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**The applicability of EU law on procedural and
substantive issues to arbitration proceedings**

Sebastián Aznárez López de Guereño

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The applicability of EU law on procedural and substantive issues to arbitration proceedings

Sebastián Aznárez López de Guereño*

Abstract

The present paper aims at presenting the main characteristics of EU law and arbitration in order to undertake a comparative analysis between both to correctly assess the problems of their co-existence. Do arbitral awards have to take into consideration EU law and if so, up to what extent? What happens when an arbitral award possibly contradicts mandatory EU law? More than that, if this is the case, are they entitled to request the ECJ for a preliminary ruling?

As will be seen throughout this study, there is a series of factors that influence and threaten the stability of European judicial powers and alternative dispute resolution mechanisms within EU territory. Therefore, it is peremptory to approach these cases and study the possible outcomes as well as review several ECJ case law and its judgments’.

In order to assess the aforementioned thoroughly, it becomes imperative to briefly explain some of the ruling laws and principles not only in the EU but also in the arbitral context and to name the difficulties between them. The principles of equivalence, effectiveness, legal certainty, res judicata, public order, amongst others, are regarded as main guidelines of the EU legal framework and arbitration and, as will be proven, play a crucial role for the understanding of the above stated clash between EU law and arbitration.

Keywords: arbitration, EU Law, applicability of EU law, preliminary ruling mechanism, mandatory norms, public policy, definition of court or tribunal, conflict of laws, award recognition, award enforcement

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LIST OF ABBREVIATIONS

ADR = Alternative Dispute Resolution

B2B = Business-to-business

B2C = Business-to-consumer

CJEU = Court of Justice of the European Union

ECJ = European Court of Justice

EC Law = European Community Law

ECT = Energy Charter Treaty

Et seq. = “*Et sequentes*” in Latin, meaning “*and the following*”

EU Law = European Union Law

ICC Rules = International Chamber of Commerce Rules of Arbitration of 1998.

ICSID = International Centre for Settlement of Investment Disputes

MA = Market Authorization

Modernisation Regulation = Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

New York Convention = New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

PIL = Private International Law

Rome Convention = Convention 80/934/ECC on the law applicable to contractual obligations of 1980

Rome I Regulation = Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

SME = Small and medium enterprises

TEC = Treaty establishing the European Community

TEU = Treaty on European Union

TFEU = Treaty on the Functioning of the European Union

UNCITRAL Model Law = United Nations Commission on International Trade Law Model Law on International Commercial Arbitration of 1985, amended in 2006.

US = United States of America

VAT = Value Added Tax

Chapter I

General Introduction

I.I Present Research: Questions addressed

The purpose of this paper is to examine the nature and bond between EC/EU competition law and international commercial arbitration tribunals, and how they interact with each other. There has been much discussion on whether competition law should be arbitrable or not, due to its importance to the EU and for some, because of its incompatibility with this type of alternative dispute resolution¹ mechanism. Naturally, the first question that should be then raised is whether EU competition law is arbitrable or not. Through the entry into force of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty² we learned that Member States have been assigned the task to enforce EU competition law through their national courts, but does this apply to arbitration tribunals?

Parting from the previous question, more complex issues inevitably arise regarding not only procedural rules but also substantive ones. The situations where the EU legal framework limits award effectiveness (recognition and enforcement) have to be studied. For this purpose, and throughout the present paper, the operating principles and provisions for both legal institutions will be evaluated in order to provide the reader with the criteria that the EU and the European Court of Justice³ (also known as the Court of Justice of the European Union or CJEU) have established on award recognition, enforcement and annulment. Additionally, to examine not only how the laws are interpreted within the European context and arbitral realm

¹ Hereinafter ADR.

² Hereinafter Modernisation Regulation.

³ Hereinafter ECJ.

but also to understand the aim of the EU, various essential judgements from the ECJ/CJEU shall have to be reviewed.

Procedurally speaking, we will address the availability of the preliminary ruling for arbitration tribunals within the meaning of article 267 TFEU. This topic is crucial not only in the legal sense, but also politically, and as can be logically reasoned, the answer to this question has enormous practical consequences. Which could be the reasons for the ECJ to allow or not to allow arbitration tribunals to formulate preliminary questions to it? Is the ECJ radical in this matter or do they impose specific acceptance criteria? Another aspect to be inevitably considered, is if arbitrators have the duty apply EU law “*ex officio*”?

Moving forward now into the substantive conflicts arisen between EU and international private law,⁴ public policy and mandatory norms⁵ as limits of award enforcement and annulment will be interpreted. Furthermore, various principles will have to be pondered. For instance, can an award that undermines EU “*public ordre*” be annulled even when it has become final and thus protected by the “*res judicata*” principle? Also, could the hypothetical arbitrability of EU competition law spill over to other areas such as consumer law?

I.II General Aspects of Arbitration

First and foremost, in order to assess the present problematic in depth, it becomes necessary to evoke the very definition of arbitration as well as some general aspects of it. Before outlining the general traits of arbitration, it must be mentioned that there are numerous types of

⁴ Also known as conflict of laws.

⁵ Mandatory norms must be understood as legal provisions that are of compulsory application within a legal proceeding that cannot be eliminated by the parties through contract regulation.

arbitration, however, for our purposes we will only study international commercial arbitration.

Having stated the previous, the first question one should ask to oneself is “*What is arbitration?*”

Arbitration has to be seen as a private dispute settlement mechanism created to bring the most reasonable solution to an underlying problem between two or more parties. The private quality of arbitration has two variables; primarily, it is to be understood in contrast with court dispute settlement: it is an alternative dispute settlement mechanism to State courts (public dispute settlement), but in order to become this, it had to be conferred with jurisdiction from State powers. This outcome has given rise to several issues; national courts have ceased to be the only dispute mechanism available, giving way to a new form of modern solution making.⁶

The second variable is to be interpreted in a less technical manner and in terms of confidentiality. Increasingly, parties are enticed to recur to this type of alternative dispute resolution mechanism because of the comfortableness of the aforementioned confidentiality. Parties under these proceedings are frequently entitled to insert privacy clauses to protect their interests. More than that, generally States do not impose on arbitral tribunals any obligation to publish their awards, let alone the existence of an on-going arbitration process.

As we are studying not every type of arbitration but international commercial arbitration, it is wise to bring into play Article 1 (3) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration of 1985, and amended in 2006⁷, which categorises arbitration as international when:

⁶ *Landolt*, Modernised EC Competition Law in International Arbitration, p. 2.

⁷ Hereinafter UNCITRAL Model Law.

1. The parties subject to arbitration had their place of business in different States at the time of conclusion of the agreement, or;
2. When either the (i) determined place of arbitration, (ii) a place where at least partially obligations take place or (iii) the place with which the subject-matter of the dispute is most closely connected is located outside the State in which the parties have their place of business, or;
3. When the parties concur that the agreement includes or relates to more than one country.

Having already described the definition of arbitration, its international commercial variant and its confidential feature, we now must mention perhaps the most remarkable feat of this type of ADR: the principle of party autonomy; through it, parties can virtually choose the settings most appealing for them, whether it be the arbitrator himself, the venue, procedural and substantive law, amongst others.⁸ Although enshrined in various international legal treaties, the principle of party autonomy is best described through article 17 para. 1 of the International Chamber of Commerce Rules of Arbitration of 1998,⁹ which proclaims that:

“The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate”.

As will be seen in the following chapters, the principle of party autonomy has its limits: whether the parties like it or not, the arbitrator must respect mandatory norms and public order, therefore this principle cannot be categorised as absolute. Nonetheless, and in

⁸ Renner, in: Mattli /Dietz (eds.), International Arbitration and Global Governance, pp. 119-120.

⁹ Hereinafter ICC Rules.

contrast with conventional dispute settlement (national courts), party autonomy provides the sides involved with obvious numerous advantages.

Additional benefits of applying arbitration can be for instance that usually this type of ADR is not only a much more cost efficient institution than its traditional counterpart, but also a quicker one in resolving conflicts. Moreover, one can also argue that this “private judiciary”¹⁰ helps decongest the already work-saturated national courts.

When talking about arbitration, it becomes obligatory to clarify the nature of the bond between the States and this institution. Already mentioned earlier, the States give up part of their public power in favour of arbitration tribunals, but despite the previous, one should not believe that ADR mechanisms are a tool that work for the States.¹¹ Yes, there is a close inevitable connection between the both of them, but under no circumstance should one believe the latter. If that were so, arbitration tribunals would lose much of their appeal for evident reasons. For instance, when parties are amidst a litigation process in the State of one of them, the other might feel discriminated, estranged or even at a tactical or legal disadvantage. This is avoided in arbitration proceedings; therefore, neutrality is to be considered as another advantage.

As in all things, there are those who support arbitration processes and those who retain certain distrust towards them. Arbitration as seen before can be perceived as a piece of “private procedural legislation” but it not only affects the terrain of the public procedural, but can also be deemed as a mechanism to oust the jurisdiction national courts

¹⁰ Kubas/Zawicki, in: *Belohlávek/Cerny/Rozehnalová* (eds.), *CYArb: Borders of Procedural and Substantive Law in Arbitral Proceedings*, pp.5-6.

¹¹ This comment should be understood in a relative sense, there are certain arbitration tribunals that actually work for the State, but are more rare to find, the general rule is that this institution is independent from the State.

could or would have had.¹² Despite the aforementioned, we must reiterate that it was the States who took a leap of faith in granting jurisdiction to arbitration tribunals and trying to relieve the already case-flooded national judges, and as such, they took the necessary precautions to safeguard their legal ordinances as will be seen further on.

Moreover, the fact that arbitrators must occasionally seek the assistance of national courts in order to recognise or enforce their awards proves not only that arbitrators need the help of national courts and there is therefore an underlying control by the latter but also that both institutions can be helpful to each other and co-exist in a productive and symbiotic manner. In any case it must be affirmed that as of today, almost more than 150 countries have signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹³ meaning that the recognition and enforcement of these awards can be applied in a swifter manner than ordinary court judgements.

Since awards have the nature of being final¹⁴ and binding decisions, and as such, enforceable through recourse to ordinary courts or party compliance, it gives arbitration a prerogative only courts held and that other types of ADR like mediation still do not enjoy. Additionally, whereas there is ample room for appeal in national courts, the same cannot be said for awards. As a rule, appeals are not permitted for international arbitral awards.¹⁵

¹² *Lookofsky/Hertz* (eds.), in: *Transnational Litigation and Commercial Arbitration: An analysis of American, European, and International Law*, pp. 833-834.

¹³ Hereinafter the New York Convention.

¹⁴ Clearly, the award is not automatically final, but will become final when the period for appealing has expired.

¹⁵ The exceptional situations where an award can be appealed or annulled by the parties will be studied more closely in Chapter III.

The list of advantages does not end here. Arbitrators also have the faculty of acting under two different decision making methods; the principles of equity, also known as “*ex aequo et bono*”, or as an “*amiable compositeur*”. One must be careful not to confuse the terms or apply them in a similar manner, the principles of “*ex aequo et bono*” and “*amiable compositeur*” differ in many ways.

There are many divergences between both principles, for example in the procedure of decision-making or in its content, but we will have to refrain from going in-depth in these matters. Simply put, the principle of equity can be described as a “*praeter legem*” decision-making mechanism under international arbitration, which relies on the arbitrator’s subjective sense of justice. Following the “*amiable compositeur*” approach on the other hand, one must observe the law and the principles stemming from it, but can -to an extent- modify the applied effects. It must be noted that arbitrators, regardless of acting under one principle or another, must always endure the obligation of solving conflicts based on their merits.¹⁶

Lastly, and in proximity with Chapter I.III, is the issue of “arbitrable” matters. It is said that where the law licenses a certain case to be submitted to the powers of arbitrators it is considered to be “arbitrable”, however, not all spheres of law can be arbitrable. This is due to several reasons: for instance, when a certain sphere of law is regarded as high public interest, it might not be desired to bestow such power at the arbitrators disposal, since arbitration has been specifically conceived to serve the exclusive interests of the parties. Moreover, in some areas of law, the State may believe that arbitration tribunals are not capable for dealing with particular questions. Also, even in the hypothesis of a State willing to delegate jurisdiction on arbitral tribunals, it would perhaps have to worry about not knowing

¹⁶ Belohlávek, in: Belohlávek/Rozehnalová/Cerny (eds.), Czech (& central European) Yearbook of Arbitration: Borders of Procedural and Substantive Law in Arbitral Proceedings, Volume III, 2013, pp. 25-26.

about the existence of the dispute and the result of said conflict. Finally, the State may not want to confer jurisdiction upon arbitration tribunals because it deems one of the parties weaker than the other (for instance in disputes between sellers and consumers).¹⁷

I.III Specific link between EU Law and Arbitration

Although many types of arbitration spheres can be found within EU context, we will solely cover arbitration regarding EU competition law. Especially within this sphere of law, arbitration is gaining great importance. Clearly, the perks of this ADR studied in Chapter I.I lure many companies and businessmen and women. Nevertheless, parallel to this rise in importance is the number of questions regarding the interpretation of the applicable norms, and how arbitration will apply them within EU context.

Previously mentioned, arbitration has been subject to scepticism by many, mainly due to the fear of law evasion and litigation circumvention. States find it at times challenging to be aware and up to date over the development of countless arbitration proceedings, and more importantly it is not a simple endeavour to figure out if arbitral awards are respecting or applying mandatory norms, due to arbitration's private trait. In addition to that, Member States courts', the European Commission and the ECJ could worry about arbitrators not employing mandatory norms correctly and thus disrupting the desired legislative harmonisation. Specifically speaking, EU competition norms have been created to protect the wider interest of the European internal market and its consumers¹⁸, yet arbitration constitutes a tool to serve private interests.

¹⁷ *Landolt*, (fn. 6), pp. 89-90.

¹⁸ Regarding the finality of competition law, many authors go beyond the protection of the internal market and the maximum welfare for consumers: they argue that the previously stated is more characteristic of the US, and that competition law in the European context not only strives for internal market protection and maximum consumer welfare but also aims to protect certain spheres relevant to articles 11

More than that, competition law is not easily applicable: it involves vast economic factors and requires a deep understanding of the global market that few professionals retain, and in a majority of cases, infringement of competition laws can effortlessly go unnoticed. To complete hardships that the present ADR mechanism might face is the fact that it has limited fact-finding power.

Accordingly, it might well be questioned if arbitration –as flexible as it is- should be given so much leeway in this matter. Hence, it is safe to say that the States’ concerns on what should be arbitrable matters have a solid foundation.

On the other hand, it should also be taken into account that arbitral tribunals, if they do not carry out their functions properly, risk having their status and jurisdiction over a certain arbitrable realm taken away by the States, since one must not forget that the State is the sponsor of arbitral tribunals, “taking a chance” and delegating some powers that were before completely of public power character.¹⁹ Furthermore, the fear of the avoidance of mandatory norm appliance should be to a degree dismissed; although true that party autonomy is a strong principle guiding an arbitrator’s performance, this principle is only applicable when private interests are in play. When we add to private interests public ones, the situation will radically change, and arbitrators, as experienced professionals, will override party autonomy in favour of “*ordre public*”.²⁰ Concerning the argument regarding arbitrators possibly being unfit to carry out competition law disputes, it could undoubtedly be refuted by stating the fact that arbitrators are

TFEU *et seq.* such as the environment, employment, industrial policy, preservation of liberty, fair competition, promotion of SME and social policies.

¹⁹ One must not believe that this delegation of powers comes from an altruistic spirit. Most likely, the main underlying reason for States conferring these competences upon private institutions such as arbitration tribunals is to reduce public spending.

²⁰ Landolt, (fn.6), pp. 107-108.

usually renowned lawyers or retired judges, and therefore more than qualified to understand the complex topics presented before them.

In any case, there are a series of measures that interested players such as Member States or the European Commission could impose to safeguard their national and European legal frameworks, respectively. For instance, States can impose the duty on arbitral tribunals to inform them of the existence and outcome of all disputes handled by them. Another option available would be to have national courts scrutinize the correct application of mandatory norms at the recognition or enforcement stage of an award.

In fact, the fear of arbitrators having too much action margin has been materialised in the past through the imposition of a series of measures to preserve the integrity of EC law. For instance, the European Commission implemented the duty on arbitrators to notify it when emitting awards in connection to block exempted agreements.²¹

Formerly, the European Commission played a crucial role with centralised and overseeing powers concerning the implementation and enforcement of EC Competition Law throughout EU territory. This has changed much since the entry into force of the Modernisation Regulation; through it, the Member States courts' and competition authorities received a new responsibility: the direct enforcement of EC competition law, including the previously exclusive competence of the Commission of enforcing article 81 (3) EC.²² In other words, the Commission's grip on competition law has been loosened after the Modernisation Regulation.

²¹ Landolt, (fn.6), pp. 99-100.

²² Currently article 101 (3) TFEU.

Consequently, and by virtue of article 10 EC²³, Member States must currently enforce competition laws. The previous statement makes one wonder if this is by analogy applicable to arbitral courts, which leads us to our next chapter.

²³ Currently article 4 (3) TEU.

Part I

EU and Arbitration: Legislative Contrast

It is not often when EU laws and arbitration laws clash, however, as we have seen and will continue to see throughout this paper, there are certain situations in which a collision between legislations may occur. In order to assess the issue correctly, we must revise some of the main legislative framework and guidelines conducting EU law and arbitration.

Chapter II

Introduction to EU law: review of main functioning principles

II.I Supremacy

Together with the principle of direct effect, the supremacy of EU law²⁴ has been regarded as one of the backbone principles that have helped to shape the current EU legal order. The meaning of this principle is as self-explanatory as its name suggests: “*all EU law prevails over all national law*”.²⁵

The spirit of this principle can be best understood through the Judgement in *Costa vs. E.N.E.L.*²⁶ Within it, it was reasoned that the Member States forfeited part of their sovereignty in order to create a superior legal system, with unlimited duration, own institutions, personality and legal capacity, and had thus transferred part of their powers to it. Accordingly, this competence transferral can only be understood as the acceptance that the rights and obligations stemming from the Treaties and the Community are binding to the States.

²⁴ Also known as the principle of primacy of EU law.

²⁵ Bobek, in: *Barnard/Peers* (eds.), *European Union Law*, p. 159.

²⁶ Judgement in *Costa v. E.N.E.L.*, Case C-6/64, ECR 585, EU:C:1964:66.

Therefore, primacy gives authority to all national judges –indistinctly to whether they are a Court of First Instance or Supreme Court judges– to consider not applying a domestic piece of legislation if they consider it contrary to EU law. This setting aside of national laws in favour of EU law can be performed by the judiciary at any procedural moment, “*sua sponte*” and without heeding what their domestic laws prescribe in that context.²⁷ The previously stated must now be evaluated not in national law terms, but within the arbitral domain. Can the primacy of EU law affect not only national legal system, but also international ones such as arbitration tribunals?

The answer to the aforementioned is “*prima facie*” a simple one, but as will be proven, much thornier than it appears: the answer will depend on whom you are asking. From the above, one could believe that the principle of supremacy of EU law is an absolute one, even when put in contrast with other legal systems. To shed some light on this issue and to raise understanding on the complexity of this issue, it is convenient to briefly mention a recent case under international investment arbitration raised before the International Centre for Settlement of Investment Disputes:²⁸ the *Electrabel v. Hungary* case.²⁹

This case concerns an intra-EU Energy Charter Treaty³⁰ claim between a Belgian company and the Republic of Hungary. The European Commission participated within the proceedings as “*amicus curiae*”³¹, and argued before the tribunal that it firstly did not have the competence to rule over EU matters, and secondly, that Hungary acted

²⁷ Bobek, (fn. 25), p. 161.

²⁸ Hereinafter ICSID.

²⁹ Judgement in *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, decision on jurisdiction, applicable law and liability, 30 November 2012.

³⁰ Hereinafter ECT.

³¹ “*Amicus Curiae*” or literally friend of the Court is the involvement of a third person in a legal proceeding that is not part of the case. Although not solicited by the parties, the role of this person is to provide information to the Court raising awareness on the matter that the Court’s decision can carry such great legal effects that surpass the parties’ compliance to it.

in accordance to the Commission's instructions and therefore any decision by the tribunal contrary to EU law would not be enforced within EU territory by virtue of the principle of primacy.³² Up to this point, the answer posed before could be answered in the affirmative; however, the tribunal's answer was opposed to the Commission's view and held that signatories under the ECT had subjected themselves to the ICSID, and therefore the latter was competent. Not surprisingly, the tribunal omitted any reasoning concerning the principle of supremacy.

From *Electrabel*, we might partly conclude that if the ECJ would uphold the Commission's stance regarding the principle of supremacy, the award would not be recognised or enforced within EU territory. This at the same time would create tension amongst other international institutions such as ICSID.

II.II Direct effect and applicability of EU law

The principle of direct effect can be considered as the principle of supremacy's brother; both in combination constitute a solid base for EU law enforcement over national ordinances. This is so because to a great extent their relation is symbiotic, one would be meaningless without the other: primacy without direct effect would lead to a principle that is not applicable in domestic legal systems, while reversely the translation of this would be to have the States' constitutions decide the rank of EU law.³³

In other words, direct effect can be conceptualised as the immediate availability of an EU provision for a national judge to apply if he deems doing so necessary; furthermore, no implementation act is

³² *Laird/Sabahi/Sourgens/ Birch/Duggal*, in: *Bjorklund* (ed.), *Yearbook on International Investment Law and Policy* 2012-2013, p.113.

³³ *Bobek*, (fn. 25), p. 159.

necessary for the application of the hypothetical provision.³⁴ Again, like in the Judgement in *Costa*, we find that through the Judgement in *Van Gend en Loos*,³⁵ the ECJ reflects upon the value of the European legal framework:

“Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage”.

Having stated the above, it must equally be noted that for a provision to be directly effective, it needs the following pre-requisites:

1. Unconditional.
2. Sufficiently precise.
3. Because of the failure of a Member State to implement said provision into its national legal system within the established period of time or due to an incorrect implementation of the norm.

For the purposes of this research, it also becomes necessary to understand horizontal and vertical direct effect. On one hand, vertical direct effect is the faculty of invoking an EU norm against a Member State. On the other hand, horizontal direct effect concerns the use of an EU provision against another individual.

Not only must the “private judiciary” take into account direct effect when emitting their awards, but also the direct applicability of norms. This second principle, although similar to the former, is a carrier to

³⁴ Bobek, (fn.25), p. 143.

³⁵ Judgement in *Van Gend en Loos*, Case C-26/62, ECR 1, EU:C:1963:1.

certain special characteristic and its differences are worth quickly mentioning. Firstly, applicability is specifically linked to EU regulations, as laid down in article 288 TFEU³⁶. Secondly, this provision points out that regulations shall enjoy general application, are completely binding to Member States as well as being directly applicable. Directly applicability can hence be translated as the faculty a norm possesses to become law in a Member State without the stage of needing a national parliament to enact legislation. Directives for instance do not enjoy this privilege: before being directly applicable in a Member State, they must be transposed. An important case related to direct applicability and EC/EU competition law, is the Judgement in *BRT v. Sabam*³⁷. Through it, we can safely declare that articles 81 (1) and 82 EC were asserted by the ECJ as directly applicable.

As previously mentioned, together with the principle of supremacy of EU law, direct effect and direct applicability constitute an extremely effective enforcement mechanism. This must not go unnoticed, since these principles acting together form an integral part of Member States legal systems. This at its time means that arbitrators, if wanting to have their awards recognised and enforced, must act very thoroughly when emitting their awards to not contradict any EU norm.

II.III Principles of equivalence and effectiveness

Following the context of the previous chapters, we must move further on towards the principles of effectiveness and equivalence, which together can also be considered a legal force to be reckoned with in terms of enforceability.

³⁶ In this context, it is worth noting that not only regulations enjoy direct applicability, but also EU Treaties.

³⁷ Judgement in *BRT v. Sabam*, Case C-127/73, ECR 313, EU:C:1974:25.

On one hand, the principle of equivalence prohibits any type of discrimination against EU law in comparison with national law of Member States.³⁸ In other words, it commands that the recognition and enforcement of EU rights must be parallel to those embedded by Member State authorities.

On the other hand, the principle of effectiveness exists to ensure the effective enforcement of EU rights. Therefore, the enforcement of EU laws must not be made practically impossible as well as excessively difficult.³⁹ An example of practical impossibility would be for instance when there is no EU or national remedy available concerning law-based claims. Excessively difficult, in contrast –its nature being more subjective- is trickier to analyse. Depending on the party involved, the degree of difficulty will be similar, even if the problem is the same for both (i.e. Multinational company with dedicated litigation department vs'. small local business).

Recently however -more specifically with the entry into force of the Treaty of Lisbon-, the dual requirement of equivalence and effectiveness, although still very present, appears to have gained slight inertia since the introduction of the principle of effective judicial protection,⁴⁰ which will be studied in Chapter II.V.

II.IV Principle of “*res judicata*”

Largely found in Chapter V, the principle of “*res judicata*” or claim preclusion is a key element to take into account in almost all legal circumstances that may arise. Its translation into English would be close to “already judged matter”, and this by itself can serve as an

³⁸ Bobek, (fn.25), p. 166.

³⁹ Ibid, p. 167.

⁴⁰ Enshrined in article 19 (1) TFEU.

introduction to this doctrine. Claim preclusion can be put forth by the parties or by the judge to block the same case –because a judgement has already been rendered- from being brought again to a court. More practical explanations of why this doctrine is applied for instance can be the fact that without “*res judicata*”, losing parties would bring up the same issue to a court or different courts hoping that the ruling would be different under another judge. It also prevents future judgements to contradict old ones.

There are different types of “*res judicata*”, but we can mainly distinguish procedural and substantive claim preclusion. Under national law, for instance Spanish civil law, these two variants of the same principle are also taken into account. Under article 207 of the Spanish Civil Procedural Code (*Ley de Enjuiciamiento Civil*), procedural “*res judicata*” can be applied when a final judgement has been rendered, with no chance of appeal or having had the option to appeal, the fixed period of time to appeal has expired without any action by the parties.

Article 222 of the same code on the other hand describes the substantive “*res judicata*”. It stipulates that the parties cannot solicit new proceedings when there is duplicity in the parties involved, the object of the plea, and the merits of the dispute with a former judgement.

The theory behind this doctrine seems fairly simple, but as will be seen by studying ECJ case law, it may collide with other equally important principles, multiplying its complexity.

II.V Main applicable articles of the TEU and TFEU

II.V.A Article 4 TEU: Sincere cooperation

In close connection to the aforementioned principles of equivalence and effectiveness is article 4 (3) TEU,⁴¹ which states that:

“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

Emanating from this provision is the obligation for the Member States of loyal cooperation, meaning that they have the duty to properly give effect to EU law. This duty is materialized through 3 requirements:⁴²

1. The principle of equivalence must be applied and respected.
2. The principle of effectiveness must be applied and respected.
3. The chance to formulate a preliminary reference to the ECJ under article 267 TFEU must be present at all times in order to guarantee a uniform interpretation and application of EU law.⁴³

Through this article and its subsequent interpretation by the ECJ in *Rheinmühlen*, the principle of sincere cooperation is made clear, meaning that Member States are the ones tasked with imposing

⁴¹ Formerly article 10 TEC.

⁴² Landolt, Eco Swiss and its ramifications, February 2012, p. 1, available at http://www.landoltandkoch.com/wp-content/uploads/2012/02/120130_VAD_PhLandolt_NotesReferences.pdf (12 May 2015).

⁴³ Judgement in *Rheinmühlen v. Einfuhr*, Case C-166/73, ECR 33, EU:C:1974:3, paras. 2, 3 and 5.

respect and correctly enforcing EU law through their national courts. Although arbitration courts are not directly affected by this provision -seeing as the obligations are between the EU and Member States-, they must still take it into account: this principle should also be observed by the arbitrators when reaching decisions, due to the fact that if an award does not comply with EU law, national judges in the enforcement process will not recognize it. In practice, this has been shown in the Judgement in *Asturcom*⁴⁴ by saying that the obligation to apply EU public policy is built upon the principle of equivalence.⁴⁵

In reference to the last requirement for the duty of sincere cooperation, it is “*conditio sine qua non*” to include Article 267 TFEU amongst the most critical articles for the purposes of this research.

II.V.B Article 267: The preliminary reference mechanism

The mechanism contained within this provision is regarded as the “*ultimate manifestation of the relationship of cooperation between the national courts and the Court of Justice*”.⁴⁶ Through it, the EU aims -and greatly achieves it- to guarantee that EU law is applied in an undeviating manner by domestic judges.⁴⁷

For an optimal understanding of Chapter IV and of the functioning of the EU legal system, article 267 TFEU reads as follows:

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

(a) the interpretation of the Treaties;

⁴⁴ Judgement in *Asturcom Telecomunicaciones SL v Rodriguez Nogueira*, Case C-40/08, ECR I-9579, EU:C:2009:615.

⁴⁵ *Cole/Bantekas/Ferreti/Riefa/Warwas/Otrolani*, Legal Instruments and Practice of Arbitration in the EU, 2014, p.202, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf) (accessed 8 June 2015).

⁴⁶ *Albors-Llorens*, in: *Barnard/Peers* (eds.), *European Union Law*, p. 284.

⁴⁷ Judgement in *International Chemical Corporation v Amministrazione delle finanze dello Stato*, Case C-66/80, ECR 1191, EU:C:1981:102, para. 2.

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

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

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

From the spirit of this provision it is clear to observe that this mechanism is to be utilized when a national court is under the obligation of applying EU law and needs interpretation of a certain provision. Additionally, judges may face the issue of assessing the validity of an EU law under a certain context and hence request a preliminary ruling.

However, what happens when it is not a national court or tribunal who is confronted with these conflicts but an arbitrator? Could they request for a preliminary ruling in the same manner as a national judge?

The answer is best explained through the judgements of the ECJ in this regard, and will be elucidated within Chapters V and VI.

Chapter III

Introduction to applicable Arbitration Law

Although the present section constitutes a very interesting one, and much can be said upon the interpretation and application of conflict of law rules, we will only try to briefly describe their relevance within our particular context, since it is in the opinion of the author that law is better understood when “*put to the test*”. In other words, although we will tackle in this chapter all the essential arbitration provisions in a theoretical way, a more in depth analysis of them will be carried out through case law of the ECJ throughout Chapter V, to see how they function in practice.

III.I New York Convention

The New York Convention, as its full name lucidly explains, find its meaning on the recognition and enforcement of foreign arbitral awards. Currently, more than 145 States have signed it, including all EU Member States. By virtue of article I (2), this provides that when an arbitral tribunal emits his award, it will enjoy recognition amongst all EU Member States.

However, more interesting is the “*numerus clausus*” list contained in article V (1) concerning the exceptions where denial of recognition of awards can be lawfully performed; 5 potential situations can be numbered:⁴⁸

1. One of the parties suffers from incapacity or the agreement in itself is invalid.
2. Lack or insufficient notice to one of the parties as to the arbitral proceedings.
3. The award has surpassed the threshold agreed by the parties.
4. Unlawful arbitral procedures.
5. Non-binding award.

⁴⁸ Lookofsky/Hertz (fn. 12), pp. 920.

Moreover, the second section of article V adds 2 more criteria. The first criterion on the denial of recognition and enforcement of rendered awards is the “*non-arbitrability*” exception:⁴⁹ if the national court of a State comes to the conclusion that under their national rules, arbitrators are not entitled to settle the subject that caused the dispute between the parties⁵⁰. Secondly, where a judge deems an award to be contrary to the public policy of his/her country, it is permitted to refuse its recognition and enforcement.⁵¹

Both criteria for denying effectiveness to an award are paramount. First of all, what is considered arbitrable is controlled and decided by the Member States; nonetheless, this exclusion criterion is rarely invoked.

On the other hand, parties frequently try to prove that under article V (2) (b), an award must not be enforced. As will be seen in the case law section, public policy constitutes a incredibly powerful instrument of the EU and of Member States to “*keep at bay*” unlawful acts, and at the same time provides arbitrators with an efficient guiding protocol.

III.II Rome Convention and Rome I Regulation

The Convention 80/934/ECC on the law applicable to contractual obligations of 1980⁵² and the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008⁵³ on the law applicable to contractual obligations also constitute two fundamental pieces of private international law.⁵⁴

⁴⁹ *Born*, International Arbitration: Law and Practice, p. 404.

⁵⁰ Article V (2)(a) of the New York Convention.

⁵¹ Article V (2)(b) of the New York Convention.

⁵² Hereinafter the Rome Convention.

⁵³ Hereinafter the Rome I Regulation.

⁵⁴ Hereinafter PIL.

III.II.A The Rome Convention

The Rome Convention is Rome I Regulation's legal predecessor. It was applied to all EU Member States at that time, as well as imposing the obligation on accession candidates to sign it upon entry to the EU; therefore, it is applicable to all 28 Member States.

The treaties' purpose is to provide the parties with the option of choosing the applicable law of a concrete state, and if not chosen, imposing a special conflict rule by default. As will be seen, this limits it in comparison to the UNCITRAL Model Law. Firstly, while the former enables parties to choose applicable law from a state, the latter goes beyond and includes in this spectrum general principles of law, commercial practices or transnational law. Moreover, when the parties have not designated the applicable law, the Rome Convention foresees the application of the standard of "*characteristic performance*",⁵⁵ contrary to the UNCITRAL Model Law, which allows arbitrators to choose the conflict of law rules of their own preference. Nevertheless, it must be taken into account that the Rome Convention, although mandatory for all Member States, does not include arbitration agreements as one of its compulsory jurisdictions by virtue of Article 1 (2)(d).⁵⁶

III.II.B The Rome I Regulation

The Rome I Regulation entered into force in 2008, replacing the Rome Convention and also applied to all Member States excepting Denmark, who opted out. Being it an EU Regulation, and thus having direct applicability, it helped establish more uniform rules regarding

⁵⁵ The term or mechanism of characteristic performance is used in PIL to help determine the applicable law of a dispute when the parties have not explicitly chosen one. Usually, characteristic performance will choose the applicable law of either the place of habitual residence or the principal place of business. See *Lipstein*, Nw. J. Int'l L. & Bus, 1981, Volume III, Issue 2 Fall, pp. 402-405.

⁵⁶ *Belohlávek*, in: *Belohlávek/Rozehnalová* (eds.), *Czech (& central European) Yearbook of Arbitration: Second Decade Ahead: Tracing the Global Crisis*, Volume I, 2010, pp. 39-40.

choice of law than its ancestor.⁵⁷ There has been much debate whether this regulation must be applied for arbitration disputes: many authors seem to lean towards this premise⁵⁸ and in practice it is used by parties (voluntarily); however, taking the more restrictive approach and invoking article 1 (2)(e), “*prima facie*” the answer to this should be in the negative.

In any case, for EU purposes, the Rome I Regulation remains a fundamental piece of the conflict of law sphere. Relevant to this paper, we will highlight articles 3, 9 and 21. Through article 3, or the principle of party autonomy, parties will choose their preferred applicable law, but both articles 9 and 21 will limit the application of the chosen law. The first limit given by article 9 comes in the form of “*overriding mandatory provisions*”.⁵⁹ This is translated as the prerogative of national judges to deem an award applicable or non-applicable according to the content of the award. Secondly, article 21 stipulates that national courts may deny application of a norm when it contradicts the “*public policy of the forum*”.

III.III The UNCITRAL Model Law for International Arbitration

Last but not least, is worth mentioning the UNCITRAL Model Law, since it applies exemplary standards so as to international arbitration, and is evaluated –as its name states- as a model or an ideal way to approach conflict of law situations. The Model Law has taken the determination to harmonise PIL rules regarding international commercial arbitration such as award nullity, recognition or

⁵⁷ Upon accession of new EU Members, the Convention was sometimes not implemented completely or was incorporated with some exceptions, creating legal differences between countries.

⁵⁸ Belohlavek, Romanian Review of Arbitration 2014, Volume 8, Issue 2 (30), pp.15-16.

⁵⁹ Overriding mandatory provisions must be considered as the norms of public interest that are essential to uphold for a country, whether they be of political, social or economic character. See article 3 (1) of the Rome I Regulation.

enforcement.⁶⁰ One of the characteristics of this model law is exactly that it is a model law. It has been created as an example that all States can –and should- follow, yet is not binding because as it is not a treaty or convention, there is no possibility for States to become signatories of it.⁶¹ Despite this fact, the UNCITRAL Model Law has progressively conquered influence over States,⁶² enjoying from more and more national enactments as time passes. This could be explained –apart from the model’s manifest excellent standards- by the fact that, as its Explanatory Note describes, it holds no incompatibility with domestic arbitration rules.⁶³

Moreover, and as previously stated, the scope of application of this model is wider than that of the Rome Convention, by for instance assigning general principles of law, commercial practices or transnational law to govern a contract. Not only that, but also when parties have not chosen the applicable law to rule an agreement, arbitrators have the freedom to choose from their perspective the more convenient one.⁶⁴

The UNCITRAL Model Law has a narrow connection to the New York Convention, having almost virtually the same norms for instance in party autonomy and for award recognition and enforcement. In relation to the New York Convention, it recommended that article II (2) should not be interpreted exhaustively with regards to the circumstances described there. Additionally, it advocated that article VII (1) had to allow parties to avail themselves of rights to seek

⁶⁰ European Parliament, Legal Instruments and Practice of Arbitration in the EU, p.23, 2014, available at: [Http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf) (12.06.2015).

⁶¹ UNCITRAL, FAQ-UNCITRAL Texts, 2015 http://www.uncitral.org/uncitral/en/uncitral_texts_faq.html#model, (12.06.2015).

⁶² Currently, legislation based on the Model Law has been adopted in 69 States in a total of 99 jurisdictions.

⁶³ UNCITRAL Model Law Part Two: Explanatory Note.

⁶⁴ Belohlávek, in: *Belohlávek/Rozehnalová* (eds.), *Czech (& central European) Yearbook of Arbitration: Second Decade Ahead: Tracing the Global Crisis*, Volume I, 2010, pp. 39-40.

recognition of an award's validity under the law ruling the country where recognition is sought.⁶⁵ In its own article 36 (1), it is stated that award recognition and enforcement may be rejected on the grounds of the public policy of the State in question. Obviously, there is no mention of EU public policy in either legal text, since none of them were drafted solely for the EU Community Members but for the international community as such. In this sense, both provisions enabling actors to request for non-recognition and enforcement should be interpreted "outside the box". Although national public policy is mentioned, it is clear that EU Member States and their national courts will have to observe EU mandatory norms and public policy, and as a consequence, so will arbitrators.

Chapter IV

Connecting two worlds: Mandatory norms and public policy

Having already defined in a short and concise manner mandatory norms and public policy, due to its paramount relevance to the present research, it must be further developed. Through the looking glass of the New York Convention, Rome Convention, Rome I Regulation, and UNCITRAL Model Law, it is manifest that both terms possess a great relevance in terms in arbitral awards, because they constitute legal causes for review of an award, for a petition for annulment, and even enforcement denial.

Although mandatory rules are in a way an expression of public policy,⁶⁶ it becomes necessary to clarify the difference between mandatory provisions and public policy:

"The generally accepted dividing line between the two is that public policy operates negatively in that it involves the disapplication of the

⁶⁵ UNCITRAL Model Law Part Three: Recommendations.

⁶⁶ Nygh, *Autonomy in International Contracts*, p.203.

*relevant applicable law, while mandatory rules operate positively in that they are superimposed onto the applicable law of the contract”*⁶⁷

This in other words means that mandatory norms frequently protect private interests by preventing a position imbalance between parties in a contract, by not avoiding the application of a rule that would otherwise protect the weaker person involved (whether physical or legal). Public policy on the other hand deals more with the issue of – as stated above- not recognising and enforcing a norm because it flagrantly opposes the values of the court where effectiveness is petitioned.⁶⁸

Not surprising, both terms are considered within the sphere of EU Competition Law as artificial, being in a way two sides of the same coin.⁶⁹ Being aware of this, it then becomes evident that arbitrators, in terms of recognition and enforcement, will also observe the “*overriding mandatory provisions*” and the “*public policy of the forum*” contained for instance in Rome I Regulation when rendering their awards. This is also no exception under the principle of equity or “*ex aequo bono*”, where even if the parties have authorised the arbitrator to act according to this principle, the latter will still have to observe not only EU public policy areas, but also national “*ordre public*”.

It is a growing trend that arbitrators, in order to alleviate themselves with this cumbersome ordeal, first try to interpret international public policy, and then try to match it to the domestic policies. This could be translated as “*ordre public transnational*”,⁷⁰ although the exact

⁶⁷ Chong, JPIL 2006, Volume II, Number 1, p.32.

⁶⁸ Landolt, (fn.6), pp. 115-116.

⁶⁹ Danov, Jurisdiction and Judgments in Relation to EU Competition Law Claims, pp.152-153.

⁷⁰ Pierre Lalive, “Ordre public transnational (ou réellement international) et arbitrage internationale”, Revue de l’arbitrage, no. 3 (1986): pp.327-373, cited in:

definition remains unclear, since it can either mean shared legal concepts between States or for instance values of “*international commerce*”.⁷¹ One thing is for certain, transnational public policy might very well be the seed of the constitutionalization of international commercial arbitration.⁷²

It is then safe to say that the “private judiciary”, as professional as they are, largely take into account the possibilities of award recognition and enforcement refusal. More colloquially, nobody wants their work (in this case, their awards or orders⁷³) to not be acknowledged by others and, in an extreme case, criticised. Nonetheless, after having reviewed the differences between both terms, it will also be gratifying to further explore how they work in sections to come.

Part II

Renner, in: *Mattli/Dietz* (eds.), *International Arbitration and Global Governance: Contending Theories and Evidence*, pp. 130.

⁷¹ ICC case no. 6320 (1992), *Y.B Comm. Arb.* XX (1995), p.62.

⁷² Renner, (fn. 8), pp. 133.

⁷³ Orders have to be distinguished from awards in the way that they are mainly issued for the procedural aspects of the proceedings.

Review on main EC/EU case law on arbitration proceedings

Chapter V

EC/EU Case Law Overview

V.I Nordsee Judgement⁷⁴

In order to assess the problematic of the applicability of EU law to arbitration courts, it becomes imperative to give a summarized explanation of ECJ rulings, the first of them being the “*Nordsee Judgement*”.

It must be noted that *Nordsee* was in a way a legal pioneer, since it was the first case posed to the ECJ concerning the obligations and rights that Community law could impose or grant on arbitrators.

In this case, three German shipping groups entered into a joint project for building factory-ships for fishing, and asked the EC for funds to do so. However, the Commission did not grant funding for all the ships desired by the parties, and the latter signed on the 27th of June of 1973 a secret contract to share the available funds between themselves disregarding the Commissions assessment on how to allocate the funds. Afterwards *Nordsee*, having built six ships (three more than its counterparty), claimed payment from *Nordstern*, to which the latter refused to pay under the basis that their agreement was in violation of Community Law.

In the pooling agreement signed on the 27th of June of 1973, there was an arbitration clause that forbade recourse to ordinary courts and assigned any dispute to arbitration. In any case, under German law,

⁷⁴ Judgement in *Nordsee v Reederei*, C-102/81, ECR I-1095, EU:C:1982:107.

arbitrators apply German Civil procedural law and judicial enforcement is provided.

For the arbitrator to properly emit his award, it was imperative to analyse Community Law in order to assess whether there had been an irregular use of the funds through the pooling agreement. Therefore, he requested under article 177 of the Treaty⁷⁵ a preliminary ruling from the ECJ and formulated the following question:

“Is a German arbitration court, which must decide not according to equity but according to law, and whose decision has the same effects as regards the parties as a definitive judgment of a court of law (article 1040 of the Zivilprozessordnung (rules of civil procedure)) authorized to make a reference to the Court Of Justice of the European Communities for a preliminary ruling pursuant to the second paragraph of article 177 of the EEC treaty?”⁷⁶

It became clear for the arbitrator that the first issue to be resolved was the nature of the arbitration courts in the eyes of the ECJ, this is so because under the aforementioned article, it is stated that *“Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”⁷⁷*

Under the analysis of the provision, it is quite clear that in order for the arbitration court to request a preliminary ruling, it would first have to study with the ECJ if their courts under Community Law could be regarded as equal to those ordinary courts of Member States. It must

⁷⁵ Article 234 of the TEC and currently article 267 of the TFUE.

⁷⁶ Judgement in *Nordsee v Reederei*, C-102/81, ECR I-1095, EU:C:1982:107, para. 8.

⁷⁷ Para. 2 of article 267 TFUE.

be noted that the factors defining a court or tribunal had already been created; several keynotes had to be fulfilled:

1. Established by law.
2. Permanent.
3. Compulsory jurisdiction.
4. “*Inter partes*” procedure.
5. Application of rules of law.
6. Independent.

However, these criteria are not absolute. For instance, in *Broekmeulen v Huisarts Registratie Commissie*⁷⁸ the ECJ gave out a judgement instituting that a court established by the Royal Medical Society for the Promotion of Medicine was a "court or tribunal" within the meaning of the treaty, even though that society was actually a private association.

As stated by the arbitrator in his request, there are narrow similarities between ordinary courts and arbitration courts; for instance, arbitrators must apply the law, are independent, established by law and their awards have the force of “*res judicata*” and are enforceable.

On the other hand, the parties when signing the agreement were under no obligation to submit or bind themselves to arbitral jurisdiction, therefore, it cannot be considered as a compulsory jurisdiction. At the same time, the German Public Authorities were in no moment involved in the decision of the parties to opt for arbitration, and consequently were not called to intervene in the proceedings before the arbitrator.

⁷⁸ Judgement in *Broekmeulen v Huisarts Registratie Commissie*, C-246/80, ECR 2311, EU:C:1981:218.

It follows from the reasoning of the ECJ that arbitral courts cannot be considered -at least completely- as Courts within the meaning of article 267 TFUE. As reasoned in *Broekmeulen*, Community Law has to be fully taken into account throughout the whole European Community territory and parties bounded by contracts are not free to create exceptions to it. The ECJ continues its reasoning stating that if EC Law questions are raised in arbitral disputes, these can refer to ordinary courts to examine them due to the bond that joins both ordinary and arbitral courts. As a consequence, the ruling of the ECJ was that since arbitral courts were not Courts of the Member States “*per se*”, it lacked the jurisdiction to formulate a preliminary question.

According to *Sionaidh Douglas-Scott*, the line of thought present by the ECJ can seem at first hard to stomach, due to the fact that allowing arbitration courts to formulate preliminary requests to the ECJ would clearly ensure a more homogeneous interpretation of EC law throughout the Community territory. *Douglas-Scott* continues explaining that the ECJ probably bestowed a considerable sum of importance upon the fact that arbitral courts did not have compulsory jurisdiction and that they did not constitute a permanent body. More than that, the ECJ was almost certainly “*fearful of a floodgate of litigation arising from unnecessary preliminary references*”.⁷⁹

On the other hand, it is safe to say that any controversial judgement is like a double-edged sword, where it's reasoning seems to be logical, it can also contain certain hindrances. In *Nordsee*, the ECJ was given the chance to expand its influence to arbitral tribunals but decided not to do so; this at the same time came with the considerable setback of

⁷⁹ *Douglas-Scott, Sionaidh*, Constitutional Law of the European Union, Pearson Education Limited (Longman), Great Britain, 2002, page 231.

not being able to “*saddle arbitration tribunals with obligations, in particular those flowing from article 10 EC*”.⁸⁰

Independently of the above mentioned, at this point the ECJ thought it best to leave the issue of enforcement of Community rights to the Member States courts’.

V.II Eco Swiss Judgement⁸¹

Despite the Eco Swiss judgement is not the first judgement as regards to arbitration, it is in any case and in practice considered to be one of the foundational ones⁸², therefore, extensive and careful analysis must be employed in the present chapter.

Benetton International, a company located in The Netherlands, entered into a license agreement with a Chinese company by the name of *Eco Swiss* and also with the American company *Bulova*. The purpose of the license agreement was to allow *Eco Swiss* and *Bulova* the manufacturing and commercialisation of watches containing the words “Benetton by Bulova” for a period of at least 8 years. The license agreement signed in 1986, appointed Dutch law and arbitration⁸³ as the adequate path to any disputes that could potentially arise.

However, the contract forbade *Eco Swiss* and *Bulova* selling these watches in Italy and the rest of the EC territory, respectively. This clause clearly violated EC competition law through market sharing

⁸⁰ Landolt, (fn. 6), p. 100.

⁸¹ Judgement in *Eco Swiss v Benetton International*, C-126/97, ECR I-3079, EU:C:1999:269.

⁸² Landolt, *Eco Swiss and its ramifications*, February 2012, p. 2 para. 1, available at http://www.landoltandkoch.com/wp-content/uploads/2012/02/120130_VAD_PhLandolt_NotesReferences.pdf (12.05.2015).

⁸³ The rules that would have to be followed were the ones stated by the Netherlands Institute of Arbitrators.

practices without notification to the European Commission, and was thus automatically void.

Five years later, *Benetton* informed its counterparties of the cancellation of their business agreement (3 years before the term agreed to in the contract) as of September 1991. The parties then were subjected to an arbitration tribunal that emitted 2 awards. The Partial Final Award held *Benetton* liable for damages towards *Eco Swiss* and *Bulova* as a result of the contracts' early termination, whereas the Final Award instructed *Benetton* to pay several millions of US dollars as compensation for damages suffered.

The concept of “*res judicata*” comes into play now, when *Benetton* applies to the Dutch courts for the annulment of both arbitral awards, and the stay of enforcement of the Final Award. It is required under Dutch law that any plea for award annulment must be filed within the period of 3 months of the emission of the award, to which *Benetton* was only in time to appeal the Final Award. Under this principle, a preclusion of the right to appeal should be precedent, however, the Court gave an exception which will be seen further below.

Coming back to the appeal for annulment, *Benetton* argued to the Dutch Courts that the licensing agreement was contrary to public policy on grounds of article 85 of the TEC⁸⁴, and therefore automatically void. For the upcoming reasoning, it is also crucial to note that none of the parties during the arbitration proceedings had brought up the matter of void contract due to it being contrary to public policy.

The matters argued by the parties during the court proceedings were eventually heard by The Netherlands' last legal instance, the “*Hoge*

⁸⁴ Currently article 101 TFEU. This article prohibits anti-competitive practices performed by companies, such as market sharing, price fixing or controlling production.

Raad” (Dutch Supreme Court). This Court was presented with several delicate legal issues. Firstly, and as earlier legal instances argued, the possibility of entering into substantive law assessments was unclear because 3 months had passed since the Partial Award was lodged, precluding the possibility of resorting to ordinary national courts for an award annulment in virtue of the “*res judicata*” principle. Over the substantive area, it was clear for the Courts that the licensing agreement could be at least held partially void under the basis of being contrary to public policy due to the market-sharing practice that undermined the now article 85 TEC. According to article 1065.1 (e) of the Code of Civil Procedure of The Netherlands, annulment may be ordered when the award that has been made is contrary to public policy. However, according to the *Hoge Raad*, an arbitration award is contrary to public policy when it defies with a mandatory rule that is so essential that not even procedural boundaries should “protect it”. It continues to reason that normally under Dutch law the non-appliance of a prohibition regarding competition law is not usually considered as going against public policy.⁸⁵

Another issue was the (clearer) question regarding the applicability of EC law “*ex officio*” by arbitrators when the parties have not addressed the issue. The Dutch Supreme Court believes that under article 1065.1 (c)⁸⁶, if the arbitrators had ruled upon issues of EC law, their awards would be vulnerable against annulment for going outside their ambit of dispute.

Under these circumstances, the *Hoge Raad* posed to the ECJ the following questions:

⁸⁵ Judgement in *Eco Swiss v Benetton International*, C-126/97, ECR I-3079, EU:C:1999:269, para. 24.

⁸⁶ An annulment application can be presented when the arbitration tribunal has failed to comply with its terms of reference.

1. Until what extent is *Van Schijndel and Van Veen v SPF*⁸⁷ applicable by analogy to the present case?
2. If the Court considers the award to be contrary to article 85 TEC, would a claim for annulment be allowed considering that annulment can be asked for on grounds on inconsistency with public policy, and under national law, competition law does not fall within this scope?
3. Is the Court entitled to allow a claim regarding EC law, when the issue has not been previously raised in arbitration courts?
4. Taking into account that the Partial Award acquired the force of “res judicata”, is the Court in the right to overrule this principle in order to analyse if the subsequent Final Award is void for being contrary to article 85 TEC?
5. May the annulment of the Partial Award (taken into account its “res judicata” condition) be sought concurrently with the Final Award?

The ECJ chose to answer the second question first, as by answering it, it thought it would at the same time answer the first and third question. The Court reasoned that the review of arbitration awards should be limited in scope and non-enforcement should only be provided in exceptional circumstances. According to EC law, article 85 TEC did in fact constitute a mandatory provision, essential for the correct functioning of the internal market. In order to avoid conflict with public international law institutions, the Court’s argument was that the previous reasoning was in harmony with that established in

⁸⁷ Judgement in *Van Schijndel*, Joined cases C-430/93 and C-431/93, ECR I-4705, EU:C:1995:441. This judgement established the principle of national procedural autonomy, stating in its seventeenth paragraph that it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law.

articles V (l) (c) and (e) and II (b) of the New York Convention of 10 June of 1958 on the Recognition of Foreign Arbitral Awards.

Therefore, the Court's answer was that:

*“It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty”*⁸⁸

Regarding the 4th and 5th questions, the ECJ clearly stated that when there are procedural rules preventing an award from being annulled, even if it was in fact automatically void according to article 85 TEC, in order to safeguard the principles of “*res judicata*” and legal certainty, the national courts are not forced to abstain from applying their domestic procedural law when the prescribed time-limit has expired, and this time-limit was reasonable.

V.III Mostaza Claro Judgement⁸⁹

In order to fully enter into the *Mostaza Claro* Judgement analysis, it becomes logical to concisely explain the conclusion reached by the ECJ in two previous cases, the *Océano* Judgement⁹⁰ and the *Cofidis* Judgement⁹¹. In these instances, the Court decided that national courts had to examine the applicability of Directive 93/12/EEC on unfair terms in consumer contracts in an “*ex officio*” manner.⁹²

⁸⁸ Judgement in *Eco Swiss v Benetton International*, C-126/97, ECR I-3079, EU:C:1999:269, para.37.

⁸⁹ Judgement in *Mostaza Claro*, C-168/05, ECR I-10421, EU:C:2006:675.

⁹⁰ Judgement in *Océano*, C-240/98, ECR I-4941, EU:C:2000:346.

⁹¹ Judgement in *Cofidis*, C-473/00, ECR I-10875, EU:C:2002:705.

⁹² *Lauwaars*, Fordham International Law Journal, 2007, Vol. 31, Issue 5, Article 5, pp.1164-1165.

In the present case, *Ms. Mostaza Claro* subscribed in 2002 with *Centro Móvil* (a Spanish telephone operator) a mobile phone plan for a certain period of time. In the subscription contract, an arbitration clause referring all disputes to the “*Asociación Europea de Arbitraje de Derecho y Equidad*” (*AEADE* or *European Association of Arbitration in Law and in Equity*) could be found.

Since *Ms. Mostaza Claro* did not comply with the minimum contracted period, the counterparty *Centro Móvil* initiated arbitration proceedings against her. She consequently claimed that the arbitration agreement award was void and lost substantively. However, the award was contested before a Spanish court alleging the unfair nature of the arbitration clause, thus its nullity.

Article 3(1) of Council Directive 93/13/EEC⁹³ states that if a term is unfair, it will not be binding upon the consumer. Consequently, the question for the ECJ was if the arbitration agreement was in fact binding for *Ms. Mostaza Claro*, to which the Court responded that the non-binding nature of an arbitration clause was mandatory, when national courts regarded a clause as unfair under the Directives’ provisions.

Running parallel to the aforementioned problem was the legal issue of preclusion; *Ms. Mostaza Claro* did not raise the invalidity of the arbitration clause during the arbitration proceeding, therefore there was doubt if she could then raise it on ordinary courts. However, it was concluded that Spanish law did not require the consumer to contest the validity of an arbitration clause during arbitration proceedings in order to have the award set aside for being contrary to public policy.

⁹³ Article 3(1) of the Council Directive 93/13/EEC of April 5th, 1993 on unfair terms in consumer contracts.

The Court concluded that consumer protection under the umbrella of Directive 93/11/EEC was of public interest and this fact justified national courts to assess the unfairness of a contractual stipulation “*ex officio*”.⁹⁴ For this purpose, it invoked the already studied *Eco Swiss* ruling, where it was stated that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, national law must also grant such an application where it is founded on failure to comply with Community rules.⁹⁵ It could then be implicitly stated that arbitration courts have the obligation of applying EC law to guarantee an effective and enforceable arbitration award.⁹⁶

There has been room for criticism within the reasoning of this judgement; many could argue that the decision reached by the ECJ was too abstract, due to the fact that it widens the definition of “*public ordre*” and one no longer can define what is public policy and what is not. More than that, and perhaps more importantly, it increased the strain in the relations between European Law and arbitration law. How are arbitrators expected to apply European law but at the same time not be allowed to formulate preliminary rulings to the ECJ to interpret European Law?⁹⁷

⁹⁴ Due to the imbalances between consumers and suppliers and as already seen in the *Océano* and *Cofidis* Judgements.

⁹⁵ Judgement in *Eco Swiss v Benetton International*, C-126/97, ECR I-3079, EU:C:1999:269, para. 37.

⁹⁶ Hradilová, European Law in Arbitration Proceeding, 2007, page 9 para. 2, available at <http://www.law.muni.cz/sborniky/Days-of-public-law/files/pdf/mep/Hradilova.pdf> (last accessed on 24.05.2015).

⁹⁷ Novy, Arbitration Clause as Unfair Contract Term: Some Observations on the ECJ's Claro Case, 2008, page 8, para 2., available at http://www.academia.edu/2562065/Arbitration_Clause_as_Unfair_Contract_Term_Some_Observations_on_the_ECJs_Claro_Case (last accessed on 25.05.2015).

On the other hand, the *Mostaza Claro* Judgement can also be seen as a bulwark for consumers,⁹⁸ because as we have comprehended, the reasoning of the Court is that consumers might not know their rights or they cannot afford arbitration costs, and therefore must be protected.

V.IV Fallimento Olimpiclub Judgement⁹⁹

Without entering too deeply into the facts of the case, *Olimpiclub* was a company dedicated to construct and manage sporting facilities and owned a sport complex in Italy. In 1985, it concluded with a non-profit association (most of its members were shareholders of *Olimpiclub*) a contract where the association would make use of the complex and in return pay the state fee, standard costs and all gross income.

Later on in 1992, the Italian Finance Administration deemed the contract unlawful, believing that the contract had the purpose of circumventing the legislation of the time by obtaining a tax advantage. Consequently, the Finance Administration imposed on *Olimpiclub* the entirety of the gross income they would have had to pay without the circumvention plus 4 adjustment notices correcting the VAT returns submitted by the Company in between 1988 and 1991. Throughout the proceedings, *Olimpiclub* argued that it had 2 judgements from the Finance Administration¹⁰⁰ that had become final and therefore “*res judicata*” and could no longer be modified.

⁹⁸ Despite the fact that in the present case Ms. Claro was not substantively right.

⁹⁹ Judgement in *Fallimento Olimpiclub*, Case C-2/08, ECR I-07501, EU:C:2009:506.

¹⁰⁰ The judgements were regarding different fiscal years than those desired to be modified by the Italian Administration but were nonetheless still bonding to the proceeding.

The question then posed to the ECJ was if Community Law regarding tax disputes could be applied, overriding the domestically applied principle of “*res judicata*”.

To this legal dilemma, the Court was decisive in its answer; it argued that

*“Community Law precludes the application (...) of a provision of national law (...) to the extent that it would prevent the national court seised of that dispute from taking into consideration the rules of Community law concerning abusive practices in the field of value added tax.”*¹⁰¹

The Court here in other words is saying that final judgements stating that tax obligations in period X were also binding in period Y are not protected by the “*res judicata*” principle, because this would infringe the principle of effectiveness. This is so because if the principle of “*res judicata*” were to be applied in this way to tax issues and judges would not be able to make amends, the effect of this would be that the judicial decision that became final would perpetually be misapplied every new tax year, without having the chance to rectify it. For the Court, this would go against legal certainty and the principle of effectiveness, taken into account that these types of legal anomalies are obstacles to the correct application on Union rules on VAT. The ECJ cannot allow unlawfulness to go rampant throughout EU territory.

Therefore, it is clear to infer from this judgement that on certain occasions, the principle of supremacy will override the national principle of “*res judicata*”. Nonetheless, this will not happen often and will have to be decided on a case by case basis.

¹⁰¹ Judgement in *Fallimento Olimpiclub*, Case C-2/08, ECR I-07501, EU:C:2009:506, last paragraph (ruling of the Court).

V.V Merck Canada Judgement¹⁰²

The last case pending of analysis concerns *Merck Canada* and several other companies in a dispute over industrial property rights and the period of exploiting those rights on the commercialisation of generic drugs containing the active ingredient “*Montelukast sodium*”. However, only the procedural aspect of this ruling is of our interest, therefore we will not enter into the substantive reasoning of the Court.

The issue between *Merck Canada* and the defendants arose over the legal interpretation of article 13 of Regulation n° 469/2009¹⁰³, which granted marketing exclusivity over a medicinal ingredient for a certain period of time. *Merck Canada*, which was protected by the patent and supplementary protection certificate of “*Montelukast sodium*”, pleaded the Portuguese Arbitral Tribunal to prevent the marketing of any generic drugs which contained this active ingredient in Portuguese territory until 17 August 2014.

On the other hand, *Accord Healthcare* argued to the Arbitral Tribunal that in fact, the exclusivity period was over since August 2012, since the first market authorization¹⁰⁴ was granted in Finland in 1997. Due to the fact that the dispute concerned the interpretation of article 13 of the aforementioned regulation, the Portuguese Arbitral Tribunal decided to stay proceeding and formulate a preliminary ruling to the ECJ.

The question formulated was essentially if article 13 of Regulation 469/2009 should be interpreted as allowing the period of 15 years of exclusive exploitation to be extended by a certificate.

¹⁰² Judgement in *Merck Canada v Accord Healthcare*, Case C-555/13, ECLI:EU:C:2014:92.

¹⁰³ Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products s (OJ 2009 L 152, p. 1).

¹⁰⁴ Hereinafter MA.

As mentioned earlier, our main concern is the fact of an arbitral tribunal formulating a preliminary reference to the ECJ. This was also one of the main concerns of the ECJ, which in order to enter into the substantive analysis it first had to review the procedural aspect of the case.

It has been previously stated by the ECJ that in order to formulate a preliminary reference, the issue has to go through a “court or tribunal”, therefore, the first question to be solved by the ECJ was if the “*Tribunal Arbitral necessário*” (Portuguese Arbitration Court) was in fact a court or tribunal within the meaning of article 267 TFEU.

As studied in Chapters V.I and V.II, the ECJ sets a series of criteria to catalogue courts or tribunals such as compulsory jurisdiction or being it a permanent body. Moreover, it has formerly been stated that arbitral tribunals are generally not regarded as “courts or tribunals for the purposes of article 267 TFEU, since they do not possess mandatory jurisdiction and Member States are not involved in the decision to opt for arbitration.”¹⁰⁵

On the other hand, under distinctive circumstances, preliminary questions to the ECJ by an arbitral tribunal have been accepted; where law establishes a tribunal, when the latter’s decisions are binding and the jurisdiction does not depend on the parties’ agreement it becomes possible to opt for a preliminary ruling.¹⁰⁶ It became evident from the present case that the Portuguese Arbitral Tribunal had compulsory jurisdiction not due to the will of the parties, but from a national law, which granted competence over matters such as industrial property rights in the sphere of medicinal products or generic drugs. Like in the

¹⁰⁵ Judgement in *Denuit and Cordenier*, Case C-125/04, ECR I-923, EU:C:2005:69, para. 13.

¹⁰⁶ Judgement in *Danfoss*, Case C-109/88, ECR 3199, EU:C:1989:383, paras. 7-9.

Broekmeulen Judgement¹⁰⁷, the Member State chose to confer jurisdiction in the above said matters to a different body other than an ordinary national court. The ECJ continued to reason that the *Tribunal Arbitral necessário*'s awards, if not appealed, become definite and have the same effect than that of an ordinary court. Moreover, the arbitrators must carry out the same exercise of impartiality and independence when developing their functions, just like ordinary judges. Also, the principle of equal treatment and the adversarial principle in the treatment of parties are observed as well the national legislation in force concerning industrial property rights.

The only matter where the ECJ had doubts on the adequacy of the Arbitral Tribunal as a court within the meaning of article 267 TFEU was in its non-permanent character, since after reaching its decision, it is dissolved. Nonetheless, the Court regarded the characteristics the Arbitral Tribunal being established on a legislative basis, its permanent compulsory jurisdiction and that national law defined its procedural rules.

For all the above said, the ECJ in this case ruled that the Portuguese Arbitral Tribunal was entitled to request from it a preliminary ruling, since it constituted a court or tribunal within the meaning of article 267 TFEU.¹⁰⁸

¹⁰⁷ Judgement in *Broekmeulen v Huisarts Registratie Commissie*, C-246/80, ECR 2311, EU:C:1981:218.

¹⁰⁸ For those curious on the ECJ's substantive ruling, it held that the period of protection established by the Regulation n° 469/2009 could not exceed the period of 15 years.

Part III

Key problems on EU Law and arbitral award compatibility

Chapter VI

Main aspects on the collision between EU Law and arbitration

VI.I Applicability of EU Law on procedural and substantive matters

Due to the complexity of the applicability of EU law towards arbitration plus the numerous additional issues stemming from it, the optimal way of approaching this pre-conclusive chapter is to respond to the various key questions that have arisen throughout this paper.

Starting from the very beginning:

a) Can EU competition law be considered as “arbitrable”?

Although no express decision can be found on behalf of any EU institution regarding this matter, it is in a way “*vox populi*” that EU competition is a matter that can be subjected to the “private judiciary”.¹⁰⁹ For instance, in *Eco Swiss* the ECJ had the opportunity to settle the matter yet decided to tacitly and tactically omit any reasoning on this matter. Leaning towards a favourable answer, the ECJ did add that the review of arbitral awards should be limited in scope and annulment should only be granted in exceptional circumstances.

¹⁰⁹Landolt and Koch, Arbitration and Antitrust: an overview of EU and national caselaw, 2012, p.2, http://www.landoltandkoch.com/wp-content/uploads/2012/07/Landolt_ArbitrationAntitrust_e-Competitions.pdf

b) Can EU Consumer Law be considered as “arbitrable” as a result of a spill-over from EU Competition Law? Can an arbitral tribunal assess unfairness “ex officio”?

Again, there is no legal provision of EU character that states that consumer law is “arbitrable”. Despite this fact, the ECJ has had vast occasions to limit the arbitrability of consumer law, but avoided doing so, which could lead one to believe that it implicitly accepts consumer law subject to arbitration. It has been stated though under the context of *Mostaza Claro*, that some types of arbitration agreements have the purpose of being business-to-business¹¹⁰ and not business-to-consumer¹¹¹. Through the cases regarding consumer arbitration presented before the ECJ, and as previously stated, the latter has no intention of disconnecting consumer contracts from arbitration, yet it greatly limits the effectiveness of them, especially when there is a flagrantly weaker party involved. It must be concluded equally as in question a), that the ECJ implicitly allows EU consumer law to be subject to the power of arbitrators.

The second question posed concerning the availability of arbitrators to assess the unfairness of these types of contracts is closely connected to question d), and will be analysed in-depth there. In any case, we must link to the present argument the cases of *Océano* and *Cofidis*, where the Court decided that national courts had to examine the previously mentioned unfairness in an “*ex officio*” way. The underlying reason for this is that consumer protection was conceived to form part as EU public interest, due to the special protection that needed to be safeguarded between consumers and sellers and suppliers. Moreover, this does not contravene what is stated in the New York Convention: the public policy objection may be raised “*ex officio*” under the New York Convention.

¹¹⁰ Hereinafter B2B.

¹¹¹ Hereinafter B2C.

c) *Must arbitrators mandatorily apply EC/EU law?*

The question is to be answered in affirmative. When parties raise a question to the arbitrator regarding EU law, the latter must always take it into consideration. Naturally, if the rendered award is going to have effect inside EU territory, EU laws will come into play. As established before, arbitrators in this case must be aware of the complex intricacies between domestic law, arbitral seat and EU law. For instance, the principle of primacy will enter into effect under these circumstances, ruling over any piece of legislation that would go against EU law.

d) *Must arbitrators raise and apply EC/EU competition law questions “ex officio”?*

Again, the ECJ has chosen to be rather discrete on this issue, perhaps because of the fact that it was not enticed to interfere upon the arbitrators realm. A wink of sorts towards arbitrators can be located in *Nordsee*, when it is pronounced that Community law had to be observed throughout all EC territory, and that parties through a contract could not circumvent it¹¹². The Court continues leaving “bread crumbs” or tips in *Van Schijndel*¹¹³ and *Peterbroeck*¹¹⁴, declaring that national judges -and perhaps by analogy to arbitrators- had the legal duty under article 10 EC to raise and apply EC competition law on their own motion when the facts of the dispute were not exceeded. This same line of thought was reinforced and reiterated in *Eco Swiss*, when the “*Hoge Raad*” of The Netherlands believed that if arbitrators raised questions “*sua sponte*” regarding EC Competition Law they would go beyond the scope of action

¹¹² Judgement in *Nordsee v Reederei*, C-102/81, ECR I-1095, EU:C:1982:107

¹¹³ Judgement in *Van Schijndel*, Joined cases C-430/93 and C-431/93, ECR I-4705, EU:C:1995:441.

¹¹⁴ Judgement in *Peterbroeck*, C-312/93, ECR I-04599, EU:C:1995:437.

commended to them and would therefore risk having their awards annulled and not recognised. Nonetheless, by decreeing that national judges had the duty of annulling an award contrary to public policy if national procedural law permitted it, whilst the question addressed to the ECJ referred “*de facto*” to arbitrators and not judges, the Court implicitly informed that when it came to mandatory norms such as articles 81 and 82 TEC, they had the duty of doing so.

It goes without saying that the aforementioned duty of arbitrators to apply EU Competition law is not specified anywhere; nevertheless, this does not mean that they should not apply EU Competition law “*sua sponte*”. Although true that one of the main guiding lines for arbitrators is the principle of party autonomy, this cannot be interpreted as an absolute principle overriding all others. As we have seen throughout the paper, arbitrators must also follow certain protocols such as meeting the parties’ legitimate expectations and aiming for award enforceability. Influenced by the latter, arbitral tribunal must then have observance of transnational mandatory laws, as if they overlook them, they risk having their awards annulled or unenforced by national courts. This at the same time cannot be interpreted as an undermining of the principle of the parties’ legitimate expectations.

Conclusively, we come to assertion that while there is no formal duty for the “private judiciary” to observe and apply EU law “*ex officio*”, it is a “*de facto*” obligation for them: they are not bound by article 4 (3) TEU but by the contract with the parties, but parallel to this they are private enforcers of public policy.¹¹⁵

¹¹⁵ Dempegiotis, EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission, <http://www.icc.qmul.ac.uk/docs/gar2008/144728.pdf> p.141-143, (last accessed on 14.06.2015)

e) How do mandatory norms and public policy affect national courts and arbitrators?

First and foremost, the correlation between national public policy and EU public policy must be signalled. As founded in *Eco Swiss*:

*“It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty”*¹¹⁶

From the previous, we can establish that EU Competition Law as a whole is of public policy to the EU, and that the latter must be observed just as closely as national law.

Going further, in *Asturcom* the ECJ informed that where a Member State would not apply national public policy to deny recognition or enforcement, it was not in the obligation of doing so for EU public policy, since the latter was ruled by the principle of equivalence.¹¹⁷

Therefore, national courts have the duty to annul an award or deny its recognition and enforcement when they believe it contradicts either national public policy or EU public policy. This reason for award review or enforcement denial is parallel to those stated in the New York Convention and UNCITRAL Model Law. On one hand, national judges will have to control that awards at the enforcement stage do not oppose public policy, and on the other hand, arbitrators with aims of

¹¹⁶ Judgement in *Eco Swiss v Benetton International*, C-126/97, ECR I-3079, EU:C:1999:269.

¹¹⁷ European Parliament, Legal Instruments and Practice of Arbitration in the EU, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf), p.200, (last accessed on 14.06.2015).

rendering a valid award, must also predict whether their decision will have the possibility of being upheld or not. The “private judiciary” however will have a harder time, because not only is EU public policy hard to fix, but also that of the Member States as it will vary from country to country.¹¹⁸

An open question remains. What constitutes EU public policy? We now know that competition law is of public policy to the EU due to its vital role within the Union, as a protection of the internal market and to some market players as well.¹¹⁹ The concept of EU public policy appears to be a subjective one, and no interpretation guideline is offered for courts and arbitrators. For instance, in *Mostaza Claro* it was concluded that consumer law also formed part of EU public policy. Conclusively, there is no clear pattern for differentiating what is and what is not public policy. This fact patently hazes the predictability of the ECJ’s behaviour as to what it may consider of vital importance, and will have to be studied case by case. Subsequently, national courts and especially arbitrators will have difficulties concerning the interpretation and practical application of this term.

f) Can an arbitral award that has become final and thus acquired “res judicata” force be annulled?

The answer to this question is not a straightforward one, since it will vary depending on several factors. The general trend however is to believe as was stated in *Asturcom*¹²⁰ that

¹¹⁸ Dermendijev, in: Belohlávek./Rozehnalová /Cerny (eds.), Czech (& central European) Yearbook of Arbitration: Independence and Impartiality of Arbitrators, Volume IV, 2014, pp. 77.

¹¹⁹ Renner, (fn.8), pp. 139.

¹²⁰ Judgement in *Asturcom Telecomunicaciones SL v Rodriguez Nogueira*, Case C-40/08, ECR I-9579, EU:C:2009:615

“...Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if doing so would make it possible to remedy an infringement of a provision of Community law, regardless of its nature, on the part of the decision at issue, even if to do so would make it possible to remedy an infringement of a provision of Community law, regardless of its nature, on the part of the decision at issue”¹²¹

The general line of thought to be then followed is that national courts are not in the obligation of overruling the principle of “res judicata” in favour of a correct interpretation and implementation of Community Law.

Nevertheless, this statement has to be contrasted with the time given to appeal an award, but this matter is to be decided on a case-by-case basis. To provide the reader with a barometer, in *Asturcom* the ECJ found the period to appeal of two months to be long enough to protect the principles of equivalence and effectiveness.¹²² As a rule, we can then assure that the “res judicata” principle has enough force to stop the review of an award that has become final, but as previously indicated, this matter is to be assessed on an individual case basis.

However, as with every rule, there is an exception, as was seen in *Fallimento Olimpiclub*. Here, the ECJ took a different approach because it concerned tax law and allowing the award to subsist would produce a legal misapplication that would repeat itself over time and no possibility to rectify it would be available. To let this happen would undermine the principles of legal certainty and effectiveness, therefore, in this case supremacy overruled “res judicata”.

¹²¹Judgement in *Asturcom Telecomunicaciones SL v Rodriguez Nogueira*, Case C-40/08, ECR I-9579, EU:C:2009:615, para. 37.

¹²² *Ibid*, paras. 38-39.

g) Can arbitration tribunals request the ECJ for a preliminary ruling under article 267 TFEU?

The judgement in *Nordsee* provided a clear answer as to the matter of arbitrators employing the preliminary reference mechanism. Only a court or tribunal within the meaning of article 267 TFEU is entitled to this mechanism, and at its time this comes with several criteria that must be fulfilled. The general criteria to follow to be considered as court or tribunal is that is has to be:

1. Established by law.
2. Permanent.
3. Of a compulsory jurisdiction.
4. An “*Inter partes*” procedure.
5. Compliant with rules of law.
6. Independent.

One must come to the conclusion that arbitration tribunals are not entitled to request for a preliminary reference, because they do not meet the criteria laid out by the ECJ. There are however, some exceptions as the ones seen in *Broekmeulen* and *Merck Canada*. While the former judgement granted a medical tribunal (a private association) with the privilege of request a preliminary ruling, so did the latter for an arbitration tribunal regarding industrial property.

This can be explained through *Denuit and Cordenier* and *Danfoss*, where the Court explain that in some cases, if the tribunal was established by law, their decisions were binding and its jurisdiction did not depend on the parties agreement it would be possible to request a preliminary reference.

As provided by the Court, there are some exceptions to the rule laid out in *Nordsee*, and will sometimes allow arbitrators to employ article

267 TFEU. Unfortunately, the rules judicially established for allowing some arbitration tribunals will not apply for international commercial arbitration courts, as was observed in *Nordsee*.

VI.II Conclusion

The conclusion to be made over this issue might seem to the reader of a somewhat radical tenor, and without a doubt debatable. However, it is always best to be as critical as possible in order to impulse issues forward and thus accomplish greater achievements.

Although some authors might claim that the fog of controversies between international commercial arbitration and EU law have dissipated, the author is of the opinion that much regularisation is left to be done in this matter. The more globalised the world becomes, the more will States rely on arbitration. This premise cannot be contested, and as incontestable as it is, development needs to be made within the EU to bring arbitration closer to the European Union's legal framework, values and line of thought. If nothing is to be done, harder it will be in the future to reconcile the gap between both spheres that, as time passes, gain more and more importance.

Let us take for instance *Electrabel*;¹²³ discrepancies may arise as to what was lawful within that determined case, but in this example the opposing views might entail a much greater importance and impact than other cases presented, because it dealt with a wider scenario than the EU territory. Wider scenario must not be interpreted in geographical terms, but in legal and political standings. Through the ruling in *Electrabel*, the European Commission's line of argumentation -playing the role of "*amicus curiae*"- was contested by

¹²³ Although *Electrabel* constitutes a different dimension of arbitration (investment arbitration) and thus different rules apply to it, it is still worth mentioning under this context.

the ICSID and worse, through the ruling it opened a gateway for potential future losses for the EU institutions in the kingdom of arbitration by establishing a negative precedent.

Another line of potential criticism towards the current situation between both powers (EU and arbitration) is the preliminary ruling mechanism. As understandable as the ECJ's motives are for not granting the arbitral world an unequivocal access to article 267 of the TFEU, the aftermath of it is nonetheless damaging. The ECJ had compelling reasons to oppose entry to the preliminary reference mechanism to arbitrators in general. It is equally true that the Court is not supposed to be "another legal instance" and that the matters they should be assessing have to be of a reduced character. More than that, if answered in the affirmative, the functionality of the Court would be impaired by a "breaking dam", allowing itself to be gradually engulfed by a flood of preliminary references.

Although open for debate, it is more than probable that the ECJ took the most correct stance possible towards this issue. However, as stated before, there have also been adverse consequences. The outcome of this is that arbitrators, in their own interests to provide parties with a swift resolution, will avoid to request national courts for a preliminary reference to the ECJ, since at least partially, the reasons for parties to slant to arbitration would otherwise be greatly diminished. Arbitrators, seeing their functionality reduced, might feel seduced to embark on different ways of dispute solutions which are not parallel to EU policy, or simply put, will not work together with the EU for an uncontested conflict assessment system.

It should also be reminded that since we are mainly focusing on competition law, parties are usually not attracted to the idea of litigation due to many reasons. Where parties for instance enter in an anti-competitive agreement, they will want to keep the contracts'

validity out of the reach of experts' analysis. If this were not enough, as we have seen throughout the text, public policy control by Courts over these matters is limited and often avoided. Thirdly, let us suppose that award enforcement would take place outside the EU territory; this award could be considered enforceable but contradict EU public order, however, as not being allowed to use the preliminary reference mechanism, this matter would remain uncontested.

More than that, and as some authors argue, if arbitrators were provided with the possibility of requesting a preliminary ruling from the ECJ, this would guarantee an unconditional "*res judicata*" effect due to the fact that the arbitration courts would be able to observe EU law properly.¹²⁴

All of the aforementioned simultaneously reduces the options for a harmonised legal framework concerning the competition realm, and in a long term, will take longer to obtain a uniform and peaceful application of conflict of law rules and EU norms. For these reasons and for the sake of legal harmony and legal certainty, it is up to the EU as a whole to provide arbitrators with more efficient mechanisms to observe EU law than to just resort to national courts for a preliminary reference.

Another gap that is necessary to be filled is the question of the concept of EU public policy. Clearly, "*public ordre*" is not a static bulwark, what constitutes public policy will depend in great measure on political influences, global trends, the EU's given priorities within a time frame, among others factors. However, this is no obstacle for the ECJ to try to establish a certain guideline for judges and arbitrators on what could be regarded as highly vital for the EU. Without providing

¹²⁴ Dermendijev, (fn. 117), pp. 89.

a working structure, both public and private judiciaries are left blindfolded as to how to proceed with certain norms.

Although both institutions are affected, the latter have many more mechanisms to “rebel” against an institution which they might deem to a certain extent unreliable. This statement is not to be taken in the way of a “protest” on behalf of arbitrators, but just as a potential consequence to circumvent EU norms due to the fact of their legal haziness. This in practical terms is not farfetched; any professional within the legal sphere aims and strives to provide their clients with an answer that is as decisive and secure as possible. The divide that is being established between legal certainty and EU public policy might be considered to be increasing as the EU coins more and more spheres to be of public policy, and within this tendency, arbitrators and national courts have so far not been informed as to the protocol to follow.

Clearly, there is no easy answer to this problem. On one hand, the ECJ’s (and therefore the EU) performance can surely be considered close to impeccable despite the negative consequences some of its judgements might have had. For instance, when widening its definition of public policy, it has done so in order to protect other market players like consumers, and this fact must be deeply appreciated and honoured. On the other hand, arbitrators need to be given more tools to apply EU legislation in a more uniform way without losing their essential functionalities like time efficiency. Moreover, if given the instruments necessary to comply with EU law, this would relieve all judicial spheres (ECJ, national courts and arbitrators as “private judges”) from an increasing appliance of award review due to public policy breaches.

All in all, it should be reminded that the EU is growing in influence as a global player. However, also to be observed is that the arbitration

institutions, as the world becomes more and globalised at an alarming rate, might even gain more influence than the former. Nevertheless, and independent to who is more influential, both institutions have the obligation to come to an approximation to each other: neither of them can in practice deny or eliminate the existence of the other and no positive outcome can come if there is no cooperation and alliance.

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