

INTERNATIONAL ARBITRATION

INTERPRETATION AND APPLICATION OF EUROPEAN UNION LAW BY THE COURT OF INTERNATIONAL COMMERCIAL ARBITRATION ATTACHED TO THE CHAMBER OF COMMERCE AND INDUSTRY OF ROMANIA

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Abstract

The interpretation and application of the European Union law, including the case-law of the Court of Justice of the European Union, by the arbitral tribunals is a subject which is little approached. This is due on the one hand as a result of the confidentiality of the arbitration awards and on the other hand to the specificity of the legal order of the European Union and of the International commercial arbitration. This article aims to illustrate the interpretation and application of the European Union law by the International Commercial Arbitration Court attached to the Romanian Chamber of Commerce and Industry as it emerges from the recent arbitration awards.

Keywords: international commercial arbitration; International Commercial Arbitration Court attached to the Romanian Chamber of Commerce and Industry; Romania; arbitration; case law; interpretation of European Union law; application of European Union law.

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Introduction

Arbitration is an alternative private jurisdiction (Article 541 Code of Civil Procedure).² The application of the European Union law norms is different, depending on their character.³ The distinction between the interpretation and application of European Union law, which is made by the case-law of the Court of Justice of the European Union, is itself subject to interpretation. In general, the courts try by specific means to apply judicial activism, teleological interpretation and other methods to determine a certain way of interpreting the law. Commercial arbitration still has limited access to the rich mass of interpretation of the European Union law by way of preliminary reference.⁴

In this introduction, we mention that the link⁵ between arbitration and European Union law is yet a special one,⁶ both with regard to the preliminary reference and in the light of the regulations on the recognition of arbitration

² **Andreea Tabacu**, *In-depth Civil Procedure Law. Arbitration and forced execution*, Ed. Universul Juridic, Bucharest, 2015, p.37-38. **Eugen Huruba, Lumita Gabura**, *The exception of unconstitutionality raised before an international arbitral tribunal*, *Curentul Juridic*, 1/2014, p. 106 and the following, available here at http://revcurentjur.ro/old/arhiva/attachments_201401/recjurid141_11A.pdf; **Angelica Rosu**, *Resolution of International Commercial Disputes through Arbitration - Mediation - Alternative Dispute Resolution of International Commercial Disputes*, Ed. Universul Juridic, Bucharest, 2010, pp. 77-119.

³ **Tilman Niedermaier**, *Arbitration Agreements between Parties of Unequal Bargaining Power - Balancing Exercises on Either Side of the Atlantic*, *ZDAR*, nr. 1/2014, p. 12 and further.

⁴ The Court of Justice of the European Union shall, in accordance with the powers conferred by the Treaty on European Union, "ensure respect for the law in the interpretation and application of the Treaties". National courts apply European Union law and the European Court of Justice has exclusive jurisdiction to interpret the law, within the system of preliminary references, Article 267 TFEU. See also **Paul Craig, Grainne de Burca**, *European Union Law, Comments, jurisprudence and doctrine*, Ed Hamangiu, 2009, p. 618-619

⁵ It is difficult to choose a word to substantiate the multiple bridges between arbitration and EU law (also with regard to competition, consumer protection, especially abusive clauses, foreign investment regime). See also: **George A. Bermann**, *Navigating EU Law and the Law of International Arbitration*, *Arbitration International*, no. 3/2014, p. 398 which speaks of a confrontation.

⁶ Broadly speaking, **Camelia Toader**, *Arbitration and Community Law*, *Romanian Arbitration Magazine ("Revista română de arbitraj")*, no. 3/2009, pp. 2-16. Recently, a document published under the aegis of the European Parliament puts the issue of arbitration within the European Union in a more detailed way: Tony COLE, Ilias BANTEKAS, Federico FERRETTI, Christine RIEFA, Barbara WARWAS, Pietro ORTOLANI, *Legal Instruments and Practice of Arbitration in the EU*, European Parliament, 312 p. Available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf). Regarding the relation between investment arbitration and European Union law, see a detailed case: **Daniel Mihail Șandru, Nicolae Ploșteanu**, *Enforcement of arbitral awards rendered under the aegis of the International Centre for Settlement of Investment Disputes (ICSID / CIRDI) against Romania in the context of European law in the volume of the International Conference „Civil Lawsuit and Legal Enforcement. Theory and Practice”*, Târgu-Mureș, Romania, August 25th-27th 2016. Available at <https://ssrn.com/abstract=2830776>

awards or litigation on competition law in arbitration.⁷ Another aspect, tangent to arbitration and European Union regulations is imposed by the consumer's right where arbitration, in the context of some causes, is viewed unfavorably.⁸

In the following paragraphs we shall look at some of the judgments of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania⁹ in which the European Union law has been interpreted. The application of European Union law was primarily realized due to Romania's accession to the European Union, but the judgments of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (hereinafter "CAB") are also an element of rationality of the judgment. Arbitration awards in which European Union law is applied reflect the publicity of private law by as many norms of public law, some of which have an imperative character (hence the tense relationship between arbitration and consumer protection regulations, e.g. abusive clauses). A more important aspect to be noticed is whether failure to comply with European Union law could lead to the admissibility of an action for annulment of the arbitration award (and, at least as the trend is expressed in *Asturcom* case¹⁰, it is not a favorable one for arbitration).

⁷ **Mel Marquis, Roberto Cisotta (eds)**, *Litigation and arbitration in EU Competition Law*, Edward Elgar, 2015, p. **Anamaria Toma Bianov**, *Private enforcement of competition rules in the European Union. Actions for damages brought before national courts and arbitral tribunals*, University Publishing House („Editura Universitară”), 2016 and the cited bibliography.

⁸ For the *Asturcom* cause we have emphasized that this must always be interpreted within the strict framework of the facts, see **Daniel Mihail Şandru, Evelina Oprina**, *Discussions on the possibility of annulment of the arbitral award by the enforcement Court*, Dreptul, no. 2/2012, pp. 148-167. Article available at <https://ssrn.com/abstract=2583843>. However, the unanimous conclusion is that there is a pressure of EU law on arbitrators. **Alina Oprea**, *Arbitration and Community Consumer Law - Some comments on the conciliation between the two areas, based on the decision of the European Court of Justice in Centro Movil*, Romanian Arbitration Magazine ("Revista română de arbitraj"), no. 3/2009, p.33: "The Centro Movil decision affects, of course, the development of arbitration in a field where there is potential and thus could be criticized by the arbitrators. The European Court of Justice does not hesitate to intervene to define the content of the values that must be imperatively defended by judges in the EU Member States through the exception of public order and the conditions for its intervention. The ease with which it links consumer protection, guaranteed through a directive of public interest, to the general interest, the energy with which it promises "community public order" creates problems insofar as its reasoning is easily transposable in regards to any Community source "values"; the significant widening of the content of the public order exception contrasts with the restrictive interpretation this instrument / technique normally enjoys. The ECJ's position is likely to exert considerable pressure on the arbitrators: while internationally it is accepted that an arbitral tribunal may settle a dispute involving a consumer, in practice the sentences will be abolished extremely often if the state courts will faithfully apply the reasoning of the European Court of Justice. In order to prevent this issue, in order to pronounce sentences to be recognized and enforced by the courts of the EU Member States, the arbitrators will have to pay particular attention to European consumer law. "

⁹ **Crenguța Leaua, Flavius A. Baias (eds)**, *Arbitration in Romania: A Practitioners Guide*, Wolters Kluwer, 2016.

¹⁰ C-40/08, *Asturcom Telecomunicaciones*, judgment of October 6th 2009, ECR 2009, p. I-9579, ECLI: EU: C: 2009: 615. In his conclusions, GA V. Trstenjak pointed out the particular situation of the

Citing European directives as an argument of authority

In a dispute that opposed two companies in Romania, an annulment of an agency contract was requested. The arbitral court retains no direct consequence from the fact that the directive has been transposed into Romanian legislation, it does not refer to the possible case law of the Court of Justice. These were not even necessary since the situation was purely internal and would not have been a source of dilemmas about the interpretation of the Directive.

"The arbitral tribunal considers that, in the regulation of the Law no.509 / 2002 on independent commercial agents, issued for the harmonization with the Community Directive no. 86/653 of the 18th of December 1986, unilateral termination of this contract may be done either under Article 20, or, as the case may be, under the conditions of Article 21. "¹¹

Reference to arbitration courts in the European Union:

"In other words, in concordance with the practice of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania - but also with the constant practice of commercial arbitration throughout the European Union - by its behavior before the Arbitral Tribunal it agreed upon the complaint made by the applicant, so that the Arbitral Tribunal is competent to resolve the present dispute. "¹²

European Union law - private international law relation.¹³

"In assessing the measures set by the preceding paragraph, the Arbitral Tribunal took into account a factual situation which is found in practice in

case, but his conclusion in this paragraph is general: "But even if the arbitral courts were required or authorized to do so [to verify the validity of a clause or to declare it abusive] there would be serious doubts as to whether an arbitral court could always be considered independent and neutral, more so if an arbitrator may have a personal interest in maintaining the arbitration clause in respect of which he/she is competent. The Commission rightly draws attention to this point of view. That is the case, for example, in a situation such as that of the issue in the main proceedings, in which the arbitration agreement was drafted by the same association which was responsible for conducting the arbitration procedure. As a consequence, the examination of the nullity issue regarding an abusive arbitration clause cannot be entrusted solely to the arbitrator. On the contrary, this task must be entrusted to a court which offers all the guarantees of judicial independence that is present in a state governed by the rule of law. " This way, the Kompetenz Kompetenz principle is removed by applying the principle of the effectiveness of the European Union's law.

¹¹ CAB, arbitration award no. 96/2008, unpublished. Currently, the agency contract is regulated by art. 2072-2095 found in the Civil Code. In addition, the disputes in this field were not lacking in a certain period: the arbitral award no.94 / 22nd of April 2004, published in the Romanian Arbitration Magazine ("Revista română de arbitraj"), no. 4/2010, pp. 69-72. The Court of Justice has ruled (Case C-381/98 Ingmar, judgment of 9th of November 2000 ECR 2000 p. 1-9305 ECLI: EU: C: 2000: 605) for cross-border - even non-EU- application of the directive..

¹² CAB, Arbitration Session no. 59/2008, unpublished.

¹³ CAB, arbitral award no. 132/2013, unpublished.

numerous contracts presenting the complexity of the mentioned one as well as the overlapping of commercial, administrative relationships and external element [footnote: The term "external" is not really appropriate for issues related to the European Union, of which Romania is a member, and its institutions, which are equally institutions of Romania; the situation remains external to the contract.] represented by the specific conditions and deadlines assumed by European funding. "(the footnote is from the arbitration award).

Establishing in law an arbitration award on a directive.

In another litigation, with a purely internal situation, the plaintiff in the arbitration proceedings also bases his application on a directive ("Directive 1999/44 / EC").¹⁴ It is important to underline that this is one of the (many) references the plaintiffs refer to. The situation would be different if it were based solely on a directive.

Interpretation of Romanian law and European law

In a case which opposed two companies,¹⁵ the European Union law was interpreted, respectively, the extent of the notion of consumer, namely whether a company constituted under Law no. 31/1990 is a consumer within the meaning of the Directive. Two observations can be made prior to the discussion on the merits, referring to the quality of consumer the companies have, the arbitral tribunal shall apply the directive at the same time as the transposing law and in the same way motivates the chosen solution on the merits.

"Neither the claim that clause 3.11 is *abusive* and, therefore, null, in relation to the provisions of art. 3 of the Directive no. 93/13 / EEC on unfair terms in consumer contracts (published in the Official Journal of the European Communities of the 21st of April 1993), and Law no. 193/2000 on unfair terms in contracts concluded between traders and consumers, republished (Official Journal

¹⁴ CAB, Arbitration Sentence no. 317/2009, unpublished. Ironically, the directive in question could have even been an impediment to the complainant, given the field in which it is applied <<and the exceptions provided for in Article 7 paragraph (1) >> as well as point 25 of the preamble which does not prohibit arbitration but makes a reference to the solution that is specific in consumer protection: "Whereas, in accordance with the Commission Recommendation of the 30th of March 1998 on the principles applicable to the bodies responsible for the amicable settlement of consumer disputes, Member States can establish bodies providing impartial and effective treatment of complaints, in a national and cross-border context, and which consumers can use as mediators." The international doctrine does not validate such a restrictive opinion. See **Jan Engelmann**, *International Commercial Arbitration and the Commercial Agency Directive. A Perspective from Law and Economics*, Springer, 2017, p. 12, footnote 57, which is illustrated by two of the ICC cases (9032/1998 and 12045/2003) in which the parties agreed to apply the provisions of the Directive. See also **Natalya Shelkopyas**, *The Application of EC Law in Arbitration Proceedings*, Europa Law Publishing, 2003, p. 152 provides examples in this respect. Also, CAB, arbitration award no. 129/2015, unpublished.

¹⁵ CAB, arbitration award no. 148/2011, unpublished.

of the European Communities No. 305 of 18 April 2008), cannot be accepted because, even if they are likely to create a significant imbalance between the rights and the obligations of the parties - which remains to be discussed, however, as long as the locator / financier has fulfilled its obligation to deliver the good, and the usage, guarding and control of the good return to the lessee / user, it is therefore normal for the latter to take over, in whole or in part, the related risks - nor art. 3 par. 1 of the Directive no. 93/13 / EEC and no. 4 of Law no. No 193/2000 are not relevant in the present case, since the defendant plaintiff, as a legal person, *is not* a consumer, according to those normative provisions.

For the purpose of this directive, "*consumer*" means "any natural person who, in the context of contracts covered by this Directive, acts for purposes outside his/her professional activity" (Art. 2 letter (b)], and art. 2 par. 1 of the Law no. 193/2000, republished, provides, in full agreement with the Directive's text, that the *consumer* is understood to mean "any natural person or group of natural persons constituted in associations which, by virtue of a contract falling within the scope of this law, acts for the purposes outside of its commercial, industrial production, craft or liberal business activity".

As a consequence, the contractual clause 3.11, since it cannot be censured from the consumer law's point of view, it is and remains fully valid and therefore *binding*.

The solution is constant at the Court of International Commercial Arbitration and is also envisaged in the coming years.¹⁶

Publication of a directive, reason for not fulfilling the contract.

In one dispute one of the parties invoked the emergence of a directive which, if transposed, would lead to higher costs and restoration of works, since the new technical conditions imposed by the Directive are different from the existing contractual stipulations.¹⁷ This reasoning was not received by the arbitral court, and the provisions regarding the coerciveness of the contractual clauses were applied.

¹⁶ CAB, Arbitration Session no. 160/2012, unpublished. "For the purpose of obtaining a different interpretation of the clause (...) The contract at issue, namely the specific terms and conditions of the financial leasing contract, concluded with the defendant, the claimant cannot rely on the provisions of Council Directive 93/13 / EEC of the 9th of April 1993, transposed into our national legislation by Law no. 193/2000 regarding the abusive clauses in the contracts concluded between traders and consumers, since the applicant as a trading company - a legal person, having the status of a trader under the Commercial Code, then in force, which she herself invokes in the action, does not fall under the provisions Article 2 paragraph (1), not being able to be qualified as a consumer." Also, in the arbitral award no. 83/2016 (unpublished): "Neither the claims regarding the abusive nature of certain clauses in the contract are founded, because these clauses are circumscribed to the main object of the contract and, therefore, are exempted from the substantive control mechanism of abusive clauses established by Directive 93/13 / EEC and Law no. 193/2000."

¹⁷ CAB, Arbitration Session no. 38/2014, unpublished.

Application of Directive 2000/35

In another case, the arbitral court indirectly applies, at least as a support of the reasoning given in the judgment, without discussing the field it is applied in.¹⁸

"The plaintiff's claim in which it is stated that the European Parliament's Directive 2000/35/EC on combating late payment in commercial transactions cannot be disregarded is fair, but taking into account the defendant's conduct in relation to the obligations assumed both before and after the referral of the arbitral court, diminishing of the amount of penalties, in the present litigation, shall be without prejudice to the principle of the performance in good faith of the contracts and shall in no way prevent effective combating late payment in commercial transactions."

European Directive part of the reasoning on applicable law.

In a case¹⁹ in which the capacity of an agent to lawfully represent a company is discussed, the Arbitration Court also took into account the Directive "*on the advertising of branches established in a Member State by certain types of companies falling within the scope of the legislation of another State*".

"Directive 89/666 of the Council of the European Communities, Article 2 reflects the solution that the right to legal representation of the branch is governed by the law of the parent company. This is a reflection of the international private law principle of "*lex societatis*" which, inter alia, provides that the branch, when it comes to its ability to conclude legal acts and the power of legal representation of its organs, is governed by the law of the parent company. In the present case, it is German law; therefore the provisions of the 2006 United Kingdom Act on Directors (directors) are irrelevant."

Another similar example²⁰ is the reference to the transposition of the same directive by two Member States of the European Union, and consequently the applicable law being uniform.

"In this context, the [Arbitral] Tribunal reminds us that the copyright for computer programs is harmonized in the Member States of the European Union by Directive (EC) No. 24 of the 23rd of April 2009 on the legal protection of computer programs (codified version of Directive 91/250 of the 14th of May 1991) and the Directive was implemented both by "A", the country where the "IM" computer program's rights holder is located, as well as in "B" [the State] where the plaintiff's own rights are claimed to have been incurred."

¹⁸ CAB, arbitration award no. 162/2013, unpublished.

¹⁹ CAB, arbitration award no. 38/2015, unpublished.

²⁰ CAB, Arbitration Session no. 58/2016, unpublished. The same situation is found in the case solved by the arbitral award no. 102/2016, unpublished.

Implementing Directive 2011/7/EU on combating late payments in commercial transactions

In a case²¹ involving a political party (debtor) and a company constituted under Law no. 31/1990. The arbitral court uses the “*a fortiori*” method of interpretation:

"Article 5 from Government Ordinance no. 11/2013, cited before, refers to legal relationships that do not result from the exploitation of a profit-making enterprise within the meaning of Art. 3 par. 3 of the Civil Code, without distinguishing whether both parties are enterprises, or only one of them has this quality, so that the application of the text cannot be restricted by interpretation, since *ubi lex nos distinguit, nec nos distinguere debemus*. A restrictive application of the article in question results neither from Directive 2011/7 / EU on combating late payments in commercial transactions, which G.O. no. 13/2011 has transposed it, according to its substantiation note."

The purpose of transposing the Directive, part of the motivation of the arbitration award

The arbitral court²² realizes a whole history of transposing a directive into Romanian law, including by referring to its transposition by emergency ordinance.²³

"Law no. 220/2008 aims at transposing the Directive 2009/28 / EC of the European Parliament and of the Council of 23rd of April 2009 on the promotion of the use of energy from renewable sources, amending and subsequently abolishing Directives 2001/77 / EC and 2003/30 / EC. The transposition of the Directive was based on Art. 35 paragraphs (1) and (2) of Romania's Constitution, whereby the state recognizes the right of every person to a healthy and ecologically balanced environment, hence the public interest in adopting the methodology of the amended Law no. 220/2008. The Community provisions have been transposed by the national legislator under Law no. 220/2008, in order to regulate the system for promoting the production of energy from renewable energy sources by using green certificates. According to the Explanatory Memorandum for the approval of

²¹ CAB, arbitration award no. 107/2015, unpublished.

²² CAB, arbitration award no. 65/2015, unpublished.

²³ Broadly: **Irina Alexe, Constantin Mihai Banu**, *Transposition of the Directive by emergency government ordinance. Recent examples from Romanian law and comparative aspects*, in vol. *Directive - act of European Union law - and Romanian law*, **Daniel-Mihail Șandru, Dragoș-Alin Călin, Constantin Mihai Banu (ed.)**, University Publishing House ("Ed. Universitară"), 2016, p. 132 and the following, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932828. Also, **Irina Alexe, Constantin-Mihai Banu**, *Transposition and/or implementation of European Union law by means of Government Emergency Order. Requirements set in the case-law of the Constitutional Court of Romania*, "Curentul juridic" Magazine, XVIII, No. 2 (61) 2015, pp. 49-56, available at <https://ssrn.com/abstract=2627024>.

the Government Emergency Ordinance amending and supplementing Law no. 220/2008, the green certificates system is a support scheme to encourage producers of electricity to use renewable sources, which consists in giving the resellers the electricity sold to the final consumers, the latter being obliged to purchase a number of green certificates calculated according to the quota set by A.N.R.E., applied to the supplied electricity. (...) Their agreement to supply energy, to maintain the power plant, to pay the cost of electricity and to take over the plant owned by the defendant was not altered in any way by the entry into force of Law no. 134/2012. It has imposed, due to reasons regarding environmental protection and stimulating the development of renewable energy production, a cost applicable to all participants on the market. The defendant's view that the immediate application of Law [No] 220/2008 would be a partial retroactivity of the fore mentioned law, since it would attach to the contract other legal consequences than those agreed by the parties, is not sustained. No effect of the contract, as it was negotiated, was modified by the entry into force of Law no. 220/2008. In addition, the final consumer's obligation to pay the CV was applied only for the subsequent activity of supplying energy, so that the argument that the law is retroactive does not have sustainability. "

Conclusions

The experience of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania considers various typologies of the application and interpretation of European Union law, from its application only as an argument of authority to the motivation based on the transposition of a directive.