ȘTIINȚE JURIDICE ȘI ADMINISTRATIVE

Daniel-Mihail ȘANDRU

European Union Law and Arbitration

Slices and slides. Text, cases and materials

EDITURA UNIVERSITARĂ

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Chapters

I. Introduction, methodology

Principal course topics

European Union Law and arbitration: state of the art

Chapters

Methodology

Who is interested

Keywords:

European Union Law, international commercial arbitration, investment arbitration, procedure of preliminary ruling, data protection, public procurement, EU Competition Law, EU State Aid, EU Private International Law, EU Consumer Law, Interpretation and application of European Union, mediation, right to effective judicial protection, autonomy of EU law, human rights, Brexit, judicial cooperation.

European Union Law and arbitration: state of the art

- Actors
  - European Union
  - International commercial arbitration
- Competences of the institutional actors
- Applicable law
- What kind of relationship? What kind of arbitration?
- Arbitration in three dimensions (Jan Paulsson)
- Particularly challenging challenge (George A. Bermann)
- EU Internal Market law
- Arbitration and the autonomy of EU law
  - *Overview, development of the ECJ case law*
    - Judgment of 5 February 1963, van Gend & Loos, 26/62, EU:C:1963:1.
  - *The autonomy of EU law and international investment arbitration*
- Arbitration and the right to effective judicial protection
- Bibliography

Actors

European Union

- bureaucrats, politicians, experts

International commercialarbitration

Arbitrators, arbitration centers (ICC, VIAC, LCIA), trade organisations, lawyers and other practitioners in the field of arbitration

Competences of the institutional actors

European Union

- Competences of EU

(Article 3 1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market;
(c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; **(e) common commercial policy.** 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.)

- Competences of EU institutions

...arbitration

- Autonomy of party

Applicable law

EU

- Public law

arbitration

- Private law, consent
- International private law (public order/ loi de police)
- &public

(The New York Convention. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards)

* public order

What kind of relationship? What kindof arbitration?

- **EU law in arbitration**
- Procedure of preliminary ruling
- Data protection
- Competition
- Human rights
- Consumer Law or other contracts

- **EU law and international private law**
- & procedure of anti-suit injuction

- **Arbitration in EU law**
- Competition
- Data protection
- Public procurement

- **European Court of Justice – arbitral competences**

- **Investment Arbitration**
- Queen Mary London Research

Jan Paulsson, Arbitration in three dimensions, ICLQ vol 60, April 2011, p. 292.

"**Arbitration paradoxically seeks the cooperation of the very public authorities from which it wants to free itself.** The 'law of arbitration', as traditionally conceived, is the manifestation of this tension. What will the State tolerate? To what will it lend its authority and power? Are arbitrations by necessity legally connected to a particular jurisdiction? If so, is it correct to say that only the law of that jurisdiction may give effect to awards? Can arbitration function without the support of the law of a particular State? These questions become more tangible when they arise in an international context. As borderless communities integrate, and as the once exclusive orderings of states become more diffuse, these inquiries become indispensable."

Bermann - International Arbitration and EU Law_ What Next_ - New York Arbitration Week2020

- particularly challenging challenge
- 07.30' – 08.23'
- Confruntation
- 37.00'-38.05
- How & when
- 41.40

EU Internal Market law

- **Abstract**
- EU Internal Market law and international arbitration increasingly interact with each other but there are important areas of conflict between the two that represent an obstacle to market integration in a common area of justice. The article examines, from the perspective of EU public economic law, these areas of conflict to assess the extent to which the Internal Market needs harmonised rules on commercial arbitration to support dispute resolution and access to an efficient delivery of justice within its operation. The current state of affairs is unsatisfactory and it lacks legal certainty. If properly regulated, commercial arbitration can become an important instrument functional to EU market efficiency.

- Federico FERRETTI, EU Internal Market Law and the Law of international commercial arbitration, Cambridge Yearbook of European Legal Studies,
- https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/eu-internal-market-law-and-the-law-of-international-commercial-arbitration-have-the-eu-chickens-come-home-to-roost/3DEBB38D5588C8942561A9ED1B43C04 4

• Arbitration and the autonomy of EU law

Judgment of 5 February 1963, van Gend & Loos, 26/62, EU:C:1963:1.

- '… the [European Union] constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals'.
- Contrary to the position in relation to international agreements in general, the Court of Justice held that it is not for the constitutions of the Member States to determine whether an EU Treaty provision may produce direct effect, as that determination is to be found in 'the spirit, the general scheme and the wording' of the EU Treaty itself. Questions regarding the normative nature of EU law are to be solved in the light of the Treaties themselves
- **Koen Lenaerts,** The autonomy of European Union Law, Post AISDUE, I (2019), https://www.aisdue.eu/web/wp-content/uploads/2019/04/001C_Lenaerts.pdf

Van Gend en Loos

- The autonomy of EU law may be defined in a negative fashion: EU law is not ordinary international law. Traditionally, international law has operated on the assumption that actions brought by a contracting party against another contracting party are sufficient to guarantee respect for an international agreement.
- Van Gend en Loos established the autonomy of the EU legal order vis-à-vis international law. In the following years, the Court of Justice continued to distance itself from international law. For example, whilst in van Gend en Loos, it wrote 'the [Union] constitutes a new legal order of international law', in subsequent judgments, the expression 'of international law' was abandoned by the Court.
- K. Lenaerts and J.A. Gutierrez-Fons, 'The European Union: a Constitutional Perspective', in R. Schütze and T. Tridimas (eds), Oxford Principles of European Union Law - Volume I: The European Union Legal Order (Oxford, OUP, 2018), at 103-141.

"The implications of such a maximalist position would be striking. In fact, it would be difficult to envisage an international dispute settlement system which would meet this high normative threshold. After all, courts in all legal orders are faced with rules of other legal orders as a matter of course. The highly principled but inflexible approach that emerges from the judgment in *Achmea* is in stark contrast to the nuanced approach of the Arbitral Tribunal itself in *Achmea* which had pointed out the following: '[c]ourts and tribunals throughout the EU interpret and apply EU law daily. What the ECJ has is a monopoly on the final and authoritative interpretation of EU law'. **And this was not an isolated approach. In *Euram***, for instance, whilst the Arbitral Tribunal had rejected all the jurisdictional objections put forward by both the Commission and Slovakia about the application of the Austria-Slovakia BIT to Austrian investors, it made it clear that it had no power to determine the validity of an act of an EU institution. In other words, it is not in dispute that, as a matter of law, the jurisdiction of an arbitral tribunal is confined to the interpretation and application of the BITs pursuant to which a dispute was brought before them."

• Arbitration and the right to effective judicial protection

Anthony Arnull, *The Principle of Effective Judicial Protection…*

- Those principles began to emerge in the mid-1970s. They deal with the remedies and procedural rules applicable to claims in national courts based on Union law. They therefore add flesh to the skeleton of primacy, direct effect and state liability, helping to bring it to life. The starting point was a principle that has come to be known as national procedural autonomy. As the Court put it in *Rewe*:

"In the absence of [Union] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [Union] law … ."

Anthony Arnull, *The Principle of Effective Judicial Protection…*

- That principle was subject to two provisos. The first is now known as the principle of equivalence, according to which "the detailed procedural rules governing actions for safeguarding an individual's rights under [Union] law must be no less favourable than those governing similar domestic actions".
- *Unibet London Ltd v Justitiekanslern* (C-432/05) [2007] E.C.R. I-2271; [2007] 2 C.M.L.R. 30 at [43].
- The second is the so-called principle of effectiveness. This means that procedural conditions laid down by national law may not be applied if their effect is to render "practically impossible or excessively difficult the exercise of rights conferred by [Union] law".
- *Unibet* (C-432/05) [2007] E.C.R. I-2271 at [43].

Consumer protection

There are also important remedial provisions in Union legislation on consumer protection. Article 6(1) of Directive 93/13 on unfair terms in consumer contracts provides:

"Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms."

Article 7(1) requires Member States to ensure that "adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers".

The effect of these provisions was considered in *Asturcom*,98 a reference by a Spanish court concerning the enforcement of an arbitration award made in a consumer dispute. The consumer concerned had not played any part in the arbitration proceedings, nor had she challenged the arbitration award after it was made, with the result that it had become final. Was a national court asked to enforce the award required to examine of its own motion whether the contract the consumer had entered into was unfair for the purposes of Directive 93/13?

Anthony Arnull, *The Principle of Effective Judicial Protection…*

In *Océano Grupo*, the Court said that the system of protection introduced by Directive 93/13 was "based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge". It went on:

"The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion."

Anthony Arnull, *The Principle of Effective Judicial Protection…*

"The decision in *Asturcom* was more nuanced, reflecting the restraint evident in other recent case law. Underlining the importance of the principle of res judicata, the Court took the view that the consumer had had a reasonable opportunity to challenge the arbitration award. It therefore concluded that the national court was not required to compensate for what it described as the "total inertia" of the consumer. However, while the principle of effectiveness was satisfied, the Court found a potential infringement of the principle of equivalence. This was because, under Spanish law, a court asked to enforce an arbitration award could assess of its own motion whether an arbitration clause in a consumer contract was compatible with national rules of public policy. The Court said that the relevant provisions of the directive had to be treated as having the same status as such rules."

- 79 Thus, the European Court of Human Rights had occasion to state, in *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011, the conditions in which a fine which, taking into account the amount of the fine and the preventive and punitive objective which it pursues, constitutes a criminal matter may be imposed by an administrative authority which does not satisfy all the requirements of Article 6(1) of the ECHR. That case concerned the Italian system of penalising infringements of competition law. The European Court of Human Rights stated, in essence, that compliance with Article 6(1) of the ECHR did not preclude a 'penalty' from being imposed by an administrative authority with the power to impose penalties in competition law matters, provided that the decision adopted by that authority is amenable to subsequent review by a judicial body exercising unlimited jurisdiction. Among the characteristics of a judicial body of that type is the power to vary in all respects, in fact and in law, the decision taken by the body below. Thus, review by the court or tribunal, in such cases, cannot be limited to verifying the 'procedural' legality of the decision for review, as it must be in a position to assess the proportionality of the choices of the competition authority and to verify its technical assessments.

- 80 It must be held that judicial review by this Court of decisions whereby the Commission imposes infringements in the event of infringement of EU competition law satisfies those requirements.

- 81 It should first of all be emphasised, in that regard, that EU law confers on the Commission a supervisory role which includes the task of investigating infringements of Article 81(1) EC and Article 82 EC, while the Commission is required, in the context of that administrative procedure, to observe the procedural guarantees provided for by EU law. Furthermore, Regulation No 1/2003 empowers the Commission to impose, by decision, fines on undertakings and associations of undertakings which have infringed those provisions either intentionally or negligently.

- 82 In addition, the requirement for effective judicial review of any Commission decision that finds and punishes an infringement of the competition rules is a general principle of EU law which follows from the common constitutional traditions of the Member States (*Enso Española* v *Commission*, paragraph 75 above, paragraph 60). That principle is now enshrined in Article 47 of the Charter of Fundamental Rights (Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 30 and 31, and Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 49).

- 83 It follows from the case-law that the judicial review of the decisions adopted by the Commission in order to penalise infringements of competition law that is provided for in the Treaties and supplemented by Regulation No 1/2003 is consistent with that principle (see, to that effect, Case C-272/09 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraph 106, and Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraph 67).

effective judicial protection, *T-56/09 and T-73/09, Saint-Gobain Glass France and others / Commission, Judgment of 27 March 2014, ECLI:EU:T:2014:160*

84 In the first place, the General Court is an independent and impartial court, established by Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1, corrected version in OJ 1989 L 241, p. 4). As is apparent from the third recital in the preamble to that decision, the General Court was established in order particularly to improve the judicial protection of individual interests in respect of actions requiring close examination of complex facts.

85 In the second place, the General Court has jurisdiction, under Article 3(1)(c) of Decision 88/591, to exercise the jurisdiction conferred on the Court of Justice by the Treaties and the acts adopted in implementation thereof in, inter alia, 'actions brought against an institution by natural or legal persons pursuant to the second paragraph of Article [230 EC] relating to the implementation of the competition rules applicable to undertakings'. In the context of actions based on Article 230 EC, the review of the legality of a Commission decision finding an infringement of the competition rules and imposing a fine in that respect on the natural or legal person concerned must be regarded as effective judicial review of the measure in question. The pleas on which the natural or legal person concerned may rely in support of his application for annulment are of such a nature as to allow the General Court to assess the correctness in law and in fact of any accusation made by the Commission in competition proceedings.

86 In the third place, in accordance with Article 31 of Regulation No 1/2003, the review of legality provided for in Article 230 EC is supplemented by unlimited jurisdiction to review decisions, which enables the Courts, in addition to reviewing the legality of the penalty, to substitute their assessment for the Commission's and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 692).

José Rafael Mata Dona, Nikos Lavranos (Eds), *International Arbitration and EU Law*, Edward Elgar Publishing, 2021.

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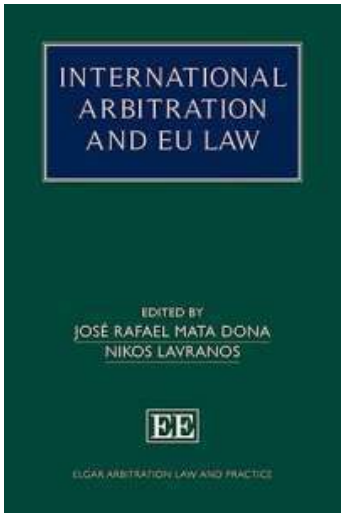

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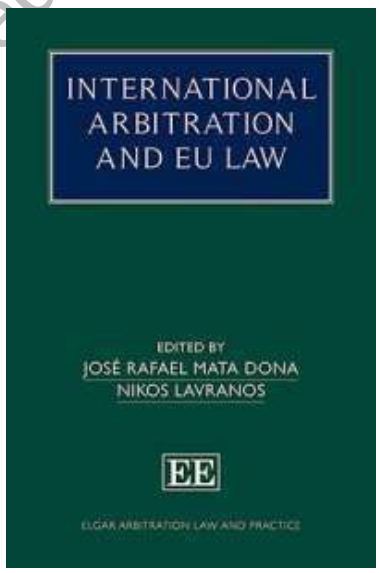

Chukwudi Ojiegbe, International Commercial Arbitration in the European Union Brussels I,
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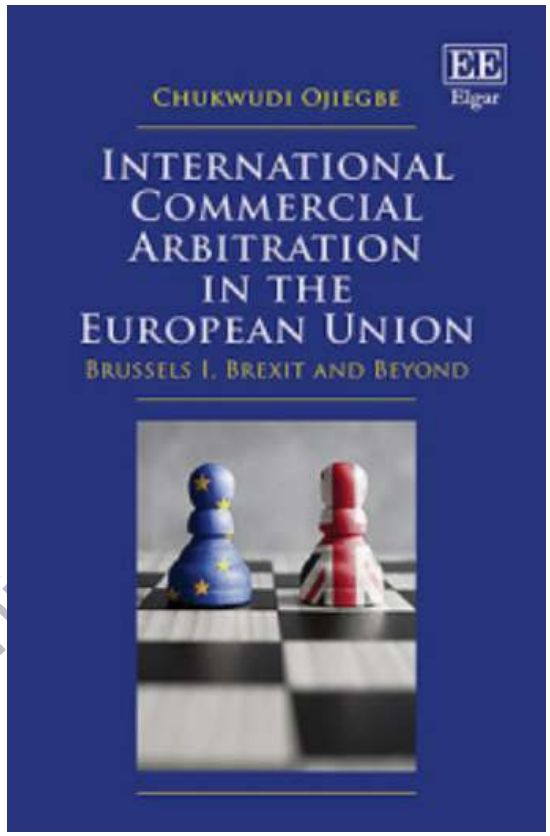

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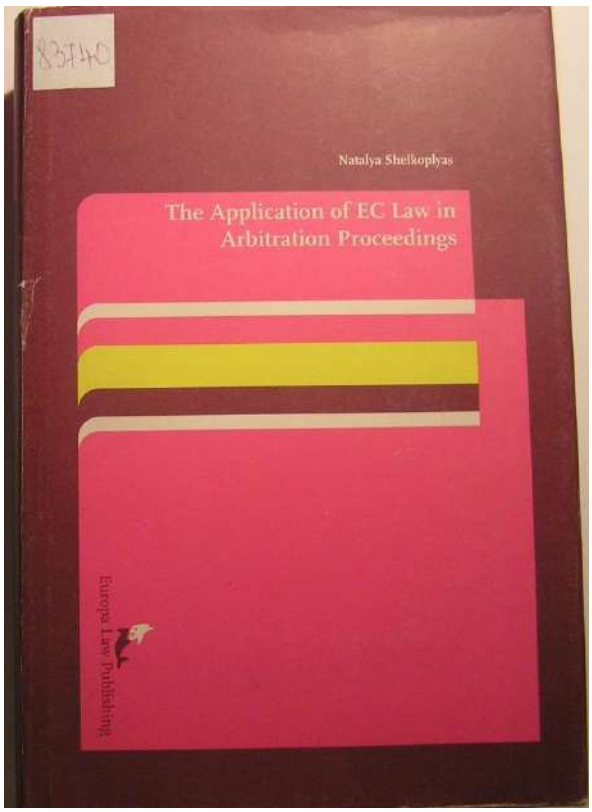

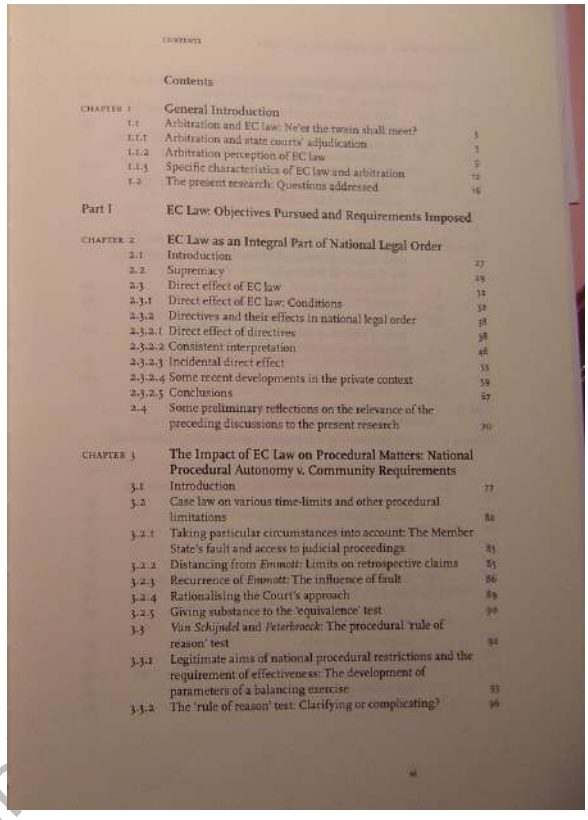

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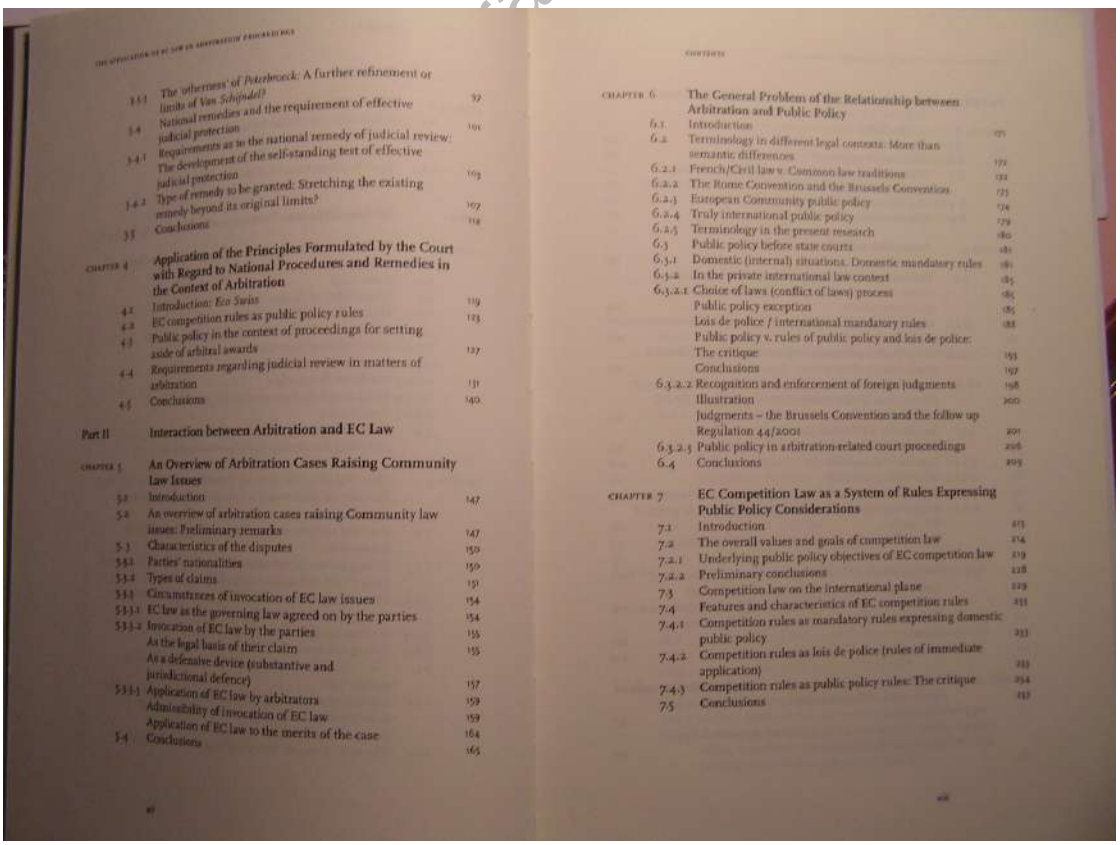

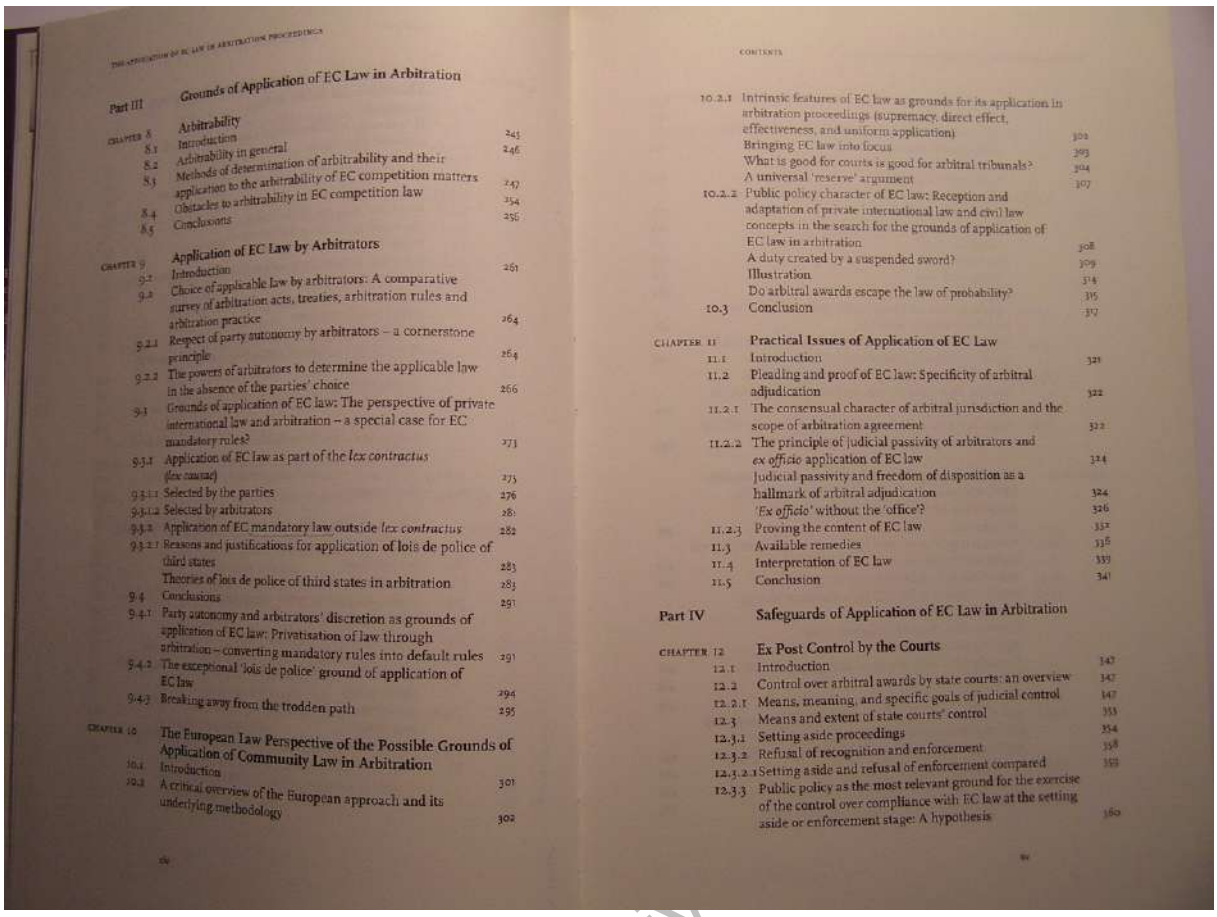

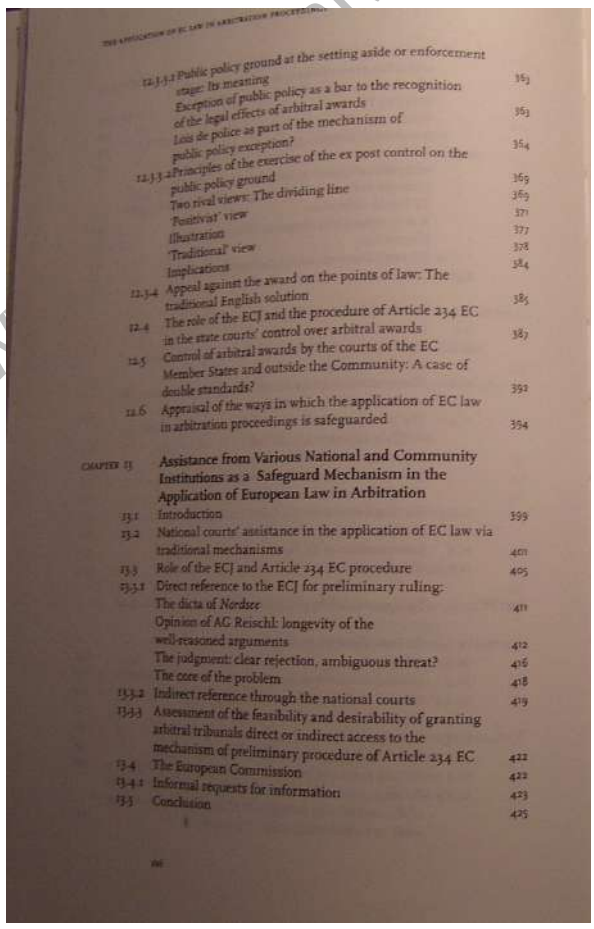

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  - The Roadmap seeks to provide a high-level overview of the relevant aspects of data protection in the context of arbitration;
  - The Explanatory Notes give further detail on, and explanation of, the relevant notions by reference to source material and examples; and
  - The Annexes provide concrete guidance (in the form of inter alia check lists and sample notices) intended to assist individuals involved in arbitration to determine the applicable data protection regime and to assess how the obligations arising thereunder can be complied with.
- Confidentiality and data protection

GDPR procedure applied in arbitration court

Website

ICC DATA PRIVACY NOTICE FOR ICC DISPUTE RESOLUTION PROCEEDINGS

Arbitration in the Digital Age

Data protection & profiling on AI

Artificial Intelligence in arbitration

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Arbitration on data protection litigation

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    - *Opinion AG Saggio*
  - *C-344/98, Masterfoods and HB, Judgment of 14 December 2000, ECR 2000 p. I-11369, ECLI:EU:C:2000:689*
  - *Commission decisions and acts of potential relevance to arbitral proceedings*
- Co-operation between the Commission and arbitration
  - European Commission as *amicus curiae* in international arbitration procedure
- Review of recent competition cases decided by arbitrators
- *Micula Case*
  - Commission Decision (EU) 2015/1470
  - *T-624/15, T-694/15 and T-704/15, European Food and others / Commission, Judgment of 18 June 2019, ECLI:EU:T:2019:423*
- *Conclusion*

VII. EU law and Investment Arbitration

- *Legal basis*
  - Soft law, i.e., Protection of intra-EU investment (COM/2018/547 final)
  - *EU law and intra-EU BIT*
  - *Termination Agreement (2020)*
  - Investment Protection in the EU-UK Trade and Cooperation Agreement
- EU Investment Screening Regulation
- *EU law and multilateral investment court*
  - Effects of EU law on ICSID provisional measures
- CETA - Opinion 1/17 of ECJ regarding the compatibility of the arbitration resolution mechanism in CETA with EU law
- Energy Charter Treaty
  - Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty
- Case law
  - Achmea case
- Working Group III: Investor-State Dispute Settlement Reform
- European Commission Public consultation: Cross-border investment within the EU – clarifying and supplementing EU rules (2020)
- *Conclusion*

VIII. Arbitration and EU Private International Law

- *Introduction. Legal basis*
  - Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968, Consolidated version CF 498Y0126(01), *OJ L 299, 31.12.1972, p. 32–42*
  - 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) OJ L 177, 4.7.2008, p. 6–16
  - Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001, p. 1–23 (No longer in force) (*(Brussels I)*)
  - 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, *OJ L 351, 20.12.2012, p. 1–32 (Brussels I Recast)*
- Arbitral autonomy and applicable and overriding law (Jonathan Mance)
- European Union between UNCITRAL and Hague Convention

- Case law
  - *C-190/89, Rich / Società Italiana Impianti, Judgment of 25 July 1991, ECR 1991 p. I-3855, ECLI:EU:C:1991:319*
  - *C-391/95, Van Uden Maritime / Kommanditgesellschaft in Firma Deco-Line and others, 17 November 1998, ECR 1998 p. I-7091, ECLI:EU:C:1998:543*
  - *C-159/02, Turner, Judgment of 27 April 2004, ECR 2004 p. I-3565, ECLI:EU:C:2004:228*
  - *C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [***West Tankers***], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69*
  - *C-536/13, Gazprom, Judgment of 13 May 2015, ECLI:EU:C:2015:316*
- *Conclusion*

IX. Arbitration and EU Consumer Law

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  - Consumer law – public law / public policy/ arbitrability
- Legal basis
- Preliminary ruling made by an arbitral tribunal in consumer case
  - *C-125/04, Denuit and Cordenier, Judgment of 27 January 2005, ECR 2005 p. I-923, ECLI:EU:C:2005:69*
- Case law
  - *C-240/98 to C-244/98, Océano Grupo Editorial and Salvat Editores, Judgment of 27 June 2000, ECR 2000 p. I-4941, ECLI:EU:C:2000:346*
  - *C-168/05, Mostaza Claro, Judgment of 26 October 2006, ECR 2006 p. I-10421, ECLI:EU:C:2006:675*
  - *C-40/08, Asturcom Telecomunicaciones, Judgment of 6 October 2009, ECR 2009 p. I-9579, ECLI:EU:C:2009:615*
  - *C-76/10, Pohotovost', Order of 16 November 2010, ECR 2010 p. I-11557, ECLI:EU:C:2010:685*
- *Distinction from international arbitration: C-284/16, Achmea, judgment of 6 March 2018, Publié au Recueil numérique, ECLI:EU:C:2018:158*
- Consumer law – public law / public policy/ arbitrability
- ...arbitrators had not applied mandatory EU law over compensation. Debate.
- Pros and cons for consumers exclusion of arbitration as a way of resolving disputes
- Conclusion

X. Interpretation and application of European Union law by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

- Application of EC Law in Arbitration Proceedings
- Procedural matters
- Implications of EU Law
- Interpretation and application of European Union law by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
    - Reference to arbitration courts in the European Union
    - European Union law - private international law relation
    - Establishing in law an arbitration award on a directive
    - Interpretation of Romanian law and European law
    - Publication of a directive, reason for not fulfilling the contract
    - Application of Directive 2000/35
    - European Directive part of the reasoning on applicable law
    - Implementing Directive 2011/7/EU on combating late payments in commercial transactions
    - The purpose of transposing the Directive, part of the motivation of the arbitration award
- Conclusion

XI. Arbitration and the autonomy of EU law. Arbitration and the Right to Effective Judicial Protection. Human rights and arbitration

- Arbitration and the autonomy of EU law
  - *Overview, development of the ECJ case law*
    - Judgment of 5 February 1963, van Gend & Loos, 26/62, EU:C:1963:1.
  - *The autonomy of EU law and international investment arbitration*
- Arbitration and the right to effective judicial protection
- Human rights and arbitration
  - Accession of the EU to the ECHR. Impact for arbitration
    - Opinion 2/13 of the ECJ, 18 December 2014
  - ECtHR and arbitration
  - Investment arbitration and human rights
    - What is arbitration from the perspective of the President of ECHR?
    - Dispute resolution: ECHR | investment arbitration
  - United Nations Guiding Principles on Business and Human Rights
  - The Hague Rules on Business and Human Rights Arbitration
    - The proposal for the "International Arbitration of Business and Human Rights Disputes"
- Conclusion

XII. ADR Mechanisms at EU Level

- *Conflict, Dispute and the Intervention of a „Third Party"*
- *Arbitration, Mediation, Conciliation: A View of the various Concepts. Legal basis.*
  - 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 OJ L 136, 24.5.2008, p. 3–8/ Aim of the Directive, a balanced relationship between mediation and judicial proceedings: adequate safeguards are needed

- ***CJEU Case Law on other ADR***
  - *C-317/08 to C-320/08, Alassini and others, Judgment of 18 March 2010, ECR 2010 p. I-2213, ECLI:EU:C:2010:146 / Facts, free implementation of out-of-court procedures, legitimate objective and implementation of the principle of judicial effective protection*
  - *C-492/11, Di Donna, Judgment of 27 June 2013, ECLI:EU:C:2013:428/ Facts, impact on mediatiation directive's future*
  - *C-75/16, Menini and Rampanelli, Judgment of 14 June 2017, ECLI:EU:C:2017:457 / Facts, relation between ADR and mediation directive*
- Online Dispute Resolution
- Romanian case law

Methodology (I)

- Typology and influences between EU law and arbitration
- In-depth analysis of court decisions (ECJ, arbitral tribunal, ICSID)
- Research

https://curia.europa.eu/jcms/jcms/Jo1_6308/fr/

Numerical access: https://curia.europa.eu/jcms/jcms/Jo2_7045/en/

Search form: http://curia.europa.eu/juris/recherche.jsf?language=en

Preliminary ruling: https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_3/tab_index_3_04.htm

Methodology (II)

Procedure before the Court:
https://curia.europa.eu/jcms/jcms/Jo2_7031/en/
Rules of Procedure of the Court of Justice

- **https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf**
- **Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (8-11-2019)**
- **https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001**

Methodology (III)

- Arbitration:
- https://www.kluwerarbitration.com/
- https://www.kluwerarbitration.com/practiceplus
- http://arbitrationblog.kluwerarbitration.com/
- https://jusmundi.com/en/
- https://arbitratorintelligence.com/

Methodology (IV)

- UNCITRAL.org
- ECtHR
- https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRAND CHAMBER%22,%22CHAMBER%22]}

Who is interested

- Arbitrators;
- Arbitral institution (data protection, security of information);
- Public servants (drafting international agreement);
- Lawyer and lawyer in-house (drafting international contracts, public procurement, competition);
- Judge (EU, national);
- Mediators;
- Students, academics,
- Professional associations & organizations.

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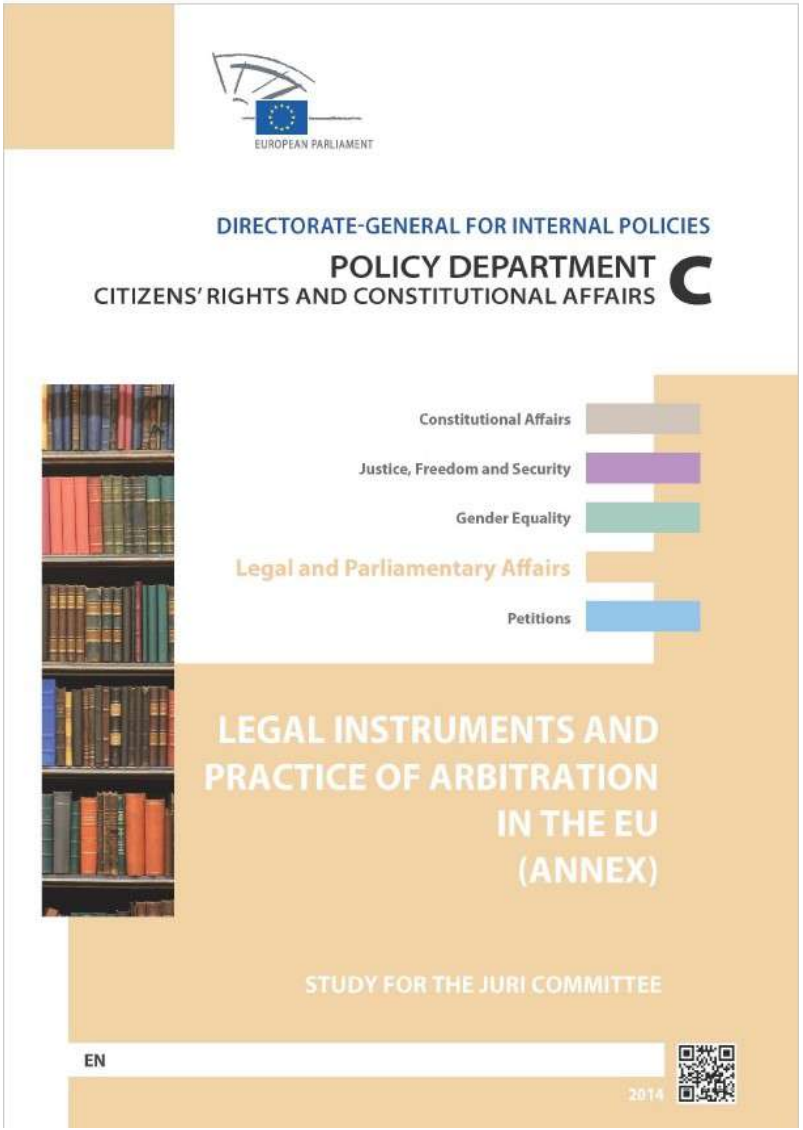

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- Asian Dispute Review
- b-Arbitra | Belgian Review of Arbitration
- B CDR International Arbitration Review
- Journal of International Arbitration
- Journal of International Dispute Settlement
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II. Arbitration and the procedure of preliminary ruling (art. 267 TFEU)

Agenda

- Introduction
- *European Court of Justice. Where is arbitration?*
  - European Court of Justice competences (Article 19 TUE)
  - Preliminary ruling – legal basis (Art. 267 TFEU)
  - Preliminary ruling procedure - Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019)
  - ECJ, but not only, Opinion 01/09 on national courts competences in interpretation of EU LAW
  - References to ECJ for Preliminary Rulings: Pros & Cons (Siegfried H. Elsing)
- ECJ Case law
  - *Case 61/65, **Vaassen-Goebbels** / Beambtenfonds voor het Mijnbedrijf, Judgment of 30 June 1966,*
  - *102/81, **Nordsee** / Reederei Mond, Judgment of 23 March 1982, ECR 1982 p. 1095*
  - 109/88, ***Danfoss*** ***(****Handels- og Kontorfunktionærernes Forbund i Danmark / Dansk Arbejdsgiverforening, acting on behalf of Danfoss****)****, Judgment of 17 October 1989, 109/88, ECR 1989 p. 3199, ECLI:EU:C:1989:383*
  - *C-393/92, Gemeente **Almelo** and others / Energiebedrijf IJsselmij Judgment of 27 April 1994, ECR 1994, p. I-1477, ECLI:EU:C:1994:171*
  - *C-125/04, **Denuit** and Cordenier, Judgment of 27 January 2005, ECR 2005 p. I-923, ECLI:EU:C:2005:69*
  - *C-394/11, **Belov**, Judgment of 31 January 2013, ECLI:EU:C:2013:48*
  - *C-555/13, **Merck Canada**, Order of 13 February 2014, ECLI:EU:C:2014:92*
  - *C-377/13, **Ascendi** Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, Judgment of 12 June 2014, ECLI:EU:C:2014:1754*
- The preliminary ruling made by an arbitral court from Romania
  - *C-370/18, Holunga, Order of 13 December 2018, ECLI:EU:C:2018:1011*
  - *C-185/19, KE, Order of 24 September 2019, Publié au Recueil numérique, ECLI:EU:C:2019:779*
- *Debate: Arbitral tribunal.* Article 267 TFEU, CJEU, and arbitration: the public policy and obligation to apply the EU law (for the arbitral tribunal)
  - Nordsee - implicit recognition of uniform application of EU law
  - Action for annulment in arbitration - is sufficient for the uniform application of EU law?
- From the procedure of preliminary ruling to BIT's preliminary ruling (abstract)
- Conclusion

European Court of Justice competences (Article 19 TUE)

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

   Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State.

   The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

Preliminary ruling – legal basis (Art. 267 TFEU)

Article 267 TFEU

(ex Article 234 TEC / ex Article 177 TEEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any **court or tribunal of a Member State**, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Preliminary ruling procedure - Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019) - **Introduction**

"1. The reference for a preliminary ruling, provided for in Article 19(3)(b) of the Treaty on European Union ('TEU') and Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), is a fundamental mechanism of EU law. It is designed to ensure the uniform interpretation and application of EU law within the European Union, by offering the

courts and tribunals of the Member States a means of bringing before the Court of Justice of the European Union ('the Court') for a preliminary ruling questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.

2. The preliminary ruling procedure is based on close cooperation between the Court and the courts and tribunals of the Member States. In order to ensure that that procedure is fully effective, it is necessary to recall its essential characteristics and to provide further information to clarify the provisions of the rules of procedure relating, in particular, to the originator, subject matter and scope of a request for a preliminary ruling, as well as to the form and content of such a request. That information — which applies to all requests for a preliminary ruling (I) — is supplemented by provisions concerning requests for a preliminary ruling requiring particularly expeditious handling

(II) and by an annex which summarises, by way of a reminder, all the elements that must be included in a request for a preliminary ruling."

Preliminary ruling procedure - Recommendations to national courts and tribunals in r elation to the initiation of preliminary ruling proceedings (2019) - **The originator of the request for a preliminary ruling**

"3. The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, whether or not the parties to the main proceedings have expressed the wish that a question be referred to the Court. In so far as it is called upon to assume responsibility for the subsequent judicial decision, it is for the national court or tribunal before which a dispute has been brought — and for that court or tribunal alone — to determine, in the light of the particular circumstances of each case, both the need for a request for a preliminary ruling in order to enable it to deliver its decision and the relevance of the questions which it submits to the Court."

Preliminary ruling procedure - Recommendations to national courts and tribunals in r elation to the initiation of preliminary ruling proceedings (2019) - **The originator of the request for a preliminary ruling**

"4. Status as a court or tribunal is interpreted by the Court as an **autonomous concept of EU law**. The Court takes account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent.

5. The courts and tribunals of the Member States may refer a question to the Court on the interpretation or validity of EU law where they consider that a decision of the Court on the question is necessary to enable them to give judgment (see second paragraph of Article 267 TFEU). A reference for a preliminary ruling may, inter alia, prove particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts."

Preliminary ruling procedure - Recommendations to national courts and tribunals in r elation to the initiation of preliminary ruling proceedings (2019) - **The originator of the request for a preliminary ruling**

"6. Where a question is raised in the context of a case that is pending before a court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal is nonetheless required to bring a request for a preliminary ruling before the Court (see third paragraph of Article 267 TFEU), unless there is already well-established

case-law on the point or unless the correct interpretation of the rule of law in question admits of no reasonable doubt.

7. It follows, moreover, from settled case-law that although national courts and tribunals may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court has exclusive jurisdiction to declare such acts invalid. When it has doubts about the validity of such an act, a court or tribunal of a Member State must therefore refer the matter to the Court, stating the reasons why it has such doubts."

Preliminary ruling procedure - Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019)

INTRODUCTION

I. PROVISIONS WHICH APPLY TO ALL REQUESTS FOR A PRELIMINARY RULING
The originator of the request for a preliminary ruling
The subject matter and scope of the request for a preliminary ruling

The appropriate stage at which to make a reference for a preliminary ruling
The form and content of the request for a preliminary ruling
Protection of personal data and anonymisation of the request for a preliminary ruling

Transmission to the Court of the request for a preliminary ruling and of the case file in the national proceedings Interaction between the reference for a preliminary ruling and the national proceedings
Costs and legal aid

Conduct of the proceedings before the Court and the action taken by the referring court or tribunal upon the Court's decision

II. PROVISIONS APPLICABLE TO REQUESTS FOR A PRELIMINARY RULING REQUIRING PARTICULARLY EXPEDITIOUS HANDLING Conditions for the application of the expedited procedure and the urgent procedure
The request for application of the expedited procedure or the urgent procedure

Communication between the Court, the referring court or tribunal and the parties to the main proceedings

***ANNEX.* The essential elements of a request for a preliminary ruling**

- 81. The draft agreement provides for a preliminary ruling mechanism which reserves, within the scope of that agreement, the power to refer questions for a preliminary ruling to the PC while removing that power from the national courts.

- 82. It must be emphasised that the situation of the PC envisaged by the draft agreement would differ from that of the Benelux Court of Justice which was the subject of Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraphs 21 to 23. Since the Benelux Court is a court common to a number of Member States, situated, consequently, within the judicial system of the European Union, its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union.

- 83. It should also be recalled that Article 267 TFEU, which is essential for the preservation of the Community character of the law established by the Treaties, aims to ensure that, in all circumstances, that law has the same effect in all Member States. The preliminary ruling mechanism thus established aims to avoid divergences in the interpretation of European Union law which the national courts have to apply and tends to ensure this application by making available to national judges a means of eliminating difficulties which may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States. Further, the national courts have the most extensive power, or even the obligation, to make a reference to the Court if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of the provisions of European Union law and requiring a decision by them (see, to that effect, Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraphs 2 and 3, and Case C-458/06 *Gourmet Classic* [2008] ECR I-4207, paragraph 20).

- 84. The system set up by Article 267 TFEU therefore establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order.

- 85. It follows from all of the foregoing that the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties.

- *Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011 (ECR 2011 p. I-1137) ECLI:EU:C:2011:123* [CURIA]

- **Koen Lenaerts**, *The Court of Justice of the European Union as the guardian of the authority of EU law*, https://www.youtube.com/watch?v=YBN4AODcKMQ, 9.10' importance of national courts, Opinion 01/09

*Arbitral tribunal. A*rticle 267 TFEU, CJEU, and arbitration: the public policy and obligation to apply the EU law (for the arbitral tribunal)

Gerhard Bebr,

Arbitration Tribunals and Article 177 of the EEC Treaty, CML Rev, Vol. 22, 1985, p. 489-504

legal order which would justify an ordinary court refusing to enforce such an award.

The Court did implicitly recognize in *Nordsee* the need for the uniform interpretation and application of Community law even in arbitration proceedings. However, it may be questioned whether the traditional method of relying on the national rules on arbitration procedure, as suggested by the Court, may really further this objective. This procedure may turn out to be a cumbersome and particularistic solution. The other alternative is to recognize the right of a true arbitration tribunal to refer. Some grounds contesting such a right should not be minimized and dismissed immediately. However, in an overall appraisal, such a right appears to be of such importance to the uniform interpretation and application of Community law that in the long run its recognition may clearly outweigh the objections raised. In view of the detrimental consequences which are likely to result to Community law should arbitration tribunals be excluded from the application of Article 177, their right to refer should indeed be recognized. It is, therefore, hoped that the Court may reconsider its decision in *Nordsee*, the reasoning of which is not so rigid as to preclude *a priori* such a step.

George Bermann, International Arbitration and EU Law. What Next, New York Arbitration Week 2020

- *Opinion 1/09*
- *31'-33'*

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Arbitration in Europe – A Framework in the Making?

Vienna Arbitration Days 2012

Prof. Dr. Siegfried H. Elsing, LL.M. (Yale)
Rechtsanwalt (Düsseldorf) / Attorney-at-Law (New York)

Vienna, 17 February 2012

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Pros and Cons

- **Contra right to seek PRs**
  - Strict textual interpretation (*"einzelstaatliche"* Gerichte / *"tribunal of a Member State"*)
  - Manipulation through mutual termination of arbitration agreement?
  - Unfounded references by "lay" arbitrators
  - Loss of efficiency of arbitration
- **Pro right to seek PRs**
  - EU law must be applied *ex officio* by arbitral tribunals
  - Arbitral tribunals have same adjudication powers as ordinary courts of law
  - State courts cannot act as *"forwarding agent"* (Vorlagebote) of arbitral tribunal
  - Reference in connection with annulment proceedings inappropriate
  - Increased case load of ECJ?

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• ECJ Case law

Case 61/65, *Vaasen Göbbels, Judgment of 30 June 1966*

• *PROCEDURE - PRELIMINARY RULING - NATIONAL COURT OR TRIBUNAL WITHIN THE MEANING OF ARTICLE 177 OF THE EEC TREATY - BODIES ANALOGOUS TO ORDINARY COURTS OF LAW - POWER TO REFER CASES TO THE COURT*

"THE SCHEIDSGERECHT IS PROPERLY CONSTITUTED UNDER NETHERLANDS LAW, AND IS PROVIDED FOR BY THE ' REGLEMENT VAN HET BEAMBTENFONDS VOOR HET MIJNBEDRIJF ' (RBFM) WHICH GOVERNS THE RELATIONSHIP BETWEEN THE BEAMBTENFONDS AND THOSE INSURED BY IT.

ACCORDING TO THE TERMS OF THE NETHERLANDS INVALIDITY LAW, THE COMPULSORY INSURANCE PROVIDED FOR BY THAT LAW DOES NOT APPLY TO PERSONS WHOSE INVALIDITY OR OLD-AGE PENSION IS PROVIDED FOR UNDER THE TERMS OF ANOTHER SCHEME WHICH IS INTENDED TO REPLACE THE GENERAL SCHEME. SUCH SUBSTITUTION WILL OCCUR WHEN THE COMPETENT AUTHORITIES DECLARE THAT THE SUBSTITUTED SCHEME SATISFIES THE LEGAL REQUIREMENTS AND OFFERS SUFFICIENT GUARANTEES FOR THE PROVISION OF PENSIONS. ANALOGOUS PROVISIONS EXIST FOR OTHER BRANCHES OF SOCIAL SECURITY. IT FOLLOWS THAT THE RULES AND ANY SUBSEQUENT AMENDMENTS OF THEM MUST BE APPROVED NOT ONLY BY THE NETHERLANDS MINISTER RESPONSIBLE FOR THE MINING INDUSTRY, BUT ALSO BY THE MINISTER FOR SOCIAL AFFAIRS AND PUBLIC HEALTH."

Case 61/65, Vaassen-Goebbels / Beambtenfonds voor het Mijnbedrijf, Judgment of 30 June 1966, ECR 1966 p. 261.[CURIA]

Vaasen Göbbels, Case 61/65 Commentary in Epameinondas Stylopoulos, Arbitrators: judges or not?

”The ECJ elucidated in *Nordsee* that an arbitral tribunal constituted pursuant to an arbitration agreement is purely private in nature because its authority derived only from party autonomy and therefore it is not a “court or tribunal of a Member State” within the meaning of Art 234 EC Treaty. In this case, the Court applied the criteria laid down in the *Vaasen Göbbels* [Case 61/65, 30 June 1966] decision whether a Member State had entrusted or left to a tribunal the duty of ensuring compliance with the State’s obligations under Community law. In order for an organ to be considered as a court or tribunal and be in the position to refer preliminary questions to the ECJ, it has to fulfil five criteria: the organ in question must be provided for by law, must be permanent, must respect due process requirements, must apply rules of law and those under its jurisdiction must be bound to go before it. Moreover, the degree of governmental co-operation with, and supervision of, the organ in question is ultimately decisive in recognizing it as a tribunal under Art 234 EC Treaty.”

Epameinondas Stylopoulos, Arbitrators: judges or not? An EC approach…, Kluwer Arbitration Blog, 09.03.2009,

http://arbitrationblog.kluwerarbitration.com/2009/03/09/arbitrators-judges-or-not-an-ec- approach/

102/81, Nordsee / Reederei Mond, Judgment of 23 March 1982, ECR 1982 p. 1095

7 SINCE THE ARBITRATION TRIBUNAL WHICH REFERRED THE MATTER TO THE COURT FOR A PRELIMINARY RULING WAS ESTABLISHED PURSUANT TO A CONTRACT BETWEEN PRIVATE INDIVIDUALS THE QUESTION ARISES WHETHER IT MAY BE CONSIDERED AS A COURT OR TRIBUNAL OF ONE OF THE MEMBER STATES WITHIN THE MEANING OF ARTICLE 177 OF THE TREATY.

8 THE FIRST QUESTION PUT BY THE ARBITRATOR CONCERNS THAT PROBLEM IT IS WORDED AS FOLLOWS :

"IS A GERMAN ARBITRATION COURT , WHICH MUST DECIDE NOT ACCORDING TO EQUITY BUT ACCORDING TO LAW , AND WHOSE DECISION HAS THE SAME EFFECTS AS REGARDS THE PARTIES AS A DEFINITIVE JUDGMENT OF A COURT OF LAW (ARTICLE 1040 OF THE ZIVILPROZESSORDNUNG (RULES OF CIVIL PROCEDURE)) AUTHORIZED TO MAKE A REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES FOR A PRELIMINARY RULING PURSUANT TO THE SECOND PARAGRAPH OF ARTICLE 177 OF THE EEC TREATY?""

9 IT MUST BE NOTED THAT , AS THE QUESTION INDICATES , THE JURISDICTION OF THE COURT TO RULE ON QUESTIONS REFERRED TO IT DEPENDS ON THE NATURE OF THE ARBITRATION IN QUESTION.

10 IT IS TRUE, AS THE ARBITRATOR NOTED IN HIS QUESTION , THAT THERE ARE CERTAIN SIMILARITIES BETWEEN THE ACTIVITIES OF THE ARBITRATION TRIBUNAL IN QUESTION AND THOSE OF AN ORDINARY COURT OR TRIBUNAL INASMUCH AS THE ARBITRATION IS PROVIDED FOR WITHIN THE FRAMEWORK OF THE LAW , THE ARBITRATOR MUST DECIDE ACCORDING TO LAW AND HIS AWARD HAS , AS BETWEEN THE PARTIES , THE FORCE OF RES JUDICATA , AND MAY BE ENFORCEABLE IF LEAVE TO ISSUE EXECUTION IS OBTAINED. ***HOWEVER****, THOSE CHARACTERISTICS ARE NOT SUFFICIENT TO GIVE THE ARBITRATOR THE STATUS OF A "COURT OR TRIBUNAL OF A MEMBER STATE" WITHIN THE MEANING OF ARTICLE 177 OF THE TREATY.*

CURIA/EUR-LEX

102/81, Nordsee / Reederei Mond, Judgment of 23 March 1982, ECR 1982 p. 1095

11 THE FIRST IMPORTANT POINT TO NOTE IS THAT WHEN THE CONTRACT WAS ENTERED INTO IN
1973 THE PARTIES WERE FREE TO LEAVE THEIR DISPUTES TO BE RESOLVED BY THE ORDINARY COURTS OR TO OPT FOR ARBITRATION BY INSERTING A CLAUSE TO THAT EFFECT IN THE CONTRACT. FROM THE FACTS OF THE CASE IT APPEARS THAT THE PARTIES WERE UNDER NO OBLIGATION, WHETHER IN LAW OR IN FACT, TO REFER THEIR DISPUTES TO ARBITRATION.

12 THE SECOND POINT TO BE NOTED IS THAT THE GERMAN PUBLIC AUTHORITIES ARE NOT INVOLVED IN THE DECISION TO OPT FOR ARBITRATION NOR ARE THEY CALLED UPON TO INTERVENE AUTOMATICALLY IN THE PROCEEDINGS BEFORE THE ARBITRATOR. THE FEDERAL REPUBLIC OF GERMANY, AS A MEMBER STATE OF THE COMMUNITY RESPONSIBLE FOR THE PERFORMANCE OF OBLIGATIONS ARISING FROM COMMUNITY LAW WITHIN ITS TERRITORY PURSUANT TO ARTICLE 5 AND ARTICLES 169 TO 171 OF THE TREATY, HAS NOT ENTRUSTED OR LEFT TO PRIVATE INDIVIDUALS THE DUTY OF ENSURING THAT SUCH OBLIGATIONS ARE COMPLIED WITH IN THE SPHERE IN QUESTION IN THIS CASE.

13 IT FOLLOWS FROM THESE CONSIDERATIONS THAT THE LINK BETWEEN THE ARBITRATION PROCEDURE IN THIS INSTANCE AND THE ORGANIZATION OF LEGAL REMEDIES THROUGH THE COURTS IN THE MEMBER STATE IN QUESTION IS NOT SUFFICIENTLY CLOSE FOR THE ARBI TRATOR TO BE CONSIDERED AS A "COURT OR TRIBUNAL OF A MEMBER STATE" WITHIN THE MEANING OF ARTICLE 177. CURIA/EUR-LEX

102/81, Nordsee / Reederei Mond, Judgment of 23 March 1982, ECR 1982 p. 1095

14 AS THE COURT HAS CONFIRMED IN ITS JUDGMENT OF 6 OCTOBER 1981 BROEKMEULEN , CASE 246/80 (1981) ECR 2311), COMMUNITY LAW MUST BE OBSERVED IN ITS ENTIRETY THROUGHOUT THE TERRITORY OF

ALL THE MEMBER STATES; PARTIES TO A CONTRACT ARE NOT , THEREFORE , FREE TO CREATE EXCEPTIONS TO IT. IN THAT CONTEXT ATTENTION MUST BE DRAWN TO THE FACT THAT IF QUESTIONS OF COMMUNITY LAW ARE RAISED IN AN ARBITRATION RESORTED TO BY AGREEMENT THE ORDINARY COURTS MAY BE CALLED UPON TO EXAMINE THEM EITHER IN THE CONTEXT OF THEIR COLLABORATION WITH ARBITRATION TRIBUNALS , IN PARTICULAR IN ORDER TO ASSIST THEM IN CERTAIN PROCEDURAL MATTERS OR TO INTERPRET THE LAW APPLICABLE , OR IN THE COURSE OF A REVIEW OF AN ARBITRATION AWARD - WHICH MAY BE MORE OR LESS EXTENSIVE DEPENDING ON THE CIRCUMSTANCES - AND WHICH THEY MAY BE REQUIRED TO EFFECT IN CASE OF AN APPEAL OR OBJECTION , IN PROCEEDINGS FOR LEAVE TO ISSUE EXECUTION OR BY ANY OTHER METHOD OF RECOURSE AVAILABLE UNDER THE RELEVANT NATIONAL LEGISLATION.

15 IT IS FOR THOSE NATIONAL COURTS AND TRIBUNALS TO ASCERTAIN WHETHER IT IS NECESSARY FOR THEM TO MAKE A REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE TREATY IN ORDER TO OBTAIN THE INTERPRETATION OR ASSESSMENT OF THE VALIDITY OF PROVISIONS OF COMMUNITY LAW WHICH THEY MAY NEED TO APPLY WHEN EXERCISING SUCH AUXILIARY OR SUPERVISORY FUNCTIONS.

16 IT FOLLOWS THAT IN THIS INSTANCE THE COURT HAS NO JURISDICTION TO GIVE A RULING.

CURIA/EUR-LEX

109/88, ***Danfoss***, *Judgment of 17 October 1989*

*109/88, Handels- og Kontorfunktionærernes Forbund i Danmark / Dansk Arbejdsgiverforening, acting on behalf of **Danfoss**, Judgment of 17 October 1989, ECR 1989 p. 3199, ECLI:EU:C:1989:383.[CURIA]*

7 As regards the question whether the Industrial Arbitration Board is a court or tribunal of a Member State within the meaning of Article 177 of the Treaty, it should first be pointed out that, according to Article 22 of the Danish Law No 317 of 13 June 1973 on the Labour Court, disputes between parties to collective agreements are, in the absence of special

provisions in such agreements, subject to the Agreed Standard Rules adopted by the Employers' Association and Employees' Union . An industrial arbitration board then hears the dispute at last instance . Either party may bring a case before the board irrespective of the objections of the other. ***The board' s jurisdiction thus does not depend upon the parties' agreement****.*

8 The same provision of the aforementioned law governs the composition of the board and in particular the number of members who must be appointed by the parties and the way in which the umpire must be appointed in the absence of agreement between them. ***The composition of the industrial arbitration board is thus not within the parties' discretion.***

9 In those circumstances the Industrial Arbitration Board must be regarded as a court or tribunal of a Member State within the meaning of Article 177 of the Treaty.

*C-393/92, Gemeente **Almelo** and others/Energiebedrijf IJsselmij Judgment of 27 April 1994, ECR 1994, p. I-1477, ECLI:EU:C:1994:171*

21 In order to answer the first question, it should be noted that, as the Court held in its judgment in Case 61/65 Vaassen-Goebbels [1966] ECR 377, the concept of a court or tribunal within the meaning of Article 177 of the Treaty necessarily implies that such a forum should satisfy a number of criteria; it must be established by law, have a permanent existence, exercise binding jurisdiction, be bound by rules of adversary procedure and apply the rule of law. ***The Court has extended those criteria, pointing out in particular the need for the court or tribunal in question to be independent*** *(judgments in Case 14/86 Pretore di Salò [1987] ECR 2545, paragraph 7, Case 338/85 Pardini [1988] ECR 2041, paragraph 9 and Case C-24/92 Corbiau [1993] ECR I-1278).*

22 With regard to arbitration, the Court held in its judgment in Case 102/81 Nordsee [1982] ECR 1095, paragraph 14, that the concept of a court or tribunal within the meaning of Article 177 of the Treaty covers an

ordinary court reviewing an arbitration award in the case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.

23 That interpretation by the Court is not affected by the fact that, by virtue of the arbitration agreement made between the parties, a court such as the Gerechtshof gives judgment according to what appears fair and reasonable. ***It follows from the principles of the primacy of Community law and of its uniform application, in conjunction with Article 5 of the Treaty, that a court of a Member State to which an appeal against an arbitration award is made pursuant to national law must, even where it gives judgment having regard to fairness, observe the rules of Community law, in particular those relating to competition.***

24 The answer to the first question must therefore be that a national court which, in a case provided for by law, determines an appeal against an arbitration award must be regarded as a court or tribunal within the meaning of Article 177 of the EEC Treaty, even if under the terms of the arbitration agreement made between the parties that court must give judgment according to what appears fair and reasonable.

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CJ0393

C-125/04, Denuit and Cordenier, Judgment of 27 January 2005, ECR 2005 p. I-923, ECLI:EU:C:2005:69

11 As a preliminary issue it must be examined whether the abovementioned Collège d'arbitrage should be regarded as a court or tribunal for the purposes of Article 234 EC.

12 In order to determine whether a body making a reference is a court or tribunal of a Member State for the purposes of Article 234 EC, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96

Dorsch Consult [1997] ECR I- 4961, paragraph 23, and the case-law there cited, and Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 34).

13 Under the Court's case-law, an arbitration tribunal is not a 'court or tribunal of a Member State' within the meaning of Article 234 EC where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case 102/81 '*Nordsee*' *Deutsche Hochseefischerei* [1982] ECR 1095, paragraphs 10 to 12, and Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 34).

14 In the main proceedings it is apparent from the decision to refer the matter that submission of the matter to the arbitration panel of the travel dispute committee stems from an arbitration agreement entered into between the parties.

15 Belgian legislation does not lay down recourse to this arbitration board as the sole means of resolving a dispute between an individual and a travel agency. It is true that an ordinary court before which a dispute is brought to which an arbitration agreement applies must decline jurisdiction under Article 1679(1) of the Belgian judicial code. None the less, jurisdiction of the arbitration panel is not mandatory in the sense that, in the absence of an arbitration agreement entered into between the parties, an individual may apply to the ordinary courts for resolution of the dispute.

16 Since in the main proceedings the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the Belgian public authorities are not involved in the decision to opt for arbitration, the Collège d'arbitrage de la Commission de Litiges Voyages cannot be regarded as a court or tribunal of a Member State for the purposes of Article 234 EC.

17 Accordingly, the Court is not competent to rule on questions referred to it by that body.

C-394/11, Belov, Judgment of 31 January 2013, ECLI:EU:C:2013:48

• 38 In that regard, it should be recalled, as a preliminary point, that, according to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case C-196/09 *Miles and Others* [2011] ECR I-5105, paragraph 37 and the case-law cited).

• 39 ***In addition, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature*** (see, in particular, Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29 and the case-law cited).

• 40 Therefore, it is appropriate to determine whether a body may refer a case to the Court of Justice on the basis of criteria relating both to the constitution of that body and to its function. In that connection, a national body may be classified as a court or tribunal within the meaning of Article 267 TFEU, when it is performing judicial functions, but when exercising other functions, of an administrative nature, for example, it cannot be recognised as such (see, in particular, order of 26 November 1999 in Case C-192/98 *ANAS* [1999] ECR I-8583, paragraph 22).

• 41 It follows that, in order to establish whether a national body, entrusted by law with different categories of functions, is to be regarded as a court or tribunal within the meaning of Article 267 TFEU, it is necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling from the Court (see order in *ANAS*, paragraph 23).

15 First, it is must be examined whether the Tribunal Arbitral necessário should be considered to be a court or tribunal for the purposes of Article 267 TFEU.

16 In that regard, it should be noted that, according to settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see C-394/11 *Belov* [2013] ECR, paragraph 38 and the case-law cited).

17 It should also be stated that a conventional arbitration tribunal is not a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case C-125/04 *Denuit and Cordenier* [2005] ECR I-923, paragraph 13 and the case-law cited).

18 However, the Court has held admissible preliminary questions referred to it by an arbitral tribunal, where that tribunal had been established by law, whose decisions were binding on the parties and whose jurisdiction did not depend on their agreement (see, to that effect, Case 109/88 *Danfoss* [1989] ECR 3199, paragraphs 7 to 9).

19 In the main proceedings, it is clear from the order for reference that the jurisdiction of the Tribunal Arbitral necessário does not stem from the will of the parties, but from Law No 62/2011 of 12 December 2011. That law confers upon that tribunal compulsory jurisdiction to determine, at first instance, disputes involving industrial property rights pertaining to reference medicinal products and generic drugs. In addition, if the arbitral decision handed down by such a body is not subject to an appeal before

the competent appellate court, it becomes definitive and has the same effects as a judgment handed down by an ordinary court.

20 The Member State at issue has therefore chosen, in the context of its procedure autonomy and with a view to implementing Regulation No 469/2009, to confer the jurisdiction for this type of dispute upon another body rather than an ordinary court (see, to that effect, Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie* [1981] ECR 2311, paragraph 16).

CURIA

*C-555/13, **Merck Canada**, Order of 13 February 2014, ECLI:EU:C:2014:92*

21 It is, moreover, apparent from the order for reference that the conditions laid down in the case-law of the Court referred to in paragraph 16 of the present order, relating to whether the body is established by law, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent, are met.

22 It is clear from the order for reference that Article 209(2) of the Constitution of the Portuguese Republic lists the arbitral tribunals among those entities capable of exercising an adjudicative function and that the Tribunal Arbitral necessário was established by Law No 62/2011 of 12 December 2011.

23 Furthermore, according to the order for reference, the arbitrators are subject to the same obligations of independence and impartiality as judges belonging to the ordinary courts and the Tribunal Arbitral necessário observes the principle of equal treatment and the adversarial principle in the treatment of parties and gives its rulings on the basis of the Portuguese law on industrial property.

24 The Tribunal Arbitral necessário may vary in form, composition and rules of procedure, according to the choice of the parties. Moreover, it is dissolved after making its decision. It is true that, those factors may raise certain doubts as to its permanence. However, given that that tribunal

was established on a legislative basis, that it has permanent compulsory jurisdiction and, in addition, that national legislation defines and frames the applicable procedural rules, it should be found that, in the present case, the requirement of permanence is also met.

25 Taking all of those considerations into account, it must be held that, in circumstances such as those of the main proceedings, the Tribunal Arbitral necessário fulfils all of the conditions laid down by the case-law of the Court, as set out in paragraphs 16 to 19 of the present order, and must be considered to be a court or tribunal for the purposes of Article 267 TFEU.
CURIA

*C-377/13, **Ascendi** Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, Judgment of 12 June 2014, ECLI:EU:C:2014:1754*

22 As a preliminary matter, it is necessary to examine whether the Tribunal Arbitral Tributário is to be considered a court or tribunal of a Member State for the purposes of Article 267 TFEU.

23 In that regard, it must be recalled that, according to settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see Case C-394/11 *Belov* EU:C:2013:48, paragraph 38 and the case-law cited). In addition, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, in particular, Case C-53/03 *Syfait and Others* EU:C:2005:333, paragraph 29, and *Belov* EU:C:2013:48, paragraph 39).

24 In the main proceedings, it appears from the information provided in the order for reference that the arbitration tribunals dealing with taxation have been established by law. The arbitration tribunals are included in the list of national courts in Article 209 of the Constitution of the Portuguese Republic. Moreover, Article 1 of Decree-Law No 10/2011, of 20 January 2011, on the legal rules governing tax arbitration, provides that tax arbitration constitutes an alternative means of judicial resolution of tax disputes and Article 2 of the same decree-law confers general jurisdiction on arbitration tribunals dealing with taxation for assessing the legality of the payment of any tax.

25 In addition, as an element of the system of judicial resolution of tax disputes, arbitration tribunals dealing with taxation meet the requirement of permanence.

26 As stated by the Advocate General in paragraph 37 of his Opinion, even though the composition of the trial formations of the Tribunal Arbitral Tributário is ephemeral and their activity ends once they have made their ruling, the fact remains that, as a whole, the Tribunal Arbitral Tributário, as an element of the system referred to, is permanent in nature.

CURIA

*C-377/13, **Ascendi** Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, Judgment of 12 June 2014, ECLI:EU:C:2014:1754*

27 With regard to compulsory jurisdiction, it must be recalled that this element is lacking in contractual arbitration, since the contracting parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are neither involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case C-125/04 *Denuit and Cordenier* EU:C:2005:69, paragraph 13 and the case-law cited, and order in C-555/13 *Merck Canada* EU:C:2014:92, paragraph 17).

28 However, the Court has held admissible preliminary questions referred to it by an arbitration tribunal, where that tribunal had been established by law, its decisions were binding on the parties and its jurisdiction did not depend on their agreement (order in *Merck Canada* EU:C:2014:92, paragraph 18 and the case-law cited).

29 As stated by the Advocate General in paragraphs 28 and 40 of his Opinion, the Tribunal Arbitral Tributário, whose decisions are binding on parties under Article 24(1) of Decree-Law No 10/2011, must be distinguished from an arbitration tribunal in the strict sense. Its jurisdiction stems directly from the provisions of Decree-Law No 10/2011 and is not, as a result, subject to the prior expression of the parties' will to submit their dispute to arbitration (see, by analogy, Case 109/88 *Danfoss* EU:C:1989:383, paragraph 7). Thus, where the taxpayer applicant submits its dispute to tax arbitration, the Tribunal Arbitral Tributário has, in accordance with Article 4(1) of Decree-Law No 10/2011, compulsory jurisdiction as regards taxation and customs matters.

CURIA

*C-377/13, **Ascendi** Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, Judgment of 12 June 2014, ECLI:EU:C:2014:1754*

30 The requirement of *inter partes* procedure before the arbitration tribunals dealing with taxation, meanwhile, is guaranteed by Articles 16 and 28 of Decree-Law No 10/2011. Moreover, in accordance with Article 2(2) of that decree-law, the arbitration tribunals dealing with taxation 'are to adjudicate on the basis of statutory law and recourse to equity is prohibited'.

31 With regard to the independence of the arbitration tribunals dealing with taxation, it is apparent, first, from the order for reference that the arbitrators comprising the Tribunal Arbitral Tributário before which the dispute in the main proceedings was brought were appointed, pursuant to Article 6 of Decree-Law No 10/2011, by the Conselho Deontológico do

Centro de Arbitragem Administrativa (Ethics Board of the Centre for Administrative Arbitration) from among the list drawn up by that institution.

32 Secondly, Article 9 of Decree-Law No 10/2011 provides that arbitrators are to be subject to the principles of impartiality and independence. Moreover, Article 8(1) of that decree-law specifies, as an impediment to the exercise of the function of arbitrator, the existence of any personal or professional relationship between the arbitrator and one of the parties to the dispute. It is thus ensured that the relevant arbitration tribunal acts as a third party in relation to the authority which adopted the impugned decision (see Case C-517/09 *RTL Belgium* EU:C:2010:821, paragraph 38 and the case-law cited, and order in Case C-167/13 *Devillers* EU:C:2013:804, paragraph 15).

33 Lastly, as is apparent from Article 1 of Decree-Law No 10/2011, the arbitration tribunals dealing with taxation give judgment in proceedings that give rise to a decision of a judicial nature.

34 It is clear from all the foregoing considerations that the referring body possesses all the characteristics necessary in order to be regarded as a court or tribunal of a Member State for the purposes of Article 267 TFEU.

35 The Court therefore has jurisdiction to reply to the question referred by the referring court.

CURIA

Paschalis Paschalidis, Arbitral tribunals and preliminary references to the EU Court of Justice

"As to the Ascendi judgment, it also marks a startling departure from the Danfoss case-law in that the Court accepted a reference for a preliminary ruling from an arbitral tribunal where recourse to arbitration was not rendered compulsory by law. Indeed Article 1 of Decree-Law No 10/2011 introduced arbitration of tax disputes as a means of alternative dispute resolution."

"even though in Merck Canada recourse to arbitration was rendered compulsory by law, the reference for a preliminary ruling was submitted

by an ad hoc arbitral tribunal which was not covered by any arbitral institution. The Merck Canada tribunal, like any other ad hoc tribunal, became *functus officio* as soon as it handed it down its final award. It is thus surprising that, in reaching its conclusion that the ad hoc arbitral tribunal qualified as a 'court or tribunal of a Member State', the Court relied on the Danfoss ruling, as the requirement of permanence was not fulfilled in Merck Canada."

The preliminary ruling made by an arbitral court from Romania

- *C-370/18, Holunga, Order of 13 December 2018, ECLI:EU:C:2018:1011*
- *C-185/19, KE, Order of 24 September 2019, Publié au Recueil numérique, ECLI:EU:C:2019:779*

C-370/18, Holunga, Order of 13 December 2018, ECLI:EU:C:2018:1011

- **Order of the Court (Eighth Chamber) of 13 December 2018 — Holunga**
- **(Case C-370/18)**
- (Reference for a preliminary ruling — Article 53(2) of the Rule of Procedure — Article 267 TFEU — Concept of a 'court or tribunal of a Member State' — Compulsory nature of its jurisdiction — Manifest inadmissibility of the request for a preliminary ruling)
- *Questions referred for a preliminary ruling — Reference to the Court — National court or tribunal within the meaning of Article 267 TFEU — Definition — Tribunalul de Arbitraj Instituţionalizat Galaţi (Institutional Arbitration Tribunal, Galați, Romania) — Not included*
- *(Art. 267 TFEU)*
- *(see paras 11, 13, 14, 15, operative part.)*
- **Operative part**
- The request for a preliminary ruling made by the Tribunalul de Arbitraj Instituţionalizat Galaţi (Institutional Arbitration Tribunal, Galați, Romania), by decision of 7 May 2018, is manifestly inadmissible.

C-370/18, Holunga, Order of 13 December 2018, ECLI:EU:C:2018:1011

12 According to settled case-law of the Court, the procedure established by Article 267 TFEU is an instrument of cooperation between the Court and national courts, by means of which the Court provides the latter with the interpretations of European Union law which they need to resolve the dispute before them. (see, inter alia, Case C-370/12 Pringle [2012] ECR I-0000, paragraph 83, and the Order of 8 September 2016, Google Ireland and Google Italy, C-322/15 , EU: C: 2016: 672, paragraph 14).

13 It follows that, in order to be able to refer the matter to the Court of First Instance, it must be possible to classify it as a 'court' within the meaning of Article 267 TFEU, which the Court is required to examine on the basis of the reference for a preliminary ruling.

14 In order to determine whether the referring body has the character of a 'court' within the meaning of Article 267 TFEU, which is an exclusive matter of European Union law, the Court considers a set of criteria such as the legal origin of the body, its permanent character, the binding nature of jurisdiction. its contradictory nature of the procedure, its application of the rules of law and its independence (see Case C-54/96 Dorsch Consult [1997] ECR I-0000, paragraph 23, and Judgment of 6 October 2015, Consorci Sanitari del Maresme, C - 203/14, EU: C: 2015: 664, paragraph 17, and Ordinance of 14 November 2013, MF 7, C - 49/13, EU: C: 2013: 767, paragraph 15 and the case-law cited).

15 The Court has already held, in respect of an arbitral tribunal established by a convention, that, since it lacks the binding nature of its jurisdiction, since there is no obligation, either in law or in fact, of the contracting parties to arbitration disputes and the public authorities of the Member State concerned are neither involved in the decision to opt for arbitration nor called upon to intervene ex officio in the proceedings before the arbitrator, it shall not constitute a court of a Member State in within the meaning of Article 267 TFEU (see, to that effect, Order of 13

February 2014, Merck Canada, C - 555/13, EU: C: 2014: 92, paragraph 17 and the case-law cited).

16 However, the Court has ruled that questions referred by a arbitral tribunal of legal origin are admissible, the decisions of which are binding on the parties and whose jurisdiction does not depend on their agreement (Order of 13 February 2014, Merck Canada, C -555/13, EU: C: 2014: 92, paragraph 18 and the case law cited, and the judgment of 6 October 2015, Consorci Sanitari del Maresme, C - 203/14, EU: C: 2015: 664, paragraphs 23-25).

17 In the present case, it is apparent from the order for reference that the Galati Court of Institutional Arbitration was seised as a result of the conclusion of an arbitration agreement by the parties to the main proceedings.

18 In response to a request for clarification made to it by the Court pursuant to Article 101 of the Rules of Procedure, the Galati Institutional Arbitration Tribunal confirmed that, in the absence of the signing of that arbitration agreement, only the ordinary courts would have jurisdiction. the main dispute.

19 In the present case, the jurisdiction of the Galați Institutional Arbitration Tribunal expressly depends on the agreement of the parties to the main proceedings.

20 It follows that the Galați Institutional Arbitration Tribunal does not fulfill the criterion of the binding nature of its jurisdiction and that, consequently, it cannot be classified as a 'court' within the meaning of Article 267 TFEU.

21 In the light of the foregoing, it must be held that this reference for a preliminary ruling is manifestly inadmissible.

- ORDER OF THE COURT (Sixth Chamber)
- 24 September 2019 (*)
- (Reference for a preliminary ruling — Charter of Fundamental Rights of the European Union — Right to effective legal protection — Legal precedent — Arbitral tribunal — Manifest inadmissibility and lack of jurisdiction of the Court of Justice — Article 53(2) and Article 94 of the Rules of Procedure of the Court of Justice)

- In Case C-185/19,

- REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Arbitral de pe lângă Asociația de arbitraj de pe lângă Baroul Cluj (Arbitral Tribunal of the Arbitration Association at the Cluj Bar, Romania), by a decision of 12 February 2019, received at the Court on 25 February 2019, in the proceedings

- **KE**

- v

- **LF,**

- **The request for a preliminary ruling made by the Tribunalul Arbitral de pe lângă Asociația de arbitraj de pe lângă Baroul Cluj (Arbitral Tribunal of the Arbitration Association at the Cluj Bar, Romania), by a decision of 12 February 2019, is manifestly inadmissible and, in any event, the Court of Justice of the European Union clearly lacks jurisdiction to hear and determine that request.**

C-185/19, KE, Order of 24 September 2019, Publié au Recueil numérique, ECLI:EU:C:2019:779

The dispute in the main proceedings and the question referred for a preliminary ruling

The dispute in the main proceedings and the question referred for a preliminary ruling

9 KE and LF are lawyers and members of the Cluj bar (Romania). KE states that, on 22 February 2018, the *Jurnalul Baroului Cluj* (*Journal of the Cluj Bar*), the journal of the professional association of lawyers belonging to that bar, published an article written by KE, entitled 'Exercitarea dreptului la apărare prin declarații conținând afirmații necorespunzătoare adevărului în fața organelor judiciare' ('Exercise of the rights of the defence before the courts using declarations containing untruthful statements').

10 KE draws attention to the fact that, although initially LF, who is the editor of that journal, had no objection to publication of that scientific article, after it was published, he expressed a number of criticisms, which KE believes are unjustified, culminating in the publication of a post on his

Facebook page, the contents of which are not set out in the decision to refer.

11 According to KE, statements of that kind do not in any respect fall within the category of criticism covered by the right to freedom of expression.

12 On 28 January 2019, KE brought an action against LF before the Tribunalul Arbitral de pe lângă Asociația de arbitraj de pe lângă Baroul Cluj (Arbitral Tribunal of the Arbitration Association at the Cluj Bar, Romania). KE applied to that arbitral tribunal:

– to find that the post that LF published on his Facebook page on 7 January 2019 is unlawful and

– under Article 252(3)(a) and (b) of the Romanian Civil Code, to order LF to publish the judgment on his Facebook page and to continue to publish it for at least as long as the period during which the unlawful post existed on that page.

13 LF asked the Tribunalul Arbitral de pe lângă Asociația de arbitraj de pe lângă Baroul Cluj (Arbitral Tribunal of the Arbitration Association at the Cluj Bar) to refer a question to the Court of Justice for a preliminary ruling.

14 According to that arbitral tribunal, it is faced with, on the one hand, the duty of the Romanian courts to respond to all the parties' applications and requested remedies, and therefore to a request for a reference to the Court of Justice, and, on the other hand, the fact that it is bound by legal precedent, in so far as that tribunal believes it cannot adopt an outcome that departs from the relevant legal precedent unless it identifies a way to apply the legislation at issue more in conformity with the letter of the law.

15 In those circumstances the Tribunalul Arbitral de pe lângă Asociația de arbitraj de pe lângă Baroul Cluj (Arbitral Tribunal of the Arbitration Association at the Cluj Bar) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Must the provisions of the [EU] Treaty, and Article 6(1) in particular, according to which the [European] Union recognises the rights, freedoms and principles set out in the Charter …, which shall have the same legal

value as the Treaties, and the provisions of the Charter, in particular Article 20, which establishes that everyone is equal before the law, and Article 47, which establishes that everyone is entitled to a fair hearing, be interpreted as meaning that a Romanian national court is obliged:

- to respond to all the parties' applications and requested remedies and to examine them effectively, because the parties are entitled to expect a specific and explicit response in respect of all the pleas in law that are decisive in determining the case at issue, and

- to be bound by legal precedent, where the legal precedent is a final judgment of the same court, or of a different Romanian national court, in a case in which the national court hearing the case has established that it is relevant to invoke that precedent and finds the cases to be "legally similar", given that the binding nature of that precedent means that a court that finds cases to be "legally similar" can adopt a different outcome only if it justifies its divergent approach on the grounds that it is applying the legislation more in conformity with the letter of the law?'

C-185/19, KE, Order of 24 September 2019, Publié au Recueil numérique, ECLI:EU:C:2019:779

Admissibility of the request for a preliminary ruling and the jurisdiction of the Court of Justice

16 Under Article 53(2) of the Rules of Procedure of the Court, where the Court clearly has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

17 That article should be applied in the present case.

18 It needs stating in that respect that the request for a preliminary ruling is manifestly inadmissible under Article 94(c) of the Rules of Procedure, given that it cannot be found from the evidence set out in this request that the request is admissible in the light of the requirement that

it must be from a 'court or tribunal' within the meaning of Article 267 TFEU. The Tribunalul Arbitral de pe lângă Asociația de arbitraj de pe lângă Baroul Cluj (Arbitral Tribunal of the Arbitration Association at the Cluj Bar) has in fact not provided any evidence capable of demonstrating that it is such a court or tribunal.

19 Since it does not appear that the national legislation requires recourse to that tribunal as the only means of settling the dispute in the main proceedings and precludes the parties from recourse to the ordinary courts, that arbitral tribunal should have established why, in the situation under analysis, proceedings had to be brought before it. The decision to refer does not in fact make any mention of the provisions of the Code of Civil Procedure governing official arbitration. This request for a preliminary ruling must therefore be found to be manifestly inadmissible.

20 As regards the jurisdiction of the Court to interpret certain provisions of the Charter, it is worth adding that, even assuming the request to be admissible, there is no evidence in the order for reference to indicate that the objective of the main proceedings concerns the interpretation or application of a rule of Union law other than those set out in the Charter.

21 The context of the question referred is in fact a dispute between two individuals concerning an application for a finding that a post on a Facebook page is unlawful. In those circumstances, the Tribunalul Arbitral de pe lângă Asociația de arbitraj de pe lângă Baroul Cluj (Arbitral Tribunal of the Arbitration Association at the Cluj Bar) is seeking to apply Article 6(1) TEU and Articles 20 and 47 of the Charter in order to assess a number of procedural obligations.

22 However, under Article 51(1) of the Charter, the provisions of the Charter are addressed to the Member States only when they are implementing EU law. Indeed, according to the Court's settled case-law, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law,

but not outside such situations (judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 19, and order of 11 January 2017, *Boudjellal*, C-508/16, not published, EU:C:2017:6, paragraph 17).

23 That being so, it must be found, under Article 53(2) of the Rules of Procedure of the Court, that the request for a preliminary ruling made by the Tribunalul Arbitral de pe lângă Asociația de arbitraj de pe lângă Baroul Cluj (Arbitral Tribunal of the Arbitration Association at the Cluj Bar), by a decision of 12 February 2019, is manifestly inadmissible and that, in any event, the Court clearly lacks jurisdiction to hear and determine that request.

Debate

- *Arbitral tribunal. A*rticle 267 TFEU, CJEU, and arbitration: the public policy and obligation to apply the EU law (for the arbitral tribunal)
- Nordsee - implicit recognition of uniform application of EU law
- Action for annulment of an arbitral award - is sufficient for the uniform application of EU law?

From the procedure of preliminary ruling to BIT's preliminary ruling (abstract)

- BIT's preliminary ruling, in Achmea case, was declared admissible: a new step, new interpretation?

LLC SPC Stileks v. Republic of Moldova, No. 19-7106 (D.C. Cir. 2021)

• Patricia Zghibarta, Stileks v. Moldova: A Chance to Go Back to Square One After the Preliminary Ruling of the CJEU?, 15.03.2021, Wolter Kluver Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2021/03/16/stileks-v-moldova-a-chance-to-go-back-to-square-one-after-the-preliminary-ruling-of-the-cjeu/

Conclusion

• *Any mandatory "arbitration" is a court or tribunal within the meaning of Article 267*

• *Doesn't matter the nomination of the court, like* Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) - *C-21/16, Euro Tyre, Judgment of 9 February 2017, ECLI:EU:C:2017:106.*

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Daniel-Mihail Șandru, *Prima trimitere preliminară formulată de o instanță arbitrală din România: Cauza Holunga, C-370/18 [The first preliminary ruling made by an arbitral court from Romania: Case C-370/18 Holunga]*, Revista română de drept european, nr. 3/2018, p. 21-26, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354187

Daniel-Mihail Șandru, *Este un tribunal arbitral o instanţă naţională, în sensul art. 267 TFUE, pentru a participa la procedura trimiterii preliminare? / Is an arbitration court a 'court or tribunal' according to Article 267 TFEU, in order to take part in the preliminary ruling procedure?*, Revista română de arbitraj, nr. 4/2019, p. 78-91, ISSN: 1842-6859

III. CJEU arbitration under public law and the Brexit panel

Agenda (73)

- **EU law topic**
- **CJEU - The various types of proceedings**
- **Legal basis (art. 275-276 TFEU; art. 344 TFEU)**
- **Article 344 TFEU**
  - **C-459/03, Commission / Ireland, Judgment of 30 May 2006, ECR 2006 p. I-4635, ECLI:EU:C:2006:345**
  - **ECtHR's decision in the Slovenia v Croatia case: is Art. 344 TFEU applicable?**
    - GRAND CHAMBER, DECISION Application no. 54155/16, SLOVENIA against CROATIA
- **Application of EU law in international public (ad-hoc) arbitration**
  - **C-457/18, Slovenia / Croatie, Judgment of 31 January 2020, ECLI:EU:C:2020:65**
- **Case Law**
  - **109/81,** Porta / Commission, Judgment of 1 July 1982, ECR 1982 p. 2469, ECLI:EU:C:1982:253
  - **C-142/91,** Cebag / Commission, Judgment of 11 February 1993, ECR 1993 p. I-553, ECLI:EU:C:1993:54
  - **C-209/90,** *Commission / Feilhauer, Judgment of 8 April 1992, ECR 1992 p. I-2613, ECLI:EU:C:1992:172*
  - **C-299/93,** *Bauer / Commission, Judgment of 6 April 1995, ECR 1995 p. I-839, ECLI:EU:C:1995:100*
- **Conclusion**

Agenda (2)

- **Brexit - Establishment of the arbitration panel & CJEU**
- Legal basis
- References to the Court of Justice of the European Union concerning Part Two from the Agreement on the withdrawal (Title Two)
- *TITLE III. DISPUTE SETTLEMENT* from the Agreement on the withdrawal
- Joint Committee
- Initiation of the arbitration procedure
- Council Decision (EU) 2020/2232
- Disputes raising questions of Union law
- Compliance with the arbitration panel ruling
- Arbitration panel decisions and rulings
- Conclusion

EU law topic

- European public law $\Rightarrow$ CJEU $\Rightarrow$ competences
- Competences of EU $\Rightarrow$ substantive law

Legal basis (art. 275-276 TFEU; art. 344 TFEU)

- **Article 275** - the Court of Justice of the European Union **shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy** nor with respect to acts adopted on the basis of those provisions.
- Article 276 - the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of **operations carried out by the police or other law-enforcement services** of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the **maintenance of law and order and the safeguarding of internal security**.

CJEU - **The various types of proceedings**

- **References for preliminary rulings**
- The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of European Union law. To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law.
- **Actions for failure to fulfil obligations**
- These actions enable the Court of Justice to determine whether a Member State has fulfilled its obligations under European Union law. Before bringing the case before the Court of Justice, the Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice.
- **Actions for annulment**
- By an action for annulment, the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union. The Court of Justice has exclusive jurisdiction over actions brought by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or brought by one European Union institution against another. The General Court has jurisdiction, at first instance, in all other actions of this type and particularly in actions brought by individuals.
- **Actions for failure to act**
- These actions enable the lawfulness of the failure of the institutions, bodies, offices or agencies of the European Union to act to be reviewed. However, such an action may be brought only after the institution concerned has been called on to act. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures. Jurisdiction to hear actions for failure to act is shared between the Court of Justice and the General Court according to the same criteria as for actions for annulment.
- **Appeals**
- Appeals on points of law only may be brought before the Court of Justice against judgments and orders of the General Court. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself decide the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.
- CURIA - https://curia.europa.eu/jcms/jcms/Jo2_7024/en/

Article 344 TFEU

Article 344

(ex Article 292 TEC)

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

C-459/03, Commission / Ireland, Judgment of 30 May 2006, ECR 2006 p. I-4635, ECLI:EU:C:2006:345 (I)

By its application, the Commission of the European Communities seeks a declaration by the Court that, by instituting dispute-settlement proceedings against the United Kingdom of Great Britain and Northern Ireland under the United Nations Convention on the Law of the Sea ('the Convention') concerning the MOX plant located at Sellafield (United Kingdom), Ireland has failed to fulfil its obligations under Articles 10 EC and 292 EC and Articles 192 EA and 193 EA. Findings of the Court

- **Legal context**
- 2 The Convention, which was signed at Montego Bay (Jamaica) on 10 December 1982, came into force on 16 November 1994.
- 3 The Convention was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1). The Convention has also been ratified by all of the Member States of the European Union.
- 4 On 21 June 1996, at the time when the Convention was being ratified by Ireland, that Member State made the following declaration:
- 'Ireland recalls that, as a State member of the European Community, it has transferred competence to the Community in regard to certain matters which are governed by the Convention. A detailed declaration on the nature and extent of the competence transferred to the European Community will be made in due course in accordance with the provisions of Annex IX to the Convention.'

C-459/03, Commission / Ireland, Judgment of 30 May 2006, ECR 2006 p. I-4635, ECLI:EU:C:2006:345 (II)

168 **The Commission first of all criticises Ireland for having failed in its duty of cooperation under Article 10 EC inasmuch as, by bringing arbitral proceedings under the Convention, Ireland exercised a competence which belongs to the Community.**

169 The obligation devolving on Member States, set out in Article 292 EC [344 TFEU], to have recourse to the Community judicial system and to respect the Court's exclusive jurisdiction, which is a fundamental feature of that system, must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 10 EC.

170 The unavoidable conclusion must also be drawn that this first part of the third head of complaint has the same subject-matter as the first head of complaint since it focuses on the same conduct on the part of Ireland, that is to say, the bringing by that Member State of the proceedings before the Arbitral Tribunal in contravention of Article 292 EC.

171 It is for that reason unnecessary to find that there has been a failure to comply with the general obligations contained in Article 10 EC that is distinct from the failure, already established, to comply with the more specific Community obligations devolving on Ireland pursuant to Article 292 EC.

C-459/03, Commission / Ireland, Judgment of 30 May 2006, ECR 2006 p. I-4635, ECLI:EU:C:2006:345 (III)

172 Second, the **Commission criticises Ireland for having breached Articles 10 EC and 192 EA by bringing the proceedings before the Arbitral Tribunal without having first informed and consulted the competent Community institutions.**

173 This second part of the third head of complaint relates to an alleged omission by Ireland which is distinct from the conduct forming the

subject-matter of the first head of complaint. It is for that reason necessary to examine it.

174 **The Court has pointed out that, in all the areas corresponding to the objectives of the EC Treaty, Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (see, inter alia, Opinion 1/03 [2006] ECR I-0000, paragraph 119). The Member States assume similar obligations under the EAEC Treaty by virtue of Article 192 EA.**

175 The Court has also emphasised that the Member States and the Community institutions have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement (see *Dior and Others*, paragraph 36).

176 That is in particular the position in the case of a dispute which, as in the present case, relates essentially to undertakings resulting from a mixed agreement which relates to an area, namely the protection and preservation of the marine environment, in which the respective areas of competence of the Community and the Member States are liable to be closely interrelated, as is, moreover, evidenced by the Declaration of Community competence and the appendix thereto.

C-459/03, Commission / Ireland, Judgment of 30 May 2006, ECR 2006 p. I-4635, ECLI:EU:C:2006:345 (IV)

177 The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law.

178 Moreover, in their letter of 8 October 2001, the Commission's services had already contended that the dispute relating to the MOX plant, as referred by Ireland to the arbitral tribunal constituted pursuant to the Convention for the Protection of the Marine Environment of the North-East Atlantic, was a matter falling within the exclusive jurisdiction of the Court.

179 **In those circumstances, the obligation of close cooperation within the framework of a mixed agreement involved, on the part of Ireland, a duty to inform and consult the competent Community institutions prior to instituting dispute-settlement proceedings concerning the MOX plant within the framework of the Convention.**

180 The same duty of prior information and consultation was also imposed on Ireland by virtue of the EAEC Treaty in so far as that Member State contemplated invoking provisions of that Treaty and measures adopted pursuant to it within the framework of the proceedings which it was proposing to bring before the Arbitral Tribunal.

181 **It is common ground that, at the date on which those proceedings were brought, Ireland had not complied with that duty of prior information and consultation.**

182 Regard being had to the foregoing, the third head of complaint must be upheld in so far as it seeks a declaration by the Court that, by bringing proceedings under the dispute-settlement system set out in the Convention, without having first informed and consulted the competent Community institutions, Ireland has failed to comply with its duty of cooperation under Articles 10 EC and 192 EA.

183 The action must accordingly be upheld.

Application of EU law in international arbitration - Article 259 TFEU

- Article 259 (ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

C-457/18, Slovenia/Croatie, Judgment of 31 January 2020, ECLI:EU:C:2020:65

- Failure of a Member State to fulfil obligations — Article 259 TFEU — Jurisdiction of the Court — Determination of the common border between two Member States — Border dispute between the Republic of Croatia and the Republic of Slovenia — Arbitration agreement — Arbitration proceedings — Notification by the Republic of Croatia of its decision to terminate the agreement because of an irregularity alleged by it to have been committed by a member of the arbitral tribunal — Arbitration award made by the arbitral tribunal — Alleged failure by the Republic of Croatia to observe the arbitration agreement and the border established by the arbitration award — Principle of sincere cooperation — Request that a document be removed from the case file — Protection of legal advice

C-457/18, Slovenia / Croatie, Judgment of 31 January 2020, ECLI:EU:C:2020:65

92 It is clear from that case-law that the Court lacks jurisdiction to rule on an action for failure to fulfil obligations, whether it is brought under Article 258 TFEU or under Article 259 TFEU, **where the infringement of provisions of EU law** that is pleaded in support of the action is ancillary to the alleged failure to comply with obligations arising from such an agreement.

102 In that regard, it must be stated that the arbitration award was made by an international tribunal established under a bilateral arbitration agreement governed by international law, the subject matter of which does not fall within the areas of EU competence referred to in Articles 3 to 6 TFEU and to which the European Union is not a party. It is true that the European Union offered its good offices to both parties to

the border dispute with a view to its resolution and that the Presidency of the Council signed the arbitration agreement on behalf of the European Union, as a witness. Furthermore, there are links between, on the one hand, the conclusion of the arbitration agreement, and the arbitration proceedings conducted on the basis of that agreement, and on the other, the process of negotiation and accession by the Republic of Croatia to the European Union. Such circumstances are not, however, sufficient for the arbitration agreement and the arbitration award to be considered an integral part of EU law.

103 In particular, the fact that point 5 of Annex III to the Act of Accession added points 11 and 12 to Annex I to Regulation No 2371/2002 and that the footnotes to points 11 and 12 refer, in neutral terms, to the arbitration award made on the basis of the arbitration agreement, in order to determine the date on which the regime governing access to the coastal waters of Croatia and Slovenia under neighbourhood relations will be applicable, cannot be interpreted as meaning that the Act of Accession incorporated into EU law the international commitments entered into by the Republic of Croatia and the Republic of Slovenia under the arbitration agreement, in particular the obligation to observe the border established in the arbitration award.

C-457/18, Slovenia / Croatie, Judgment of 31 January 2020, ECLI:EU:C:2020:65

104 It follows that the infringements of EU law pleaded are ancillary to the alleged failure by the Republic of Croatia to comply with the obligations arising from a bilateral international agreement to which the European Union is not a party and whose subject matter falls outside the areas of EU competence. Since the subject matter of an action for failure to fulfil obligations brought under Article 259 TFEU can only be non-compliance with obligations arising from EU law, the Court, in accordance with what has been stated in paragraphs 91 and 92 of the present judgment, lacks jurisdiction to rule in the present action on an alleged failure to comply with the obligations arising from the arbitration agreement and the arbitration award, which are the source of the

Republic of Slovenia's complaints regarding alleged infringements of EU law.

105 It should be added in this regard that, in the absence, in the Treaties, of a more precise definition of the territories falling within the sovereignty of the Member States, it is for each Member State to determine the extent and limits of its own territory, in accordance with the rules of public international law (see, to that effect, judgment of 29 March 2007, *Aktiebolaget NN*, C-111/05, EU:C:2007:195, paragraph 54). Indeed, it is by reference to national territories that the territorial scope of the Treaties is established, for the purposes of Article 52 TEU and Article 355 TFEU. Moreover, Article 77(4) TFEU points out that the Member States have competence concerning the geographical demarcation of their borders, in accordance with international law.
http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-457/18&jur=C

ECtHR, GRAND CHAMBER, DECISION Application no. 54155/16, SLOVENIA against CROATIA

- The applicant Government complained that, through systematic arbitrary and unlawful conduct amounting to an administrative practice, the Croatian authorities have prevented and continue to prevent the Ljubljana Bank from enforcing and collecting the debts of its Croatian debtors in Croatia. This alleged practice consists, firstly, in a systematically arbitrary interpretation of the relevant Slovenian law by Croatian courts, which refuse to recognise the locus standi of the Ljubljana Bank before them regarding these claims; secondly, in the interference of members of the executive branch of the respondent Government in judicial proceedings; thirdly, in systematically protracting the proceedings and various other procedural shortcomings, and fourthly, in the refusal of enforcement of final judicial decisions given in favour of the Ljubljana Bank by the Croatian courts. The applicant Government alleged multiple violations of Articles 6 § 1, 13 and 14 of the Convention and of Article 1 of Protocol no. 1. Under Article 41 of the Convention, they also requested just satisfaction corresponding to the losses incurred by the Ljubljana Bank as a result of the alleged violations.

ECtHR, GRAND CHAMBER, DECISION Application no. 54155/16, SLOVENIA against CROATIA

- 51. Finally, the respondent Government acknowledged the existence of the case- law of the Court of Justice of the European Union according to which foreign State-owned companies may lodge direct appeals with the EU Courts (paragraphs 26-30 above). However, they considered it not to be relevant in the present case, not least because the Court of Justice has explicitly recognised that it was not bound by the procedural rules of the Convention.
- 52. In short, the respondent Government alleged that the applicant Government were trying to turn the Court into a platform for resolution of an unresolved inter-State dispute, which is contrary to the meaning and purpose of the Convention as a human rights treaty. Since the rights and interests of legal entities such as the Ljubljana Bank may not be protected by means of an inter- State application according to Article 33, there is no "genuine allegation" of a violation of human rights for the purposes of that provision, and the examination of any such application would be beyond the jurisdiction conferred on the Court by the Convention.

ECtHR, GRAND CHAMBER, DECISION Application no. 54155/16, SLOVENIA against CROATIA

- Holds that it has no jurisdiction to take cognisance of the application.

ECtHR's decision in the Slovenia v Croatia case

- "On 15 September 2016 the Government of Slovenia lodged an inter-State application against the Republic of Croatia before the European

Court of Human Rights (ECtHR), related to the claims of Ljubljanska banka towards Croatian companies. Pursuant to Article 33 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the Republic of Slovenia informed the Court that the Republic of Croatia had violated the provisions of the Convention when the latter's judicial and executive authorities systematically undertook actions to unlawfully deny Ljubljanska banka the right to property. For a period of 25 years the bank has not been able to recover its claims from Croatian companies. The application states that this has allowed the debtors of Ljubljanska banka in Croatia to avoid repaying their debt – currently estimated to be 360 million Euro. This amount is very similar to the one Slovenian taxpayers were requested to pay after the Grand Chamber delivered its decision in *Ališić* two years ago, one of the largest cases in ECtHR's history considering its massive financial implications for Slovenia's two million population. Although one might say that the Slovenian government timed its application so as for the recent Croatian elections to pass, the date of the application was in fact more closely related to the latest decision of the Croatian Constitutional Court on the subject-matter which was adopted in March this year."

- **Janja Hojnik**, *Slovenia v. Croatia: The First EU Inter-State Case before the ECtHR*, 17.10.2016, https://www.ejiltalk.org/slovenia-v-croatia-the-first-eu-inter-state-case-before-the-ecthr/

"Monopoly of the ECtHR for deciding the dispute

"Article 344 TFEU states that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." According to the case law of the CJEU, this provision establishes the exclusive jurisdiction of the CJEU over any dispute between EU Member States concerning the interpretation and application of EU law. In its Opinion 2/2013, the CJEU expressly established that "as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the EU". Until the EU becomes a party to the ECHR, Article 344 TFEU therefore

does not apply to disputes concerning the interpretation or the application of the ECHR and does not constitute a barrier to an inter-State application before the ECtHR of one EU Member State against another pursuant to Article 33 ECHR (see more on this here and here). This is also in line with Article 55 ECHR that establishes "the monopoly of the Convention institutions for deciding disputes arising out of the interpretation and application of the Convention." (Cyprus v Turkey, No. 25781/94, 1996, 86- A DR 104). However, considering the facts of the case, the CJEU would be exclusively competent to rule on whether the Croatian judicial and executive practice against LB has led to the breach of EU legal principles guaranteeing free movement of capital and services, as guaranteed by Articles 63 and 56 TFEU."

Janja Hojnik, *Slovenia v. Croatia: The First EU Inter-State Case before the ECtHR*, 17.10.2016, https://www.ejiltalk.org/slovenia-v-croatia-the-first-eu-inter-state-case-before-the-ecthr/

ECJ – arbitrator
Case Law

- **109/81**
- **C-142/91**
- **C-209/90**
- **C-299/93**

109/81, Porta / Commission, Judgment of 1 July 1982, ECR 1982 p. 2469, ECLI:EU:C:1982:253

"IN SO FAR AS THE JURISDICTION OF THE COURT OF JUSTICE IS BASED ON AN ARBITRATION CLAUSE CONTAINED IN EACH OF THE ANNUAL CONTRACTS SIGNED AS FROM A PARTICULAR YEAR , THE FACT THAT THE

SAME CLAUSE DOES NOT APPEAR IN THE PREVIOUS CONTRACTS AND THAT, AS REGARDS THE FIRST YEARS OF THE RELATIONSHIP, THERE WERE NOT EVEN ANY WRITTEN CONTRACTS IS NO OBSTACLE TO THE COURT'S HAVING REGARD, IN ITS ASSESSMENT OF THE RELATIONS BETWEEN THE PARTIES, TO ALL THE CONTRACTS SUCCESSIVELY ENTERED INTO."

C-142/91, Cebag / Commission, Judgment of 11 February 1993, ECR 1993 p. I-553, ECLI:EU:C:1993:54

- *1. Pursuant to Regulation No 3972/86 on food-aid policy and food-aid management, such aid is supplied on the basis of contractual undertakings between the Commission and the successful tenderers. The relationship between successful tenderers and the Commission cannot be held to be governed entirely by regulatory provisions, particularly in view of the fact that the price of the supplies is a function of the tenderer' s bid and its acceptance by the Commission. Since the regulations forming the basis for a tendering procedure provide for supplies to be effected pursuant to Regulation No 2200/87 laying down general rules for the mobilization in the Community of products to be supplied as Community food aid, a clause referred to in Article 23 of that regulation, whereby the Court is competent to judge any dispute resulting from the carrying out, or the failure to carry out, or from the interpretation of provisions concerning supply operations pursuant to the said regulation, forms an integral part of supply contracts and must therefore be regarded as an arbitration clause within the meaning of Article 181 of the Treaty.*
- 14 Next, it should be observed that, according to the regulations, based in particular on Article 6(1)(c) of Regulation No 3972/86, by which the Commission mobilized the goods in question, the supplies are to be made in accordance with the provisions of Regulation No 2200/87. Consequently, the clause set out in the aforementioned Article 23 forms an integral part of the supply contracts in question and must therefore be regarded as an arbitration clause within the meaning of Article 181 of the Treaty.

C-209/90, Commission / Feilhauer, Judgment of 8 April 1992, ECR 1992 p. I-2613, ECLI:EU:C:1992:172

13 This objection of lack of jurisdiction cannot be upheld. While, under an arbitration clause entered into pursuant to Article 181 of the EEC Treaty, the ***Court may be called on to decide a dispute on the basis of the national law governing the contract, its jurisdiction to determine a dispute concerning that contract falls to be determined solely with regard to*** *Article 181 of* ***the EEC Treaty*** *and* ***the terms of the arbitration clause****, and* **this cannot be affected by provisions of** national law which allegedly exclude its jurisdiction**.**

C-299/93, Bauer / Commission, Judgment of 6 April 1995, ECR 1995 p. I-839, ECLI:EU:C:1995:100

4 Under the terms of Article 16 of the tenancy agreement `the Court of Justice of the European Communities shall have sole jurisdiction concerning disputes arising under this agreement. The agreement shall be governed by Italian law.'

10 It must be observed as a preliminary matter that even if Mr Bauer referred in his application to two complaints lodged under Article 90(2) of the Staff Regulations, this dispute does not concern decisions by the appointing authority in the context of the civil-service status binding Mr Bauer to the Commission but the relationship under the tenancy agreement of 1 June 1969. In that respect the application is founded on the provisions of Article 153 of the Treaty and the arbitration clause contained in Article 16 of that agreement.

11 Under the terms of Article 54 of Italian law No 392 of 27 July 1978 on tenancies of residential property (Official Gazette of the Italian Republic No 211 of 29 July 1978) any clause stipulating that disputes concerning the determination of rent are to be settled by arbitrators is null and void. However, even if this provision can apply to the abovementioned arbitration clause, it follows from the judgment in Case C-209/90

Commission v Feilhauer [1992] ECR I-2613, paragraph 13, that the Court's jurisdiction to determine a dispute concerning a contract falls to be determined solely with regard to Article 181 of the EEC Treaty, which is in the same terms as Article 153 of the Euratom Treaty, and the terms of the arbitration clause, and this cannot be affected by provisions of national law which purport to oust its jurisdiction.

Brexit – Establishment of the arbitration panel & CJEU

- Legal basis
- References to the Court of Justice of the European Union concerning Part Two from the Agreement on the withdrawal (Title Two)
- *TITLE III. DISPUTE SETTLEMENT* - clause of the Brexit Agreement
- Joint Committee
- Initiation of the arbitration procedure
- Council Decision (EU) 2020/2232
- Disputes raising questions of Union law
- Compliance with the arbitration panel ruling
- Arbitration panel decisions and rulings
- Conclusion

Legal basis

- Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ L 29, 31.1.2020, p. 7–187,*
- *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12020W%2FTXT&qid=1609168381598*
- Council Decision (EU) 2020/2232 of 22 December 2020 on the position to be taken on behalf of the European Union within the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as

regards the adoption of a decision establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement and on a reserve list of persons who are willing and able to serve as Union members of an arbitration panel under the Agreement, *OJ L 437, 28.12.2020, p. 182–187*
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020D2232

Link to legal basis

- **Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information**
- **Council Decision (Euratom) 2020/2253 of 29 December 2020 approving the conclusion, by the European Commission, of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy and the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part**
- **TRADE AND COOPERATION AGREEMENT BETWEEN THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMUNITY, OF THE ONE PART, AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, OF THE OTHER PART**
- **AGREEMENT BETWEEN THE EUROPEAN UNION AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING SECURITY P ROCEDURES FOR EXCHANGING AND PROTECTING CLASSIFIED INFORMATION**
- **Declarations referred to in the Council Decision on the signing on behalf of the Union, and on a provisional application of the Trade and Cooperation Agreement and of the Agreement concerning security procedures for exchanging and protecting classified information**
- https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2020:444:TOC
- Also, see: https://www.gov.uk/government/publications/eu-future-relationship-bill

References to the Court of Justice of the European Union concerning Part Two

- *Article 158*
- **References to the Court of Justice of the European Union concerning Part Two(CITIZENS' RIGHTS)**
- 1. Where, in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the Court of Justice of the European Union to give a preliminary ruling on that question.
- However, where the subject matter of the case before the court or tribunal in the United Kingdom is a decision on an application made pursuant to Article 18(1) or (4) or pursuant to Article 19, a request for a preliminary ruling may be made only where the case commenced at first instance within a period of 8 years from the date from which Article 19 applies.
- 2. The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings on requests pursuant to paragraph 1. The legal effects in the United Kingdom of such preliminary rulings shall be the same as the legal effects of preliminary rulings given pursuant to Article 267 TFEU in the Union and its Member States.

TITLE III. DISPUTE SETTLEMENT - clause of the Brexit Agreement

- *Article 167*
- **Cooperation**
- The Union and the United Kingdom shall at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution of any matter that might affect its operation.
- *Article 168*
- **Exclusivity**
- For any dispute between the Union and the United Kingdom arising under this Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement.

Joint Committee

- *Article 169*
- **Consultations and communications within the Joint Committee**
- 1. The Union and the United Kingdom shall endeavour to resolve any dispute regarding the interpretation and application of the provisions of this Agreement by entering into consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution. A party wishing to commence consultations shall provide written notice to the Joint Committee.
- 2. Any communication or notification between the Union and the United Kingdom provided for in this Title shall be made within the Joint Committee.

Initiation of the arbitration procedure

- *Article 170*
- **Initiation of the arbitration procedure**
- 1. Without prejudice to Article 160, if no mutually agreed solution has been reached within 3 months after a written notice has been provided to the Joint Committee in accordance with Article 169(1), the Union or the United Kingdom may request the establishment of an arbitration panel. Such request shall be made in writing to the other party and to the International Bureau of the Permanent Court of Arbitration. The request shall identify the subject matter of the dispute to be brought before the arbitration panel and a summary of the legal arguments in support of the request.
- 2. The Union and the United Kingdom may agree that the establishment of an arbitration panel may be requested before the expiry of the time limit laid down in paragraph 1.

Establishment of the arbitration panel

- *Article 171*
- **Establishment of the arbitration panel**
- 1.The Joint Committee shall, no later than by the end of the transition period, establish a list of 25 persons who are willing and able to serve as members of an arbitration panel. To that end, the Union and the United Kingdom shall each propose ten persons. The Union and the United Kingdom shall also jointly propose five persons to act as chairperson of the arbitration panel. The Joint Committee shall ensure that the list complies with these requirements at any moment in time.

- 2.The list established pursuant to paragraph 1 shall only comprise persons whose independence is beyond doubt, who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognised competence, and who possess specialised knowledge or experience of Union law and public international law. That list shall not comprise persons who are members, officials or other servants of the Union institutions, of the government of a Member State, or of the government of the United Kingdom.
- 3.An arbitration panel shall be composed of five members.

Council Decision (EU) 2020/2232

- Council Decision (EU) 2020/2232 of 22 December 2020 on the position to be taken on behalf of the European Union within the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards the adoption of a decision establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement and on a reserve list of persons who are willing and able to serve as Union members of an arbitration panel under the Agreement, *OJ L 437, 28.12.2020, p. 182–187*

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020D2232

Disputes raising questions of Union law

Article 174

Disputes raising questions of Union law

1. Where a dispute submitted to arbitration in accordance with this Title raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2), the arbitration panel shall not decide on any such question. In such case, it shall request the Court of Justice of the European Union to give a ruling on the question. The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration panel.

The arbitration panel shall make the request referred to in the first subparagraph after having heard the parties.

2. Without prejudice to the first sentence of the first subparagraph of paragraph 1, if the Union or the United Kingdom considers that a request in accordance with paragraph 1 is to be made, it may make submissions to the arbitration panel to that effect. In such case, the arbitration panel shall submit the request in accordance with paragraph 1 unless the question raised does not concern the interpretation of a concept of Union law, interpretation of a provision of Union law referred to in this Agreement, or does not concern whether the United Kingdom has complied with its obligations under Article 89(2). The arbitration panel shall provide reasons for its assessment. Within 10 days following the assessment, either party may request the arbitration panel to review its assessment, and a hearing shall be organised within 15 days of the request for the parties to be heard on the matter. The arbitration panel shall provide reasons for its assessment.

3. In the cases referred to in paragraphs 1 and 2, the time limits laid down in Article 173 shall be suspended until the Court of Justice of the European Union has given its ruling. The arbitration panel shall not be required to give its ruling less than 60 days from the date on which the Court of Justice of the European Union has given its ruling.

4. The first subparagraph of Article 161(2) and Article 161(3) shall apply *mutatis mutandis* to the procedures brought before the Court of Justice of the European Union in accordance with this Article.

Compliance with the arbitration panel ruling

- *Article 175*
- **Compliance with the arbitration panel ruling**
- The arbitration panel ruling shall be binding on the Union and the United Kingdom. The Union and the United Kingdom shall take any measures necessary to comply in good faith with the arbitration panel ruling and shall endeavour to agree on the period of time to comply with the ruling in accordance with the procedure in Article 176.

Arbitration panel decisions and rulings

- *Article 180*
- **Arbitration panel decisions and rulings**
- 1. The arbitration panel shall make every effort to take decisions by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by majority vote. However, in no case dissenting opinions of members of an arbitration panel shall be published.
- 2. Any ruling of the arbitration panel shall be binding on the Union and the United Kingdom. The ruling shall set out the findings of fact, the applicability of the relevant provisions of this Agreement, and the reasoning behind any findings and conclusions. The Union and the United Kingdom shall make the arbitration panel rulings and decisions publicly available in their entirety, subject to the protection of confidential information.

Conclusion

- international public arbitration;
- the principle of unconditional compliance with ECJ rullings is applicable;
- a breach of the aforementioned principle implies a breach of the treaties.

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IV. Data protection and cybersecurity in international arbitration

Agenda

- Legal basis
  - Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
    - Main definition: 'personal data', 'processing', 'controller'
    - Recitals, 65 & 97, Art. 9, 17, 18, 21, 37 GDPR in arbitration proceedings
  - Arbitration Rules
    - Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021)
    - Model Data Protection Clause for Procedural Order One
- ICCA-IBA Joint Task Force on Data Protection in International Arbitration Proceedings
  - The Roadmap seeks to provide a high-level overview of the relevant aspects of data protection in the context of arbitration;
  - The Explanatory Notes give further detail on, and explanation of, the relevant notions by reference to source material and examples; and
  - The Annexes provide concrete guidance (in the form of inter alia check lists and sample notices) intended to assist individuals involved in arbitration to determine the applicable data protection regime and to assess how the obligations arising thereunder can be complied with.
- Confidentiality and data protection

Agenda

GDPR procedure applied in arbitration court

Website

ICC DATA PRIVACY NOTICE FOR ICC DISPUTE RESOLUTION PROCEEDINGS

Arbitration in the Digital Age

Data protection & profiling on AI

Artificial Intelligence in arbitration

Cybersecurity in International Arbitration

Arbitration on data protection litigation

Case law

Conclusion

Legal basis

- Legal basis
  - Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
    - Main definition: 'personal data', 'processing', 'controller'
    - Recitals, 65 & 97, Art. 9, 17, 18, 21, 37 GDPR in arbitration proceedings
  - Arbitration Rules & other soft law

General Data Protection Regulation (GDPR): 'personal data'

- Main definition: 'personal data', 'processing', 'controller'
- Recitals, 65 & 97, Art. 9, 17, 18, 21, 37 GDPR in arbitration proceedings

- ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;
- Article 4 (1)

General Data Protection Regulation (GDPR): ‘controller’

- ‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, **determines the purposes and means of the processing of personal data**; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;
- ‘processor’ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;
- Article 4 (7)

General Data Protection Regulation (GDPR): ‘processing’

- ‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;
- Article 4 (2)

General Data Protection Regulation (GDPR): Data subject rights in arbitration

Recital (65) A data subject should have the right to have personal data concerning him or her rectified and a 'right to be forgotten' where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject. In particular, a data subject should have the right to have his or her personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for which they are collected or otherwise processed, where a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her, or where the processing of his or her personal data does not otherwise comply with this Regulation**. That right is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved by the processing**, and later wants to remove such personal data, especially on the internet. The data subject should be able to exercise that right notwithstanding the fact that he or she is no longer a child. However, the further retention of the personal data should be lawful where it is necessary, for exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims.

Art. 9, 17, 18, 21 GDPR

General Data Protection Regulation (GDPR): data protection officer (DPO)

Recital (97) Where the processing is carried out by a public authority, except for courts or independent judicial authorities when acting in their judicial capacity, where, in the private sector, processing is carried out by a controller whose core activities consist of processing operations that require regular and systematic monitoring of the data subjects on a large scale, or where the core activities of the controller or the processor consist of processing on a large scale of special categories of personal data and data relating to criminal convictions and offences, a person with expert knowledge of data protection law and practices should assist the controller or processor to monitor internal compliance with this Regulation. In the private sector, the core activities of a controller relate to its primary activities and do not relate to the processing of personal data as ancillary activities. The necessary level of expert knowledge should be determined in particular according to the data processing operations carried out and the protection required for the personal data processed by the controller or the processor. Such data protection officers, whether or not they are an employee of the controller, should be in a position to perform their duties and tasks in an independent manner.

Art. 37 GDPR

DPO

- **the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania**

- **Ad hoc arbitration – DPO is NOT REQUIRED**

INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

1 January 2021

NOTE TO PARTIES AND ARBITRAL TRIBUNALS ON THE CONDUCT OF THE ARBITRATION UNDER THE ICC RULES OF ARBITRATION

Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021)

- **Protection of Personal Data**

- 115. ICC recognises the importance of effective and meaningful personal data protections when it collects and uses such personal data as data controller pursuant to data protection laws and regulations, including the European Union Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "General Data Protection Regulation" or "GDPR"). To that effect, ICC has published the ICC Data Privacy Notice for ICC Dispute Resolution Proceedings.

- 116. In order to comply with the Court's (i) mission to disseminate and improve international knowledge of arbitration and (ii) obligations under the Rules, ICC, the Court and its Secretariat collect and process the personal data of the parties, their representatives, the arbitrators, the administrative secretary, the witnesses, the experts, and any other individuals that may be involved in any capacity in the arbitration. In performing their duties under the Rules, arbitral tribunals also have to collect and process such personal data. For this purpose, such personal data may be transferred by or to the various offices of the Secretariat in and out of the European Union.

- 117. The parties, their representatives, the arbitrators, the administrative secretary, the witnesses, the experts, and any other individuals who may be involved in any capacity in the arbitration, acknowledge that collecting, transferring and archiving personal data is necessary for the purposes of arbitration proceedings, and that said data may be published in case of a publication of an award, procedural order and dissenting and/or concurring opinion.

• 118. The parties shall ensure that (i) their representatives, as well as their witnesses, party-appointed experts and any other individual appearing on their behalf or in their interest in the arbitration, are aware that their personal data may have to be collected, transferred, published and archived for purposes of the arbitration, and (ii) applicable data protection regulations, including the GDPR, are complied with.

• 119. At an appropriate time in the arbitration, the arbitral tribunal shall remind the parties, representatives, witnesses, experts and any other individuals appearing before it that the GDPR or other data protection laws and regulations apply to the arbitration and that their personal data may be collected, transferred, published and archived pursuant to the arbitration agreement or the legitimate interests to resolve the dispute and that arbitration proceedings operate fairly and efficiently. Arbitral tribunals are encouraged to draw up a data protection protocol to that effect.

• 120. Parties and arbitrators shall ensure that only personal data that are necessary and accurate for the purposes of the arbitration proceedings are processed. Any individual whose data is collected and processed in the context of an arbitration may at any time request the appropriate data controller to exercise notably his right of access and that inaccurate data be corrected or suppressed, according to the applicable data protection laws and regulations.

Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021)

• 121. The arbitral tribunal, the parties and their representatives shall put in place and ensure that all those acting on their behalf put in place appropriate technical and organisational measures to ensure a reasonable level of security appropriate to the arbitration, taking into account the scope and risk of the processing, the state of the art, the impact on data subjects, the capabilities and regulatory requirements of all those involved in the arbitration, the costs of implementation, and the nature of the information being processed or transferred, including whether it includes personal data or sensitive business, proprietary or confidential information. To that

effect, arbitral tribunals and parties are encouraged to consult the Report on the Use of Information Technology in International Arbitration by the ICC Commission on Arbitration and ADR.

- 122. Any breach of the security and confidentiality of personal data, such as unauthorised access to or use of personal data or inadvertent disclosure to persons who should not have been identified as recipients, must be reported immediately to the individual whose personal data may be affected and to the Secretariat. Pursuant to the applicable data protection laws and regulations, ICC, when it acts as data controller, must notify the competent supervisory authority and as the case may be the concerned individuals of such breach.

- 123. Once an arbitration is completed, arbitrators may retain the personal data that were processed during the proceedings for as long as they keep the case file in their archives pursuant to applicable laws. Such duration shall be communicated to the parties and the Secretariat.

Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021)

- 124. At the end of each case, the Secretariat shall retain, pursuant to its obligations (Article 1(7) of Appendix II), personal data pertaining to the case. Such data shall be archived. Other personal data that are no longer necessary for ICC to discharge its obligation under the Rules shall be destroyed or erased.

- 125. The archives of the Court and its Secretariat are also kept for scientific and historical research purposes. Access to archives and their publication either in full, as excerpts redacted or not, or in a summarised form, may be allowed by the President or the Secretary General of the Court in furtherance of ICC's mission to disseminate and improve international knowledge of arbitration.

B - Publication of Information Regarding Arbitral Tribunals, Industry Sector and Law Firms involved

50. Increasing the information available to parties, the business community at large and academia is key to ensuring that arbitration remains a trusted tool to facilitate trade. Transparency provides greater confidence in the arbitration process, and helps protect arbitration against inaccurate or ill-informed criticism. The Court therefore endeavours to make the arbitration process more transparent without compromising the parties' expectations, if any, of confidentiality.

51. Consistent with that policy and unless otherwise agreed by the parties, the Court publishes on the ICC website, for arbitrations registered as of 1 January 2016, the following information: (i) the names of the arbitrators, (ii) their nationality, (iii) their role within an arbitral tribunal, (iv) the method of their appointment, and (v) whether the arbitration is pending or closed. The arbitration reference number and the names of the parties and of their counsel will not be published.

Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021)

52. For arbitrations registered as of 1 January 2020, the Court publishes on the ICC website the following additional information: (vi) the industry sector involved, (vii) law firms representing the parties in the case. For arbitrations registered as of 1 January 2021, the Court will also, as of 1 July 2021, publish the names of administrative secretaries.

53. This information is published once the Terms of Reference have been transmitted to, or approved by, the Court (or after the case management conference in expedited proceedings) and updated in the event of a change in the arbitral tribunal's composition or party

representation (without however mentioning the reason for the change).

54. **This information remains on the ICC website after the closure of the arbitration unless the concerned individual requests erasure in accordance with applicable data protection laws and regulations.**

55. The parties may jointly request the Court to publish additional information about a particular arbitration in which they are involved.

Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021)

C - Publication of Awards, Procedural Orders, Dissenting and/or Concurring Opinions

- 61. The Secretariat may anonymise or pseudonymise personal data included in the award and/or orders, dissenting and/or concurring opinions as necessary pursuant to the applicable data protection laws and regulations. Arbitral tribunals will be encouraged to include in their award a list of the names of relevant individuals or entities involved in the case.

C - Hearings – Virtual Hearings

- 101. Any virtual hearing requires a consultation between the arbitral tribunal and the parties with the aim of implementing measures – often **called a cyber-protocol** – that are needed in order to comply with any applicable data privacy regulations. Such measures should also deal with the privacy of the hearing and the protection of the confidentiality of electronic communications within the arbitration proceeding and any electronic document platform.

Model Data Protection Clause for Procedural Order One

1. When personal data is submitted during the arbitration, unless otherwise agreed or ordered in advance, it will be processed based on the legitimate interest of the parties, the arbitrators, and others impacted by the proceeding in ensuring that the arbitration is administered in accordance with the ICC Rules in a fair, impartial, and efficient manner and that the rights of the parties are protected, except where such fundamental rights and interests are overridden by the interests or fundamental rights and freedoms of the data subjects.
2. If sensitive/special category data is submitted during the arbitration, it shall be processed to the extent necessary to establish, exercise, or defend legal claims in the arbitration.
3. Personal data will be transferred outside the European Union (EU) during the arbitration only when there is a lawful basis to do so, which unless otherwise agreed or ordered in advance will be (1) because the EU considers the country of transfer to provide adequate protection; (2) standard contractual clauses have been put in place; or (3) another lawful basis applies, for example, the personal data is necessary to establish, exercise, or defend legal claims in the arbitration. In all cases of personal data transfer outside the EEA in the context of the proceeding, reasonable measures shall be put in place to ensure that the data protection principles established in the relevant data protection law are complied with after transfer.
4. The parties and their legal representatives shall not do anything contrary to the principles set forth in paragraphs 1 through 4, for example seeking consent, without first raising the issue with the tribunal and obtaining directions.
5. The parties and their legal representatives are responsible for:
   - Properly notifying the data subjects whose personal data is submitted during the arbitration by providing privacy statements in accordance with article 13 and/or 14 of GDPR.
   - Ensuring that the processing for the arbitration is compatible with the purpose notified to the data subjects whose personal data is processed during the arbitration.
   - Maintaining adequate records of their data protection compliance efforts.
   - Minimizing the personal data processed during the arbitration.
   - Putting appropriate technical and organisational measures in place to ensure a reasonable level of security appropriate to the arbitration, taking into account the scope and risk of the processing, including the state of the art, the impact on data subjects, the capabilities and regulatory requirements of all those involved in the arbitration, the costs of implementation, and the nature of the information being processed or transferred, including whether it includes personal data or sensitive commercial, proprietary or confidential information.
   - Putting mechanisms in place to comply with their data breach notification obligations.
   - Putting mechanisms in place to comply with the rights of the data subjects whose personal data is submitted during the arbitration.
6. The arbitrators shall retain the personal data for such period as is necessary, depending on applicable laws and professional obligations, for the purposes of the arbitration proceedings and of potential legal proceedings and any related ethical or other obligations applicable to them and thereafter shall safely dispose of it without providing further notice to the parties.
7. If the parties fail to meet their data protection obligations as set forth in this Order, the arbitrators may not be able to comply with their data protection obligations in a reasonable manner, the effects of which may be borne by the party that fails to comply.

- Model Data Protection Clause for Procedural Order One
- https://iccwbo.org/publication/model-data-protection-clause-for-procedural- order-one/

SCC - PRIVACY POLICY FOR THE STOCKHOLM CHAMBER OF COMMERCE

- **https://sccinstitute.com/about-the-scc/privacy-policy/**

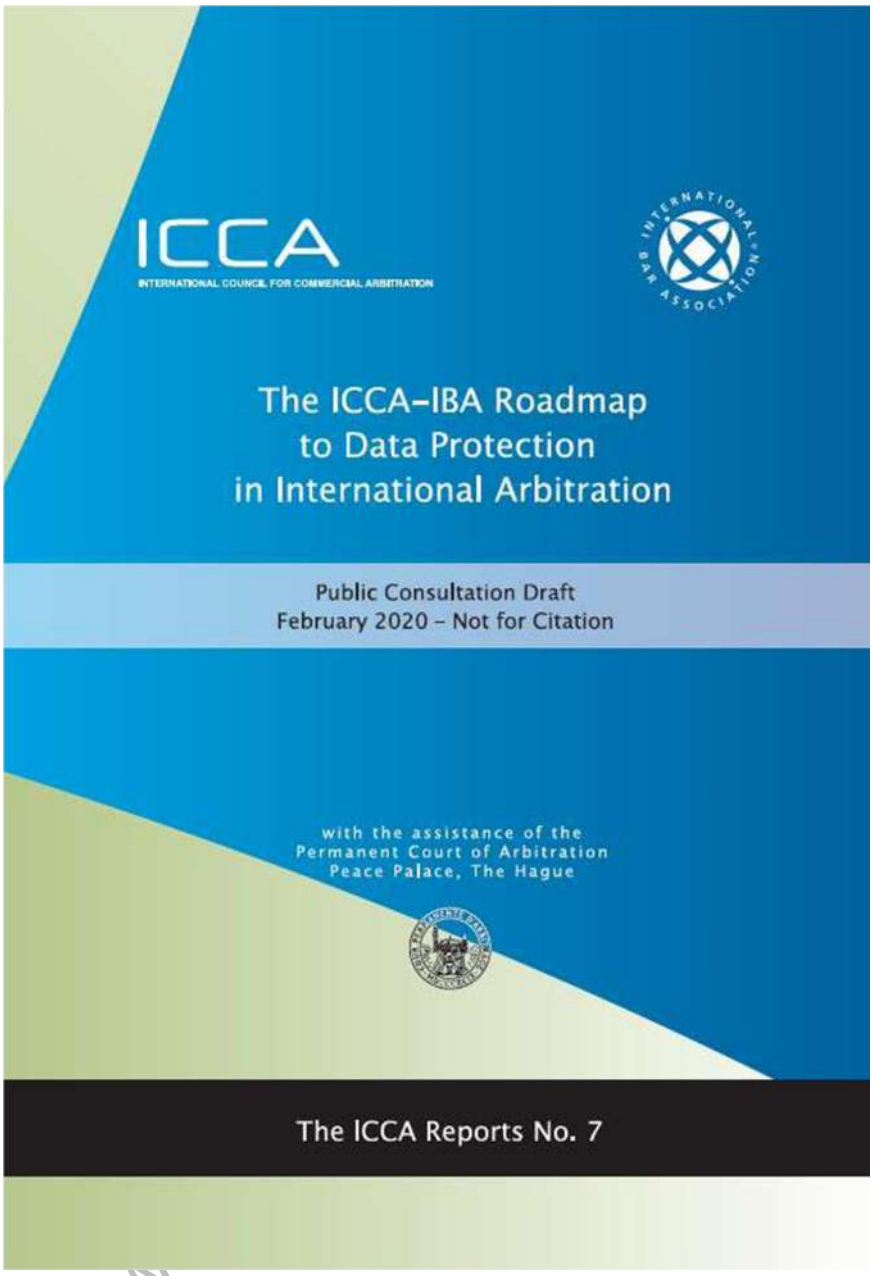
LCIA - **General Privacy Notice**

- https://www.lcia.org/privacy-policy.aspx

- ICCA-IBA Joint Task Force on Data Protection in International Arbitration Proceedings

Introduction

- Need for understanding and procedures data protection in arbitration;
- International Council for Commercial Arbitration (ICCA) is a worldwide NGO devoted to promoting the use and improving the processes of arbitration, conciliation and other forms of dispute resolution.
- https://www.arbitration-icca.org/projects/ICCA-IBA_TaskForce.html
- The Roadmap seeks to provide a high-level overview of the relevant aspects of data protection in the context of arbitration;
- The Explanatory Notes give further detail on, and explanation of, the relevant notions by reference to source material and examples; and
- The Annexes provide concrete guidance (in the form of inter alia check lists and sample notices) intended to assist individuals involved in arbitration to determine the applicable data protection regime and to assess how the obligations arising thereunder can be complied with.



Roadmap: **Roadmap Organisation**

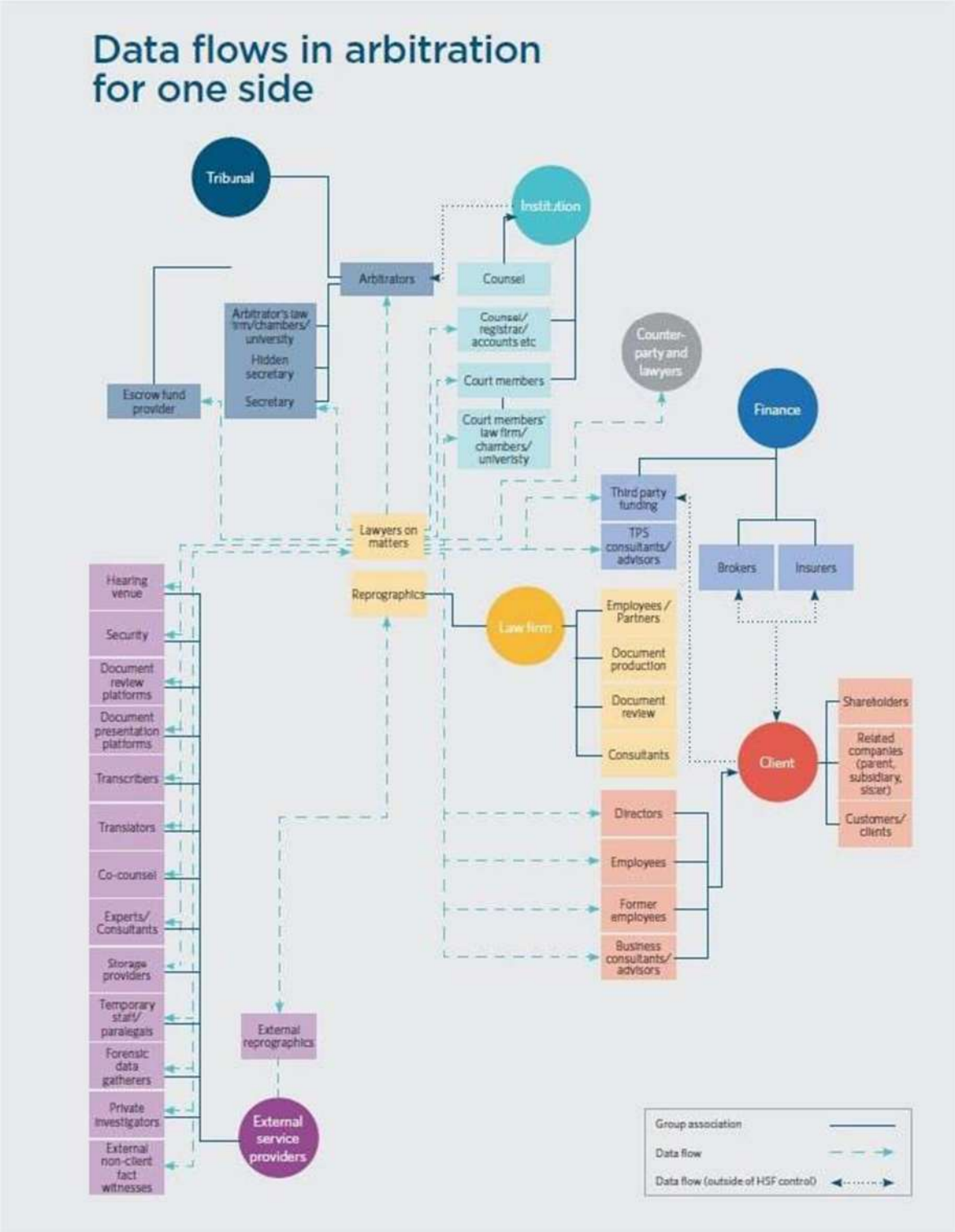
Roadmap Organisation. The Roadmap is divided into two sections:

- Section I describes the primary data protection principles potentially applicable to international arbitration; and

- Section II addresses how the data protection principles described in Section I may apply during the different stages of an international

arbitration, and how they may affect the Arbitral Participants during the arbitral process.

- Herbert Smith Freehills LLP (HSF) in Inside Arbitration – Issue 8, dated 16 July 2019



Filing the Request for Arbitration

- In the case of institutional arbitration, the request for arbitration will typically be filed with an arbitral institution or international organisation, and in the case of an *ad hoc* arbitration, directly with the opposing party. To the extent the subsequent submissions involve personal data, the filing thereof also constitutes processing. In ad hoc proceedings, at least after the appointment of the tribunal, communication is directly with the arbitrator (s).
- More details, Roadmap..., p. 37-39

Appointment of Arbitrators

- When selecting arbitrators for cases in which the GDPR or other relevant data protection law(s) may apply, best practice suggests for those making the appointment to consider how it will implicate the application of the data protection laws. Where the potential arbitrator is not subject to the same data protection obligations, it would be prudent to consider how this will be managed during the arbitration and whether steps should be taken as part of the appointment to ensure that data can freely be transferred during the proceedings (for example through standard contractual clauses).
- More details, Roadmap..., p. 39-40

During the Arbitral Process, Who Should Raise Data Protection and When?

- Where arbitrators are not themselves bound by any data protection regime, they may be inclined to avoid a discussion of data protection if it is not raised by the parties. However, this can create problems down the road as a party may not raise data protection

concerns during the first procedural conference but may later claim that it cannot produce documents because disclosure would violate data protection laws. In the interest of compliance with data protection laws, as well as time- and costs efficiency of the arbitration, these issues are best addressed and managed from the outset.

- More details, Roadmap..., p. 41

Disclosure or Production of Documents

Document disclosure is an important part of the international arbitration process. The obligation to minimise data is particularly relevant to document disclosure. Although data minimisation is a general obligation, there is no guidance as to how this should be applied in the arbitral process generally or during the document disclosure/pr

If the same approach that the Working Party applied to US litigation disclosure were to be applied to the more limited document production in arbitration, this would imply a three-step process aimed at minimising the data disclosed:

1. Limiting the data disclosed to what is relevant to the dispute and non-duplicative;
2. Identifying the personal data contained in the responsive material; and
3. Redacting or pseudonymising unnecessary personal data protection phase in particular.

More details, Roadmap..., p. 42

Arbitral Awards and Other Decisions

Arbitral tribunals process personal data (including potentially sensitive data and criminal offence data) when preparing, drafting and rendering their orders, decisions and awards, while arbitration institutions process personal data when constituting tribunals, dealing with applications of the

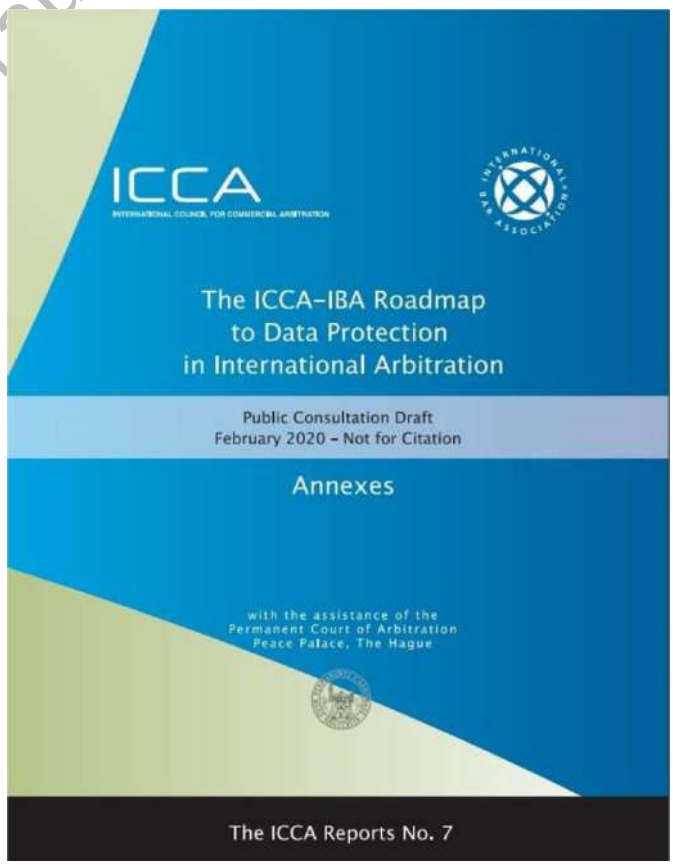
parties, rendering challenge decisions, scrutinizing and notifying awards, etc.

Even in confidential arbitrations, there is a risk that the award will become public if it is enforced in a country where awards (or parts thereof) become public in the enforcement process. Moreover, in investment and treaty- based arbitrations, awards are often published and commercial institutions increasingly considering the publication of awards if the parties do not object and subject to possible redaction, and (excerpts of) challenge decisions.

More details, Roadmap..., p. 43

After the Arbitration - Data Retention and Deletion

Both data retention and deletion is considered data processing under many modern data protection laws. The GDPR, for example, provides that personal data shall be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data is processed." (GDPR Art. 5(1)(e)). Similarly, under LGPD Articles 15 and 16, the processing of personal data shall be terminated as soon as its purpose has been achieved. Further, unless there is a legal basis for keeping personal data, it shall be deleted following the termination of their processing. Under Indian law, sensitive personal data of an individual should not be stored or retained for longer than is necessary to fulfil the purpose for which it is collected.



- More details, Roadmap..., p. 44

TABLE OF CONTENTS

- Confidentiality and data protection

- Confidentiality – private law (contractual)
- Data protection – public law (especially, GDPR)
- Collusion between transparency and data protection
- See: ARTICLE 29 DATA PROTECTION WORKING PARTY, Guidelines on transparency under Regulation 2016/679, 17/EN WP260, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227

”Even where confidentiality obligations are not imposed upon the parties by either their agreement or applicable national law, the arbitrators are subject to separate confidentiality obligations by virtue of their adjudicative function. One element of the arbitrator’s role is the duty to maintain the confidentiality of the parties’ written and oral submissions, evidence and other materials submitted in the arbitration. It is generally inconsistent with the arbitrator’s mandate to disclose materials from the arbitration to third parties.”

- Gary BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 2003 (Wolters Kluwer, 2d ed. 2014)

GDPR procedure applied in arbitration court

Website of the arbitration court

- https://sccinstitute.com/about-the-scc/privacy-policy/
- https://www.arbitrationbelgium.com/privacy-policy/

GDPR procedure applied in arbitration court

- ICC DATA PRIVACY NOTICE FOR ICC DISPUTE RESOLUTION PROCEEDINGS https://iccwbo.org/dispute-resolution-services/icc-data-privacy-notice-for-icc-dispute-resolution-proceedings/

ICC DATA PRIVACY NOTICE FOR ICC DISPUTE RESOLUTION PROCEEDINGS

- This privacy notice describes how the International Chamber of Commerce collects and processes personal data as data controller in the context of the dispute resolution services and activities, performed by the International Court of Arbitration (the "Court") and its Secretariat, the ICC International Centre for ADR and its Standing Committee (hereafter "ICC," "we", "us") under the ICC Arbitration Rules, ICC Mediation Rules, other rules and similar dispute resolution proceedings ("ICC Proceedings").
- The conduct of ICC Proceedings requires the processing of personal data relating to actual or potential arbitrators, mediators, expert determiners, dispute board members, and individuals with similar functions ("Neutrals"), administrative secretaries, members of the Court and of National Committees and Groups, as well as the parties, their legal representatives, witnesses, and all other individuals that may be identified or identifiable in any data that is processed by ICC in the context of actual or potential ICC Proceedings (collectively "Data Subjects").
- ICC acts as a controller of personal data for some of its activities and services in the context of ICC Proceedings. You should also be aware that in the context of an ICC Proceeding, others may also act as data controllers, including, for example, the parties, their representatives, and the Neutrals. ICC is the responsible entity for the data processing activities that it undertakes as an institution as described in this Notice, but not for the activities undertaken by other data controllers in the context of ICC Proceedings and their activities are not the subject of this Notice.
- Please note that where you provide any personal data relating to third parties with whom we have no direct relationship in the context of an ICC proceeding, it is your duty to provide them with adequate notice that their data is being processed by ICC and other data controllers for the purposes described in this Notice.

- This Privacy Notice is not intended to override any other privacy related orders or notices that may be issued in the context of ICC Proceedings or that we may provide you in specific circumstances. This Notice applies to the conduct of ICC in ICC Proceedings only. The International Chamber of Commerce's general privacy notice can be found **here**.

ICC DATA PRIVACY NOTICE FOR ICC DISPUTE RESOLUTION PROCEEDINGS

- **II. Categories of Personal Data Processed**
- Neutrals, Members of the ICC Court, Members of the Standing Committee, Members of the National Committees and Groups
- Parties (including in-house counsel and recipient of a power in the company)
- Legal Representatives (external counsel)
- Fact and Expert Witnesses
- Other Individuals (including Personal Data Contained in Submissions or Evidence)

ICC DATA PRIVACY NOTICE FOR ICC DISPUTE RESOLUTION PROCEEDINGS

- **VI. Retention of Data**
- Your personal data will be stored as long as necessary to fulfil the purposes for which the data is collected and to satisfy any legal, accounting or reporting requirements.
- Awards, the Terms of Reference, procedural orders, decisions of the Court, and pertinent correspondence of the Secretariat will be archived in accordance with Article 1 (7) Appendix II of ICC Rules of Arbitration.
- Personal data necessary to carry out conflict checks and to assist parties in recognition and enforcement proceedings and actions

related thereto is stored as long as necessary to fulfil these purposes.

- Evaluation forms are stored for six years.
- Personal data related to payments is stored for 10 years. Thereafter, it will be securely deleted, unless ICC is obligated to retain it for the purposes of any legal proceedings or to comply with any legal obligations.

ICC DATA PRIVACY NOTICE FOR ICC DISPUTE RESOLUTION PROCEEDINGS

- **VII. Data Subjects Rights**
- Depending on the circumstances and if the request does not impinge on the rights of others, you have a number of rights concerning the personal data that we process about you. Not all these rights apply in every case, and they are the following:
- To be informed about the collection and use of your personal data;
- To access your personal data;
- To correct or complete your personal data;
- To have your personal data erased where there is no basis for ICC to continue to use or retain it, unless the processing is necessary to pursue a legal claim or defense;
- To request that your personal data is used only for restricted purposes, unless the processing is necessary to pursue a legal claim or defence;
- To object to your personal data being processed if the lawful basis for processing it is either in ICC's or a third party's legitimate interest;
- To withdraw your consent if consent is the lawful basis for the processing;
- To require certain of your personal data to be transferred where the personal data was collected directly from the data subject; or
- **To submit a complaint with the relevant data protection authority in your jurisdiction (e.g., CNIL in France).**

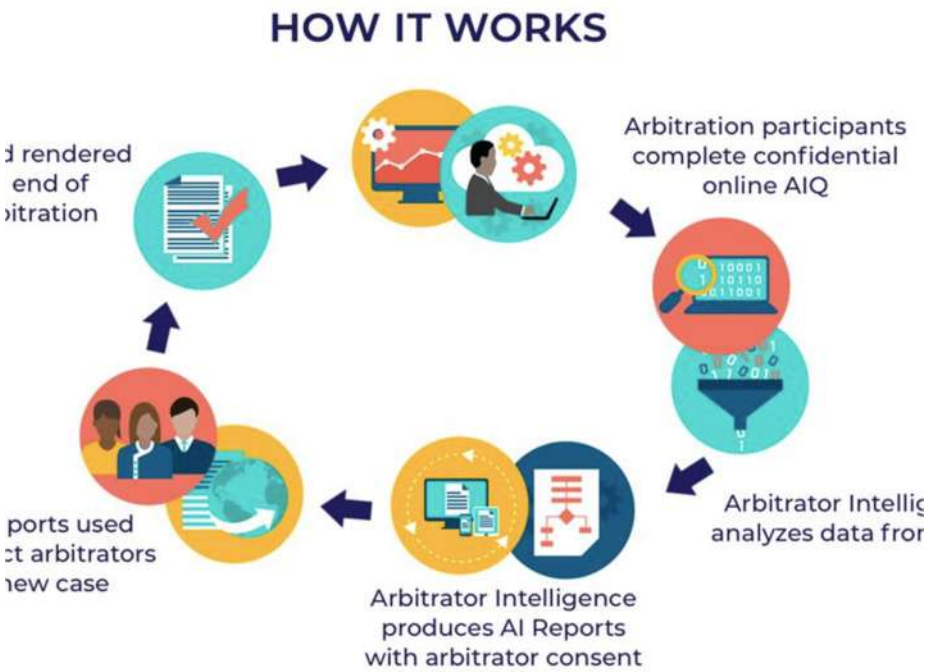
Data protection & profiling on AI (1)

- https://arbitratorintelligence.com/

ARBITRATOR INTELLIGENCE

Data protection & profiling on AI (2)

- CONSENT
- Oreview AI Reports
- https://www.youtube.com/watch?v=VtbxUrXdMvU
- https://www.youtube.com/watch?v=E42-aA6LXr4
- Privacy Policy
- https://arbitratorintelligence.com/privacy-policy/



Catherine A. Rogers, Arbitrator Intelligence: From Intuition to Data in Arbitrator Appointments (January 30, 2018). New York Dispute Resolution Lawyer Volume 11 No. 2 (Spring 2018), Penn State Law Research Paper No. 3-2018, Available at SSRN

Catherine A. Rogers, Moneyball for Arbitrators, Wolters Kluwer Blog, 2018
Catherine Rogers - Keynote at the Vienna Arbitration Day 2019 https://www.youtube.com/watch?v=E42-aA6LXr4, 9.30' etc

Arbitration in the Digital Age. Artificial Intelligence

- *"**Artificial Intelligence and Arbitration: Should We Keep It Real?**", Wolters Kluwwer, December 2020 [source, webinar]*

- 37'-39 - **Simon Greenberg (why)**

- **45'-47 - Dean Sonderegger (choosing an arbitrator)**

UNCITRAL: United Nations Commission on International Trade Law Working Group III

• **Arbitrator Intelligence** is delighted to once again be cited by **UNCITRAL: United Nations Commission on International Trade Law** Working Group III, in the most recent version of the Secretariat's Note on 'Possible reform of investor-State dispute settlement (ISDS) Selection and Appointment of ISDS tribunal members' dated November 16, 2020.

Arbitrator Intelligence's Reports are highlighted in conjunction with the Working Group's discussion of "How to ensure transparency and accountability" at footnote 20 in page 6/15.

United Nations A/CN.9/WG.III/WP.203

General Assembly

Distr.: Limited
16 November 2020

Original: English

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Fortieth session
Vienna, Online, 8-12 February 2021

Possible reform of investor-State dispute settlement (ISDS)

Selection and appointment of ISDS tribunal members

Note by the Secretariat

Contents

How to ensure transparency and accountability

27. Measures to enhance transparency and availability of information on the selection and appointment process by the appointing authorities would need to be developed further. These include publication of applicable rules and criteria (for instance , information on nationality, gender, age group, legal system\ degree of involvement of the parties in the process, as well as the costs involved. Appointing authorities could also be directed to make public the lists of possible ISDS arbitrators they circulate to the parties as nominees for appointment. This would provide evidence of tbe efforts made towards in clusiveness.[20]

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19 In its submission (available a-:t bttp s:// uncit ral.un.org /sites/uncit ral.un.org/files/media - documents /un citral/en /pca_mechanisms _for_select ion and _appointment pdf) the PCA indicated that the list procedure is usually followed by the Secretary-General of the PCA as per the UNCITRAL Arbitration Rules (Article 8(2)) and the PCA Rules (Article 8(2)). It also presented alternative mechanisms .

20 See, for instance the project Arbitrator Intelligence , which reports contain data and feedback about international arbitrators and arbitrations. This information and related analytics are meant to enahle users to make better-informed decisions about arbitrator selection and case strategy available at bttps://arb it ratorinte lligence.com / .

• Cybersecurity in International Arbitration

EU law on cybersecurity

- Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, *OJ L 194, 19.7.2016, p. 1–30*
- The EU Cybersecurity Act
- https://ec.europa.eu/digital-single-market/en/eu-cybersecurity-act/
- ENISA

cyberintrusion

The focus here on cyberintrusion into the arbitral process does not imply that international arbitration is uniquely vulnerable to data breaches, but only that international arbitration proceedings are not immune to increasingly pervasive cyberattacks against corporations, law firms, government agencies and officials and other custodians of large electronic data sets of sensitive information.

Stephanie Cohen, Mark Morrily, A Call To Cyberarms: The International Arbitrator's Duty To Avoid Digital Intrusion, Fordham International Law Journal, Volume 40, Issue 3, 2017, p.

Duty to protect the integrity and legitimacy of the arbitral process

"The arbitrator's duty to avoid intrusion also rests on a duty to protect the integrity and legitimacy of the arbitral process. Unauthorized intrusion by hackers or other malevolent actors threatens more than confidentiality: it is a direct threat to the fair, neutral, and orderly process that underlies all arbitrations and to public trust in the arbitral process. If we accept that hacking threatens the integrity of the process, it follows that the arbitrator's obligation to protect the integrity of the process encompasses some form of duty to avoid such intrusion."

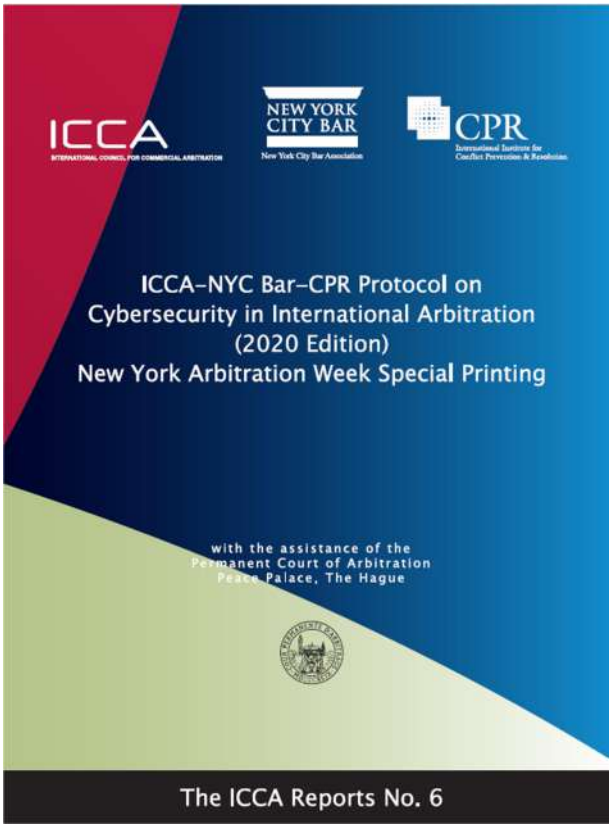
Stephanie Cohen, Mark Morrily, A Call To Cyberarms: The International Arbitrator's Duty To Avoid Digital Intrusion, Fordham International Law Journal, Volume 40, Issue 3, 2017, p. 989-990

Duty of Competence

Various arbitrator ethics codes expressly require arbitrators to be "competent." Canon 1 of the *ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes*, which requires an arbitrator to uphold the integrity and fairness of the arbitration process, provides that an arbitrator should accept appointment in a particular matter only if fully satisfied that he or she is "competent toserve." The *IBA Rules of Ethics for International Arbitrators* provide a more general requirement that "international arbitrators should be . . . competent" in addition to a specific requirement that the arbitrator be competent to determine the issues in dispute in a particular matter.

Stephanie Cohen, Mark Morrily, A Call To Cyberarms: The International Arbitrator's Duty To Avoid Digital Intrusion, Fordham International Law Journal, Volume 40, Issue 3, 2017, p. 997-998.

Principles



- **1. The Cybersecurity Protocol provides a recommended framework to guide tribunals, parties, and administering institutions in their consideration of what information security measures are reasonable to apply to a particular arbitration matter.**

- **2. As a threshold matter, each party, arbitrator, and administering institution should consider the baseline information security practices that are addressed in Schedule A and the impact of their own information security practices on the arbitration. Effective information security in a particular arbitration requires all custodians of arbitration-related information to adopt reasonable information security practices.**

- **3. Parties, arbitrators, and administering institutions should ensure that all persons directly or indirectly involved in an**

arbitration on their behalf are aware of, and follow, any information security measures adopted in a proceeding, as well as the potential impact of any security incidents.

- **4. The Protocol does not supersede applicable law, arbitration rules, professional or ethical obligations, or other binding obligations.**

- **5. Subject to Principle 4, the information security measures adopted for the arbitration shall be those that are reasonable in the circumstances of the case as considered in Principles 6-8.**

Principles

6. In determining which specific information security measures are reasonable for a particular arbitration, the parties and the tribunal should consider:

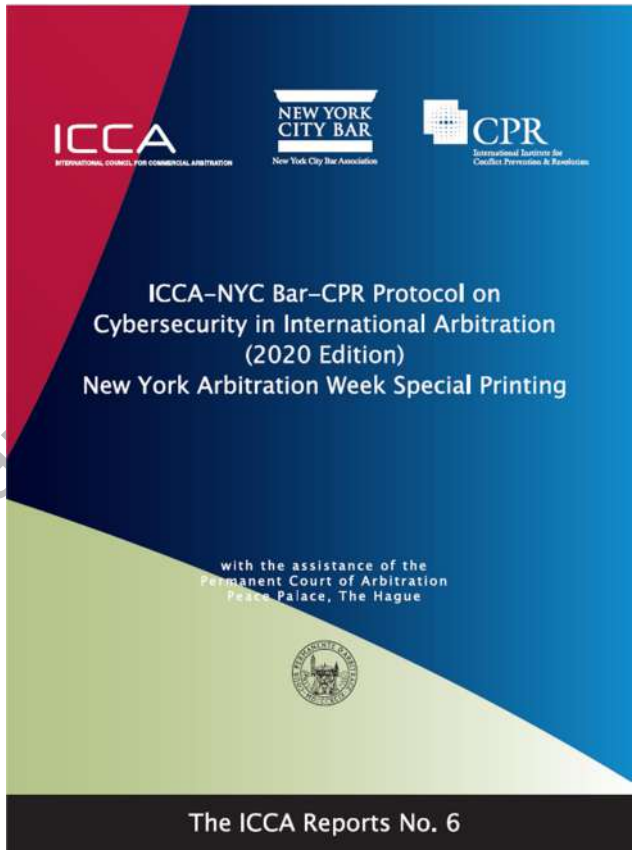
(a) the risk profile of the arbitration, taking into account the factors set forth in Schedule B;

(b) the existing information security practices, infrastructure, and capabilities of the parties, arbitrators, and any administering institution, and the extent to which those practices address the categories of information security measures referenced in Principle 7;

(c) the burden, costs, and the relative resources of the parties, arbitrators, and any administering institution; 18

(d) proportionality relative to the size, value, and risk profile of the dispute; and

(e) the efficiency of the arbitral process.



Principles

7. In considering the specific information security measures to be applied in an arbitration, consideration should be given to the following categories:

(a) asset management;

(b) access controls;

(c) encryption;

(d) communications security;

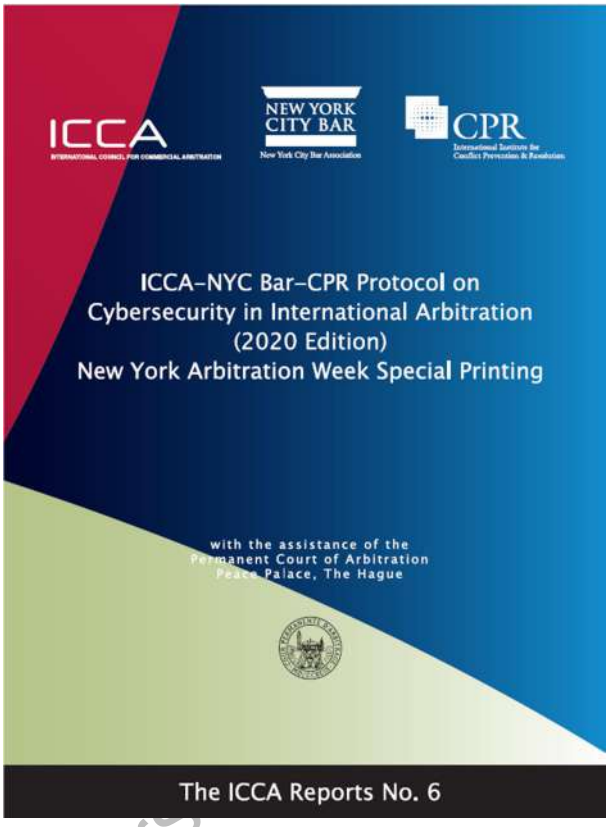
(e) physical and environmental security;

(f) operations security; and

(g) information security incident management.

8. In some cases, it may be reasonable to tailor the information security measures applied to the arbitration to the risks present in different aspects of the arbitration, which may include:

- (a) information exchanges and transmission of arbitration-related information;
- (b) storage of arbitration-related information;
- (c) travel;
- (d) hearings and conferences; and/or
- (e) post-arbitration retention and destruction policies.



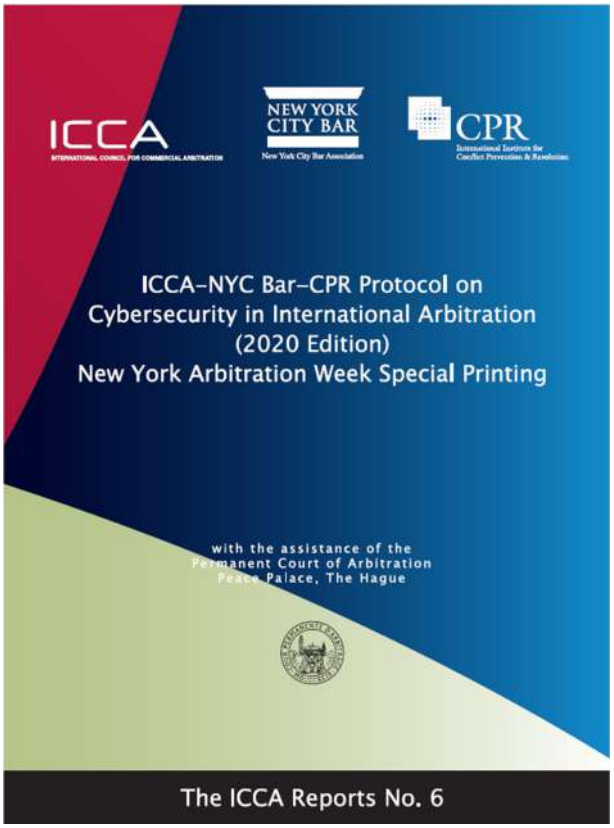
Principles

9. Taking into consideration the factors outlined in Principles 6-8 as appropriate, the parties should attempt in the first instance to agree on reasonable information security measures.

10. Information security should be raised as early as practicable in the arbitration, which ordinarily will not be later than the first case management conference.

11. Taking into consideration Principles 4-9 as appropriate, the arbitral tribunal has the authority to determine the information security measures applicable to the arbitration.

12. The arbitral tribunal may modify the measures previously established for the arbitration, at the request of any party or on the tribunal's own initiative, in light of the evolving circumstances of the case.



13. In the event of a breach of the information security measures adopted for an arbitration proceeding or the occurrence of an information security incident, the arbitral tribunal may, in its discretion:
(a) allocate related costs among the parties; and/or (b) impose sanctions on the parties.

14. The Protocol does not establish any liability or any liability standard for any purpose, including, but not limited to, legal or regulatory purposes, liability in contract, professional malpractice, or negligence.

ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings, https://iccwbo.org/publication/icc-checklist-for-a-protocol-on-virtual-hearings-and-suggested-clauses-for-cyber-protocols- and-procedural-orders-dealing-with-the- organisation-of-virtual-hearings/

- SUGGESTED CLAUSES FOR CYBER- PROTOCOLS AND PROCEDURAL ORDERS DEALING WITH THE ORGANISATION OF VIRTUAL HEARINGS
- I. PARTICIPANTS
- II. TECHNICAL ISSUES, SPECIFICATIONS, REQUIREMENTS AND SUPPORT STAFF
- III. CONFIDENTIALITY, PRIVACY AND SECURITY
- V. ONLINE ETIQUETTE AND DUE PROCESS CONSIDERATIONS
- V. PRESENTATION OF EVIDENCE AND EXAMINATION OF WITNESSES AND EXPERTS

Video Conferencing in International Arbitration Proceedings

- Since the Tribunal functions as *"data controller",* the GDPR requires the Tribunal to ensure that any processors being used are GDPR compliant and that there is a comprehensive data processing agreement in place, to clarify and understand what the provider does with the data it collects through the software from the Tribunal and the parties.

- In essence, the Tribunal should have appropriate technical and organizational measures in place in order to implement the data protection principles and safeguard individual rights with regard to video conferencing. This is also referred to as "*data protection by design*", i.e. to consider all data protection issues up-front before the actual hearings commence.

- Andreas Respondek, Should the ICCA / IBA's Task Force on Data Protection "Roadmap" address the impact of the GDPR on Video Conferencing in International Arbitration Proceedings?, 18.07.2020, http://arbitrationblog.kluwerarbitration.com/2020/07/18/should-the-icca-ibas-task-force-on-data-protection-roadmap-address-the-impact-of-the-gdpr-on-video-conferencing-in- international-arbitration-proceedings/

• Arbitration on data protection litigation

- Data protection authorities
- Controller
- Processor
- Data subject

• Case law

"In an ongoing *NAFTA* Chapter 11 *investor-state* dispute (*Tennant Energy v Canada*), the claimant raised the rather novel question about whether the *EU General Data Protection Regulation (GDPR)* was applicable to *arbitration* proceedings. Tennant Energy had, amongst other things, referred to the fact that one of the *arbitrators*, Sir Daniel Bethlehem QC, was a UK national with offices in London and thus fell under the GDPR. Since arbitration proceedings typically involve a huge amount of data (including personal data), which
the arbitrators receive from the parties and which they must process, it is not far-fetched to argue for the applicability of the *GDPR in arbitration* proceedings.

However, the arbitral tribunal decided the issue as follows:

On the potential application of the General Data Protection Regulation 2016/679 ("GDPR") to this arbitration, having carefully considered Parties' submissions on this issue, the Tribunal finds that an arbitration under NAFTA Chapter 11, a treaty to which neither the European Union nor its Member States are party, does not, presumptively, come within the material scope of the GDPR. Accordingly, the Confidentiality Order makes no reference to the GDPR. This is without prejudice to the importance of ensuring a high level of data protection, and language to this effect has been added into the Confidentiality Order."

Nikos Lavranos, The need for a Data Protection Protocol for arbitration proceedings, 12.09.2019, http://arbitrationblog.practicallaw.com/the-need-for-a-data-protection-protocol-for-arbitration-proceedings/

Conclusion

- The problem with non-EU parties or non-EU counsels, or even Non - EU arbitrators that do not sit in countries who have adopted similar GDPR Regulations such as Switzerland they are still called to respect GDPR Practices since the arbitration rules impose such practice (i.e. ICC/SCC).

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V. Public procurement and international commercial arbitration

Agenda

- Introduction. Legal basis
- The legitimacy of State and public authorities' capacity to enter into arbitration agreement
- Geneva European Convention - Article II - Right of Legal Persons of Public Law to Resort to Arbitration
- EU procurement law and private law (arbitration)
- Commercial Arbitration in Public Procurement. Overview of case-law of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania
- ADR, included arbitration - cannot be governed by procurement rules
- Conclusion

Introduction. Legal basis

- Council Directive 89/665/EEC of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, JO L 395, 30.12.1989, p.33.
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance, *OJ L 94, 28.3.2014, p. 243–374*
- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, *OJ L 94, 28.3.2014, p. 65–242*
- Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, JO L 335, 20.12.2007, p.31.
- https://ec.europa.eu/environment/gpp/eu_public_directives_en.htm

Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts

- Public law
- The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the

contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.

- Recital 4.

The Legitimacy of State and Public Authorities' Capacity to Conclude an Arbitration Agreement

State and public authorities (bodies of public law) are legal entities different from traders, the latter being the main participants in (domestic and international) business relationship. Legislative solutions are various, certain legislations provide expressly for the ability of State entity to conclude (or not) arbitration agreements, while others provide for intermediate formulas, by subjecting the State's "capacity" to an consent from government. The State's (or, state organs and public authorities) ability to conclude arbitration agreements is deemed as an issue pertaining primarily to power / (public) competence, and less to capacity.

Geneva European Convention - Article II - Right of Legal Persons of Public Law to Resort to Arbitration

1. In cases referred to in Article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements.

2. On signing, ratifying or acceding to this Convention any **State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration.**

- European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961 United Nations, Treaty Series, vol. 484, p. 364 No. 7041 (1963-1964)

EU procurement law and private law (arbitration)

The relationship between arbitration and "public procurement" implies dealing with the protection of certain contradicting values: confidentiality (commercial arbitration) and transparency (public procurement), and from a legal norms' point of view, the convergence between the private law norms and the public law norms. There are divergent interests that arise from the state's and its public entities' necessity to invest and to develop their government programs in good conditions. The goals mentioned can only be achieved through the conclusion of contracts.

If there are administrative contracts that should follow the precise rules of administrative law or (even in part) can be "privatized", this is a technical and necessary discussion. The current state of affairs requires a description, as the modification of the Romanian legislation may seem surprising, but the role of the state in the economy and the important proportion of the gross domestic product referring to the contracts concluded by the state and the public authorities must not be forgotten. That is why there is a pressure from investors and companies with whom the state or public entities contracted to obtain a court or an arbitration ruling within reasonable time and expenses. Hence the reason why a legislative policy that favours procurement arbitration has very important practical consequences

- We must see these consequences from both investors' and the state's perspectives. The state's financially important interests are sometimes put in balance with other reasons (geopolitical strategies, investment development) so that the "oxymoronic relationship" (procurement arbitration) has begun to be accepted in as many developed states as possible.

- Finally yet importantly, all of this issues must be considered in the international legal framework, primarily with regard to Romania's rights and obligations as a member state of the European Union. Coming back to the advantages that the arbitral proceedings may have in the matter of public procurement, we take into account a couple of considerations regarding confidentiality, arbitral fees, and the

recognition and enforcement of arbitration awards. Confidentiality is an advantage that commercial arbitration (international) implies, but which is not absolute.

- The subject of the transparency of procurement procedure appears to be linked corruption in international commercial arbitration, and the UNCITRAL Model Law on Public Procurement avoids referring to arbitration as a way of settling disputes.

- Abdulhay Sayed, (2014), Corruption in International Trade and Commercial Arbitration, Wolters Kluwer International, p. 29.

- Sue Arrowsmith, (January 2004), Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard, The International and Comparative Law Quarterly, Volume 53, Issue 1, p. 17-46. The Model Law of UNCITRAL on Public Procurement (2011) there is no reference to arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011M odel.html

- Commercial Arbitration in Public Procurement. Overview of case-law of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania

- The International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania settled disputes in which the contract that included the arbitration agreement, was concluded following a public procurement procedure. Litigations regarding contracts concluded by public entities (such as lease agreement) were also settled by the mentioned court.

- Likewise, at certain times, the Court of Arbitration verified its own jurisdiction and dismissed the case on grounds of lack of competence, thus, it proceeded to give either a referral or declining solution, or one in which it found that it was facing an "inoperative" arbitration agreement in relation to Article 286 from GEO [Government emergency order] no. 34/2006.

    - As well as a solution to the closure of the arbitration procedure. See, Marin Voicu, (2014), Commercial Arbitration. Jurisprudence annotated and commented. 2004-2014, “Universul Juridic” Publisher House, p. 207. CAB, CCIR, arbitral award no. 51/2014.

- See, Marin Voicu, (2014), Commercial Arbitration. Jurisprudence annotated and commented. 2004-2014, "Universul Juridic" Publishing House, p. 208, CAB, CCIR, arbitration award no. 77 of 11 April 2012.

- Thus, in one case relating to a public procurement contract that envisaged the construction of roads using EU funds, contract that was concluded in 2008, the arbitral tribunal considered its own jurisdiction stating the following:

- *„In regards to jurisdiction, it has been the subject of an exception raised by the defendant, an exception that was put up for discussion before the parties. The applicant thus stated that, in an identical action pending before the State Courts, the exclusive jurisdiction of the State Courts in question was established by final judgment. Moreover, the applicant filed with the Arbitral tribunal as evidence the document in question, Civil Law Decision 349/2014 of the Bucharest Court of Appeal, Civil Division V.*

- *While deliberating, the arbitral tribunal found that in the present case, the Court of Appeal pronounced decision its decision in a civil law matter that establishes the exclusive jurisdiction of the state courts over the dispute in question, and it considered that the provisions of the law in force at the time of the contract's conclusion would have invalidated the compromise agreement present in the contract concluded between parties. As such, the arbitral tribunal is to uphold the exception regarding its lack of material jurisdiction in the matter and consequently to close the arbitral proceedings without going into the merits of the case."*

- CAB, CCIR, arbitral award no. 51/2014

- Investigating its own jurisdiction, the arbitral tribunal underlines, in connection with GEO no. 34/2006 (GEO nr. 34/2006) that:

- *"The inclusion of the compromise agreement in the concluded contract by the parties does not prevent the arbitral tribunal to decide, in the present case, the non-arbitrary nature of the dispute and to establish the lack of jurisdiction of the International Commercial Arbitration Court to resolve the arbitration request formulated by the applicant."*

- CAB, CCIR, Arbitration award no. 74/2013

- Apart from public procurement litigations, the Court also ruled on litigations in which one of the parties was a public entity, the contract rather being a public private partnership that materialized in the form of a joint venture agreement. In this case, the exception regarding the nullity of the arbitration agreement inserted in the joint venture contract was overruled because it concerns a dispute over which the law does allow for a transaction [as the Arbitral Tribunal diferentiated between the public private partnership contract and the joint venture agreement, the latter being the contract that provided for the arbitration clause.].

- CAB, CCIR, Arbitration Notice of 10.02.2016

- "In support of the exception, it is stated that "a transaction can only be done by those entitled to the possibility of a disposition over the object contained therein"... The object of the contract, which includes the compromise agreement, relates to the acquisition/purchase of goods and services by a public administration structure, the municipality..., and the provider is a private company. In regards to the right to purchase works and services from a private supplier, The municipality could not freely dispose of it, but only under public procurement law (GEO 60/2001). The arbitral tribunal finds that the exception is unfounded, and will reject it because the clause is inserted in the joint venture agreement (commercial contract), which was legally concluded on the basis of Article 251-256 Commercial Code (in force at that time), following the adoption of the Decision of the Local Council ... no. ... of ... The object of the contract was not the purchase of works and services, but the undertaking of the two associates as a joint venture to carry out the public lighting activity in the City ..., the rights and obligations of each party being determined by the contractual clauses. "

- CAB, CCIR, Arbitration Notice of 10.02.2016

In one case, the inadmissibility exception was raised by the contracting authority, that has not been notified in advance, according to Article 6 (1) and (2) of Law no. 101/2016 on remedies and appeals in respect of the award of public procurement contracts, sector- specific contracts and works and concession contracts, as well as for the organization and

functioning of the National Council for Solving Complaints.) The court, ruling on the *inadmissibility exception* invoked by the contracting authority by means of it`s statement of defence, rejected it statement of defence, rejects it, stating that the object of the application refers to a dispute concerning the enforcement of the contract concluded between the parties, the settlement procedure being governed by the provisions of Article 53-57 of the Law no. 101/2016, and it also refers to the settlement of a judicial appeal, as allowed by the provisions of Article 49-52 of the Law no. 101/2016, in which case the notification provided by Article 6 of the Law no. 101/2016 is required. On the other hand, the court observes that, the applicant has proved the fulfilment of the preliminary procedure under Law no. 554/2004 of administrative litigation using the correspondence she/he had with the defendant on the object brought to court.

- Dâmboviţa Tribunal, Civil II-nd Administrative and Fiscal Section, Decision no. 67 of January the 17th 2017, unpublished available in http://rolii.ro/hotarari/589b24c8e49009543b000467

In another case, the solution in the appeal was to uphold the decision of the court of first instance, which "*fairly interpreted the court procedure applicable in such a case, namely the provisions of Article 53- 57 of the Law no. 101/2016, which do not impose the existence of a pre-litigation procedure before the court, but a special administrative section.*

- Ploieşti Court of Appeal, II-nd Civil Administrative and Fiscal Section, Decision no. 1234 of the 21st of June 2017 available on ROLII.ro at http://rolii.ro/hotarari/598137c4e49009001b000401

- This, because since Law no. 101/2016 is a special law, for disputes concerning public procurement, its provisions shall be applied with priority and shall be supplemented where necessary with the provisions of Law no. 554/2004 on administrative litigation. In this respect, the provisions of Article 68 of Law no. 101/2016 states that *"the provisions of the present law shall be supplemented by the provisions of the Law on administrative contentious no. 554/2004, with the subsequent amendments and completions, and of the Law no. 134/2010, republished, as amended ... ".*

- It can be noticed, however, that Law no. 101/2016 provides for a pre-trial procedure before the court, applicable only in the situation

presented in Article 6, and the obligation to fulfil it belongs to the person who considers himself / herself harmed in the sense defined in Article 3 par. 1 lit. f of the same law.

- In such a context, the court of law substantially and lawfully rejected the exceptions invoked, finding that in the case presented for judgment the provisions of Law no. 554/2004 regarding the realization of the condition of pre-trial procedure are not applicable."

ADR, includes arbitration - cannot be governed by procurement rules

- It should be recalled that arbitration and conciliation services and other similar forms of alternative dispute resolution are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules. It should be clarified that this Directive does not apply to service contracts for the provision of such services, whatever their denomination under national law.
- Recital 24
- *Article 10* - Specific exclusions for service contracts

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, *OJ L 94, 28.3.2014, p. 65–242*

Public procurement

- ICSID
- ICC

Conclusion

- Commercial arbitration may resolve disputes concerning public procurement contracts within the limits provided by the special law, *"disputes relating to the interpretation, conclusion, execution, modification and termination of contracts shall be settled by arbitration*". The International Commercial Arbitration Court attached to the Chamber of Commerce and Industry has the legal capacity to settle litigations in this category, as it has happened so far, although under non-uniform regulations.
- State immunity no longer an issue see NCPC Article 542 (2)and (3) and NCPC Article 1112 (2) based on the Geneva European Convention Article II.

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VI. EU Competition Law and State Aid confronted arbitration

Agenda

- *Legal basis*
- *Duty of arbitrators and use of arbitration in competition law*
  - *Private antitrust enforcement*
    - *Judgment of 20 September 2001, Courage and Crehan (C-453/99, ECR 2001 p. I-6297) ECLI:EU:C:2001:465*
    - *C-295/04 to C-298/04, Manfredi, Judgment of 13 July 2006, ECR 2006 p. I-6619, ECLI:EU:C:2006:461*
  - Ex officio *application of EU Competition Law by arbitrators*
    - C-126/97, *Eco Swiss*
    - *Opinion AG Saggio*
  - *C-344/98, Masterfoods and HB, Judgment of 14 December 2000, ECR 2000 p. I-11369, ECLI:EU:C:2000:689*
  - *Commission decisions and acts of potential relevance to arbitral proceedings*
- Co-operation between the Commission and arbitration
  - European Commission as *amicus curiae* in international arbitration procedure
- Review of recent competition cases decided by arbitrators
  - Laura Bergamini, Analysis of recent competition cases decided by arbitrators
  - Alexis Mourre, Courts in France and Belgium confirm limited review of awards under European competition law
- *Micula Case*
  - Commission Decision (EU) 2015/1470
  - *T-624/15, T-694/15 and T-704/15, European Food and others / Commission, Judgment of 18 June 2019, ECLI:EU:T:2019:423*
- *Conclusion*

Legal basis

- TFEU, art. 101-107
- Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
- Communication from the Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law 2020/C 242/01, C/2020/4829, *OJ C 242, 22.7.2020, p. 1–17*

Legislation – Antitrust law

Antitrust law

- **Anticompetitive practices & abuse of a dominant position**
  - Guidelines on the effect on trade concept
  - Access to the European Commission file in merger and anti-trust cases
  - Implementing EU competition rules: application of Articles 101 and 102 of the TFEU
  - EU rules on concerted practices and agreements between companies
  - De minimis notice: Exemption for agreements of minor importance
  - Rules to compensate victims of cartels and anti-competitive practices
  - Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC)
  - Complaining about businesses infringing competition rules
  - Guidelines on horizontal cooperation agreements
  - Competition proceedings — The role of the hearing officer
  - Implementing EU competition rules — best practices for the conduct of proceedings concerning Articles 101 and 102 of the TFEU
- **Mergers**
  - Control of concentrations between companies
  - The future direction of the EU mergers and acquisitions policy
  - Guidelines on the assessment of horizontal mergers
  - https://eur-lex.europa.eu/summary/chapter/0801.html

Legislation – Cartels

- Guidelines for setting fines
- EU competition — conduct of proceedings by the European Commission
- Immunity from and reduction of fines: leniency in cartel cases
- EU antitrust proceedings — rules for rewarding cooperation

Legislation – State aid

State aid — general rules

- Transparency of financial relations between public authorities and public undertakings
- State aid — application of rules for services of general economic interest (SGEI)
- Notion of State aid
- De minimis aid for services of general economic interest
- Categories of State aid exempted from notification
- General Block Exemption Regulation
- State aid procedural rules
- De minimis rule — exemption of small aid amounts from notification

- **Rules applicable to specific sectors**
  - State aid — important projects of common European interest
  - State aid — films and other audiovisual works
  - State aid: European Union financial crisis rules for banks
  - Internal market and State aid — public passenger transport services by rail and road
  - State aid for rapid broadband deployment
  - State aid: research and development and innovation
  - State aid — maritime transport
  - State aid: EU guidelines for regional aid for 2014 to 2020
  - State aid for railway companies
  - De minimis aid for services of general economic interest
  - State aid for businesses in difficulty
  - State aid: environmental protection and energy
  - State aid — Guidelines on aid to airports and airlines
  - State aid — guarantees

- https://eur-lex.europa.eu/summary/chapter/0802.html

Legislation – other topics

- Competition: international dimension and enlargement
- Empowerment of national competition authorities for effective enforcement

- Competition — general rules
- EU competition policy: cooperation between the European Commission and national courts
- European Competition Network (ECN)
- Definition of relevant market
- Informal guidance to firms

***

- Cases - https://ec.europa.eu/competition/elojade/isef/index.cfm

Arbitration and Competition Law: duty of arbitrators and use of arbitration in competition law

- *Private antitrust enforcement*
  - *C-453/99, Courage and Crehan, Judgment of 20 September 2001, ECR 2001 p. I-6297) ECLI:EU:C:2001:465*
  - *C-295/04 to C-298/04, Manfredi, Judgment of 13 July 2006, ECR 2006 p. I-6619, ECLI:EU:C:2006:461*
- Ex officio *application of EU Competition Law by arbitratiors*
  - C-126/97, *Eco Swiss*
- *Conclusion*

Judgment of 20 September 2001, Courage and Crehan (C-453/99, ECR 2001 p. I-6297) ECLI:EU:C:2001:465

"23. (…) it should be borne in mind that the Court has held that Article 85(1) of **the Treaty** and Article 86 of the EC Treaty (now Article 82 EC – [now**, 101 TFEU**]) **produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard** (judgments in Case 127/73 BRT and SABAM [1974] ECR 51, paragraph 16, (BRT and Case C-282/95 P Guérin Automobiles v Commission [1997] ECR I-1503, paragraph 39).

24. It follows from the foregoing considerations that any individual can rely on a breach of Article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.

Judgment of 20 September 2001, Courage and Crehan (C-453/99, ECR 2001 p. I-6297) ECLI:EU:C:2001:465

• 25. As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see inter alia the judgments in Case 106/77 Simmenthal [1978] ECR 629, paragraph 16, and in Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19).

• 26. The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

• 27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

C-295/04 to C-298/04, Manfredi, Judgment of 13 July 2006, ECR 2006 p. I-6619, ECLI:EU:C:2006:461

• 53 By this question, which should be examined before the second question in Case C-298/04, the national court asks, essentially, whether Article 81 EC is to be interpreted as entitling any individual to rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm.

C-295/04 to C-298/04, Manfredi, Judgment of 13 July 2006, ECR 2006 p. I-6619, ECLI:EU:C:2006:461

56 First, it should be noted that Article 81(2) EC provides that any agreements or decisions prohibited pursuant to Article 81 EC are void.

57 According to settled case-law, that principle of invalidity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 81(1) EC are met and so long as the agreement concerned does not justify the grant of an exemption under Article 81(3) EC (see on the latter point, inter alia, Case 10/69 *Portelange* [1969] ECR 309, paragraph 10). **Since the invalidity referred to in Article 81(2) EC is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be invoked against third parties** (Case 22/71 *Béguelin* [1971] ECR 949, paragraph 29). Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned (see Case 48/72 *Brasserie de Haecht* [1973] ECR 77, paragraph 26, and *Courage and Crehan*, cited above, paragraph 22).

58 Further, as was noted in paragraph 39 of this judgment, **Article 81(1) EC produces direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard**.

Arbitration?

72 The answer to the second question in Case C-298/04 must therefore be that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to *solve cases* for damages based on an infringement of the Community competition rules and to prescribe the detailed procedural rules governing those actions, provided that the provisions concerned are not less favourable than those governing actions for damages based on an infringement of national competition rules and that those national provisions do not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 81 EC.

Importance of the arbitrators

”In principle, arbitrators can hardly be considered poorly equipped to rule on highly technical issues – in other words, economic analysis of market conditions and (effects of) undertakings’ behaviours, evaluation of damages, legal issues concerning burden of proof, presumptions, and so on; on the contrary, they can normally be considered better equipped than judges to rule on such aspects. Indeed, arbitrators are chosen to perform their specific duty (concerning a particular case) from amongst professionals who are usually more familiar with economic analysis tools and international business practice than judges.”

Roberto Cisotta, Some considerations on arbitrability of competition law disputes and powers and duties of arbitrators in applying EU competition law, in Mel Marquis, Roberto Cisotta (eds), *Litigation and Arbitration in EU Competition Law,* Edward Elgar, 2015, p. 244.

Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law

- *Applicable in arbitration? NO*

- 4. National courts may thus receive requests for disclosure of evidence in proceedings for the private enforcement of EU competition law. National courts will need to ensure effective private enforcement actions by granting access to the relevant information for substantiating the respective claim or defence if the conditions for its disclosure are met. At the same time, national courts need to protect the interests of the party or third party whose confidential information is subject to disclosure.

- 5. To this end, national courts should have at their disposal measures to protect confidential information in a way that does not impede the parties' effective access to justice or the exercise of the right to full compensation

- Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJL 349, 5.12.2014, p. 1)

Ex officio *application of EU Competition Law by arbitrators*

"After the *Eco Swiss* judgment, leading scholars endorsed this solution, which, although apparently clear and simple, still leaves room for some uncertainties. According to a judgment of the *Cour d'Appel de Paris*, the fact that arbitrators have not applied EU competition law *ex officio* does not necessarily amount to a violation of public policy. According to the *Cour d'Appel*, such a violation has to be 'flagrant, effective and concrete' in order to oblige the national judge to set aside an arbitral award. Here the judgment is illustrative of a minimalist approach in the review of arbitral awards, which also stresses the responsibility of the parties, who had not raised any kind of claims regarding EU competition law during the

arbitral proceedings (the party opposing the enforcement of the awards finally raised the argument before the national judge reviewing their validity)."

Roberto Cisotta, Some considerations on arbitrability of competition law disputes and powers and duties of arbitrators in applying EU competition law, in Mel Marquis, Roberto Cisotta (eds), *Litigation and Arbitration in EU Competition Law,* Edward Elgar, 2015, p. 256- 7.

- See "Eco Swiss" in http://www.rolii.ro/cautare

Paradox, sui generis…

"One may say that EU competition law enforcement through international commercial arbitration suffers from a kind of imbalanced control mechanism, if compared with normal private enforcement. This stems from the case law of the Court of Justice of the EU (hereinafter the CJEU, or the Court of Justice, or the Court). In the first place, in *Nordsee*,1 the Court stated that arbitrators cannot refer a question to it for a preliminary ruling. In the second place, in *Eco Swiss*,2 two important principles were established: Article 81 EC (now Article 101 TFEU) has to be treated as a matter of public policy, and thus an arbitration award has to be annulled where it is contrary to that provision; however, Community (EU) law does not preclude national legislation according to which an interim arbitration award, enjoying the nature of a final award, acquires the force of *res judicata* – where no application for annulment has been filed within the prescribed limitation period – even if only in the context of a judicial review of a subsequent arbitration award it can be determined whether an agreement held valid by the interim award is nonetheless contrary to Article 81 EC (now Article 101 TFEU).

It is immediately evident that the picture drawn by the *Nordsee* and *Eco Swiss* judgments is quite different from ordinary judicial EU (competition) law enforcement, which is based on the respective roles of the national and EU Courts and on the preliminary reference mechanism."

Roberto Cisotta, Some considerations on arbitrability of competition law disputes and powers and duties of arbitrators in applying EU competition

law, in Mel Marquis, Roberto Cisotta (eds), *Litigation and Arbitration in EU Competition Law,* Edward Elgar, 2015, p. 244.

Nordsee

7 SINCE THE ARBITRATION TRIBUNAL WHICH REFERRED THE MATTER TO THE COURT FOR A PRELIMINARY RULING WAS ESTABLISHED PURSUANT TO ***A CONTRACT BETWEEN PRIVATE INDIVIDUALS*** *THE QUESTION ARISES WHETHER IT MAY BE CONSIDERED AS A COURT OR TRIBUNAL OF ONE OF THE MEMBER STATES WITHIN THE MEANING OF ARTICLE 177 OF THE TREATY.*

- *See. Ch.2 – "***Article 267 TFEU and Arbitration"**

C-126/97, *Eco Swiss, Judgment of 1 June 1999, ECR 1999 p. I-3055, ECLI:EU:C:1999:269*

- *1 Community law - Rights conferred on individuals - Protected by the national courts - National rules of procedure - Application for annulment of an arbitration award - Consideration by the court seised of a plea in law alleging infringement of Article 85 of the Treaty (now Article 81 EC)*
- *(EC Treaty, Arts 85 and 177 (now Arts 81 EC –* ***now 101 TFEU*** *and 234 EC – now* ***art. 267 TFEU****))*
- *2 Community law - Rights conferred on individuals - Protected by the national courts - National rules of procedure - Application for annulment of an arbitration award - Examination of the validity under Article 85 of the Treaty (now Article 81 EC) of a contract held valid in the context of an interim arbitration award - Precluded under domestic rules of procedure concerning res judicata - Whether compatible with Community law*
- *(EC Treaty, Art. 85 (now Art. 81 EC))*

C-126/97, *Eco Swiss*

- *31 By its second question, which is best examined first, the referring court is asking essentially whether a national court to which application is made for annulment of an arbitration award must grant such an application where, in its view, that award is in fact contrary to Article 85 of the Treaty although, under domestic procedural rules, it may grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which, according to the applicable national law, is not generally to be invoked on the sole ground that, because of the terms or the enforcement of an arbitration award, effect will not be given to a prohibition laid down by domestic competition law.*
- *32 It is to be noted, first of all, that,* ***where questions of Community law are raised in an arbitration resorted to by agreement, the ordinary courts may have to examine those questions, in particular during review of the arbitration award, which may be more or less extensive depending on the circumstances and which they are obliged to carry out in the event of an appeal, for setting aside, for leave to enforce an award or upon any other form of action or review available under the relevant national legislation*** *(Nordsee, cited above, paragraph 14).*

C-126/97, *Eco Swiss*

- *35 Next, it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.*
- *36 However, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the*

framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.

- *37 It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.*

C-126/97, *Eco Swiss*

- *38 That conclusion is not affected by the fact that the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member States, provides that recognition and enforcement of an arbitration award may be refused only on certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Article V(1)(c) and (e) and II(b) of the New York Convention).*
- *39 For the reasons stated in paragraph 36 above,* ***the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention****.*

C-126/97, *Eco Swiss*

- *40 Lastly, it should be recalled that, as explained in paragraph 34 above, arbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions*

of interpretation of Community law. However, it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied (Case C-88/91 Federconsorzi [1992] ECR I-4035, paragraph 7). It follows that, in the circumstances of the present case, unlike Van Schijndel and Van Veen, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 85(1) of the Treaty should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.

- *41 The answer to be given to the second question must therefore be that a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.*

C-126/97, *Eco Swiss*

• 48 The answer to be given to the fourth and fifth questions must therefore be that Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of res judicata and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

*C-393/92, Gemeente **Almelo** and others / Energiebedrijf IJsselmij Judgment of 27 April 1994, ECR 1994, p. I-1477, ECLI:EU:C:1994:171*

"A national court which, in a case provided for by law, determines an appeal against an arbitration award must be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, even if under the terms of the arbitration agreement made between the parties that court must give judgment according to what appears fair and reasonable."

- *See. Ch.2 – "***Article 267 TFEU and Arbitration"**

Request for a preliminary ruling from - Competition Authority

- Alfonso Rincon Garcia Loygorri, ***ANESCO*: Maintaining an Orthodox View On the Admissibility of Requests for a Preliminary Ruling,** *Journal of European Competition Law & Practice*, Volume 11, Issue 10, December 2020, Pages 595–597

"On 16 September 2020, the Court of Justice of the European Union ruled that a request for a preliminary ruling from the Spanish Competition Authority (*Comisión Nacional de los Mercados y la Competencia*; hereinafter CNMC) was inadmissible since it could not be regarded as having the nature of a 'court or tribunal' for the purposes of Article 267 TFEU.

The request for a preliminary ruling is related to an alleged anticompetitive practice in the provision in Spain of stowage services. In 2017, the Kingdom of Spain adopted a Decree with the aim of complying with the judgment of the Court of Justice of 11 December 2014, *Commission v Spain* (C-576/13)…"

Moreover, arbitrators, being appointed by the parties to an agreement in order to settle a dispute, are under an even greater obligation to comply with the parties' wishes than a court would be, so it does not seem reasonable to require them as a matter of course to consider issues that are outside the ambit of the dispute as defined by the parties. As a form of private judicial procedure, albeit recognised by the law, arbitration is based on the principles of autonomy of the parties and the passive role of the tribunal, as is evident from the

6 — See Advocate General Jacobs's Opinion in *Van Schijndel and Van Veen*, cited above, point 18.

Opinion AG Saggio

It is worth noting that the Court of Justice did not rule directly on the first question, in other words, the one discussed by AG Saggio in the quoted passage. According to the Court, its response to the second question obviated the need to respond to the first. Nevertheless, the Court incidentally recognized that the preceding case law at issue, referred to above in the previous note (specifically, Joined Cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705), was not applicable to the matter before it (see para 40 of the *Eco Swiss* judgment, cited above, note 2).

Roberto Cisotta, Some considerations on arbitrability of competition law disputes and powers and duties of arbitrators in applying EU competition law, in Mel Marquis, Roberto Cisotta (eds), *Litigation and Arbitration in EU Competition Law,* Edward Elgar, 2015, p. 258.

C-344/98, Masterfoods and HB, Judgment of 14 December 2000, ECR 2000 p. I-11369, ECLI:EU:C:2000:689

Masterfoods was codificated in Article 16(1) of Regulation 1/2003.

48. Despite that division of powers, and in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Articles 85(1) and 86 of the Treaty. The Commission is therefore entitled to adopt at any time individual decisions under Articles 85 and 86 of the Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision.

49. It is also clear from the case-law of the Court that the Member States' duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see, to that effect, Case C-2/97 *IP* v *Borsana* [1998] ECR I-8597, paragraph 26).

50. Under the fourth paragraph of Article 189 of the Treaty, a decision adopted by the Commission implementing Articles 85(1), 85(3) or 86 of the Treaty is to be binding in its entirety upon those to whom it is addressed.

51. The Court has held, in paragraph 47 of *Delimitis*, that in order not to breach the general principle of legal certainty, national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which

would conflict with a decision contemplated by the Commission in the implementation of Articles 85(1) and 86 and Article 85(3) of the Treaty.

C-344/98, Masterfoods and HB, Judgment of 14 December 2000, ECR 2000 p. I-11369, ECLI:EU:C:2000:689

52. It is even more important that when national courts rule on agreements or practices which are already the subject of a Commision decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance.

Commission decisions and acts of potential relevance to arbitral proceedings

• **Gordon Blanke,** The interaction between arbitration and public enforcement: clash or harmony?, in Mel Marquis, Roberto Cisotta (eds), *Litigation and Arbitration in EU Competition Law,* Edward Elgar, 2015, p. 267

• Co-operation between the Commission and arbitration

Co-operation between the Commission and arbitration

• Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (Text with EEA relevance) OJ C 127, 9.4.2016, p. 13–21

• It's applicable in arbitration: **Gordon Blanke,** The interaction between arbitration and public enforcement: clash or harmony?, in Mel Marquis,

Roberto Cisotta (eds), *Litigation and Arbitration in EU Competition Law,* Edward Elgar, 2015, p. 267

• 17. In order to assist national courts in the application of EC competition rules, the Commission is committed to help national courts where the latter find such help necessary to be able to decide on a case. Article 15 of the regulation refers to the most frequent types of such assistance: the transmission of information (points 21 to 26) and the Commission's opinions (points 27 to 30), both at the request of a national court and the possibility for the Commission to submit observations (points 31 to 35). Since the regulation provides for these types of assistance, it cannot be limited by any Member States' rule. However, in the absence of Community procedural rules to this effect and to the extent that they are necessary to facilitate these forms of assistance, Member States must adopt the appropriate procedural rules to allow both the national courts and the Commission to make full use of the possibilities the regulation offers(39).

• 18. The national court may send its request for assistance in writing to European Commission Directorate General for Competition B - 1049 Brussels Belgium

• or send it electronically to comp-amicus@cec.eu.int

• 19. It should be recalled that whatever form the co-operation with national courts takes, the Commission will respect the independence of national courts. As a consequence, the assistance offered by the Commission does not bind the national court. The Commission has also to make sure that it respects its duty of professional secrecy and that it safeguards its own functioning and independence(40). In fulfilling its duty under Article 10 EC, of assisting national courts in the application of EC competition rules, the Commission is committed to remaining neutral and objective in its assistance. Indeed, the Commission's assistance to national courts is part of its duty to defend the public interest. It has therefore no intention to serve the private interests of the parties involved in the case pending before the national court. As a consequence, the Commission will not hear any of the parties about its assistance to the national court. In case the Commission has been contacted by any of the parties in the case pending before the court on issues which are raised before the national court, it will inform the national court thereof, independent of whether

these contacts took place before or after the national court's request for co-operation.

ICC Draft Best Practice Note on the European Commission Acting as *Amicus Curiae* in International Arbitration Proceedings – The Text

The present note sets out best practices that the European Commission (the "Commission") and the international arbitrator (the "Arbitrator" or the "Arbitral Tribunal", as the case may be)[13] are invited to apply by way of guidance in their mutual dealings within the course of international arbitral proceedings. A number of these best practices may, at first sight, seem controversial to the extent that they have not yet been tested in real practice.[14] Accordingly, the present guidelines seek to set out what is deemed to be best practice in terms of the Commission's involvement as *amicus curiae*[15] in international arbitration proceedings from the viewpoint of the ICC Task Force. As the title of the document suggests, the best practices put forward do not bind either the Commission or the Arbitrator, and are hence to be understood as mere guidelines to facilitate and guarantee the successful employment of arbitration as a mechanism in EC-competition-law-related arbitral proceedings, such as specified below.

Definitions

1. For the purposes of this Best Practice Note, any terms shall have the meaning given to them in this definitions section. For the avoidance of doubt, unless otherwise indicated, any terms employed in this Best Practice Note that are not defined in this definitions section shall have the meaning specified at the relevant paragraph of this Best Practice Note at which they are used for the first time.
2. The terms "Remedy-Related Arbitrations" and "Ordinary EC Antitrust Arbitrations" have the meaning given to them at paragraphs 7 and 8 respectively.
3. The terms "Arbitrator" and "Arbitral Tribunal" are used interchangeably unless otherwise specified. For the sake of clarification, to the extent that the Arbitrator acts on his own, he is understood to act in his capacity as sole arbitrator (the "Sole Arbitrator"). To the extent that the arbitral proceedings are conducted by a

[13] Please, note that for the purposes of this Best Practice Note, the terms "arbitrator" and "arbitral tribunal" have the meaning specified at para 3 below.

[14] Please, note that the authors are not aware of any instances in which the European Commission has in fact acted as *amicus curiae* (as defined at para 5 of this Best Practice Note) in arbitral proceedings to date.

[15] Lat. for "friend of the court". In the context of international arbitration proceedings, for reasons of semantic consistency, it might be more appropriate to speak of the Commission's role as "*amicus arbitri*" (Lat. for "friend of the arbitral tribunal"). For further detail on the definitional scope of the *amicus curiae* concept for the purposes of this Best Practice Note, see para 5 below.

Carl Nisser, *ICC Draft Best Practice Note on the European Commission Acting as Amicus Curiae in International Arbitration Proceedings – The Text*, European Business Law Review Volume 19, Issue 1 (2008) pp. 198 – 218

European Commission as *amicus curiae* in international arbitration procedure

- Eiser v Spain: ICSID Award annulled on two grounds due to undisclosed ties between claimants' appointed arbitrator and claimants' quantum experts
- In its recent decision in the case of *Eiser Infrastructure Limited and Energia Solar Luxemburg S.à r.l. v Kingdom of Spain* (ICSID Case No ARB/13/36), an International Centre for Settlement of Investment Disputes ad hoc committee annulled the underlying award in its entirety, considering that the claimants' appointed arbitrator had a conflict of interest. For the first time in the history of ICSID, a decision is annulled on the grounds of: (1) improper constitution of the tribunal; and (2) serious departure from a fundamental rule of procedure.
- *EiserInfrastructure Limited and Energía Solar Luxembourg S.à r.l v Spain*, ICSID Case No ARB/13/36

Joseph (Yusuf) Saei (2017) Amicus curious: structure and play in investment arbitration, Transnational Legal Theory, 8:3, pp. 273

"NDTPs [non-disputing third-party / amicus] have avowed a new kind of specific interest in cases where they play a direct role in the implementation and interpretation of legal rules that are implicated in the dispute. In *Electrabel v Hungary*, investors claimed that Hungary had illegally terminated a power purchase agreement concluded with the investors, with the excuse that the termination was required by EU regulations forbidding state aid. In that case, the

tribunal recognized the EC's direct interest in protecting the European Court of Justice's (ECJ) 'monopoly over the interpretation of EU law'. (…)On this basis, it seems a number of treaty bodies and supranational organizations that have never inserted themselves into arbitral disputes may begin to do so."

Electrabel v Hungary, ICSID Case No. ARB/07/19 (Electrabel), 'Decision on Jurisdiction, Applicable Law and Liability' (30 November 2012) ('Electrabel Decision') [4.146].

Joseph (Yusuf) Saei (2017) Amicus curious: structure and play in investment arbitration, Transnational Legal Theory, 8:3, pp. 274-5

NDTPs concretize abstract legal conflicts by attempting to make outside norms, like human rights, applicable to an arbitration. Tribunals will sometimes reply that the outside norm does not, in fact, apply and so there can be no conflict. Numerous examples of this back and forth are to be found in cases where the European Commission (Commission) is an NDTP.

In Micula v Romania, for example, where investors claimed that Romania illegally damaged their interests by revoking investment incentives in order to comply with EU law and accede to the EU, the Commission acted as an NDTP and made submissions on the applicable law. It argued that the tribunal must take into account EU state aid rules and ECJ case law. The Commission insisted that Article 30(3) of the Vienna Convention on the Law of Treaties directed the tribunal to apply EU state aid law rather than provisions of the BIT that would prove incompatible with the Energy Charter treaty (ECT). The Tribunal rejected this analysis, concluding that 'there [was] no real conflict of treaties' because EU law was 'not directly applicable to Romania at the time of the dispute, since it was in [the EU accession] negotiating phase' at that time. The Tribunal did accept, however, the idea that EU law plays some role in the interpretation of the BIT, but only vaguely. According to the tribunal, EU law was less law than '**factual background**' to the BIT.

• Review of recent competition cases decided by arbitrators

• Laura Bergamini, Analysis of recent competition cases decided by arbitrators, in Mel Marquis, Roberto Cisotta (eds), *Litigation and Arbitration in EU Competition Law,* Edward Elgar, 2015, p. 267

- Reti Televisive Italiane v Sky Italia, *and*
- Electrabel S.A. v Hungary

Alexis Mourre, Courts in France and Belgium confirm limited review of awards under European competition law

• The SNF v. Cytec dispute (on which, A. Mourre and L. Radicati di Brozolo, **Revue de l'arbitrage, 2007, 304** and A. Mourre, Revue de l'arbitrage, 2009, 594) arises from the termination by SNF of a long term supply agreement of a raw material called AMD, based on its alleged anti-competitive effects. The contract provided for ICC arbitration in Brussels. Cytec started an arbitration with the aim of challenging the contract's termination and seeking damages, and SNF alleged before the arbitrators that the contract not only violated Article 81 EC [now article 101 of the TFEU] but was also an abuse of its dominant market position. Two awards were rendered in Brussels in 2002 and 2004 under the aegis of the ICC rules. The arbitrators decided in a partial award that one of the contracts indeed violated Article 81 of the EC Treaty since it had the effect of foreclosing SNF from the AMD market. The tribunal also decided that both parties were responsible for the nullity of the contract and that liability should thus be equally shared between them. In the final award, the tribunal nevertheless held that SNF had not established its losses and thus awarded damages only to Cytec, in an amount that roughly matched those that such company had initially sought for the termination of the contract.

• *Micula Case*

• Romania - Sweden BIT (2002) - https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2830/romania---sweden-bit-2002-

• International Centre for Settlement of Investment Disputes IOAN MICULA, VIOREL MICULA, S.C. EUROPEAN FOOD S.A., S.C. STARMILL S.R.L. AND S.C. MULTIPACK
S.R.L. CLAIMANTS v. ROMANIA RESPONDENT ICSID Case No. ARB/05/20 - https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf

• Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013 (notified under document C(2015) 2112) (Only the Romanian text is authentic) (Text with EEA relevance), *OJ L 232, 4.9.2015, p. 43–70* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1470

• *T-624/15, T-694/15 and T-704/15, European Food and others / Commission, Judgment of 18 June 2019, ECLI:EU:T:2019:423 -*

Commission Decision (EU) 2015/1470: *The State aid law applicable in Romania before its accession to the Union*

(12) On 1 February 1995, the Europe Agreement ('EA') between the European Community (the 'Community') and its Member States, on the one hand, and Romania, on the other hand, entered into force (12). The aim of the EA was to prepare Romania for accession to the Union. Article 64(1)(iii) of the EA declared incompatible with the proper functioning of the EA any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production

of certain goods in so far as they may affect trade between the Union and Romania. According to Article 64(2) EA, any practices contrary to this Article had to be assessed 'on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community' (now Articles 101, 102 and 107 of the Treaty). This dynamic reference to 'criteria arising from the application of the rules' refers to all Union rules on State aid, including those governing the grant of regional State aid (13). In addition to the substantive obligation to comply with Union State aid law, Articles 69 and 71 of the EA obliged Romania to harmonise its domestic legislation with the *acquis communautaire*, expressly mentioning Union competition law and thus Union State aid law which forms part thereof. Accordingly, the EA obliged Romania, and Romania committed, to comply with the entire corpus of Union State aid law. Furthermore, the EA has been part of the domestic legal order after been ratified by law 20/1993 by the national Parliament and published in the national Official Journal on 12 April 1993 (14).

Joseph (Yusuf) Saei (2017) Amicus curious: structure and play in investment arbitration, Transnational Legal Theory, 8:3, pp. 263

~Thus, an NDTP [non-disputing third-party / amicus] player that trespasses against investment law conventions by making uncanny moral arguments— for example, about the fairness or anti-democratic nature of ISDS itself—is engaged in a rather remarkable subversion. Arbitration discourse was not previously concerned with social welfare preferences, economic- consequentialist ordering or moral outcomes. With their arguments, indeed with their mere presence, NDTPs push arbitral law in these new directions. As 'strangers' to the play, NDTPs are, depending on your perspective, either exciting normative innovators or unwelcome outsiders that reveal the relativity and fragility of the arbitration world itself and threaten to shatter it."

Indeed, the European Commission after the Micula I award, Micula v Romania, ICSID Case No. ARB/05/20 (Micula), Award (11 December 2013), issued a letter to Romania

obliging it to suspend any action that would lead to the enforcement of an ICSID award against it (effectively obliging Romania not to fulfil its duty to pay awards under the ICSID Convention). See EC letter of 26 May 2014 (informing Romania of the Commission's decision to issue an injunction).

Commission Decision (EU) 2015/1470: European Commission as *amicus curiae*

(24) In the course of the arbitration proceedings, the Commission intervened as *amicus curiae*. In its intervention, submitted on 20 July 2009, the Commission explained that the EGO 24 incentives were: 'incompatible with the Community rules on regional aid. In particular, the incentives did not respect the requirements of Community law as regards eligible costs and aid intensities. Moreover, the facilities constituted operating aid, which is proscribed under regional aid rules'.

(25) The Commission also observed that '[a]ny ruling reinstating the privileges abolished by Romania, or compensating the claimants for the loss of these privileges, would lead to the granting of new aid which would not be compatible with the EC Treaty'. It also advised the Tribunal that the 'execution of [any award requiring Romania to re-establish investment schemes which have been found incompatible with the internal market during accession negotiations] can thus not take place if it would contradict the rules of EU State aid policy'.

T-624/15, T-694/15 and T-704/15, European Food and others / Commission, Judgment of 18 June 2019, ECLI:EU:T:2019:423

99 The Commission also noted, in recital 99 of the contested decision, that, 'in justifying its decision to award compensation for increased prices and the loss of the ability to stockpile, as well as lost profits, the [arbitral tribunal had] referred only to damages incurred by the [arbitration applicants] as a result of the revocation of the [EGO] incentives'.

100 In that regard, Article 107(1) TFEU provides that 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

101 According to settled case-law, for a measure to be classified as 'aid' for the purposes of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. Thus, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient and, fourth, it must distort or threaten to distort competition (see judgment of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraphs 23 and 24 and the case-law cited).

102 State aid, as defined in the FEU Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the European Union judicature must, in principle and having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see judgment of 21 June 2012, *BNP Paribas and BNL* v *Commission*, C-452/10 P, EU:C:2012:366, paragraph 100 and the case-law cited)

T-624/15, T-694/15 and T-704/15, European Food and others / Commission, Judgment of 18 June 2019, ECLI:EU:T:2019:423

103 In addition, compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid (see, to that effect, judgment of 27 September 1988, *Asteris and Others*, 106/87 to 120/87, EU:C:1988:457, paragraphs 23 and 24), as recalled by the Commission in recital 104 of the contested decision. That recital 104 confirms that the Commission

considers the arbitral award to be incompatible aid because it compensates for the withdrawal of a measure which it considers to be aid which is incompatible with EU law.

104 However, it follows from the analysis of the first part of the first plea put forward in Case T-704/15 and the first part of the second plea put forward in Cases T-624/15 and T-694/15 that EU law is not applicable to the compensation for the withdrawal of EGO, at least in respect of the period predating accession, because the arbitral award, which found that a right to compensation arose in 2005, did not have the effect of triggering the applicability of EU law and the Commission's competence to that earlier period.

105 Therefore, the compensation for the withdrawal of the EGO scheme, at least in respect of the amounts relating to the period from 22 February 2005 to 1 January 2007, cannot be regarded as compensation for the withdrawal of aid which is unlawful or incompatible with EU law.

106 In so far as EU law is not applicable to the compensation for the withdrawal of EGO, at least in respect of the period predating accession, the applicants may, at least for that period, rely on the judgment of 27 September 1988, *Asteris and Others* (106/87 to 120/87, EU:C:1988:457).

107 However, it follows from the analysis of the first part of the first plea put forward in Case T-704/15 and the first part of the second plea put forward in Cases T-624/15 and T-694/15 that the Commission is not competent and that EU law is not applicable to the EGO scheme, to its revocation or to the compensation for that revocation, because the arbitral award, which found that there was a right to compensation in 2013, did not have the effect of triggering the applicability of EU law and the Commission's competence to the earlier EGO tax incentives and, accordingly, to the compensation at issue which resulted therefrom.

108 Therefore, as the compensation at issue covered, at least in part, a period predating accession (from 22 February 2005 to 1 January 2007) and as the Commission did not draw a distinction, among the amounts to be recovered, between those falling within the period predating accession and those falling within the period subsequent to accession, the decision by which it classified the entirety of the compensation as aid is necessarily unlawful.

T-624/15, T-694/15 and T-704/15, European Food and others / Commission, Judgment of 18 June 2019, ECLI:EU:T:2019:423

109 "It follows that the contested decision is unlawful in so far as it classified as an advantage and aid within the meaning of Article 107 TFEU the award, by the arbitral tribunal, of compensation intended to compensate for the damage resulting from the withdrawal of the tax incentives, at least in respect of the period predating the entry into force of EU law in Romania."

Appeal:

C-638/19 P - Commission v European Food and Others, pending case, http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-638/19%20P&jur=C

Opinion of Advocate General Wathelet delivered on 19 September 2017 in Achemea, C-284/16

"45. The arbitral tribunals have to a large extent allowed the Commission to intervene in arbitrations and to my knowledge in none of those 10 cases was the arbitral tribunal required to review the validity of acts of the Union or the compatibility of acts of the Member States with EU law. In their written observations, several Member States and the Commission have mentioned only a single example, namely the arbitration *Ioan Micula and Others v Romania* (ICSID Case No ARB/05/20), which resulted in an arbitral award that was allegedly incompatible with EU law. Even though that example is in my view not relevant in the present case,* the fact that there is only a single example reinforces my opinion that the fear expressed by certain Member States and the Commission of a systemic risk created by intra-EU BITs is greatly exaggerated."

49 This was not a dispute arising under an intra-EU BIT, since Romania had not yet acceded to the European Union in 2005, when the arbitration commenced and when the dispute crystallised.

Consequently, EU law was not applicable to the facts referred to in that arbitral procedure.

Appeal brought on 27 August 2019 by European Commission against the judgment of the General Court (Second Chamber, Extended Composition) delivered on 18 June 2019 in Case T-624/15: European Food e.a. v Commission

(Case C-638/19 P)

Language of the case: English

Parties

Appellant: European Commission (represented by: T. Maxian Rusche, Agent, P.-J. Loewenthal, Agent)

Other parties to the proceedings: European Food SA, Starmill SRL, Multipack SRL,Scandic Distilleries SA, Ioan Micula, Viorel Micula, European Drinks SA, Rieni Drinks SA, Transilvania General Import-Export SRL, West Leasing International SRL, Kingdom of Spain and Hungary

Form of order sought

The appellant claim that the Court should:

set aside the judgment of the General Court (Second Chamber, Extended Composition) of 18 June 2019 in joined cases T-624/15, T-694/15 and T-704/15, European Food and Others v. Commission[1] ;

reject the first part of the first plea and the first part of the second plea put forward in case T-704/15;

reject the first and second part of the second plea put forward in cases T-624/15 and T-694/15;

refer joined cases T-624/15, T-694/15 and T-704/15 back to the General Court for reconsideration of the pleas not already assessed; and

reserve the costs of the proceedings at first instance and on appeal.

C-638/19 P - Commission v European Food and Others, pending case **Pleas in law and main arguments**

- **Pleas in law and main arguments**
- By a first ground of appeal, the Commission submits that the General Court committed an error in law consisting of the misinterpretation and misapplication of Article 108 TFEU and/or Annex V, chapter 2, of Romania's Act of Accession2 , and an erroneous legal qualification of the facts, by concluding that the Commission was not competent to adopt the contested decision3 .
- By a primary argument, the Commission submits that the General Court was wrong to conclude that the measure through which Romania granted aid to Ion and Viorel Micula, investors with Swedish nationality, and three Romanian companies they control (hereinafter collectively referred to as "The Miculas") is the repeal of the incentive scheme on 22 February 2005. Rather, it is through the payment by Romania of the compensation awarded for the repeal of that scheme, which occurs after its accession to the Union that aid is granted to the Miculas.
- By a subsidiary argument, the Commission submits that, even if the General Court was right to conclude that the aid granting measure was the repeal of the incentive scheme by Romania (*quod non*), the Commission was still competent to adopt the contested decision by virtue of Annex V, chapter 2, of Romania's Act of Accession.
- By a second ground of appeal, the Commission submits that the General Court committed an error in law consisting of the misinterpretation and misapplication of Article 2 of Romania's Act of Accession

and of the rules on the application of EU law *ratione temporis*, and/or a misinterpretation and misapplication of the 1995 Europe Agreement4 , and an erroneous legal qualification of the facts, by concluding that EU law did not apply to the compensation awarded.

- By a primary argument, the Commission submits that the General Court was wrong to conclude that EU law was not applicable to the compensation awarded on the basis that all the events giving rise to that compensation occurred prior to accession. Rather, the award of compensation constitutes the future effects of a situation arising prior to accession within the meaning of the rules on the application of EU law *ratione temporis*.

- By a subsidiary argument, the Commission submits that even if the General Court was right to conclude that the award of compensation did not constitute the future effects of a situation arising prior to accession (*quod non*), EU law still applied to the compensation awarded because the 1995 Europe Agreement, which forms part of EU law, was applicable to all the events giving rise to that compensation that occurred pre-accession.

- By a third ground of appeal, the Commission submits that the General Court committed an error in law consisting of the misinterpretation of Article 107(1) TFEU and a failure to apply Article 64(1)(iii) of the 1995 Europe Agreement, by concluding that the contested decision erroneously classified the award of compensation by the arbitral tribunal as an advantage.

- First, the General Court was wrong to conclude that the Commission lacked the competence to adopt the contested decision and that EU law was inapplicable to the compensation awarded.

- Second, the General Court failed to address all arguments presented in the contested decision establishing that Romania conferred an advantage on the Miculas. The arguments not addressed suffice on their own to justify the presence of an advantage.

Bermann - International Arbitration and EU Law_ What Next_ - New York Arbitration Week 2020

- *Micula*
- *27.40'*

Ioan Lazăr, Laura Lazăr, Aspecte legate de arbitrajul comercial internaţional în materie de concurenţă în Uniunea Europeană [Aspects related to the international commercial arbitrage in the competitive matters of the European Union], RRDP, no, 6/2011

"The arbitrability of the competition matters represented for a long time the subject of some doctrine controversies, the authors having different opinions regarding this subject. Thus, according to the majority's opinion, the confidentiality of the arbitral procedures was deemed inadequate for the judgment of the issues related to competition law, having in mind that the aspects of the economic policy related to competition pertain to public policy. Moreover, the specialists declared their scepticism with regard to the arbitrators' capacity to solve the competition aspects of the affairs, due to their complexity. The situation changed in the meantime, the experience of the latest years showing the fact that the competition arbitrage became reality and even more, it became a fundamental feature of the international commercial arbitrage. The arbitrability of the competition-related aspects was not contested anymore, the arbitral courts all over the world solving this type of issues more frequently and with professionalism. The recent evolutions may be deemed important, especially in the context of the modernisation process of application of the competition law, which targeted also the increasing importance of its private application.

The authors propose the analysis of the arbitrability of the competitive side of the affairs undergoing resolution before the arbitral courts, the frequency of the use of the arbitrage in relation to the resolution of the aspects related to the competition law, as well as the arbitrators' role in the context of the application of the competition norms in the European Union. The authors believe that, in the current context, the arbitrage may become an important option in the application of the competition law in the European Union."

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VII. EU law and Investment Arbitration

Agenda

- *Legal basis*
  - Soft law, i.e., Protection of intra-EU investment (COM/2018/547 final)
  - *EU law and intra-EU BIT*
  - *Termination Agreement (2020)*
  - Investment Protection in the EU-UK Trade and Cooperation Agreement
- EU Investment Screening Regulation
- *EU law and multilateral investment court*
  - Effects of EU law on ICSID provisional measures
- CETA - Opinion 1/17 of ECJ regarding the compatibility of the arbitration resolution mechanism in CETA with EU law
- Energy Charter Treaty
  - Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty
- Case law
  - Achmea case
- Working Group III: Investor-State Dispute Settlement Reform
- European Commission Public consultation: Cross-border investment within the EU – clarifying and supplementing EU rules (2020)
- *Conclusion*

Legal basis

- TFEU, art. 206, **207**
- Achemea **(ECJ)**
- COMMUNICATION FROM THE **COMMISSION** TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Protection of intra-EU investment, Brussels, 19.7.2018 COM(2018) 547 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8
- **Member States**
- Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, O*J L 169, 29.5.2020, p. 1–41*

Importance of art. 207 TFEU

Article 3 TEU
1. The Union shall have **exclusive competence** in the following areas: (…)
(e) common commercial policy
Article 207 TFEU (ex Article 133 TEC)

1. **The common commercial policy** shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, **foreign direct investment**, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

Protection of intra-EU investment (COM (2018))

- “In the last decades, governments have encouraged cross-border investments by concluding bilateral investment treaties (BITs). These BITs typically include the right to national treatment and most favourable nation treatment, to a fair and equitable treatment, to the protection against expropriation and to the free transfer of funds. Investors can claim violations of those provisions before investor-State arbitration tribunals. Similar provisions are to be found in the Energy Charter Treaty, a plurilateral investment treaty initiated by the EU to stimulate investments in the energy sector. The EU has embarked on substantial reform of these agreements in the EU external context.”
- “Some countries with which EU Member States had previously concluded BITs have since joined the EU. As a result of accession, the substantive rules of BITs, as applied between Member States ("intra-EU BITs"), became a parallel treaty system overlapping with single market rules, thereby preventing the full application of EU law. This is the case, for example, when intra-EU BITs are interpreted in such a way that they constitute the basis for the award of unlawful state aid in violation of the level playing field in the single market.”

Protection of intra-EU investment (COM (2018))

- “For these reasons, the European Commission has consistently taken the view that intra-EU BITs are incompatible with Union law. Through its reasoned opinions of 23 September 2016, the Commission sent a formal request to Austria, the Netherlands, Romania, Slovakia and Sweden to terminate their intra-EU BITs. In the recent preliminary ruling concerning the Achmea case, the Court of Justice confirmed that investor-State arbitration clauses in intra-EU BITs are unlawful.”

- free movement

Protection of intra-EU investment (COM (2018))

"Treaty rules on free movement apply to situations with a cross-border element or when cross-border movement is at least possible. However, some EU directives and regulations which specify and further develop the fundamental freedoms may apply also to purely internal situations, thus benefiting all investors including national ones."

- C-67/08 Block ECLI:EU:C:2009:92, para. 21; C-98/15 Berlington Hungary, ECLI:EU:C:2015:386, para. 28; Joined Cases C-197/11 and C-203/11 Libert ECLI:EU:C:2013:288, para. 34; Joined Cases C-570/07 and C571/07 Blanco Pérez and Chao Gómez ECLI:EU:C:2010:300, para. 40; Joined Cases C-51/96 and C-191/97 Deliège, ECLI:EU:C:2000:199, para. 58.

Protection of intra-EU investment (COM (2018))

"In the aftermath of the Achmea judgment, the unlawfulness of intra-EU investor- State arbitration may result in the perception that EU law does not provide for adequate substantive and procedural safeguards for intra-EU investors. However, the EU legal system protects cross-border investors in the single market, while ensuring that other legitimate interests are duly taken into account.

When investors exercise one of the fundamental freedoms, they benefit from the protection granted by:

i) the Treaty rules establishing those freedoms;
ii) the Charter of Fundamental Rights of the European Union ("Charter");
iii) the general principles of Union law; and
iv) extensive sector-specific legislation covering areas such as financial services, transport, energy, telecommunications, public procurement, professional qualifications, intellectual property or company law."

Protection of intra-EU investment (COM (2018)). Conclusion

"EU law does not solve all problems investors may face in their activities. However, in the single market, EU investors' rights are protected by EU law, which allows for the pursuit and development of economic activities in all Member States. Investors can enforce their rights before national administrations and courts, according to national procedural rules which are to ensure that these rights are effectively protected.

EU investors cannot invoke intra-EU BITs, which are incompatible with Union law and no longer necessary in the single market. They cannot have recourse to arbitration tribunals established by such intra-EU BITs or, for intra-EU litigation, to arbitration tribunals established under the Energy Charter Treaty. However, the EU legal system offers adequate and effective protection for cross-border investors in the single market, while ensuring that other legitimate interests are duly and lawfully taken into account. When investors exercise one of the fundamental freedoms such as the freedom of establishment or the free movement of capital, they act within the scope of application of Union law and therefore enjoy the protection granted by that law."

EU law and intra-EU BIT; Termination Agreement (2020)

- Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, O*J L 169, 29.5.2020, p. 1–41 - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX: 22020A0529(01)*

European Commission press release

18 June 2015 Brussels Commission asks Member States to terminate their intra-EU bilateral investment treaties - https://ec.europa.eu/ commission/ presscorner/detail/ en/IP_15_5198

On 24 October 2019 EU Member States reached agreement on a plurilateral treaty for the termination of intra-EU bilateral investment treaties (BITs). The agreement follows the declarations of 15 and 16 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, where member states committed to terminate their intra-EU BITs.

On 5 May 2020, 23 Member States signed the agreement for the termination of intra-EU bilateral investment treaties ("termination agreement").

The termination agreement implements the March 2018 European Court of Justice judgment (Achmea case), where the Court found that investor-State arbitration clauses in intra-EU bilateral investment treaties ("intra-EU BITs") are incompatible with the EU Treaties.

Signatories of the termination agreement are Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

This agreement enters into force on 29 August 2020. To check the status of Contracting Parties' ratification, acceptance of approval of the agreement, please consult the Treaties and Agreements database.

https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en

Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union

HAVING in mind the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) and general principles of Union law,

HAVING in mind the rules of customary international law as codified in the Vienna Convention on the Law of Treaties (VCLT),

RECALLING that the Court of Justice of the European Union (CJEU) held in Case C-478/07 *Budějovický Budvar* that provisions laid down in an international agreement concluded between two Member States cannot apply in the relations between those two States if they are found to be contrary to the EU Treaties,

CONSIDERING that, in compliance with the obligation of Member States to bring their legal orders in conformity with Union law, they must draw the necessary consequences from Union law as interpreted in the judgment of the CJEU in Case C- 284/16 *Achmea* (*Achmea* judgment),

CONSIDERING that investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union,

SHARING the common understanding expressed in this Agreement between the parties to the EU Treaties and intra-EU bilateral investment treaties that, as a result, such a clause cannot serve as legal basis for Arbitration Proceedings,

UNDERSTANDING that this Agreement should cover all investor-State arbitration proceedings based on intra-EU bilateral investment treaties under any arbitration convention or set of rules, including the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the ICSID arbitration rules, the Permanent Court of Arbitration (PCA) arbitration rules, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) arbitration rules, the International Chamber of Commerce (ICC) arbitration rules, the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules and *ad hoc* arbitration,

Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union

• CONSIDERING that when investors from Member States exercise one of the fundamental freedoms, such as the freedom of establishment or the free movement of capital, they act within the scope of application of Union law and therefore enjoy the protection granted by those freedoms and, as the case may be, by the relevant secondary legislation, by the Charter of Fundamental Rights of the European Union, and by the general principles of Union law, which include in particular the principles of non-discrimination, proportionality, legal certainty and the protection of legitimate expectations (Judgment of the CJEU in Case C-390/12 *Pfleger*, paragraphs 30 to 37). Where a Member State enacts a measure that derogates from one of the fundamental freedoms guaranteed by Union law, that measure falls within the scope of Union law and the fundamental rights guaranteed by the Charter also apply (Judgment of the CJEU in Case C-685/15 *Online Games Handels*, paragraphs 55 and 56),

• RECALLING that Member States are obliged under the second subparagraph of Article 19(1) TEU to provide remedies sufficient to ensure effective legal protection of investors' rights under Union law. In particular, every Member State must ensure that its courts or tribunals, within the meaning of Union law, meet the requirements of effective judicial protection (Judgment of the CJEU in Case C-64/16 *Associação Sindical dos Juízes Portugueses*, paragraphs 31 to 37),

• RECALLING that disputes between the Contracting Parties concerning the interpretation or application of this Agreement pursuant to Article 273 TFEU shall not concern the legality of the measure that is the subject of investor-State arbitration proceedings based on a Bilateral Investment Treaty covered by this Agreement,

Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union

Article 4

Common provisions

1. The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.
2. The termination in accordance with Article 2 of Bilateral Investment Treaties listed in Annex A and the termination in accordance with Article 3 of Sunset Clauses of Bilateral Investment Treaties listed in Annex B shall take effect, for each such Treaty, as soon as this Agreement enters into force for the relevant Contracting Parties, in accordance with Article 16.

Investment Protection in the EU-UK Trade and Cooperation Agreement

- **Substantive standards of protection under the TCA**
- The standards of protection under the TCA are similar to those under the WTO, but differ from the protection available under the **CETA**. These substantive standards of protection include:
- **market access**, which is limited to the prohibition of a number of enumerated limitations such as those concerning the number of enterprises that may carry out a specific economic activity, the participation of foreign capital or the types of legal entity through which an investor may perform an economic activity (Articles SERVIN.2.2/3.2);

- **national treatment** (Articles SERVIN.2.3/3.4);
- **most favoured nation treatment** ("**MFN**") with respect to investors of a third country and their enterprises (Articles SERVIN.2.4/3.5). Under the MFN provision, investors will not be able to import ISDS procedures provided for in other international agreements (Article SERVIN.2.4(4)). This means that investors will not be able to invoke the TCA before an independent arbitration tribunal (see also Article SERVIN.2.4(5) regarding additional limitations to the MFN clause); and
- **provisions preventing** the introduction of: **nationality restrictions** for senior personnel (Article SERVIN.2.5); **enumerated performance requirements** based on trade, such as to export a given level or percentage of goods or services or to purchase, use or accord a preference to goods produced or services provided in its territory (Article SERVIN.2.6); **requirements that a service supplier has a local presence** as a condition for the cross-border supply of a service (Article SERVIN.3.3).

  - Kirstin Schwedt, Gerard Meijer, Bo Ra Hoebeke, Guillaume Croisant, Investment Protection in the EU-UK Trade and Cooperation Agreement, Kluwer Arbitration Blog, 09.01.2021, http://arbitrationblog.kluwerarbitration.com/2021/01/09/investment-protection-in-the-eu-uk-trade-and-cooperation-agreement/

EU Investment Screening Regulation

- The EU Investment Screening Regulation Enters Into Effect [11 OCT. 2020]. Today marks the first day of full application of the EU Investment Screening Regulation [Regulation (EU) 2019/452]. For the first time, the European Union has adopted a common framework for review of foreign direct investments on grounds of security or public order.
- Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, *OJ L 79I , 21.3.2019, p. 1 –14*
- CETA - Opinion 1/17 of ECJ regarding the compatibility of the arbitration resolution mechanism in CETA with EU law

  http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548

Legal basis for the Opinion, art. 218 (11)

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Comprehensive Economic and Trade Agreement between the EU and Canada ("CETA") - compatibility with EU law

In September 2017, Belgium **requested** the opinion of the Court of Justice of the European Union ("CJEU") on the compatibility with EU law of the Investment Court System ("ICS") provided for by the Comprehensive Economic and Trade Agreement between the EU and Canada ("CETA").

Last January, Advocate General Bot **concluded** that this mechanism for the settlement of investor-State disputes was compatible with the EU Treaties and the EU Charter of Fundamental Rights. The CJEU followed suit in its much anticipated opinion **delivered today**.

An adverse opinion would have had serious political consequences, as it would have required the amendment of CETA (pursuant to Article 218(11) of the TFEU), and potentially brought grist to the mill of part of the European civil society opposing investor-State arbitration.

As further developed in a previous **post** reporting on AG Bot's opinion, most of the recent free trade agreements ("FTAs") concluded by the EU (including with Canada (CETA), Singapore (the EUSFTA) and Vietnam (the EUVFTA)) provide for a so-called Investment Court System ("ICS"), whereby investor disputes may be submitted to a permanent and institutionalised court, whose members (subject to strict independence and impartiality requirements) are appointed in advance by the States parties to the treaty and whose decisions are subject to an appellate body. The EU ultimately aims to replace the bilateral investment courts of

each FTA by a single multilateral investment court ("MIC"). International negotiations are currently ongoing at **UNCITRAL Working Group III**, where the reform of the Investor-State Dispute Settlement system is under discussion.

This break from the traditional *ad hoc* arbitration system has not overcome the general public's mistrust for investment arbitration. The ICS provided for by CETA, in particular, gave rise to heated debates among Belgium's federated entities. As a result, on 7 September 2017, Belgium **requested** the CJEU to render an opinion on the compatibility of the CETA's ICS with EU law – in particular with (i) the exclusive competence of the CJEU to provide the definitive interpretation of EU law, (ii) the general principle of equality,

(iii) the requirement that EU law is effective, and (iv) the right to an independent and impartial judiciary.

Guillaume Croisant, Opinion 1/17 – The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law, Kluwer Arbitration Blog, 30.04.2019, http://arbitrationblog.kluwerarbitration.com/2019/04/30/opinion-117-the-cjeu-confirms-that-cetas-investment-court-system-is-compatible-with-eu-law/

IODE LawTTIP Seminar Series "Opinion of the ECJ on CETA", Ramses Wessel, 8.30' (youtube)

V. Position of the Court

A. The compatibility of the envisaged ISDS mechanism with the autonomy of the EU legal order

1. Principles
2. No jurisdiction to interpret and apply rules of EU law other than the provisions of the CETA
3. No effect on the operation of the EU institutions in accordance with the EU constitutional framework

B. The compatibility of the envisaged ISDS mechanism with the general principle of equal treatment and with the requirement of effectiveness

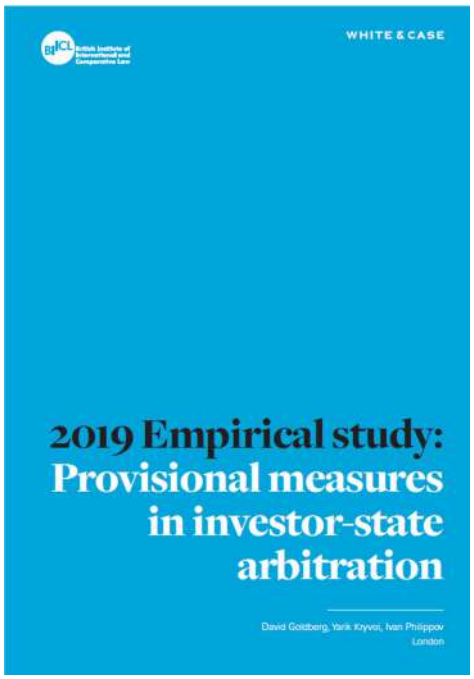
1. Principles
2. Compatibility with the principle of equal treatment
3. Compatibility with the requirement of effectiveness

C. The compatibility of the envisaged ISDS mechanism with the right of access to an independent tribunal

1. Principles
2. Compatibility with the requirement of accessibility
3. Compatibility with the requirement of independence

Effects of EU law on ICSID provisional measures

While there is not much publicly available information about enforcement of the ICSID decisions on provisional measures in state courts, in *Hydro v. Albania*, the English court decided that "the Tribunal's Order was binding on the extradition court and the extradition proceedings should be suspended". In another case, *Nova Group v. Romania*,* the tribunal, on the contrary, decided that the ICSID tribunal's provisional measures order against Romania could not oust an extradition process that had its origins in EU law.



- **Adamescu v Bucharest Appeal Court Criminal Division, Romania* [2019] EWHC 525 (Admin) (06 March 2019), paragraphs 30-31
- The same judgment in 2020: *Adamescu v Bucharest Appeal Court Criminal Division, Romania,* [2020] EWHC 2709 (Admin) Case No: CO/1569/2018
- https://uk.practicallaw.thomsonreuters.com/w-010-9493?transitionType=Default&contextData=(sc.Default)&firstPage=true
- **Also, see: Paul-Jean Le Cannu**, *Corruption: An Overview of Select Issues in ICSID Arbitration*, 2019, youtube

Next one? The Energy Charter Treaty

The Treaty's provisions focus on four broad areas:

the protection of foreign investments, based on the extension of national treatment, or most-favoured nation treatment (whichever is more favourable) and protection against key non-commercial risks;

non-discriminatory conditions for trade in energy materials, products and energy-related equipment based on WTO rules, and provisions to ensure reliable cross-border energy transit flows through pipelines, grids and other means of transportation;

the resolution of disputes between participating states, and - in the case of investments - between investors and host states;

the promotion of energy efficiency, and attempts to minimise the environmental impact of energy production and use.

https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/

Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty

Belgium submits a request to the Court of Justice of the European Union for an opinion on the compatibility of the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty with the European Treaties.

By submitting this question, Belgium is seeking legal clarification from the Court on the compatibility under Union law of the dispute settlement mechanism provided for in the draft modernised Energy Charter Treaty, in view of the fact that this mechanism could be interpreted as allowing its application intra-European Union, i.e. between an investor who is a national of EU Member States only and an EU Member State.

Belgium does not wish to defend a pre-established opinion on the matter but considers that, in view of the uncertainties and divergences which

have arisen between Member States on whether or not the lessons of the Court's *Achmea* judgment apply to the Treaty in question, a clear legal response is necessary to prevent any complications which might arise from possible subsequent legal challenges.

Since the purpose of this request for an opinion is to provide clarity and legal certainty, Belgium is putting the question to the Court in a neutral manner. The submission of this request follows a decision by the intra-Belgian coordination body for European matters, the DGE, which brings together representatives of the federal government and the governments of the federated entities.

[1] *The Achmea judgment of the Court of 6 March 2018 in Case C-284/16 states that the arbitration clause included in the agreement concluded between the Netherlands and Slovakia on the protection of investments infringes the autonomy of Union law and is therefore incompatible with it.* SOURCE

Nord Stream 2 AG v. The European Union

- On 26 September 2019, Nord Stream 2 AG commenced arbitration proceedings against the European Union pursuant to Article 3 of the UNCITRAL Rules and Article 26(4)(b) of the Energy Charter Treaty in relation to an investment in the oil and gas sector.
- https://pca-cpa.org/en/cases/239/
- https://www.euractiv.com/section/energy/news/nord-stream-2- seeks-arbitration-in-dispute-with-eu-commission/
- Achmea case
- Opinion of Advocate General Wathelet delivered on 19 September 2017 in Achemea, C-284/16
- *C-284/16, Achmea, Judgment of 6 March 2018, Publié au Recueil numérique, ECLI:EU:C:2018:158*

Opinion of Advocate General Wathelet delivered on 19 September 2017 in case Achemea, C-284/16

"43. Furthermore, all the Member States and the Union have ratified the Energy Charter Treaty, signed at Lisbon on 19 December 1994*. That multilateral treaty on investment in the field of energy operates even between Member States, since it was concluded not as an agreement between the Union and its Member States, of the one part, and third countries, of the other part, but as an ordinary multilateral treaty in which all the Contracting Parties participate on an equal footing. In that sense, the material provisions for the protection of investments provided for in that Treaty and the ISDS mechanism also operate between Member States. I note that if no EU institution and no Member State sought an opinion from the Court on the compatibility of that treaty with the EU and FEU Treaties, that is because none of them had the slightest suspicion that it might be incompatible."

> Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ 1998 L 69, p. 1).

Opinion of Advocate General Wathelet delivered on 19 September 2017 in case Achemea, C-284/16 – the roots of the case

1. The present request for a preliminary ruling was submitted in the context of an action brought before the German courts and seeking annulment of the Final Award of 7 December 2012, made by the Arbitral Tribunal composed of Professor V. Lowe QC (President), Albert Jan van den Berg and V.V. Veeder QC (Arbitrators) and constituted in accordance with the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic ('the Netherlands-Czechoslovakia BIT') and the Arbitration Rules of the United Nations Commission on International

Trade Law (UNCITRAL), the Permanent Court of Arbitration (PCA) acting as Registry.*

2. This request provides the Court with the first opportunity to express its views on the thorny question of the compatibility of BITs concluded between Member States, and in particular of the investor-State dispute settlement ('ISDS') mechanisms established by those BITs, with Articles 18, 267 and 344 TFEU.

3. The question is of fundamental importance in the light of the 196 intra-EU BITs currently in force and the numerous arbitral procedures between investors and Member States in which the European Commission has intervened as *amicus curiae* in order to support its argument that intra-EU BITs are incompatible with the FEU Treaty, an argument which the arbitral tribunals have systematically rejected as unfounded.

- *Achmea B.V. (formerly known as 'Eureko B.V.')* v *The Slovak Republic* (UNCITRAL PCA Case No 2008-13), Final Award of 7 December 2012, available on the website of the Investment Policy Hub of the United Nations Conference on Trade and Development (UNCTAD) http://investmentpolicyhub.unctad.org/ISDS/Details/323.

Opinion of Advocate General Wathelet delivered on 19 September 2017 in case Achemea, C-284/16 – Political options in intra-BIT

34. The Member States which have intervened in the present case are divided into two groups. The first group consists of the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Austria and the Republic of Finland, which are essentially countries of origin of the investors and therefore never or rarely respondents in arbitral proceedings launched by investors: the Kingdom of the Netherlands and the Republic of Finland have never been respondents, the Federal Republic of Germany has been a respondent in three cases and the French Republic and the Republic of Austria have each been a respondent in only a single case.

35. The second group is made up of the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, Hungary, the Republic of Poland, Romania and the Slovak Republic. Those States have all been respondents in a number of arbitral proceedings relating to intra-EU investments, the Czech Republic 26 times, the Republic of Estonia three times, the Hellenic Republic three times, the Kingdom of Spain 33 times, the Italian Republic nine times, the Republic of Cyprus three times, the Republic of Latvia twice, Hungary 11 times, the Republic of Poland 11 times, Romania four times and the Slovak Republic nine times.

36. Faced with such economic reality, it is hardly surprising that the Member States in the second group have intervened in support of the argument put forward by the Slovak Republic, which is itself the respondent to the investment arbitration at issue in the present case.

Opinion of Advocate General Wathelet delivered on 19 September 2017 in case Achemea, C-284/16 – European Commission point of view

40. For a very long time, the argument of the EU institutions, including the Commission, was that, far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe. The Association Agreements between the Union and candidate countries also contained provisions for the conclusion of BITs between Member States and candidate countries.

41. At the hearing, the Commission attempted to explain that change in its position on the incompatibility of BITs with the EU and FEU Treaties, maintaining that the agreements in question were necessary in order to prepare for the accession of the candidate countries. However, if those BITs were justified only during the association period and each party was aware that they would become incompatible with the EU and FEU Treaties as soon as the third State concerned had become a member of the Union, why did the accession treaties not provide for the termination of those agreements, thus leaving them in uncertainty which has lasted

more than 30 years in the case of some Member States and 13 years in the case of many others?

42. In addition, in the European Union, there are no investment treaties solely between market- economy countries and countries which previously had controlled economies or between Member States and candidate countries for accession, as the Commission has suggested.

C-284/16, Achmea, Judgment of 6 March 2018, Publié au Recueil numérique, ECLI:EU:C:2018:158 – european framework

- 31 By its first and second questions, which should be taken together, the referring court essentially asks whether Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.
- 32 In order to answer those questions, it should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 201 and the case-law cited).
- 33 Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU

and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and the case-law cited).

C-284/16, Achmea, Judgment of 6 March 2018, Publié au Recueil numérique, ECLI:EU:C:2018:158 – european framework

- 34 EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited).
- 35 In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the

interpretation of EU law (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174).

- 36 In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law (see, to that effect, Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraph 68; Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 175; and judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 33).
- 37 In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited).

C-284/16, Achmea: "a tribunal such as that referred to in Article 8 of the BIT cannot be regarded as a 'court or tribunal of a Member State'"

- 43 It must therefore be ascertained, secondly, whether an arbitral tribunal such as that referred to in Article 8 of the BIT is situated within the judicial system of the EU, and in particular whether it can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. The consequence of a tribunal set up by Member States being situated within the EU judicial system is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU (see, to that effect, Opinion 1/09 (Agreement

creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraph 82 and the case-law cited).

- 44 In the case in which judgment was given on 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754), the Court derived the status of 'court or tribunal of a Member State' of the tribunal in question from the fact that the tribunal as a whole was part of the system of judicial resolution of tax disputes provided for by the Portuguese constitution itself (see, to that effect, judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754), paragraphs 25 and 26).

- 45 In the case in the main proceedings, the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia. Indeed, it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT.

- 46 That characteristic of the arbitral tribunal at issue in the main proceedings means that it cannot in any event be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU.

- 47 The Court has indeed held that there is no good reason why a court common to a number of Member States, such as the Benelux Court of Justice, should not be able to submit questions to the Court for a preliminary ruling in the same way as the courts or tribunals of any one of the Member States (see, to that effect, judgments of 4 November 1997, *Parfums Christian Dior*, C-337/95, EU:C:1997:517, paragraph 21, and of 14 June 2011, *Miles and Others*, C-196/09, EU:C:2011:388, paragraph 40).

- 48 However, the arbitral tribunal at issue in the main proceedings is not such a court common to a number of Member States, comparable to the Benelux Court of Justice. Whereas the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly, and the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules, the arbitral tribunal at issue in the main proceedings does not have any such links with the judicial systems of the Member States (see, to that effect, judgment of

14 June 2011, *Miles and Others*, C-196/09, EU:C:2011:388, paragraph 41).

- 49 It follows that a tribunal such as that referred to in Article 8 of the BIT cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling.

*C-284/16, Achmea: "***freely expressed wishes of the parties***" vs "***Member States agree to remove from the jurisdiction of their own courts***"*

55 However, arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings. **While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts**, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34), disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT.

56 Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.

*C-284/16, Achmea: "***In those circumstances**, Article 8 of the BIT has an adverse effect on the autonomy of EU law."

57 It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected (see, to that effect, Opinion 1/91 (EEA Agreement — I) of 14 December 1991, EU:C:1991:490, paragraphs 40 and 70; Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraphs 74 and 76; and Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 182 and 183).

58 In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above.

59 In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law.

EU law under ISDS

The first condition that has to be met for autonomy to be violated, is that investment tribunals can decide matters of EU law. The Court makes a hasty finding that this condition is met. It opines that since EU law is part of the law of Member States and the provision of the specific BIT explicitly allows for such domestic law to be considered as applicable law, ISDS is bound to apply and interpret EU law. The very short analysis of the Court raises however 2 important questions. Is EU law applicable law under all intra-EU BITs, or only under those such as the Netherlands- Slovakia BIT that explicitly provide that the law in force at the host state, ie "domestic law" is part of the applicable law? Secondly, is EU law applicable law only in ISDS under intra-EU BITs, or also under extra-EU IIAs, that is under investment agreements between the EU and its Member States with third countries?

To answer these questions, we need to understand when the CJEU considers that a matter of EU law is determined by non-EU courts or tribunals. This is not a new question. The CJEU clearly stated in Opinion 2/13 that "*any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of* ***binding*** *[emphasis added] the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law*" (para. 184). A threat to the autonomy of the EU legal order arises only if ISDS can result in a binding interpretation of EU law. The mere possibility of providing a binding interpretation of EU law suffices for autonomy to be breached.

In that respect, it can be argued that ISDS is always incompatible with the principle of autonomy, whether under intra- EU BITs or extra-EU investment treaties, because it would deprive the CJEU of providing a definitive interpretation of relevant EU law rules. The mere fact that an investment tribunal would assess an EU measure or a national measure falling within the scope of EU law would suffice for the CJEU to consider that investment tribunals can rule on matters of EU law.

> Angelos Dimopoulos, Achmea: The principle of autonomy and its implications for intra and extra-EU BITs, 27.03.2018, https://www.ejiltalk.org/achmea-the-principle-of- autonomy-and-its-implications-for-intra-and-extra-eu-bits/

Working Group III: Investor-State Dispute Settlement Reform

40 th session 8-12 February 2021, Vienna

Letter from the chair of Working Group III to member States of UNCITRAL
Information sheet for delegations (forthcoming)
A/CN.9/WG.III/WP.200 - Annotated provisional agenda (*advance copy*)
A/CN.9/WG.III/WP.201 - Possible reform of investor-State dispute settlement (ISDS)

- Draft code of conduct (*advance copy*)

A/CN.9/WG.III/WP.202 - Possible reform of investor-State dispute settlement (ISDS)

- Appellate mechanism and enforcement issues (*advance copy*)

A/CN.9/WG.III/WP.203 - Possible reform of investor-State dispute settlement (ISDS)

- Selection and appointment of ISDS tribunal members (*advance copy*)

(…)
https://uncitral.un.org/en/working_groups/3/investor-state

European Commission Public consultation: Cross-border investment within the EU – clarifying and supplementing EU rules (2020)

- Cross-border investments within the EU play an important role to make full use of the Single Market, mobilise private funding and provide more financing opportunities for businesses, infrastructures and projects across the European Union, as well as better choice of jobs, diversified products and services. A favourable intra-EU investment environment, where clear rules are implemented in a coherent way, effective remedies are ensured and measures facilitating access to investment opportunities are provided, is critical to encourage people to invest across EU Member States. With the aim of ensuring a high standard intra-EU investment climate, the Commission is assessing the current

system of investment protection and facilitation within the European Union. It is therefore inviting stakeholders, and more generally EU citizens, to express their views on strengths or weaknesses of the intra-EU system, as well as possible ideas and options to improve it.

- Contributions Download
- Documents annexed to contributions Download
- https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation

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VIII. Arbitration and EU Private International Law

Agenda

- *Introduction. Legal basis*
  - Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968, Consolidated version CF 498Y0126(01), *OJ L 299, 31.12.1972, p. 32–42*
  - 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) OJ L 177, 4.7.2008, p. 6–16
  - Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001, p. 1–23 (No longer in force) (*(Brussels I)*)
  - 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, *OJ L 351, 20.12.2012, p. 1–32 (Brussels I Recast)*
- Arbitral autonomy and applicable and overriding law (Jonathan Mance)
- European Union between UNCITRAL and Hague Convention
- Case law
  - *C-190/89, Rich / Società Italiana Impianti, Judgment of 25 July 1991, ECR 1991 p. I-3855, ECLI:EU:C:1991:319*
  - *C-391/95, Van Uden Maritime / Kommanditgesellschaft in Firma Deco-Line and others, 17 November 1998, ECR 1998 p. I-7091, ECLI:EU:C:1998:543*
  - *C-159/02, Turner, Judgment of 27 April 2004, ECR 2004 p. I-3565, ECLI:EU:C:2004:228*
  - *C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [***West Tankers***], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69*
  - *C-536/13, Gazprom, Judgment of 13 May 2015, ECLI:EU:C:2015:316*
  - *C-352/13, CDC Hydrogen Peroxide, Judgment of 21 May 2015, ECLI:EU:C:2015:335*
- *Conclusion*

EU regulation. 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) OJ L 177, 4.7.2008, p. 6–16

- 1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.
- It shall not apply, in particular, to revenue, customs or administrative matters.
- 2. The following shall be excluded from the scope of this Regulation:
- (e) arbitration agreements and agreements on the choice of court;
- https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001, p. 1–23 (No longer in force)

- No longer in force, Date of end of validity: 09/01/2015; Repealed by Regulation (EU) No 1215/2012

A history

1. The Heidelberg Report

- delete arbitration-exception from the Brussels I-Regulation; introduce a device “as effective as an English anti- suit injunction”

2. Commission Report + Green Paper (2009)

- delete arbitration-exception from the Brussels I-Regulation

3. Commission Proposal (2010)

- keep arbitration exception… but: obligation of a court to stay proceedings if jurisdiction is contested due to arbitration agreement and arbitration or court proceedings at the seat of arbitration have commenced

4. Parliament Resolution (2010)

- anti-suit injunctions must continue to be available; position prior to West-Tankers should be re-established

- strongly opposes abolition of arbitration-exclusion from the Brussels I-Regulation

5. **Parliament Proposal (2011)** - extent scope of arbitration exclusion in Brussels I-Regulation

- - consequence: anti-suit injunctions in aid of arbitration would again be possible

6. **Council Proposal (2012) -*** clarification that the Brussels I-Regulation should not affect the application of the New York Convention

SOURCE: **Markus Schifferl**, Anti-Suit Injunctions and EU Law: An Update, https://www.arbitration-ch.org/asset/15692c47749002dc4b9dc48e65f339f5/anti%E2%80%93suit-injuctions-and-eu-law-an-update.pdf

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, *OJ L 351, 20.12.2012, p. 1–32*

(12) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in

accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

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, *OJ L 351, 20.12.2012, p. 1–32*

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

2. This Regulation shall not apply to:

(d) arbitration.

Jonathan Mance, Arbitral autonomy and applicable and overriding law, Asia Pacific Law Review, 27:1, 2019, p. 7.

"What then if the seat of the arbitration and the law governing the dispute differ? Of course, if a challenge to an award comes before a court of the seat, that court will apply any mandatory laws or public policy applicable under the law of the seat, regardless of the governing law of the dispute. Emphasis needs here to be put on the word applicable'. There is always a potential question whether a particular mandatory law or policy was intended to apply generally to all issues coming before the seat. But, assuming that it was, then it cannot be evaded in the court of

the seat by the simple device of making the parties' relationship or transaction subject to the law of another state where the relevant mandatory provisions or public policy does not apply. Thus, continuing with the example of EU law, parties agreeing to arbitrate within Europe could hardly avoid the protective rules of European employment or consumer law, or European competition law principles, by selecting Hong Kong law (or, post-Brexit, English law) to govern their relationship." (p. 7)

Jonathan Mance, Arbitral autonomy and applicable and overriding law, Asia Pacific Law Review, 27:1, 2010, p 8.

"The conceptual basis for such a conclusion at common law is, however, important. If all that is being said is that no EU court would recognize the choice of a non-European law as ousting the mandatory provisions or public policy of EU law, that is not saying much. The European Court of Justice decided accordingly in Ingmar GB Ltd v Eaton Leonard Inc. where an agreement between a Californian principal and a European commercial agent was expressly subject to Californian law. The question was whether the agent could take advantage of the protection of the EU's Commercial Agency Regulations. The Court of Justice held that the mandatory provisions of those Regulations, could not be evaded 'by the simple expedient of a choice-of-law clause' in favour of a non-EU jurisdiction." [Ingmar GB Ltd v Eaton Leonard Inc (Case C-381/98).] (p. 8)

Jonathan Mance, Arbitral autonomy and applicable and overriding law, Asia Pacific Law Review, 27:1, 2019, p. 5.

"The current English choice of law rules in respect of contractual obligations are found in Article 9(3) of the Rome Regulation (EC) No 593/2008 (Rome Regulation). The Rome Regulation does not apply to arbitration agreements or choice of court clauses, but it can apply to determine the law applicable to the business, the subject-matter of an

arbitration agreement. Thus, if the choice of law rules applicable in an arbitration refer to those of the lex arbitri and if the lex arbitri is the law of a EU member state, the Rome Regulation will apply to determine the law applicable to determine the substantive dispute submitted to arbitration."

European Union between UNCITRAL and Hague Convention

- UNCITRAL, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") - https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards

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- 37: Convention of 30 June 2005 on Choice of Court Agreements
  - **2014/887/EU: Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, OJ L 353, 10.12.2014, p. 5–8 - *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex% 3A32014D0887***
  - ***See also: Legal certainty in international trade for EU businesses using choice of court agreements - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ajl0026***
- 41: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters
  - Not yet in force

• Case law

C-190/89, Rich / Società Italiana Impianti, Judgment of 25 July 1991, ECR 1991 p. I-3855, ECLI:EU:C:1991:319

- *By excluding arbitration from the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in*

Civil and Commercial Matters, by virtue of Article 1(4) thereof, on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.

- *Consequently, the abovementioned provision must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.*

C-190/89, Rich / Società Italiana Impianti, Judgment of 25 July 1991, ECR 1991 p. I-3855, ECLI:EU:C:1991:319

- *Whether a preliminary issue concerning the existence or validity of an arbitration agreement affects the application of the Convention to the dispute in question*
- *22 Impianti contends that the exclusion in Article 1(4) of the Convention does not extend to disputes or judicial decisions concerning the existence or validity of an arbitration agreement. In its view, that exclusion likewise does not apply where arbitration is not the principal issue in the proceedings but is merely a subsidiary or incidental issue.*
- *23 Impianti argues that, if that were not so, a party could avoid the application of the Convention merely by alleging the existence of an arbitration agreement.*
- *24 Impianti contends that, in any event, the exception in Article 1(4) of the Convention does not apply where the existence or validity of an arbitration agreement is being disputed before different courts to which the Convention applies, regardless of whether that issue has been raised as a main issue or as a preliminary issue.*

25 The Commission shares Impianti' s opinion in so far as the question of the existence or validity of an arbitration agreement is raised as a preliminary issue.

C-190/89, Rich / Società Italiana Impianti, Judgment of 25 July 1991, ECR 1991 p. I-3855, ECLI:EU:C:1991:319

- *26 Those interpretations cannot be accepted. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.*
- ***27 It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention (see judgment in Case 38/81 Effer v Kantner [1982] ECR 825, paragraph 6) for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.***
- *28 It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.*
- ***29 Consequently, the reply must be that Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.***

C-391/95, Van Uden Maritime / Kommanditgesellschaft in Firma Deco- Line and others, 17 November 1998, ECR 1998 p. I-7091, ECLI:EU:C:1998:543

* Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968, Consolidated version CF 498Y0126(01), *OJ L 299, 31.12.1972, p. 32–42*

- *24 Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention. Consequently, a party to such a contract is not in a position to make an application for provisional or protective measures to a court that would have jurisdiction under the Convention as to the substance of the case.*
- *30 However, Article 24 cannot be relied on to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded from it (Case 143/78 De Cavel v De Cavel [1979] ECR 1055, paragraph 9).*
- *31 Under Article 1, second paragraph, point 4, of the Convention, arbitration is excluded from its scope. By that provision, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts (Case C- 190/89 Rich v Società Italiana Impianti [1991] ECR I-3855, paragraph 18).*
- *32 The experts' report drawn up on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention (OJ 1979 C 59, p. 71, at pp. 92-93) specifies that the Convention does not apply to judgments determining whether an arbitration agreement is valid or not or, because it is invalid, ordering the parties not to continue the arbitration proceedings, or to proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. Also excluded from the scope of the Convention are proceedings ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time- limit for making awards.*

C-391/95, Van Uden Maritime / Kommanditgesellschaft in Firma Deco- Line and others, 17 November 1998, ECR 1998 p. I-7091, ECLI:EU:C:1998:543

33 However, it must be noted in that regard that provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect (see Case C-261/90 Reichert and Kockler v Dresdner Bank [1992] ECR I-2149, paragraph 32).

- *The answer to the fifth question must be that*
- *- where the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.*

C-159/02, Turner, Judgment of 27 April 2004, ECR 2004 p. I-3565, ECLI:EU:C:2004:228

31 Consequently, the answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, **even where that party is acting in bad faith with a view to frustrating the existing proceedings**.

- Why?
- http://curia.europa.eu/juris/document/document.jsf?text=&docid=49081&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=22125256

*C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [**West Tankers**], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69:*
House of Lords

9 In August 2000 the *Front Comor*, a vessel owned by West Tankers and chartered by Erg Petroli SpA ('Erg'), collided in Syracuse (Italy) with a jetty owned by Erg and caused damage. The charterparty was governed by English law and contained a clause providing for arbitration in London (United Kingdom).

10 Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision.

11 Having paid Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings on 30 July 2003 against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. The action was based on their statutory right of subrogation to Erg's claims, in accordance with Article 1916 of the Italian Civil Code. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement.

12 In parallel, West Tankers brought proceedings, on 10 September 2004, before the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court), seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Tribunale di Siracusa ('the anti-suit injunction').

13 By judgment of 21 March 2005, the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court), upheld West Tankers' claims and granted the anti-suit injunction sought against

Allianz and Generali. The latter appealed against that judgment to the House of Lords. They argued that the grant of such an injunction is contrary to Regulation No 44/2001.

*C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [*West Tankers*], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69:*

House of Lords

- 14 The House of Lords first referred to the judgments in Case C-116/02 *Gasser* [2003] ECR I-14693 and Case C- 159/02 *Turner* [2004] ECR I-3565, which decided in substance that an injunction restraining a party from commencing or continuing proceedings in a court of a Member State cannot be compatible with the system established by Regulation No 44/2001, even where it is granted by the court having jurisdiction under that regulation. That is because the regulation provides a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States which must trust each other to apply those rules correctly.
- 15 However, that principle cannot, in the view of the House of Lords, be extended to arbitration, which is completely excluded from the scope of Regulation No 44/2001 by virtue of Article 1(2)(d) thereof. In that field, there is no set of uniform Community rules, which is a necessary condition in order that mutual trust between the courts of the Member States may be established and applied. Moreover, it is clear from the judgment in Case C-190/89 *Rich* [1991] ECR I-3855 that the exclusion in Article 1(2)(d) of Regulation No 44/2001 applies not only to arbitration proceedings as such, but also to legal proceedings the subject-matter of which is arbitration. The judgment in Case C-391/95 *Van Uden* [1998] ECR I-7091 stated that arbitration is the subject-matter of proceedings where they serve to protect the right to determine the dispute by arbitration, which is the case in the main proceedings.
- 16 The House of Lords adds that since all arbitration matters fall outside the scope of Regulation No 44/2001, an injunction addressed

to Allianz and Generali restraining them from having recourse to proceedings other than arbitration and from continuing proceedings before the Tribunale di Siracusa cannot infringe the regulation.

- 17 Finally, the House of Lords points out that the courts of the United Kingdom have for many years used anti-suit injunctions. That practice is, in its view, a valuable tool for the court of the seat of arbitration, exercising supervisory jurisdiction over the arbitration, as it promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. Furthermore, if the practice were also adopted by the courts in other Member States it would make the European Community more competitive vis-à-vis international arbitration centres such as New York, Bermuda and Singapore.

*C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [*West Tankers*], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69:* **preliminary ruling**

- 18 In those circumstances, the House of Lords decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:
- 'Is it consistent with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?'

*C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [*West Tankers*], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69:* **pct. 23 – recognition**

- 19 By its question, the House of Lords asks, essentially, whether it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or

continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof.

- 20 An anti-suit injunction, such as that in the main proceedings, may be directed against actual or potential claimants in proceedings abroad. As observed by the Advocate General in point 14 of her Opinion, non-compliance with an anti-suit injunction is contempt of court, for which penalties can be imposed, including imprisonment or seizure of assets.

- 21 Both West Tankers and the United Kingdom Government submit that such an injunction is not incompatible with Regulation No 44/2001 because Article 1(2)(d) thereof excludes arbitration from its scope of application.

- 22 In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (*Rich*, paragraph 26). More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (*Van Uden*, paragraph 33).

- **23 Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.**

*C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [*West Tankers*], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69*

24 However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and

commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.

25 It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.

*C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [*West Tankers*], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69*

25 It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.

26 In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.

- **27 It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.**

*C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [*West Tankers*], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69*

- 28 Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.
- 29 It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, *Gasser*, paragraphs 48 and 49). It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317, paragraph 24, and *Turner*, paragraph 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has

jurisdiction (*OverseasUnion Insurance and Others*, paragraph 23, and *Gasser*, paragraph 48).

- **30 Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based (see, to that effect, *Turner*, paragraph 24).**
- 31 Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.
- 32 Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001.

*C-185/07, Allianz (formerly Riunione Adriatica di Sicurtà) [*West Tankers*], Judgment of 10 February 2009, ECR 2009 p. I-663, ECLI:EU:C:2009:69*

- 33 This finding is supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

- 34 In the light of the foregoing considerations, the answer to the question referred is that it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

C-536/13, Gazprom, Judgment of 13 May 2015, ECLI:EU:C:2015:316

- 12 It is apparent from the order for reference and the documents before the Court that at the material time the main shareholders of 'Lietuvos dujos' AB ('Lietuvos dujos') were E.ON Ruhrgas International GmbH, a company incorporated under German law which held 38.91% of the share capital, Gazprom, which held 37.1% thereof, and the Lithuanian State, which held 17.7%.
- 13 On 24 March 2004, Gazprom concluded a shareholders' agreement ('the shareholders' agreement') with E.ON Ruhrgas International GmbH and the State Property Fund acting on behalf of Lietuvos Respublika (the Republic of Lithuania), the fund subsequently being replaced by the Lietuvos Respublikos energetikos ministerija (the Ministry of Energy of the Republic of Lithuania; 'the Ministry'). That agreement contained, in Section 7.14, an arbitration clause according to which '[a]ny claim, dispute or contravention in connection with this Agreement or its breach, validity, effect or termination, shall be finally settled by arbitration'.
- *21 By a first order of 17 December 2012, the Lietuvos apeliacinis teismas refused Gazprom's application. It held (i) that the arbitral tribunal which made the arbitral award could not rule on an issue already raised before and examined by the Vilniaus apygardos teismas and (ii) that, in ruling on that issue, the arbitral tribunal had not observed Article V(2)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 (United Nations Treaty Series, Vol. 330, p. 3; 'the New York Convention').*

- *22 Furthermore, the Lietuvos apeliacinis teismas stated that, by the arbitral award of 31 July 2012 recognition and enforcement of which were sought, the arbitral tribunal not only limited the Ministry's capacity to bring proceedings before a Lithuanian court with a view to initiation of an investigation in respect of the activities of a legal person, but also denied that national court the power which it possesses to determine whether it has jurisdiction. In that way, the arbitral tribunal infringed the national sovereignty of the Republic of Lithuania, which is contrary to Lithuanian and international public policy. According to the Lietuvos apeliacinis teismas, the refusal to recognise the award was also justified by Article V(2)(b) of the New York Convention.*

C-536/13, Gazprom, Judgment of 13 May 2015, ECLI:EU:C:2015:316

- **35 In the present case, however, the referring court is asking the Court not whether such an injunction issued by a court of a Member State is compatible with Regulation No 44/2001, but whether it would be compatible with that regulation for a court of a Member State to recognise and enforce an arbitral award ordering a party to arbitration proceedings to reduce the scope of the claims formulated in proceedings pending before a court of that Member State.**
- 36 In that regard, it should be remembered first of all that, as has been stated in paragraph 28 of the present judgment, arbitration does not fall within the scope of Regulation No 44/2001, since the latter governs only conflicts of jurisdiction between courts of the Member States. As arbitral tribunals are not courts of a State, there is, in the main proceedings, no such conflict under that regulation.
- 37 Next, so far as concerns the principle of mutual trust — accorded by the Member States to their respective legal systems and judicial institutions — which finds expression in harmonisation of the rules on jurisdiction of the courts, on the basis of the system established by Regulation No 44/2001, it must be pointed out that, in the circumstances of the main proceedings, as the order has been made by

an arbitral tribunal there can be no question of an infringement of that principle by interference of a court of one Member State in the jurisdiction of the court of another Member State.

C-536/13, Gazprom, Judgment of 13 May 2015, ECLI:EU:C:2015:316

39 Thus, in those circumstances, neither that arbitral award nor the decision by which, as the case may be, the court of a Member State recognises it are capable of affecting the mutual trust between the courts of the various Member States upon which Regulation No 44/2001 is based.

40 Finally, unlike the injunction at issue in the case which gave rise to the judgment in *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69, paragraph 20), failure on the part of the Ministry to comply with the arbitral award of 31 July 2012 in the context of the proceedings relating to initiation of an investigation in respect of the activities of a legal person is not capable of resulting in penalties being imposed upon it by a court of another Member State. It follows that the legal effects of an arbitral award such as that at issue in the main proceedings can be distinguished from those of the injunction at issue in the case which gave rise to that judgment.

41 Therefore, proceedings for the recognition and enforcement of an arbitral award such as that at issue in the main proceedings are covered by the national and international law applicable in the Member State in which recognition and enforcement are sought, and not by Regulation No 44/2001.

C-536/13, Gazprom, Judgment of 13 May 2015, ECLI:EU:C:2015:316

42 Thus, in the circumstances of the main proceedings, any potential limitation of the power conferred upon a court of a Member State — before which a parallel action has been brought — to determine whether

it has jurisdiction would result solely from the recognition and enforcement of an arbitral award, such as that at issue in the main proceedings, by a court of the same Member State, pursuant to the procedural law of that Member State and, as the case may be, the New York Convention, which govern this matter excluded from the scope of Regulation No 44/2001.

43 Since the New York Convention governs a field excluded from the scope of Regulation No 44/2001, it does not relate to a 'particular matter' within the meaning of Article 71(1) of that regulation. Article 71 governs only the relations between that regulation and conventions falling under the particular matters that come within the scope of Regulation No 44/2001 (see, to this effect, judgment in *TNT Express Nederland*, C-533/08, EU:C:2010:243, paragraphs 48 and 51).

44 It follows from all the foregoing considerations that the answer to the questions referred is that Regulation No 44/2001 must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.

C-352/13, CDC Hydrogen Peroxide, Judgment of 21 May 2015, ECLI:EU:C:2015:335

- 63 Second, it must be considered that the court seised of the matter cannot, without undermining the aim of Regulation No 44/2001, refuse to take into account a jurisdiction clause which has satisfied the requirements of Article 23 of that regulation solely on the ground that it considers that the court with jurisdiction under that clause would not give full effect to the requirement of effective enforcement of the prohibition of cartel agreements by not allowing a victim of the cartel to obtain full compensation for the loss it suffered. On the contrary, it must be considered that the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in

Article 267 TFEU, affords a sufficient guarantee to individuals in that respect (see, by analogy, judgment in *Renault*, C-38/98, EU:C:2000:225, paragraph 23).

C-352/13, CDC Hydrogen Peroxide, Judgment of 21 May 2015, ECLI:EU:C:2015:335

- 67 In that regard, it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope (judgments in *Powell Duffryn*, C-214/89, EU:C:1992:115, paragraph 37, and in *Benincasa*, C-269/95, EU:C:1997:337, paragraph 31).
- 68 A jurisdiction clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship, which limits the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. The purpose of that requirement is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made (see, to that effect, judgment in *Powell Duffryn*, C-214/89, EU:C:1992:115, paragraph 31).
- 69 In the light of that purpose, the referring court must, in particular, regard a clause which abstractly refers to all disputes arising from contractual relationships as not extending to a dispute relating to the tortious liability that one party allegedly incurred as a result of its participation in an unlawful cartel.

C-352/13, CDC Hydrogen Peroxide, Judgment of 21 May 2015, ECLI:EU:C:2015:335

- **Article 23(1) of Regulation No 44/2001 must be interpreted as allowing, in the case of actions for damages for an infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992, account to be taken of jurisdiction clauses contained in contracts for the supply of goods, even if the effect thereof is a derogation from the rules on international jurisdiction provided for in Article 5(3) and/or Article 6(1) of that regulation, provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law.**

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IX. Arbitration and EU Consumer law

Agenda

- Introduction
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  - *C-168/05, Mostaza Claro, Judgment of 26 October 2006, ECR 2006 p. I-10421, ECLI:EU:C:2006:675*
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Legal context

- *Arbitration and EU Law on Unfair Terms: the principle of procedure autonomy, Nuances and EU law:* Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, p. 29–34
- 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)/ Purpose and consequences of the Regulation
- 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)/ Purpose and scope of Directive 2013/11/EU, Comparison with Directive on consumer rights

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Article 3

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

ANNEX TERMS REFERRED TO IN ARTICLE 3 (3) 1. Terms which have the object or effect of:

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

Kompetenz Kompetenz principle / principle of the effectiveness of the European Union

- C-40/08, Asturcom Telecomunicaciones, judgment of October 6th 2009, ECR 2009, p. I- 9579, ECLI: EU: C: 2009: 615. In his conclusions, GA V. Trstenjak pointed out the particular situation of the case, but his conclusion in this paragraph is general: "But even if the arbitral courts were required or authorized to do so [to verify the validity of a clause or to declare it abusive] there would be serious doubts as to whether an arbitral court could always be considered independent and neutral, more so if an arbitrator may have a personal interest in maintaining the arbitration clause in respect of which he/she is competent. The Commission rightly draws attention to this point of view. That is the case, for example, in a situation such as that of the issue in the main proceedings, in which the arbitration agreement was drafted by the same association which was responsible for conducting the arbitration procedure. As a consequence, the examination of the nullity issue regarding an abusive arbitration clause cannot be entrusted solely to the arbitrator. On the contrary, this task must be entrusted to a court which offers all the guarantees of judicial independence that is present in a state governed by the rule of law. "

- This way, the Kompetenz Kompetenz principle is removed by applying the principle of the effectiveness of the European Union's law.

Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes

(1) Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU. Article 38 of the Charter of Fundamental Rights of the European Union provides that Union policies are to ensure a high level of consumer protection.

(2) In accordance with Article 26(2) TFEU, the internal market is to comprise an area without internal frontiers in which the free movement of goods and services is ensured. In order for consumers to have confidence in and benefit from the digital dimension of the internal market, it is necessary that they have access to simple, efficient, fast and low-cost ways of resolving disputes which arise from the sale of goods or the supply of services online. This is particularly important when consumers shop cross-border.

(3) In its Communication of 13 April 2011 entitled 'Single Market Act — Twelve levers to boost growth and strengthen confidence — "Working together to create new growth" ', the Commission identified legislation on alternative dispute resolution (ADR) which includes an electronic commerce dimension as one of the twelve levers to boost growth and strengthen confidence in the Single Market.

(4) Fragmentation of the internal market impedes efforts to boost competitiveness and growth. Furthermore, the uneven availability, quality and awareness of simple, efficient, fast and low-cost means of resolving disputes arising from the sale of goods or provision of services across the Union constitutes a barrier within the internal market which undermines consumers' and traders' confidence in shopping and selling across borders.

https://ec.europa.eu/consumers/odr/main/?event=main.home2.show

Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes

(15) This Regulation should not apply to disputes between consumers and traders that arise from sales or service contracts concluded **offline** and to **disputes between traders**.

(18) This Regulation aims to create an **ODR [**online dispute resolution**] platform at Union level**.

The ODR platform should take the form of an **interactive website offering a single point of entry to consumers and traders seeking to resolve disputes out-of-court which have arisen from online transactions**.

The ODR platform should provide **general information regarding the out-of-court resolution of contractual disputes between traders and consumers arising from online sales and service contracts**.

It should allow consumers and traders **to submit complaints by filling in an electronic complaint** form available in all the official languages of the institutions of the Union and to attach relevant documents.

It should transmit complaints to an ADR entity competent to deal with the dispute concerned.

The ODR platform should offer, **free of charge, an electronic case management tool which enables ADR entities to conduct the dispute resolution procedure with the parties through the ODR platform**. ADR entities should not be obliged to use the case management tool.

Regulation (EU) No 524/2013 and Directive 2013/11/EU

- Regulation (EU) No 524/2013 should apply to the out-of-court resolution of disputes initiated by consumers resident in the Union against traders established in the Union which are covered by Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (Directive on consumer ADR).

- Alternative dispute resolution (ADR) offers a simple, fast and low-cost out-of- court solution to disputes between consumers and traders. However, ADR is not yet sufficiently and consistently developed across the Union. It is regrettable that, despite Commission Recommendations 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, ADR has not been correctly established and is not running satisfactorily in all geographical areas or business sectors in the Union.

Directive 2013/11/EU

- (29) Confidentiality and privacy should be respected at all times during the ADR procedure. Member States should be encouraged to protect the confidentiality of ADR procedures in any subsequent civil or commercial judicial proceedings or **arbitration**.
- Article 1
- The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. This Directive is without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Directive 2013/11/EU

This Directive shall not apply to:

(d) disputes between traders;

(e) direct negotiation between the consumer and the trader;

(g) procedures initiated by a trader against a consumer;

• Case law

C-240/98 to C-244/98, Judgment of 27 June 2000, Océano Grupo Editorial and Salvat Editores

2. The question was raised in two sets of proceedings, between (i) Océano Grupo Editorial SA and Ms Murciana Quintero and (ii) Salvat Editores SA and Mr Sánchez Alcón Prades, Mr Copano Badillo, Mr Berroane and Mr Viñas Feliu. The proceedings concerned the payment of sums due under contracts concluded between the companies and the defendants in the main proceedings for the sale on deferred payment terms of encyclopaedias.

C-240/98 to C-244/98, Judgment of 27 June 2000, Océano Grupo Editorial and Salvat Editores

15. Between 4 May 1995 and 16 October 1996, each of the defendants in the main proceedings, all of whom are resident in Spain, entered into a contract for the purchase by instalments of an encyclopaedia for personal use. The plaintiffs in the main proceedings are the sellers of the encyclopaedias.

16. The contracts contained a term conferring jurisdiction on the courts in Barcelona (Spain), a city in which none of the defendants in the main proceedings is domiciled but where the plaintiffs in those proceedings have their principal place of business.

17. The purchasers of the encyclopaedias did not pay the sums due on the agreed dates, and, between 25 July and 19 December 1997, the sellers brought actions ('juicio de cognición - a summary procedure available only for actions involving limited amounts of money) in the Juzgado de Primera Instancia No 35 de Barcelona to obtain an order that the defendants in the main proceedings should pay the sums due.

18. Notice of the claims was not served on the defendants since the national court had doubts as to whether it had jurisdiction over the

actions in question. The national court points out that on several occasions the Tribunal Supremo (Supreme Court) has held jurisdiction clauses of the kind at issue in these proceedings to be unfair. However, according to the court making the reference, the decisions of the national courts are inconsistent on the question of whether the court may, in proceedings concerning consumer protection, determine of its own motion whether an unfair term is void.

C-240/98 to C-244/98, Judgment of 27 June 2000, Océano Grupo Editorial and Salvat Editores

21. First, it should be noted that, where a term of the kind at issue in the main proceedings has been included in a contract concluded between a consumer and a seller or supplier within the meaning of the Directive without being individually negotiated, it satisfies all the criteria enabling it to be classed as unfair for the purposes of the Directive.

22. A term of this kind, the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive.

23. By contrast, the term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in the court in the jurisdiction of which he has his principal place of business. This makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so.

24. It follows that where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or

supplier within the meaning of the Directive and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

C-240/98 to C-244/98, Judgment of 27 June 2000, Océano Grupo Editorial and Salvat Editores

- 25. As to the question of whether a court seised of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.
- 26. The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.

- 30. As regards the position where a directive has not been transposed, it must be noted that it is settled case-law (Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, Case C-334/92 *Wagner Miret* v *Fondo de Garantía Salarial* [1993] ECR I-6911, paragraph 20, and Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 26) that, when applying national law, whether adopted before or after the directive, the national court called upon to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).
- 31. Since the court making the reference is seised of a case falling within the scope of the Directive and the facts giving rise to the case postdate the expiry of the period allowed for transposing the Directive, it therefore falls to that court, when it applies the provisions of national law outlined in paragraphs 10 and 11 above which were in force at the material time, to interpret them, as far as possible, in accordance with the Directive and in such a way that they are applied of the court's own motion.
- 32. It is apparent from the above considerations that the national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.

C-168/05, Mostaza Claro, Judgment of 26 October 2006, ECR 2006 p. I-10421, ECLI:EU:C:2006:675

- 2 This reference has been made in the context of proceedings between Ms Mostaza Claro and Centro Móvil Milenium SL ('Móvil') concerning the validity of an arbitration clause included in the contract which she concluded with that company.
- 16 On 2 May 2002, a mobile telephone contract was concluded between Móvil and Ms Mostaza Claro. The contract contained an arbitration clause under which any disputes arising from the contract were to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and in Equity) (AEADE).
- 17 As Ms Mostaza Claro did not comply with the minimum subscription period, Móvil initiated arbitration proceedings before the AEADE. By letter of 25 July 2003, the latter granted Ms Mostaza Claro a period of 10 days in which to refuse arbitration proceedings, stating that, in the event of refusal, she could bring legal proceedings. Ms Mostaza Claro presented arguments on the merits of the dispute, but did not repudiate the arbitration proceedings or claim that the arbitration agreement was void. The arbitration proceedings subsequently took place and the arbitrator found against her.
- 18 Ms Mostaza Claro contested the arbitration decision delivered by the AEADE before the referring court, submitting that the unfair nature of the arbitration clause meant that the arbitration agreement was null and void.

C-168/05, Mostaza Claro, Judgment of 26 October 2006, ECR 2006 p. I-10421, ECLI:EU:C:2006:675

- 19 In the order for reference, the Audiencia Provincial (Provincial Court) de Madrid (Spain) states that there is no doubt that the arbitration agreement includes an unfair contractual term and is therefore null and void.

- 20 However, as Ms Mostaza Claro did not plead that the agreement was invalid in the context of the arbitration proceedings, and in order to interpret the national law in accordance with the Directive, the Audiencia Provincial de Madrid decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
- 'May the protection of consumers under Council Directive 93/13/EEC … require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that arbitration agreement contains an unfair term to the consumer's detriment, when that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings?'

C-168/05, Mostaza Claro, Judgment of 26 October 2006, ECR 2006 p. I-10421, ECLI:EU:C:2006:675

- 33 Móvil and the German Government submit that, if the national court were allowed to determine whether an arbitration agreement is void where the consumer did not raise such an objection during the arbitration proceedings, this would seriously undermine the effectiveness of arbitration awards.
- 34 It follows from that argument that it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances (Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 35).
- 35 However, the Court has already ruled that, where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with Community rules of this type (see, to that effect, *Eco Swiss*, paragraph 37).

C-168/05, Mostaza Claro, Judgment of 26 October 2006, ECR 2006 p. I-10421, ECLI:EU:C:2006:675

- 36 The importance of consumer protection has in particular led the Community legislature to lay down, in Article 6(1) of the Directive, that unfair terms used in a contract concluded with a consumer by a seller or supplier 'shall … not be binding on the consumer'. This is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.
- 37 Moreover, as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory (see, by analogy, concerning Article 81 EC, *Eco Swiss*, paragraph 36).

C-168/05, Mostaza Claro, Judgment of 26 October 2006, ECR 2006 p. I-10421, ECLI:EU:C:2006:675

- 38 The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.
- 39 Having regard to the foregoing, the answer to the question referred must be that the Directive must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the

course of the arbitration proceedings, but only in that of the action for annulment.

- **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.**

- "The Centro Movil decision affects, of course, the development of arbitration in a field where there is potential and thus could be criticized by the arbitrators. The European Court of Justice does not hesitate to intervene to define the content of the values that must be imperatively defended by judges in the EU Member States through the exception of public order and the conditions for its intervention. The ease with which it links consumer protection, guaranteed through a directive of public interest, to the general interest, the energy with which it promises "community public order" creates problems insofar as its reasoning is easily transposable in regards to any Community source ”values”; the significant widening of the content of the public order exception contrasts with the restrictive interpretation this instrument / technique normally enjoys. The ECJ's position is likely to exert considerable pressure on the arbitrators: while internationally it is accepted that an arbitral tribunal may settle a dispute involving a consumer, in practice the sentences will be abolished extremely often if the state courts will faithfully apply the reasoning of the European Court of Justice. In order to prevent this issue, in order to pronounce sentences to be recognized and enforced by the courts of the EU Member States, the arbitrators will have to pay particular attention to European consumer law. “

- **Alina Oprea,** *Arbitration and Community Consumer Law - Some comments on the conciliation between the two areas, based on the decision of the European Court of Justice in Centro Movil*, Romanian Arbitration Journal (”Revista română de arbitraj”), no. 3/2009, p.33

C-40/08, Judgment of 6 October 2009, Asturcom Telecomunicaciones, ECR 2009 p. I-9579, ECLI:EU:C:2009:615

- 20 On 24 May 2004, a subscription contract for a mobile telephone was concluded between Asturcom and Mrs Rodríguez Nogueira. The contract contained an arbitration clause under which any dispute concerning the performance of the contract was to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and Equity) ('AEADE'). The seat of that arbitration tribunal, which was not indicated in the contact, is located in Bilbao.
- 21 Since Mrs Rodríguez Nogueira failed to pay a number of bills and terminated the contract before the agreed minimum subscription period had expired, Asturcom initiated arbitration proceedings against her before the AEADE.
- 22 The arbitration award, made on 14 April 2005, ordered Mrs Rodríguez Nogueira to pay the sum of EUR 669.60.
- 23 Since Mrs Rodríguez Nogueira did not initiate proceedings for annulment of the arbitration award, it became final.

C-40/08, Judgment of 6 October 2009, Asturcom Telecomunicaciones, ECR 2009 p. I-9579, ECLI:EU:C:2009:615

- 24 On 29 October 2007, Asturcom brought an action before the Juzgado de Primera Instancia (Court of First Instance) No 4 de Bilbao (Spain) for enforcement of the arbitration award.
- 25 In its order for reference, that court states that the arbitration clause in the subscription contract is unfair, particularly in view of the fact that, first, the costs incurred by the consumer in travelling to the seat of the arbitration tribunal were greater than the amount at issue in the dispute in the main proceedings. Next, according to that court,

that seat is located at a considerable distance from the consumer's place of residence and its location is not indicated in the contract. Lastly, that body itself draws up the contracts which are subsequently used by telecommunications undertakings.

- 26 However, the referring court also points out, first, that arbitrators are not permitted under Law 60/2003 to examine of their own motion whether unfair arbitration clauses are void and, second, Law 1/2000 does not contain any provision dealing with the assessment to be carried by the court or tribunal having jurisdiction as to whether arbitration clauses are unfair when adjudicating on an action for enforcement of an arbitration award that has become final.

C-40/08, Judgment of 6 October 2009, Asturcom Telecomunicaciones, ECR 2009 p. I-9579, ECLI:EU:C:2009:615

28 By its question, the Juzgado de Primera Instancia No 4 de Bilbao asks, in essence, whether the Directive 93/13 must be interpreted as meaning that a national court or tribunal hearing an action for enforcement of an arbitration award which has acquired the force of res judicata and was made in the absence of the consumer is required to determine of its own motion whether an arbitration clause in a contract concluded between a consumer and a seller or supplier is unfair and to annul the award.

29 For the purpose of replying to the question referred, it is appropriate to note, first, that the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25, and Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25).

30 As regards that weaker position, Article 6(1) of that directive provides that unfair terms are not binding on the consumer. As is

apparent from case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (*Mostaza Claro*, paragraph 36, and Case C-243/08 *Pannon GSM* [2009] ECR I-0000, paragraph 25).

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- 32 It is in the light of those principles that the Court has therefore held that the national court is required to assess of its own motion whether a contractual term is unfair (*Mostaza Claro*, paragraph 38).
- 33 However, the present case can be distinguished from that which gave rise to the judgment in *Mostaza Claro* in that Mrs Rodríguez Nogueira did not in any way become involved in the various proceedings relating to the dispute between her and Asturcom and, in particular, did not bring an action for annulment of the arbitration award made by the AEADE in order to challenge the arbitration clause on the ground that it was unfair, so that that award now has the force of res judicata.
- 34 Accordingly, it is necessary to determine whether the need to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them requires the court or tribunal responsible for enforcement to ensure that the consumer is afforded absolute protection, even where the consumer has not brought any legal proceedings in order to assert his rights and notwithstanding the fact that the domestic rules of procedure apply the principle of res judicata.

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- 35 It is necessary at the outset to draw attention to the importance, both for the Community legal order and for the national legal systems, of the principle of res judicata.
- 36 Indeed, the Court has already had occasion to observe that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided to exercise those rights can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38; Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20; and Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-0000, paragraph 22).
- 37 Consequently, according to the case-law of the Court, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision of Community law, regardless of its nature, on the part of the decision at issue (see, inter alia, Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 47 and 48; *Kapferer*, paragraph 21; and *Fallimento Olimpiclub*, paragraph 23).
- 38 In the absence of Community legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness) (see, inter alia, *Kapferer*, paragraph 22, and *Fallimento Olimpiclub*, paragraph 24).
- See: *Judgment of 18 July 2007, Lucchini (C-119/05, ECR 2007 p. I-6199) ECLI:EU:C:2007:434*

C-40/08, Judgment of 6 October 2009, Asturcom Telecomunicaciones, ECR 2009 p. I-9579, ECLI:EU:C:2009:615

- 39 As regards, first, the principle of effectiveness, the Court has already held that every case in which the question arises as to whether a national procedural provision makes the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14, and *Fallimento Olimpiclub*, paragraph 27).
- 40 In the present case, the arbitration award at issue in the main proceedings became final because the consumer in question did not bring an action for annulment of the award within the time-limit prescribed for that purpose.
- 41 According to established case-law, it is compatible with Community law to lay down reasonable time- limits for bringing proceedings in the interests of legal certainty (see, to this effect, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28; and Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 58). Such time-limits are not liable to make it virtually impossible or excessively difficult to exercise rights conferred by Community law (see, to that effect, Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 34).
- 42 It is therefore necessary to ascertain whether it is reasonable to impose a two-month time-limit, such as that laid down in Article 41(4) of Law 60/2003, upon the expiry of which, in the absence of any action for annulment, an arbitration award becomes final and thus acquires the authority of res judicata.

C-40/08, Judgment of 6 October 2009, Asturcom Telecomunicaciones, ECR 2009 p. I-9579, ECLI:EU:C:2009:615

- 43 In the present case, it should be noted first that, as the Court has already held, a period of 60 days is not objectionable per se (see, to that effect, *Peterbroeck*, paragraph 16).
- 44 A peremptory time-limit of that kind is reasonable in that it enables both an assessment to be made as to whether there are grounds for challenging an arbitration award and, if appropriate, the action for annulment of the award to be prepared. It should be pointed out that in the present case it has not been alleged that the national procedural rules governing the bringing of an action for annulment of an arbitration award, in particular the ruling imposing a two-month time-limit for that purpose, were unreasonable.
- 45 Moreover, it should be pointed out that Article 41(4) of Law 60/2003 provides that the time-limit starts to run from the date of notification of the arbitration award. Therefore, in the action in the main proceedings, it was not possible for the consumer to have found herself in a situation in which the limitation period had started to run, or had expired, without even being aware of the effects of the unfair arbitration clause upon her.
- 46 In such circumstances, such a time-limit is consistent with the principle of effectiveness, since it is not in itself likely to make it virtually impossible or excessively difficult to exercise any rights which the consumer derives from Directive 93/13 (see, to that effect, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 55).

47 In any event, the need to comply with the principle of effectiveness cannot be stretched so far as to mean that, in circumstances such as those in the main proceedings, a national court is required not only to compensate for a procedural omission on the part of a consumer who is unaware of his rights, as in the case which gave rise to the judgment in *Mostaza Claro*, but also to make up fully for the total inertia on the part of the consumer concerned who, like the defendant in the main proceedings, neither participated in the arbitration proceedings nor brought an action for annulment of the arbitration award, which therefore became final.

48 In the light of the foregoing considerations, it must be held that the procedural rules laid down by the Spanish system for the protection of consumers against unfair terms in contracts does not make it impossible or excessively difficult to exercise the rights conferred on consumers by Directive 93/13.

49 Next, in accordance with the principle of equivalence, the conditions imposed by domestic law under which the courts and tribunals may apply a rule of Community law of their own motion must not be less favourable than those governing the application by those bodies of their own motion of rules of domestic law of the same ranking (see, to that effect, inter alia, Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraphs 13 and 17 and the case-law cited).

50 In order to determine whether that principle is complied with in the case before the national court, it is for that court, which alone has direct knowledge of the detailed procedural rules governing actions in the field of domestic law, to consider both the purpose and the essential characteristics of domestic actions which are claimed to be similar (see, inter alia, Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraphs 49 and 56). However, with a view to the appraisal to be carried out by the national court, the Court may provide guidance for the interpretation of Community law (see *Preston and Others*, paragraph 50).

C-40/08, Judgment of 6 October 2009, Asturcom Telecomunicaciones, ECR 2009 p. I-9579, ECLI:EU:C:2009:615

- 51 As pointed out at paragraph 30 above, Article 6(1) of Directive 93/13 is a mandatory provision. It should also be noted that, according to the Court's case-law, that directive as a whole constitutes, in accordance with Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the Community (*Mostaza Claro*, paragraph 37).
- 52 Accordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.
- 53 It follows from this that, inasmuch as the national court or tribunal seised of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of that directive, where it has available to it the legal and factual elements necessary for that task (see, to that effect, *Pannon GSM*, paragraph 32).

C-40/08, Judgment of 6 October 2009, Asturcom Telecomunicaciones, ECR 2009 p. I-9579, ECLI:EU:C:2009:615

57 Lastly, as regards the consequences of a finding by the court responsible for enforcement that the arbitration clause in a contract concluded by a seller or supplier with a consumer is unfair, it should be recalled that Article 6(1) of Directive 93/13 requires the Member States

to lay down that unfair terms are not to be binding on the consumer, 'as provided for under their national law'.

58 Accordingly, as the Hungarian Government suggested in its written observations, it is for the referring court to give due effect, in accordance with national law, to any finding in relation to the arbitration award that an arbitration clause is unfair, so long as the clause is not capable of binding the consumer.

59 In the light of the foregoing considerations, the answer to the question referred is that Directive 93/13 must be interpreted as meaning that a national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made **in the absence of the consumer** is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, **under national rules of procedure,** it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause.

C-76/10, Pohotovosť, Order of 16 November 2010, ECR 2010 p. I-11557, ECLI:EU:C:2010:685

36 By part (a) of its second question, which should be examined first of all, the national court asks whether, pursuant to Directive 93/13, a national court, hearing an application for enforcement of a final arbitration award issued by default and without the participation of the consumer, is required of its own motion, where the necessary information on the legal and factual state of affairs is available to it for this purpose, to consider the fairness of a penalty contained in a credit agreement concluded by a creditor with a consumer, that penalty having been applied in that award, if, according to national procedural rules, such an assessment may be conducted in similar proceedings under national law.

37 According to settled case-law, the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak

position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25, and Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25).

38 As regards such a weaker position, Article 6(1) of Directive 93/13 provides that unfair terms are not to be binding on the consumer. As follows from the case-law, it is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (*Mostaza Claro*, cited above, paragraph 36, and Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 25).

39 In order to guarantee the protection intended by Directive 93/13, the Court has also stated on a number of occasions that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (*Océano Grupo Editorial and Salvat Editores*, cited above, paragraph 27; *Mostaza Claro*, cited above, paragraph 26; and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 31).

40 It is in the light of those principles that the Court has therefore held that the national court is required to assess of its own motion whether a contractual term is unfair (*Asturcom Telecomunicaciones*, cited above, paragraph 32).

C-76/10, Pohotovosť, Order of 16 November 2010, ECR 2010 p. I-11557, ECLI:EU:C:2010:685

- 41 A court's power to determine of its own motion whether a term is unfair must be regarded as constituting a proper means both of achieving the result sought by Article 6 of Directive 93/13, namely, preventing an individual consumer from being bound by an unfair term, and of contributing to the attainment of the objective of Article

7, since, if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms being used by traders in contracts concluded with consumers (Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 32, and *Mostaza Claro*, cited above, paragraph 27).

- 42 That power of the national court has been regarded as necessary for ensuring that the consumer enjoys effective protection, in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them (*Cofidis*, cited above, paragraph 33, and *Mostaza Claro*, cited above, paragraph 28).

- 43 The protection which the directive confers on consumers thus extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve (*Cofidis*, cited above, paragraph 34).

C-76/10, Pohotovosť, Order of 16 November 2010, ECR 2010 p. I-11557, ECLI:EU:C:2010:685

45 It is true that, according to the case-law of the Court, European Union law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, such as an arbitration award, even if to do so would make it possible to remedy an infringement of a provision of European Union law, regardless of its nature, on the part of the decision at issue (*Asturcom Telecomunicaciones*, cited above, paragraph 37).

46 Indeed, the Court has already had occasion to observe that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided to exercise those rights can no longer be called into question (*Asturcom Telecomunicaciones*, cited above, paragraph 36, and the case-law cited).

47 Thus, in the absence of European Union legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law (principle of effectiveness) (*Asturcom Telecomunicaciones*, cited above, paragraph 38).

C-76/10, Pohotovosť, Order of 16 November 2010, ECR 2010 p. I-11557, ECLI:EU:C:2010:685

- 48 In accordance with the principle of equivalence, the conditions imposed by domestic law under which the courts and tribunals may apply a rule of European Union law of their own motion must not be less favourable than those governing the application by those bodies of their own motion of rules of domestic law of the same ranking (*Asturcom Telecomunicaciones*, cited above, paragraph 49, and the case-law cited).
- 49 In that regard, it must be pointed out that Article 6(1) of Directive 93/13 is a mandatory provision. It should also be noted that, according to the Court's case-law, that directive as a whole constitutes a measure which is essential to the accomplishment of the tasks entrusted to the European Union and, in particular, to raising the standard of living and the quality of life throughout the Union (*Mostaza Claro*, cited above, paragraph 37, and *Asturcom Telecomunicaciones*, cited above, paragraph 51).
- 50 Accordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy (*Asturcom Telecomunicaciones*, paragraph 52).

C-76/10, Pohotovosť, Order of 16 November 2010, ECR 2010 p. I-11557, ECLI:EU:C:2010:685

- 51 It follows from this in particular that, inasmuch as the national court or tribunal seised of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of that directive, where it has available to it the legal and factual elements necessary for that task (*Pannon GSM*, cited above, paragraph 32, and *Asturcom Telecomunicaciones*, cited above, paragraph 53).
- 52 In the main proceedings, it appears that, according to the information provided by the national court, the national rules on arbitration proceedings require the court to discontinue the enforcement of a payment laid down by an arbitration award where that payment is prohibited by law or where it contravenes basic morality. Moreover, that court considers that any unfair term appearing in a contract concluded with a consumer would, in terms of national law, contravene basic morality since, contrary to the requirement of good faith, it would cause a significant imbalance in the rights and obligations of the supplier and of the consumer to the detriment of the consumer.
- 53 Thus, as in the context of the *Asturcom Telecomunicaciones* judgment, in a situation such as that in the main proceedings, where the court seised with a view to the enforcement of an arbitration award may, of its own motion, discontinue the application of that arbitration award where that award imposes on the party concerned an objectively impossible payment, prohibited by law or contrary to basic morality, that court must, where it has available to it the legal and factual elements necessary for that task, examine, of its own motion, within the context of the enforcement proceedings, whether the penalty laid down by a credit contract concluded between a creditor and a consumer is unfair.

- 54 The answer to part (a) of the second question is therefore that Directive 93/13 requires a national court, hearing an application for enforcement of a final arbitration award issued by default and without the participation of the consumer, of its own motion, where the necessary information on the legal and factual state of affairs is available to it for this purpose, to consider the fairness of a penalty contained in the credit agreement concluded by a creditor with a consumer, that penalty having been applied in that award, where, according to national procedural rules, such an assessment may be conducted in similar proceedings under national law.

C-76/10, Pohotovosť, Order of 16 November 2010, ECR 2010 p. I-11557, ECLI:EU:C:2010:685

- **1. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts requires a national court, hearing an application for enforcement of a final arbitral award issued by default and without the participation of the consumer, of its own motion, where the necessary information on the legal and factual state of affairs is available to it for this purpose, to consider the fairness of the penalty contained in a credit agreement concluded by a creditor with a consumer, that penalty having been applied in that award, where, according to national procedural rules, such an assessment may be conducted in similar proceedings under national law.**

- Preliminary ruling made by an arbitral court in consumer case
  - *C-125/04, Denuit and Cordenier, Judgment of 27 January 2005, ECR 2005 p. I-923, ECLI:EU:C:2005:69*

C-125/04, Denuit and Cordenier, Judgment of 27 January 2005, ECR 2005 p. I-923, ECLI:EU:C:2005:69

5. Mr Denuit and his wife, Ms Cordenier, who are the claimants in the main proceedings, reserved with the agency an all-inclusive package to Egypt from 2 to 9 March 2003 for themselves and their child, Thierry, at a

total price of EUR 2 765, comprising air transport from Brussels and back as well as a Nile cruise.

6. In the agency's special conditions it is stated that 'the price of these services have been calculated on the basis of the dollar rate in force on publication of this brochure (January 2002 – EUR 1 = USD 0.91). Any alteration in either direction of more than 10% prior to departure will enable us to adjust our prices.'

7. After the holiday, the claimants in the main proceedings requested the agency to reimburse to them a part, namely EUR 217.61, of the total price already paid by them, claiming that it ought to have been revised downwards in proportion to the dollar amount calculated in respect of the services offered following a change in the exchange rate of that currency, which was exchanged on the date of their departure at the rate of USD
1.08 to EUR 1.

8. The agency refused to reimburse the claimants in the main proceedings, relying in particular on Article 11(1) of the law of 16 February 1994.

9. The claimants in the main proceedings then brought the matter before the Collège d'arbitrage de la Commission de Litiges Voyages (Arbitration Panel of the Travel Dispute Committee), a non-profit-making association governed by Belgian law.

CURIA - http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-125/04&jur=C

C-125/04, Denuit and Cordenier, Judgment of 27 January 2005, ECR 2005 p. I-923, ECLI:EU:C:2005:69

11. As a preliminary issue it must be examined whether the abovementioned Collège d'arbitrage should be regarded as a court or tribunal for the purposes of Article 234 EC.

12. In order to determine whether a body making a reference is a court or tribunal of a Member State for the purposes of Article 234 EC, the

Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 Dorsch Consult [1997] ECR I- 4961, paragraph 23, and the case-law there cited, and Case C-516/99 Schmid [2002] ECR I-4573, paragraph 34).

13. Under the Court's case-law, an arbitration tribunal is not a 'court or tribunal of a Member State' within the meaning of Article 234 EC where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case 102/81 'Nordsee' Deutsche Hochseefischerei [1982] ECR 1095, paragraphs 10 to 12, and Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraph 34).

14. In the main proceedings it is apparent from the decision to refer the matter that submission of the matter to the arbitration panel of the travel dispute committee stems from an arbitration agreement entered into between the parties.

15. Belgian legislation does not lay down recourse to this arbitration board as the sole means of resolving a dispute between an individual and a travel agency. It is true that an ordinary court before which a dispute is brought to which an arbitration agreement applies must decline jurisdiction under Article 1679(1) of the Belgian judicial code. None the less, jurisdiction of the arbitration panel is not mandatory in the sense that, in the absence of an arbitration agreement entered into between the parties, an individual may apply to the ordinary courts for resolution of the dispute.

16. Since in the main proceedings the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the Belgian public authorities are not involved in the decision to opt for arbitration, the Collège d'arbitrage de la Commission de Litiges Voyages cannot be regarded as a court or tribunal of a Member State for the purposes of Article 234 EC.

17. Accordingly, the Court is not competent to rule on questions referred to it by that body.

Consumer law – public law/public policy/arbitrability

"The history of the term 'subject matter incapable of settlement by arbitration under the law of the country in which the award is sought to be relied upon' goes back to the Geneva Convention on the Execution of Foreign Judicial Awards 1927. It was discussed by Allsop J in Comandate Marine Corp v Pan Australia Shipping Pty Ltd.43 He identified as non-arbitrable matters in which there was a sufficient legitimate public interest rendering the enforceable, private extra-curial resolution of disputes concerning

Robert French, Arbitration and Public Policy, Asia Pacific Law Review, 2016, 24:1, 1-15, DOI: 10.1080/10192577.2016.1198542 the matter inappropriate."

Distinction from international arbitration: C-284/16, Achmea, Judgment of 6 March 2018, Publié au Recueil numérique, ECLI:EU:C:2018:158

"54. It is true that, in relation to commercial arbitration, the Court has held that the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling (see, to that effect, judgments of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraphs 35, 36 and 40, and of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraphs 34 to 39)."

...arbitrators had not applied mandatory EU law over compensation. Debate.

- A Canadian company that wants to stop UK courts from hearing a dispute already arbitrated in Canada has failed, after a judge ruled

that the arbitrators had not applied mandatory EU law over compensation

- http://www.bailii.org/ew/cases/EWHC/QB/2009/2655.rtf
- http://www.globalarbitrationreview.com/news/article/19460 (link is not working in 2021)

Pros and cons for consumers exclusion of arbitration as a way of resolving disputes

David Collins, *Compulsory Arbitration Agreements in Domestic and International Consumer Contracts:*

- "a protectionist mentality may be misplaced because disadvantages associated with consumer arbitration, primarily related to cost, may be illusory and are often outweighed by benefits;"

Susan Schiavetta, *Does the Internet Occasion New Directions in Consumer Arbitration in the EU?*

" By and large problems arise when awards are being recognised and enforced under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Specifically it is difficult for consumers to either argue that consumer protection comes under the public policy exception found in Article V(2) (b) or rely on Article V(2) (a), which allows courts to refuse recognition and enforcement based on the non-arbitrability of the dispute."

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- **Robert French**, Arbitration and Public Policy, Asia Pacific Law Review, 2016, 24:1, 1-15, DOI: 10.1080/10192577.2016.1198542 the matter inappropriate."
- **Alina Oprea,** *Arbitration and Community Consumer Law - Some comments on the conciliation between the two areas, based on the decision of the European*

Court of Justice in Centro Movil, Romanian Arbitration Journal („Revista română de arbitraj"), no. 3/2009, p.33

- **Susan Schiavetta**, Does the Internet Occasion New Directions in Consumer Arbitration in the EU?**,** 2004 (3) *The Journal of Information, Law and Technology (JILT)*. http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/schiavetta/
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X. Interpretation and application of European Union law by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

Agenda

- Application of EC Law in Arbitration Proceedings
- Interpretation and application of European Union law
- Interpretation and application of European Union law by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
    - Reference to arbitration courts in the European Union
    - European Union law - private international law relation
    - Establishing in law an arbitration award on a directive
    - Interpretation of Romanian law and European law
    - Publication of a directive, reason for not fulfilling the contract
    - Application of Directive 2000/35
    - European Directive part of the reasoning on applicable law
    - Implementing Directive 2011/7/EU on combating late payments in commercial transactions
    - The purpose of transposing the Directive, part of the motivation of the arbitration award
- Conclusion

Abstract:

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

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

Application of EC Law in Arbitration Proceedings

The arbitrators are obliged to apply the EU law. The arbitrators conclude the issue before the arbitration court and evaluate the law governed to the case. If it raises a question of EU law, the arbitrators will consider this law. The arbitrators must observe Community law and it follows the principles of primacy and uniform application of EC law[1].

The problem of the application of EC law was monitored mostly in the area of competition law[2]. To the most important judgments belong *Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij*[3] and *Eco Swiss China Time Ltd v. Benetton International NV*.[4] It is not foreclosed in the area of consumer contracts nor individual employment contracts. The

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

[2] Rozehnalová, N.: Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku, Praha: ASPI, 2002, pp. 145. 16 C-393/92.

[3] C-393/92.

[4] C-126/97.

last subsection will analyse the judgment of the ECJ in case *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*[5], concerning the consumer dispute before arbitration court.

VERONIKA HRADILOVÁ, EUROPEAN LAW IN ARBITRATION PROCEEDING

Interpretation and application of European Union law (1)

- Arbitration is an alternative private jurisdiction (Article 541 Code of Civil Procedure). The application of the European Union law norms is different, depending on their character. The distinction between the interpretation and application of European Union law, which is made by the case-law of the Court of Justice of the European Union, is itself subject to interpretation. In general, the courts try by specific means to apply judicial activism, teleological interpretation and other methods to determine a certain way of interpreting the law. Commercial arbitration still has limited access to the rich mass of interpretation of the European Union law by way of preliminary reference.
- The Court of Justice of the European Union shall, in accordance with the powers conferred by the Treaty on European Union, *"ensure respect for the law in the interpretation and application of the Treaties".* National courts apply European Union law and the European Court of Justice has exclusive jurisdiction to interpret the law, within the system of preliminary references, Article 267 TFEU. See also **Paul Craig, Grainne de Burca**, *European Union Law, Comments, jurisprudence and doctrine,* Ed. Hamangiu, 2009, p. 618-619.

Interpretation and application of European Union law (2)

- The application of European Union law was primarily realized due to Romania's accession to the European Union, but the judgments of the Court of International Commercial Arbitration attached to the

[5] C 168/05.

Chamber of Commerce and Industry of Romania (hereinafter "CAB") are also an element of rationality of the judgment. Arbitration awards in which European Union law is applied reflect the publicity of private law by as many norms of public law, some of which have an imperative character (hence the tense relationship between arbitration and consumer protection regulations, e.g. abusive clauses). A more important aspect to be noticed is whether failure to comply with European Union law could lead to the admissibility of an action for annulment of the arbitration award (and, at least as the trend is expressed in Asturcom case, it is not a favorable one for arbitration).

See Ch. IX - **Arbitration and EU Consumer law**

Interpretation and application of European Union law by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

- Reference to arbitration courts in the European Union
- European Union law - private international law relation
- Establishing in law an arbitration award on a directive
- Interpretation of Romanian law and European law
- Publication of a directive, reason for not fulfilling the contract
- Application of Directive 2000/35
- European Directive part of the reasoning on applicable law
- Implementing Directive 2011/7/EU on combating late payments in commercial transactions
- The purpose of transposing the Directive, part of the motivation of the arbitration award

Reference to arbitration courts in the European Union

- "In other words, in concordance with the practice of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania - but also with the constant practice of commercial arbitration throughout the European Union - by its behavior before the Arbitral Tribunal it agreed upon the complaint made by the applicant, so that the Arbitral Tribunal is competent to resolve the present dispute."
- CAB, Arbitration notice no. 59/2008, unpublished.

Citing European directives as an argument of authority

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

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

CAB, arbitration award no. 96/2008, unpublished. Currently, the agency contract is regulated by art. 2072-2095 found in the Civil Code. In addition, the disputes in this field were not lacking in a certain period: the arbitral award no.94 / 22nd of April 2004, published in the Romanian Arbitration Magazine (”Revista română de arbitraj”), no. 4/2010, pp. 69-72. The Court of Justice has ruled (Case C-381/98 Ingmar, judgment of 9th of November 200 ECR 2000 p. 1-9305 ECLI: EU: C: 2000: 605) for cross-border – even non-EU- application of the directive.

European Union law - private international law relation

- "In assessing the measures set by the preceding paragraph, the Arbitral Tribunal took into account a factual situation which is found in practice in numerous contracts presenting the complexity of the mentioned one as well as the overlapping of commercial, administrative relationships and external element [footnote: The term "external" is not really appropriate for issues related to the European Union, of which Romania is a member, and its institutions, which are equally institutions of Romania; the situation remains external to the contract.] represented by the specific conditions and deadlines assumed by European funding. "(the footnote is from the arbitration award).
- CAB, arbitral award no. 132/2013, unpublished.

Establishing in law an arbitration award on a directive

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

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

Interpretation of Romanian law and European Consumer law (I)

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

"Neither the claim that clause 3.11 is *abusive* and, therefore, null, in relation to the provisions of art. 3 of the Directive no. 93/13 / EEC on unfair terms in consumer contracts (published in the Official Journal of the European Communities of the 21st of April 1993), and Law no. 193/2000 on unfair terms in contracts concluded between traders and consumers, republished (Official Journal of the European Communities No. 305 of 18 April 2008), cannot be accepted because, even if they are likely to create a significant imbalance between the rights and the obligations of the parties - which remains to be discussed, however, as long as the locator / financier has fulfilled its obligation to deliver the good, and the usage, guarding and control of the good return to the lessee / user, it is therefore normal for the latter to take over, in whole or in part, the related risks - nor art. 3 par. 1 of the Directive no. 93/13 / EEC and no. 4 of Law no. No 193/2000 are not relevant in the present case, since the defendant plaintiff, as a legal person, *is not* a consumer, according to those normative provisions.

Interpretation of Romanian law and European Consumer law (II)

For the purpose of this directive, *"consumer"* means "any natural person who, in the context of contracts covered by this Directive, acts for purposes outside his/her professional activity" (Art. 2 letter (b)], and art. 2 par. 1 of the Law no. 193/2000, republished, provides, in full agreement

with the Directive's text, that the *consumer* is understood to mean "any natural person or group of natural persons constituted in associations which, by virtue of a contract falling within the scope of this law, acts for the purposes outside of its commercial, industrial production, craft or liberal business activity".

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

CAB, arbitration award no. 148/2011, unpublished. The solution is constant at the Court of International Commercial Arbitration and is also envisaged in the coming years.> CAB, Arbitration Session no. 160/2012, unpublished. "For the purpose of obtaining a different interpretation of the clause (...) The contract at issue, namely the specific terms and conditions of the financial leasing contract, concluded with the defendant, the claimant cannot rely on the provisions of Council Directive 93/13 / EEC of the 9th of April 1993, transposed into our national legislation by Law no. 193/2000 regarding the abusive clauses in the contracts concluded between traders and consumers, since the applicant as a trading company - a legal person, having the status of a trader under the Commercial Code, then in force, which she herself invokes in the action, does not fall under the provisions Article 2 paragraph (1), not being able to be qualified as a consumer." Also, in the arbitral award no. 83/2016 (unpublished): "Neither the claims regarding the abusive nature of certain clauses in the contract are founded, because these clauses are circumscribed to the main object of the contract and, therefore, are exempted from the substantive control mechanism of abusive clauses established by Directive 93/13 / EEC and Law no. 193/2000."

Publication of a directive, reason for not fulfilling the contract

In one dispute one of the parties invoked the emergence of a directive which, if transposed, would lead to higher costs and restoration of works, since the new technical conditions imposed by the Directive are different from the existing contractual stipulations.

- CAB, Arbitration Notice no. 38/2014, unpublished.

Application of Directive 2000/35

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

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

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

European Directive part of the reasoning on applicable law (I)

- In a case in which the capacity of an agent to lawfully represent a company is discussed, the Arbitration Court also took into account the Directive *"on the advertising of branches established in a Member State by certain types of companies falling within the scope of the legislation of another State ".*
- "Directive 89/666 of the Council of the European Communities, Article 2 reflects the solution that the right to legal representation of the branch is governed by the law of the parent company. This is a reflection of the international private law principle of *"lex societatis"* which, inter alia, provides that the branch, when it comes to its ability to conclude legal acts and the power of legal representation of its organs, is governed by the law of the parent company. In the present case, it is German law; therefore the provisions of the 2006 United Kingdom Act on Directors (directors) are irrelevant."
- CAB, arbitration award no. 38/2015, unpublished.

European Directive part of the reasoning on applicable law (II)

- Another similar example is the reference to the transposition of the same directive by two Member States of the European Union, and consequently the applicable law being uniform.
- "In this context, the [Arbitral] Tribunal reminds us that the copyright for computer programs is harmonized in the Member States of the European Union by Directive (EC) No. 24 of the 23rd of April 2009 on the legal protection of computer programs (codified version of Directive 91/250 of the 14th of May 1991) and the Directive was implemented both by "A", the country where the "IM" computer program's rights holder is located, as well as in "B" [the State] where the plaintiff's own rights are claimed to have been incurred."
- CAB, Arbitration Session no. 58/2016, unpublished. The same situation is found in the case solved by the arbitral award no. 102/2016, unpublished.

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

- In a case involving a political party (debtor) and a company constituted under Law no. 31/1990. The arbitral court uses the "*a fortiori*" method of interpretation:
- "Article 5 from Government Ordinance no. 11/2013, cited before, refers to legal relationships that do not result from the exploitation of a profit-making enterprise within the meaning of Art. 3 par. 3 of the Civil Code, without distinguishing whether both parties are enterprises, or only one of them has this quality, so that the application of the text cannot be restricted by interpretation, since *ubi lex nos distinguit, nec nos distinguere debemus*. A restrictive application of the article in question results neither from Directive 2011/7 / EU on combating late payments in commercial transactions, which G.O. no. 13/2011 has transposed it, according to its substantiation note."
- CAB, arbitration award no. 107/2015, unpublished.

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

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

"Law no. 220/2008 aims at transposing the Directive 2009/28 / EC of the European Parliament and of the Council of 23rd of April 2009 on the promotion of the use of energy from renewable sources, amending and subsequently abolishing Directives 2001/77 / EC and 2003/30 / EC. The transposition of the Directive was based on Art. 35 paragraphs (1) and (2) of Romania's Constitution, whereby the state recognizes the right of every person to a healthy and ecologically balanced environment, hence the public interest in adopting the methodology of the amended Law no. 220/2008. The Community provisions have been transposed by the national legislator under Law no. 220/2008, in order to regulate the system for promoting the production of energy from renewable energy sources by using green certificates. According to the Explanatory Memorandum for the approval of the Government Emergency Ordinance amending and supplementing Law no. 220/2008, the green certificates system is a support scheme to encourage producers of electricity to use renewable sources, which consists in giving the resellers the electricity sold to the final consumers, the latter being obliged to purchase a number of green certificates calculated according to the quota set by A.N.R.E., applied to the supplied electricity. (...) Their agreement to supply energy, to maintain the power plant, to pay the cost of electricity and to take over the plant owned by the defendant was not altered in any way by the entry into force of Law no. 134/2012. It has imposed, due to reasons regarding environmental protection and stimulating the development of renewable energy production, a cost applicable to all participants on the market. The defendant's view that the immediate application of Law [No] 220/2008 would be a partial retroactivity of the fore mentioned law, since it would attach to the contract other legal consequences than those agreed by the parties, is not sustained. No effect of the contract, as it was negotiated, was modified by the entry into force of Law no. 220/2008. In addition, the final consumer's obligation to pay the CV was applied only for the subsequent activity of supplying energy, so that the argument that the law is retroactive does not have sustainability. "

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

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XI. Human rights and arbitration

Agenda

- Accession of the EU to the ECHR. Impact for arbitration
  - Opinion 2/13 of the ECJ, 18 December 2014
- ECtHR and arbitration
- Investment arbitration and human rights
  - What is arbitration from the perspective of the President of ECHR?
  - Dispute resolution: ECHR | investment arbitration
- United Nations Guiding Principles on Business and Human Rights
- The Hague Rules on Business and Human Rights Arbitration
  - The proposal for the "International Arbitration of Business and Human Rights Disputes"
- *2020 in Review: The Pandemic, Investment Treaty Arbitration, and Human Rights*
- Conclusion

Opinion 2/13 of the ECJ, 18 December 2014

Accession of the EU to the ECHR. Impact for arbitration

Opinion 2/13 of the ECJ, 18 December 2014

34. According to well-established case-law of the Court of Justice, fundamental rights form an integral part of the general principles of EU law. For that purpose, the Court of Justice draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (judgments in *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4, and *Nold* v *Commission*, 4/73, EU:C:1974:51, paragraph 13). In that context, the Court of Justice has stated that the ECHR has special significance (see, in particular, judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41, and *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 283). Article F(2) of the Treaty on European Union (which became, after amendment, Article 6(2) EU) codified that case-law.

Opinion 2/13 of the ECJ, 18 December 2014

a) The specific characteristics and the autonomy of EU law

179. It must be borne in mind that, in accordance with Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law. However, as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the EU (see, to that effect, judgments in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 60, and *Åkerberg Fransson*, EU:C:2013:105, paragraph 44).

See: p. 179-200

Opinion 2/13 and the autonomy of EU law

„A second thread that emerges from the gradual prominence of autonomy is that the Court's interpretation of the principle is somewhat detached from the substantive issues that are at stake. This was illustrated in a striking manner in Opinion 2/13: whilst ostensibly about the protection of human rights and the implementation of Article 6(2) TEU which requires that the Union accede to ECHR, the long analysis in Opinion 2/13 had nothing to do with the protection of fundamental human rights. It was about the institutional and procedural arrangements negotiated carefully—and with input from the Court of Justice itself—in order to ensure that the interpretation of EU law would be a matter left for the Court of Justice. The concept of autonomy was, therefore, viewed through a narrow Court- centred lens and the co-operation with the European Court of Human Rights was treated suspiciously, even though the relationship between the two courts had been deeply symbiotic."

Panos Koutrakos, *The autonomy of EU law and international investment arbitration*, Nordic Journal of International Law, 88, 1/2019, pp. 41-64.

Opinion 2/13 of the ECJ, 18 December 2014

- b) Article 344 TFEU
- 201. The Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein (see, to that effect, Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in Commission v Ireland,

C-459/03, EU:C:2006:345, paragraphs 123 and 136, and Kadi and Al Barakaat International Foundation v Council and Commission, EU:C:2008:461, paragraph 282).

- 202. Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law — and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system — must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU (see, to that effect, judgment in Commission v Ireland, EU:C:2006:345, paragraph 169), it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU.
- 203. It is precisely in view of these considerations that Article 3 of Protocol No 8 EU expressly provides that the accession agreement must not affect Article 344 TFEU.
- See: p. 201-2014

Opinion 2/13 of the ECJ, 18 December 2014

c) The co-respondent mechanism

d) The procedure for the prior involvement of the Court of Justice

In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

– it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;

– it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;

– it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and

– it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in

that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

Consequently, the Court (Full Court) gives the following Opinion:

The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

ECtHR and arbitration

CASE OF MUTU AND PECHSTEIN v. SWITZERLAND (Applications nos. 40575/10 and 67474/10), STRASBOURG, JUDGMENT 2 October 2018, FINAL 04/02/2019

1. Declares, unanimously, the applications admissible as to the complaints concerning a lack of independence and impartiality on the part of the CAS and a failure to hold a public hearing before the CAS, and inadmissible for the remainder;

2. *Holds*, by five votes to two, that there has been no violation of Article 6 § 1 of the Convention as regards the applicants' complaints of a lack of independence and impartiality on the part of the CAS;

3. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention in respect of the second applicant on account of the lack of a public hearing before the CAS;

4. *Holds*, by five votes to two,

(a) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, by five votes to two, the remainder of the claim for just satisfaction.

https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2240575/10%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186828%22]}

- **Investment arbitration and human rights**

Interviews: Toby Landau and Robert Spano

- QC on arbitration and human rights
- Toby Landau QC on arbitration and human rights (interview, youtube)
- - investment arbitration 1.30-3.40; who can claim human rights (12-14).

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What is arbitration from the perspective of the President of ECtHR? Róbert Spanó, Conversation with Neil, Delos, 13 August 2020, https://www.youtube.com/watch?v=rg9hoiND14s, min. 28 - 33

Dispute resolution: ECHR | investment arbitration

- Is the margin appreciation doctrine one that should applied in other areas of international law, such as international invetsment law?

  Róbert Spanó, Conversation with Neil, Delos, 13 August 2020, https://www.youtube.com/watch?v=rg9hoiND14s, 41 – 43

- Fair compensation:

  Róbert Spanó, Conversation with Neil, Delos, 13 August 2020, https://www.youtube.com/watch?v=rg9hoiND14s, 43 – 44.10

José E. Alvarez, *The Boundaries of Investment Arbitration: The Use of Trade and European Human Rights Law in Investor-State Disputes*

- 65 Rulings from 343 not discontinued/settled: about 20 percent with ECtHR or WTO reference

- But 53 with serious ECtHR reference vs. 35 for WTO (but these most likely distinguishing substantive trade)

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- Competing views on ECtHR law's relevance to expropriation: Tecmed v. Mexico, Azurix v. Argentina/Fireman's Fund v. Mexico, Siemens v. Argentina
- Competing views on the applicability of the ECtHR's margin of appreciation: Continental Casualty v. Argentina, Philip Morris v. Uruguay (Majority)/Siemens v. Argentina, Quasar v. Russia, Bernhard von Pezold v. Zimbabwe

José E. Alvarez, *The Boundaries of Investment Arbitration: The Use of Trade and European Human Rights Law in Investor-State Disputes*

Xavier Taton, Guillaume Croisant, *Intra-EU Investment Arbitration Post- Achmea: A Look at the Additional Remedies Offered by the ECHR and EU Law*

"The internal market of the EU is based on four fundamental freedoms, namely the free movement of goods, persons, capital and services (which includes the freedom of establishment). Under certain circumstances, State measures jeopardising an investment may constitute an illegal hinder to these freedoms, in particular the free movement of capital and services. Pursuant to the CJEU's case law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must (i) be applied in a non-discriminatory manner; (ii) be justified by imperative requirements in the general interest; (iii) be necessary and proportionate to these requirements; and (iv) be compatible with the fundamental rights, in particular the Charter of Fundamental Rights of the European Union and the ECHR (which, as we have seen, protect the investors' rights to property, to a fair trial and to be free from discrimination)."

Xavier Taton, Guillaume Croisant, *Intra-EU Investment Arbitration Post- Achmea: A Look at the Additional Remedies Offered by the ECHR and EU Law*

"(…) investors opposing what they see as excessive intervention from EU Member States are not limited to investment arbitration but may resort to additional or alternative remedies under the ECHR or EU law. In the post-*Achmea* world we can expect that investors are increasingly likely to consider these in their assessment of the potential remedies available to them in any given case; each offering a contrast in terms of procedures, substantive rules, chances of success, remedies and enforcement mechanisms."

United Nations Guiding Principles on Business and Human Rights

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

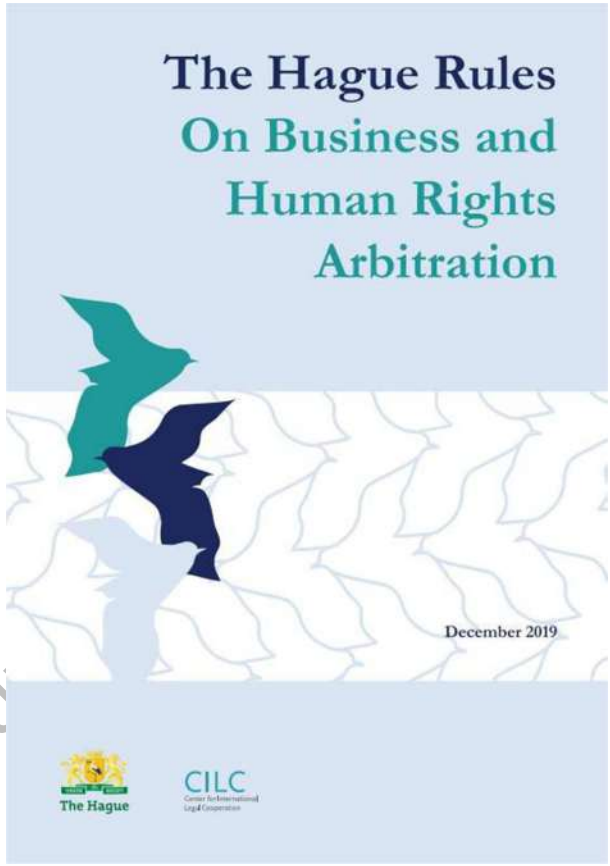
Commentary

Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, freetrade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf

The Hague Rules on Business and Human Rights Arbitration

The Hague Rules on Business and Human Rights Arbitration provide a set of procedures for the arbitration of disputes related to the impact of business activities on human rights. The Hague Rules are based on the Arbitration Rules of the United Nations Commission on International Trade Law (with new article 1, paragraph 4, as adopted in 2013) (the "UNCITRAL Rules"), with modifications needed to address certain issues likely to arise in the context of business and human rights disputes



The Hague Rules on Business and Human Rights Arbitration

"As with the UNCITRAL Rules, the scope of the Hague Rules is not limited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute and extends to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under the Hague Rules. Parties could thus include business entities, individuals, labor unions and organizations, States, State entities, international organizations and civil society organizations, as well as any other parties of any kind. Equally, the Hague Rules purposefully do not define the terms "business,"

“human rights” or “business and human rights.” For the purposes of the Hague Rules, such terms should be understood at least as broadly as the meaning such terms have under the UN Guiding Principles on Business and Human Rights. However, in the vast majority of cases, no definition of these terms should be necessary at all.”

The Hague Rules on Business and Human Rights Arbitration

“Like the UNCITRAL Rules, the Hague Rules do not address the modalities by which the parties may consent to arbitration nor the content of such consent. As with all arbitration, proper and informed consent remains the cornerstone of business and human rights arbitration. Such consent can be established before a dispute arises, e.g., in contractual clauses, or after a dispute arises, e.g., in a submission agreement (compromis).”

The Hague Rules on Business and Human Rights Arbitration

“The Hague Rules also do not address enforcement of arbitral awards, which are governed by national laws and various treaty obligations, including in most cases the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Lastly, the Hague Rules do not address other modalities for ensuring compliance with an award, such as monitoring by intergovernmental institutions, non-governmental organizations or multi-stakeholder initiatives.”

The proposal for the "International Arbitration of Business and Human Rights Disputes" (2017)

The use of arbitration in business and human rights disputes is not free from challenges. Two of the main issues are (i) the risk of non-enforceability of a BHR Arbitration award and (ii) the clash between the need for transparency, essential in disputes involving human rights' violations, and confidentiality, one of the main features of arbitration. The Rules, however offer a solution for these and other relevant issues (*e.g.*, evidence gathering, protection of witnesses, agreement to arbitrate, and choice of law).

The enforceability issue arises from the perception of human rights' violation in the society. Adjudicating the breach of an individual's human rights has traditionally been perceived as a matter for a state's national court as it has no commercial nature. Therefore, there is the risk that enforcement may be challenged on the grounds that the adjudication of human rights issues by a private tribunal is either not capable of being settled by arbitration under national law because not commercial or is contrary to the public policy of that State (Art. 5(2) of the New York Convention).

To overcome this risk, the draft of the Rules state at Article 1 that:

"*The parties agree that any dispute that is submitted to arbitration under these Rules shall be considered to have arisen out of a commercial relationship or transaction for the purposes of Article I of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter called the "New York Convention*")".

Maria Laura Izzo, A Further Step Towards Business and Human Rights Arbitration – The Hague Rules, Kluwer
Arbitration Blog, 13.09.2019,
http://arbitrationblog.kluwerarbitration.com/2019/09/13/a-further-step-towards-business-and-human-rights-arbitration-the-hague-rules/

The proposal for the "International Arbitration of Business and Human Rights Disputes" (2017)

- Regarding transparency, many argue that the public interest in the resolution of human rights disputes requires a high degree of transparency which cannot be guaranteed by arbitration, traditionally characterized by confidentiality. Other argue that transparency can be better guaranteed in arbitration than in public courts because it guarantees greater neutrality and impartiality in politically and emotionally charged disputes.
- To guarantee a high degree of transparency and to promote awareness and legal certainty, Article 35 establishes that the main documents of the arbitration proceeding, such as the notice of arbitration, response, statement of claim and of defence, lists of the exhibits, witnesses and any other document provided or issued by the arbitral tribunal need to be made public.
- **Maria Laura Izzo**, A Further Step Towards Business and Human Rights Arbitration – The Hague Rules, Kluwer Arbitration Blog, 13.09.2019, http://arbitrationblog.kluwerarbitration.com/2019/09/13/a-further-step-towards-business-and-human-rights-arbitration-the-hague-rules/

Business related human rights…

Business related human rights issues cover a wide range of impacts that a company, its contractors, its suppliers or business partners may have on people. They include, but are not limited to:

- ✓ Damage to people's health through pollution, environmental accidents and health and safety failures;
- ✓ Use of forced labor or child labor, or underpayment of workers;
- ✓ Provision of unsafe or unhealthy working conditions;
- ✓ Forced or involuntary displacement of communities, including indigenous communities;
- ✓ Use of excessive force by security guards protecting assets;
- ✓ Discrimination against employees, for example by race, gender or sexuality;

- ✓ Depletion or contamination of water sources that local communities depend upon.
- ✓ https://assets.kpmg/content/dam/kpmg/xx/pdf/2016/11/addressing-human-rights-in- business.pdf

2020 in Review: The Pandemic, Investment Treaty Arbitration, and Human Rights

"UNCTAD's 2020 **World Investment Report** notes that the pandemic has caused a severe drop in foreign direct investment (FDI), falling well below the trough reached during the 2008 global financial crisis, with a disproportionate impact on low- and middle-income countries (LMICs). Altogether, this implies that countries, particularly LMICs, will likely compete for limited available FDI. In this environment, countries may be willing to forego human rights and other sustainable development considerations in an attempt to attract FDI.

The COVID-19 pandemic has also had severe human rights implications. The pandemic has **exacerbated** human rights challenges globally, which the UN High Commissioner **notes** will "create even wider inequalities." Alarmingly, Amnesty International has **noted** that the pandemic is "being exploited as a pretext for oppression in nearly every region of the world." In response, UN Secretary General Guterres has **called for** human rights to be placed "front and center" of any pandemic response."

Nicholas J. Diamond, Kabir A.N. Duggal, *2020 in Review: The Pandemic, Investment Treaty Arbitration, and Human Rights*, Kluwer Arbitration Blog, 23.01.2021,

http://arbitrationblog.kluwerarbitration.com/2021/01/23/2020-in-review-the-pandemic-investment-treaty-arbitration-and-human-rights/

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XII. ADR mechanisms at EU level

Agenda

- *Legal context. Mediation, conciliation, med-arb, arbitration*
  - 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 OJ L 136, 24.5.2008, p. 3–8/ Aim of the Directive, a balanced relationship between mediation and judicial proceedings: adequate safeguards are needed
- *Case law*
  - *C-317/08 to C-320/08, Alassini and others, Judgment of 18 March 2010, ECR 2010 p. I-2213, ECLI:EU:C:2010:146 / Facts, free implementation of out-of-court procedures, legitimate objective and implementation of the principle of judicial effective protection*
  - *C-464/11, Galioto, Removed from the register on 8 February 2013, ECLI:EU:C:2013:79*
  - *C-492/11, Di Donna, Judgment of 27 June 2013, ECLI:EU:C:2013:428/ Facts, impact on mediatiation directive's future*
  - *C-75/16, Menini and Rampanelli, Judgment of 14 June 2017, ECLI:EU:C:2017:457 / Facts, relation between ADR and mediation directive*
  - Romanian case law

Legal context. Mediation, conciliation, med-arb, arbitration

- *Mediation*
- *Conciliation*
- *Med-Arb*
- *Arbitration*

- 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 OJ L 136, 24.5.2008, p. 3–8
- EU: Alternative dispute resolution for consumers/ Online dispute resolution
- https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en
- European Commission, Green paper on alternative dispute resolution in civil and commercial law (COM/2002/0196 final)
- See. Ch. **IX. Arbitration and EU Consumer law**

Directive 2008/52/EC

"(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market."

"(5)Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements."

Directive 2008/52/EC - **Objective and scope (art. 1)**

Article 1

Objective and scope

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

Directive 2008/52/EC – Definition (art. 3)

• 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

Directive 2008/52/EC – **Recourse to mediation (art. 5)**

Article 5

Recourse to mediation

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Directive 2008/52/EC – **Enforceability of agreements resulting from mediation (art. 6)**

Article 6

Enforceability of agreements resulting from mediation

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument *in accordance with the law of the Member State* where the request is made.

Investor-State Mediation

"Interest is growing in the use of mediation for investor-state disputes. Recent webinars on investor-statemediation (including SIDRA's **webinar**) have explored **ICSID's new investor-state mediation rules**, the role of the Singapore Convention for investor-state mediation and the need for further domestic legislation on mediation. Discussions at these virtual conferences have also emphasised the importance of who is at the table, noting that with disputes involving states it can be time consuming and difficult to identify those who have the requisite authority to agree to a resolution. A topic which seems to have received less attention, though is also of fundamental importance, is who in terms of the mediators will be at the investor-state mediation table."

• See: Anna Howard, Investor-State Mediation: Who Will Be At The (Top) Table?, Kluwer Mediation Blog, 16.10.2020, http://mediationblog.kluwerarbitration.com/2020/10/16/investor-state-mediation-who-will-be-at-the-top-table/

• *Case law*

C-317/08 to C-320/08, Alassini and others, Judgment of 18 March 2010

• These references for a preliminary ruling concern the interpretation of the principle of effective judicial protection in relation to national legislation under which an attempt to achieve an out-of- court settlement is a mandatory condition for the admissibility before the courts of actions in certain disputes between providers and end-users under **Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and users' rights relating to electronic communications networks and services** (Universal Service Directive) (OJ 2002 L 108, p. 51). *010 p. I-2213, ECLI:EU:C:2010:146*

• **Nor do the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation**

which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.

C-464/11, Galioto, Removed from the register on 8 February 2013, ECLI:EU:C:2013:79

Questions referred

1. Can Articles 3 and 4 of Directive 2008/52/EC, (1) concerning the effectiveness and competence of mediators, be interpreted as requiring that the mediator should also have legal skills and that the choice of mediator by the person responsible in the body concerned should take account of specific knowledge and professional experience relating to the subject-matter of the dispute?

2. Can Article 1 of Directive 2008/52/EC be interpreted as requiring criteria on the territorial competence of mediation bodies which are intended to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes?

3. Can Article 1 of Directive 2008/52/EC, concerning the balanced relationship between mediation and judicial proceedings, Article 3(a), recital 10 and recital 13 of Directive 2008/52/EC, concerning the essentially voluntary nature of the mediation process for the parties as regards its organisation and any decision to terminate it, be interpreted as meaning that, where an amicable voluntary settlement is not reached, the mediator may draw up a proposal for conciliation, unless the parties concerned have jointly requested him not to do so (since they consider that they must terminate the mediation process)?'

C-492/11, Di Donna, Judgment of 27 June 2013, ECLI:EU:C:2013:428

26 Thus, on the basis of settled case-law, it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (see to that effect, inter alia, Case C-225/02 García Blanco [2005] ECR I-523, paragraph 27 and case-law cited).

27 In the case in the main proceedings, following the judgment of the Corte costituzionale of 24 October 2012, the national legislation applicable to the dispute in the main proceedings is no longer that under consideration in the context of the request for a preliminary ruling (see, by analogy, Fluxys, paragraph 32). That judgment, declaring some of the provisions of Decree No 28/2010 incompatible with the constitution, has the effect of removing them from the national legal system.

C-75/16, Menini and Rampanelli, Judgment of 14 June 2017

49 That interpretation is supported by Article 3(a) of Directive 2008/52 which defines mediation as a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute. This process may be initiated by the parties or suggested or ordered by a court, but also prescribed by the law of a Member State. Furthermore, in accordance with Article 5(2) thereof, Directive 2008/52 is without prejudice to national legislation making the use of mediation compulsory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

50 As stated in recital 13 of Directive 2008/52, the voluntary nature of the mediation lies, therefore, not in the freedom of the parties to choose

whether or not to use that process but in the fact that 'the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time'.

51 Accordingly, what is important is not whether the mediation system is mandatory or optional, but the fact that the parties' right of access to the judicial system is maintained. To that end, as the Advocate General observed in point 75 of his Opinion, Member States retain their full legislative autonomy, on condition that Directive 2013/11 remains effective.

52 Accordingly, the fact that national legislation, such as that at issue in the main proceedings, has not only put in place an out-of-court mediation procedure, but has also made it mandatory to have recourse to that procedure before bringing an action before a judicial body, is not such as to jeopardise the attainment of the objective of Directive 2013/11 (see, by analogy, judgment of 18 March 2010, *Alassini and Others*, C-317/08 to C-320/08, EU:C:2010:146, paragraph 45).

C-75/16, Menini and Rampanelli

54 Nevertheless, it is settled case-law of the Court that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (judgment of 18 March 2010, *Alassini and Others*, C-317/08 to C-320/08, EU:C:2010:146, paragraph 63 and the case-law cited).

55 As the Advocate General observed in point 81 of his Opinion, although the judgment of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146) concerns a settlement procedure, the reasoning adopted by the Court in that judgment can be transposed to national legislation making recourse to other out-of-court procedures mandatory, such as the mediation procedure at issue in the main proceedings.

56 That said, as recital 45 of Directive 2013/11 in essence states, Member States are free to choose the means they deem appropriate for the purposes of ensuring that access to the judicial system is not hindered. The fact, first, that the outcome of the ADR procedure is not binding on the parties and, secondly, the fact that the limitation periods do not expire during such a procedure are two means which, amongst others, would be appropriate for the purposes of achieving that objective.

57 As regards the binding nature of the outcome of the ADR procedure, Article 9(2)(a) of Directive 2013/11 requires Member States to ensure that, in the context of that procedure, the parties have the possibility of withdrawing from the procedure at any stage if they are dissatisfied with its performance or operation. Furthermore, in accordance with Article 9(2)(b) of that directive, at the end of the ADR procedure, a solution is merely proposed to the parties and they have the choice as to whether or not to agree to or follow it.

C-75/16, Menini and Rampanelli

• 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) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prescribes recourse to a mediation procedure, in disputes referred to in Article 2(1) of that directive, as a condition for the admissibility of legal proceedings relating to those disputes, to the extent that such a requirement does not prevent the parties from exercising their right of access to the judicial system.

• On the other hand, that directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, in the context of such mediation, consumers must be assisted by a lawyer and that they may withdraw from a mediation procedure only if they demonstrate the existence of a valid reason in support of that decision.

Romanian case law
Directive 2008/52 /EC cannot be applied in labor disputes

• Curtea de Apel Ploiești, Secția I Civilă, Decizia nr. 284/2019, http://rolii.ro/hotarari/5c9ae5b4e49009e00b00004e

Directive 2008/52 /EC cannot be applied in labor disputes if there are rules of public order for the respective areas, for example, regarding the employment in special working conditions.

Romanian case law
The mediation agreement is not enforceable

• Judecătoria Alexandria, Încheierea nr. 1895 C/2010, în vol. *Culegere de hotărâri judecătorești pronunțate în materia medierii. Note si comentarii*, Ed. Universitară, 2012, p. 113

• Judecătoria Ineu, Încheierea nr. 161/2011 în vol. *Culegere de hotărâri judecătorești pronunțate în materia medierii. Note si comentarii*, Ed. Universitară, 2012, p. 521

Conclusion

- ODR (online dispute resolution) in consumer protection;
- Lack of interest in the interpretation of the mediation directive

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An explanation

This present book, “European Union law and arbitration. Slices and slides. Text, cases and materials”, is what the title highlights: *slices and slides*. This training course was prepared following the invitation addressed by Mr Professor Flavius Baias to teach the course "European Union law and arbitration" at the master's degree in "International Arbitration" of the Faculty of Law of the University of Bucharest.

The teaching material within this volume is rather a series of ideas or of references: it has a methodological, operational nature. But it is also a first form of a general construction dealing about the relationship between European Union law and arbitration. Documents enclosed reflect both theoretical and practical experiences. The reader has to get familiar with advanced concepts and mechanisms of both areas in order to fully understand this material.

I hope that this first step will be followed by debates and studies relevant to this field also in Romania.

Daniel-Mihail ȘANDRU has been a professor of European Union law and international trade law for over 20 years. He has been an arbitrator at the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania for over 10 years. With extensive research in both fields, and also experience as an arbitrator, Daniel-Mihial ȘANDRU produces in this volume a sketch of the tangled relationship between European Union law and arbitration.

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