The (long) growth crisis of International Commercial Arbitration

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Resumen: El autor resalta alguno de los problemas que, en su opinión, han llevado a la creciente crisis al arbitraje comercial internacional. El análisis propone una posible solución a esos problemas. De acuerdo a lo propuesto por el autor, alguno de esos problemas surgen de la actitud que ha tenido a lo largo de los años la Unión Europea hacia el arbitraje internacional, demostrando que la UE se ha modificado su conducta hacia el arbitraje internacional de una simple indiferencia a una verdadera falta de confianza. El análisis nos lleva inevitablemente al desarrollo interno que le ha dado la EU al arbitraje de inversión, haciendo que el autor proponga a la comunidad de usuarios del arbitraje comercial internacional solicitar un instrumento legislativo Europeo sobre arbitraje comercial internacional, para evitar que la EU lo trate de la misma forma que al arbitraje internacional de inversión.

Abstract: The author highlights some of the issues that, in his opinion, led to the growth crisis of international commercial arbitration. The above-mentioned analysis comes with a possible and feasible solution to those issues. According to the author, some of those issues are at the root of the European Union attitude towards international arbitration over the years, showing how the EU moved from a simple indifference towards international arbitration to a real mistrust. The analysis inevitably leads to the recent developments of intra-EU investment arbitration, bringing the author to urge international arbitration practitioners to solicit a European legislative instrument for international commercial arbitration in order to avoid the contagion of EU's approach towards international investment arbitration.

Palabras Claves: Arbitraje. Arbitraje comercial internacional. Arbitraje internacional de inversión. Problemas prácticos en la prácitca. Sistema legal europeo y arbitraje

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[**] The Author is grateful to Gianmarco Ronzo Esq. for his clever and very helpful contribution to the drafting of this paper

internacional. Sistema de justicia de inversión. Sistema multilateral de justicia de inversión. Regulación europea. Achmea. Covid-19.

Keywords: Arbitration. International commercial arbitration. International investment arbitration. Problematic issues in the practice. Eu law and international arbitration. Investment court system. Multilateral investment court system. European regulation. Achmea. Covid-19.

Summary: I. Introduction, II. The main practical and open issues of international arbitration, A. The problem of timing, B. The problem of costs, C. Predictability vs. elasticity, D. Conciseness vs. completeness of files, E. The circulation of the award after annulment in the country of origin, III. The growing mistrust of the European Union towards international arbitration, A. From the EU indifference to the EU mistrust of international arbitration, B. Overcoming EU mistrust of international commercial arbitration, IV. Conclusion

I. Introduction

International commercial arbitration has been in a growth crisis for quite some time now. Indeed, its very success determines several critical issues, some of which will be analyzed, both from a practical and theoretical point of view, in the first part of the article –sometimes trying to give a possible and immediate solution to those issues (some of them are well known among arbitration practitioners and, hence, they do not need to be illustrated thoroughly) **(I)**. Along with these issues, and partly because of some of these issues, we have assisted to a growing mistrust by European Union institutions towards international arbitration. A possible way to overcome such mistrust is strengthening EU rules on arbitration and particularly enacting a uniform legislation binding for all EU countries **(II)**.

II. The main practical and open issues of international arbitration

A. The problem of timing

It is absolutely necessary to revise the rules of international institutional arbitration and the practices of large arbitration institutions in order to reduce the length of the proceedings and specially to reduce the time needed to constitute the Arbitral Tribunal. Some arbitral institutions already felt the need for a reduction of the length of the proceeding: the International Chamber of Commerce, for instance, introduced in the latest version of its rules the expedited proceeding[1] that aim at providing the parties with an award within six months from the case management con-

[1] These expedite procedure provisions apply if the arbitration agreement was concluded after 1 March 2017, the amount in dispute does not exceed US $ 2,000,000.00 and, the parties have not opted out the expedited procedure rules in the arbitration agreement or at any time thereafter. Moreover, the parties may, irrespective of the date of conclusion of the arbitration agreement or the amount in dispute, agree to opt in by an *opt-in agreement.* In the pursuit of accelerating a large number arbitral proceedings, the ICC, in the forthcoming review of the rules, may increase the maximum amount in dispute to US $ 4,000,000.00 to make the expedite rules applicable unless the parties opt out.

ference. However, without shortening the phase of the constitution of the Tribunal the problem of timing will not be easily solved.

As a matter of fact, state judges are often very slow, but they are always available. The Arbitral Tribunal must, of course, be constituted on a case-by-case basis and this phase is very delicate and important for the success of an arbitration. However, it cannot and must not last six or seven months.

B. The problem of costs

The increase of arbitration costs (especially perceivable in small and medium-sized arbitrations) has discouraged, in times of global economic crisis and spending review, many big Italian (and not only Italian) companies from including an arbitration clause in their contracts. One can easily imagine that this trend will be even strengthened by the global health/economic crisis caused by the Covid-19 virus. In fact, it is true that large arbitration institutions have made an effort to render the costs of the arbitration foreseeable. Nonetheless, it is also true that those large institutions often uses, in determining the value of the dispute, criteria much more favorable to the creditors (the arbitrators and the institution itself) than to the debtors (the parties) –in contrast to what normally happens in many State courts with regard to the ruling on the costs[2]. Conversely, one should very much welcome, for protecting both the integrity of arbitration and arbitrators' work, the persistence and rigor with which the arbitration institutions request the payment of the advance on costs.

However, the discouragement of the companies in commencing arbitration has mainly concerned domestic contracts. This, because in case of international contracts the disadvantage of costs is balanced both by the difficulty for the parties to find a "natural" and neutral judge different from international arbitrators, and by the risk for each party of uncertainties in identifying the competent judge or, even worse, to be "surprisingly" summoned to appear before an "inconvenient" jurisdiction. Nevertheless, it is certain that the "competition" of some large state commercial courts is starting to be tangible, as they offer their services upon the parties' concurrent choice and even do so through intensive marketing cam-

[2] It often happens that State judges adopt more the criteria of *decisum* rather than the traditional one of the *disputatum*. Sometimes this approach constitutes an exaggeration and inevitably leads to unfair decisions on the litigation costs, but it is surely possible to find a middle ground.

paigns[3]. These courts are particularly attractive because they allow the judges to hear cases in English and have special procedural rules that, generally, speed up the process compared to the procedural rules applying in "normal" commercial courts.

C. Predictability vs. elasticity in evidence proceedings and fact-finding

The common law approach and the IBA Rules have certainly accentuated predictability but have also reduced elasticity. Evidence proceedings in international arbitration, notwithstanding their size and specificity, have become very much alike and therefore always predictable. However, for this very reason, it is not always suited for the specific traits of the dispute.

Many times, it can happen that cross-direct-recross-redirect examination are simply redundant, or that the arbitrators, given the leading role of lawyers in cross-examination, end up being too passive. In addition, even more often, it can happen that the splendor and complications of the hearing as the central moment of the proceedings are redundant and that, for example, the opening statements and closing statements become useless.

Hence, it is clear that there is a middle ground between the common law and the civil law approach as far as witness evidence is concerned: the parties shall hand over the witness to the intelligent, pressing and unpredictable questions of expert arbitrators who know all the facts of the case. These arbitrators shall ask the questions without fixed objective constraints (neither those proper to the common law approach such as the witness statement, nor those proper to the civil law and especially to the Italian approach such as the "witness evidence chapters", *i.e.* the list of questions predetermined by the parties that the judge has to address to the witness). Of course, this median approach should not only be inquisitorial, but also adversarial and therefore should leave adequate room for lawyers to synthetically cross and recross examine the witness and to supplement arbitrators' questions.

In any case, the question is not whether the IBA Rules or the newer (and more "civil law" oriented) Prague Rules are more desirable than the other, or on another level (the level of the defensive briefs), whether the pleadings approach or the memorials approach is more appropriate before an Arbitral Tribunal, or generally speaking, whether the com-

[3] Particular reference here is made to the *Chambre commerciale internationale de la Cour d'appel de Paris* and the *Chambre internationale et européenne,* the Netherlands commercial court and Singapore International commercial court.

mon law or the civil law approach is more convenient. The issue is to find the right balance between predictability and elasticity; to avoid routine and standardization; to regain predictability, not through routine but through preparatory dialogue, in each specific case, between the arbitrators and the parties; to leave room for the flexible and discretionary adjustment of the fact finding to the specific traits of the dispute. This should be one of the main advantages of arbitration over court litigation, and is, indeed, formally favored by the arbitration laws of every country as well as by the arbitration rules, all of which confer wide discretionary powers to the arbitrators regarding the fact-finding.

Indeed, arbitral procedural flexibility has particularly proven its advantages during the Covid-19 crisis, particularly when compared to national courts' procedural rules: many ongoing legal proceedings in courts have been suspended and some of the hearings scheduled during the lockdown period were postponed or rescheduled, causing, sometimes, serious harm to the parties' rights. However, arbitral proceedings, through some adjustments agreed upon by the parties and the tribunals, could go forward by holding online hearings and adjusting the procedure to the special needs caused by the pandemic. In conclusion, legislators and arbitral institutions should foster this elasticity in the future years that should become –even once the pandemic is over– even more, a distinctive mark of international arbitration.

D. Conciseness vs. completeness of files

This is another aspect of standardization. The balance between conciseness and completeness is being lost and, above all, the parties have stopped looking for this balance on a case-by-case basis.

The practice of international commercial arbitration and its standardization are going more and more towards an incredible and often useless weighting of files (both in terms of length of the defensive writings and number of exhibits). The possibility of filing briefs and attachments electronically increases the phenomenon, simply because one may not perceive immediately the useless length of a document filed electronically.

It is true that arbitrators are generally more willing to examine complex and detailed files than state judges are. However, many times it is simply too much.

E. The circulation of the award after annulment in the country of origin

The well-known French solution, according to which an international commercial award may be recognized and enforced abroad even after setting aside in the country of origin, has spread but not uniformly. The global panorama is very varied in this regard.

This favors *forum shopping* and the search at all costs for an indulgent state jurisdiction that is willing to enforce the award even in case it was rightfully declared null and void by the competent jurisdiction of the country of origin.

It is not possible to follow this direction. Even if the French solution and similar ones adopted by the courts of other countries invoke (improperly, in my opinion) the rule of the "more favorable national law" provided for in Article VII.1 of the New York Convention, such a varied and uncertain landscape is certainly contrary to the overall spirit and essential function of the New York Convention. In fact, the foreign award will have a radically different effectiveness depending on the solutions that each country's case law gives to the problem at issue. UNCITRAL-Model Law itself gives equivocal answers in this regard, and in any case, it is not and cannot be an effective instrument of uniformization.

Therefore, it is important to find a uniform and balanced solution: probably by intervening on and reforming the New York Convention, and probably on the model adopted at the time by the 1961 Geneva Convention (the annulment in the country of origin definitively prevents the recognition of the award abroad, but only in certain and limited cases of annulment).

III. The growing mistrust of the European Union towards international arbitration

A. From the EU indifference to the EU mistrust of international arbitration

The EU has been basically *indifferent* to the world of international commercial arbitration for a long time. The expression "arbitration as excluded matter" in Brussels I (with all the practical questions and debates that such a statement entailed also and, at last, in the transition from Brussels I to Brussels I *bis*) is only the explicit emblem of such indifference.

Eco Swiss-Benetton, *Mostaza Claro* and, in part, also *Van Uden* represented, in the case law of the Court of Justice, more or less balanced solutions in marginal cases of inevitable contact between arbitration and European law. However, the "traditional" *Nordsee* decision is always there (in the absence of a *revirement* of

the Court of Justice) to prevent the direct contact between arbitrators and the Court of Justice. And above all, the indifference at the level of European law policy has been evident: EU legislator has shown no particular interest in arbitration and in the need for European uniformization of arbitration law, despite the fact that arbitration is certainly an important component of the legal and economic market[4].

Recently, however, in EU circles, the season of indifference has been replaced by the season of mistrust or even hostility: in short, the "*Achmea* approach"[5].

This mistrust has become particularly evident toward investment arbitration. As a matter of fact, in recent years, the European Union, which has the power to negotiate international commercial treaties binding all the Member States, has developed the idea to include in

[4] CJEU, Case C-126/97 *Eco Swiss China Limited Ltd v. Benetton International NV (1999).* In this case the Court held that (i) when a challenge of an award is possible under the national procedural rule on the ground of breach of public policy, a violation of Article 85 of the Treaty (now article 81 EC) - "*which prohibits agreements or undertakings having as their object of effect the prevention, restriction or distortion of completion within the common market*"- *"must be treated as a breach of national rules of public policy by the court"* reviewing such award and; (ii) notwithstanding the obligation on national courts to consider Article 85 of the Treaty as rule on national public policy, as set forth by the Court in the same decision (see (i) above), the EU law does not "*prescribe if, to what extent and how a review of the award on the basis of public policy is to be effected"* (*see* J.F. Poudret and S. Besson in *Comparative Law of International Arbitration*, 612).
CJEU, Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL (2006),* is, just as *Eco Swiss – Benetton* a case regarding EU public policy and, hence, what courts have to consider in a procedure concerning the annulment of an award. In this case, the Court held that a national court must annul an arbitral award where the agreement examined in the arbitration contains an unfair term in violation of the Council Directive on unfair terms in consumer contracts. The national court shall annul such award even though the consumer has not pleaded the invalidity *vis à vis* the Directive in the course of the arbitration proceedings.
CJEU, Case C- 391/95 *Van Uden Maritime BV, trading* as *Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another (1995)*. In this case the Court held that *"where the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention, that Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators".* (Summary available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX%3A61995CJ0391) This decision solved a serious practical problem relating to enforcement in a third EU country of interim measures granted by the national court in which the arbitration seat is located.
CJEU, Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*. In this case the Court essentially held that an arbitral tribunal is purely private in nature because its authority comes solely from parties' autonomy and therefore it is not a "court or tribunal of a Member State" within the meaning of Article 177 of the EEC Treaty and, thus, cannot make a reference to the Court of Justice for a preliminary ruling.
[5] CJEU, Case C-248/16, *Slovak Republic v. Achmea B.V,* landmark case in which the Court held that arbitration clause in BITs is not compatible with EU law. The reason underlying this judgement is that the CJUE feared the fact that the tribunal so constituted may be called to interpret or to apply EU law and such interpretation may not be controlled by the Court of justice or other national courts (that, contrary to arbitral tribunals, are entitled to refer to the Court for a preliminary ruling on EU law matters).

those international instruments, a dispute resolution mechanism different from arbitration. The clearest example of this trend can be synthesized by looking at the dispute resolution mechanism included in the 'Comprehensive economic and Trade Agreement' (CETA) executed by and between the UE and Canada: the 'Investment Court System' (ICS). The idea thereunder is to constitute a permanent court with the power to hear cases of Canadian investors against UE Member States and *vice versa*. According to the Commission, this new mechanism (i) "sets up a permanent dispute settlement tribunal" (ii) "establishes an appeal system like those in national legal systems" (iii) "ensures proceedings are transparent" and (iv) "bans frivolous claims"[6]. The Commission analyses these as being 'new features' compared to the ancient dispute resolution mechanism provided for under BITs (*i.e.* investment arbitration), implicitly highlighting what, in the Commission's view, were the defaults of international investment arbitration.

This new approach clearly exemplifies the mistrust of EU against arbitration. Actually, the EU is taking further steps against international investment arbitration. The EU Commission is actively trying to modify the "outdated" investor dispute settlement system (ISDS) by starting a talk with other countries under the auspices of a working group of the *United Nation Commission on International Trade Law (*UNCITRAL) for the establishment of a Multilateral Investment Court. In a submission to the working group, the Commission overtly stated its concerns (partly shared with other countries) towards investor-state arbitration which are the basis for the conclusion "*on the desirability of* [a] *reform*"[7]. The Commission also

[6] See "*Investment provisions in the EU-Canada free trade agreement (CETA)"* published by the European Commission on February 2016.

[7] See "*Possible reform of investor – State dispute settlement (ISDS)* – Submission from the European Union and its Member States (New York, 1-5 April 2019)". The concerns outlined in the paper are: "

(i) Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunal

- *concerns related to unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals;*
- *concerns related to the lack of a framework for multiple proceedings that were brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms; and*
- *concerns related to the fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions.*

(ii) Concerns pertaining to arbitrators and decision makers:

- *concerns related to the lack or apparent lack of independence and impartiality of decision makers in ISDS;*

highlighted the systemic nature of those issues: simply addressing these concerns would not be enough, there must be a complete change of the system.

Furthermore, the Commission, since the *Achmea* case, is promoting the termination of all intra-EU BITs. This policy led to the "Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union"[8] executed on May 2020, by 23 Member States. According to Article 4 of the Agreement, the contracting parties "*confirm[ed] that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility [...] the Arbitration Clause in such Bilateral Investment Treaty cannot serve as a legal basis for Arbitration proceedings*". Notwithstanding the effect that such treaty may have on pending arbitrations, it is clear that Intra-UE investment arbitrations (particularly for investments made after the termination of those BITs) will be very rare (or inexistent): the mistrust led to the "abolition" of intra-UE investment arbitrations.

The *Achmea* approach, as well all the reforms highlighted above, are formally limited to investment arbitration but potentially contagious for the whole world of international commercial arbitration.

B. Overcoming EU mistrust of international commercial arbitration

In order to avoid a contagion to international commercial arbitration, in brief, we need to overcome mistrust by overcoming indifference, and we could so by directly and significantly involving the EU in uniform legislation on international commercial arbitration.

EU circles do not trust arbitration. Good: rather than cleaning up the world of arbitration from the real or alleged faults that led to this mistrust (which would be a long, complex and uncertain operation), arbitration practitioners should involve the EU in a legislative process on arbitration law. This involvement could generate practical benefits to the world of arbitration, even different

- concerns relating to the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules;
- concerns about the lack of appropriate diversity amongst decision makers in ISDS; and
- concerns with respect to the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules.
(iii) Concerns pertaining to cost and duration of ISDS cases:
- concerns with respect to cost and duration of ISDS proceedings;
- concerns with respect to allocation of costs by arbitral tribunals in ISDS; and
- concerns with respect to security for cost."

[8] Available on the European Commission website.

and additional ones to the mere overcoming the EU's mistrust.

Essentially, it may be the right time for a uniform European law instrument on international commercial arbitration. Of course, this would be a much more effective and practical instrument than UNICITRAL-Model Law. In the past, the appropriate instrument would have been a "European Community Convention" like Brussels', but today the most appropriate one would be a Regulation.

The Regulation:

- should provide for a "European" commercial arbitration system which would be - depending on the parties' choice - additional to the "traditional" arbitration governed by the several national laws;
- would adequately ensure the independence and impartiality of the arbitrators and the guarantees of fairness of the arbitral proceeding (which are the aspects on which the EU is generally more concerned about);
- would entrust *more than one* national jurisdiction, as appropriate, with the function of assisting arbitration;
- would entrust *a single national court* (probably that of the place of the arbitration) with the function of control and possible setting aside of the award (expressly providing for a preliminary ruling to the Court of Justice, where appropriate);
- should still entrust the exequatur procedure to a single national court (again that of the place of arbitration); it would have to be an extremely simplified exequatur, and the relationship between exequatur and appeal against the award would be properly regulated;
- should provide that the 'European' award, once the exequatur has been obtained, would be equally and automatically effective throughout the territory of the Union and would circulate in that territory without the need for a new enforcement procedure and recourse to the New York Convention (which, on the other hand, could be used to circulate the award outside the territory of the European Union).

IV. Conclusion

Although mistrust towards international arbitration has been cyclical, having history proven that periods of growth have followed periods of fears towards "private justice", the latest years are leading international arbitration towards an unknown and uncertain place. This needs a strong response from arbitration practitioners that should rise in order to

defend a system that has proven to be beneficial for private parties, for businesses and for justice. The strong mistrust of the EU Commission against international investment arbitration should warn all the practitioners that have always disfavored an intervention of the European Union in the regulation of commercial arbitration. I very much hope that a working group toward such goal can soon be set up to start studying the feasibility of a European commercial arbitration regulation project.