Arbitration Clauses and Requirement for EU-Based Effective Judicial Review: Intersections between the EU Law and Commercial Arbitration in the Recent Case-law of the CJEU

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The article examines recent case-law of the CJEU related to interpretation of arbitration agreements in disputes involving EU law and the implications it brings both for the party autonomy in designing dispute resolution arrangements and the need to ensure uniform interpretation and application of EU law. In Parts I and II, the article analyses CJEU case-law on distinctions between intra-EU investment and commercial arbitration proceedings, as well as recent jurisprudence in which arbitration agreements were found to be incompatible with the EU law. In Part III, the notion of EU public policy is considered, which may trigger the requirement for effective review by the national courts in the context of commercial arbitration. In Part IV, the authors analyse what are the implications of the effective review requirement for the parties to arbitration, and what tools could be introduced to balance party autonomy in arbitration with the need to uphold EU legal principles.

In recent years, the evolving jurisprudence of the Court of Justice of the European Union (**CJEU**) has significantly impacted the landscape of arbitration within the European Union (**EU**). Among the most notable rulings is the 2018 *Achmea*[1] judgment, where the CJEU declared the arbitration nprovision in an intra-EU bilateral investment treaty incompatible with EU law. It has sparked extensive debate due to its implications for investor-state dispute settlement (ISDS) mechanisms based on treaties between EU Member States. However, the CJEU's stance on arbitration extends beyond the confines of investment arbitration. In the recent *ISU v Commission*[2] case, the CJEU scrutinized the compatibility of an arbitration mechanism embedded within the regulations of the International Skating Union (ISU) with EU competition law. This case highlighted the Court's willingness to reinforce a requirement for effective judicial review to commercial arbitration when fundamental EU norms are at stake. The *ISU* judgment raises questions about the potential for increased judicial oversight over arbitral awards involving EU public policy considerations.

Arbitral tribunals, whether seated in the EU or handling disputes connected to the EU, may encounter situations where EU law becomes relevant to the issues at hand, although the EU law

[1] Judgment of the Court of Justice of the European Union of 6 March 2018 *Slovak Republic v. Achmea B.V.*, Case C-284/16.

[2] Judgement of the Court of Justice of the European Union of 21 December 2023 *International Skating Union* v *Commission,* C-124/21 P.

generally does not recognize arbitral tribunals as capable of making preliminary references to the CJEU. While much attention has been focused on these challenges in the context of intra-EU investment treaty arbitration, similar concerns can arise in commercial arbitration, albeit with less drastic consequences.

I. CJEU'S FINDINGS IN *ACHMEA*: DISTINCTION BETWEEN INVESTMENT AND COMMERCIAL ARBITRATION

In 2018, the CJEU issued one of the most impactful judgements in the area of investment arbitration relating to disputes involving EU Member States and investors from another EU Member State (intra-EU disputes). In *Achmea*,[3] the CJEU ruled that the arbitration provision contained in the bilateral investment treaty concluded between the Netherlands and the Slovak Republic was incompatible with the EU law due to its adverse effect on the autonomy of the EU legal system. Namely, the Court interpreted an intra-EU investment arbitration agreement contained in a bilateral investment treaty as being in violation of Articles 267 and 344 of the Treaty on the Functioning of the European Union (**TFEU**), setting the exclusive jurisdiction of the CJEU to interpret and apply the EU law, and a corresponding obligation of the Member States not to submit a dispute concerning such interpretation and application to any other method of dispute settlement. The Court reasoned that arbitration provision in intra-EU investment treaty, such as the disputed one, may undermine the autonomy of the EU legal order in allowing disputes that involve the interpretation or application of EU law to be settled by arbitral tribunals, which are not part of the EU judicial system and therefore cannot refer questions to the CJEU for a preliminary ruling under Article 267 TFEU.

In the aftermath of *Achmea* judgement, its reasoning was subsequently extended by the CJEU when dealing with intra-EU disputes between Member States and investors under the Energy Charter Treaty,[4] and to other *ad hoc* arbitration agreements identical to arbitration provisions of intra-EU bilateral investment treaties between Member States and investors from another Member State.[5]

While the judgement in *Achmea* was met with controversies,[6] a general consensus held that its impact is limited to the investment treaty-based arbitration, not extending to international commercial arbitration.[7] A distinction between investment and commercial arbitration was confirmed by the CJEU itself in *Achmea* and later reaffirmed in *Komstroy*[8], as the Court recognized that in relation to commercial arbitration, "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

[3] Judgment of the Court of Justice of the European Union of 6 March 2018 *Slovak Republic v. Achmea B.V.*, Case C-284/16.

[4] Judgment of the Court of Justice of the European Union of 2 September 2021 *Republic of Moldova v Komstroy LLC*, Case C-741/19.

[5] Judgment of the Court of Justice of the European Union of 26 October 2021 *Republic of Poland v. PL Holdings Sàrl,* Case C-109/20.

6 Janssen A.U., Wahnschaffe J. (2019). Year One After Achmea. A Review of the State of Play in Investment Arbitration in 2019. *International Arbitration Law Review 22,* p. 117-143 [interactive]. Accessed online: https://repository.ubn.ru.nl/bitstream/handle/2066/208343/208343.pdf?sequence=1&isAllowed=y [accessed 26 08 2024]

[7] Ibid., p. 118. Hess B. (2018). The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice. *MPILux Research Paper (3)* [interactive]. Accessed online: https://ssrn.com/abstract=3152972 [accessed 21 08 2024], Lavranos N., Singla T. (2018). Achmea: Groundbreaking or Overrated? *17 German Arb. J. 208*, p. 348, 356. [interactive]. Accessed online: https://researchportal.vub.be/en/publications/achmea-groundbreaking-or-overrated [accessed 23 08 2024].

[8] Judgment of the Court of Justice of the European Union of 2 September 2021 *Republic of Moldova v Komstroy LLC*, Case C-741/19.

course of that review and they can, if necessary, be the subject of a reference to the [CJEU] for a preliminary ruling".[9] The emphasis put by the CJEU was seemingly the distinction of a "freely chosen" forum by the parties in commercial arbitration, and a "quasi chosen" mechanism of investment treaty-based arbitration, which is designed by the States and so imposed on private parties via the set of rules contained in international investment treaties concluded between the States themselves. With such mechanism, according to the CJEU, it is Member States that agreed to remove jurisdiction from their own courts (and from the system of national judicial remedies) in favour of investment treaty-based arbitration, although those same Member States have an obligation to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, as mandated by Article 19(1) of the Treaty on European Union (**TEU**).[10]

When analysing the conclusions drawn by CJEU in *Achmea,* it is noteworthy that the Court acknowledged, in the context of post-award proceedings in commercial arbitration, the possibility of national courts of the EU Member States, in performing a limited review of an arbitral award, to refer to the CJEU for a preliminary ruling to examine the fundamental provisions of EU law. However, the same rationale, at least to some extent, could be applied to intra-EU treaty-based investment arbitration, as the national courts within the EU, if met with requests for recognition and enforcement, or annulment of an award, can apply to the CJEU for a preliminary ruling if questions of interpretation and application of EU law are concerned. However, the CJEU refused to apply this rationale to arbitration clauses in intra-EU investment treaties, by seemingly holding that the Member States are precluded from imposing arbitration mechanism in their investment treaties independently from other considerations, such as the possibility of performing a limited review in post-award proceedings.

Ultimately, based on the findings of the CJEU, it could be argued that the essential qualifying factors of treaty-based arbitration, when compared with commercial arbitration, are listed as: (i) the specific subject matter of arbitration, namely, the disputes arising from alleged violations of international treaties which were concluded *by* the Member States, rather than under a classic commercial agreement concluded directly between the parties to a dispute; and (ii) the specific mechanism of arbitration clauses contained in intra-EU investment treaties, wherein the jurisdiction (agreement to arbitrate) is based on the offer by the Member States set within a text of the treaty, and which could be later accepted by the investor. Said features, characteristic to investment arbitration, coupled with the specific *party* to arbitration, i.e., the Member State itself, which has direct obligations to ensure effective legal protection in the fields covered by EU law,[11] constituted the CJEU's rationale in distinguishing arbitration provisions in intra-EU investment treaties from commercial arbitration agreements, holding that the former have an adverse effect on the autonomy of EU law and therefore are precluded under Articles 267 and 344 TFEU.

However, recent jurisprudence of the CJEU seemingly reinforces another carve-out for arbitration agreements: the requirement of effective judicial review in matters pertaining to EU public policy. Absence of effective judicial review on matters of interpretation and application of EU law in commercial arbitration not involving Member States can likewise attract criticism from the CJEU in defining whether a particular arbitration agreement is compatible with the EU law. Whereas in *Achmea* the CJEU relied solely

[9] Judgment of the Court of Justice of the European Union of 6 March 2018 *Slovak Republic v. Achmea B.V.*, Case C-284/16, para 54; Judgment of the Court of Justice of the European Union of 2 September 2021 *Republic of Moldova v Komstroy LLC*, Case C-741/19, para 58.

[10] Judgment of the Court of Justice of the European Union of 6 March 2018 *Slovak Republic v. Achmea B.V.*, Case C-284/16, para 55.

[11] Article 19(1) of the TEU.

on the distinction of treaty-based and commercial arbitration, by holding that the former encompasses a freely chosen forum by the parties that do not have direct obligations in ensuring full effectiveness of EU law, such freedom may be further curtailed, as evidenced from the recent decision in the case *ISU v Commission*.[12]

II. CJEU'S FINDINGS IN *ISU V COMMISSION*: EXPANDING THE BOUNDS OF SCRUTINY IN COMMERCIAL ARBITRATION

At the very end of last year, the CJEU issued a judgement on appeal in case C-124/21 P *International Skating Union v European Commission*[13]. The judgment garnered significant attention from the arbitration community and received mixed reviews for its potential impact on commercial arbitration.

The case concerned Commission's decision[14] determining that the ISU's prior authorisation and eligibility rules, which regulated the participation of athletes in international competitions, restricted competition in violation of Article 101 of the TFEU. These rules required skaters to obtain the ISU's permission to participate in non-ISU competitions, effectively limiting their opportunities and maintaining the ISU's control over the sport. ISU's decisions could be challenged before the Court of Arbitration for Sport (**CAS**), established in Lausanne (Switzerland), with the Swiss Supreme Court having jurisdiction of final review of the CAS awards.

The Commission established that the ISU rules violated EU competition law and contended that arbitration mechanism established by the ISU further reenforced the restriction of competition because it essentially insulated ISU's decisions from being examined under EU competition law. The General Court[15] annulled Commission's decision in part and found, *inter alia*, that the Commission was wrong to conclude that the arbitration rules reinforced the restrictions of competition caused by the ICU's eligibility rules.

In its judgment, the CJEU sided with the Commission and concluded that the General Court erred in law by merely finding, in an undifferentiated and abstract manner, that the arbitration rules "may be justified by legitimate interests linked to the specific nature of the sport", in so far as they confer on "a specialised court" the power to review disputes relating to the prior authorisation and eligibility rules, without seeking to ensure that those arbitration rules allowed for an effective review of compliance with the EU competition rules.

According to the CJEU, parties may enter into an agreement that subjects disputes to an arbitration body in place of the national court and that the requirements relating to the effectiveness of the arbitration proceedings may justify the judicial review of arbitral awards being limited, echoing the findings in *Achmea*. However, the CJEU pointed out that such judicial review must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy, in this particular case, Articles 101 and 102 TFEU. The requirement of effective judicial review means that, in the event that such rules contain provisions conferring mandatory and exclusive jurisdiction on an arbitration body, the court having jurisdiction to review the awards made by that body may confirm that those awards comply with Articles 101 and 102 TFEU, including, if necessary, by refereeing the case to the CJEU for a preliminary ruling under Article 267 TFEU. In the absence of such judicial review, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law.

[12] Judgement of the Court of Justice of the European Union of 21 December 2023 *International Skating Union* v *Commission,* C-124/21 P.

[13] Judgement of the Court of Justice of the European Union of 21 December 2023 *International Skating Union* v *Commission,* C-124/21 P.

[14] Commission Decision C(2017) 8230 final of 8 December 2017, Case 40208. [interactive]. Accessed online: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40208/40208_1579_5.pdf [accessed 23 08 2024].

[15] Judgment of the General Court of the European Union of 16 December 2020 *International Skating Union v Commission*, Case T93/18.

Due to this rationale, the CJEU held that recourse to the CAS arbitration is a reinforcement of the infringement of the EU competition rules, as the review of CAS awards falls out of the jurisdiction of courts of EU Member States.

Based on the CJEU's reasoning in *ISU v. Commission*, it could be argued that the Court established a requirement for EU-based effective judicial review of arbitration clauses in cases involving EU competition rules, as these fall under the norms of EU public policy. However, it is important to note that, according to CJEU case-law, EU public policy extends beyond just Articles 101 and 102 TFEU. Thus, the question remains whether other fundamental EU norms could also trigger application of this effective review requirement.

III. EU PUBLIC POLICY: CONSIDERATIONS TRIGGERING THE REQUIREMENT FOR EFFECTIVE REVIEW IN COMMERCIAL ARBITRATION

The concept of EU public policy lacks a universal and definitive definition. The CJEU delineates the scope and content of public policy through its jurisprudence on a case-by-case basis. To illustrate this, one can analyse the CJEU's rulings in cases involving arbitration, where the Court has identified certain legal norms as integral to EU public policy, reflecting its context-dependent nature within the EU legal order.

The CJEU's conclusions in the *ISU v. Commission* case, affirming that Articles 101 and 102 TFEU are part of EU public policy, are not particularly surprising. In the landmark *Eco Swiss*[16] case, the CJEU had already addressed the significance of EU competition law rules within the EU's legal framework. After briefly reviewing the CJEU's interpretations in *Eco Swiss*, it is also worth examining other case-law related to the concept of EU public policy.

In the *Eco Swiss* case, the CJEU dealt with a dispute between Eco Swiss and Benetton, which arose out of a licensing agreement. By the final award Benetton was ordered to pay compensation of damages suffered by Eco Swiss due to Benetton's termination of the licensing agreement. Benetton applied to the competent Dutch court for annulment arguing, *inter alia*, that the awards were contrary to public policy by virtue of the licensing agreement under Article 101 TFEU (ex Article 81 EC). During the annulment proceedings, the Supreme Court of the Netherlands referred the case to the CJEU for a preliminary ruling. The CJEU considered Article 101 TFEU as a fundamental mandatory rule of EU Law, incorporated into the notion of public policy[17].

In *Mostaza Claro* case[18], Ms. Mostaza Claro entered into a mobile phone contract with an arbitration clause requiring disputes to be resolved by arbitration. After failing to meet the contract's terms, arbitration ruled against her. She later contested the decision, arguing the arbitration clause was unfair and invalid. The Spanish court, recognizing the clause as unfair, referred the matter to the CJEU to determine whether the arbitration agreement should be considered void, despite her not challenging it during the arbitration. The CJEU held that EU consumer protections rules require the Member States to ensure that consumers are not bound by unfair terms. This aim could not be achieved if the court seized of an action for annulment of an arbitration award was unable to determine whether that award was void solely because the consumer did not plead the invalidity of the arbitration agreement in the course of the arbitration proceedings. The CJEU acknowledged that in the interest of efficient arbitration proceedings, review of arbitration awards should be lim-

[16] Judgement of the Court of Justice of the European Union of 1 June 1999 *Eco Swiss China Time Ltd v Benetton International NV*, Case C-126/97.

[17] Sirmen K.S. (2021). The Concept of Public Policy in the Eco Swiss Decision of the Court Of Justice of the European Union and its Impact on the Intra-Eu Investment Treaty Arbitrations. *Inonu University Law Review – InULR 12(2)*, p. 441-442.

[18] Judgement of the Court of Justice of the European Union of 26 October 2006 *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Case C-168/05.

ited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances. However, the CJEU referred to *Eco Swiss* and stated that if national law requires annulment of an arbitration award for violating public policy, the same should apply when the violation concerns important Community rules. The CJEU emphasised the importance of consumer protection rules and concluded that national court seized 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.

To determine what falls within the bounds of public policy, it is useful to consider CJEU's case-law beyond that related to arbitration. Under the Brussels I bis Recast Regulation[19], a court judgment may be refused recognition and enforcement if it is contrary to public policy (Article 45(1)(a) of the Brussels I Recast). The concept of public policy is defined on a case-by-case basis. Public policy norms can only be mandatory norms[20]. Whether the relevant mandatory provision governs procedural or substantive issues is of no significance[21]. According to the CJEU, for example, negative economic consequences also do not fall within the scope of public policy;[22] or, for example, public policy ground does not encompass a permission to refuse the recognition and enforcement of a court judgment simply because it is, in the court's view, insufficiently reasoned.[23]

The CJEU's judgement in the *Renault* case[24] warrants particular attention and illustrates a difference in CJEU's approach towards public policy in arbitration-related proceedings and recognition proceedings under the Brussels regime. In this case Renault SA, a French automotive manufacturer, sought to enforce a French judgment against Maxicar and Orazio Formento in Italy. The judgment fined Mr. Formento for forgery and ordered the defendants to pay FRF 100,000 in damages, holding them jointly liable. The case involved allegations that the defendants had manufactured and imported counterfeit Renault car parts from Italy to France without Renault's permission. Defendant fought the enforcement claiming that the French judgement is contrary to public policy under the Brussels Convention[25]. The CJEU ruled that the enforcement court cannot, without undermining the aim of the Convention, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or EU law was misapplied in that decision. French judgement recognising the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Member State from manufacturing, selling, transporting, importing or exporting in that Member State such body parts, cannot be considered to be contrary to public policy.

Compared to *Eco Swiss*, *Renault* appears to set double standards in the interpretation of public policy. The reasoning in both cases illustrates a disparity in how public policy is

[19] 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 (recast), *OJ L 351, 20.12.2012,* p. 1–32.

[20] Kisieliauskaitė A. (2017). Viešosios tvarkos sąvoka „Briuselis I" reglamente*. Teisė, 102*, p. 112.

[21] Ibid, p. 112-113.

[22] Judgement of the Court of Justice of the European Union of 23 October 2014 *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS, Air Baltic Corporation AS*, Case C-302/13.

[23] Ibid.

[24] Judgement of the Court of Justice of the European Union of 11 May 2000 *Renault SA v Maxicar SpA*, C-38/98.

[25] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, *OJ L 299, 31.12.1972,* p. 32–42.

construed under the Brussels I Regulation versus the New York Convention, reflecting inconsistent legal practices.[26] Within the Brussels I framework, the notion of public policy is interpreted more narrowly due to the judicial protection mechanisms established by EU law, particularly the preliminary ruling procedure, which does not apply to arbitration awards[27] (unless set-aside or enforcement proceedings are initiated before the courts of a Member State). These judgments underscore a significant issue: whether there is an inherent mistrust of arbitration compared to national courts within the EU legal framework. The *ISU v Commission* decision seems to confirm a sceptical stance towards arbitration, raising questions about the justification for such scepticism.

The discussed rationale in *Eco Swiss* and *Renault* suggests that the scope and content of public policy can vary depending on whether a national court or an arbitral tribunal is involved. This raises concerns about whether the substance of EU public policy should depend on the forum applying the law. The reliability of national courts in applying EU law is also a matter of concern. According to the CJEU's 2023 annual report,[28] the Court received 518 references for preliminary rulings from national courts across all Member States, with Lithuanian courts, for example, referring only six cases during the year. This data reveals differing levels of engagement with EU law among national courts and suggests that the assumption of greater reliability on national courts may warrant further scrutiny.

IV IMPLICATIONS OF EFFECTIVE REVIEW REQUIREMENT AND POSSIBLE WAY FORWARD

Drawing on the discussed CJEU's jurisprudence, clear parallels can be drawn between the *Achmea* and *ICU v Commission* decisions, both of which underscore the CJEU's commitment to upholding the primacy and autonomy of EU law by restraining the questions of interpretation and application of EU law rules, at least those amounting to public policy, within the jurisdiction (or a judicial review) of national EU courts and the CJEU itself. This raises numerous implications for parties to a dispute involving the EU law. For one, the effectiveness of arbitration agreement or a possibility to enforce arbitral award rendered pursuant to an arbitration agreement within the EU is no longer confined solely to the distinction between treaty-based and commercial arbitration, to the considerations of party autonomy in preferring arbitration over state courts, or to the autonomy in selecting the seat of arbitration. Additional issues, related to the possible EU law matters in dispute, as well as the possibilities to perform an effective judicial review on interpretation and application of EU law, should likewise be considered. If a dispute in arbitration may involve EU law issues, especially those amounting to fundamental rules of EU public policy, the arbitral award may be subjected to effective judicial review requirement by EU Member State court, and failing to foresee such requirement may be detrimental to the effectiveness of arbitration proceedings altogether. What is clear, is that commercial arbitration proceedings involving fundamental EU law rules can be subject to oversight by Member State courts, which are encouraged to ensure compliance by the CJEU. If arbitration is subject to stricter control or scepticism, especially when seated outside the EU, the implications for arbitration might be twofold.

First, the parties may be discouraged from selecting a seat of arbitration outside the EU, recognizing that the effective review requirement may be impaired if the court entrusted

[26] Opinion of Advocate General Szpunar of 3 March 2015 *Diageo Brands BV v Simiramida-04 EOOD*, Case C-681/13.

[27] Ibid.

[28] Annual Report 2023. Statistics concerning the judicial activity of the Court of Justice. [interactive]. Accessed online: https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/en_ra_2023_cour_stats_web_bat_22042024.pdf [accessed 23 08 2024].

with limited review of the arbitral award is unable to refer to the CJEU for a preliminary ruling. Second, it could lead to a preference for litigation in national courts, potentially diminishing arbitration's role as an alternative and effective dispute resolution mechanism. Both prospects have respective drawbacks not only from the perspective or party autonomy in designing arbitration clauses, but also for the effectiveness of arbitration itself. Parties generally opt for arbitration outside the EU due to number of reasons, including those related to perceived neutrality, enhanced confidentiality, and procedural flexibility that might not be available within the EU's jurisdiction. Notably, a number of key arbitration hubs like the UK, Switzerland or Singapore are now outside the EU, making this issue even more pertinent. However, the EU's evolving stance might influence how the arbitration clauses are drafted, leading the parties to be more cautious about choosing arbitration seated outside the EU, or choosing arbitration altogether, for disputes involving EU law. Ultimately, the discussed judgements of the CJEU may signal a broader movement towards reinforcing the primacy of EU law and its uniform application, potentially at the expense of arbitration outside the EU.

On the other hand, the implications of recent CJEU case-law should not be argued as creating the same – or even comparable – level of scrutiny for commercial arbitration agreements, as was created for intra-EU investment arbitration. It is clear that the CJEU does not draw any general conclusions of commercial arbitration's purported incompatibility with the EU law. Moreover, the *ISU v Commission* case contained a set of very matter-specific circumstances, such as the fact that recourse to arbitration was provided in ISU's rules and regulations, the acceptance of which was dictated on those aiming to become professional athletes with membership rights within the ISU, rather than in a 'classic' arbitration agreement individually concluded between the athlete and the ISU. In this sense, the ISU had considerable influence on the rights of athletes which were conferred on them by the EU competition law. It could be argued that the CJEU's scrutiny of arbitration agreements having such broad effects, sets the discussed case as an example of exception, rather than a general rule.

Among the possible means to control the tension between the requirement to ensure uniform interpretation of EU law and the respect for party autonomy in designing dispute settlement mechanisms, the possibilities have a varying degree of practical implementation. For a distant one, the possibility to refer for a preliminary ruling procedure, presently confined to the jurisdiction of EU national courts, may be equally valuable to arbitration tribunals. While it is true that the CJEU does not regard arbitral tribunals as a "court or tribunal" of a Member State within the meaning of Article 267 of the TFEU,[29] entrusted with a right to request a preliminary ruling, the arbitration tribunals have a general right to seek assistance from state courts, such as that related to collection of evidence in aid of arbitration. Arguably, extending the concept (or meaning) of national courts' assistance in arbitral proceedings may introduce a way for arbitral tribunals seated in EU Member States to request, via support from national courts, preliminary rulings while the arbitration proceedings are still pending. For a less distant possibility, the doubts of correct interpretation and application of EU rules on public policy can also be dispelled via the recognition and enforcement proceedings of arbitral awards, if those are conducted in a Member State court even if the seat of arbitration in question is outside the EU. During the recognition and enforcement proceedings, Member State courts enjoy the possibility to referring to the CJEU for a preliminary ruling if the EU law issues in question are of such extent as to require for such refer-

[29] Judgment of the Court of Justice of the European Union of 6 March 2018 *Slovak Republic v. Achmea B.V.*, Case C-284/16, para 49.

ral – and it is solely for the national Member State court to decide whether the issue in question warrants such application, i.e. if reference to the CJEU is necessary for the national court to render a decision on recognition and enforcement. If the national court considers that such reference is not necessary (and the court has a discretion in doing so), the national court is under no obligation to refer the case to the CJEU even if the parties to proceedings consider differently[30].

CONCLUSIONS

From the viewpoint of proponents of commercial arbitration, the CJEU's recent stance on commercial arbitration proceedings involving EU law issues could be described as increasingly interventionalist, highlighting the intersection between the parties' autonomy in designing dispute resolution mechanisms and the primacy of EU law. This suggests that parties must be mindful of the potential for judicial review in EU courts, particularly when fundamental EU law issues are at stake, and may be deterred from selecting arbitration seats outside the EU due to concerns about the effective enforcement.

Looking forward, the interaction between EU law and arbitration will likely continue to evolve, with potential solutions including the extension of preliminary ruling procedures to arbitral tribunals or increased reliance on national courts during recognition and enforcement proceedings. Ultimately, the CJEU shows broader efforts to ensure the uniform application of EU law, even as they challenge the traditional autonomy of arbitration.

[30] Judgement of the Court of Justice of the European Union of 6 October 1982 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Case 283/81.