen aan den Rijn, 2010, p. 79; Ph. L. Landolt, *Modernised EC Competition Law in International Arbitration*, Kluwer Law International, Haga, 2006, p. 94; J. F. Poudret, S. Besson, *Comparative Law in International Arbitration*, Sweet & Maxwell Ltd., London, 2007, p. 299.

¹⁴ For more details regarding constitutionality and constitutional control in EU please see D. C. Valea, *Sistemul de control al constituționalității din România*, Universul Juridic, Bucharest, 2010, p.32.

¹⁵ Please see for more details S. I. Dempegiotis, "EC Competition Law and International Commercial Arbitration", *Global Antitrust Review*, p.135, [Online] on: <http://www.icc.qmul.ac.uk/GAR/GAR2008/Dempegiotis.pdf>.

¹⁶ Please see for the definition of the concept A. Bonomi, P. Volken, *Yearbook of Private International Law*, vol. X., Ed. Sellier GmbH, Munich, 2009, p. 287.

¹⁷ See G. I. Zekos, *loc.cit.*, p. 41; E. Lecchi, M. Cover, Ch. Russel, *loc.cit.*, *passim*.

¹⁸ Please see the ECJ decision from 1st of June 1999 in case C-126/97 *Eco Swiss China Time Ltd. c. Benetton International NV*, ECR 1999, p. 3055.

article 101 of the Treaty on the functioning of the European Union. The arbitrators obligation regarding the application of the EU competition law was deduced from the wording of the mentioned ECJ decision. So, since the Eco Swiss decision, arbitrators have the obligation to apply the EU competition norms *ex officio* in the cases brought in their attention by the parties, the violation of competition norms being equivalent to the breaching of public order. This obligation of the arbitrators is considered to persist, regardless of the *lex contractus*, i.e. the identity of the law chosen by the parties, provided that the arbitral award will be implemented in one of the Member States.

Another problem which arises in relation with arbitrability of competition law aspects is connected to the legal issues which can be judged by the arbitrators and those which are excluded¹⁹ because of the nature of arbitration or because of the specificity of the business behavior taken into consideration. Thus, arbitration as an institution is based on the agreement of the parties expressed in the arbitration clause or in the arbitral convention. In the case of understanding between undertakings the problem of arbitration arises when we have the express consent of the parties in what regards the settlement by arbitration of the eventual conflicts arising in relation with the implementation of their convention. However, the existence of such an agreement is unlikely to exist, when we are talking about a secret understanding between undertakings. In the case of abuse of dominance, the possibility of the eventual conflict resolution by arbitration is unlikely as well, in the first hand because we are talking about an unilateral conduct of the enterprise and also because this would imply the existence of an agreement between the dominant undertaking and the victim of the abusive behavior.

Another widely discussed issue in the doctrine regards the possibility of application of the article 101 par. 3 of the TFEU (ex.-article 81 par. 3. of the EC Treaty) by the arbitrators, regarding the exemption of agreements between undertakings that brings net benefits to consumers. The opinion of the majority ruled in the sense of lack of arbitrability of the mentioned provisions, because it involves a complex and often economic analysis of the positive and negative effects of certain anti-competitive business behavior. In our opinion, the arbitrators expertise and the existence of the Commission notices on these problem as explanatory documents, makes possible the application of these provisions by the arbitrators, especially since the inability of arbitrators to apply these provisions would reduce the efficiency of arbitration and would lead to unnecessary complication of the procedures.

Although the arbitrability of issues related to competition is not anymore put into question, still in conformity with some doctrinal views, arbitration lacks some of the facilities granted by the European legislator to national judges or to national competition authorities. Thus, it was assumed that in the lack of legal regulation²⁰ the arbitrators would not have the possibility to consult the Commission in connection with the correct application of the EU rules²¹. In our opinion, even if legal regulations do not mention expressly the possibility of the consultation of the Commission by the arbitrators, these option already exists, of course, subject to prior consultation of the parties. The prior

¹⁹ See for details E. Lecchi, M. Cover, Ch. Russel, *loc.cit.*, *passim*.

²⁰ It is worth to mention that the art.10 of the EC Regulation no. 1 from 2003 mentions that the European Commission has only the obligation to consult national courts and national competition authorities.

²¹ Please see G. I. Zekos, *loc.cit.*, p. 42.

consultation of the parties is necessary in order to preserve one of the fundamental features and advantages of arbitration, namely its private and confidential nature. Therefore, our belief is that the lack of mentioning of the possibility of consultation with the Commission in problems related to the application of competition rules, proves the unequal treatment accorded by the European legislator to arbitration, as an alternative method of conflict resolution.

Another problem would be to analyze the extent to which national competition authorities or the Commission could participate as *amicus curiae* during the procedures which take place before the arbitrators. We consider, that this possibility does not exist, because it would mean the lack of confidentiality of arbitration procedures and because of the lack of arbitrators' obligation to report the competition cases for whose settlement they were invested. The only possibility for the Commission intervention remains the hypothesis of intervening during the action of annulment brought against the arbitral award²².

This unequal treatment regarding arbitration can be observed also connected to the possibility of introduction of preliminary actions by arbitrators, in case they are confronted with difficulties of interpretation of the EU competition law, or when they are in doubt regarding the validity of a particular competition norm. The decision which formed the base of this unequal treatment between national courts and arbitrations is the ECJ *Nordsee* case-law²³.

The lack of possibility for arbitrators to introduce preliminary actions implies positive and negative aspects. Thus, the lack of these possibility could be favorable in what regards celerity²⁴. On the other hand, the optimal solution of the competition law aspects of the case, imply the arbitrators deliberation on high complexity issues, so it can appear difficult as if there misses the possibility to consult the ECJ or the Commission, after case.

4. CONCLUSIONS

In the context of the integration of business community and the increasing of the volume of international trade and hence the number of international commercial disputes, the role of arbitration as an alternative method of conflict resolution has been steadily growing.

Although there have been discussions on the problem of arbitrability of the competitive aspects of commercial cases, the conclusion was unanimous in the favor of arbitrability of competition law, after the adoption by the ECJ of the *Eco Swiss* decision. Although the discussions on the arbitrability of competition issues were finished, there are still discussions regarding the concrete issues that can be submitted to the arbitrators. The conclusion is that only the civil aspects of the competition cases can be brought before

²² For more details regarding the Commission participation as *amicus curiae* in the arbitral procedure please see G. Blake, *EU and US Arbitration. A Handbook for Practitioners*, Kluwer Law International, Alphen aan den Rijn, 2011, p. 1776.

²³ Please see ECJ decision from 23rd of March 1982 in case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH.*, ECR 1982, p. 1095.

²⁴ We have to take in consideration the fact that the medium period necessary for the settlement of a preliminary action is 2-3 years, which automatically prolongs the period for the settlement of the case before the arbitrators.

arbitration tribunals (i.e. request for compensation for damages arising from anticompetitive behavior), but not those covering the problem of administrative fines, the latter remaining the prerogative of the competitive authorities and that of the courts.

Arbitral tribunals do not enjoy equal rights with the national courts in the application of competition rules. Differences exist both based on the legislation and on the conclusions of the ECJ case law. Thus, the legal regulation on the application of EU competition rules, Regulation no. 1 of 2003 does not make any references to arbitration tribunals. However, in conformity with the case-law on the arbitrability of competition law aspects, we can deduce the fact that arbitration courts may consult with national competition authorities and with the Commission, of course with the previous consent of the parties.

But we have to mention the fact that ECJ case law has not removed a major difference in treatment regarding the possibility of introducing of preliminary actions by arbitrators, because they still not have this right.

We believe this constitutes a major impediment, especially in what regards the application of competition rules, because the application of these provisions should imply the right to introduce preliminary actions. Thus we are expecting a reorientation of the case law in this respect, especially in the current context of the increased use of arbitration as a means of conflict resolution.

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