MASARYK UNIVERSITY
FACULTY OF LAW

Klára Drličková, Tereza Kyselovská (eds.)

COFOLA INTERNATIONAL 2017

Resolution of International Disputes

Conference Proceedings

ACTA UNIVERSITATIS BRUNENSIS

IURIDICA
Editio Scientia vol. 599

PUBLICATIONS
OF THE MASARYK UNIVERSITY

---

theoretical series, edition Scientia
File No. 599

COFOLA INTERNATIONAL 2017

Resolution of International Disputes

(Conference Proceedings)

Klára Drličková, Tereza Kyselovská
(eds.)

Masaryk University
Brno 2017

Vzor citace:
DRLIČKOVÁ, Klára and Tereza KYSELOVSKÁ (eds.) *Cofola International 2017: Resolution of International Disputes: Conference Proceedings*. 1st editions. Brno: Masaryk University, 2017. 108 p. Publications of the Masaryk University, theoretical series, editions Scientia, File No. 599. ISBN 978-80-210-8792-7 (print).

CIP - Katalogizace v knize

Cofola international 2017 : resolution of international disputes : (conference proceedings) / Klára Drličková, Tereza Kyselovská (eds.). -- 1st edition. -- Brno: Masaryk University, 2017. 108 stran. -- Publications of the Masaryk University, theoretical series, edition Scientia ; File. No. 599. ISBN 978-80-210-8792-7 (brož.), 978-80-210-8793-4 (online)

34* 341.61* 341.63* 062.534*
- právo
- mezinárodní spory
- mezinárodní arbitráž
- sborníky konferencí

34 – Právo [16]

This publication was written at Masaryk University as part of the project "MUNI/B/1181/2016 Conference COFOLA INTERNATIONAL 2017" with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2017.

The publication ethics follows the principles published on https://www.law.muni.cz/content/cs/proceedings/.

The authors of the respective papers themselves are responsible for the content and for the language quality of the papers.

Editors:
JUDr. Klára Drličková, Ph.D.
JUDr. Tereza Kyselovská, Ph.D.

Reviewers:
JUDr. Pavel Bureš, Ph.D.
Mgr. Slavomír Halla, Ph.D.
JUDr. Jaroslav Králíček, Ph.D.
doc. JUDr. Miroslav Slašťan, Ph.D.
doc. JUDr. Václav Stehlík, Ph.D.

ISBN 978-80-210-8792-7
ISBN 978-80-210-8793-4 (online : pdf)
ISSN 2464-8485

TABLE OF CONTENTS

PREFACE

The conference "COFOLA = Conference for Young Lawyers" is annually organized by the Masaryk University, Faculty of Law from 2007. The main aim of this conference is to give floor to the doctoral students and young scientists at their early stage of career and enable them to present the results of their scientific activities.

Since 2013 COFOLA has been enriched by a special part called "COFOLA INTERNATIONAL". COFOLA INTERNATIONAL focuses primarily on issues of international law and the regulation of cross-border relations and is also oriented to doctoral students and young scientists from foreign countries. COFOLA INTERNATIONAL contributes to the development of international cooperation between students and young scientists from different countries. It constitutes the platform for academic discussion and develops scientific and presentation skills of young scientists. Such a platform for scientific debate beyond the boundaries of one country contributes to the global view on the law, which is so important in current days.

COFOLA INTERNATIONAL 2017 focused on resolution of international disputes. This area of law has become the core topic of COFOLA INTERNATIONAL since 2015. Disputes are inevitable part of international (cross-border) relationships. As in the previous years we called for papers from the areas of international commercial arbitration, international investment arbitration as well as alternative dispute resolution. The papers show that it is mainly the investment arbitration, which draw the attention of young academics. This year's conference proceedings unfortunately contain only a limited number of papers. There were more applications to the conference and more oral presentations. However, in order to ensure the quality of the conference proceedings, each written paper undergo double blind review process. Only the following papers have been recommended by reviewers for publication.

Klára Drličková *(scientific and organizational guarantor of COFOLA INTERNATIONAL)*

ABOUT THE AUTHORS

Michaela Garajová is a first year Ph.D. student at the Faculty of Law, Masaryk University, Department of European and International law. She specializes in international commercial arbitration. She focuses on the issue of corruption in international commercial arbitration.

Tereza Kyselovská graduated from the Faculty of Law, Masaryk University (2008 Mgr., 2011 JUDr. and 2013 Ph.D.), where she holds the position of assistant professor at the Department of International and European Law. She teaches courses in private international law, international commercial law and arbitration. In her research, she focuses on issues of private international law and intellectual property rights. Full list of her publications is available from: https://is.muni.cz/osoba/107801?lang=en

Ivan Puškár is a Ph.D. student at the Faculty of Law, Masaryk University, Department of European and International law. He is currently at the research exchange at the Law Faculty of University of Latvia. He focuses on relation between International Investment Law and European Union Law, Law of Treaties and International Customary Law. Full list of his publications is available from: http://www.muni.cz/people/450823/publications

Ondřej Svoboda serves as an officer at the Unit of International Law of the Ministry of Industry and Trade of the Czech Republic. He is also attending a Ph.D. course in international public law at the Faculty of Law of Charles University. His main fields of interest include international investment law, WTO law and the EU trade policy.

Nikola Šimková is a Ph.D. candidate at the Faculty of Economics, Technical University of Košice. In her research work, she is focused on economic efficiency of online dispute resolution in B2B relationships. She is currently on an internship at the Institute of Law and Technology, Faculty of Law and works as a business development manager for ICT at the Faculty of Informatics, Masaryk University. Full list of her publications is available from: www.researchgate.net/profile/Nikola_Simkova

Martin Švec is a Ph.D. candidate at Masaryk University, Faculty of Law. His dissertation focuses on the limits of energy security and international law instruments at states disposal. His expertise covers international energy law, investment law, international environmental law and international humanitarian law. In 2015 Martin Švec worked as a legal intern at the Energy Charter Secretariat in Brussels. Full list of his publications is available from: http://www.muni.cz/people/325544/publications

LIST OF ABBREVIATIONS

BIT	Bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
Court of Justice	Court of Justice as a part of the Court of Justice of the European Union
EU	European Union
ICJ	International Court of Justice
ISDS	Investor–state dispute settlement
IIA	International investment agreement
ILC	International Law Commission
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings, in effect since 10 April 2006
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965
NAFTA	North America Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
UN	United Nations

UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006
UNCTAD	United Nations Conference on Trade and Development
US	United States
Vienna Convention	Vienna Convention on the Law of Treaties of 23 May 1969
TEC	Treaty Establishing European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

CUSTOMARY RULES AS APPLICABLE LAW AND THEIR IMPORTANCE IN INVESTOR-STATE ARBITRATION

Ivan Puškár

Masaryk University
Faculty of Law, Department of International and European Law
Veveří 70, 611 80 Brno
Brno, Czech Republic
e-mail: ivan.puskar@mail.muni.cz

Abstract

One of the sources of international law listed in Article 38(1) of the Statute of the International Court of Justice is international custom, as evidence of a general practice accepted as law. This paper examines the contemporary role of custom in the present context of the proliferation of bilateral treaties on investment protection. It looks at three traditional reasons invoked by scholars to explain the continuing relevance of custom in contemporary international law. There exists also another cause for the importance of custom in investor-State arbitration, because international law is the applicable law in the majority of arbitration disputes. Therefore, the paper examines the question of the application of international law (including customary rules) by tribunals through the different ways arbitration claims can be introduced by foreign investors.

Keywords

International Custom; Bilateral Investment Treaties (BITs); international Investment Law; Investor-State Arbitration.

1 Introduction

International custom is the oldest and original source of not only international law but also of the law as such. International treaties are undoubtedly the most abundant source; however, it cannot be said that the importance of customary rules is currently in decline. One of the sources of international law listed in Article 38(1) of the Statute of the ICJ is "*international*

custom, as evidence of a general practice accepted as law". Unlike international treaties, international custom represents an unwritten rule of international law which states grant legally binding nature. Binding force of customary rules as a source of international law is not different from the binding force of international treaties. Custom differs with process of its creation and way of expression of agreement with it. The basis of the process of creating custom is the practice of states, which is usually not coordinated but rather spontaneous and responsive to the specific needs of states or external stimuli without conscious intention of creating new binding rules of international law. Interstate practice, as well as teaching of international law confirm that for the unwritten rule, to acquire the nature of legally binding rule must be met two fundamental elements of customary law-making. Material, consisting in its use in practice after a certain period (*usus longaevus*) and psychological which consist in conviction of states about its legal binding nature (*opinio iuris sive necessitatis*).[1] For the formation of customary law both elements are necessary.[2]

We may conclude that question of international customary law remains in the forefront of the teaching of international law. It is not only about question if and what influence have almost 3000 BITs on development of customary rules.[3] The report of UNCTAD estimates that 3 268 IIA provide investors with investment protection, including 2 923 BITs.[4] It is undeniable fact that for all practical purposes, treaties have become the fundamental source of international law in the area of foreign investment. The fact that international investment law is mostly based on bilateral treaties is clearly its most distinctive feature in comparison to other fields of international public

1 KLUČKA, Ján. *Medzinárodné právo verejné: (všeobecná a osobitná časť)*. 2nd ed. Bratislava: Iura edition, 2011, p. 113.

2 For more general information about international custom see: MALENOVSKÝ, Jiří. *Mezinárodní právo veřejné: obecná část a poměr k jiným právním systémům*. 6th ed. Brno: Doplněk, 2014, pp. 153–162; KLUČKA, Ján. *Medzinárodné právo verejné: (všeobecná a osobitná časť)*. 2nd ed. Bratislava: Iura edition, 2011, pp. 113–118; ČEPELKA, Čestmír, ŠTURMA, Pavel *Mezinárodní právo veřejné*. Praha: C. H. Beck, 2008, pp. 98–112; SHAW, Malcolm N. *International law*. 6th ed. New York: Cambridge University Press, 2008, pp. 72–93.

3 ŠTURMA, Pavel; BALAŠ, Vladimír. *Mezinárodní ekonomické právo*. 2nd ed. Praha: C. H. Beck, 2013, p. 340.

4 Recent Trends in IIAs and ISDS. *IIA Issues Note* [online]. 2015, No. 1 [accessed on 2017-03-20].

law. Why we should enquire about customary rules in today's international investment law when foreign investors can obtain sufficient protection under the huge amount of investment treaties that have been entered into by states in last decades? Why is custom relevant today when so many BITs exist? The main aim of this paper is to proof that customary rules still play important role in current international investment law and investor-State arbitration. The paper firstly looks at the three traditional reasons to explain the continuing relevance of custom in the field of investment law and further examines another existing cause for the importance of custom in investor-State arbitration, which is the fact that international law is the applicable law in the majority of arbitration disputes.

2 Role of Custom in International Law

The question of the relevance of international custom is part of a larger discussion currently ongoing in contemporary international law. Custom has historically had a dominant role as a source of international law, but the last century has been marked by the growing importance of treaties. Many writers often speak about the superiority of treaties over custom for the development of international law. There exists even the view that the custom has become irrelevant in modern international law.[5] Sign of the persisting relevance of custom today is the decision of the ILA to include the topic of Formation and Evidence of Customary International Law in its programme of work. Special Rapporteur Michael Wood explained in his report why custom is still relevant today: „*Even in fields where there are widely accepted 'codification' conventions, the rules of customary international law continue to govern questions not regulated by the conventions and continue to apply in relations with and between non-parties. Rules of customary international law may also fill possible lacunae in treaties, and assist in their interpretation."*[6] These are the same three reasons,

5 GOLDSMITH, J. L., POSNER, E. A. Understanding the Resemblance Between Modern and Traditional Customary International Law. *Virginia Journal of International Law*, 2000, Vol. 40, p. 640.

6 *First Report on Formation and Evidence of Customary International Law by Michael Wood, Special Rapporteur* [online]. International Law Commission, Sixty-fifth session, Geneva, 6 May–7 June and 8 July–9 August 2013 [accessed on 2017-03-20].

which had been identified by the Iran-US Claims Tribunal in the *Amoco case*.[7] We will look on these three traditional reasons from the international investment law perspective.

3 Customary Rules as the Applicable Legal Regime in the Absence of any BIT

Even though a large number of BITs exists, they still do not cover the whole spectrum of possible bilateral treaty relationships between states. BITs in fact only cover around 13% of the total bilateral relationship between states worldwide.[8] Since a BIT is only binding on the parties to the treaty and not on third parties,[9] the limited worldwide geographical scope of BITs necessarily results in gaps in the legal protection of foreign investments. Therefore, a foreign investor originating from a state that has not entered into a BIT with the state where the investment is made will not have the legal protection, which would have otherwise been offered under such a treaty. That investor will still get some legal protection under a contract or under the domestic legislation of the country where it made its investment. It will also benefit from existing customary rules in the field of international investment law. Thus, custom applies to all states, including those which have not entered into any BITs. Customary rules can be invoked by any foreign investor, irrespective of whether his state of origin has entered into a BIT with the country where he makes his investment. Custom is therefore the applicable legal regime in the absence of any BIT.

4 Explicit Reference to Customary Rules in International Investment Agreements

We can identify three situations of explicit reference to customary rules in IIAs. Custom is obviously important when a BIT makes explicit reference

7 Award of 14 July 1987, No. 310-56-3, Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited [online]. *Trans-Lex.org* [accessed on 2017-03-20]. Para. 112: *„The rules of customary law may be useful in order to fill in possible lacunae of the treaty, to ascertain the meaning of undefined terms in the text or, more generally, to aid the interpretation and implementation of its provision."*

8 GAZZINI, Tarcisio. The Role of Customary International Law in the Field of Foreign Investment. *Journal of World Investment & Trade*. 2007. Vol. 8, p. 691.

9 Article 34 of the Vienna Convention.

to the application of customary international law. Secondly, the relevance of custom is also undeniable when one of the parties to a treaty argues in pleadings that one provision must be interpreted taking into account custom. Customary rules are also significant when a treaty requires interpreting treaty provisions in accordance with customary international law.

4.1 Explicit Reference to Customary Rules

Several BITs make explicit reference to the application of customary international law. An arbitral tribunal must determine the content of a customary rule when faced with such a specific provision. Such a direct reference to custom is sometimes possible to find in fair and equitable treatment standard clauses ("FET"). This is a new phenomenon. Since there have been varied and conflicting interpretations on the scope and content of the FET standard, a number of states have started to explicitly specify in their BITs that the standard is not only linked to international law, but that it is in fact a reference to the minimum standard of treatment ("MST") under customary international law.[10] The good example of such a reaction is that of the NAFTA Parties regarding Article 1105. Under this provision, NAFTA Parties must accord a fair and equitable treatment under international law to foreign investors. NAFTA Parties issued in 2001 Notes of Interpretation of Certain Chapter 11 Provisions.[11] The Notes clarified, inter alia, that Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.[12] It should be noted that the US and Canada have subsequently followed this path in their respective model BITs (both adopted in 2004).

10 Fair and Equitable Treatment. *UNCTAD Series on Issues in International Investment Agreements II* [online]. United Nations, 2012, p. 29 [accessed on 2017-03-20].

11 ŠTURMA, Pavel; BALAŠ, Vladimír. *Ochrana mezinárodních investic v kontextu obecného mezinárodního práva*. Praha: Univerzita Karlova v Praze, Právnická fakulta, 2012, p. 30.

12 DUMBERRY, Patrick. A Few Observations on the Remaining Fundamental Importance of Customary Rules in the Age of Treatification of International Investment Law. *ASA Bulletin*. 2016, Vol. 34, p. 48.

4.2 Parties Referring to Customary Rules in Pleadings When the BIT Does not Mention the Concept

The majority of BITs include so-called autonomous or stand-alone FET clauses where the standard of treatment is not linked to international law or the MST under custom. In other words, these FET clauses contain no reference to custom. In a number of arbitration proceedings, the respondent states parties to these treaties have argued in their pleadings that such an autonomous FET clause should be nevertheless interpreted as a reference to the MST under custom.[13] Several South American countries have expressed the position that an autonomous FET clause is in fact a reference to the MST under customary international law. For example, Argentina has argued that the concept of FET „*does not establish an autonomous and independent standard, but rather coincides with the minimum standard*" under custom.[14] A number of states (including Czech Republic) have also argued, similar to Georgia in *Kardassopoulos case* that „*the FET standard is an objective standard synonymous with customary international law*".[15]

4.3 Treaties Requiring Tribunals to Interpret BITs Provisions in Accordance with Custom

The importance of custom is also undoubted when a tribunal is required to interpret treaty provisions in accordance with customary international law. A good example is the applicable law provision found in CETA, which provides: *"A Tribunal established under this Chapter shall render its decision consistent with this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties."*[16] Undoubtedly, rules of customary international law are applicable between Canada and EU Member States. There exist also another

13 DUMBERRY, Patrick. A Few Observations on the Remaining Fundamental Importance of Customary Rules in the Age of Treatification of International Investment Law. *ASA Bulletin*. 2016, Vol. 34, p. 50.

14 Final Award of 11 June 2012, ICSID Case No. ARB/03/23, EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentine Republic, para. 343 [online]. In: *italaw* [accessed on 2017-03-20].

15 Award of 3 March 2010, ICSID Case Nos. ARB/05/18 and ARB/07/15, Ioaniss Kardassopoulos v. The Republic of Georgia, para. 409 [online]. In: *italaw* [accessed on 2017-03-20].

16 Article X.27(1).

related situation where a tribunal would have to take into account the content of customary rule. Many BITs provide for the application of custom whenever it leads to a more favourable treatment than the one existing under the treaty.[17] In *Saipem case* the Tribunal indicated that pursuant to a similar clause found in the Italy - Bangladesh BIT, it would also apply general international law where it may provide a more favourable solution than the one arising from the BIT.[18] This is clearly a situation where a tribunal would have to apply customary rules. We can say that custom is increasingly referred to by states in investment treaties and in their pleadings. This phenomenon therefore demonstrates the continuing importance and relevance of customary rules in international investment law.

5 Customary Rules and Their Gap-filling Role

We will examine two closely related questions:

- What happens when there is a contradiction between a rule found in custom and a treaty rule?
- What happens when a BIT is silent on a particular legal issue?

Tribunals rarely address the issues arising out of the interaction between custom and investment treaties. What happens when there is a contradiction between a rule found in custom and a treaty rule? Under international law, treaty and custom have equal weight and inconsistencies are regulated by three principles: a) *lex specialis derogat legi generali*, b) *lex posterior derogat legi priori*, c) respecting the parties' intentions - where the parties intended to replace a rule deriving from one source of international law with another rule included in another source of law, the rule preferred by the parties will prevail.[19] In the *ADM case*, the Tribunal stated that the substantive obligations contained in a multilateral investment treaty (Section A of NAFTA Chapter 11) offers a form of *lex specialis* to supplement the under-developed standards of customary international law relating to the treatment of aliens

17 For example Article 3(5) of BIT between Czecho-Slovakia and Netherlands.

18 Award of 30 June 2009, ICSID Case No. ARB/05/07, Saipem S.p.A. v. The People's Republic of Bangladesh, para. 99 [online]. In: *italaw* [accessed on 2017-03-20].

19 MALENOVSKÝ, Jiří. *Mezinárodní právo veřejné: obecná část a poměr k jiným právním systémům*. 6th ed. Brno: Doplněk, 2014, pp. 171–174.

and property.[20] Based on this *lex specialis* position, a number of tribunals have affirmed that treaty obligations prevail over rules of customary international law.

This is usually the case, but there are some rather exceptional situations where another solution should prevail. There are some treaties, which expressly indicate that the investor should be entitled to receive any better treatment existing under international law, which includes custom.[21] Another exception are *jus cogens* norms, so those rules, which have a peremptory character. The parties cannot derogate in treaties (or contracts) from these norms.[22]

Another related question arises from situations when a BIT is silent on a particular legal issue. Solving this issue will involve using customary international law as well. Custom therefore operates in a residual way. This is the conclusion reached by the ILA Report on Fragmentation. The Report concluded that one of the applications of the principle of systemic integration[23] is *„that the parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms".*[24] The gap-filling role played by customary international law demonstrates its remaining importance.

6 Customary Rules as Applicable Law in Investor-State Arbitration

There exists also another cause for the importance of custom in investor-state arbitration. International law is the applicable law in the majority of arbitration disputes. International law also plays an important role whenever a tribunal decides a dispute submitted by an investor based on the host state's domestic law. This is the case in both situations when

20 Award of 21 November 2007, ICSID Case No. ARB (AF)/04/5, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, para. 117 [online]. In: *italaw* [accessed on 2017-03-20].

21 Already mentioned BIT between Czecho-Slovakia and Netherlands. As well other BITs concluded by the Netherlands.

22 Article 53 of the Vienna Convention.

23 Mentioned in Article 31(3)(c) of the Vienna Convention.

24 *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Report of the Study Group of International Law Commission* [online]. International Law Commission. Fifty-eighth session. Geneva, 1 May–9 June and 3 July–11 August 2006, para. 251 [accessed on 2017-03-20].

the domestic law explicitly mentions that the host state's law is the applicable law and when the domestic law is silent on this issue.[25] Tribunal applying international law in these circumstances will necessarily have to take into account relevant rules of customary international law, in relation to fact that the custom is one of the main sources of international law. Why rules of customary international law should be applicable even in situations where international law does not apply to a dispute? That could be the case in the context of an ad hoc arbitration where the parties to a contract have chosen domestic law of the host state. Normally, the tribunal should apply that law. ICSID tribunal should also normally apply domestic law under Article 42 of the ICSID Convention when such law has been expressly chosen by the parties in a state contract. The question would be as to whether a tribunal should also apply relevant customary rules in these circumstances. In my opinion, relevant rules of custom should apply to all cases, even those situations where a tribunal should normally apply domestic law to settle the dispute. As other authors noted, mandatory rules of international law, which provides an international minimum standard of protection for aliens, exists independently of any choice of law made for a specific transaction.[26] Therefore, the application of rules of customary international law should be deemed an entirely different question than that of the applicable law to a dispute. The transaction remains governed by the domestic legal system chosen by the parties, but this choice is checked by the application of a number of mandatory international rules such as the discriminatory taking of property of the arbitrary repudiation of contractual undertaking or the prohibition of denial of justice.[27]

BITs sometimes contain choice of law clauses which indicate the law applicable to settle disputes under the instrument. In the absence of a choice of law clause in the BIT, the question of the applicable law is determined by the tribunal in accordance with the rules under which the proceeding is conducted. When a tribunal is applying international law in these circumstances it will

25 SCHREUER, Christoph, MALINTROPPI, Loretta, REINISCH, August, SINCLAIR Anthony. *The ICSID Convention; A Commentary*. 2nd ed. Cambridge: UP, 2009, p. 606.

26 *Ibid*, p. 587.

27 DUMBERRY, Patrick. A Few Observations on the Remaining Fundamental Importance of Customary Rules in the Age of Treatification of International Investment Law. *ASA Bulletin,* 2016, Vol. 34, p. 59.

necessarily have to take into account relevant rules of customary international law. For example, according to the Tribunal in *LG & E case*, applying the rules of international law is to be understood as comprising the general international law, including customary international law, to be used as an instrument for the interpretation of the BIT.[28] As we have mentioned before, ICSID tribunals have to apply Article 42 of the ICSID Convention whereby the parties to a BIT are free to choose the applicable law. If the BIT is silent on the issue, the tribunal must apply the host State's domestic law and such rules of international law as may be applicable. What are these rules? The Tribunal in *Waste Management case*[29] came to the conclusion that applicable rules of international law included the rules of treaty interpretation contained in the Vienna Convention. Even if the parties to a BIT decide to choose domestic law as the applicable law, this choice will not operate to exclude the application of international law rules on treaty interpretation. This is because Articles 31 and 32 of the Vienna Convention are generally recognized as rules of customary international law on matters of treaty interpretation.

7 Conclusion

We have explained the reasons why custom remains fundamentally important to all actors involved in investor-state arbitration. We proved that customary rules continue to play an important role in investment protection because of its nature as an applicable legal regime in the absence of any BIT. This role will remain important also in the future. In any event, an increasing number of BITs are making explicit reference to the concept. If we would assume that had custom really become an obsolete concept, states would simply stop making reference to it. But this is not what is currently happening. Customary rules have never been so popular in bilateral investment treaties.

28 Decision on Liability of 3 October 2006, ICSID Case No. ARB/02/1, LG & E Energy Corp., LG & E Capital Corp., and LG & E International, Inc. v. Argentine Republic, para. 89 [online]. In: *italaw* [accessed on 2017-03-20].

29 Award of 2 June 2000, ICSID Case No. ARB(AF)/98/2, Waste Management, Inc. v. United Mexican States, para. 9 [online]. In: *italaw* [accessed on 2017-03-20]. See also partial Award of 7 August 2002, UNCITRAL Case, Methanex Corporation v. United States of America, para. 100. [online]. In: *italaw* [accessed on 2017-03-20].

List of references

Books

ČEPELKA, Čestmír, ŠTURMA, Pavel. *Mezinárodní právo veřejné*. Praha: C. H. Beck, 2008.

KLUČKA, Ján. *Medzinárodné právo verejné: (všeobecná a osobitná časť)*. 2nd ed. Bratislava: Iura edition, 2011.

MALENOVSKÝ, Jiří. *Mezinárodní právo veřejné: obecná část a poměr k jiným právním systémům*. 6th ed. Brno: Doplněk, 2014.

SHAW, Malcolm N. *International law*. 6th ed. New York: Cambridge University Press, 2008.

SCHREUER, Christoph, MALINTROPPI, Loretta, REINISCH, August, SINCLAIR Anthony. *The ICSID Convention; A Commentary*. 2nd ed. Cambridge: UP, 2009.

ŠTURMA, Pavel, BALAŠ, Vladimír. *Mezinárodní ekonomické právo*. 2nd ed. Praha: C. H. Beck, 2013.

ŠTURMA, Pavel, BALAŠ, Vladimír. *Ochrana mezinárodních investic v kontextu obecného mezinárodního práva*. Praha: Univerzita Karlova v Praze, Právnická fakulta, 2012.

Chapters in books, articles (also from electronic databases), conference papers

DUMBERRY, Patrick. A Few Observations on the Remaining Fundamental Importance of Customary Rules in the Age of Treatification of International Investment Law. *ASA Bulletin*, 2016, Vol. 34, pp. 41–61.

GAZZINI, Tarcisio. The Role of Customary International Law in the Field of Foreign Investment. *Journal of World Investment & Trade,* 2007, Vol. 8, pp. 691–715.

GOLDSMITH, J. L., POSNER, E. A. Understanding the Resemblance Between Modern and Traditional Customary International Law. *Virginia Journal of International Law,* 2000, Vol. 40, pp. 639–672.

Electronic sources

Fair and Equitable Treatment. *UNCTAD Series on Issues in International Investment Agreements II* [online]. United Nations, 2012. Available from: http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf

First Report on Formation and Evidence of Customary International Law by Michael Wood, Special Rapporteur [online]. International Law Commission, Sixty-fifth session, Geneva, 6 May–7 June and 8 July–9 August 2013. Available from: http://legal.un.org/docs/?symbol=A/CN.4/663

Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Report of the Study Group of International Law Commission [online]. International Law Commission. Fifty-eighth session. Geneva, 1 May–9 June and 3 July–11 August 2006 [online]. Available from: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf

Recent Trends in IIAs and ISDS. *IIA Issues Note* [online]. 2015, No. 1. Available from: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

Court decisions and arbitral awards

Arbitral awards

Award of 14 July 1987, No. 310-56-3, Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited [online]. In: *Trans-Lex.org.* Available from: https://www.trans-lex.org/231900/_/iran-us-claims-tribunal--amoco-int-l-finance-corp-v-iran-15-iran-us-ctr-at-189-et-seq/#toc_0

Award of 2 June 2000, ICSID Case No. ARB(AF)/98/2, Waste Management, Inc. v. United Mexican States [online]. In: *italaw.* Available from: http://www.italaw.com/cases/1158

Decision on Liability of 3 October 2006, ICSID Case No. ARB/02/1, LG & E Energy Corp., LG & E Capital Corp., and LG & E International, Inc. v. Argentine Republic [online]. In: *italaw.* Available from: http://www.italaw.com/cases/documents/623

Award of 21 November 2007, ICSID Case No. ARB (AF)/04/5, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States [online]. In: *italaw.* Available from: http://www.italaw.com/cases/91

Award of 30 June 2009, ICSID Case No. ARB/05/07, Saipem S.p.A. v. The People's Republic of Bangladesh [online]. In: *italaw*. Available from: https://www.italaw.com/cases/951

Award of 3 March 2010, ICSID Case Nos. ARB/05/18 and ARB/07/15, Ioaniss Kardassopoulos v. The Republic of Georgia [online]. In: *italaw*. Available from: http://www.italaw.com/cases/599

Final Award of 11 June 2012, ICSID Case No. ARB/03/23, EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentine Republic [online]. In: *italaw*. Available from: http://www.italaw.com/cases/372

Partial Award of 7 August 2002, UNCITRAL Case, Methanex Corporation v. United States of America [online]. In: *italaw*. Available from: https://www.italaw.com/cases/683

Legal acts

Comprehensive Economic and Trade Agreement [online]. *European Commission*. Available from: http://ec.europa.eu/trade/policy/in-focus/ceta/

Convention on the Settlement of Investment Disputes between States and Nationals of Other States [online]. *ICSID*. Available from: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm

North America Free Trade Agreement [online]. NAFTANow.org. Available from: http://www.naftanow.org/agreement/default_en.asp

Statute of the International Court of Justice [online]. *ICJ*. Available from: http://www.icj-cij.org/en/statute

Vienna Convention on the Law of Treaties of 23 May 1969 [online]. *United Nations Treaty Collection*. Available from: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

CURRENT STATE OF TRANSPARENCY IN INVESTMENT ARBITRATION: PROGRESS MADE BUT NOT ENOUGH

Ondřej Svoboda

Charles University**,** Faculty of Law, Department of International Law/
Ministry of Industry and Trade, Department of International Law
nám. Curieových 901/7, 116 40**/** Politických vězňů 20, 112 49
Praha, Czech Republic
e-mail: ondrej.svobod@gmail.com

Abstract

The issue of transparency is one of the main causes of the "backlash" against investor-state arbitration that we observe today. Perceived lack of transparency has led to notorious terms such as "secret trade courts" and "proceedings behind closed doors". During the recent years, the international community thus has initiated a series of steps to improve the situation. The main effort was concentrated in the UNCITRAL, which prepared important instruments to address the concerns of insufficient transparency and participation in proceedings. However, as the paper illustrates, challenges regarding this area still remain and are worth further attention.

Keywords

Investment Arbitration; ISDS; Transparency Rules; Transparency Convention; UNCITRAL.

1 Introduction[1]

The system of international investment law providing protection of foreign investors and dispute settlement for their claims against host states is facing serious challenges regarding its legitimacy. Inadequate transparency is one of the most common complains aimed at the system. The current ISDS is historically based on the concept of commercial arbitration.

1 The opinions expressed in this article do not represent official position of the Ministry of Industry and Trade of the Czech Republic and are just and only of the author.

Because of this background, confidentiality of proceedings has been one of the main features of investment arbitrations. Gradually, this confidential nature has become heavily criticised because investment disputes frequently concern public interest such as protection of public health or environment but at the same time offer little or no opportunities for public participation.[2] For these reasons, the general public and interest groups such as various non-governmental organisations have pressed for access not only to the final awards, but also to proceedings. This call is not limited only to investment law. In all major fields of international law, e.g. environmental law or human rights law, demands for more transparent institutions and procedures have recently been raised.[3]

Under such circumstances, the trend toward open and participatory investment arbitrations intensified and consensus that the public should have the right to be informed about a notification of a claim, an access to proceedings and a final award was established in the international community.[4] Based on this perception, many states undertook individual steps regarding transparency in investment disputes which they were involved in. The Parties of NAFTA, which had already provided a certain level of transparency were the "pioneers" in this way in the 90 s.[5] One of the more recent examples is the Czech Republic. The Ministry of Finance of the Czech Republic decided to voluntarily publish all awards as one of the parties of a dispute.[6]

---

2 VAN HARTEN, Gus. Reforming the system of international investment dispute settlement. In: LIM, Ching L. (ed.). *Alternative Visions of the International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2016, p. 111.

3 PETERS, Anna. The Transparency Turn of International Law. *The Chinese Journal of Global Governance,* 2015, Vol. 1, No. 1, p. 4.

4 ORELLANA, Marcos A. The Right of Access to Information and Investment Arbitration. *ICSID Review,* 2011, Vol. 26, No. 2, p. 85.

5 NAFTA in Articles 1128 and 1129 provides for access to the documents and submissions on issues of interpretation by non-disputant parties. These submissions are regularly posted on the web. Non-disputant private parties have no access to the proceedings unless there is consent of the parties to open or the Tribunal in its discretion opens up the proceedings to *amici curiae*. Also, NAFTA's Annex 1137.4 provides for the possibility of making the awards public. Further headway in transparency under NAFTA was made through the NAFTA Free Trade Commission in 2001, 2003 and 2004.

6 *Přehled rozhodčích nálezů z řízení vedených proti ČR* [online]. Ministerstvo financí ČR [accessed on 2017-03-08].

Various modern model BITs contain provisions promoting various levels of transparency.[7] The issue has been also a subject of analytical works conducted by various international organisations.[8]

As all these separate steps were welcomed initiatives, the conviction that multilateral approach is needed to tackle the issue of lack of transparency prevailed in international community. Responding to the development, leading arbitral institutions, particularly ICSID and UNCITRAL, initiated revisions of the procedural rules. The most important step towards more transparency was undertaken within the negotiations in the UNCITRAL and its Working Group II on Arbitration and Conciliation ("Working Group II") since October 2010 until December 2014, which resulted in the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration[9] ("Transparency Rules") and subsequently the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration[10] ("Transparency Convention").

This paper will identify, describe and evaluate the latest development regarding level of transparency in investment arbitration. It will not, however, discuss possible pros and cons of increased transparency for reasons of limited space. Rather, the focus of the paper will concentrate on perception of transparency, newly emerged concerns, existing gaps and recently-created instruments as possible solutions to address this issue. The ultimate aim is therefore to demonstrate that despite the increasing commitment of states to transparency, it remains serious issue undermining the current investment dispute settlement system. The purpose in not to analyse the exact level of transparency in recent instruments, rather this paper observes

7 Particularly US Free Trade Agreements as well as the new model US Bilateral Investment Treaty and Canada's Foreign Investment Promotion and Protection Agreements serve as good examples.

8 Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures. *OECD Working Papers on International Investment* [online]. 2005, No. 1 [accessed on 2017-03-21]; Transparency. *UNCTAD Series on Issues in International Investments Agreements* II [online]. New York and Geneva: United Nations, 2012 [accessed on 2017-03-21].

9 UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration effective from 1 April 2014 [online]. *UNCITRAL* [accessed on 2017-03-21].

10 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) [online]. *UNCITRAL* [accessed on 2017-03-21].

the leading trends and puts them into broader context. Bearing in mind this goal, the paper will consider the latest treaties and recent collective effort in the UNCITRAL. On the basis of non-applicability of the Transparency Convention majority of investment treaties remain silent on this issue. The "old" investment treaties cannot be easily renegotiated. Therefore this contribution will conclude in the light of evidence that lack of transparency is still a serious concern.

This paper is structured as follows: first section outlines the manner in which transparency is addressed in current instruments, second part considers other State practice in this area, and third section addresses hurdles to overcome on the way to create a fully transparent system. Final section provides brief conclusions.

2 Multilateral Approach under the UNCITRAL Auspices

ICSID and UNCITRAL Arbitration Rules are the most common arbitration rules for ISDS.[11] Until recently, in terms of transparency there was quite significant difference between the both sets of rules. Under ICSID Arbitration Rules the ICSID Secretariat publicly registers all cases. The register includes the name of the parties involved in the dispute, the date of registration and a short description of the dispute. Regarding awards, the ICSID Secretariat encourages the parties to the dispute to make the awards public as it may publish an award only when both parties give their consent.[12] ICSID Arbitration Rules were amended in 2006 to incorporate greater transparency and opportunity for public access to investment arbitrations.[13]

In contrast, UNICTRAL Arbitration Rules[14] did not contain any requirement for registration and award could be "only with the consent of the parties".[15]

11 According to available data in January 2015, the ICSID Rules were applied in 57,81 % of total cases and the UNCITRAL Rules in 30,05 % of total cases. See *UN Convention on Transparency in Treaty-based Investor-State Arbitration* [online]. European Parliamentary Research Service. 2016, p. 1 [accessed on 2017-03-17].

12 Article 48(5) of the ICSID Convention.

13 ZOELLNER, Carl-Sebastian. Lightning Crashes or Mere Ray of Light? Recent Developments Regarding Transparency in ICSID Proceedings. *Transnational Dispute Management*. 2006, Vol. 3, No. 5, pp. 6–9.

14 UNCITRAL Arbitration Rules (as revised in 2010) [online]. *UNCITRAL* [accessed on 2017-03-17].

15 Article 32(5) of the UNCITRAL Rules.

Important step in direction to update UNCITRAL Arbitration Rules in this direction was decision of the UNCITRAL Commission to entrust its Working Group II with the task to prepare the set of new rules providing transparency in international investment proceedings.[16] As a result of the work, the Transparency Rules were approved and came into effect on 1 April 2014. They primarily open hearings to the public allow interested parties to make submissions to the tribunal and make public near-comprehensively related documents, including the investor's request for consultation and arbitration, the submission of parties, and all tribunal decisions in disputes under investment treaties. The Transparency Rules represents the most comprehensive set of procedural rules in existence governing transparency in treaty-based investor-State disputes.[17] However, the Transparency Rules apply only in relation to disputes arising out of investment treaties concluded on or after 1 April 2014.

For this reason the UNCITRAL Commission assigned the Working Group II to continue with the transparency with a preparation of an instrument on the application of the Transparency Rules to already existing investment treaties, taking into account the fact that the aim of the convention was to give those states wishing to make the Transparency Rules applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other states would use the mechanism offered by the convention.[18]

One year later, the Working Group II presented a tool by which Parties to investment treaties concluded before 1 April 2014 can express their consent to be bound by the Transparency Rules. The instrument is the Transparency Convention and was opened for signature in Port Louis in Mauritius on 17 March 2015 after adopted by the UN General Assembly

16 Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010), paras. 7–11 [online]. *UNCITRAL* [accessed on 2017-03-15].

17 SALASKY, Julia, MONTINERI, Corinne. UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. *ASA Bulletin*, 2013, Vol. 31, No. 4, p. 795.

18 Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session (New York, 3-7 February 2014), para. 3 [online]. *UNCITRAL* [accessed on 2017-03-15].

on 10 December 2014.[19] For entry into force, the Transparency Convention requires to be ratified by three Parties at least. However, since March 2015 until now, only two countries, Mauritius in June 2015 and Canada in December 2016, accessed to the Transparency Convention.[20] Thus, after two and half years since Transparency Convention's opening to signature, it has not yet entered into force.[21] This state of play noticeably does not correspond with the widely expressed interest and participation of states in preparation of the Transparency Convention in the UNCITRAL.

3 Positive Trends in Investment Treaty Making Practice

In 88% of concluded treaties between 2010 and 2013 transparency remains unregulated. In addition, neither the Austrian, British, Korean, Chinese, Colombian, Dutch, French, German, Italian, Korean nor Russian model treaty provides any regulation of procedural transparency issues in 2014.[22] Also majority of all previous investment treaties is similarly unregulated. This silence led to the adoption of unpredictable and at times inconsistent approaches.[23] The following examples prove that current treaty practice influenced indeed by work in the UNCITRAL changes this approach. Many countries recently adopted a reference to the Transparency Rules in its model investment treaties and investment chapters in free trade agreements.

The EU has started to use the Transparency Rules as a basis for the provisions on transparency in its trade agreements and they are also included in its *de facto* model investment chapter - the text proposal to the US in the Transatlantic

19 *Resolution adopted by the General Assembly on 10 December 2014* [online]. UN General Assembly [accessed on 2017-03-15].

20 *Status. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)* [online]. UNCITRAL [accessed on 2017-03-15].

21 Another 16 countries nevertheless signed the Convection: Belgium, Congo, Finland, France, Gabon, Germany, Iraq, Italy, Luxembourg, Madagascar, Netherlands, Sweden, Switzerland, Syria, United Kingdom, and United States.

22 MOLLESTAD, Cristoffer, N. See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement. *PluriCourts Research Paper*, 2014, No. 14–20, p. 39.

23 SHIRLOW, Esmé. Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration. *ICSID Review*, 2016, Vol. 31, No. 3, p. 626.

Trade and Investment Partnership negotiations.[24] The Transparency Rules are already in CETA and final text of the EU - Vietnam Free Trade Agreement.[25] The text of the EU - Singapore Free Trade Agreement does not contain direct reference, however it provides similarly high level of transparency as previous EU agreements.[26]

The current practice shows that the EU Members States embraced the concept as well. In its new model investment treaty adopted by the Czech government in November 2016 the Czech Republic incorporated a provision which applies the Transparency Rules to ISDS.[27] Slovakian - Iran investment treaty[28] concluded in January 2016 applies the Transparency Rules on disputes against Slovakia while Iran "shall duly consider" their application in arbitration against it.[29] The last example of the EU Member States' effort in this area is the investment treaty between France and Columbia[30] from 2014, which stipulates that the Transparency Rules shall apply to ISDS initiated under this agreements.[31]

Positive development can be also observed in proliferation of transparency commitments among states which have never been its strong proponents

24 Transatlantic Trade and Investment Partnership. Trade in Services, Investment and E-Commerce, Chapter II – Investment, Article 18 [online]. *European Commission* [cit. 2017-03-25].

25 EU - Vietnam Free Trade Agreement, Chapter 8 - Trade in Services, Investment and E-Commerce, Article 20 [online]. *European Commission* [accesed on 2017-03-25].

26 EU - Singapore Free Trade Agreement, Chapter 9 – Investment Protection, Section B, Article 9.22, Annex 9-G [online]. *European Commission* [accessed on 2017-03-25].

27 Article 8(5): "*The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to disputes submitted under this Article.*"

28 Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments [online]. *Investment Policy Hub* [accessed on 2017-09-03].

29 Article 14(4): "*The UNCITRAL rules on transparency in treaty-based investor-State arbitration shall apply to any international arbitration proceedings initiated against the Slovak Republic pursuant to this Agreement. The Islamic Republic of Iran shall duly consider the application of the UNCITRAL rules on transparency in treaty-based investor-State arbitration to any international arbitration proceedings initiated against the Islamic Republic of Iran pursuant to this Agreement."*

30 Acuerdo entre el gobierno de la Republica de Colombia y el gobierno de la Republica Francesa sobre el fomento y proteccion reciprocos de inversiones [online]. *Investment Policy Hub* [accessed on 2017-09-03].

31 Article 15(12): "*Sujeto al acuerdo de las partes contendientes, el Reglamento de la CNUDMI sobre la Transparencia se aplicara a los arbitrajes iniciados en virtud del presente articulo.*"

via (mega)regional trade and investment negotiations. For instance, this is the case of Japan. Japan was effectively forced, as a one of the future Party to Trans-Pacific Partnership to accept such commitment under this treaty.[32]

In sum, many countries have embraced transparency as one of its benchmark or as a necessary part of deal in conclusion of investment treaty with these states. Provisions governing transparency thus have become rather standard part of procedure rules. In this light, one would expect that the described trend will be supportive of widespread use of UNCITRAL tools. Despite the logic the next part paints somehow less optimistic picture.

4 Alas, There are Still Significant Gaps

The recent development described above illustrates how far the recognition of transparency as an essential element of investment arbitration has now come. The progress was allowed by a broad consensus that proceedings should be more open to the public. However, the reform is not yet finished and various obstacles persist.[33]

A *prima facie* problem of the Transparency Rules is their application only to arbitration proceeding based on an investment treaty concluded on or after 1 April 2014. This significantly limits the otherwise far-reaching transparency obligations under the Transparency Rules.[34] For this reason, the role of the Transparency Convention is essential as an instrument to apply the Transparency rules to some 3000+ investment treaties. As was shown above, the Transparency Convention has not still attracted interest of a sufficiently large number of states and regional economic integration organizations, such as the EU or ASEAN, to accede. Above all, the case of the EU is peculiar as the majority of the EU Member States as well

32 Trans-Pacific Partnership, Chapter 9 – Investment, Article 9.24 [online]. *Office of the United States Trade Representative* [accessed on 2017-03-22].

33 TRAKMAN, Leon; MUSAYELYAN, David. Caveat Investors – Where do Things Stand Now? In: LIM, Ching L. (ed.). *Alternative Visions of the International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2016, pp. 99–100.

34 SCHILL, Stephan. Editorial: Five Times Transparency in International Investment Law. *Journal of World Investment and Trade*, 2014, Vol. 15, No. 3–4, p. 25.

as the European Commission are in favour of wide-ranging transparency.[35] Without participation of the EU Member States, the majority of investment treaties remain uncovered by the Transparency Rules.

In the context of the Transparency Convention it is important to highlight numerous reservations available for states. These exceptions allow the Parties to exclude the Transparency rules from the application of any specific rules other than the UNCIRAL Arbitration Rules or may exclude the binding force of the unilateral declaration of the Transparency Convention.[36] The both reservations can be made by a Party at any time and their far-reaching impact has potential to undermine the purpose *per se* of the document.

This situation is highlighted by other serious circumstances. According to UNCTAD, the Energy Charter Treaty has become the most frequently invoked investment agreement[37] with its 101 publicly known investment arbitration cases.[38] However, the Energy Charter Treaty as a treaty signed in 1994 does not contain any provision regarding transparency. It neither requires investors to publicly manifest their intention to launch a dispute. Even the Energy Charter Secretariat collects information about concluded and pending investment cases solely on the basis of public sources and "invites

35 The issue is on what basis the EU and its Member States can sign the Transparency Convention as a scope of EU exclusive competence in investment is disputed and subject of court proceeding before the Court of Justice. Research service of the European Parliament further provides that *"the Commission proposal [requesting authority to sign the Transparency Convention] is currently blocked in the Council by a few Member States, for some due to political opposition to transparency in arbitration proceedings, and for others because of competence concerns. Moreover, some Member States consider that qualified majority voting cannot be used to approve the decision. On the competence issue, the Council Legal Service, supported by some Member States argued that, as the Convention would apply to both foreign direct investment and portfolio investments, and because of its application to the Energy Charter Treaty to which both the EU and all Member States are parties, the Convention would fall under both EU and Member State competence and would thus be a mixed agreement. Consequently, the need for an empowerment clause to allow Member States to sign the Convention was challenged. A compromise by the Latvian Presidency to permit the EU to sign 'in as far as its competence allowed', was rejected*." *UN Convention on Transparency in Treaty-based Investor-State Arbitration* [online]. European Parliamentary Research Service Brussels, 2016, p. 2 [accessed on 2017-03-17].

36 EULER, Dimitrij. Transparency Rules and the Mauritius Convention: A Favourable Haircut of the State's Sovereignty in Investment Arbitration. *ASA Bulletin*, 2016, Vol. 34, No. 2, p. 364.

37 Recent Trends in IIAs and ISDS. *IIA Issues Note* [online]. 2015, No. 1, p. 7 [accessed on 2017-03-25].

38 *Investment Dispute Settlement Cases* [online]. International Energy Charter [accessed on 2017-03-20].

any additional information or clarifications on specific cases" admitting that the actual number of disputes filed is likely to be higher as they are kept confidential.[39] Taking into account the difficulties of possible amendments modifying the text in this regard – which would require consent and ratification by all 54 Signatories or Contracting Parties – it is highly unlikely that situation will improve in the foreseeable future. Therefore, the most used platform for investment claims will remain outside of the transparency effort.

Furthermore, significant state actors such as Singapore, Republic of Korea, India, China and Japan to a great extent avoid express transparency regulation in all or the majority of their investment treaties.[40] Despite the new trend towards transparency, some states attitude has not changed since it had been described three years ago as "an almost unilateral lack of regulation increasing the procedural transparency of investment arbitration."[41]

5 Conclusion

It has been universally acknowledged that more transparency and participation in the proceedings can enhance the acceptability and credibility of the system of investment protection. It is evident that increased transparency can contribute to effectiveness and continued recognition of the system of investment dispute settlement in the form of arbitration as a legitimate instrument to solve investment disputes between investors and states.

This paper identifies significant progress which has been made in recent years in the issue of transparency by the UNCITRAL - the Transparency Rules followed by the Transparency Convention. Also other initiatives in forms of bilateral or multilateral treaties providing transparency are under negotiation. However, this study also finds continuing gaps and challenges to overcome in order to achieve a transparent system of investment dispute settlement. A key issue is application of transparency standards to "old" investment treaties via the broadly accepted the Transparency Convention.

39 *Investment Dispute Settlement, Latest Statistics (updated as of 1 January 2017)* [online]. International Energy Charter [accessed on 2017-03-20].

40 E.g. the China–Japan–Korea Trilateral Investment Agreement signed in 2012 does not contain any provisions on transparency.

41 MOLLESTAD, Cristoffer, N. See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement. *PluriCourts Research Paper*, 2014, No. 14–20, pp. 71–72.

In this case, despite all visible effort at international fora and public declarations of state representatives and officials, the current number of state parties or only signatories to this treaty serves as a worthy reality check. Even though the Transparency Convention becomes applicable, its real impact remains to be seen depending on frequency of using broadly available exceptions from the convention by State parties in individual cases. Other major issue, without a feasible solution, is the Energy Charter Treaty whose changes are under current conditions unimaginable.

It was argued by various authors that the Transparency Rules together with the Transparency Convention will bring about a paradigm shift in ISDS.[42] Unfortunately, the high expectations associated with the both documents broadly supported by various states in the Working Group II and subsequently at the General Assembly of the UN remain hitherto unfulfilled and inadequate transparency has still a potential to further undermine legitimacy of the system of investment arbitration. To conclude, a certain degree of progress was made, but confidentiality as opposed to transparency continues to be prevailing principle in the current investment dispute settlement system and it stays as it is in coming years.

Acknowledgements

This paper was created within the project of the Faculty of Law of the Charles University Progres Q04 – "Právo v měnícím se světě".

List of references

Chapters in books, articles (also from electronic databases), conference papers

EULER, Dimitrij. Transparency Rules and the Mauritius Convention: A Favourable Haircut of the State's Sovereignty in Investment Arbitration. *ASA Bulletin,* 2016, Vol. 34, No. 2, pp. 355–374.

42 SHIRLOW, Esmé. Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration. *ICSID Review,* 2016, Vol. 31, No. 3, pp. 651–652; SCHILL, Stephan. Editorial: The Mauritius Convention on Transparency. *Journal of World Investment and Trade*, 2015, Vol. 16, No. 2, p. 202.

MOLLESTAD, Cristoffer, N. See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement. *PluriCourts Research Paper*, 2014, No. 14–20, pp. 1–161.

ORELLANA, Marcos A. The Right of Access to Information and Investment Arbitration. *ICSID Review*, 2011, Vol. 26, No. 2, pp. 59–106.

PETERS, Anna. The Transparency Turn of International Law. *The Chinese Journal of Global Governance*, 2015, Vol. 1, No. 1, pp. 3–15.

SALASKY, Julia, MONTINERI, Corinne. UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. *ASA Bulletin*, 2013, Vol. 31, No. 4, pp. 774–796.

SCHILL, Stephan. Editorial: Five Times Transparency in International Investment Law. *Journal of World Investment and Trade*, 2014, Vol. 15, No. 3–4, pp. 363–374.

SCHILL, Stephan. Editorial: The Mauritius Convention on Transparency. *Journal of World Investment and Trade*, 2015, Vol. 16, No. 2, pp. 201–204.

SHIRLOW, Esmé. Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration. *ICSID Review*, 2016, Vol. 31, No. 3, pp. 622–654.

TRAKMAN, Leon, MUSAYELYAN, David. Caveat Investors – Where do Things Stand Now? In: LIM, Ching L. (ed.). *Alternative Visions of the International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2016, pp. 69–98.

VAN HARTEN, Gus. Reforming the System of International Investment Dispute Settlement. In: LIM, Ching L. (ed.). *Alternative Visions of The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2016, pp. 103–129.

ZOELLNER, Carl-Sebastian. Lightning Crashes or Mere Ray of Light? Recent Developments Regarding Transparency in ICSID Proceedings. *Transnational Dispute Management*, 2006, Vol. 3, No. 5, pp. 1–17.

Electronic sources

Investment Dispute Settlement Cases [online]. International Energy Charter. Available from: http://www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/

Investment Dispute Settlement, Latest Statistics (updated as of 1 January 2017) [online]. International Energy Charter. Available from: http://www.energycharter.org/what-we-do/dispute-settlement/cases-up-to-1-january-2017/

Přehled rozhodčích nálezů z řízení vedených proti ČR [online]. Ministerstvo financí ČR [cit. 2017-03-08]. Available from: http://www.mfcr.cz/cs/zahranicni-sektor/ochrana-financnich-zajmu/arbitraze/prehled-rozhodcich-nalezu

Recent Trends in IIAs and ISDS. *IIA Issues Note* [online]. 2015, No. 1. Available from: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4–8 October 2010) [online]. *UNCITRAL*. Available from: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session (New York, 3–7 February 2014) [online]. *UNCITRAL*. Available from: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

Resolution adopted by the General Assembly on 10 December 2014 [online]. United Nations General Assembly. Available from: https://treaties.un.org/doc/source/docs/A_RES_69_116-E.pdf

Status. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) [online] UNCITRAL. Available from: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html

Transatlantic Trade and Investment Partnership. Trade in Services, Investment and E-Commerce [online]. *European Commission*. Available from: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

Trans-Pacific Partnership [online]. *Office of the United States Trade Representative* Available from: https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text

Transparency and Third Party Participation in Investor-State Dispute Settlement Procedure. *OECD Working Papers on International Investment*. [online]. 2005, No. 1. Available from: https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf

Transparency. *UNCTAD Series on Issues in International Investments Agreements II* [online. New York and Geneva: United Nations, 2012. Available from: http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf

Transparency Registry (a repository for the publication of information and documents in treaty-based investor-State arbitration) [online]. UNCITRAL. Available from: http://www.uncitral.org/transparency-registry/en/introduction.html

Transparency. *UNCTAD Series on Issues in International Investments Agreements II* [online]. New York and Geneva: United Nations, 2012. Available from: http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf

UN Convention on Transparency in Treaty-based Investor-State Arbitration [online]. European Parliamentary Research Service, Brussels, 2016. Available from: http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/573948/EPRS_ATA(2016)573948_EN.pdf

UNCITRAL Arbitration Rules (as revised in 2010) [online]. *UNCITRAL*. Available from: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html

UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration effective from 1 April 2014 [online]. *UNCITRAL*. Available from: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html

Legal acts

Acuerdo entre el gobierno de la Republica de Colombia y el gobierno de la Republica Francesa sobre el fomento y proteccion reciprocos de Inversiones [online]. *Investment Policy Hub.* Available from: http://investmentpolicyhub.unctad.org/Download/TreatyFile/4771

Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments [online]. *Investment Policy Hub.* Available from: http://investmentpolicyhub.unctad.org/IIA/CountryBits/191

Convention on the Settlement of Investment Disputes between States and Nationals of Other States [online]. *ICSID*. Available from: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm

Energy Charter Treaty [online]. *International Energy Charter*. Available from: http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/

EU – Canada Comprehensive Economic and Trade Agreement [online]. *European Commission*. Available from: http://ec.europa.eu/trade/policy/in-focus/ceta/

EU - Singapore Free Trade Agreement [online]. *European Commission*. Available from: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961

EU - Vietnam Free Trade Agreement [online]. *European Commission*. Available from: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf

North America Free Trade Agreement [online]. NAFTANow.org. Available from: http://www.naftanow.org/agreement/default_en.asp

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) [online]. *UNCITRAL*. Available from: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html

THE EUROPEAN COMMISSION'S ATTEMPTS TO DISMANTLE EUROPEAN INTERNAL NETWORK OF BILATERAL INVESTMENT TREATIES: FROM *AMICUS CURIAE* TO INFRINGEMENT PROCEEDINGS

Martin Švec

Masaryk University
Faculty of Law, Department of International and European Law
Veveří 70, 611 80
Brno, Czech Republic
e-mail: martin.svec@mail.muni.cz

Abstract

The European Commission believes that intra-EU BITs are not necessary, since the EU single market rules, in particular freedom of establishment and free movement of capital, already provide solid legal framework for cross-border European investments. Moreover, intra-EU BITs violate principle of non-discrimination, since additional investment protection is provided only to investors whose states concluded international investment agreements. Although the Commission has intervened via amicus curiae in numerous investment proceedings, tribunals have always found that they held jurisdiction over disputes and applied relevant BITs. Since the European Commission cannot change the legal status of concluded international agreements, it has triggered Article 258 of the TFEU. This paper seeks to analyse various legal tools at disposal of the European Commission to dismantle European internal network of BITs. Special attention is given to the infringement proceeding launched by the Commission against 5 EU Member States in 2015.

Keywords

EU Law; Investment Law; BITs; Infringement Proceedings; Amicus Curiae; Court of Justice; International Investment Agreements; Vienna Convention; Termination of International Treaty.

1 Introduction

On 1 May 2004 ten new countries, including three former Soviet republics, four former satellites of the Soviet Union, former Yugoslav republic and two Mediterranean islands, joined the EU. Bulgaria and Romania jointed the EU three years later and Croatia acceded to the EU in 2013. This historic enlargement has brought together developed European capital exporting countries and states, which in 1990 s underwent dramatic economic and social transformation.

In order to attract foreign capital, eastern European states provided foreign investors with broad range of substantive and procedural rights embodied in BITs. Enlargement of the EU has brought together capital exporting countries and capital importing countries. System of various international investment agreements became part of the single market.

However, from the European Commission's perspective, intra-EU BITs are inherently discriminatory. Investment arbitration provides an advantage to investors whose states concluded intra-EU BITs. The European Commission believes that intra-EU BITs are not necessary, since the EU single market rules, in particular freedom of establishment and free movement of capital, already provide solid legal framework for cross-border European investments.

Although the Commission has intervened via *amicus curiae* in numerous investment proceedings, tribunals have always found that they held jurisdiction over disputes arising from intra-EU BITs and applied relevant BITs. Thus, the EU launched the infringement proceedings against five EU Member States pursuant to Article 258 of the TFEU.

This paper seeks to analyse various legal tools at disposal of the European Commission to dismantle European internal network of BITs. Part 2 provides a broader overview of investment law with a special focus on intra-EU BITs. Part 3 assesses various legal tools to dismantle internal network of intra-EU BITs. Part 4 traces infringement proceedings initiated by the Commission in July 2015 against Austria, Romania, Slovakia, Sweden and the Netherlands. The author does not address the question

of enforcement of awards rendered by investment tribunals and their possible incompliance with the EU state aid rules, since the paper is primarily focused on the eradication of the system of existing intra EU BITs.[1]

2 Intra-EU Bilateral Investment Treaties

2.1 Investment Law

The main purpose of investment law is to provide foreign investors with protection of their investments against interference by the host state.[2] Subsequent flow of capital is supposed to enhance economic development of countries concerned. The use of BITs has spread to the point that they are widely used throughout the investment world today.[3]

The source of contemporary investment law is BITs, investment chapters of free trade agreements[4] and regional treaties.[5] According to the UNCTAD there were 2620 international investment agreements in force in 2016.[6]

Investment law provides for substantive guarantees, such as national treatment and most favoured nation, as well as fair and equitable treatment ("FET") and full protection and security. Moreover, investment treaties usually provide for protection against unreasonable or discriminatory measures and require that expropriation has to take place only against prompt, effective and adequate compensation under due process of law and in public interest. Most of the international investment agreements include ISDS. Instead of relying on their home states to espouse their claims through diplomatic protection, investors have a direct access to an arbitration.[7]

1 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid, pp. 43–47 [online]. In: *EUR-Lex* [accessed on 2017-05-05].

2 SORNARAJAH, M. *The International Law and Foreign Investment*. 3rd ed. New York: Cambridge University Press, 2010, pp. 1–7.

3 GOMÉZ, Katia Fach. Rethinking the Role of Amicus Curiae. *Fordham International Law Journal* [online]. 2012, Vol. 35, No. 2, Article 3, p. 524 [accessed on 2017-05-05].

4 For instance NAFTA, CETA, US – Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), US – Peru Trade Promotion Agreement.

5 For instance NAFTA, Energy Charter Treaty.

6 *Investmetnt Policy Hub* [online]. UNCTAD [accessed on 2017-05-05].

7 DOLZER, Rudolf, SCHREUER, Christoph. *Principles of International Investment Law*. Oxford: Oxford University Press, 2008, pp. 220–222.

2.2 Intra-EU Bilateral Investment Treaties

There are around 190 BITs concluded between EU Member States (intra-EU BITs).[8] Most of these BITs were concluded in the 1990 s between "old EU Member States" and "new EU Member States" before their accession to the EU in 2004,[9] 2007[10] and 2013.[11]

It is worthy to mention that there are only two intra-EU BITs concluded between "old EU Member States", in particular Germany-Portugal BIT and Germany-Greece BIT. Since the "old EU Member States" were members of the same regional economic integration organization, i.e. European Economic Community, and their relations have been based on a mutual trust, there was no need to adopt additional protection of foreign investors, no risk was perceived. More in general, foreign investment policy of capital exporting countries has been traditionally focused on less developed, less stable, capital importing countries.[12]

However, accession of central and eastern European countries to the EU brought the network of BITs to the European internal market. Being protected by BITs, investors from "old EU Member States" got access to markets of "new EU Member States". Intra-EU BITs became very popular among EU investors. According to the UNCTAD the overall number of intra-EU investment arbitrations totalled 147 by the end of 2016, i.e. approximately 19% of all known cases globally.[13]

2.3 Rationale behind the Request to Terminate Intra-EU BITs

The European Commission is of the opinion that reassurance provided for by BITs to foreign investors from other EU Member States is not necessary,

8 VACCARO-INSCIA, Matteo. Protection of Foreign Investments and the EU: Framework, Legal Risks and First Fruits. In: MIŠĆENIĆ, Emilia, RACCAH, Aurélien. *Legal Risks in EU Law: Interdisciplinary Studies on Legal Risk Management and Better Regulation in Europe*. Cham: Springer International Publishing, 2016, p. 120.

9 Following countries: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia

10 Following countries: Bulgaria, Romania

11 Following countries: Croatia

12 SORNARAJAH, M. *The International Law and Foreign Investment*. 3rd ed. New York: Cambridge University Press, 2010, pp. 1–7.

13 *Investor-State Dispute Settlement: Review of Developments in 2016* [online]. UNCTAD, 2017 [accessed on 2017-05-05].

since the EU single market rules, such as freedom of establishment and free movement of capital, already provide solid legal framework for cross-border investments. According to *Jonathan Hill*, EU Commissioner for Financial Services, Financial Stability and Capital Markets Union, intra-EU BITs are outdated and as Italy and Ireland have shown by already terminating their intra-EU BITs, no longer necessary in a single market of 28 Member States.[14]

The Commission considers intra-EU BITs to be incompatible with EU law, in particular BITs overlap and conflict with the EU regulatory framework applicable to cross-border investments. Moreover, intra-EU BITs violate principle of non-discrimination, since additional investment protection is provided only to investors whose states concluded international investment agreements.[15] The Commission further argues that the arbitration mechanism foreseen in the intra-EU BITs (ISDS) excludes both national courts and especially the Court of Justice from ensuring the full effect and application of EU law.[16]

Criticism against the network of intra-EU BITs has to be read against the backdrop of intensified global criticism and rising distrust towards investment law and ISDS in particular.[17] The backlash against investment law and ISDS comes from both NGOs and governments. Critics of the current system of investment law highlight that IIAs undermine states regulatory powers especially in relation to health, safety or environment. Investment law is criticized for lack of transparency,[18] lack of ethics and lack of legitimacy.[19]

14 *Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties* [online]. European Commission, 2015 [accessed on 2017-05-05].

15 *Ibid.*

16 Commission Staff Working Document on the Movement of Capital and the Freedom of Payments. SWD (2017) 94 final, Brussels, 20. 2. 2017 [online]. *European Commission* [accessed on 2017-05-05].

17 *The ISDS Controversy: How We Got Here and Where Next* [online]. International Centre for Trade and Sustainable Development, 2016 [accessed on 2017-05-05].

18 SCHILL, Stephan. Transparency as a Global Norm in International Investment Law [online]. *Kluwer Arbitration Blog*. 2014 [accessed on 2017-05-05]; *A Response to the Criticism against ISDS* [online]. European Federation for Investment Law and Arbitration (EFILA), 2015 [accessed on 2017-05-05].

19 LISE, Johnson, SACHS, Lisa. *Entrenching, Rather than Reforming, a Flawed System* [online]. Colombia Center for Sustainable Investment. 2015 [accessed on 2017-05-05]; FRANCK, Susan D. Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions. *Fordham Law Review* [online]. 2005, Vol. 73, No. 4 [accessed on 2017-05-05].

From the global perspective, future of the investment law is uncertain. There is a broad consensus among international organizations (World Bank, UNCTAD, OECD, EU) and states that the current system of investment law does not keep pace with global changes as well as with changes within society and reform of the system is required.[20]

3 Existing Tools to Dismantle European Internal Network of BITs

3.1 Vienna Convention: International Law Perspective

According to Article 54 of the Vienna Convention, international treaty can be terminated in conformity with the provisions of the treaty, or by agreement between the parties. Unless there is consensus between contracting parties of an international treaty ("masters of a treaty"), such treaty cannot be terminated.

Regardless of alleged incompatibility of a treaty with EU law, the Commission does not have any legal instruments at its disposal to effectively intervene. Although the Member States are obliged to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties and facilitate the achievement of the EU's tasks,[21] room for manoeuvre is limited.

---

20 SCHILL, Stephan. Reforming International Investment Law: Institutional Change v. System-Internal Adaptation [online]. *Blog of the European Journal of International Law.* 2013 [accessed on 2017-05-05]; Reform of Investor-State Dispute Settlement: In Search of a Roadmap. *IIA Issues Note* [online]. 2013, No. 2 [accessed on 2017-05-05]; WAIBEL, Michael et al. (eds.). *The Backlash against Investment Arbitration: Perceptions and Reality*. Kluwer Law International, 2010; *European Commission Concept Paper: Investment in TTIP and Beyond – The Path For Reform. Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards an Investment Court* [online]. European Commission. 2015 [accessed on 2017-05-05]; European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) [online]. *European Parliament* [accessed on 2017-05-05]; SHAN, Wenhua. An Outline for Systematic Reform of the Investment Law Regime. *Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues* [online]. 2016, No. 170 [accessed on 2017-05-05]; *World Investment Report 2015: Reforming International Investment Governance.* [online]. UNCTAD. 2016 [accessed on 2017-05-05]; LESTER, Simon. Reforming the International Investment Law System. *Maryland Journal of International Law* [online]. 2015, Vol. 30, No. 1 [accessed on 2017-05-05].

21 Article 4(3) of the TEU.

First, the Commission may intervene in arbitral proceedings through *amicus curiae*. Second, the Commission may convince the EU member states to terminate intra-EU BITs. Third, the Commission may enforce Member States obligations arising out of the TFEU/TEU *via* infringement proceedings.

3.2 Amicus Curiae

It is difficult to provide a comprehensive definition of *amicus curiae*, since its features and functions have varied according to the historical moment and the country in which these *amicus curiae* interventions have been accepted.[22] Responding to controversy connected with national politics and direct effects on their regulatory powers, most of the international investment agreements and procedural rules of arbitration institutions incorporated principle of transparency. *Amicus curiae* is considered as one of its elements.[23] In general terms, non-party of the litigation proceedings may bring a factual or legal perspective that could assist the tribunal in the adjudication of the dispute.[24]

The scope of *amicus curiae* in investment arbitration varies according to the respective procedural rules. European Commission sought to participate in arbitrations governed by ICSID Arbitration Rules, UNCITRAL Arbitration Rules and SCC Arbitration Rules.[25]

According to the ICSID Arbitration Rules, non-disputing party may attend the hearings only with the consent of the parties.[26] However, tribunal may allow a non-disputing party to file a written submission regarding a matter within the scope of the dispute.[27] Tribunal's power to accept written

22 GOMÉZ, Katia Fach. Rethinking the Role of Amicus Curiae. *Fordham International Law Journal* [online]. 2012, Vol. 35, No. 2, pp. 523–524 [accessed on 2017-05-05].

23 *Ibid.*

24 Award of 11 December 2013, ICSID Case. No. ARB/05/20, Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, para 27 [online]. In: *italaw* [accessed on 2017-05-05].

25 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as of 1 January 2017 [online]. *Arbitration Institute of the Stockholm Chamber of Commerce* [accessed on 2017-05-05] ("SCC Arbitration Rules").

26 Article 32(2) of the applicable ICSID Arbitration Rule reads: *"The Tribunal shall decide, with the consent of the parties, which [non-disputing parties]… may attend the hearings."*

27 Article 37(2) of the applicable ICSID Arbitration Rules, BASTIN, Lucas. The Amicus Curiae in Investor–State Arbitration. *Cambridge Journal of International and Comparative Law,* 2012, Vol. 1, No. 3, paras. 208–234.

submissions is also given by Article 17 of UNCITRAL Arbitration Rules.[28] SCC Arbitration Rules include special Annex III applicable to investment arbitration, which explicitly provides that third party or a non-disputing treaty party may apply to the arbitral tribunal for permission to make a written submission in the arbitration.

Nonetheless, legal opinion of the Commission submitted via *amicus curiae* does not have to be followed by the tribunal. The Commission has intervened in number of publicly available investment arbitrations (based on intra-EU BIT) through *amicus curiae* submissions: *Eastern Sugar v. Czech Republic*,[29] *Electrabel v. Hungary*,[30] *AES v. Hungary*,[31] *Eureko v. Slovak Republic*,[32] *EURAM v. Slovakia*,[33] *U.S. Steel v. Slovakia*,[34] *Micula v. Romania*,[35] *Charanne v. Spain*,[36] *Eiser v. Spain*[37] It is worth mentioning that the tribunal in *RREEF v. Spain* refused to admit the Commission's submission.[38]

28 Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures. *OECD Working Papers on International Investment* [online]. 2005, No. 1, p. 9 [accessed on 2017-05-05].

29 Award of 12 April, SCC Case No. 088/2004, Eastern Sugar B.V. v. The Czech Republic [online]. In: *italaw* [accessed on 2017-05-05].

30 Award of 25 November 2015, ICSID Case No. ARB/07/19, Electrabel S.A. v. The Republic of Hungary [online]. In: *italaw* [accessed on 2017-05-05].

31 Award of 23 September 2010, ICSID Case No. ARB/07/22, Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary [online]. In: *italaw* [accessed on 2017-05-05].

32 Award of 7 December 2012, PCA Case No. 2008-13, Achmea B.V. v. The Slovak Republic [online]. In: *italaw* [accessed on 2017-05-05].

33 Decision on Jurisdiction of 22 October 2012, PCA Case No. 2010-17, European American Investmetn Bank AG v. Slovakia [online]. In: *italaw* [accessed on 2017-05-05].

34 *Further attempts by the European Commission to Eradicate intra-EU BITs* [online]. Volltera Fietta [accessed on 2017-05-05].

35 Award of 11 December 2013, ICSID Case. No. ARB/05/20, Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania. [online]. In: *italaw* [accessed on 2017-05-05].

36 Award of 21 January 2016, SCC Case No. 062/2012, Charanne B.V. and Construction Investmetns S.A.R.L. [online]. In: *Energy Charter Secretariat Database* [accessed on 2017-05-05].

37 Award of 4 May, ICISD Case No. ARB/13/36, Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain [online]. In: *italaw* [accessed on 2017-05-05].

38 Decision on Jurisdiction of 6 June 2016, ICSID Case No. ARB/13/30, RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain [online]. In: *italaw* [accessed on 2017-05-05].

The Commission has constantly argued that EU law automatically prevails over the non-conforming BITs provisions when EU either primary or secondary legislation is in conflict with some of BIT's provisions.[39] According to the Commission, intra-EU BITs are source of inequality between EU citizens as well as a hindrance to the harmonized development of EU law. Moreover, BITs should be terminated in so far as the matters under the agreements fall under EU competence.[40]

Although the Commission argues that intra-EU disputes shall be subject to the EU law and thus, investment tribunals do not have jurisdiction, tribunals have always found that they held jurisdiction over disputes arising from intra-EU BITs and applied international investment agreements instead of EU law and national law.

3.3 Termination of Intra-EU BITs

The European Commission stated in its written submission (via *amicus curiae*) in *Eureko/Achmea v. Slovakia*: *"Eventually, all intra-EU BITs will have to be terminated. Commission services intend to contact all Member States again, urging them to take concrete steps soon."*[41]

In response to the Commission's call several EU Member States have already terminated all their intra-EU BITs, namely Italy and Ireland.[42] Poland appointed an inter-ministerial group to review legal and international aspects of Poland's investment policy. This group is assigned to revise and analyse binding IIAs to which Poland is a contracting party in light of EU law, economic interests of Poland and economic interests of Polish investors.[43] Denmark proposed to other EU Member States a mutual termination of respective intra-EU BITs in May 2016, responding to the EU Pilot

39 Based on application of Articles 30 and 59 of the Vienna Convention.

40 Award of 12 April, SCC Case No. 088/2004, Eastern Sugar B.V. v. The Czech Republic [online]. In: *italaw* [accessed on 2017-05-05].

41 Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, PCA Case No. 2008-13, Achmea B.V. v. The Slovak Republic [online]. In: *italaw* [accessed on 2017-05-05].

42 *Commission Asks Member States to Terminate their Intra-EU Bilateral Investment Treaties* [online]. European Commission, 2015 [accessed on 2017-05-05].

43 ORECKI, Marcin. Bye-Bye BITs? Poland Reviews Its Investment Policy [online]. In: *Kluwer Arbitration Blog*. 2017 [accessed on 2017-05-05].

procedure initiated by the Commission.[44] Romanian Parliament approved and sent to the Romanian President the Law allowing for the termination of its intra-EU BITs for promulgation.[45]

3.4 Infringement Proceedings by Virtue of Article 258 TFEU

According to Article 17 of the TEU the Commission ensures application of the Treaties. If the Commission considers that a Member State has failed to fulfil its obligation under the Treaties, it can initiate infringement proceedings against the state concerned. Infringement proceedings aim at securing the rule of EU law, contribute to the effective functioning of the EU policies and serve as a public law arena in which the different interests of the EU institutions should be mediated.[46]

Before the proceedings are formally initiated the Commission usually seeks to find a solution compliant with EU law through an informal bilateral dialogue (called EU Pilot). The EU Pilot is a scheme including online database and communication tool designed to resolve compliance problems without having to resort to infringement proceedings.[47]

The infringement procedure is comprised of several stages and its legal basis is set out in Articles 258 - 260 of the TFEU: a) an informal letter to the Member State, b) a letter of formal notice to the Member State that it is in breach of EU law, c) the submission of observations by the Member State, d) the issuing of a reasoned opinion by the Commission setting out the breach of EU law, e) a period for the member state to comply with the reasoned opinion and submit observations, f) referral to the Court of Justice by the Commission, g) judgment by the Court of Justice.[48]

---

44 LAVRANOS, Nikos. The End of intra-EU BITs is Nearing [online]. In: *Arbitration Blog*. 2016 [accessed on 2017-05-05].

45 *Romania Set to Terminate its Intra-EU BITs* [online]. Volltera Fietta, 2017 [accessed on 2017-05-05]; BALTAG, Crina. Green Light for Romania to Terminate its Intra-EU Bilateral Investment Treaties [online]. In: *Kluwer Arbitration Blog*. 2017 [accessed on 2017-05-05].

46 CHALMERS, Damian; DAVIES, Gareth; MONTI, Glorgio. *European Union Law: Cases and Materials*. 2nd ed. Cambridge: Cambridge University Press, p. 315.

47 *EU Pilot* [online]. European Commission [accessed on 2017-05-05].

48 CHALMERS, Damian, DAVIES, Gareth, MONTI, Glorgio. *European Union Law: Cases and Materials*. 2nd ed. Cambridge: Cambridge University Press 2010, p. 332.

At the end of the procedure under Article 258 of the TFEU, the Court of Justice declares whether the EU Member State breached EU law. If the Commission considers that member state has not taken necessary measures to comply with the judgment of the Court of Jusitce, it may bring the case before the Court again. Subsequently, the Court of Justice may impose a lump sum or penalty on the state concerned.[49]

4 Infringement Proceedings as a Tool to Dismantle European Network of BITs

4.1 Legal Basis

First, the Commission argues that the access to investor–state arbitration constitutes direct discrimination against investors from other Member States that may not have the possibility to refer a dispute to arbitration. Discrimination based on nationality is incompatible with EU law.[50]

Second, the Commission claims that the ISDS contravenes Article 344 of the TFEU, since Member States shall resolve disputes regarding the interpretation or application of EU law through the referral to the Court of Justice.[51]

Third, Article 4(3) TEU imposes on EU Member States obligation *"to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties"*. In line with case - law of the Court of Justice, in particular *C249/06* and *C-205/06*, the Commission may argue that EU Member States did not take appropriate measures to eliminate incompatibilities of intra-EU BITs with EU law in order to fulfil obligations arising out of the Treaties.[52]

---

49 Article 260 of the TFEU.

50 *Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties* [online]. European Commission, 2015 [accessed on 2017-05-05].

51 Commission Staff Working Document on the Movement of Capital and the Freedom of Payments. SWD (2017) 94 final, Brussels, 20. 2. 2017 [online]. *European Commission* [accessed on 2017-05-05].

52 Judgment of the Court of Justice of 3 March 2009. Commission v. Sweden. C-249/06 [online]. In: *EUR-Lex* [accessed on 2017-05-05]; Judgment of the Court of Justice of 3 March 2009. Commission v. Austria. C-205/06 [online]. In: *EUR-Lex* [accessed on 2017-05-05].

4.2 EU Pilot

The Commission has initiated an informal bilateral dialogue with EU Member States (except Austria, Ireland, Italy, the Netherlands, Romania, Slovakia and Sweden), requesting these states to resolve issues concerning intra-EU BITs.[53] In response to the EU Pilot, several EU Member States have been reassessing their intra-EU investment policies, such as Poland and Denmark.[54]

4.3 Infringement Proceedings against Five EU Member States

On 18 June 2015, the Commission initiated infringement proceedings (by sending letters of formal notice) against Austria, the Netherlands, Romania, Slovakia and Sweden requesting them to terminate their intra-EU BITs.[55]

In response to the infringement proceedings, Romania has taken in March 2017 necessary legislative steps in order to terminate its intra-EU BITs.[56]

Austria, Finland, France, Germany and the Netherlands presented to the European Council their respective views and positions regarding the alleged incompatibility of intra-EU BITs with EU law through a "Non-paper" (the position was not presented in an official way, document has leaked).[57] The "Non-paper" proposes conclusion of an agreement among all EU Member States in order to phase out existing intra-EU BITs and provide EU investors with appropriate level of substantive and procedural protection.[58]

---

53 *Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties* [online]. European Commission, 2015 [accessed on 2017-05-05].

54 BALTAG, Crina. Green Light for Romania to Terminate its Intra-EU Bilateral Investment Treaties [online]. In: *Kluwer Arbitration Blog*. 2017 [accessed on 2017-05-05]; LAVRANOS, Nikos. The End of intra-EU BITs is Nearing [online]. In: *Arbitration Blog*. 2016 [accessed on 2017-05-05].

55 *Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties* [online]. European Commission, 2015 [accessed on 2017-05-05].

56 BALTAG, Crina. Green Light for Romania to Terminate its Intra-EU Bilateral Investment Treaties [online]. In: *Kluwer Arbitration Blog*. 2017 [accessed on 2017-05-05].

57 *The Future of ISDS in the EU: Leaked Non-Paper Reveals Proposal for EU-Wide Investment Agreement* [online]. Herbert Smith Freehills [accessed on 2017-05-05].

58 *Non-paper from Austria, Finland, France, Germany and the Netherlands on Intra-EU Investment Treaties* [online]. Transnational Institute [accessed on 2017-05-05].

With respect to intra-EU BITs, Austrian Ministry of Science, Research and Trade is of the opinion that termination of intra-EU BITs without their replacement would mean a deterioration of the investment climate in the EU and potential disadvantage for European investors over those from the third countries. Referring to the "Non-paper" from Austria, Finland, France, Germany and the Netherlands, Austria supports development of a new system of investment protection addressing shortcomings of the current system and providing Austrian's investors with appropriate investment protection.[59]

The European Commission has never publicly commented on the "Non-Paper". On the contrary, in September 2016 the Commission issued a reasoned opinion and infringement proceedings against five EU Member States entered the second stage. The Commission reiterated that the intra-EU BITs were aimed at reassuring investors and encouraging them to invest in central and eastern European counties undergoing the process of transition to a market economy. Intra-EU BITs concluded in 1990 s necessarily reflected their historical and political impetus. Since all EU member states are subject to the same rules, which equally provide protection for EU investors, intra-EU BITs only cause market distortions and are no longer needed.[60]

5 Conclusions

In its effort to dismantle the European internal network of BITs the European Commission has taken various steps including an intervention in arbitral proceedings through *amicus curiae* or diplomacy. However, an international treaty can be terminated in line with the principles set forth by the Vienna Convention only by consent of all Contracting Parties.[61] Thus, the Commission turned its attention to the EU Member States and their obligation to take any appropriate measures, general or particular, to ensure fulfilment of obligations arising out of the Treaties.[62] The Commission on 18 June 2015 launched infringement proceedings. However, regardless

59 *Bilaterale Investitionsschutzabkommen einschließlich Intra-EU-BITs* [online]. Bundesministerium für Wissenschaft, Forschung und Wirtschaft [accessed on 2017-05-05].

60 *September Infringements' Package: Key Decisions* [online]. European Commission, 2016 [accessed on 2017-05-05].

61 Article 54 of the Vienna Convention.

62 Article 4(3) of the TEU.

of alleged incompatibility of a treaty with EU law, neither the Commission nor the Court of Justice can replace required consensus on intra-EU BITs termination (as long as investment law does not fall within exclusive competence of the EU).

The existence of intra-EU BITs or eventually reformed system of investment protection providing for both substantive and procedural guarantees is an issue of great importance the EU and its competitiveness. Especially at the time when the EU seeks to improve Europe's investment environment and mobilize private investments, uncertainty over intra-EU BITs has negative impact on flow of private investments in the EU.[63]

European investors should watch closely steps taken by the European Commission and the EU member states in relation to the intra-EU BITs. Since domestic courts and national law do not offer the equivalent to investment arbitration, European investors should consider restructuring of their investments outside the EU.

List of references

Books

CHALMERS, Damian, DAVIES, Gareth, MONTI, Glorgio. *European Union Law: Cases and Materials.* 2nd ed. Cambridge: Cambridge University Press 2010.

DOLZER, Rudolf, SCHREUER, Christoph. *Principles of International Investment Law*. Oxford: Oxford University Press, 2008.

SORNARAJAH, M. *The International Law and Foreign Investment.* 3rd ed. New York: Cambridge University Press, 2010.

WAIBEL, Michael et al. (eds.). *The Backlash against Investment Arbitration: Perceptions and Reality*. Kluwer Law International, 2010.

63 *The Investment Plan for Europe* [online] European Commission, 2016 [accessed on 2017-05-05]; Strengthening European Investments for Jobs and Growth: Towards a Second Phase of the European Fund for Strategic Investments and a new European External Investment Plan. COM(2016) 581 final, 14. 9. 2016 [online] In: *EUR-Lex* [accessed on 2017-05-05]; *Conclusions on Tackling Bottlenecks to Investment Identified under the Third Pillar of the Investment Plan* [online]. Council of the European Union [accessed on 207-05-05].

Chapters in books, articles (also from electronic databases), conference papers

BASTIN, Lucas. The Amicus Curiae in Investor–State Arbitration. *Cambridge Journal of International and Comparative Law* [online]. 2012, Vol. 3, No. 1, pp. 208–234. Available from: http://heinonline.org/HOL/LandingPage?handle=hein.journals/cajoincla1 & div=61 & id=&page=

FRANCK, Susan D. Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions. *Fordham Law Review* [online]. 2005, Vol., 73, No. 4. Available from: http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4062 & context=flr

GOMÉZ, Katia Fach. Rethinking the Role of Amicus Curiae. *Fordham International Law Journal* [online]. 2012, Vol. 35, No. 2. Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1999374

LESTER, Simon. Reforming the International Investment Law System. *Maryland Journal of International Law* [online]. 2015, Vol. 30, No. 1. Available from: http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1633 & context=mjil

VACCARO-INSCIA, Matteo. Protection of Foreign Investments and the EU: Framework, Legal Risks and First Fruits. In: MIŠĆENIĆ, Emilia, RACCAH, Aurélien. *Legal Risks in EU Law: Interdisciplinary Studies on Legal Risk Management and Better Regulation in Europe*. Cham: Springer International Publishing, 2016, pp. 111–135.

Electronic sources

Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as of 1 January 2017 [online]. *Arbitration Institute of the Stockholm Chamber of Commerce*. Available from: http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf

A Response to the Criticism against ISDS [online]. European Federation for Investment Law and Arbitration (EFILA), 2015. Available from: http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf

BALTAG, Crina. Green Light for Romania to Terminate its Intra-EU Bilateral Investment Treaties [online]. In: *Kluwer Arbitration Blog*. 2017. Available from: http://kluwerarbitrationblog.com/2017/03/14/green-light-for-romania-to-terminate-its-intra-eu-bilateral-investment-treaties/

Bilaterale Investitionsschutzabkommen einschließlich Intra-EU-BITs [online]. Bundesministerium für Wissenschaft, Forschung und Wirtschaft. Available from: https://www.bmwfw.gv.at/Aussenwirtschaft/investitionspolitik/Seiten/BilateraleInvestitionsschutzabkommen.aspx

Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties [online]. European Commission, 2015. Available from: http://europa.eu/rapid/press-release_IP-15-5198_en.htm

Conclusions on Tackling Bottlenecks to Investment Identified Under the Third Pillar of the Investment Plan [online]. Council of the European Union, 2016. Available from: http://data.consilium.europa.eu/doc/document/ST-15314-2016-INIT/en/pdf

Commission Staff Working Document on the Movement of Capital and the Freedom of Payments. SWD (2017) 94 final, 20. 2. 2017 [online] In: *EUR-Lex*. Available from: https://ec.europa.eu/info/sites/info/files/2017-capital-market-monitoring-analysis_0.pdf

EU Pilot [online]. European Commission. Available from: http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm

European Commission Concept Paper: Investment in TTIP and Beyond – The Path for Reform. Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards an Investment Court [online]. European Commission, 2015. Available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

Further Attempts by the European Commission to Eradicate Intra-EU BITs [online]. Volltera Fietta. Available from: https://www.volterrafietta.com/further-attempts-by-the-european-commission-to-eradicate-intra-eu-bits/

ICSID Rules of Procedure for Arbitration Proceedings [online]. *ICSID*. Available from: http://icsidfiles.worldbank.org/icsid/icsid/StaticFiles/basicdoc/partF.htm

Investmetnt Policy Hub [online]. UNCTAD, 2017. Available from: http://investmentpolicyhub.unctad.org/

Investor-State Dispute Settlement: Review of Developments in 2016 [online]. UNCTAD, 2017. Available from: http://unctad.org/en/PublicationsLibrary/diaepcb2017d1_en.pdf

LAVRANOS, Nikos. The End of Intra-EU BITs is Nearing [online]. In: *Arbitration Blog*. 2016. Available from: <http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-bits-is- nearing/>

LISE, Johnson, SACHS, Lisa. *Entrenching, Rather than Reforming, A Flawed System* [online]. Colombia Center for Sustainable Investment, 2015. Available from: http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf

Non-paper from Austria, Finland, France, Germany and the Netherlands on Intra-EU Investment Treaties [online]. Transnational Institute. Available from: https://www.tni.org/files/article-downloads/intra-eu-bits2-18-05_0.pdf

Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures. *OECD Working Papers on International Investment* [online]. 2005, No. 1. Available from: https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf

ORECKI, Marcin. Bye-Bye BITs? Poland Reviews Its Investment Policy [online]. In: *Kluwer Arbitration Blog*. 2017. Available from: http://kluwerarbitrationblog.com/2017/01/31/bye-bye-bits-poland-reviews-investment-policy/

Reform of Investor-State Dispute Settlement: In Search of a Roadmap. *IIA Issues Note* [online]. 2013, No. 2 Available from: Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf,

Romania Set to terminate Its Intra-EU BITs. [online]. Volltera Fietta, 2017. Available from: http://www.volterrafietta.com/romania-set-to-terminate-its-intra-eu-bits/

SCHILL, Stephan. Reforming International Investment Law: Institutional Change v. System-Internal Adaptation [online]. In: *Blog of the European Journal of International Law*. 2013. Available from: https://www.ejiltalk.org/reforming-international-investment-law-institutional-change-v-system-internal-adaptation/

SCHILL, Stephan. Transparency as a Global Norm in International Investment Law [online]. In: *Kluwer Arbitration Blog*. 2014. Available from: http://kluwerarbitrationblog.com/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/

September Infringements' Package: Key Decisions [online]. European Commission, 2016. Available from: http://www.consilium.europa.eu/en/press/press-releases/2016/12/06-conclusions-tackling-bottlenecks/

SHAN, Wenhua. An Outline for Systematic Reform of the Investment Law Regime. *Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues* [online]. 2016, No. 170. Available from: https://academiccommons.columbia.edu/catalog/ac:201596

Strengthening European Investments for jobs and growth: Towards a second phase of the European Fund for Strategic Investments and a new European External Investment Plan. COM(2016) 581 final [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0581

The Future of ISDS in the EU: Leaked Non-Paper Reveals Proposal for EU-Wide Investment Agreement [online]. Herbert Smith Freehills. Available from: http://hsfnotes.com/publicinternationallaw/2016/05/31/the-future-of-isds-in-the-eu-leaked-non-paper-reveals-proposal-for-eu-wide-investment-agreement/

The Investment Plan for Europe [online] European Commission, 2016. Available from: https://ec.europa.eu/commission/sites/beta-political/files/2-years-on-investment-plan_en_2.pdf

The ISDS Controversy: How We Got Here and Where Next [online]. International Center for Trade and Sustainable Development, 2016. Available from: Available at: http://www.ictsd.org/opinion/the-isds-controversy-how-we-got-here-and-where-next

UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013 [online]. *UNCITRAL*. Available from: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf

VON KRAUSE, Christophe. The European Commission's Opposition To Intra-EU BITs And Its Impact On Investment Arbitration [online]. In: *Kluwer Arbitration Blog*. 2010. Available at: http://kluwerarbitrationblog.com/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration/?print=pdf

World Investment Report 2015: Reforming International Investment Governance. [online]. UNCTAD, 2016. Available from: http://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf

Court decisions and arbitral awards

Court of Justice

Judgment of the Court of Justice of 3 March 2009. Commission v. Sweden. C-249/06 [online]. In: *EUR-Lex*. Available from: http://curia.europa.eu/juris/liste.jsf?language=en & jur=C,T,F & num=249/06 & td=ALL

Judgment of the Court of Justice of 3 March 2009. Commission v. Austria. C-205/06 [online]. In: *EUR-Lex*. Available from: http://curia.europa.eu/juris/liste.jsf?language=en & num=C-205/06

Arbitral awards

Award of 12 April 2007, SCC Case No. 088/2004, Eastern Sugar B.V. v. The Czech Republic [online]. In: *italaw*. Available from: https://www.italaw.com/cases/368

Award of 23 September 2010, ICSID Case No. ARB/07/22, Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary [online]. In: *italaw*. Available from: https://www.italaw.com/cases/193

Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, PCA Case No. 2008-13, Achmea B.V. v. The Slovak Republic [online]. In: *italaw*. Available from: https://www.italaw.com/cases/417

Decision on Jurisdiction of 22 October 2012, PCA Case No. 2010-17, European American Investmetn Bank AG v. Slovakia [online]. In: *italaw*. Available from: https://www.italaw.com/sites/default/files/case-documents/italaw4226.pdf

Award of 7 December 2012, PCA Case No. 2008-13, Achmea B.V. v. The Slovak Republic [online]. In: *italaw*. Available from: https://www.italaw.com/cases/417

Award of 11 December 2013, ICSID Case. No. ARB/05/20, Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, para 334 [online]. In: *italaw*. Available from: https://www.italaw.com/cases/697

Award of 25 November 2015, ICSID Case No. ARB/07/19, Electrabel S.A. v. Republic of Hungary [online]. In: *italaw*. Available from: https://www.italaw.com/cases/380

Award of 21 January 2016, Charanne B.V. and Construction Investmetns S.A.R.L., SCC Case No. 062/2012 [online]. In: *Energy Charter Secretariat Database*. Available from: http://www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/34-charanne--the-netherlands-and-construction-investments-luxembourg-v-spain/

Decision on Jurisdiction of 6 June 2016, ICSID Case No. ARB/13/30, RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain [online]. In: *italaw*. Available from: https://www.italaw.com/cases/2317

Award of 4 May 2017, ICISD Case No. ARB/13/36, Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain [online]. In: *italaw*. Available from: https://www.italaw.com/cases/5721

Legal acts

Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015D1470

Convention on the Settlement of Investment Disputes between States and Nationals of Other States [online]. *ICSID*. Available from: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm

European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) [online]. *European Parliament*. Available from: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN

Vienna Convention on the Law of Treaties of 23 May 1969 [online]. *United Nations Treaty Collection*. Available from: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

PRIVACY AND CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION UNDER INSTITUTIONAL ARBITRATION RULES

Michaela Garajová

Masaryk University
Faculty of Law, Department of International and European Law
Veveří 70, 611 80
Brno, Czech Republic
E-mail: misa.garaj@gmail.com

Abstract

Before entering into international arbitration as a dispute resolution conflict parties consider all advantages and disadvantages of such a settlement. Privacy, among other advantages, is usually the reason why parties choose to settle their dispute in international arbitration. The ability to avoid third persons from attending the arbitral proceedings in order to protect their commercial interests in the public eye is only for their benefit. Although the privacy is not what many users of international arbitration frequently assume. The extent of privacy in international arbitration is limited, but there is another way how to impose an obligation to protect sensitive and confidential information which are used and produced for the purpose of arbitration proceedings. The institutional arbitration rules are attempting to address this matter increasingly. The objective of this paper is to clarify concepts of institutional arbitration courts how they tackled the matter of privacy and confidentiality in relation to parties in their arbitration rules.

Keywords

Arbitration Rules; Confidentiality; International Arbitration; Privacy.

1 Introduction

The privacy and confidentiality are two of the main issues, which frequently arise in international commercial arbitration. Considering all information provided and disclosed by the parties before a dispute arises between them and mainly during the dispute resolution, the international commercial arbitration is conceived as a way of a settlement that can keep these

often sensitive information out of the public eye. Indeed, the international commercial arbitration is defined as a private way of dispute resolution which is based on an arbitration agreement between two parties who are willing to reveal their inner knowledge for one and only purpose. Because of the private nature of arbitration, legal practitioners have claimed that the parties and other involved participants are obliged to keep the information disclosed during proceedings confidential. Nevertheless, the principle of privacy should not be confused with the principle of confidentiality. The fact that the arbitration process is generally private does not automatically lead to the conclusion that is also confidential. The existence, extent and basis of privacy and confidentiality in international commercial arbitration depend on confidential agreement between parties, arbitration rules, decisions of arbitration tribunals and state courts. The parties often come to arbitration with an assumption of not only having their dispute settled in private, but also with the confidence that documents and information disclosed for this purpose will be treated as classified.

The aim of this paper is to analyse the regulation of privacy and confidentiality under various arbitration rules as well as to clearly distinguish the duty of confidentiality from the notion privacy. At the same time, it is necessary to set out which rules presume the existence of these principles, to which stages of the arbitration process they can be possibly applied and what potential exceptions, commercial and legal, can occur. The parties who choose the arbitration as a dispute resolution of their conflict often do not realize what issues they should settle before entering such proceedings. They wrongly assume the existence and application of principles providing some sort of protection, yet that is not always the case.

2 Privacy and Confidentiality, the Cornerstones of the International Commercial Arbitration

The privacy and confidentiality are two of the cornerstones of the entire arbitration process. Their aim is to enable the parties to reach a legal conclusion of their dispute with no access of non-participants to the arbitral proceedings, but also to the information disclosed for the purpose of arbitration.[1]

1 ONG, Colin. Confidentiality of Arbitral Awards and the Advantage for Arbitral Institutions to Maintain a Repository of Awards. *Asian International Arbitration Journal* [online]. 2005, Vol. 1, p. 1 [accessed on 2017-10-19].

2.1 The Principle of Privacy and the Duty of Confidentiality

The principle of privacy is concerned with the right to attend the arbitration hearing, which is guaranteed only to the arbitrators, the parties and their representatives. The access of other persons depends on the consent of the parties. In other words, privacy does not relate to the whole arbitration process, but only to the hearing phase from which the parties may exclude non-participants even though the arbitration may affect their commercial claims.[2] In fact, this rationale was conceived in the court ruling in *Oxford Shipping Co Ltd v. Nippon Yusen Kaisha*: *"The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the arbitration hearing and the conduct of the arbitration (…)."*[3] On the contrary, the confidentiality is a state of secrecy attached to "items" capable of protection - information created, presented and used in the context of the arbitral process. Participants in arbitration are then bound by the duty not to disclose or use materials made and prepared for arbitration, transcripts and notes of evidence or the award.[4]

Court proceedings, as opposed to arbitration hearings, must be available for public access, with some exceptions. The argument of the private nature of arbitration is not dubious. As a matter of fact, the principle of privacy in arbitration proceedings is recognized by the majority of national laws and likewise by many rules of arbitration institutions. The discord occurs when defining the connection between the rule of confidentiality and the principle of privacy. The mutual relationship between these two rules is a subject of many scholarly debates, unfortunately, with no successful outcome. Both the confidentiality and the privacy have the same basis – to restrict the access of non-parties to the arbitration in order to avoid the exposure

2 TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of Commercial Disputes: International and English Law and Practice*. Oxford: Oxford University Press, 2007, p. 352.

3 Decision of the Queen's Bench Division, United Kingdom of 26 June 1984, Oxford Shipping Co Ltd v. Nippon Yusen Kaisha. In: TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of Commercial Disputes: International and English Law and Practice*. Oxford: Oxford University Press, 2007, p. 351.

4 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 5.

of confidential information.[5] The concept of privacy and the obligation of confidentiality are separate concepts in arbitration. The private nature of arbitration may not be generally assumed to guarantee or imply absolute confidentiality. Notwithstanding, there are jurisdictions which, even in case of absence of an expressed confidential clause in an arbitration agreement or in the arbitration rules, grant a protection to sensitive information and documents through the recognition of confidentiality as an implied element of the undoubted privacy in arbitration.

The duty of confidentiality can extend to the arbitration process in general or alternatively to the various information such as documents produced by the parties, transcripts, witness statements, expert reports, or summaries and work product of counsel, or the award. Additionally, the duty of confidentiality may be imposed on all parties involved, or only concern the arbitrators, the arbitral institution or the parties.[6]

As stated below, the general assumption of private nature of an arbitral hearing is broadly maintained in majority of institutional arbitration rules. Nevertheless, there are great differences between various rules in the matter whether the documents produced in proceedings ought to be protected by the duty of confidentiality. That is the reason why many parties, before accessing to the arbitration itself, are concerned with an issue where to locate the seat of their arbitration in order to predict what law will eventually apply. The applicable law may even set a duty for the parties to keep information disclosed and documents produced during the arbitration process confidential, despite the fact that the parties have not agreed on it or the applicable arbitration rules don't address the explicit positive duty on the parties. This is an approach recognized by certain jurisdictions which presume the existence of an implied duty of confidentiality.

5 MICKELSON LOUS, Camilla. Hush! Let's arbitrate – Discourse and Practice on the Question of Confidentiality in International Commercial Arbitration. *Tidsskrift for Forretningsjus* [online]. 2012, Vol. 3, p. 181 [accessed on 2017-10-19].

6 WAUTELET, Patrick. Confidentiality and Third Parties in International Commercial Arbitration: Some Preliminary Reflections. In: CAPRASSE, Olivier. *L'arbitrage et les tiers* [online]. Bruxelles: Bruylant, 2008, p. 4 [accessed on 2017-10-19].

2.2 Confidentiality as a Necessary Corollary of Privacy in Arbitration?

The duty of confidentiality as a necessary corollary of privacy has been perceived by the United Kingdom for decades.[7] Until the 1980's parties choosing arbitration to resolve their dispute considered the duty of confidentiality as an inner element of the private nature of the arbitration process.[8] The general perception was that the private nature of arbitration implicitly obliged participants in proceedings to maintain confidentiality without questioning its legal basis. This approach was justified by the fact that arbitral hearings were of a private matter between the parties and the arbitral tribunal, who were prohibited from sharing any details of their arbitration process with non-participants.[9] What was considered private, was thus considered confidential and bound by the duty of secrecy.

There are still many proponents of the opinion that the private nature of the arbitral process necessarily predicts confidential element of arbitration.[10] For example, *Fortier* argues that "… *the private nature of arbitral proceedings is well established and the concept of privacy would have no meaning if participants were required to arbitrate privately by day while being free to pontificate publicly by night*".[11] In fact, the parties may come to the conclusion that if the duty of confidentiality is not the necessary corollary of privacy, they are free to use the disclosed information for their benefit. Fortunately, there are several means how to prevent such a situation. The parties may come in to confidential

7 BLACKABY, Nigel, PARTASIDES, Constantin, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, p. 125.

8 KOURIS, Steven. Confidentiality: Is International Arbitration Losing One of its Major Benefits? *Journal of International Arbitration* [online]. 2005, Vol. 22, p. 127 [accessed on 2017-10-19].

9 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 1.

10 YOUNG, Michael, CHAMPAN, Simon. Confidentiality in International Arbitration: Does the Exception Prove the Rules? *ASA Bulletin* [online]. 2009, Vol. 27, p. 28 [accessed on 2017-10-19].

11 FORTIER, Yves L. The Occasionally Unwarranted Assumption of Confidentiality. *Arbitration International* [online]. 1999, Vol. 15, p. 131 [accessed on 2017-10-19].

agreement, where they state the existence and the extent of their duty. Alternatively, they are free to choose arbitration rules which explicitly refer to the existence and the extent of confidentiality.

On the other hand, jurisdictions which do not recognize an implied duty of confidentiality, perceive the principle of privacy as a fundamental aspect of the arbitration process.[12] This conception appeared in the High Court of Australia's decision *Esso Australia Resources Ltd v. The Honorable Sidney James Plowman and others.* The High Court stated as follows: *"… the efficacy of a private arbitration as an expeditious and commercially attractive form of dispute resolution depends, at least in part, upon its private nature".*[13] Although, the High Court of Australia declared the importance of the privacy in arbitration, it did not accept the notion of duty of confidentiality as a necessary corollary of privacy. In contrast, the High Court stressed out that the private nature of arbitration cannot be considered a presumption of an absolute obligation to maintain confidentiality.[14] A similar approach was adopted by courts in the US. According to their court ruling in *U.S. v. Panhandle Eastern Corp* information disclosed and documents provided during an arbitration process for the purpose of a dispute resolution could be free reachable for third parties and moreover, used in future court proceedings.[15]

International arbitration is a private process, but that does not automatically mean that it predicts the confidentiality. In case we would say that the duty of confidentiality is a necessary corollary of the private nature of arbitration, the established duty could apply only in one phase of the whole arbitration process, in arbitration hearings. However, the purpose of confidentiality is to avoid disclosure of any sensitive information, whether about the existence of the arbitration, materials from the arbitral hearing,

12 YOUNG, Michael; CHAMPAN, Simon. Confidentiality in International Arbitration: Does the Exception Prove the Rules? *ASA Bulletin* [online]. 2009, Vol. 27, p. 28 [accessed on 2017-10-19].

13 See the Decision of High Court of Australia, Australia of 7 April 1995, Esso Australia Resources Ltd v. Plowman [online]. *Australasian Legal Information Institute* [accessed on 2017-10-21].

14 BLACKABY, Nigel, PARTASIDES, Constantin, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration.* 6th ed. Oxford: Oxford University Press, 2015, p. 127.

15 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration.* Alphen aan den Rijn: Kluwer Law International, 2011, p. 41.

the award or the whole arbitration process. It appears that the English approach is more protective in its nature, but as it is defined, it causes unnecessary complexities. For the purpose of illustration, an arbitration between parties, who decided by their free will, not to expressly determine the duty of confidentiality, because of the probability of publishing information produced for the cause of arbitration. What if one of the parties decided to publish this information with knowledge that this action is not expressly forbidden? Would that mean that they broke the implied obligation of confidentiality which arises from the private nature of arbitration? The implied duty of confidentiality would override the party autonomy.

Institutional arbitration rules may, however, provide such basis for the duty of confidentiality. As it is noted below, the basis and the extent are various. Furthermore, the parties must bear in mind that there are limitations to a confidentiality resulting from duties to disclose that arise out of statute or public policy.

3 Various Application of Privacy and Confidentiality in Institutional Arbitration Rules

As mentioned above, the private nature of arbitration is not disputed. Institutional arbitration rules, which are different in many aspects, have the same basis - the hearings are accessible only to the arbitral tribunal, the parties and their representatives. Non-participants can be admitted to attend this phase of the arbitration proceeding only if the parties or/ and the arbitral tribunal agree upon. However, the possibility of keeping the proceedings confidential is various under institutional arbitration rules. Each rule either do not state any duty of confidentiality so they give an opportunity to the parties to agree upon or it provides the arbitral tribunal with authority to issue a final order. Or it expressly defines such obligation, provide its scope and extend.

The obligation of confidentiality and the scope of its exceptions is one of intractable problems in the international arbitration because there is no uniformity of practice among the rules of arbitral institutions. The problem is also that, although many institutional rules provide for

the confidentiality of the proceedings, virtually all have framed the exceptions to confidentiality in absolute terms, with no referee to decide when a particular exception applies or when a new exception ought to be created.[16]

I will examine several arbitration rules which are among the most used and applied rules around the world. While choosing which rules should be explored in this paper, I considered mainly the different approach to the principle of privacy and the duty of confidentiality. International arbitration rules as well as national laws on arbitration tend to fall into one of three categories. First of all, rules that contain no provisions on confidentiality e.g. the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules")[17] and UNCITRAL Arbitration Rules.[18] Secondly, rules which contain very limited provisions. Finally, rules that cater extensively for the protection of confidential information such as the London Court of International Arbitration Rules[19] ("LCIA Arbitration Rules").

3.1 LCIA Arbitration Rules

LCIA Arbitration Rules as many other arbitration rules contain a provision providing for the privacy of arbitration. What is striking to the eye is that the LCIA Arbitration Rules cater extensively for confidentiality which is not so frequent among arbitration rules. The main purpose of such an extensive regulation of the duty of confidentiality is to ensure that when the parties choose to arbitrate under the LCIA Arbitration Rules, the sensitive information and documents produced for its purposes will be protected even though the parties decide to move the seat of the arbitral tribunal out of the United Kingdom or other country that respects the implied duty of confidentiality.

16 HWANG, Michael, THIO, Nicholas. A proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self-Governing Code. *Journal of International Arbitration* [online]. 2012, Vol. 29, p. 137 [accessed on 2017-10-20].

17 2017 Rules of Arbitration of the International Chamber of Commerce [online]. *International Chamber of Commerce* [accessed on 2017-10-20].

18 UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013 [online]. *UNICITRAL* [accessed on 2017-10-20].

19 2014 London Court of International Arbitration Rules [online]. *London Court of International Arbitration* [accessed on 2017-10-20].

Before all else, the application of the principle of privacy. The LCIA Arbitration Rules[20] ensure that non-participants will not be allowed to attend the hearing phase of the arbitration. Although, the LCIA Arbitration Rules provide the parties with a right to agree on making the hearing accessible for public. In contrast to the 1998 LCIA Arbitration Rules[21], the parties do not need the approval or consent of the arbitral tribunal in order to allow such attendance.[22]

Besides the application of the principle of privacy the LCIA Arbitration Rules recognize the duty of confidentiality. This obligation is collaborating in Article 30 which is subdivided into three sections addressing the duties of the parties, the arbitral tribunal and the LCIA itself in respect of confidentiality.

In relation to the duty of confidentiality of the parties, the LCIA Arbitration Rules state an express obligation. Article 30.1 is considered as one of the best formulated provisions on confidentiality among various arbitration rules. First of all, the Article 30.1 sets out the scope and extent of the obligation of confidentiality as a general principle. This provision draws up the material scope relatively wide since the obligation refers to all involved materials and documents which, according to *Scherer, Richman and Gerbay*, include submissions of the parties, requests, responses or claims as well as expert reports, witness statements and other documents and evidence produced for the purpose of arbitration proceedings.[23] However, the duty of confidentiality applies only on materials created for the purpose of the arbitration and documents produced during the proceedings. In other words, the benefit of confidentiality is not granted to other materials that may be relevant to the dispute, but which have been used in the arbitration proceedings purpose yet.[24]

---

20 See Article 19.4 of the LCIA Arbitration Rules.

21 1998 London Court of International Arbitration Rules [online]. *London Court of International Arbitration* [accessed on 2017-10-20].

22 SCHERER, Maxi, RICHMAN, Lisa M., GERBAY, Remy. *Arbitrating under the 2014 LCIA Rules. A User's Guide.* Alphen aan den Rijn: Kluwer Law International, 2015, p. 226.

23 *Ibid.*, p. 366.

24 *Ibid.,* p. 365–367.

Nevertheless, the express duty of confidentiality is not recognized as absolute under the LCIA Arbitration Rules. The principle of confidentiality is subject to many exceptions – legal duty of a party, protection or pursue of a legal right, enforcement or challenge of an award in court proceedings. The extent is not only limited by the exceptions stated in LCIA Arbitration Rules, but it is subjected to the limits laid down by applicable law.[25]

Moreover, the LCIA Arbitration Rules respect the party autonomy even in the question of confidentiality. The parties have the authority to agree to opt-out of the application of the principle of confidentiality. Again, they have a right to state the scope of confidentiality of their own. However, the exceptions that are stated in the LCIA Arbitration Rules cannot be overruled by the parties, not even in this case.[26] If the parties agree to exclude the application of such provision, the LCIA Arbitration Rules retain to the parties to decide on the scope of such duty. This kind of situation is not typical for arbitration between private entities or trading partners, but it can occur in a dispute resolution between states or state corporations. Exactly these subjects may not wish to keep the arbitration proceedings confidential for various reasons, mostly because they are bound by the duty of transparency.

The wide protection of confidential information addressed by the LCIA Arbitration Rules is a consequence of the national law approach. LCIA is situated in London, the United Kingdom that, as mentioned above, is a strong supporter of confidentiality as an implied duty of the private nature of arbitration. The arbitration rules are providing the parties with the legal certainty that no matter where the arbitral tribunal under the LCIA Arbitration Rules will be situated, they will not only have their hearings private, but even the information strongly protected from possible leakage. In other words, the rules concede that with the principle of privacy comes the duty of confidentiality.

25 SCHERER, Maxi, RICHMAN, Lisa M., GERBAY, Remy. *Arbitrating under the 2014 LCIA Rules. A User's Guide*. Alphen aan den Rijn: Kluwer Law International, 2015, p. 366.

26 *Ibid.*, p. 365–367.

3.2 UNCITRAL Arbitration Rules

UNCITRAL Arbitration Rules provide, as opposed to the LCIA Arbitration Rules, a low protection relating to the confidentiality of arbitration. These rules do not include a general provision of confidentiality which would bind all participants to keep certain information as a secret. The main reason to reject the inclusion was the problematic formulation of such provision since it would require addressing questions such as when this duty arose and ended or what should be the personal and material scope.[27] However, an award, as a final and binding decision of the arbitral tribunal, is covered by limited protection in relation to the possibility of publication. From the material point of view, the only document that is about to be kept confidential based on explicit obligation is an award. Article 34(5) states: *"An award can be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority."*[28] The wording of this provision does not limit the right of the parties to disclose the award to consultants, although it is then their obligation to ensure that the recipient of the award will respect the duty under this provision.[29]

The duty of confidentiality is nevertheless subject to some exceptions, so even though there is an explicit positive duty of the parties, the truth is that is quite limited. The award may be made public if all parties give their consent, or when there is a legal duty of one party, in case of protection of a legal right or in relation to legal proceedings before a competent authority. The exceptions to the duty of confidentiality as they are formulated in UNCITRAL Arbitration Rules may seem as quite general, but the reason is that these rules were drafted mainly for *ad hoc* arbitration so they state only the most necessary aspects of arbitration which are usually the same for each and every case.[30]

---

27 WEBSTER, Thomas H. *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL-based Arbitration Rules*. London: Sweet and Maxwell, 2010, p. 509.

28 See Article 36(5) of the UNCITRAL Arbitration Rules.

29 WEBSTER, Thomas H. *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL-based Arbitration Rules*. London: Sweet and Maxwell, 2010, p. 509.

30 2012 UNCITRAL Notes on Organizing Arbitral Proceedings [online]. *UNCITRAL* [accessed on 2017-10-20].

The main discussion is over the Article 28(3) which provides the private nature of arbitration under the UNCITRAL Arbitration Rules by stating that hearings should be "held on camera" unless the parties agree otherwise. This provision stipulates that arbitral hearings should be in private, but at the same time it fails to specify the extent of such a principle. Many scholars then assume that this provision as it is formulated may be understood as a provider for the private nature of arbitration hearings as well as for the explicit positive duty on the participants to keep the transcripts of hearings confidential.[31] As it was later explained in known case *Methanex v. the United States*, the formulation "*held in camera*" only prevents that the arbitral tribunal will not allow the presence of third parties in the oral hearings without party consent.[32] Therefore, without any express provision of the duty of confidentiality in arbitration agreement or in context of *lex arbitri*, there will be no protection of confidential information produced during proceedings in the application of the UNCITRAL Arbitration Rules.

3.3 ICC Arbitration Rules

ICC Arbitration Rules are widely regarded as one of the world's leading rules for the arbitration of international commercial disputes. During drafting the authors had lots of discussions whether to contain an explicit provision which would define the duty of confidentiality on the parties. Eventually, the authors decided against such provision.[33] On the same basis the ICC decided not to include any possible exceptions or limitations related to confidentiality, which could occur. By trying to address the general principle of confidentiality, the ICC experienced substantial problems how to formulate the provision so that it would be acceptable for all involved. Considering all different circumstances in each case, they decided to include the space to be addressed either by the parties or the arbitral tribunal.[34]

31 WEBSTER, Thomas H. *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL-based Arbitration Rules*. London: Sweet and Maxwell, 2010, p. 411.

32 Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" of 15 January 2001, Methanex Corporation v. the United States, paras. 40–41 [online]. In: *italaw* [accessed on 2017-10-20].

33 GRIERSON, Jacob, VAN HOOFT, Annet. *Arbitrating under the 2012 ICC Rules: An Introductory User's Guide.* Alphen aan den Rijn: Kluwer Law International, 2012, p. 40.

34 DERAINS, Yves, SCHWARTZ, Eric A. *A Guide to the ICC Rules of arbitration*. 2nd ed. The Hague: Kluwer Law International, 2005, p. 285.

Therefore, in case of the ICC Arbitration Rules, the arbitration proceedings are not automatically covered by the duty of confidentiality. Nevertheless, it should be noted that they decided to avoid any possible misunderstanding by inserting an express provision that allows the parties to agree on such duty. Therefore the Article 22(3) of the ICC Arbitration Rules empowers the arbitral tribunal to make a confidentiality order concerning the arbitral proceedings or any other matters in connection with the arbitration and to adopt measures that need to be taken for protection of trade secrets and confidential information, if the parties request so. Even though there is an express provision of protection of any information, there is no united approach to what exactly constitutes the trade secrets and confidential information. In case, the parties cannot agree upon its scope, the arbitrators must decide on the nature of information in regard to the arbitration agreement, trade usages, or otherwise applicable law.[35]

This provision provides arbitrators with quite a wide authority, whether they will accept the parties‘ request and make an order with such scope of the duty of confidentiality. The arbitral tribunal can decide that the confidentiality will be applied only on certain confidential information or it will go further and forbid to disclose information about the existence of arbitration, or other matters about the proceedings.[36]

On the other hand, the ICC Arbitration Rules are clear about the principle of privacy as a generally accepted rule. The ICC Arbitration Rules state that, except the parties, their representatives and the arbitral tribunal, no other persons not involved in the proceedings should be admitted with access to the hearings. The exception is regarded to witnesses and experts which may be allowed to be present during hearings for the purpose of giving an expert report or a witness statement. This provision states that there must be an approval of the arbitral tribunal and the parties to grant an access to non-participant actors to the arbitration proceedings.[37]

35 SCHÜTZE, Rolf A. *Institutional Arbitration: Article-by-Article Commentary*. München: Verlag, C. H. Beck oHG, 2013, p. 117.

36 GRIERSON, Jacob, VAN HOOFT, Annet. *Arbitrating under the 2012 ICC Rules: An Introductory User's Guide*. Alphen aan den Rijn: Kluwer Law International, 2012, p. 15.

37 See the Article 26(3) of the ICC Arbitration Rules.

To sum up, the ICC Arbitration Rules do not provide the arbitration proceedings with a sufficient protection of confidential information. On the other hand, the rules are neither completely silent on this matter. In case that the parties will seek protection of trade secrets and confidential information, the arbitral tribunal will be able to help them. The question is what kind of information could come within the concept of "trade secrets and confidential information".

4 Conclusion

The arbitration institutions concur in the matter of addressing the principle of privacy in their rules. In most cases, the arbitral hearings are accessible only to the arbitral tribunal, the parties and their representatives. The parties are free to disclose information received during the hearings or in other stages of process unless there is an explicit positive obligation on the part of the participants.

The parties on the need to protect their sensitive inner information have three options. First of all, they can choose to explicitly address the matter of confidentiality in their arbitration agreement or alternatively they can conclude a confidential agreement. Second of all, the parties may rely on applicable law maintaining the approach that the private nature of arbitration hearings implies the duty of confidentiality so all information disclosed for the settlement purpose are generally protected. In this case, the parties must really examine decisions of national courts where the seat of their arbitration is situated.

Last but not least, they have a right to choose the appropriate set of arbitration rules. Generally, the arbitration rules differ in many circumstances. That is the undeniable result of a development of the arbitral institution and experiences from their case law as well as an impact from the different approaches among national laws and state courts. The arbitration institutions while drafting their rules must tackle unsettled matters, such as the duty of confidentiality, so that the adjustment would be adapted to distinctive circumstances in different cases. Consequently, the outcome is various. The diversity of the extent and scope of confidentiality among

institutional arbitration rules provides users of international arbitration with quite wide scale of selection so they are able to choose the appropriate set of rules which is suitable for their distinctive case.

While choosing the appropriate arbitration rules for the parties is necessary to answer a question whether they need to keep information used and documents produced during arbitration proceedings confidential and if so, to what extent. After solving this matter, they should compare various arbitration rules in accordance with their need for protection and choose the one that would fit the best for their case. There are some advantages of the wide protection of confidential information which is provided by e.g. the LCIA Arbitration Rules – the parties do not have to deal with this matter on their own, they know in advance on which documents the duty applies and what the basic exceptions are. Yet, the parties which know beforehand that they are bound by a transparency policy are more likely to choose the set of rules, which does not address the duty of confidentiality explicitly, but include the space for the parties to dispose with this matter of their choice.

List of references

Books

DERAINS, Yves, SCHWARTZ, Eric A. *A Guide to the ICC Rules of arbitration.* 2nd ed. The Hague: Kluwer Law International, 2005.

GRIERSON, Jacob, VAN HOOFT, Annet. *Arbitrating under the 2012 ICC Rules: An Introductory User's Guide.* Alphen aan den Rijn: Kluwer Law International, 2012.

BLACKABY, Nigel, PARTASIDES, Constantin, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015.

SCHERER, Maxi, RICHMAN, Lisa M., GERBAY, Remy. *Arbitrating under the 2014 LCIA Rules. A User's Guide.* Alphen aan den Rijn: Kluwer Law International, 2015.

SCHÜTZE, Rolf A. *Institutional Arbitration: Article-by-Article Commentary*. München: Verlag, C. H. Beck oHG, 2013.

SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2011.

TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of Commercial Disputes: International and English Law and Practice*. Oxford: Oxford University Press, 2007.

WEBSTER, Thomas H. *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL-based Arbitration Rules*. London: Sweet and Maxwell, 2010.

Chapters in books, articles (also from electronic databases), conference papers

FORTIER, Yves L. The Occasionally Unwarranted Assumption of Confidentiality. *Arbitration International* [online]. 1999, Vol. 15, pp. 131–140. Available from: http://www.heinonline.org/

HWANG, Michael, THIO, Nicholas. A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self-Governing Code. *Journal of International Arbitration* [online]. 2012, Vol. 29, pp. 137–170. Available from: http://www.kluwerlawonline.com

KOURIS, Steven. Confidentiality: is International Arbitration Losing One of its Major Benefits? *Journal of International Arbitration* [online]. 2005, Vol. 22, pp. 127–139. Available from: http://www.kluwerlawonline.com

MICKELSON LOUS, Camilla. Hush! Let's arbitrate – Discourse and Practice on the Question of Confientialityin International Commercial Arbitration. *Tidsskrift for Forretningsjus* [online]. 2012, Vol. 3, pp. 170–208. Available from: http://www.idunn.no

ONG, Colin. Confidentiality of Arbitral Awards and the Advantage for Arbitral Institutions to Maintain a Repository of Awards. *Asian International Arbitration Journal* [online]. 2005, Vol. 1, pp. 169–180. Available from: http://www.heinonline.org

WAUTELET, Patrick. Confidentiality and Third Parties in International Commercial Arbitration: Some Preliminary Reflections. In: CAPRASSE, Olivier. *L'arbitrage et les tiers* [online]. Bruxelles: Bruylant, 2008, pp. 79–120. Available from: http://orbi.ulg.ac.be//handle/2268/5909

YOUNG, Michael, CHAMPAN, Simon. Confidentiality in International Arbitration: Does the Exception Prove The Rules? *ASA Bulletin* [online]. 2009, Vol. 27, pp. 26–47. Available from: http://home.heinonline.org/content/databases/

Electronic sources

1998 London Court of International Arbitration Rules [online]. *LCIA*. Available from: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx

2014 London Court of International Arbitration Rules [online]. *London Court of International Arbitration*. Available from: http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx

2012 Rules of Arbitration of the International Chamber of Commerce [online]. *ICC*. Available from: http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/

UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013 [online]. *UNICITRAL*. Available from: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf

2012 UNCITRAL Notes on Organizing Arbitral Proceedings [online]. *UNCITRAL*. Available from: https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf

Court decisions and arbitral awards

Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" of 15 January 2001, Methanex Corporation v. the United States [online]. In: *italaw*. Available from: https://www.italaw.com/sites/default/files/case-documents/italaw9106.pdf

ONLINE CROSS-BORDER (CONSUMER) CONTRACTS FROM THE POINT OF VIEW OF THE CASE-LAW OF THE COURT OF JUSTICE OF THE EU

Tereza Kyselovská

Masaryk University
Faculty of Law, Department of International and European Law
Veveří 70
Brno, Czech Republic
e-mail: tereza.kyselovska@law.muni.cz

Abstract

This article analyses case law of the Court of Justice concerning online contracts, online consumer contracts in particular. The number of contracts concluded via electronic means is rising. Especially online consumer contracts are a reality of everyday life. Nowadays, it is relatively easy to conclude contract with international element. These contracts and their terms and conditions very often contain prorogation clauses and/or choice-of-law clauses. The aim of this article is to analyse the relevant European regulations, namely Rome I Regulation and Brussels Ibis Regulation in the context of online (consumer) contracts. This analysis will be based on the case law of the Court of Justice.

Keywords

Online Contract; Consumer; Case Law; Court of Justice; Directing of Activities; Prorogation Clause; Choice-of-law Clause; Rome I Regulation; Brussels Ibis Regulation.

1 Introduction

One of the topics of the conference COFOLA International 2017 was resolution of cross-border consumer contracts and disputes. This paper follows this topic and adds an online perspective.

This paper analyses the case law of the Court of Justice concerning online contracts, and online consumer contracts in particular. The number of contracts concluded via electronic means is still rising. Especially online

consumer contracts are reality of everyday life. Nowadays, it is relatively easy to conclude a contract with an international element.[1] These contracts and their terms and conditions very often contain prorogation clauses and/or choice-of-law clauses. Therefore, in order to safeguard legal predictability, certainty and protection of consumer as a weaker party in the contractual process, it is necessary to correctly interpret the relevant jurisdictional and conflict-of-laws rules.

The aim of this article is to analyse EU regulations, namely Rome I Regulation[2] and Brussels Ibis Regulation[3] in the context of online (consumer) contracts through the lenses of the (recent) case law of the Court of Justice.

2 Jurisdiction in Online Consumer Contracts

Jurisdictional rules for disputes arising out of consumer contracts are regulated in Article 18 of the Brussels Ibis Regulation.[4] In order to apply these rules, it is necessary to interpret the notion of a "consumer contract". Conditions for consumer contracts are laid down in Article 17(1) of the Brussels Ibis Regulation. Regulation distinguishes three types of consumer contracts: (1) contracts for the sale of goods on instalment credit terms; (2) contracts

1 For more on impact of the internet and electronization on private international law, see: KYSELOVSKÁ, Tereza. *Vybrané otázky vlivu elektronizace na evropské mezinárodní právo soukromé a procesní (se zaměřením na princip teritoriality a pravidla pro založení mezinárodní příslušnosti soudu ve sporech vyplývajících ze smluvních závazkových vztahů)*. Brno: Masarykova univerzita, 2014; SVANTESSON, Dan Jerker B. *Private International Law and the Internet*. 3rd ed. Netherlands. Kluwer Law International, 2016; KYSELOVSKÁ, Tereza. Elektronizace jako "nový" jev a jeho vliv na mezinárodní právo soukromé a procesní. In: ROZEHNALOVÁ, Naděžda; KYSELOVSKÁ, Tereza. *K některým vývojovým otázkám mezinárodního práva soukromého*. Brno: Masarykova univerzita, 2013, pp. 59–84; KYSELOVSKÁ, Tereza. Electronization, Globalization and Their Influence on Private International Law. In: KUNOVÁ, V. *Law as a Unifying Factor of Europe - Jurisprudence and Practice: Harmonization and Unification of Law in the European Context*. Bratislava: Comenius University in Bratislava, Faculty of Law, 2011, pp. 163–168.

2 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [online]. In: *EUR-Lex* [accessed on 2017-05-17].

3 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [online]. In: *EUR-Lex* [accessed on 2017-05-17].

4 KYSELOVSKÁ, Tereza. Rome I Regulation and the Law Applicable to Internet-Related Consumer Contracts. In: SMUK, Peter. *Az állam és jog alapvető értékei II. Győr: Széchenyi István Egyetem Állam - és Jogtudományi Doktori Iskola*. Györ: Széchenyi István Egyetem Állam - és Jogtudományi Doktori Iskola, 2011. pp. 92–97.

for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; and (3) "other" consumer contracts.

Consumer contracts in Article 17(1)(c) of the Brussels Ibis Regulation are based on condition that person who pursues commercial or professional activities "directs" his activities to the Member State of consumer's domicile. The notion of "direction of activities" was subject to, now well-established, judgments of the Court of Justice. In the first judgment in two joined cases *Pammer, Alpenhof*[6] the Court of Justice created a non-exhaustive list of criteria, which are capable of constituting evidence that the trader's activity is directed to the Member State of the consumer's domicile. These criteria, *inter alia*, are: *"international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States"*. It is for the national courts to ascertain whether such evidence exists.[7]

In the following judgment in case *Daniela Mühlleitner v. Ahmad Yusufi*[8] the Court of Justice concluded, that Article 15(1)(c) of the Brussels

5 Judgment of the Court of Justice of 7 December 2010. Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG. Joined cases C-585/08 and C-144/09 [online]. In: *EUR-Lex* [accessed on 2017-05-18].

6 For more in depth analysis in the Czech literature see KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda. *Rozhodování Soudního Dvora EU ve věcech příslušnosti (analýza rozhodnutí dle Nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 292–296; KYSELOVSKÁ, Tereza. Online spotřebitelské smlouvy a hraniční určovatel „zaměřování činnosti" ve světle judikatury Soudního dvora Evropské Unie. *Časopis pro právní vědu a praxi*. Brno: Masarykova univerzita. Právnická fakulta, 2011, Vol. 19, No. 3, pp. 221–226.

7 *Ibid.,* point 92–93.

8 Judgment of the Court of Justice of 6 September 2012. Daniela Mühlleitner v. Ahmad Yusufi, Wadat Yusufi. Case C-190/11 [online]. In: *EUR-Lex* [accessed on 2017-05-18]. For more in depth analysis in the Czech literature see KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda. *Rozhodování Soudního Dvora EU ve věcech příslušnosti (analýza rozhodnutí dle Nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 296–299.

I Regulation (Article 17(1)(c) of the Brussels Ibis Regulation) does not require the consumer contract to be concluded at a distance.

This reasoning was later confirmed and further developed in case *Lokman Emrek v. Vlado Sabranovic*.[9] The Court of Justice concluded that Article 15(1)(c) of the Brussels I Regulation (Article 17(1)(c) of the Brussels Ibis Regulation) does not require existence of a causal link between the means used to direct the commercial activity to the Member State of the consumer's domicile. As examples of such a causal link, the Court of Justice expressly specified an internet site and the conclusion of the contract between the professional and that consumer. As Court stated, the existence of such a causal link may constitute evidence of connection between the contract and such activity.

The *Pammer, Alpenhof* case created at least some guidance as to the interpretation of "directing of activities". It is questionable, whether the criteria are still relevant (every number has international prefix; thanks to online translators, it is possible to translate online content into different languages; websites are intentionally created to aim at certain markets etc.). In the case *Lokman Emrek v. Vlado Sabranovic* the Court of Justice has taken his interpretation perhaps even further. Nevertheless, as stated, the existence of a causal link may be evidence or another criterion that the national court will take into account.

3 Prorogation Clauses in Online Consumer Contracts

3.1 Prorogation Clauses in Brussels Ibis Regulation

Agreements conferring jurisdiction (choice of court clauses or prorogation clauses – if they form part of a main contract) are expression of party autonomy in contractual obligations with international element. These types of contractual clauses are a standard practice also in cross-border consumer contracts.

Prorogation clauses in general are regulated in Article 25 of the Brussels Ibis Regulation. Parties, regardless of their domicile, may agree that a court

9 Judgment of the Court of Justice of 17 October 2013. Lokman Emrek v. Vlado Sabranovic. Case C-218/12 [online]. In: *EUR-Lex* [accessed on 2017-05-18]. For more in depth analysis in the Czech literature see KYSELOVSKÁ, Tereza, ROZEHNALOVÁ, Naděžda. *Rozhodování Soudního Dvora EU ve věcech příslušnosti (analýza rozhodnutí dle Nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 299–301.

or the courts of a Member State have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship (Article 25(1)). Material validity (if the agreement is "null and void") is examined under the law of the Member States which courts have been chosen (Article 25(1) second sentence). Furthermore, such jurisdiction shall be exclusive unless the parties have agreed otherwise (Article 25(1) third sentence). Choice of court agreements which form part of a contract (prorogation clause) shall be treated as an agreement independent of the other terms of the respective contract. Invalidity of the main contract does not invalidate the prorogation clause, they shall be treated as two independents agreements (Article 25(5)).

Prorogation clauses in consumer contracts must meet additional conditions laid down in Article 19 in order to protect the consumer as a weaker contractual party. Article 19 regulates three alternative conditions for prorogation clauses in consumer contracts: (1) prorogation clause can be concluded only after the dispute has arisen; or (2) prorogation clause has to allow the consumer to bring proceedings in courts other than those indicated in Article 18; or (3) prorogation agreement was entered into by consumer and other party, both of whom have domicile in the same Member State, their agreement confers jurisdiction on the courts of that Member State, and such an agreement is not contrary to the law of that Member State.

One of the challenges of online environment is the process of forming a contract, resp. valid implementation of clauses, prorogation clauses in particular. Article 19 does not contain any provision on formal validity of prorogation clauses. Formal requirements are provided for in the general rule in Article 25(1). Under Article 25(1) *in fine*, the agreement conferring jurisdiction shall be:

a) in writing or evidenced by in writing;
b) in a form established with practices between parties; or
c) in international trade or commerce, in a form established with usages or international trade practices in the respective field.

In consumer contracts, in order to protect the consumer and his expectations, only the written form should be acceptable. Under Article 25(2), *"any communications by electronic means which provides a durable record of the agreement*

shall be equivalent to writing". Therefore, it is possible to conclude a choice of court agreement also in electronic form. The aim of this provision is to simplify the conclusion of contracts by electronic means. However, to secure the same guarantees as to the "offline" contracting, in particular as regards to evidence, it is sufficient that it is possible to save and print the information before the conclusion of the contract.

3.2 Case Law Concerning Formal Validity of Electronically Concluded Prorogation Clauses

Nowadays, it is a standard business practice, even in consumer contracts. Prorogation clauses are part of online contracts that we enter online.

Court of Justice had an opportunity to interpret the notion of electronic means in the context of Article 25(2) of the Brussels Ibis Regulation in case *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH*.[1011] It is necessary to stress, that this case concerned business-to-business contract and no consumers were involved. Nevertheless, this case may serve as an example of the approach of the Court of Justice to conclusion of contracts via electronic means.

In the present case, a contract was concluded between a car dealer established in Cologne (Germany), who bought an electric car for a very good price from seller with registered office in Amberg (Germany). The contract was concluded online via website. However, the sale was cancelled by the seller due to some technical defects of the cars. The buyer subsequently brought an action before German court seeking an order that the defendant (the seller) transfers ownership of the car.

The plaintiff (buyer) claimed that his contracting partner was the defendant established in Germany, and not its parent company, established in Belgium, and therefore, German courts have jurisdiction. The defendant contested jurisdiction of German courts, arguing with an agreement conferring jurisdiction (prorogation clause) on a Belgian court.

10 Judgment of the Court of Justice of 21 May 2015. Jaouad El Majdoub v. CarsOnTheWeb. Deutschland GmbH. Case C-322/14 [online]. In: *EUR-Lex* [accessed on 2017-05-20].

11 For more in depth analysis of the case see: GONCALVES, Anabela Susana de Sousa. Choice-of-Court Agreements in the E-commerce International Contracts. *Masaryk University Journal of Law and Technology* [online]. Vol. 11, No. 1, pp. 63–76 [accessed on 2017-07-10].

The plaintiff argued that the prorogation clause was not validly incorporated into the sales contract, because it had not been in writing in accordance with formal requirements of Article 25 of the Brussels Ibis Regulation.[12] The prorogation clause was part of general terms and conditions, to which a purchaser agrees to by clicking on a hyperlink that opens a new window (click-wrapping). The website containing the general terms and conditions did not open automatically upon registration and upon every individual sale. Instead, a box with the indication "click here to open the conditions of delivery and payment in a new window" must be clicked on; in other words, a potential buyer must expressly accept the seller's general terms and conditions by clicking the relevant box before making a purchase. The plaintiff argued that the formal requirements of Article 23(2) Brussels I Regulation (Article 25(2) of the Brussels Ibis Regulation) are met only if the window containing the terms and conditions opens automatically. Therefore, the referring German court asked preliminary question whether Article 23(2) of the Brussels I Regulation (Article 25(2) of the Brussels Ibis Regulation) must be interpreted *"as meaning that the method of accepting general terms and conditions of contract for sale by 'click-wrapping' […] concluded electronically, containing an agreement conferring jurisdiction, constitutes a communication by electronic means capable of providing a durable record of that agreement, within the meaning of that provision"*.[13]

The Court of Justice held that for validly concluded prorogation clause, two matters must be examined: first, whether the prorogation clause was subject of consensus of both parties, which must be clearly and precisely demonstrated, and second, the formal requirements ensure that the consensus between the parties was established.[14]

12 It is necessary to clarify that the case *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH* concerned interpretation of formal requirements in Article 23 of the Brussels I Regulation (44/2001), the predecessor of the Brussels Ibis Regulation. As the relevant provision is the same in both "old" and "new" Brussels, in this text we will refer to the latter.

13 Judgment of the Court of Justice of 21 May 2015. Jaouad El Majdoub v. CarsOnTheWeb. Deutschland GmbH. Case C-322/14, point 20 [online]. In: *EUR-Lex* [accessed on 2017-05-20].

14 *Ibid.,* point 29.

According to the Court of Justice, the buyer expressly accepted the general terms and conditions, by clicking the relevant box on the seller's website. Furthermore, application of Article 23(2) of the Brussels I Regulation (Article 25(2) of the Brussels Ibis Regulation) depends on, *inter alia*, the "possibility to provide durable record". As the Court stated, the provision requires "possibility" […], *"regardless of whether the text of the general terms and conditions has actually been durably recorded by the purchaser before or after he clicks the box indicating that he accepts those conditions"*.[15]

As the Court of Justice held, the click-wrapping makes printing and saving the text of general terms and conditions in this case possible before the conclusion of the contract. The fact that the website does not open automatically cannot invalidate the prorogation clause. Therefore, Article 23(2) of the Brussels I Regulation (Article 25(2) of the Brussels Ibis Regulation) must be interpreted as meaning *"that the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract"*.[16]

3.3 Online Consumer Contracts and Prorogation Clauses

Is it possible to apply the Court's findings also to consumer contracts concluded electronically which contain hyperlink to terms and conditions? According to the Court of Justice, it is not. Under to the Article 5(1) of the Directive on protection of consumers in respect of distance contracts,[17] consumer must "receive" written confirmation or confirmation in another durable medium. Hence, *"the business practice consisting of making information accessible only via a hyperlink on a website does not meet the requirements*

15 *Ibid.,* point 33.
16 *Ibid.,* point 40.
17 Directive 97/7EC of the European Parliament and of the Council of May 1997 on the protection of consumers in respect of distance contracts [online]. In: *EUR-Lex* [accessed on 2017-05-18].

of [Article 5(1)] since that information is neither 'given' by that undertaking nor 'received' by the consumer, within the meaning of [Article 5(1)], and a website cannot be regarded as a 'durable' medium within the meaning of Article 5(1)".[18]

4 Choice of Law Clauses in Online Consumer Contracts

4.1 Choice-of-Law Clause in Consumer Contracts

Choice of law is the symbol of autonomous will of the parties in commercial contracts with international element, both commercial and consumer. Choice of law as general rule is in Article 3 of the Rome I Regulation. Choice of law is limited in case of consumer contracts in Article 6(2) of the Rome I Regulation; the choice of law is limited "materially", with respect to mandatory provisions of the law of consumer's domicile.[19]

4.2 Case Law Concerning Choice-of-Law Clauses in Online Consumer Contracts

As presented in previous parts of this article, majority of case-law concerning online consumer contracts deals with jurisdictional rules in the Brussels Ibis Regulation. Nevertheless, the Court of Justice had opportunity to interpret Article 6 Rome I Regulation and requirement for choice-of-law clauses in online consumer contracts in case *Verein für Konsumenteninformation v. Amazon EU Sarl.*[20] In this case, multitude of issues were dealt with, for instance: consumer protection; Directive 93/13/EEC; data protection and processing of personal data of consumers etc. For this article, we will discuss only part of this judgment concerning choice of law clause in online sales contracts concluded with consumers.

Amazon EU is a company established in Luxembourg and belonging to an international order group, owns website with a domain name.de.

18 Judgment of the Court of Justice of 21 May 2015. Jaouad El Majdoub v. CarsOnTheWeb. Deutschland GmbH. Case C-322/14, point 37 [online]. In: *EUR-Lex* [accessed on 2017-05-20]. Also see Judgment of the Court Justice of 5 July 2012. Content Services Ltd v. Bundesarbeitskammer. Case C-49/11, point 51 [online]. In: *EUR-Lex* [accessed on 2017-05-20].

19 ROZEHNALOVÁ, Naděžda. *Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu)*. Brno: Masarykova univerzita, 2010, pp. 147–148.

20 Judgment of the Court of Justice of 28 July 2016. Verein für Konsumenteninformation v. Amazon EU Sarl. Case C-191/15 [online]. In: *EUR-Lex* [accessed on 2017-05-22].

Through this website, it directs its activities to consumers in Austria, with whom concludes electronic purchase contracts. It has nor seat or establishment in Austria. Until mid-2012, the general terms and conditions in contracts concluded with consumers contained, *inter alia*, this choice-of-law clause: *"Luxembourg law shall apply, excluding [the United Nations Convention on the International Sale of Goods]."*

Verein für Konsumenteninformation ("VKI") brought an action before Austrian courts for an injunction to prohibit the use of terms and conditions, as all these terms were contrary to legal prohibitions or accepted principles of morality. After first instances, the VKI appealed to the Supreme Court of Austria, who was uncertain as to the law applicable to the main proceedings. It referred preliminary questions to the Court of Justice, *inter alia*, concerning the choice-of-law clause: *„Is a term included in general terms and conditions under which a contract concluded in the course of electronic commerce between a consumer and an operator established in another Member State is to be subject to the law of the State in which that operator is established unfair within the meaning of Article 3(1) of [Directive 93/13*[21]*]?"*

Court of Justice stated, that a contractual term must be regarded as unfair, if has not been individually negotiated and if, *"contrary to the requirements of the principle of good faith, causes a significant imbalance in the parties' rights and obligations to the detriment of consumer"*.[22] Under Article 5(1) of the Directive on unfair terms in consumer contracts, a contractual term must be regarded as not individually negotiated if it was drafted in advance by the seller and the consumer has not been able to influence its content. This is a case in particular of a pre-formulated standard terms and conditions. Under Article 4(1) of the Directive on unfair terms in consumer contracts, each unfair character of a contractual term must be assessed *ad hoc* in every individual case.

The Court of Justice confirmed that EU legislation allows choice of law clauses even in consumer contracts in Article 6(1) of the Rome I Regulation.

21 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [online]. In: *EUR-Lex* [accessed on 2017-06-19].

22 Judgment of the Court of Justice of 28 July 2016. Verein für Konsumenteninformation v. Amazon EU Sarl. Case C-191/15, point 62 [online]. In: *EUR-Lex* [accessed on 2017-05-22].

This freedom of contractual parties is nevertheless limited under Article 6(2) of the Rome I Regulation: parties may choose the law applicable to their contract; such a choice may not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of his domicile.

In this case, a pre-formulated choice of law clause designating the law applicable to the consumer contract the law of the Member State in which the seller is established, is to be considered unfair. According to the Court of Justice, *"it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties"*.[23] Formulation of such a clause must be in plain and intelligible language because of the consumer's weak position. Furthermore, the Court of Justice stressed, that the seller or supplier must inform the consumer about the existence of mandatory statutory provisions for his protection.[24] This is the case of Article 6(2) of the Rome I Regulation.

In conclusion, the Court of Justice ruled that: *"Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of the Rome I Regulation he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term, this being for the national court to ascertain in the light of all the relevant circumstances."*

5 Conclusion

The Court of Justice has interpreted the term "directing of activities" in the context of Article 17(1)(c) of the Brussels Ibis Regulation, as seen in the *cases Pammer/Alpenhof, Daniela Mühlleitner v. Ahmad Yusufi, Wadat Yusufi* and *Lokman Emrek v. Vlado Sabranovic*. Even though the judgment in case

23 Judgment of the Court of Justice of 28 July 2016. Verein für Konsumenteninformation v. Amazon EU Sarl. Case C-191/15, point 67 [online]. In: *EUR-Lex* [accessed on 2017-05-22].

24 *Ibid.,* point 69.

Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH did not concerned consumer contracts, it is still important to the interpretation of click-wrap contracts.

In case *Verein für Konsumenteninformation v. Amazon EU Sarl* the Court of Justice had imposed duties on sellers (businesses and professionals) to inform their customers (consumers) about at least the existence of protective mandatory provisions of the law of their domicile. In the context of this decision, it is necessary to ask how free the choice of law really is (especially in online consumer contracts).

Contracts concluded via electronic means are now the everyday reality. Because of the internet, it is relatively easy to conclude consumer contract with international element. These contracts often contain choice-of-law or choice-of-court provisions. Unfortunately, there is still not enough case law from the Court of Justice interpreting the relevant private international law rules, Rome I Regulation and Brussels Ibis Regulation, in particular in the online context.

List of references

Books

KYSELOVSKÁ, Tereza, ROZEHNALOVÁ, Naděžda. *Rozhodování Soudního Dvora EU ve věcech příslušnosti (analýza rozhodnutí dle Nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014.

KYSELOVSKÁ, Tereza. *Vybrané otázky vlivu elektronizace na evropské mezinárodní právo soukromé a procesní (se zaměřením na princip teritoriality a pravidla pro založení mezinárodní příslušnosti soudu ve sporech vyplývajících ze smluvních závazkových vztahů)*. Brno: Masarykova univerzita, 2014.

ROZEHNALOVÁ, Naděžda. *Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu)*. Brno: Masarykova univerzita, 2010.

SVANTESSON, Dan Jerker B. *Private International Law and the Internet*. Third Edition. Netherlands. Kluwer Law International, 2016.

Chapters in books, articles (also from electronic databases), conference papers

KYSELOVSKÁ, Tereza. Elektronizace jako "nový" jev a jeho vliv na mezinárodní právo soukromé a procesní. In: ROZEHNALOVÁ, Naděžda, KYSELOVSKÁ, Tereza. *K některým vývojovým otázkám mezinárodního práva soukromého*. Brno: Masarykova univerzita, 2013, pp. 59–84.

KYSELOVSKÁ, Tereza. Electronization, Globalization and Their Influence on Private International Law. In: KUNOVÁ, V. *Law as a Unifying Factor of Europe - Jurisprudence and Practice: Harmonization and Unification of Law in the European Context*. Bratislava: Comenius University in Bratislava, Faculty of Law, 2011, pp. 163–168.

KYSELOVSKÁ, Tereza. Online spotřebitelské smlouvy a hraniční určovatel „zaměřování činnosti" ve světle judikatury Soudního dvora Evropské Unie. *Časopis pro právní vědu a praxi*. 2011, Vol. 19, No. 3, pp. 221–226.

KYSELOVSKÁ, Tereza. Rome I Regulation and the Law Applicable to Internet-Related Consumer Contracts. In: SMUK, Peter. *Az állam és jog alapvető értékei II. Győr : Széchenyi István Egyetem Állam - és Jogtudományi Doktori Iskola*. Györ: Széchenyi István Egyetem Állam - és Jogtudományi Doktori Iskola, 2011, p. 92–97.

GONCALVES, Anabela Susana de Sousa. Choice-of-Court Agreements in the E-commerce International Contracts. *Masaryk University Journal of Law and Technology* [online]. Vol. 11, No. 1, pp. 63–76. Available from: https://journals.muni.cz/mujlt/article/view/6288

Court decisions and arbitral awards

Court of Justice of the EU

Judgment of the Court of Justice of 7 December 2010. Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG. Joined Cases C-585/08 and C-144/09 [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62008CJ0585 & qid=1414324430100 & from=CS

Judgment of the Court of Justice of 5 July 2012. Content Services Ltd v. Bundesarbeitskammer. Case C-49/11 [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI:EU:C:2012:419

Judgment of the Court of Justice of 6 September 2012. Daniela Mühlleitner v. Ahmad Yusufi, Wadat Yusufi. Case C-190/11 [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0190 & qid=1414324311833 & from=CS

Judgment of the Court of Justice of 17 October 2013. Lokman Emrek v. Vlado Sabranovic. Case C-218/12 [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0218 & qid=1414324590308 & from=CS

Judgment of the Court of Justice of 21 May 2015. Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH. Case C-322/14 [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CJ0322 & qid=1508348421176 & from=CS

Judgment of the Court of Justice of 28 July 2016. Verein für Konsumenteninformation v. Amazon EU Sarl. Case C-191/15 [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CJ0191 & qid=1508348479411 & from=CS

Legal acts

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1508687985923 & uri=CELEX:31993L0013

Directive 97/7EC of the European Parliament and of the Council of May 1997 on the protection of consumers in respect of distance contracts [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1508685061999 & uri=CELEX%3A31997L0007

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:32000L0031 & rid=1

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008R0593 & qid=1508520814783 & from=CS

ANNUAL ASSESSMENT OF THE ONLINE DISPUTE RESOLUTION PLATFOM IN THE EU

Nikola Šimková

Technical University of Košice
Faculty of Economics, Department of Banking and Investment
Nemcovej 32
Košice, Slovakia
e-mail: nikola.simkova@tuke.sk

Abstract

The growth of Business-to-Consumer electronic commerce (B2C e-commerce) increases the frequency of disputes from these transactions between traders and consumers. The European Commission has adopted several recommendations, directives and regulations to promote online dispute resolution (ODR). As a result, the EU ODR platform is accessible to consumers and traders since 15 February 2016. The aim of this paper is to assess results of this platform during 13 months after its creation. Statistics on this website shows that 28506 complaints were registered. The most complaints originated from Germany, United Kingdom and Spain. Percentage of cross-border complaints was 36.84%. The most complaints from the perspective of the sector appeared in Clothing and footwear (11.21%), Airlines (8.54%) and Information and communication technology (ICT) goods (7.91%). The role of the alternative dispute resolution (ADR) entities together with possible modification of the ODR platform is also solved in the paper.

Keywords

Alternative Dispute Resolution; B2B e-Commerce; Online Dispute Resolution; ODR Platform.

1 Introduction

The development of Information and Communications Technology ("ICT") is also reflected in business, companies have started to sell their products and services to customers via the Internet. According to the Eurostat, in 2016, 55% of individuals purchased online in the past 12 months in the EU which represented the increase of almost 30% compared to 2006.[1] The highest

1 *Internet Purchases by Individuals [isoc_ec_ibuy]* [online]. Eurostat [accessed on 2017-02-05].

increase was recorded in Estonia (49%), Slovakia (45%) and France (44%). This growth of Business-to-Consumer electronic commerce ("B2C e-commerce") increases the frequency of disputes from these transactions between traders and consumers. The traditional way to settle disputes is by using the court. In general, this procedure is slow, expensive, and difficult to deal with.[2] Especially in disputes from online transactions, out-of-court dispute resolution mechanisms providing cheap, simple and quick solutions to consumer disputes are desirable. Flash Eurobarometer No 397 found that 46 % of consumers in the survey agreed that it is easy to settle disputes with retailers via out-of-court bodies (arbitration, mediation or conciliation body).[3] In Flash Eurobarometer No 396, retailers were asked if they are aware of any Alternative Dispute Resolution ("ADR") bodies for settling disputes with consumers in their country. Results showed that 54% of retailers knew at least one ADR body in 2014 and they are either willing or obliged to use them.[4]

The European Commission has adopted several recommendations, directives and regulations to facilitate consumers' access to ADR and Online Dispute Resolution ("ODR"). As a result, the ODR platform was launched since 15 February 2016. The aim of this paper is to assess how this platform has been used by consumers and traders in the EU during 13 months, until 15 March 2017.

The remaining of the paper is structured as follows. Section 2 contains an overview of existing EU instruments on ADR and ODR. In Section 3 we provide an assessment of the result of the ODR platform. Finally, Section 4 discusses the role of ADR entities in the ODR platform and in the last section, some concluding remarks are presented.

2 Existing EU Instruments on ADR and ODR

The first Commission Recommendation[5] applies to consumer ADR schemes which either propose or impose a solution to resolve a dispute

2 TANG, Zheng. An Effective Dispute Resolution System for Electronic Consumer Contracts. *Computer Law and Security Report*, 2007, Vol. 23, No. 1, p. 44.

3 *Flash Eurobarometer No 397. Consumer Attitudes towards Cross-Border Trade and Consumer Protection (2015)* [online]. European Commission [accessed on 2017-02-05].

4 *Flash Eurobarometer No 396. Retailers' Attitudes towards Cross-Border Trade and Consumer Protection (2015)* [online]. European Commission [accessed on 2017-02-05].

5 Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. 98/257/EC [online]. In: *EUR-Lex* [accessed on 2017-03-18].

(arbitration-like mechanisms) and encourages out-of-court bodies responsible for settling consumer disputes to apply the principles of independence, transparency, effectiveness, legality, liberty, representation and adversarial principle. The second Recommendation[6] applies to a more consensual resolution of disputes, where a third party attempts to resolve the dispute by common consent (mediation-like mechanisms) and respects the principles of impartiality, transparency, effectiveness and fairness.

The Commission has set up networks to facilitate consumers' access to ADR and provide guidance on the use of ADR schemes for disputes with traders. The "Fin-Net" was launched in 2001 and it is a financial dispute resolution network of national out-of-court complaint schemes in the European Economic Area countries that handle cross-border disputes between consumers and financial services providers, such as banks, insurance companies, investment funds, payment service providers.[7] The European Consumer Centre Network ("ECC-Net") was established in 2005 and it consists of the centres based in each EU Member State, Norway, and Iceland. It provides consumers with information on their rights under European consumer legislation and gives advice and assistance in the resolution of their individual cross-border complaints.[8]

Several EU directives[9] encourage establishing ADR schemes. The "Services Directive"[10] requires service providers as a part of an ADR scheme to provide

6 Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. 2001/310/EC [online]. In: *EUR-Lex* [accessed on 2017-03-18].

7 *FIN-NET Activity Report* [online]. European Commission [accessed on 2017-03-18].

8 *The European Consumer Centres Network. 10 years Serving Europe's Consumers. Anniversary Report 2005-2015* [online]. European Commission [accessed on 2017-03-18].

9 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [online]. In: *EUR-Lex* [accessed on 2017-03-18]; Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [online]. In: *EUR-Lex* [accessed on 2017-03-18]; Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services [online]. In: *EUR-Lex* [accessed on 2017-03-18].

10 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [online]. In: *EUR-Lex* [accessed on 2017-03-18]. ("Services Directive")

consumers with information in this regard. Other directives[11] require that adequate and effective ADR schemes are put in place. Moreover, the "Directive on Mediation"[12] encourages judges to promote recourse to mediation.

The Commission presented "A Digital Agenda for Europe"[13] which states that one of the ways of achieving the digital single market and increase consumer trust is the EU-wide ODR system for e-commerce transactions. One of the 12 actions of "Towards a Single Market Act"[14] is legislation

11 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (Text with EEA relevance) [online]. In: *EUR-Lex* [accessed on 2017-03-18]; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [online]. In: *EUR-Lex* [accessed on 2017-03-18]; Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Text with EEA relevance) [online]. In: *EUR-Lex* [accessed on 2017-03-18]; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance) [online]. In: *EUR-Lex* [accessed on 2017-03-18]; Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Text with EEA relevance) [online]. In: *EUR-Lex* [accessed on 2017-03-18]; Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Text with EEA relevance) [online]. In: *EUR-Lex* [accessed on 2017-03-18].

12 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [online]. In: *EUR-Lex* [accessed on 2017-03-18]. ("Directive on Mediation")

13 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe. COM(2010) 245 final/2 [online]. In: *EUR-Lex* [accessed on 2017-03-18]. ("A Digital Agenda for Europe")

14 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Single Market Act For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another. COM(2010) 608 final [online]. In: *EUR-Lex* [accessed on 2017-03-18]. ("Towards a Single Market Act")

on ADR for simple, fast and affordable out-of-court settlements for consumers and protects relations between businesses and their customers also in e-commerce dimension.

In 2011 was initiated a public consultation on ADR which resulted in the adoption of the "Directive on consumer ADR"[15] in 2013. It ensures that consumers can turn to quality ADR entities for all contractual disputes from online or offline, domestic or cross-border purchase in every market sector (excluding disputes regarding health and higher education) and in every Member State. The Directive on consumer ADR is linked with the "Regulation on consumer ODR"[16] for disputes from online transactions. Its aim is to create the EU-wide ODR platform which links all the national ADR entities. This single entry point is designed to be a user-friendly and interactive website, available in all 23 EU official languages and free of charge.[17] The ODR platform is accessible to consumers and traders since 15 February 2016. The effort of the EC is obvious, but the question is how the platform is being used to ODR by participants in B2C e-commerce.

3 Current Results of the EU ODR Platform

The report from the EC on the functioning of the platform will be available in the fourth quarter of 2017, but on the website[18] we can find statistics of complaints in real time. Until 15 March 2017, 13 months after the launch of the platform, were registered 28506 complaints – 63.16%

15 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [online]. In: *EUR-Lex* [accessed on 2017-03-18]. ("Directive on consumer ADR").

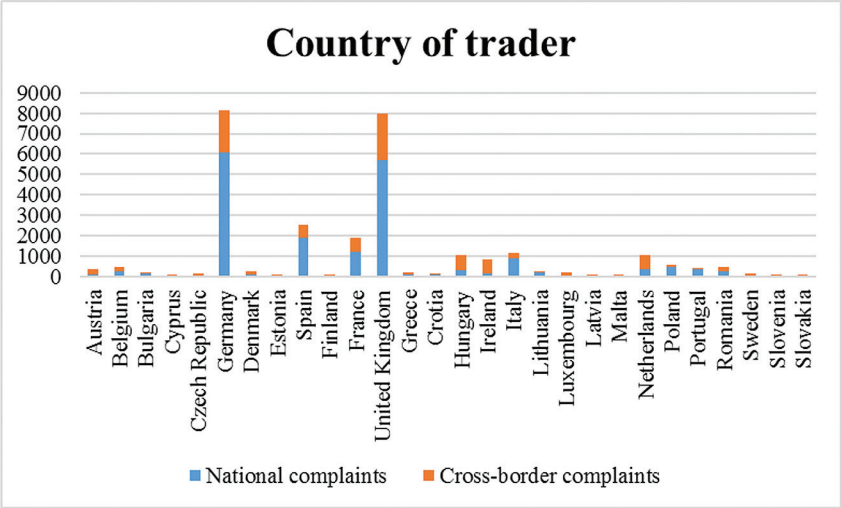
16 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [online]. In: *EUR-Lex* [accessed on 2017-03-18]. ("Regulation on consumer ODR").

17 Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes) [online]. In: *EUR-Lex* [accessed on 2017-03-18].

18 *Online Dispute Resolution. Reports and Statistics* [online]. European Commission [accessed on 2017-03-15].

of the national complaints and 36.84% of the cross-border complaints. Figure 1 shows us the number of complaints by country of a trader who is involved in the dispute.

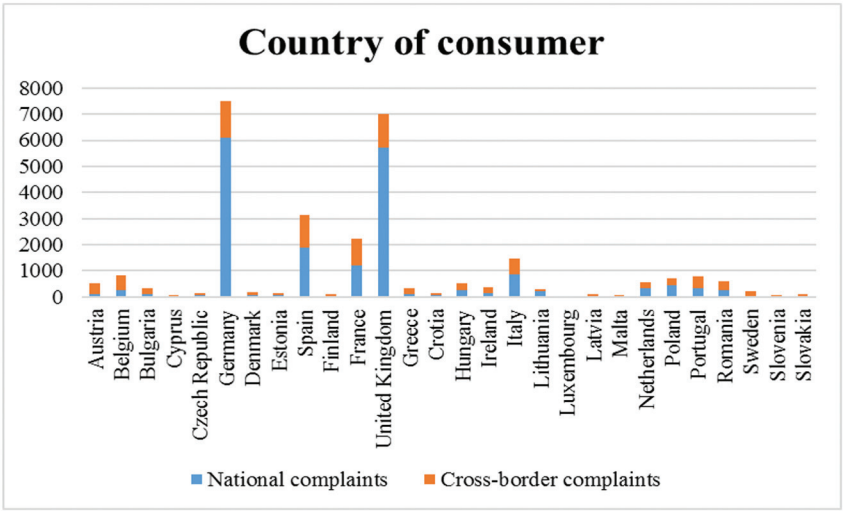
Figure 1: Number of complaints by country of trader



Source: Author (Statistics from the ODR platform, 2017-03-15)

The most complaints relate to the traders from Germany (8141), United Kingdom (7958), Spain (2530), France (1891) and Italy (1164). The same order also appears in the number of complaints by country of a consumer (Figure 2), but values are different (7502, 6999, 3128, 2238 and 1473).

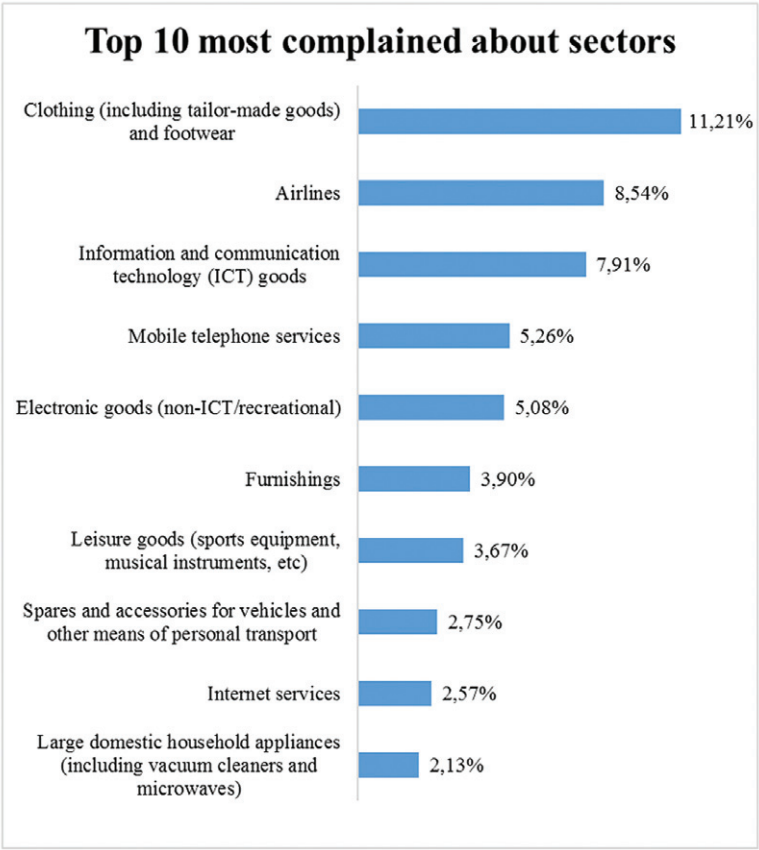
Figure 2: Number of complaints by country of consumer



Source: Author (Statistics from the ODR platform, 2017-03-15)

In terms of sectors where goods/services of the dispute belong, the most complaints related to Clothing and footwear (11.21%). Followed by Airlines (8.54%) and ICT goods (7.91%). Top 10 sectors can be seen in Figure 3.

Figure 3: Top 10 most complained about sectors



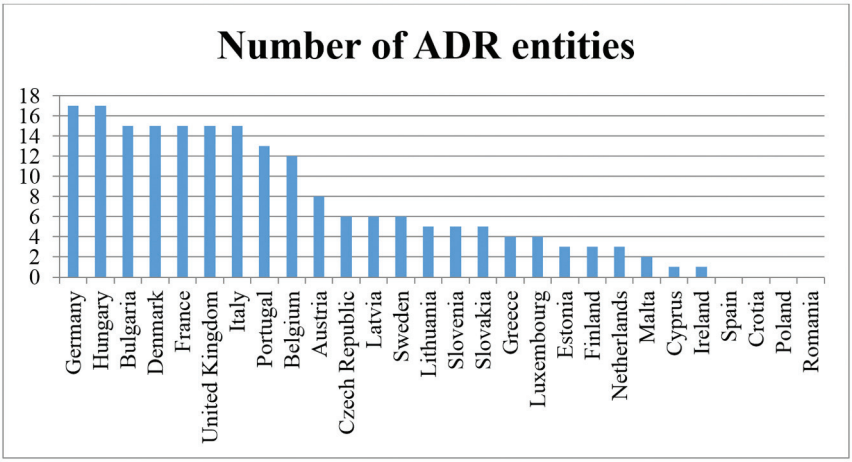
Source: Author (Statistics from the ODR platform, 2017-03-15)

4 ADR Entities in the ODR Platform

The ODR platform does not resolve the dispute directly, but only facilitates access to ADR entities, such as conciliator, mediator, ombudsman, complaints board, etc. We can see the Figure 4, which shows the number of ADR entities involved in the platform. From five countries with the largest number of complaints, four countries have at least 15 ADR entities.

A special feature is a current failure (to 2017-03-15) for Spain, where there is no ADR entity on the list. Overall, 196 ADR entities are registered in the platform. To compare, the Fin-Net had 57 national ADR schemes as members at the end of 2015 (11 in Germany)[19].

Figure 4: Number of ADR entities



Source: Author (Statistics from the ODR platform, 2017-03-15)

The question is whether the platform is just recorded complaints that were previously submitted without this platform. In 2015, 4195 cross-border cases were handled by Fin-Net members (annual increase of 19.4%)[20] and 38048 consumers complained about an issue with their cross-border purchase through the ECC-Net (annual increase of 1.2%),[21] so if we will have statistics from 2016, we can compare these figures. The answer can give us also a report from the EC, where the number of resolved disputes should appear. The participants in the ODR platform should provide feedback that could help assess whether the platform has contributed to the more efficient

19 *Online Dispute Resolution. Reports and Statistics* [online]. European Commission [accessed on 2017-03-15].

20 *Ibid.*

21 *European Consumer Centres* [online]. European Commission [accessed on 2017-03-19].

dispute resolution. The benefit of the platform can be identified through Flash Eurobarometer about consumer and retailers' attitudes towards cross-border trade and consumer protection, which should be published in 2017.

5 Conclusion and Discussion

This paper analysed current results of the ODR platform in the EU. During 13 months after the launch of the platform were registered 28506 complaints. This initiative of the EC is required due to the increase of B2C e-commerce together with growth in the frequency of disputes from these transactions between traders and consumers. The problem is that the EU ODR platform does not enable resolving the dispute directly, but only facilitates access to ADR entities. However, the term ODR is referred to the continuum encompassing online alternative dispute resolution, online arbitration, and online litigation.[22] Most commonly, ODR is defined as a process whereby disputes are substantially handled via electronic networks such as the Internet.[23] Moreover, the ODR process has a dual role - settling disputes and also building trust.[24] ODR could be useful to build trust with the participants because it allows efficient and effective law enforcement in the online business environment. Therefore, using the ODR platform only as a tool for facilitating the access to ADR entities, is not enough for consumers nowadays. There exist different methods for ODR. Developing successful ODR has become a multi-disciplinary, so the application of intelligent agents in the legal field ("AI & Law") is also used for ODR. For example, as possible seems application of ODR process using a genetic algorithm for buyer and seller.[25] This method is introduced for Business-to-Business

22 PATRIKIOS, Antonis. The Role of Transnational Online Arbitration in Regulating Cross-Border E-Business – Part I. *Computer Law & Security Review,* 2008, Vol. 24, No. 1, pp. 66–76.

23 XU Zhengchuan, YUAN, Yufei. Principle-based Dispute Resolution for Consumer Protection. *Knowledge-Based Systems*, 2009, Vol. 22, No. 1, pp. 18–27.

24 KATSH, Ethan. Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace. *International Review of Law, Computers & Technology,* 2007, Vol. 21, No. 2, pp. 97–107.

25 ŠIMKOVÁ, Nikola, SMUTNÝ, Zdeněk. Conceptual Design of Online Dispute Resolution in B2B Relationships. In: DOUCEK, Petr, CHROUST, Gerhard, OŠKRDAL Václav (eds.). *IDIMT 2016 – Information Technology, Society and Economy Strategic Cross-Influences – 24th Interdisciplinary Information Management Talks*. Linz: Trauner Verlag, 2016, pp. 303–310.

relationships and it would be useful also for disputes from this area with higher value to create the ODR platform. However, resolving disputes through the ODR entities would bring a new challenge and with this aspect is associated possible regulation of accredited ODR providers.[26]

List of references

Chapters in books, articles (also from electronic databases), conference papers

CORTÉS, Pablo. Developing Online Dispute Resolution For Consumers in the EU: A Proposal for the Regulation of Accredited Providers. *International Journal of Law and Information Technology*, 2011, Vol. 19, No. 1, pp. 1–28.

KATSH, Ethan. Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace. *International Review of Law, Computers & Technology,* 2007, Vol. 21, No. 2, pp. 97–107.

PATRIKIOS, Antonis. The Role of Transnational Online Arbitration in Regulating Cross-Border E-Business – Part I. *Computer Law & Security Review*, 2008, Vol. 24, No. 1, pp. 66–76.

ŠIMKOVÁ, Nikola, SMUTNÝ, Zdeněk. Conceptual Design of Online Dispute Resolution in B2B Relationships. In: DOUCEK, Petr, CHROUST, Gerhard, OŠKRDAL Václav (eds.). *IDIMT 2016 – Information Technology, Society and Economy Strategic Cross-Influences – 24th Interdisciplinary Information Management Talks*. Linz: Trauner Verlag, 2016, pp. 303–310.

TANG, Zheng. An Effective Dispute Resolution System for Electronic Consumer Contracts. *Computer Law and Security Report*, 2007, Vol. 23, No. 1, pp. 42–52.

XU Zhengchuan, YUAN, Yufei. Principle-based Dispute Resolution for Consumer Protection. *Knowledge-Based Systems*, 2009, Vol. 22, No. 1, pp. 18–27.

26 CORTÉS, Pablo. Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers. *International Journal of Law and Information Technology*. 2011, Vol. 19, No. 1, pp. 1–28.

Electronic sources

European Consumer Centres [online]. European Commission. Available from: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm

FIN-NET Activity Report [online]. European Commission. Available from: https://ec.europa.eu/info/sites/info/files/2015-activity-report_en.pdf

Flash Eurobarometer No 396. Retailers' Attitudes towards Cross-Border Trade and Consumer Protection (2015) [online]. European Commission. Available from: http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/67559

Flash Eurobarometer No 397. Consumer Attitudes towards Cross-Border Trade and Consumer Protection (2015) [online]. European Commission. Available from: http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/69149

Internet Purchases by Individuals [isoc_ec_ibuy] [online]. Eurostat. Available from: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc_ec_ibuy & lang=en

Online Dispute Resolution. Reports and Statistics [online]. European Commission. Available from: https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.statistics.show & lng=EN

The European Consumer Centres Network. 10 Years Serving Europe's Consumers. Anniversary Report 2005-2015 [online]. European Commission. Available from: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/docs/ecc_net_-_anniversary_report_2015_en.pdf

Legal acts

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Single Market Act For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another. COM(2010) 608 final [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52010DC0608

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML

Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0039

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008L0052

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/En/TXT/?uri=celex%3A32006L0123

Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (Text with EEA relevance) [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007L0064

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32008L0048

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Text with EEA relevance) [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0072

Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance) [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0073

Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Text with EEA relevance) [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009L0136

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Text with EEA relevance) [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009L0140

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe. COM(2010) 245 final/2 [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52010DC0245R(01)

Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. 98/257/EC [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998H0257

Commission Recommendation of 4 April 2001 on the principles for out-of--court bodies involved in the consensual resolution of consumer disputes. 2001/310/EC [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001H0310

Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008L0006

Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0011

Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes) [online]. In: *EUR-Lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2015.171. 01. 0001.01. ENG

COFOLA INTERNATIONAL 2017
Resolution of International Disputes
Conference Proceedings

JUDr. Klára Drličková, Ph.D., JUDr. Tereza Kyselovská, Ph.D. (eds.)

Published by Masaryk University, Žerotínovo nám. 617/9, 601 77 Brno
Publications of the Masaryk University No. 599
(theoretical series, edition Scientia)

Print: Point CZ, s.r.o., Milady Horákové 890/20, 602 00 Brno
1st edition, 2017

ISBN 978-80-210-8792-7
ISBN 978-80-210-8793-4 (online : pdf)
ISSN 2464-8485
www.law.muni.cz

muni
PRESS

ISBN 978-80-210-8793-4

9 788021 087934