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COMPETENCE OF THE ARBITRATION TRIBUNAL REGARDING EXTRA-CONTRACTUAL DEEDS IN THE CONDITIONS OF INVESTING THE ARBITRATION TRIBUNAL AS AN EFFECT OF AN ARBITRATION CLAUSE

Bazil OGLINDĂ

Bucharest University of Economic Studies, Bucharest, Romania, E-mail: bazil.oglinda@yahoo.com

Abstract *The doctrine and jurisprudence accepts that extra-contractual deeds are arbitrable. The Romanian arbitration rules also establish this competence, but in what condition could a non-contractual dispute be considered arbitrable? This question is solved by a carefully analysis of the purpose of the clause, which is able to reveal the real intentions of the parties.*

Keywords

Arbitration competence, extra-contractual deeds, arbitration clause, purpose of the arbitration convention

1. Introduction

An extremely interesting law issue which gains magnitude lately is the one of the competence of the Arbitration Tribunal to judge litigations related to extra-contractual deeds, such as enrichment without any just cause, the undue payment in the conditions in which the defendant has invoked incompetency of the Arbitration Tribunal invested with the resolution of the cause, considering that the effects of the arbitration clause are not extended over the extra-contractual legal deeds.

2. Importance of the arbitration clause's purpose

In the foreign doctrine it has been showed that the competence of the Arbitration Tribunal related to the extra-contractual deeds will be appreciated depending on the purpose of the arbitration clause (Born, 2014).

The purpose of the arbitration convention depends on the manner in which it has been formulated. What is the purpose of an arbitration clause, in which conditions the requests referring to the business relationships, but based on provisions such as enrichment without just cause, civil offense (etc.) represent the competence of arbitration? If the litigation between parties falls under the purpose of the arbitration agreement, then the Tribunal has the right to decide over any issue, contractual or non-contractual, deducted from arbitration (except for those that are not arbitral). An Arbitration Tribunal may conclude it would be competent to decide over the act of enrichment without just cause and the liability of civil offense, provided that these fall under the purpose of the arbitration convention (Liebscher *et. al*., 2011).

3. What does extra-contractual litigation mean?

Even in the business field, litigations may or may not be of contractual nature. If the litigation between parties is related to the tort liability, then it is possible for them to appeal to arbitration. If an arbitration convention was concluded prior to the start of litigation, and it has a tort object, it is necessary to establish if the arbitration clause is general, large enough to cover the requests related to the tort liability generated by the relationships between parties.

Nevertheless, the use of arbitration to solve tort litigations is not admitted in all states. This general definition also includes agreements in which the negotiation power of the parties is uneven and where the weaker party needs special protection related to the conventions of litigations settlement. There is no doubt regarding the fact that extra-contractual litigations under tort liability are arbitrable (Tang, 2014).

In the case of actions regarding the act of enrichment without just cause and other quasi-contractual requests, the situation is identical. Even when it comes about a conduct which infringes public order regulations, arbitration is possible as long as the arbitration decision may be appealed, ensuring that the arbitrators have observed those public order norms. When the extra-contractual dispute is deducted from arbitration, based on an arbitration convention, this agreement will be explicit enough to avoid any doubt regarding the purpose of arbitration jurisdiction.

On the other side, when arbitration jurisdiction is set by an arbitration clause, it is harder to determine the limits of the arbitrator's powers. Certain law systems are more flexible than others regarding the admittance having both contractual and tort basis. Therefore, the law governing the agreement will be applied to determine if the parties may invoke tort liability in order to repair damages caused by the illicit deed of one of them, e.g. during the execution of the agreement.

Also, it is usual for the arbitrators to get requests regarding the act of enrichment without just cause of one of the parties in the context of executing or non-executing an agreement. In this case also, the law governing the agreement will determine the viability of such an action. This kind of issues appears mostly in the privatization agreements, which reach the Arbitration Tribunal following an arbitration clause inserted in the investment contracts.

In conclusion, by extra-contractual litigation susceptible to be arbitrated we understand that type of litigations which are linked to the arbitration clause.

4. Under what conditions is an extra-contractual litigation arbitral?

At procedural level, the Arbitration Tribunal will have the competence to solve a request founded on the tort liability (illicit legal deed) or regarding a quasi-contract (illicit legal deed), if the terms of the arbitration convention are general enough to consider that the parties have intended that this type of request be solved by arbitration. We are in this situation, e.g., when the arbitration clause refers to all litigations appeared „during the execution of the present agreement" or „related to the present agreement" (Goldman, 1999).

In the majority of jurisdictions, either of common law (In the Telecom Italia case, Spa v. Wholesale Telecom Corp., 248 F. 3d 1109, 1114 it was stated that *„the jointly accepted rule is that if an arbitration clause is general enough, then a request of tort liability is arbitral as long as it has, directly or indirectly, any connection with the object of the contract."*), or continental law (The French Court of Cassation accepts that *„the civil offenses are arbitral; the imperative French regulations do not block the arbitrability of the requests in tort liability"* in the case La Societe Doga v. HTC Sweden AB, Case no. 09-67013. Also to be seen: Swiss Federal Tribunal, Judgement of 23 June 1992, DFT 118 II 353; Landgericht Hamburg, Judgement of 20 April 1977, IV Y.B. Comm. Arb. 216; Italian Corte di Cassazione, Judgement of 16 November 1987, XVI Y.B. Comm. Arb. 585.), there are no interdictions related to the arbitrability of extra-contractual litigations, such as civil offenses, enrichment without just cause, compensation or other requests not based on the provisions of the contract (Gonzales, 2002).

The Convention of New York in art. II (1) defines the arbitration convention as including conflicts arising from a contractual or non-contractual relationship, and imposes the international obligation of acknowledging the presumptive validity of such a convention. This formulation is undertaken by many national systems regarding arbitration, which states that non-contractual requests are subject of certain valid arbitration conventions (English Arbitration Act, 1996 art. 6(1); French Code of Civil Procedure art. 1442, Swiss Law on Private International Law art. 177(1); UNCITRAL Model Law art. 7(1).

Moreover, the Arbitration Procedure Regulations of the International Commercial Arbitration Court attached to the Romanian Chamber of Commerce and Industry expressly set this principle in art. 3 paragraph 2, as well as in art. 8 paragraph 2 (Art. 8 align. 2, with the marginal name of Forms of Arbitration Convention provides that: *„By the arbitration clause, the parties agree that the litigations appeared from the agreement where it is inserted are in connection with it, to be solved by arbitration"*).

Although these rules do not offer an adequate guidance for concretely interpreting an arbitration clause, it is nevertheless considered in the foreign jurisprudence that a non-contractual request may be treated less favorably than a contractual one (Mitsubishi Motors Corp. V. Soler Crysler-Plymouth, Inc., 473 U.S. 614, 626 (U.S. S.Ct. 1985): *„There is no reason to move away from the pro-arbitration interpretation when a party, on the basis of an arbitration convention invokes requests based on some statutory rights"*).

Also, after applying the above reasoning, it was decided that the civil offenses which are not predictable immediately after the execution of the contractual obligations, are not arbitral (Telecom Italia, Spa v. Wholesale Telecom Corp., 248 F. 3d 1109, 1116-17).

Moreover, the violation of some pre-contractual obligations falls under the incidence of the arbitration clause, considering that the obligation to information from the negotiation agreement (Heaads of Agreement) is connected to the agreement (Final Award ICC Case No. 12502, XXXIV Y.B. Comm. Arb. 130, 156 (2009).

The Italian Court of Cassation considered that an arbitration clause also covers situations of tort civil liability, enrichment without just cause and refund (Italian Corte di Cassazione, Judgement of 16 November 1987, XVI Y.B. Comm. Arb. 585, 586-87 (1991).

The procedure rules chosen related to certain agreements may be extended regarding the requests arisen in connection with their execution. The majority of solutions from the arbitration practice follow this

sense, considering that an arbitration clause inserted in the agreement also covers the requests of tort liability, and the rules applicable to these agreements have to be extended towards the extra-contractual requests (Draetta; Luzzatto, 2012).

5. Determination of the purpose of the arbitration convention in the foreign arbitral jurisprudence

The purpose of the arbitral convention determines what are the litigations regarding which the parties have agreed to appeal to arbitration. Unlike the arbitrability to which the capacity of the parties to deduct some litigation from arbitration refers to, the purpose of the arbitration convention depends on the interpretation of the intention of parties, which can limit the competence of the arbitration to only some of the potential litigations or issues well determined. Therefore, the parties have to establish the object of the litigation that may be solved by arbitration. For example, the Dutch Supreme Court established that an arbitration convention referring to „*interpretation, execution and termination of the agreement*" does not cover also issues referring to its conclusion (Poudret; Besson, 2007). Therefore, it is preferable not to make any mention regarding the object of the litigation, a general reference to all the litigations in connection with this agreement being more advantageous.

In doctrine, certain general standards were provided for determining if a non-contractual request falls under the purpose of the arbitration convention, considering that these requests are arbitral when they imply „significant aspects of the contractual relationships between parties", „are connected with the nucleus of the relationship between parties", „interfere *de facto* and *ipso jure* with contractual requests", „derive from the contractual relationships", „have a connection close enough to the agreement" are „they overlap the contractual requests (Born, 2014)*".*

Also, by an ICC decision, it was established the competence of the arbitrators to pronounce over an extra-contractual issue, namely the application of some regulations on the unfair competition (ICC Awards no. 7319, YCA 1999, p. 141; 147-148).

In a ICC case, the Tribunal granted damages for harm to commercial reputation (ICC Case No. 3880 of 1983, 10 Y.B. COMM. ARB. 44 (1985).

Also, ICSID has a solid jurisprudence in admitting some requests of granting moral damages in favor of the investors in their litigations against some states (Parish *et. al*, 2011).

In Romanian arbitral jurisprudence, in a recent case, the Arbitration Tribunal has rejected the exception of incompetence. It was appreciated that: „*in order to appreciate that the respective parties are or are not due, it is needed to relate to the provisions of the rental agreement, the only legal document which may discern the legal nature of the payment made"* (Arbitration sentence no. 179 from 26th of July 201, Court of International Commercial Arbitration nearby the Romanian Chamber of Commerce and Industry, unpublished).

6. Conclusions

In conclusion, it is extremely important, on one side, how the arbitration clause was written and what was the real intention of the parties regarding this category of litigations.

On the other side, in the case of litigations subject to institutionalized arbitration of the Arbitration Court attached to the Romanian Chamber of Commerce and Industry, towards the provisions of art. 2 par. 2 and art. 8 par. 2 from the Rules of Arbitration Procedure, it results that also for the hypothesis in which there wouldn't be any express provision in the clause regarding the arbitrability of these litigations, they become arbitral by applying the text from the Rules of procedure in completing the clause.

In other words, the object of the parties' probation regarding this issue should strictly limit to „*the connection with the agreement*" of the extra-contractual legal deed.

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