STUDIES AND COMMENTS

Arbitration's perspectives in the light of European Union regulations Part I[1]

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Abstract

The present study tries to identify the relationship between arbitration (commercial arbitration) and the primary and secondary rules of EU law. Through a systemic analyze of community doctrine and jurisprudence there will be identified the points where the arbitration procedure interferes with regulations of EU law and which are the perspectives to change these rules.

Keywords: *arbitration, EU law, primary and secondary law, arbitrator, merits of the case.*

JEL Classification: K33, K41

1. Introduction

From the moment of their creation the European Communities were provided with their own autonomous legal order, having a special and original origin. Neither the founding Treaties[3] nor the subsequent community Treaties have any express mentions regarding the community new legal order and, consequently, of the new *sui generis* legal system.

The community law has only general references to the principle that the rule of law is observed within European Communities. Despite this gap, the Court of Justice[4] have always interpreted the community Treaties in the light of what it considered to be an utile effect of their provisions (meaning, that the application of the Treaties provisions shall insure the effective functioning of the European

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[3] Founding Treaties are: the Treaty establishing the European Community of Steel and Coal (ECSC), signed on 1st of April 1952 and entered into force on July 23, 1952; the Treaty establishing the European Economic Community (EEC), and the Treaty establishing the European Community for Atomic Energy (ECAE- or EURATOM), both signed on March 25 1954 and entered into force on January 1st, 1958.

[4] Court of Justice of the European Communities (CJEC) was the initial denomination of the judicial instance of all three Communities. The denomination remained the same even after the Maastricht Treaties, although in 1989 to this judicial instance was added another one, the so-called Tribunal of First Instance. The CJEC denomination was changed only through the Lisbon Treaties. Now, under the denomination of Court of Justice of the European Union, there are included the Court of Justice, the General Court and the Tribunal of civil servants. All these judicial instances, together, form now, the judicial system of the EU.

Communities). Thus, the Court of Justice has firmly accentuated in its early judgments (cases Costa v./ENEL[5] and Van Gend en Loos[6]) that:

"*By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entering into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.*

By creating a Community of unlimited duration, ..., the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds their nationals and themselves".

In other words, as the legal doctrine[7] has mentioned it, the community legal system occupies an intermediary place between the national and international law.

Indeed, it applies on the territories of member states as a national law although the member state's institutions having legislative powers were not adopted it, but, from this national perspective the community legal system is an important source for the national law of each member state.

On the other hand, the community legal system cannot be considered a real international law either, because, the latter one refers to juridical relationships with external element that is not the case of community legal rules that refer mainly to the economic cooperation of member states but, from this international perspective, it can be considered as a positivist[8] source for international law, as well as for the international arbitration law.

This ambiguous position the community legal system makes more difficult the relationship between the arbitration and EU rules, as we will see further in this study.

However, the simple recognition that Community legal system becomes part of the national legal systems of the member states, does not explain the autonomy of EC law or its dynamic interaction with national laws. This is why the Court of Justice developed the principle of supremacy, direct effect and effectiveness that explain the integrity of Community rules as an autonomous legal system and its possible application in arbitral proceedings.

2. The place of arbitration within national and EU legal system

As it was mentioned by the juridical doctrine[9], the arbitration is a private judicial procedure that offers to the parties an important alternative to state jurisdiction. Through its specificity, the arbitration existence and access to it depend only on the parties will. At the same time, only the parties can appoint the arbitrators and the latters are not judges, nor their functions are permanent. They

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[5] See case 6/64 Costa v./ENEL (1964), ECR 585.

[6] See case 26/62 Vand Gend en Loos v./Administratioder Belastingen (1963), ECR 3.

[7] See Dominique Vidal, *Droit francais de l'arbitrage interne et international*, Ed. Gualino (Lextenso Editions), Paris, 2012, p. 172.

[8] See Domnique Vidal, *previous cited*, p. 173.

[9] See Natalya Shelkoplyas*, The application of EC law in arbitral proceedings*, Europa Law Publishing, Gromingen, 2003, p. 3; Titus Prescure, Radu Crisan, *Arbitrajul comercial; Modalitate alternativa de solutionare a litigiilor patrimoniale*, UJ, Bucharest, 2010, p. 11.

are persons with or without legal background that are trustworthy by the parties due to their experience and specific knowledge. They may solve the conflict aroused between the parties either *de jure* or *ex aequo et bono.*

Based on these very briefly described advantages, the arbitration has become more and more used in commercial litigations, especially in international business transactions and thus it may interfere with the community legal system.

As an alternative to state court jurisdiction, the arbitration has *de facto* assumed the role[10] of a parallel system of civil justice over the national frontiers and free of national protectionist laws and practices that is more adequate to the dynamics of international trade.

But, although it is tempting to consider the arbitration as analogous to state courts, it is already established that it does not belong to the national judicial system. As a consequence, because the arbitration is not a constitutive element of the national judiciary of a member state of the EU, its interaction with community legal system is not automatically governed by the Communities Treaties.

Thus, first of all, the arbitration is not so much preoccupied to ensure the effectiveness of law the arbitrators apply to the merits of the case, including Community law, as to properly solve the private disputes for which they were appointed.

While, on the other hand, since the EC law was conceived as an instrument to create an economic Community based on the integrated markets of the member states, it become an incomplete[11] system of legal rules because it does not cover the entire area of private economic relations which give rise to disputes referred to arbitration.

Moreover, although the Community rules have been rapidly intruding into the area of private law, they are still limited to the achievement of the objectives mentioned in the treaties.

Finally, to a substantial degree the EC rules are public law rules and, as such, they are mandatory[12] rules allowing for no derogation. From this perspective, the Community legal rules, as any other imperative rules of a foreign law, may have a direct influence on the application of mandatory rules to the substance of the dispute submitted to arbitration.

Considering all the above mentioned arguments we can draft as a first conclusion that arbitration, especially the commercial arbitration, may have or not connection points with EU rules.

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[10] See Natalya Shelkoplyas, *previous cited*, p. 4.

[11] See Natalya Shelkoplyas, *previous cited*, p. 10.

[12] Mandatory rules have different degrees of imperative strength. Usually, the mandatory rules of public law have a high degree of imperativeness because they express an important public policy concern that protects certain fundamental values of the society. Equally, since the EC rules were used as a tool for achieving the important goal of economic integration of member states, it is logical that they are have a strong imperative force justified by their purpose.

3. Arbitration and EU rules

From the early stages of European integration, the Community rules had a curious attitude towards arbitration, which oscillated[13] between ignorance, indifference, interest or attempt to regulate it.

First of all, we emphasize that none of the Community treaties have any reference regarding the arbitration.

Secondly, at the European level, among the member states of the European Communities, was concluded in 1980 the Rome Convention on the law applicable to contractual obligations. This Convention is considered[14] an important source of private international law and an instrument of harmonization that was designated to apply to any situations involving the choice of law within the subject matter cover by it. As a consequence, the Convention applies no matter if the choice of law has or not any connection with EC law or its member states.

Thirdly, we shall mention the Brussels Convention[15] on jurisdiction and enforcement of judgments in civil and commercial matters, replaced by the Regulation[16] no.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, known as the Regulation Brussels I.

Article 1(2),(4) of the Brussels Convention stipulates that its provisions do not apply to arbitration. In similar words, in its art.1§ 2 d) of the Regulation no.44/2001 excludes the arbitration from the matters regulated by it. Moreover, the Official Report to the Brussels Convention mentions that "the arbitration exception does not cover only arbitration proceedings as such, but also court proceedings ancillary to arbitration, such as: appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time-limit for making awards". In addition, a judgment determining whether an arbitration agreement is valid or not, because it is invalid, ordering the parties to continue the arbitration proceedings, is not cover by 1968 Convention.

The legal doctrine[17] showed that the scope of arbitration exclusion is to determines whether proceedings brought at the place of arbitration or in other member state in support of arbitration may have to stayed by virtue of the ***lis pendens*** provisions of art.27, 28 Regulation no.44/2001 or to determine whether judgments rendered in breach of the arbitration agreement have to be recognized in other member state under Regulation no.44/2001(because only those judgments that are not covered by art.1(2)(d) can benefit of recognition and enforcement).

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13 See Dominique Vidal, *cited*, p. 172.

14 See Natalya Shelkoplyas, *cited*, p. 173.

15 The Convention on jurisdiction and enforcement of judgments in civil and commercial matters signed in Brussels on September 27, 1968 was amended by the Accession Convention (Brussels Convention) in 1977, OJ 1978, L304/1977.

16 Regulation no.44/2001 was signed on December 22, 2000 and entered into force on March 2000, OJ 2001, L013/1.

17 See Julian D.M. Lew, Loukas A.Mistelis, Stefan M. Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 494.

4. Conclusions

As a first sight, it may be concluded that arbitration has no connection with Community rules. But, that is only a superficial understanding because:

a) due to the supremacy of Community legal system, it results that EU law has primacy over any national rule inconsistent with it and all the member states have a positive and negative obligations to take measures to facilitate the attainment of treaties' objective and to refrain from any measures that may affect their goals. Moreover, the EU legal rules have the highest position in the hierarchy of legal rules within each member state and consequently they are capable of depraving any national rule of its legal force.

b) at the same time, as the Court of Justice has explained in its judgment in the case Van Gend en Loos, the direct effect of Community legal rules imposes obligations on individuals but also confers them rights witch become part of their heritage. In other words, the rights are expressly granted by the Treaties or by reason of obligations impose in a clearly defined way upon individuals, member states or institutions.

As a consequence of arguments a) and b) it results that, and the Court of Justice has clearly expressed, the member states shall ensure the compliance of their national legal system with the treaties obligations including the possibility that individuals may bringing before national courts actions of pleading infringements of these obligations. It means that, to the obligations of the member states aroused from the Treaties it correspond an unwritten right of individuals to claim any benefit derived from the non- compliance with these obligations.

In other words, the Court of Justice has recognized to the nationals of member states a procedural right to relied on or invoked for various purposes EU rules and the obligation of national courts to apply and protect them.

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