# EVROPSKÉ PRÁVO V ROZHODČÍM ŘÍZENÍ

# EUROPEAN LAW IN ARBITRATION PROCEEDING

**VERONIKA HRADILOVÁ**

Faculty of Law, Masaryk University

**Abstrakt**

Příspěvek se zabývá problematikou vztahu evropského práva a rozhodčího řízení. Poukazuje na možnost rozhodců položit předběžnou otázku k Evropskému soudnímu dvoru a povinnost rozhodců aplikovat evropské právo v souladu s obecnými principy Evropských společenství: zásadou přednosti a přímého účinku komunitárního práva. Demonstrace dané problematiky se zaměřuje na nejdůležitější rozhodnutí ESD v této oblasti, která neoplývá nikterak bohatou judikaturou.

**Klíčová slova**

Rozhodčí řízení, rozhodčí doložka, rozhodčí nález, Evropská společenství, komunitární právo, předběžná otázka, hospodářská soutěž, spotřebitelské právo.

**Abstract**

This conference paper deals with the problems of relationship between European law and arbitration. It demonstrates the opportunity of arbitrators to give the preliminary rulings to the European Court of Justice and the obligation of arbitrators to apply Community law in order to the EC principles such as supremacy and direct effect of Community law. The main decisions of the European Court of Justice, not widely adjudged in this area, are analysed.

**Key words**

Arbitration, arbitration clause, arbitration award, European Community, Community law, preliminary ruling, competition law, consumer law.

Arbitration is the process by which the legal rights among parties are referred and determined with binding effect by the application of law by an arbitral tribunal instead of a court.

Nowadays, it seems necessary to examine the extent to which arbitration is regarded and treated by European Union law and to analyse the main decisions of European Court of Justice in this area.

The Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[1] provides that it should not apply to arbitration. The Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980 also excludes its application to arbitration agreements and agreements on the choice of court.[2] The fact that arbitration is not regulated by European Union measures does not mean that European Union law is without significance in the context of arbitration.

There are several situations in which Community law is relevant in arbitration proceedings. According to the principles of primacy and of direct effect of Community law the arbitrators are obliged to apply Community law.[3] There are two questions calling for the measure of the influence of EC law to arbitration proceedings:

- Are arbitrators entitled to ask the European Court of Justice for preliminary rulings under Article 234 (former Article 177) of the European Community Treaty to assess the compatibility of existing or proposed national rules with EC law?
- Are the arbitrators required to apply EC law?

Arbitration and Preliminary Rulings of the European Court of Justice

The judgment of the ECJ in *Nordsee Deutsche Hochseefischerei GmbH proti Reederei Mond Hochseefischerei Nordstern AG & Co. KG*[4] has dealt with the authority of German private arbitration tribunal to give a preliminary ruling to the ECJ in order to Article 234 of the Treaty.

The ECJ refused its jurisdiction over this case and decided that an arbitration tribunal called upon to decide a dispute between the parties under an arbitration clause is not to be considered as a "court or tribunal of a member state" within the meaning of Article 234 of the

[1] Article 1, par. 2 e).
[2] Article 1, par. 2 d).
[3] Bělohlávek, A.: Rozhodčí řízení a komunitární právo, Právní rozhledy, 10/2002, příloha Evropské právo, pp. 9.
[4] C-102/81.

Treaty and under this provision no preliminary questions are raised.[5] The dispute is submitted to arbitration and the public authorities in the member state are not involved in the decision to opt for the arbitration. The public authorities are not called upon to intervene in the proceedings before the arbitration tribunal. It follows the opinion that the link between the arbitration procedure and the legal organization in the member state is not sufficiently close for the arbitration tribunal to be considered as a court within the meaning of Article 234 of the Treaty.[6]

In this case the ECJ refused to accept the arbitration court as national court or tribunal under Article 234 of the Treaty on the ground that arbitration proceeding was based on existence of arbitration clause to solve the dispute between parties before arbitrators and the national courts were excluded to be involved in the decision.[7]

In case *Guy Denuit, Betty Cordenier v. Transorient – Mosaïque Voyages et Culture SA*[8] the ECJ was engaged in the arbitration in consumer dispute. It was submitted in the context of a dispute between Mr Denuit and Ms Cordenier and a travel agency Transorient, concerning the price of a package trip to Egypt. The parties agreed on an arbitration clause that the claimants in the main proceedings will bring the matter before the arbitration tribunal (Collège d'arbitrage de la Commission de Litiges Voyages).

The dispute was heard before arbitration tribunal and the arbitrators decided to stay the proceedings and to give the EJC the preliminary ruling according to the interpretation of EC law in Council Directive 90/314/EEC on package travel, package holidays and package tours.

Firstly, the EJC had to examine whether the arbitration tribunal should be regarded as a court or tribunal for the purposes of Article 234 of the Treaty. The EJC stated that a number of factors must be taken into account to make a reference whether a court fulfills the definition of court for the purposes of Article 234 of the Treaty such as:
a) the body is established by law,
b) it is permanent,

[5] Bělohlávek, A.: Rozhodčí řízení a komunitární právo. Právní rozhledy, 10/2002, příloha Evropské právo, pp. 9.
[6] Craig, P. ─ De Búrca, G.: EU Law, Text, Cases and Materials, Oxford: Oxford University Press, 4. vydání, 2007, pp. 465.
[7] Judgment *Nordsee*, par. 11-14.
[8] C-125/04.

c) its jurisdiction is compulsory,

d) its procedure is inter partes,

e) it applies rules of law,

f) it is independent.[9]

The ECJ acknowledged the ruling in the judgment *Nordsee*. An arbitration tribunal is not a "court or tribunal of a Member State" within the meaning of Article 234 of the Treaty *"where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator"*.[10]

The EJC has dealt also with the question when a party of the dispute applies to the ordinary court for the resolution in the existence of arbitration agreement. In this case, an ordinary court before which a dispute is brought to which an arbitration agreement applies must decline jurisdiction under Article 1679(1) of the Belgian judicial code.[11] On the other hand, in the absence of an arbitration agreement entered into between the parties, the jurisdiction of the arbitration panel is not mandatory and an individual may apply to the ordinary courts for resolution of the dispute.[12]

In conclusion of the preliminary rulings, Article 234 of the Treaty refers to jurisdiction which would suggest that it presents national jurisdiction and does not take arbitration proceedings into consideration. There is a question whether the ECJ should accept the arbitration tribunals as courts and tribunals under Article 234 of the Treaty and allow the arbitrators to give the preliminary questions of interpretation of EC law to the ECJ.[13]

Arbitration tribunals and EU law

This part of my conference paper will focus on the application of EU law before arbitrators.

[9] Judgment *Denuit and Cordenier*, par. 12. See judgments *Dorsch Consult* (C-54/96), par. 23 and *Schmid* (C-516/99), par. 34.
[10] Ibid. par. 13.
[11] Article 1679 (1): "The judge seized of a dispute which is the subject af an arbitration agreement shall, at the request of either party, declare that he has no jurisdiction, unless, insofar as concerns the dispute, the agreement is not valid or has terminated; this exception must be invoked in *limine litis*."
[12] Judgment *Denuit and Cordenier*, par. 15.
[13] Zekos, G. I: The Treatment of arbitration under EU law, Dispute Resolution Journal, May 1999.

The arbitrators are obliged to apply the EU law. The arbitrators conclude the issue before the arbitration court and evaluate the law governed to the case. If it raises a question of EU law, the arbitrators will consider this law. The arbitrators must observe Community law and it follows the principles of primacy and uniform application of EC law.[14]

The problem of the application of EC law was monitored mostly in the area of competition law.[15] To the most important judgments belong *Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij*[16] and *Eco Swiss China Time Ltd v. Benetton International NV*.[17] It is not foreclosed in the area of consumer contracts nor individual employment contracts. The last subsection will analyse the judgment of the ECJ in case *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*[18], concerning the consumer dispute before arbitration court.

EC Competition Law in International Arbitration

The ECJ in case *Municipality of Almelo* has dealt with determination an appeal against arbitration award before national court in Netherlands (Gerechtshof te Arnhem). The dispute arose between the Municipality of Almelo and other local distributors of electric power and Energiebedrijf IJsselmij NV ("IJM"), supplying electricity to local distributors. The local distributors appealed to the national court against arbitration award. The national court has asked the ECJ for two preliminary rulings on the following questions:

- Is a national court or tribunal which determines an appeal against an arbitration award to be regarded as a "national court or tribunal" for the purposes of Article 234 of Treaty if under the arbitration agreement made between the parties it must give judgment according to what appears fair and reasonable?
- How are Articles 37 and/or 85 and/or 86 and/or 90 of the Treaty to be interpreted?

According to the first question the ECJ has adjudged that a national court which, in a case provided for by law, determines an appeal against an arbitration award must be regarded as a court or tribunal within the meaning of Article 234 of the Treaty. This is applicable even if

[14] Bělohlávek, A.: Rozhodčí řízení a komunitární právo, Právní rozhledy, 10/2002, příloha Evropské právo, pp. 10.
[15] Rozehnalová, N.: Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku, Praha: ASPI, 2002, pp. 145.
[16] C-393/92.
[17] C-126/97.
[18] C 168/05.

under the terms of the arbitration agreement between the parties that court must give judgment according to what appears fair and reasonable.[19]

In the second question the ECJ has stated that national court is obliged to consider the Articles 85, 86 and 90 of the Treaty in respect of supremacy and uniform application of EC law.[20]

In *Eco Swiss China Time Ltd v. Benetton International NV* the ECJ has confirmed that EC competition law forms an integral part of public policy. Regarding the facts, Benetton entered in to a licensing agreement with Eco Swiss and Bulova. Under the terms of the agreement all disputes arising between the parties were to be settled by arbitration. Benetton terminated the agreement and as result the parties entered into arbitration. The arbitrators made two awards of compensation for Eco Swiss and Bulova. However, Benetton applied for annulment of the two awards on the ground that they were contrary to public policy within the meaning of Article 1065/1 e) of the Netherlands Code of Civil Procedure.[21] Benetton asserted that the licensing agreement was a nullity pursuant to Article 81 (former Article 85) of the Treaty, which sets the competition rules applicable to undertakings.

Under Article 1065/1 e) of the Netherlands Code of Civil Procedure, an arbitration award is contrary to public policy only if its terms or enforcement conflict with a mandatory rule so fundamental that there are no procedural restrictions which should prevent its application. The prohibitions included in domestic competition law are not considered fundamental for these purposes. The case was appealed to the *Hoge Raad der Netherlanden* (Supreme Court of the Netherlands), which referred the question to the ECJ whether EC competition law constitutes such a fundamental mandatory law.

The ECJ adjudged that EC competition law under Article 81 (former Article 85) of the Treaty is a fundamental rule and *"national court to which application for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 (1) of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy"*.[22] It

[19] Rozsudek *Municipality of Almelo*, par. 24.
[20] Stehlík, V.: Vybrané otázky rozhodčího řízení v komunitárním právu, Jurisprudence, 1/2005, pp. 7.
[21] Article 1065/1 e): "Annulment may be ordered only on one or more of the following grounds: (e) the award or the manner in which it has been made is contrary to public policy or accepted principles of morality."
[22] Blanke, G.: The Role of EC Competition Law in International Arbitration - A Plaidoyer, 16(1) EBLR, 2005, pp. 169-80, at p. 174. See judgment *Eco Swiss*, par. 37.

means that in the case when domestic procedural rules require a national court to grant an annulment of an arbitration award where such arbitration failed to follow up national public policy rules, then the court must also grant an annulment where the arbitration failed to comply with the prohibition laid down in Article 81(1) of the Treaty.

The ECJ finally confirmed that EC competition law forms an integral part of public policy: *"[…] according to Article 3 (1) g) of the EC Treaty Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85 (2) of the Treaty that any agreements or decisions prohibited pursuant to that article are to be automatically void."*[23] According to the ECJ the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[24]

The ECJ did not impose a duty on the arbitrator to raise the potential infringement of EC competition law, but the arbitration award could turn unenforceable if the arbitrator ignores relevant competition law issues in the making of the award. To the conclusion, it means that the arbitrator is obliged to apply Community law *ex officio* in cases where the award may be executed on territory of EU member states. Indeed, if the arbitrator does not apply EC law, he will risk having the award nullified. The national court of the EU member state should regard the non-application of community law as a breach of a public policy rule.[25]

The both judgments mentioned above demonstrate the increasing role of EC competition law in the field of international arbitration. The judgment in *Eco Swiss* establishes the arbitrators` duty to apply Community public policy *ex officio* which includes Article 81 of the Treaty. The arbitrators are the guardians of Community policy. They are obliged to apply the relevant laws and must prevent arbitration from being used to circumvent the application of public

[23] Judgment *Eco Swiss*, par. 36.
[24] Ibid. par. 39. With regard to public policy more specifically, the Convention provides that the courts of the member states can refuse the enforcement of arbitral awards on public policy grounds (Article V(1)(c) and (e) and II(b) of the New York Convention).
[25] Blanke, G.: The Role of EC Competition Law in International Arbitration - A Plaidoyer, 16(1) EBLR, 2005, pp. 169-80, at p. 175.

policy rules.[26] The arbitrators have the responsibility to render an arbitration award which would not violate EC competition law because such an award would violate *ordre public* in an EU national court.

EC Consumer Law in International Arbitration

In case *Mostaza Claro v. Centro Móvil* the ECJ has held that a national court seized of an action for the annulment of an arbitration award must determine whether the arbitration agreement is void. If the arbitration agreement contains an unfair term on the base of Article 3(1) of Council Directive 93/13/EEC on unfair terms in consumer contracts, the court will annul the award even when the consumer has not raised the issue of unfairness in the arbitration proceedings but only in the action for annulment.

In this case Ms. Claro subscribed to a mobile phone plan with an operator Centro Móvil. The contract contained an arbitration clause under which any disputes arising from the contract were to be referred for arbitration before *The Asociación Europea de Arbitraje* (AEADE). Ms. Claro did not comply with the minimum period of contract and Centro Móvil started arbitration proceedings against her. She did not claim the arbitration agreement was void and she lost on the substance. Then Ms. Claro contested the arbitral award before a national court submitting that the unfair nature of the arbitration clause meant that the arbitration agreement was null and void.

The problem is seemed in Article 3(1) of Directive which provides that if a term is unfair, it shall not be binding on the consumer. So there is a question whether Ms. Claro was bound by the arbitration agreement. The ECJ held that the non-binding nature of the unfair clause was mandatory and the national court determined itself that the clause was actually unfair.

The aim of the case is that the nature and importance of the public interest underlying the protection which Directive 93/13/EEC confers on consumers justify the national court being required to assess of its own motion whether a contractual term is unfair. The Directive calls for compensation for the imbalance which exists between the consumer and the seller or

[26] Brulard, Y. ─ Quintin, Y.: European Community Law and Arbitration: National Versus Community Public Policy, 18(5) J Int Arb, 2001, pp. 533-547, at p. 536.

supplier.[27]

Ms. Claro did not contest the validity of the arbitration agreement during the arbitration proceedings. So there arises a question whether the arbitration award shall be rejected to annul in judicial proceeding. The ECJ found that Spanish law did not require the consumer to contest the arbitration proceedings during those proceedings in order to have the award set aside for being contrary to public policy.

The ECJ decided that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, then national law must also grant such an application where it is founded on failure to comply with Community public policy rules.[28] The arbitration courts are obliged to apply EC law to guarantee the making of an effective and enforceable arbitration award.

**Literature:**


[1] Bělohlávek, A.: Rozhodčí řízení a komunitární právo, Právní rozhledy, 10/2002, příloha Evropské právo.

[2] Blanke, G.: The Role of EC Competition Law in International Arbitration - A Plaidoyer, 16(1) EBLR, 2005, pp. 169-80.

[3] Brulard, Y. ─ Quintin, Y.: European Community Law and Arbitration: National Versus Community Public Policy, 18(5) J Int Arb, 2001, pp. 533-547.

[4] Craig, P. ─ De Búrca, G.: EU Law, Text, Cases and Materials, Oxford: Oxford University Press, 4. vydání, 2007, 1148 p., ISBN 978-0-19-927389-8.

[5] Rozehnalová, N.: Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku, Praha: ASPI, 2002, 219 p., ISBN 80-86395-41-3.

[6] Rozehnalová, N.: Mezinárodní právo obchodní. II. díl, Řesení sporů, Brno: MU, 1999, 181 p., ISBN 80-210-2041-5.

[7] Stehlík, V.: Vybrané otázky rozhodčího řízení v komunitárním právu, Jurisprudence, 1/2005.

[8] Zekos, G. I: The Treatment of arbitration under EU law, Dispute Resolution Journal, May 1999.


[27] Ibid. par. 36-38.
[28] Judgment *Mostaza Claro*, par. 35. See Eco Swiss, par. 37.

**Kontaktní údaje na autora – email:**

*veronikahradil@gmail.com*