

EU Internal Market Law and the Law of International Commercial Arbitration: Have the EU Chickens Come Home to Roost?

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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.

Keywords: Internal Market, commercial arbitration, harmonisation, common area of justice

I. INTRODUCTION

This article examines, from the perspective of EU public economic law, whether reforms of the EU legal framework could address the problems created by the interference that can occur between international commercial arbitration and court litigation in support of the Internal Market.¹ Although the relationship between EU law

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¹ As distinguished from investment treaty or State arbitration, which raises issues of a different nature for its nature of involving States engaging in commercial investment deals with private parties or other States (eg foreign direct investment). This area primarily presents peculiarities regarding the participation of States in investment arbitrations and in connection with the EU common commercial policy, often involving political arguments. See eg G Mazzini, 'The European Union and Investor-State Arbitration: A Work in Progress' (2013) 24 *American Review of International Arbitration* 611; R Quick, 'Why TTIP Should Have an Investment Chapter Including ISDS' (2015) 49 *Journal of World Trade* 199; G Alvarez et al, 'A Response to the Criticism against ISDS by EFILA' (2016) 33 *Journal of International Arbitration* 1; G Van Harten, 'The European Commission and UNCTAD Reform Agendas: Do They Ensure Independence, Openness, and Fairness in Investor-State Arbitration?' in S

and international arbitration has long been treated as one of mutual indifference, the two systems increasingly interact and conflict with each other rather than simply coexisting neutrally. Nonetheless, EU law does not regulate commercial arbitration, and there is a current diversity of arbitration laws and practices across the European Union.²

Arbitration is a dispute resolution mechanism in which parties to a contract agree to have disputes resolved by a private third-party decision maker ('arbitrator' or 'arbitral tribunal'), rather than through litigation in courts. The parties agree in advance that the arbitrator's ruling ('award') will be binding on them. Although arbitration is often depicted as a form of dispute resolution alternative to court litigation, its accomplishments have largely resulted from the support it receives from States and their courts. Consequently, arbitration rests on both national legal systems and courts. The legal framework applicable to arbitration includes the laws of the State(s) connected to the proceedings or to the parties (especially where the arbitration is located, or the 'seat' of the arbitration), as well as a number of international sources of law. The legal effect of the arbitration agreement is that private parties contractually waive their right to settle future or existing disputes on that matter through State courts. However, the powers of the national courts to enable arbitration are usually contained in specific provisions of national law. In addition, after the arbitrator has delivered the award, any party can bring an action before a court in the State of the seat of the arbitration to set the award aside (ie declare it invalid and unenforceable). What is more, under the doctrine of *kompetenz-kompetenz* ('competence-competence'), arbitral tribunals have the right to decide on their jurisdiction over the dispute brought to arbitration, rather than having to wait for the matter to be decided by a court. At the same time, courts may retain the right to make a final determination of the validity of an arbitration agreement and are not bound by the arbitral tribunal's decision.³

Member States take part in the Internal Market and its rules but maintain their own national regulatory framework for arbitration. Although EU law binds court judgments in disputes affected by the rules of the Internal Market, the same is not the case as regards arbitration. All the same, Member States are parties to international conventions, which are legal instruments already providing for the regulation of arbitration at international level to eliminate conflicts and ensure coordination among States.⁴ In principle, therefore, Member States' memberships would make EU action

(*F*'note continued)

Hindelang and M Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016), pp 128–41.

² T Cole et al, 'Legal Instruments and Practice of Arbitration in the EU', Report to the European Parliament, Service Contract P/C/JURI/IC/2013-047 (2014).

³ For an accessible textbook on international commercial arbitration, see M Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2017).

⁴ Even if the EU has legal personality (Art 47 of the Treaty on European Union ('TEU')) and may have competence to make international agreements, it is not a signatory of such conventions. If anything, this is because these conventions would most probably not allow it. For example, Article VIII of the New York Convention limits accession to members of the United Nations, parties to the Statute of the International Court of Justice, and any other State invited to join. Even if the EU is an observer Member of the United Nations with no voting rights, it is doubtful that such observer status

unnecessary under the principles of subsidiarity and proportionality. At the same time, Member States cannot ensure that arbitration proceedings in their jurisdiction are properly coordinated with court proceedings taking place in another Member State. The effect of national legislation would be limited by the territoriality principle.

The combination of the scope of application of the conventions on commercial arbitration with their territorial coverage among Member States leaves many regulatory loopholes in the EU framework that frustrate the coordination that these conventions are meant to offer. To illustrate, all Member States are parties to the 1958 New York Convention,⁵ but its scope of application is limited to the mutual recognition and enforcement of awards leaving aside all the other aspects of the arbitration process. Moreover, as will be seen, it contains important normative principles such as public policy exceptions that—though interpreted restrictively—refer back to domestic law. Likewise, the 1961 Geneva Convention on International Commercial Arbitration covers more aspects of the arbitration process,⁶ but less than half of the Member States are parties to it. Equally, the UN Commission on International Trade Law ('UNCITRAL') Model Law assists States in reforming and modernising their laws on arbitral procedure,⁷ covering all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, and the extent of court intervention through to the recognition and enforcement of the arbitral award. However, only thirteen Member States adopt it in full, another thirteen adopt it only in part, but two do not follow it.⁸

Therefore, from the viewpoint of the EU and the Internal Market, the existing international regulation is incomplete. Nonetheless, the extent to which the Internal Market needs the harmonisation of rules on arbitration remains an unattended issue. The aim of the study is to analyse the areas of conflict to assess the extent to which the intervention of the EU legislator in the regulation of arbitration might best support the Internal Market and, from another angle, how EU law can best support arbitration. Arguably, within a regulated framework, arbitration may facilitate the EU's goals of ensuring access to efficiently delivered justice and dispute resolution contributing to the removal of obstacles in the application or enforcement of EU market law across Member States.

To address the issues that it raises, Part II sets out the relationship between international commercial arbitration and EU law, showing how it has moved from mutual

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qualifies as actual 'membership' as the term is used in the Convention. Regardless of legal ramblings or speculations one may engage in, though interesting in their own right, *de facto* the EU has never applied and the question has never been posed.

⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

⁶ European Convention on International Commercial Arbitration of 1961 Done at Geneva, 21 April 1961, 484 UNTS 364 (1963–1964).

⁷ UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, with subsequent amendments).

⁸ For a detailed and comparative list of the regulated areas of conventions and territorial coverage, see J Gaffney, 'Should the European Union Regulate Commercial Arbitration?' (2017) 33 *Arbitration International* 81.

indifference to increasing interaction, at times in favourable ways for the Internal Market but mostly leading to juridical inconsistencies. Parts III–V examine the specific areas of concern for conflicts between EU law and arbitration. These are arbitration and preliminary reference procedure (Part III), arbitration and the procedural exemptions in EU private international law (Part IV), and arbitration and EU public policy (Part V). These Parts are necessary to show the unsatisfactory state of affairs for the Internal Market, which is addressed in Part VI alongside the argument for the EU to intervene. Part VII concludes.

II. INTERFERENCES AND CONFLICTS BETWEEN ARBITRATION AND EU LAW

Until recently, the relationship between EU law and international commercial arbitration has been described as one of mutual indifference, with the two legal orders traditionally deemed merely to coexist for Member States, functioning in parallel according to distinctive logics.⁹ Some commentators have suggested that not only does arbitration not conflict with EU law, but it may also offer another opportunity for giving effect to EU law in the sphere of private law.¹⁰ Arbitration has also received the approval of the European Court of Human Rights ('ECtHR') with respect to the alleged possibility of interferences with the established right to judicial remedies and access to justice. The ECtHR has confirmed the consistency of arbitration with the right to judicial remedies and the right to a fair trial,¹¹ remarking, *inter alia*, that a waiver of access to national courts is a common practice that has undeniable advantages for the parties as well as for the administration of justice, thus not offending the European Convention on Human Rights.¹² Therefore, insofar as access to justice and due process rights are recognised as fundamental rights in the EU *acquis*, the future accession of the EU to the European Convention of Human Rights creates no particular problems of compatibility as far as arbitration is concerned.

Nonetheless, international commercial arbitration and EU law can interact with each other in a number of ways. In some cases, EU law has approached arbitration

⁹ TC Theofrastous, 'International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-Localization Debate' (1999) 31 *Case Western Reserve Journal of International Law* 456; N Shelkopyas, *The Application of EC Law in Arbitration Proceedings* (Europa Law Publishing, 2004); M Benedettelli, 'Ordinamento comunitario e arbitrato commerciale internazionale: favore, ostilità o indifferenza' in N Boschiero and P Bertoli (eds), *Verso un 'ordine comunitario' del processo civile* (Scientifica, 2008), p 111; M Benedettelli, "'Communitarization" of International Arbitration: A New Spectre Haunting Europe?' (2011) 27 *Arbitration International* 583; G Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 *International Arbitration* 397.

¹⁰ GI Zekos, 'The Treatment of Arbitration under EU Law' (1999) 54 *Dispute Resolution* 9; GI Zekos, 'Antitrust/Competition Arbitration in EU Versus US Law' (2008) 25 *Journal of International Arbitration* 29.

¹¹ See the ECtHR cases of *Osmo Suovaniemi and Others v Finland* (Application no 31737/96) (1999) EHRR 31737/96462; *X v Germany* (Application no 1197/1961) (1962) EHRR 165.

¹² See the ECtHR case of *Deweert v Belgium* (Application no 6903/75) (1980) ECHR 1.

favourably, especially as regards sectoral areas where it has been explicitly encouraged. This is because the settlement by arbitration of private disputes has been seen as instrumental to the achievement of policy objectives pursued by EU law. By way of illustration, in the area of EU competition law the European Commission has long established since *Elf Acquitaine v Thyssen and Minol*¹³ the requirement of arbitration for the settlement of disputes arising out of dispute on mergers for the assessment of the compatibility with the Internal Market.¹⁴ Likewise, *Eco Swiss v Benetton International*¹⁵ confirmed the absence of formal obstacles to arbitrate matters relating to EU competition law.¹⁶ Other well-documented areas in the literature encompass consumer disputes/alternative dispute resolutions ('ADR') or online dispute resolutions,¹⁷ tax law,¹⁸ and other regulatory sectors such as telecommunication and energy.¹⁹

In other more substantial circumstances, however, the interaction between commercial arbitration and EU law can lead to inconsistencies. Indeed, conflicts are on one level unavoidable because of the nature of the Internal Market and the process of European integration carried out by the EU, as well as the role attributed in this

¹³ *Elf Acquitaine v Thyssen and Minol*, Case IV/M.235, Commission Decision of 4 September 1992, OJ C232.

¹⁴ The literature reports that this practice has been consistently followed in over one hundred merger control cases and it could be followed in the related area of agreements restricting competition. In particular, private enforcement may serve the purpose to settle disputes arising out of structural or behavioural measures in the application of the provisions of EU competition law (TFEU ex Arts 101–102). See Benedettelli (2011), note 9 above.

¹⁵ *Eco Swiss China Time Ltd v Benetton International NV*, C-126/97, EU:C:1999:269.

¹⁶ P Flere, 'Impact of EC Competition Law on Arbitration Proceedings (2006) 3 *Slovenian Law Review* 155; L Radicati Di Bronzolo, 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators' (2011) 27 *Arbitration International* 1; A Komninos, 'Arbitration and EU Competition Law' in J Basedow, S Francq, and L Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart, 2012), pp 191–222; S Carbone, 'Antitrust Commitments and Arbitration in European Law' (2013) 23 *Rivista dell'arbitrato* 1; M Driessen-Reilly, 'Private Damages in EU Competition Law and Arbitration: A Changing Landscape' (2015) 31 *Arbitration International* 567.

¹⁷ J Davies and E Szyszczak, 'ADR: Effective Protection of Consumer Rights?' (2010) 35 *European Law Review* 695; P Cortes, *Online Dispute Resolution for Consumers in the European Union* (Routledge, 2010); M Piers, 'Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations' (2011) 2 *Journal of International Dispute Settlement* 209; C Hodges, I Benöhr, and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart, 2012); C Toader, 'EU Law and Consumer Arbitration' in F Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris, 2017), pp 1–29; F Wang, *Online Arbitration* (Informa Law, 2018); I Amro, *Online Arbitration in Theory and in Practice* (Cambridge University Press, 2019).

¹⁸ D Ramos Muñoz, 'A Game of Snakes and Ladders – Tax Arbitration in an International and EU Setting' in D Sarmiento and D Jiménez-Valladolid de L'Hotellerie Fallois (eds), *Litigating EU Tax Law in International, National and Non-EU National Courts* (IBFD, 2014), pp 109–204; M Lang, P Pistone, J Schuch, and C Staringer, *Introduction to European Tax Law on Direct Taxation* (Spiramus, 2016).

¹⁹ B Warwas, 'ADR in B2B Disputes in the EU Telecommunications Sector: Where Does the EU Stand and What Does the EU Stand for?' *EUI LAW 2014/12*, pp 1–45.

context to the establishment of a European area of justice for the adjudication of civil and commercial disputes.²⁰ On another level, arbitration embeds the principle of contractual autonomy entrusting parties with the power to step outside litigation before Member State courts, thus devolving adjudicatory functions to subjects operating outside of the aforementioned European area of justice.²¹ Arbitration, then, may facilitate the EU's goals of ensuring access to efficiently delivered justice and dispute resolution, but can also impede the EU's goals of harmonising and ensuring the application of specific substantive law.

Therefore, the question of the proper relationship between EU law and commercial arbitration becomes paramount. On the one hand, too much influence of EU law over commercial arbitration can undermine the utility of an important dispute resolution mechanism that has shown itself to be of enormous benefit to the European business community.²² On the other hand, too little influence of EU law over commercial arbitration risks allowing arbitration, in some situations, to be used as a means of obstructing market integration or avoiding otherwise applicable restrictions that are seen as important to the proper functioning of the EU market and the achievement of EU policy objectives.

The Parts below examine the areas of concern for potential conflicts between EU law and arbitration.

III. AUTHORITY TO MAKE REFERENCES FOR PRELIMINARY RULINGS

The Court of Justice of the EU ('CJEU') has long discussed arbitration in the context of the authority to make preliminary references under EU law, or the lack of it.²³ As in the case of national courts, in fact, arbitrators may need to make decisions on matters of the laws of Member States that are affected by EU law as to their validity or interpretation. In addition, they may be faced with directly applicable EU law.

Indeed, one long-running problem regarding the interaction of arbitration and the EU has been the inability of arbitral tribunals to make a reference to the CJEU for an interpretation and application of EU law. Such a mechanism is available to Member State national courts, and the role of arbitral tribunals as interpreters and appliers of the applicable law could suggest that they too should possess this right. After all, an award delivered in an arbitration is enforceable in Member States with little or no substantive review of the contents of the award. As a result, any time an arbitral

²⁰ See Benedettelli (2011), note 9 above.

²¹ G Blanke, 'The Application of EU Law to Arbitration in the UK: A Study on Practice and Procedure' (2014) 25 *European Business Law Review* 1.

²² See eg P Pohjankoski, 'Can International Arbitration Remain Unaffected by EU Law? – Anti-Suit Injunctions and the Scope of the Arbitration Exception' (2010) 2 *Helsinki Law Review* 81; M Illmer, 'The Arbitration Interface with the Brussels I Recast: Past, Present and Future' in Ferrari, note 17 above, pp 31–61; Gaffney, note 8 above.

²³ Lately, see J Basedow, 'The Transformation of the European Court of Justice and Arbitration Referrals' in Ferrari, note 17 above, pp 125–37.

tribunal, unable to make a reference to the CJEU, misinterprets EU law, the award becomes enforceable by the courts of a Member State. This is the case even though, had the dispute been resolved before that same court rather than through arbitration, the court itself could have made a preliminary reference to the CJEU, and thus ensured proper application of EU law.²⁴ Under EU law, when it comes to matters as to the validity or interpretation of EU legal instruments, the EU has devised a mechanism of legal enforcement through private actions that commence in national courts. The litigants may assert their rights deriving from EU law against the State or, in some cases, other private persons. This system of enforcement ensures the uniform interpretation and application of EU law across Member States. It also enables EU law to enter into the legal systems of its Member States and guide or change their laws accordingly. The legal basis for making such a reference to the CJEU is set forth in Article 267 of the Treaty on the Functioning of the European Union ('TFEU') according to which the CJEU shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of EU acts. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may or shall bring the matter before the CJEU, depending whether there remains a judicial remedy under national law or not.

The difficulty with respect to arbitration arises from the locution 'court or tribunal of a Member State'. The long-standing position of the CJEU is that arbitrators or arbitral tribunals in a traditional commercial arbitration do not have legal standing to make preliminary references to the Court, as they do not constitute a 'court or tribunal of a Member State' under Article 267 TFEU. This is the case even if the tribunal is seated in a Member State.²⁵ According to the CJEU, the criteria by which a 'court or tribunal of a Member State' is identified derive from *Vaassen (née Göbbels)*:²⁶ (1) the tribunal must be established by law; (2) it must be permanent; (3) it must respect the requirements of due process; (4) it must apply rules of law; and (5) it must exercise compulsory jurisdiction over parties appearing before it.²⁷

The CJEU has interpreted and applied these standards in several cases, and a clear stance against the recognition of commercial arbitration tribunals as 'court[s] or

²⁴ See eg Blanke, note 21 above; J Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice (2015) 32 *Journal of International Arbitration* 367; M Szpunar, 'Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU' in Ferrari, note 17 above, pp 85–123.

²⁵ *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG*, C-102/81, EU:C:1982:107.

²⁶ *G Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf*, C-61/65, EU:C:1966:39.

²⁷ See also *Cartesio Oktató és Szolgáltató bt*, C-210/06, EU:C:2008:723; *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEEV*, C53/03, EU:C:2005:333; *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, C-407/98, EU:C:2000:367; *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij*, C-393/92, EU:C:1994:171; *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*, C-54/96, EU:C:1997:413; *Pretore di Salò v Persons unknown* C-14/86, EU:C:1987:275. *Contra*, see Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster*, C-17/00, EU:C:2001:651, criticising the inconsistent case law of the CJEU.

tribunal[s] of a Member State' has developed. In *Nordsee*, the CJEU emphasised the voluntary nature of arbitral jurisdiction, noting that the parties to an arbitration are under no obligation, whether in law or in fact, to submit to the jurisdiction of the tribunal.²⁸ This part of the reasoning reflects the idea that the role of the judge requires a certain degree of coercion, ie the possibility to declare the law and render a binding decision. Here, an adjudicator qualifies as 'court or tribunal' only where the parties are obliged to accept its jurisdiction. Another difference the CJEU relies upon to conclude that arbitral tribunals do not fall within the scope of Article 267 TFEU is that the public authorities of the seat of arbitration are not involved in the decision to opt for arbitration and do not automatically intervene in the proceedings. By contrast, they have a mere role as judges with dedicated support and assistance. Therefore, even if there is a functional link between arbitral tribunals and State courts, national judges have an underived power to administer justice, whilst other tribunals or adjudicatory bodies can acquire a derived power, and therefore qualify as courts of a Member State, only if there is a strong enough connection between them and the judiciary of said State.²⁹ Scholarship has criticised *Nordsee* for ignoring that, in the specific case, recourse to the court was excluded by the contract between the parties. Therefore, the arbitrator was requested to interpret EU law without any judicial aid—the essential element thus being the absence of public participation or form of control in the procedure.³⁰

Nonetheless, references for preliminary rulings from arbitral tribunals were also rejected on this ground in *Denuit*, where the CJEU took into account a wide number of factors, eg whether the body is established by law, it is temporary or permanent, its jurisdiction is compulsory, its procedure is *inter partes*, it applies rules of law, and it is independent.³¹ The involvement of State courts in the arbitral proceedings is neither necessary nor automatic, although the procedural system of the seat recognises arbitration as a method of adjudicatory dispute resolution. In other words, a private body can be considered 'a court or tribunal' of a Member State only if it merges with public authority, exerting an authoritative power on its behalf and automatically involving the judiciary in the proceedings.³² Similarly, a complaint board set up by an international agreement is not a 'court or tribunal' and, as such, it cannot make a reference for a preliminary ruling.³³ By contrast, the CJEU has accepted a preliminary reference from an arbitral tribunal where either participation in the arbitration was legally mandatory (*Danfoss*),³⁴ or the tribunal itself was highly integrated into a Member State's legal system (*Merck*).³⁵

²⁸ *Nordsee*, note 25 above, para 11.

²⁹ *Ibid.*

³⁰ L Woods, P Watson, and M Costa, *Steiner & Woods EU Law* (Oxford University Press, 2017).

³¹ *Denuit and Cordenier v Transorient Mosaique Voyages and Culture SA*, C-125/04, EU:C:2005:69.

³² *Ibid.*

³³ *Paul Miles and others v Ecoles Europeennes*, C-196/09, EU:C:2011:388.

³⁴ *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, C-109/88, EU:C:1989:383.

³⁵ *Merck Canada Inc v Accord Healthcare Ltd and others*, C-555/13, EU:C:2014:92.

In conclusion, the distinguishing element of an arbitral tribunal vis-à-vis its status as a ‘court or tribunal of a Member State’ relates to its form and not to the legal principles that it applies. Thus, an arbitral tribunal is not a ‘court or tribunal of a Member State’ where, for example, the disputing parties are not bound to arbitrate and the tribunal is independent of public authorities.³⁶ By contrast, a national court hearing a challenge to an arbitral award is a ‘court or tribunal of a Member State’ able to make a preliminary reference, even though the question it is referring is one that has arisen in an arbitration.³⁷

However, the CJEU’s emphasis on the voluntary nature of arbitral jurisdiction and the formal independence of arbitral tribunals from national legal systems raises a problem. The structure of arbitration laws throughout the EU means that, once parties have entered into an arbitration agreement, the arbitral tribunal does not act merely as an alternative to a national court but rather as a replacement of it. This in turn means that neither party may change its mind and insist on the dispute being resolved in a national court. Moreover, once the award is delivered, it will be enforced by national courts with almost no substantive review of its contents.

In the end, the current situation remains clearly problematic, insofar as arbitral tribunals play a significant role in the application of EU law in the Internal Market, but lack the ability to gain clarification from the CJEU. After all, arbitral tribunals play a key role in the adjudication of civil and commercial disputes in the EU and it would be important to ensure that they apply EU law correctly and consistently.

IV. PRIVATE INTERNATIONAL LAW, EU LAW, AND ARBITRATION

Despite the expansive tendency of the EU to address an increasing number of policy and legal areas in its regulation and promotion of the Internal Market, private international law has traditionally been left untouched, on the rationale that the EU was not originally conceived to regulate purely private legal relations. This idea was reflected in the original EEC Treaty, which did not require harmonisation of the laws of Member States in the field of private international law. As a result, Member States have regulated this area separately through the signing of international conventions,³⁸ namely the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgements in Civil and Commercial Matters,³⁹ and the 1980 Rome Convention on the Law Applicable to Contractual Obligations.⁴⁰ It was only with the Treaty of Amsterdam that private international law was finally integrated into the first pillar of EU law, with the 1968 Brussels Convention being incorporated into Council Regulation 44/2001 (‘Brussels I’). Brussels I was directly

³⁶ *Nordsee*, note 25 above, paras 11–13.

³⁷ *Municipality of Almelo*, note 27 above.

³⁸ Bermann, note 9 above.

³⁹ [1972] OJ L299, pp 32–42.

⁴⁰ [1980] OJ L266/1.

applicable, forming part of the law of Member States without any further implementation.

A. *Brussels I*

The Brussels Convention and its European successor Brussels I are particularly interesting for international commercial arbitration.⁴¹ As an integral part of EU law, in fact, Brussels I expressly excludes in Article 1(2)(d) arbitration from the scope of European procedural law. It excludes not only the adjudicatory authority or jurisdiction of arbitrators, but it also excludes judicial jurisdiction and recognition or enforcement of judgments in arbitration cases. This exclusion was justified by the original relationship between the 1968 Brussels Convention and the 1958 New York Convention on Arbitration, alongside the consensus that the recognition of arbitral agreements and awards worked already efficiently addressed within the international framework of the latter.⁴²

The exclusion of arbitration from the scope of Brussels I was confirmed in *Marc Rich*.⁴³ Moreover, the CJEU enunciated the basic criterion that, whenever the subject-matter of the proceedings is arbitration, the Brussels Convention should not apply, even if the proceedings are conducted before a State court and not before an arbitral tribunal. Yet, the CJEU also affirmed that a preliminary question regarding the validity of an arbitration clause did not affect the applicability of the Brussels Convention. Parallel civil and arbitral proceedings in different Member States were held possible when the validity of an arbitration clause is affirmed by an arbitral tribunal but rejected by the courts of a Member State. The CJEU further clarified in *Van Uden*⁴⁴ that in order to determine if judicial proceedings have arbitration as their main object, consideration should be given as to whether the relevant action is aimed at protecting the right to settle disputes through arbitration.⁴⁵ In light of this, interim measures are not covered by the arbitration exclusion, even when the parties have concluded an arbitration agreement, since such measures are not ancillary but merely parallel to arbitration.⁴⁶

Subsequent case law, however, resulted in much more significant involvement of EU law in the arbitral process, ultimately triggering the reform of the Brussels I Regulation. In particular, the notorious *West Tankers* case raised concerns within the arbitration community about tensions between EU law and international arbitration—namely that European courts might limit the principle of party autonomy

⁴¹ See eg G Bermann, 'Reconciling European Union Law Demands with the Demands of International Arbitration' (2011) 34 *Fordham International Law Journal* 1193; Illmer, note 22 above.

⁴² P Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters* (1979), OJ C 59/1.

⁴³ *Marc Rich & Co AG v Società Italiana Impianti PA*, C-190/89, EU:C:1991:319.

⁴⁴ *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, C-391/95, EU:C:1998:543.

⁴⁵ *Ibid*, paras 30–33.

⁴⁶ *Ibid*.

embedded in arbitration and expressed in the arbitration clause of a contract, ie one of the cornerstones of arbitration.

B. *The West Tankers Saga*

The judgment in *West Tankers*⁴⁷ has triggered a debate between civil and common law lawyers regarding the role of the EU with respect to anti-suit injunctions.⁴⁸ These are actions whereby a court orders a party to a dispute not to commence or continue court proceedings before another judicial authority. In the context of arbitration, these are ordered with the goal of protecting the jurisdiction of an arbitral tribunal. Anti-suit injunctions are a familiar tool in common law jurisdictions, and failure by a party to obey an anti-suit injunction can result in the party being held in contempt of court, with sanctions consequently being applied by the court.⁴⁹

Prior to *West Tankers*, *Gasser*—as extended by *Turner*—already made it clear that EU law prohibited anti-suit injunctions being ordered with respect to proceedings in the courts of another Member State, under the principle of ‘mutual trust’.⁵⁰ The novelty of *West Tankers* was primarily that it involved international arbitration, which was explicitly excluded from Brussels I.⁵¹ While the CJEU’s decisions in *Gasser* and *Turner* suggest that the English court’s anti-suit injunctions were inconsistent with EU law, a complication existed in that Article 1(2)(d) of Brussels I carves out a general exclusion for matters of arbitration. Indeed, the CJEU expressly recognised that because of the arbitration exclusion in Brussels I, *Gasser* and *Turner* did not directly apply. Instead, Brussels I did not cover the proceedings resulting in the anti-suit injunction.⁵²

⁴⁷ *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*, C-185/07, EU:C:2009:69.

⁴⁸ Pohjankoski, note 22 above; P Ortolani, ‘Anti-suit Injunctions in Support of Arbitration under the Recast Brussels I Regulation’ (2015) *MPILux Working Paper* 6; Illmer, note 22 above; A Layton, ‘Arbitration and Anti-suit Injunctions under EU Law’ in Ferrari, note 17 above, pp 63–84.

⁴⁹ For example, in the United Kingdom sanctions that may lead to imprisonment and the seizure of the goods possessed in the country.

⁵⁰ *Erich Gasser GmbH v MISAT Srl*, C-116/02, EU:C:2003:657; *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd*, C-159/02, EU:C:2004:228.

⁵¹ In this case, a vessel owned by West Tankers and chartered by Erg Petroli collided with a jetty in an Italian port. Allianz and Generali, Erg’s insurers, compensated Erg and filed an action for subrogation against West Tankers before the Italian Court. The Italian Court claimed jurisdiction for tort liability under Article 5(3) of Brussels I, according to which ‘[a] person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur’. West Tankers and Erg, however, had concluded an arbitration agreement, providing for arbitration in London under English law. West Tankers, therefore, sought and obtained an anti-suit injunction from the English High Court on the ground that court proceedings other than arbitration had been initiated in Italy. On appeal, the House of Lords refer to the CJEU the question of the compatibility of the injunction with Brussels I.

⁵² *West Tankers*, note 47 above, para 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’.

Despite this recognition, an anti-suit injunction of this type is not compatible with Brussels I because it deprives Member State courts of their power to rule on their own jurisdiction.⁵³ In other words, even if anti-suit injunctions are ancillary to arbitration—and therefore themselves fall outside of the scope of application of Brussels I—the State court proceedings that the anti-suit injunctions are attempting to prevent fall within the scope of Brussels I. In turn, the latter entails that each Member State court must be free to exercise the power to assess its own jurisdiction. Other Member State courts must not interfere with this power, in light of the principle of mutual trust. As a result, each Member State court, when seised of an action covered by an arbitration agreement, must be allowed to rule on its own jurisdiction and to refer the parties to arbitration where appropriate.⁵⁴

This holding has raised concerns that a party to an arbitration agreement may ultimately be left powerless until the seised court has ruled on its jurisdiction, thus creating uncertainty and causing delays or tactical parallel proceedings, in addition to increasing costs and loss of confidentiality.⁵⁵ However, in the course of the CJEU judgment, the plaintiff had continued parallel arbitration proceedings against the defendant to claim compensation for the damages suffered, which may be greater than that established in the arbitration. Later, the arbitral tribunal published an award in which it declared lack of jurisdiction following the CJEU judgment, on the basis of respect for the defendant's fundamental right to bring the action before a national court. Recognising the established supremacy of EU law against national law, the tribunal concluded that the right to bring proceedings in courts having jurisdiction under Brussels I must prevail over the right to be sued exclusively before an arbitral tribunal in the presence of an arbitration agreement.

On appeal,⁵⁶ the England and Wales High Court rejected the arbitral decision and found that the tribunal was not deprived by reason of EU law of the jurisdiction to award damages for breach of the obligation to arbitrate.⁵⁷ It stated, *inter alia*, that the principle under which anti-suit injunctions breach mutual trust cannot apply to arbitral tribunals, since EU law obligations do not apply to them. In conclusion, the English High Court established that the arbitral tribunal was wrong to conclude

⁵³ This is so because Article II(3) of the New York Convention provides that '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' (*West Tankers*, see note 47 above, paragraphs 32 and 33).

⁵⁴ *West Tankers*, note 47 above.

⁵⁵ Especially common law practitioners. See N Byford and A Sarwar, 'Arbitration Clauses after *West Tankers*: The Unanswerable Conundrum? Practical Solutions for Enforcing Arbitration Clauses' (2009) 3 *International Arbitration Law Review* 29; S Wolff, 'Taking Arbitration or Breaking the System to Fix It? A Sink or Swim Approach to Unifying European Judicial Systems: The ECJ in *Grasser*, *Turner*, and *West Tankers*' (2009) 15 *The Columbia Journal of European Law Online* 65; N Archer, 'The Practical Implications of the *West Tankers* Decision' (2009) 24 *Journal of International Banking and Financial Law* 182.

⁵⁶ *West Tankers* appealed the tribunal's ruling under Section 69 of the English Arbitration Act.

⁵⁷ *West Tankers Inc v Allianz SpA and another* [2012] EWCH 854 (Comm).

that it did not have jurisdiction to make an award of damages for breach of the obligation to arbitrate or for an indemnity.⁵⁸

Such an outcome is highly problematic from the point of view of EU law, since it leads to a nullification of the effects of the Member State court judgment. Even if it does not deprive Member State courts of the power to rule on their own jurisdiction, it annuls all practical effects of the ensuing judgment. Since the Brussels I system and the principle of mutual trust enshrined therein aim at ensuring that Member States' court judgments circulate freely and produce effects in the entire EU, there is a strong case that allowing an arbitral tribunal to award 'damages for damages' is incompatible with EU law, since it cancels the *effet utile* of Brussels I.⁵⁹ In the end, *West Tankers* plainly exhibits a clash between the regime of international arbitration and that of EU law, creating a number of uncertainties.

However, the situation was made even more complex by the interpretation that *West Tankers* received in some national courts. In *Endesa*, for example, the English Court of Appeal considered whether a Spanish judgment, not ruling on the merits of the case but holding that an arbitration clause was not validly incorporated into the main contract, was binding in proceedings before the Commercial Court in London.⁶⁰ In the English proceedings, the claimant sought an anti-suit injunction to prevent the defendant making a claim in court rather than before the arbitration tribunal in London. The English Court, after dismissing the application for an anti-suit injunction under the rule set forth in *West Tankers*, granted a declaration holding that the Spanish judgment was not binding on the arbitral tribunal as its proceedings fell outside Brussels I. The English Court of Appeal overruled the lower court's judgment, declaring that, consistently with the subject-matter criterion set forth by the CJEU, the Spanish judgment was not caught by the arbitration exclusion and that therefore the English Court was obligated to recognise it.

The CJEU interpretation of *West Tankers* has been highly controversial for making it possible for any party to an arbitration agreement to nullify the effects of that agreement by simply seising a friendly national court.⁶¹ The problems arising from *West Tankers* and from the interpretation of *West Tankers* given in *Endesa* triggered debates on reforms to the Brussels I system.

⁵⁸ Ibid.

⁵⁹ Even stronger arguments supporting this view can be found in the Recast Brussels I Regulation (see below), as the abolition of *exequatur* clearly militates in favour of a reinforcement of the principle of mutual trust, which imposes on all Member States a duty to recognise and enforce judgments made by other Member State courts automatically. The implementation of such a system, whereby recognition and enforcement can be denied only on specific and exhaustive grounds set forth in Article 45 of the Recast Brussels I Regulation, seems to be incompatible with the possibility for an arbitral tribunal seated in a Member State to deprive a judgment made by the court of another Member State of all practical effects.

⁶⁰ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397.

⁶¹ Pohjankoski, note 22 above; Ortolani, note 48 above; Illmer, note 22 above; Layton, note 48 above.

C. Regulation 1215/2012 ('Recast Regulation')

One of the main shortcomings of Brussels I identified by the European Commission, after engaging in a consultation process, concerned the interface between international arbitration and litigation. The point of contention was precisely that Brussels I could undermine the effect of arbitration agreements, as particularly highlighted by the *West Tankers* saga, as well as the additional costs and delays Brussels I entailed for parties involved in arbitration proceedings.⁶²

The Commission's proposal to reform Brussels I radically changed the role of arbitration, introducing a new rule on jurisdictional conflicts, purporting thereby to enhance the effectiveness of arbitration agreements within the EU and to prevent parallel court and arbitration proceedings.⁶³

The resulting Recast Regulation 1215/2012 has not retained much of the Commission proposal, as the arbitration exclusion is maintained at Article 1(2)(d).⁶⁴ The interaction of the Recast Regulation with arbitration is dealt with in Recital 12. The Recital is not a binding provision, but merely aims at clarifying the scope of the arbitration exclusion and at resolving some of the problems arising from *West Tankers* and *Endesa*.⁶⁵ Furthermore, in Article 73(2) the Recast Regulation expressly enshrines the precedence of the New York Convention.

At paragraph 1, Recital 12 makes it clear that the national law of Member States should govern what national courts will have to do when matters relating to an arbitration agreement arise, stating that:

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.

The paragraph confirms the arbitration exclusion and makes it clear that Member States are free to comply with their international obligations under the New York Convention.⁶⁶ Therefore, whether Member State courts can rule on the existence

⁶² COM/2009/0175 final, *Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, Green Paper. The Green Paper identified a number of changes to be introduced to Brussels I, including the partial deletion of the arbitration exception from Brussels I and the introduction of an exclusive jurisdiction of the courts of the seat of arbitration over the validity of the arbitration agreement.

⁶³ COM 2010 748 final, *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*.

⁶⁴ For a detailed analysis of the proposal for the recast Regulation in the context of international arbitration, see G Carducci, 'The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration' (2013) 29 *Arbitration International* 467.

⁶⁵ *Ibid.*

⁶⁶ Even if this paragraph does not expressly mention the New York Convention, its wording is a clear reference to this international instrument and on the ensuing obligations on Member States.

and the validity of an arbitration agreement exclusively depends on the contents of the national arbitration law of the seat of the arbitration.⁶⁷

The second paragraph of Recital 12 clarifies the scope of the arbitration exclusion, stating that Member State court judgments on the existence and validity of an arbitration agreement do not circulate under the Recast Regulation and do not bind the courts of other Member States. This paragraph does not overrule *West Tankers* itself, but rather the interpretation of the case law of the CJEU that was given in *Endesa*.

Yet, the Recital cannot be interpreted to mean that the parties have an inalienable right to secure a judgment from the court seised of the case. Arguably, this derives from the CJEU jurisprudence affirming that recitals cannot be relied upon to interpret EU law in a manner contrary to its wording.⁶⁸ In turn, the third paragraph affirms that

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, which takes precedence over this Regulation.⁶⁹

Therefore, judgments on the merits are in principle always entitled to circulate under the Recast Regulation, even in cases where the Member State court had to rule on the existence, validity, or else of the arbitration agreement to affirm its own jurisdiction over the case. In the absence of such a rule, it would be possible for any party to avoid the international circulation of a court judgment under the Recast by simply alleging that the claim is covered by an arbitration agreement.⁷⁰ The possibility for a judgment on the merits to circulate under the Recast Regulation remains without prejudice to the possibility of Member State courts recognising and enforcing a conflicting arbitral award under the New York Convention, which prevails over the Regulation pursuant to Article 73(2).

The provision aims at striking a balance between the circulation of arbitral awards and the *effet utile* to ensure the effective enforcement of EU law in Member States, but its practical implementation remains to be seen. From the point of view of the arbitral award, it can be questioned the extent to which an arbitral tribunal may

⁶⁷ Ortolani, note 48 above.

⁶⁸ *Giuseppe Manfredi v Regione Puglia*, C-308/97, EU:C:1998:566.

⁶⁹ Regulation 1215/2012, Rec 12(3).

⁷⁰ M Illmer, 'Brussels I and Arbitration Revisited – The European Commission's Proposal COM (2010) 748 final –' (2011) 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 645; R Fentimann, 'Arbitration in Europe: Immunity or Regulation?' (2011) 1 *International Journal of Procedural Law* 151; P Nielsen, 'The Recast of the Brussels I Regulation' in M Bonell, M Holle, and P Nielsen (eds), *Liber Amicorum Ole Lando* (DJØF, 2012), p 273.

reach a conflicting decision once a Member State court has ruled on the merits of the case. A court decision is binding on the parties and can produce *res judicata* effects, so the arbitral tribunal is in principle bound to respect it.⁷¹ This, however, could mean that the award is set aside at the seat of arbitration, in case the applicable national *lex arbitri* indicates the violation of *res judicata* as a ground for annulment.⁷² Moreover, the award could be denied recognition and enforcement, in light of its conflict with a court judgment. Although refusing recognition and enforcement would be contrary to the overall aim and spirit of the New York Convention, nonetheless the problem of a conflict between an arbitral award and an earlier Member State court judgment can raise complex problems in national legal systems. From the point of view of the Member State court judgment, the question remains regarding the extent to which it could be denied recognition and enforcement under Article 45 of the Recast Regulation because of its conflict with an arbitral award.⁷³

Finally, Recital 12 entails that the Recast Regulation should not apply to actions or ancillary proceedings relating to 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.⁷⁴ This provision, however, does not mention anti-suit injunctions, which must be considered still incompatible with EU law under the principle of mutual trust.

The circumstance has been confirmed more recently in *Gazprom*,⁷⁵ where the CJEU has intervened once more in the complex intersection between EU law and arbitration. Here the Court has dealt with the subtle question whether arbitral tribunals (instead of the seat courts) can grant anti-suit injunctions and, more importantly, whether such injunctions must be respected by Member State courts.

V. ARBITRATION AND EU PUBLIC POLICY

Public policy is a defence of legal systems that limits the exercise of party autonomy when this is contrary to imperative norms or fundamental principles of law. In the case of arbitration, public policy may limit the enforceability of arbitration agreements.⁷⁶

⁷¹ Ortolani, note 48 above.

⁷² See eg *Planor Afrique SA v Société Emirates Télécommunications Corporation 'Etisalat'*, 17 January 2012, Cour d'Appel de Paris (2012) setting aside an arbitral award that disregarded an earlier judgment issued by a foreign Court and recognised in France under an international convention. See I Bantekas, *An Introduction to International Arbitration* (Cambridge University Press, 2015).

⁷³ Blanke, note 21 above; Ortolani, note 48 above; N Dowers and S Zheng, 'Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal' (2015) 3 *Groningen Journal of International Law* 125.

⁷⁴ Carducci, note 64 above.

⁷⁵ *Gazprom OAO v Lietuvos Respublika*, C-536/13, EU:C:2015:316.

⁷⁶ Lately, see F Ragno, 'Are EU Overriding Mandatory Provisions an Impediment to Arbitral Justice?' in Ferrari, note 17 above, pp 139–76; X Kramer, 'EU Overriding Mandatory Law and the

Under Article V(2)(b) of the New York Convention, public policy is one of the limited grounds on which courts asked to enforce an arbitration award may refuse to do so. Traditionally, national courts have interpreted the exception narrowly in the light of the pro-enforcement bias of the New York Convention, rejecting the view that the public policy exception applies whenever an award is inconsistent with domestic law. Accordingly, Article V(2)(b) is applied where the policy violated is one recognised as fundamental to international commerce, due process and fair trial, or the most fundamental norms of the State in which enforcement is sought.⁷⁷ To be annulled, the award has to offend or contradict a norm of the legal system that is deeply rooted in the most fundamental values or notions of justice and morality of society.⁷⁸

As far as the EU is concerned, Brussels I and its Recast include a public policy exception. It allows expressly Member State courts to refuse enforcement of judgments from the courts of another Member State where those judgments are ‘manifestly contrary to public policy in the Member State’ in which recognition is sought (Article 34(1) of Brussels I and Article 45(1) of the Recast Regulation). Importantly, the meaning of ‘public policy’ has also been interpreted strictly, in a manner parallel to the New York Convention.⁷⁹ Consequently, in principle there is no contradiction between the requirements of EU law and those of the New York Convention.

However, EU law has developed its own narrow view of public policy when there is a limit in relation to the applicability of its fundamental free movement principles.⁸⁰ The CJEU has developed a conception of public policy based on norms of EU law. It holds that certain of those norms are so essential to the EU itself that, where a Member State allows its courts to apply a public policy exception relating to domestic public policy, it must also apply one relating to EU public policy under the principles of equivalence and effectiveness.⁸¹ The CJEU has explicitly applied this notion in the context of the enforcement of arbitral awards and this is

(*F*note continued)

Applicable Law on the Substance in International Commercial Arbitration’ in Ferrari, note 17 above, pp 285–316; G Cordero-Moss, ‘EU Overriding Mandatory Provisions and the Law Applicable to the Merits’ in Ferrari, note 17 above, pp 317–50; L Radicati di Brozolo, ‘When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions? The Problems and a Proposal’ in Ferrari, note 17 above, pp 351–82.

⁷⁷ AJ van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer, 1981), available at <http://www.newyorkconvention.org/publications/nyac-i>; JD Fry, ‘Désordre Public International under the New York Convention: Wither Truly International Public Policy (2009) 8 *Chinese Journal of International Law* 81; G Born, *International Commercial Arbitration* (Kluwer, 2014).

⁷⁸ *Ibid.*

⁷⁹ S Francq, ‘Recognition and Enforcement. Section 1. Recognition’ in U Magnus and P Mankowski (eds), *Brussels I Regulation* (Sellier, 2007), pp 585–91.

⁸⁰ P Craig and G de Búrca, *EU LAW – Texts, Cases, and Materials* (Oxford University Press, 2011).

⁸¹ Bermann, note 9 above. Accordingly, the CJEU has had a broader view of public policy when it comes to imbuing EU law norms themselves with a public policy dimension, embracing the idea that

where it may enter in conflict with the recognition or enforcement of arbitral awards in the EU.

In *Eco Swiss*,⁸² the CJEU held that certain rules of EU competition law constitute part of the public policy of the EU, and consequently an award that violates EU competition law can be annulled or refused enforcement on that basis.⁸³ In *Mostaza Claro*⁸⁴ the CJEU held that a national court seised of an action for the annulment of an arbitration award involving a consumer must determine whether the arbitration agreement constituted an ‘unfair term’ under Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts,⁸⁵ even if this objection was never raised by the consumer in the arbitration. If it did, it shall annul the award. However, the CJEU clarified in *Asturcom* that because the obligation to apply EU public policy is built upon the ‘principle of equivalence’, where a Member State court would not apply domestic public policy to refuse enforcement of an award, it was not obligated to do so under EU public policy.⁸⁶ More recently, in *Katalin Sebestyén* the CJEU held that an arbitration agreement in a consumer contract, which has ‘the object or effect of excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy’, can be denied enforcement even where the existence of the arbitration agreement—along with ‘general information on the differences between the arbitration procedure and ordinary legal proceedings’—as communicated to the consumer in ‘plain and intelligible’ language.⁸⁷

Unfortunately, the CJEU has not yet clarified the boundaries of EU public policy, and is instead approaching this question on a case-by-case basis. Therefore, without a clear delimitation of the boundaries of EU public policy, arbitration is doomed to remain in a state of legal uncertainty vis-à-vis the framework provided by the NY Convention for the enforcement of arbitral awards. Member States are likely to apply the concept unpredictably and inconsistently, in turn jeopardising the operation of the Internal Market.

(*F*note continued)

certain norms of EU law are so essential to achieve the most fundamental objectives of EU law that they cannot accept derogation for their mandatory nature.

⁸² *Eco Swiss China Time Ltd v Benetton International NV*, C-126/97, EU:C:1999:269.

⁸³ Notably, however, arbitration itself is not seen as incompatible with EU competition law. Indeed, the European Commission has long required, since *Elf Acquitaine v Thyssen and Minol*, arbitration of disputes between private parties arising out of Commission requirements imposed when conditional merger clearance was granted pursuant to Council Regulation no 4064/89 (now see Reg EC no 139/2004). See Benedettelli (2011), note 9 above, especially p 593. For a critical account of the case, see Basedow, note 23 above, p 367.

⁸⁴ *Mostaza Claro v Centro Móvil Milenium SL*, C-168/05, EU:C:2006:675.

⁸⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95, pp 29–34.

⁸⁶ *Asturcom Telecomunicaciones SL v Rodríguez Nogueira*, C-40/08, EU:C:2009:615.

⁸⁷ *Katalin Sebestyén v Zsolt Csaba Kővári, OTP Bank, OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt*, C-342/13, EU:C:2014:1857.

VI. IMPROVING THE EU FRAMEWORK ON COMMERCIAL ARBITRATION

Although there may exist some apprehension from the arbitration community about the need for the regulation of arbitration by the EU,⁸⁸ it is evident that EU law already influences the arbitration laws of Member States in many ways and vice versa.

The analysis above demonstrates a number of concerns. Not allowing arbitral tribunals to make preliminary references to the CJEU introduces substantive inconsistencies into the application of EU law and the making of the Internal Market, particularly given the large number of commercial arbitrations occurring across the EU. Likewise, in reaffirming *West Tankers*, the CJEU confirmed the inadequacy of EU private international law. Anti-suit injunctions remain contrary to mutual trust among courts in the EU. Lately, for example, the English Commercial Court has held that the CJEU in *West Tankers* remains good law under the Recast Brussels Regulation.⁸⁹ However, since the CJEU did not consider the Recast Regulation and its new Recital 12 on the interpretation of the arbitration exclusion, the Recast Regulation does not prevent the courts of the seat of the arbitration from issuing anti-suit injunctions.⁹⁰ Thus, the parallel proceedings problem remains unresolved under the Recast Regulation, a failure that in commentators' view does not appear justified.⁹¹ Accordingly, the issue may influence and have an impact on the application of the interface between arbitration and EU civil justice, Member States' justice systems, and Member States and the EU in relation to civil justice.⁹² Last but not least, as regards the boundaries of EU public policy, while a case-by-case approach allows for a considered evaluation by the Court, it also introduces uncertainty in the arbitration context, as it is unclear which provisions of EU law constitute part of EU public policy and will form a ground for the annulment of an arbitral award, a refusal to enforce it, or a refusal to enforce an arbitration agreement. The boundaries of EU public policy remain uncertain, thus creating the risk that Member States apply it in unpredictable ways. Given the increasing range of areas addressed by EU law, clarity and certainty on this point is needed.

⁸⁸ P Pisolle, 'The Proposed Reform of Regulation 44/2001: A Poison Pill for Arbitration in the European Union?' (2009) 12 *International Arbitration Law Review* 62; Bermann, note 9 above; R Lukits, 'Private Arbitration and European Union Law' (2013) 3 *Yearbook on International Arbitration* 91; R Lukits, 'Arbitration before the European Court of Justice' (2014) 17 *International Arbitration Law Review* 1.

⁸⁹ *Nori Holding Ltd v Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm). The Court did not comment or make reference to the issue of Brexit. It is plausible that English courts will no longer be constrained by the CJEU position after Brexit.

⁹⁰ P Paschalidis, 'The Future of Anti-Suit Injunctions in Support of Arbitration After the EU Court of Justice's Judgement in the *Gazprom Case*' (2017) 34 *Journal of International Arbitration* 333; Layton, note 48 above.

⁹¹ Illmer, note 22 above.

⁹² E Storskrubb, '*Gazprom OAO v Lietuvos Republika*: A Victory for Arbitration?' (2016) 41 *European Law Review* 578.

The relationship between EU law and international arbitration has become increasingly conflictual. Firstly, this situation is likely to cause uncertainties and undue worries over the future efficiency of international arbitration in the EU. Secondly, to the extent that arbitral proceedings are functionally equivalent to court proceedings to resolve disputes in commercial matters, it also poses all the time more questions over the achievement of the policies for the establishment of the Internal Market, a level playing field in the EU, and the creation of a functional EU area of justice. To a certain degree, arbitration may constitute an impediment to the effectiveness of market regulation, especially in the context of EU market integration.

In principle, from the angle of EU integration there are good reasons to argue that the EU has competence in this area, and a common framework on arbitration would be beneficial for the EU. On the one hand, arbitration is currently excluded from the EU regulation on private international law and it remains outside the sphere of EU civil justice. On the other hand, an efficient judicial system created by EU law is essential for the smooth functioning of the Internal Market. Arguably, cooperation between Member State courts is particularly important, as it ensures a uniform application of mandatory EU law. The existence of a parallel system of adjudication, falling within the exclusive competence of the autonomy and regulatory arbitrage of Member States, cannot be considered an optimal solution from the point of view of the establishment of the Internal Market and its functional area of justice. The same is true as far as conflicts between judgments and arbitral awards exist in the Internal Market, or certainty over the boundaries of an EU public policy. Arguably, a properly functioning Internal Market requires harmonisation for the certainty and consistency over concurrent arbitration and judicial proceedings, the free circulation in the EU of arbitral awards and judgments relating to arbitration, including the conclusive and preclusive effects of prior arbitral awards vis-à-vis conflicting court judgments.⁹³ Likewise, EU overriding mandatory laws ensure the establishment and good functioning of the Internal Market, as well as opportunities to access and benefit from the level playing field of regulated markets.⁹⁴

Some scholars have already determined that, in principle, the EU could exercise competence over the regulation of commercial arbitration. If it is true that EU treaties do not explicitly provide for arbitration, established constitutional principles of the EU legal order such as conferral, subsidiarity, proportionality, and legal certainty would make it permissible for the EU legislator to intervene in the approximation of the laws of Member States in areas not covered by international conventions to which they are parties.⁹⁵ Indeed, the earlier Commission Proposal—dismissed by opposition in the EU Parliament on grounds that ‘the Member States have not reached a common position thereon and it would be counterproductive, having

⁹³ Gaffney, note 8 above.

⁹⁴ J Kleinheisterkamp, ‘Legal Certainty, Proportionality and Pragmatism: Overriding Mandatory Laws in International Arbitration’ (2018) 67 *International and Comparative Law Quarterly* 903.

⁹⁵ Gaffney, note 8 above; Benedettelli (2011), note 9 above. On subsidiarity, see JF Bourque, ‘The Legal Framework of Arbitration in the European Union’ (1994) *ICC International Court of Arbitration Bulletin, Special Supplement: International Commercial Arbitration in Europe, No 5* 8.

regard to world competition in this area, to try to force their hand'⁹⁶—was premised on the EU competence.

Recent empirical evidence suggests that arbitration practitioners across Member States are divided as regards the desirability of the EU taking action to harmonise national arbitration laws.⁹⁷ Nonetheless, it is noteworthy how half of the respondents are positive outlining differences between local practices hindering the market, especially in those newer Member States where arbitration in its commercial form was not a traditional dispute resolution mechanism. This raises the question over the unexplored issue of a market itself for commercial arbitration. To the extent that it is accepted that arbitration is a market in its own right, common rules may be needed to create a level playing field across the EU rather than domestic regulatory arbitrage in a race to the bottom to attract the resolution of disputes out of court.⁹⁸ This is an issue that has never been explored in the literature and should deserve further research, especially to the extent that regard is given to the world competition in the area and the EU aims at playing a role within a framework ensuring certainty and efficiency.

In the end, pro-arbitration legislation by the EU may help to resolve sensitive issues which have surfaced before EU and national courts, as well as arbitral tribunals. These issues are likely to give rise to further conflicts with EU law in the future, especially if the courts are not prone to a sensible approach. From a public law perspective of economic regulation, the focus here is on the public interest of the affected market.⁹⁹ As a result, it is argued that regulation removing uncertainties of the nature explored throughout this work may in fact be welcome by concrete EU legislation. Here, EU action would be justified as a response to the inconsistencies and tensions here above analysed.

At the same time, EU intervention can be justified normatively as a legitimate use of supranational legislative authority. Within the legal basis offered by Article 3(2) TEU for the creation, *inter alia*, of a common area of justice, Article 81 TFEU legitimises the EU to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption by the EU of measures for the approximation of the laws and regulations of Member States, particularly when necessary for the proper functioning of the Internal Market. Under Article 26 TFEU, the EU shall adopt measures with the aim of establishing or

⁹⁶ COM(2010)0748 – C7-0433/2010 – 2010/0383(COD), *EU Parliament Report on the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, 15 October 2012.

⁹⁷ T Cole, I Bantekas, F Ferretti, C Riefa, B Warwas, and P Ortolani, 'Legal Instruments and Practice of Arbitration in the EU, A Study for the Directorate General for Internal Policies Policy Department of the European Parliament – Annexes' (2014), available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988\(ANN01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988(ANN01)_EN.pdf).

⁹⁸ On arbitrage, see eg L Radicati di Brozolo, 'Mondialisation, Jurisdiction, Arbitrage: Vers de règles d'application semi-nécessaire' (2002) 92 *Revue Critique de Droit International Privé* 1.

⁹⁹ Kleinheisterkamp, note 94 above.

ensuring the functioning of the internal market, in accordance with those provisions of the Treaties.

VII. CONCLUSIONS

The relationship between international commercial arbitration and EU law has always been a difficult one. However, with the increasing integration of the markets of Member States and the progressive establishment of the Internal Market in a common area of justice many chickens have inevitably come home to roost.

Crucial tensions remain as long as arbitration may impede the EU's goal of harmonising and ensuring the uniform application of substantive law of EU origin. Arbitral tribunals play an important role in the adjudication and settlement of commercial disputes in a market whose feature is the inevitable application of laws emanating from the EU for the establishment of the Internal Market.

Critical areas continue in the arbitral tribunals' inability to obtain clarifications from the CJEU as regards the interpretation and application of EU law, the persistence of a parallel system of adjudication and proceedings, restricted circulation in the EU of arbitral awards and judgements relating to arbitration, and conflicts between court judgments and arbitral awards. All is seasoned by uncertainties over the boundaries of a clear EU public policy that national courts should apply in determining whether to enforce arbitral awards. The CJEU-established position of a case-by-case evaluation increasingly poses a risk that national courts apply it in uncertain and unpredictable ways.

Alongside the many legal problems analysed by this work, overall the setbacks for the Internal Market are the lack of legal certainty in fragmented markets across the EU and the failure to achieve a common area of justice.

Arguably, an improved EU regulatory framework should step in to harmonise the discussed problems to establish a proper framework for an important dispute settlement mechanism such as commercial arbitration that may become functional to an efficient Internal Market, especially in an area characterised by fierce world competition. Normatively, the EU has competence for the creation of the Internal Market and a common area of justice, the two being intertwined. As to subsidiarity and proportionality, the divergence of national rules creates uncertainty and unequal market conditions for market players as Member States cannot by themselves ensure that arbitration proceedings in one Member State are properly coordinated with court proceedings going on in another Member State. On these grounds, only legislation at European level can create a level playing field. Improving the EU framework seems therefore necessary.

A potential objection that by its very nature international commercial arbitration is transnational or even global with a unique mix of hard and soft laws certainly has merit.¹⁰⁰ Under this argument, EU law is seen as regional law in a global context, thus an unsuitable or inappropriate body of laws. At the same time, to the extent

¹⁰⁰ See EU Parliament Report, note 96 above.

that global competition in attracting disputes is mounting, each jurisdiction tries to persuade users that it is different from others. Globally, hard and soft arbitral laws signal a trend of divergence, ie a lack of harmony among jurisdictions or institutions with regards to the frameworks supporting the level of standards of fairness, certainty, and efficiency. However, the types and nature of disputes, as well as the expectations of the parties, are in constant transformation and diverse. This diversity of cases and users can be an opportunity for the EU to act as a regional hub, supported by a harmonised framework providing certainty and efficiency, where parties do not find inconsistency as regards different levels of national and supranational legislation. In a regional context such as the EU, harmonisation may well maintain diversity among Member States which, in contrast to divergence, suggests that while EU jurisdictions may well share a common framework and understanding of the laws supporting arbitration, at the same time they do not have to disregard the different needs of the disputes before the respective seats and compete one versus the other.