TOWARDS AN EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION?

A Sorbonne Law School Research Project
(Paris 1 Panthéon-Sorbonne University)

Under the supervision of Professors
Mathias Audit and Sylvain Bollée

23 April 2025

UNIVERSITÉ PARIS 1
PANTHÉON SORBONNE

IRJS Institut de Recherche Juridique de la Sorbonne ANDRÉ TUNC

1. This report is the result of a joint research project launched in 2024 on the possible development of European Union (EU) law on international commercial arbitration. This research was undertaken within the SERPI *(Sorbonne – Etude des Relations Privées Internationales)*, a department of the IRJS *(Institut de Recherche Juridique de la Sorbonne)*, one of the research units of the Paris 1 Panthéon-Sorbonne University.

2. The project was supervised by Professors **Mathias Audit** and **Sylvain Bollée.** The research team (hereafter referred to as 'the Working Group') included the following persons:

- **Vincent Bassani-Winckler, PhD Candidate**
- **Emma Bursztejn, PhD Candidate**
- **Etienne Farnoux, Professor at the University of Strasbourg**
- **Nima Nasrollahi-Shahri, Professor, Contract Teacher**
- **Benjamin Saunier, PhD**
- **François Mansourati, PhD Candidate**
- **Sara Fekkak, Master's Student and Coordinator**

3. This report also draws on the comments of a panel of experts who gathered at the Sorbonne Law School on 7 April 2025 for the 2025 Paris Arbitration Week (PAW). The panellists were **Claire Debourg** (Professor of Law at the University of Paris Nanterre), **Vanessa El Khoury-Moal** (Head of the Department of Mutual Assistance, Private International and European Law at the French Ministry of Justice's Directorate of Civil Affairs and the Seal), **Malik Laazouzi** (Professor of Law at the University of Paris Panthéon-Assas), **Tim Maxian Rusche** (Legal Adviser at the European Commission) and **Arnaud Nuyts** (Professor of Law at the University of Brussels). The report also benefited from in-depth exchanges with **Christian Koller** (Professor at the University of Vienna), who visited the Sorbonne Law School as a visiting professor. The Working Group would like to express its sincere gratitude to all of them.

4. The general objective of the research project is, first, to provide an overview of the links between arbitration law and EU law. The second objective is to formulate proposals for the improvement of commercial arbitration law within

the EU, with the aim of improving the way a series of issues are handled within the European area, while respecting the specific requirements of the laws of the various EU Member States.

5. After careful consideration, the Working Group determined that the full harmonisation of the different arbitration laws of the EU Member States would not be the best way to achieve this objective. However, the Working Group deemed that rules of a jurisdiction and a mechanism for the circulation of national judgments in commercial arbitration between Member States would undoubtedly improve the effectiveness and efficiency of this method of settling commercial disputes within the European judicial area.

6. In effect, such a system would uphold the prominent role of the courts of the Member State where the seat of arbitration is located and ensure recognition and enforcement of their judgments in other Member States. Such a 'European passport' could notably cover judgments issued in relation to both applications to set aside awards and applications for enforcement. It could also apply to decisions by assisting judges (*'juges d'appui'*). Moreover, this mechanism for the intra-EU circulation of judicial decisions in commercial arbitration matters could be part of the ongoing project to reform the Brussels I Recast Regulation.[1] To this end, the Working Group has drawn up proposals for rules that could form part of the reform.

7. The report is divided into three parts. First, the existing framework on arbitration in the EU will be examined (I). Second, the report will detail the rationale for the Working Group's proposal to take arbitration into account in the EU legal framework (II). Lastly, the proposals will be set out in more details (III).

Contact details:
mathias.audit@univ-paris1.fr
sylvain.bollee@univ-paris1.fr

[1] Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Recast Regulation) [2012] OJ L351/1.

I. THE EXISTING LEGAL FRAMEWORK ON ARBITRATION IN THE EU

8. Any proposal regarding a possible step forward of EU law in the field of arbitration will necessarily occur within the existing EU legal landscape. At its present stage, arbitration is not a completely unknown concept in EU law. Several EU legal instruments already address arbitration (I.1), while the European Court of Justice (ECJ) has recently shown increased interest in arbitration law issues, both commercial and investment (I.2).

I.1. Interplay between arbitration and EU Secondary Law

9. The EU does not have regulations aiming at facilitating, coordinating, or harmonising the laws applicable to commercial arbitration across Member States. In other words, the EU does not have a dedicated 'EU Arbitration Act', nor are there any regulations or directives specifically governing commercial arbitration. However, several EU legal instruments indirectly impact the relationship between arbitration and EU law.

10. In the specific field of investor-to-state dispute settlement (ISDS), i.e. investment arbitration, an EU regulation addresses the management of the financial responsibility when the EU itself is a party to an ISDS proceeding.[2] But this kind of regulation is highly specific and covers a very different field than the one of commercial arbitration in the EU.

11. In particular regarding commercial arbitration, it can first be stressed that several EU regulations explicitly exclude arbitration from their scope of application.[3] Article 1(2)(d) of the Brussels I Re-

[2] Council Regulation (EU) 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L257/121.

[3] See eg Council Regulation (EU) 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59, art 2; Council Regulation (EC) 861/2007 establishing a European Small Claims Procedure [2007] OJ L199/1, 4, art 2; Council Regulation (EC) 805/2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15, 17, art 2.

cast Regulation specifically leaves out arbitration.[4] Similarly, article 1(2)(e) of the Rome I Regulation explicitly excludes arbitration agreements from its scope of application.[5] In addition, Regulation 2019/517 prohibits domain name contracts between Registries and Registrars from referring disputes to arbitration outside the EU.[6] And when not explicitly excluded, in many instances arbitration is mentioned only trivially[7] in the context of inter-state arbitration[8] or in the context of court proceedings[9] – implying the existence of subject-matter arbitrability.

12. Various EU Regulations touch on arbitration in other specific contexts. Notably in EU Member States-based insolvency proceedings, article 18 of Regulation (EU) 2015/848 provides that the effects of insolvency proceedings on pending arbitration are governed solely by the law of the Member

[4] Brussels I Recast Regulation (n 1), art 1.
[5] Council Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I Regulation) [2008] OJ L177/6, 10, art 1.
[6] Council Regulation (EU) 2019/517 on the implementation and functioning of the .eu top-level domain name and amending and repealing Regulation (EC) No 733/2002 and repealing Commission Regulation (EC) No 874/2004 [2019] OJ L91/25, 30, art 5.
[7] See eg Council Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L186/12, 75; Commission Regulation (EC) 213/2008 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV [2007] OJ L74/1, 201.
[8] See eg Council Regulation (EEC) 2342/90 on fares for scheduled air services [1990] OJ L217/1, 3-4 art 6, (rescinded by Council Regulation (EEC) 2409/92 on fares and rates for air services [1992] OJ L240/15);
[9] Council Regulation (EC) 3626/82 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora [1982] OJ L384/1, 16, art XVIII (rescinded by Council Regulation (EC) 338/97 on the protection of species of wild fauna and flora by regulating trade therein [1996] OJ L61/1).
See eg Council Regulation (EU) 2024/1789 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009 (recast) [2024] OJ L; Council Regulation (EU) 2024/1735 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724 [2024] OJ L; Council Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 [2017] OJ L280/1; Council (EU) Regulation 2019/941 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC [2019] OJ L158/1; Council Regulation (EU, Euratom) 2024/2509 on the financial rules applicable to the general budget of the Union (recast) [2024] OJ L; Council Regulation (EU) 2022/869 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013 [2022] OJ L152/45; Council Regulation (EU) 2023/2631 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds [2023] OJ L; Commission Regulation (EU) 2023/1803 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council [2023] OJ L237/1; Council Regulation [EC] 1107/2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L309/1; Council Regulation (EU) 2024/1252 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 [2024] OJ L.

State where the arbitral tribunal has its seat.[10] Similarly, in the context of coercive measures adopted by the EU against third states, arbitration is often mentioned:

- In the context of EU restrictive measures (sanctions), arbitration is often considered part of the definition of a 'claim' with specific exceptions under Regulation (EU) 2024/1745 of 24 June 2024.[11]

- Recital 15 of Regulation (EU) 2024/1745 addresses Russia's amendments to its Procedure Code, which force disputes involving sanctioned entities to be resolved exclusively in Russian courts even if the contract in question includes an arbitration clause.[12] As a countermeasure, article 5ab of the Regulation sanctions companies that exploit these provisions.[13]

13. The term arbitration also appears in 47 EU Directives, but generally in an ancillary role.[14] When referenced, it is often to exclude arbitration from the directive's scope. [15] Most mentions of arbitration

[10] Council Regulation (EU) 2015/848 on insolvency proceedings (recast) [2015] OJ L141/19, 35, art 18.
[11] Council Regulation (EU) 2024/1745 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2024] OJ L, 1.
[12] *Ibid*. 3.
[13] *Ibid*. 17.
[14] See eg Council Directive (EC) 2001/34 on the admission of securities to official stock exchange listing and on information to be published on those securities [2001] OJ L184/1, 46 (Directive 2001/34); Council Directive (EC) 2001/83 on the Community code relating to medicinal products for human use [2001] OJ L311/67, 81, art 35; Council Directive (EC) 80/390 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing [1980] OJ L100/1, 15, 22 (rescinded by Directive 2001/34); Council Directive (EEC) 70/509 on the adoption of a common credit insurance policy for medium- and long-term transactions with public buyers [1970] OJ L254/1, 10, art 3 (rescinded by Council Directive (EC) 98/29 on harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover [1998] OJ L148/22, 29); Council Directive (EC) 2006/88 on animal health requirements for aquaculture animals and products thereof, and on the prevention and control of certain diseases in aquatic animals [2006] OJ L328/14, 32, art 50 (rescinded and replaced by Council Regulation (UE) 2016/429 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law') [2016] OJ L84/1); Council Directive (EC) 2001/82 on the Community code relating to veterinary medicinal products [2001] OJ L311/1, 15, art 39 (replaced on 27 January 2022 by Council Regulation (UE) 2019/6 on veterinary medicinal products and repealing Directive 2001/82/EC [2018] OJ L4/43) ; Council Directive (EEC) 93/39 amending Directives 65/65/EEC, 75/318/EEC and 75/319/EEC in respect of medicinal products [1993] OJ L214/22, 28, art 15 (no longer in force since 17 December 17 2001).
[15] See eg Council Directive (EU) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') [2024] OJ L1, 9 art 2; Council Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law [2019] OJ L305/17, 45, art 24; Council Directive (EC) 2014/24 on public procurement and repealing Directive 2004/18/EC (Directive 2014/24) [2014] OJ L94/65, 102, art 10; Council Directive (EEC) 2009/81 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L216/76, 95, art 13; Council Directive (EC) 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Directive 2004/18) [2004] OJ L134/114, 132, art 16 (rescinded by Directive 2014/24); Council Directive (EEC) 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] OJ L199/84, 88, art 1 (rescinded by Council Directive (EC) 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1); Council Directive (EEC) 92/50 relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1, 3, art 1 (rescinded by Directive 2004/18).

do not concern commercial arbitration but instead relate, among other things, to Employment law,[16] Consumer law,[17] and Competition law.[18]

14. The 2008 Mediation Directive discusses commercial arbitration in relation to confidentiality and prescription periods but does not directly provide any rules applicable to commercial arbitration.[19]

15. Altogether, EU secondary law does not strongly refer to arbitration, especially commercial arbitration. These are only marginal references. They are far removed from any substantive regulation of arbitration as a whole within the EU. The points of contact between the field of arbitration and the case law of the ECJ are undoubtedly stronger than the existing ones with the EU black letter rules.

I.2. Interplay between arbitration and ECJ case law

16. The ECJ has been regularly seized with questions relating to arbitration law. Rulings handed down by the ECJ in matters of arbitration focus primarily on the application of EU law by arbitral tribunals (i) and the exclusion of ISDS between EU Member States (ii). The exclusion of arbitration from the scope of application of the Brussels I Recast Regulation as addressed by the ECJ case law must also be specifically considered, all the more so as its link with the proposals to come in this report is important (iii).

[16] See eg Council Directive (EU) 2020/1057 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012 [2020] OJ L249/49, 56, art 1; Council Directive (EU) 2014/36 on the implementing measures for the Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania [2014] OJ L94/375, 379; Council Directive (EC) 2006/123 on services in the internal market [2006] OJ L376/36, 46; Council Directive (EC) 96/71 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1, 3, art 3 ; Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (Directive 2001/23) [2001] OJ L82/16, 19, art 7; Council Directive (EC) 1999/63 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) - Annex: European Agreement on the organisation of working time of seafarers [1999] OJ L167/33, 36; Council Directive (EC) 98/50 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1998] OJ L201/88, 91, art 6 (rescinded by Directive 2001/23/CE); Council Directive (EEC) 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L61/26, 28, art 6 (rescinded by Directive 2001/23/CE).

[17] See eg Council Directive (EEC) 93/13 on unfair terms in consumer contracts [1993] OJ L95/29, 33 (Unfair Terms Directive).

[18] Council Directive (EU) 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance [2014] OJ L349/1, 18, art 18.

[19] Council Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3, 7 arts 7-8.

(i) ECJ case law on the application of EU law in the context of commercial arbitration

17. From a chronological perspective, the ECJ first had to rule on the possibility for arbitral tribunals to make preliminary references and the way EU law should be applied with regard to the specifics of arbitration, notably at the enforcement stage of a procedure.

18. In *Nordsee*, the ECJ denied arbitral tribunals the possibility of referring preliminary questions, because of their voluntary basis and the absence of public authorities' involvement in their proceedings.[20] The ECJ pointed to the responsibility of state courts to make such references, if necessary, when they were collaborating with an ongoing arbitral proceeding or reviewing an arbitral award.[21]

19. In addition, the ECJ mentioned in passing that the review of an arbitral award 'may be more or less extensive depending on the circumstances'.[22] It went further in *Eco Swiss*, acknowledging that 'it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances'.[23]

20. In the *Eco Swiss* decision, the ECJ ruled that 'where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty [now article 101 TFEU]', highlighting at least one situation in which EU law imposed obligations on a national judge reviewing an arbitral award.[24] At the same time, it ruled that EU law, in that situation,

[20] Case C-102/81 *Nordsee v Reederei Mond* [1982] ECR, pp 1096, 1110.
[21] *Ibid*. p 1111.
[22] *Ibid.*
[23] Case C-126/97 *Eco Swiss v Benetton Int'l* [1999] [ECR] I-3079, para 35; see also Case C-168/05 *Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10437, para 34; Case C-124/21 *Int'l Skating Union v Commission* [2023] ECLI:EU:C:2023:1012, para 137 (ISU).
[24] *Eco Swiss* (n 23), para 37.

did not require national courts to refrain from applying their procedural rules setting a time period to challenge an award.[25]

21. At this point, two things were clear: arbitral tribunals could not make preliminary reference to the ECJ, so it was up to state courts to assess whether these tribunals had made a correct application of EU law when necessary. Every time domestic law made a challenge of an award possible on the grounds of public policy, it should encompass matters of EU public policy such as competition law, but the national procedural rules still applied to the possibility of setting aside a contrary award.

22. This case law was recently confirmed in *ISU*: while limitations in scope of the review of an arbitral award could be justified, 'such judicial review must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy, which include Articles 101 and 102 TFEU'.[26]

23. In the field of consumer protection, as per *Mostaza Claro*, ECJ expects 'a national court seised of an action for annulment of an arbitration award [to] determine whether the arbitration agreement is void and [to] annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment'.[27] In *Asturcom*, the Court ruled that article 6 of the Unfair Terms Directive 'must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy'.[28] A national judge must therefore ascertain in the enforcement proceedings whether an arbitration agreement in a consumer contract should be considered an unfair term in the sense of the Unfair Terms Directive.

24. The ECJ also had to deal with sports arbitration. In the aforementioned *ISU* decision, the Court said of the

[25] *Eco Swiss* (n 23), para 47.
[26] *ISU* (n 23), para 193.
[27] *Mostaza Claro* (n 23), para 39.
[28] Case C-40/08 *Asturcom Telecomunicaciones v Christina Rodriguez Nogueira Asturcom* [2009] ECLI:EU:C:2009:615, para 52.

requirement stemming from the *Eco Swiss* ruling that 'such a requirement is particularly necessary when such an arbitration mechanism must be regarded as being, in practice, imposed by a person governed by private law, such as an international sports association, on another, such as an athlete'. [29] More recently, it was suggested by Attorney General Ćapeta in *Royal Football Club Seraing* that arbitration without actual consent as it is found in sports should call for a full review with regard to EU law, and not a review limited to public policy as envisaged in Eco Swiss and *ISU*.[30]

25. In a nutshell, the ECJ has imposed a duty on national judges to verify that at least some provisions of EU law are applied in arbitration proceedings. Should those provisions have been disregarded, the risk of the award being set aside or non-enforced by EU Member States courts would have been high, as national judges are required to give EU provisions the same standing as their own public policy rules.

(ii) ECJ case law on the exclusion of ISDS between EU Member States

26. In recent years EU law and investment arbitration have interacted in ways which are informative for international commercial arbitration. Specifically, the ECJ case law on investment arbitration demonstrates the Court's concern for the autonomy of the EU legal order.

27. On 6 March 2018, under an international agreement between Member States, the ECJ ruled in *Achmea* that the arbitration clause in the Netherlands-Slovakia bilateral investment treaty (BIT) was contrary to the autonomy of the EU's legal order.[31] The Court had received a reference for a preliminary ruling from the German Federal Court of Justice ('Bundesgerichtshof') in an action for annulment of an arbitration award against Slovakia.[32] The ECJ held that the arbitral tribunal could interpret and apply EU law[33], but that it could not refer

[29] *ISU* (n 23), para 193.
[30] Case C-600/23 *RFC Seraing v FIFA* [2025] ECLI:EU:C:2025:24, Opinion of A.G. Ćapeta, para122.
[31] Case C-284/16 *Slovak Republic v Achmea* [2018] ECLI:EU:C:2018:158.
[32] *Ibid*.

questions to the ECJ for a preliminary ruling[34] and that its award could not be reviewed by national courts in a manner that ensures the full effectiveness of EU law.[35]

28. Subsequently, the ECJ extended the reasoning of the *Achmea* ruling in *Komstroy*[36] and *PL Holdings*.[37] In the former, the Court held that the intra-EU application of the Energy Charter Treaty (ECT) undermined the autonomy of the EU's legal order.[38] In the latter, the ECJ held that an ad hoc arbitration agreement between an investor from one Member State and another Member State, identical to an arbitration clause of an intra-EU BIT, was also contrary to the autonomy of the EU's legal order.[39] In order to comply with the ECJ's rulings, Member States took measures regarding intra-EU BITs[40] and regarding the ECT (in conjunction with the EU for the latter).[41]

29. However, since the *Achmea* ruling the ECJ has consistently distinguished between commercial arbitration and treaty-based investment arbitration. According to the ECJ the difference lies in the fact that commercial arbitration is based on the autonomy of the parties. Referring to *Eco Swiss*, the ECJ accepted that commercial arbitration awards could only be subject to limited review.[42]

30. The case law on investment arbitration may nevertheless remain relevant to commercial arbitration. In the aforementioned cases, the Court insisted that it acknowledged the need for prompt and efficient review proceedings for commercial arbitration, 'provided that the fundamental provisions of EU law can be examined in the course of that review and they can, if necessary, be the subject of a reference to the Court for a preliminary ruling'.[43]

31. This obiter dictum reinforces a principle that has been seen with regard to the ECJ case law on commercial arbitration, namely that the fundamental principles of EU law must not be ignored when reviewing commercial arbitration awards.

[33] *Achmea* (n 31), para 42.
[34] *Achmea* (n 31), para 49.
[35] *Achmea* (n 31), para 56.
[36] Case C-741/19 *Republic of Moldova v Komstroy* [2021] ECLI:EU:C:2021:655.
[37] Case C-109/20 R*epublic of Poland v PL Holdings* [2021] ECLI:EU:C:2021:875.
[38] See *Komstroy* (n 36), paras 62-66.
[39] *PL Holdings* (n 37), para 47.
[40] In May 2020, twenty-three Member States concluded an agreement terminating intra-EU BITs. Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union [2020] OJ L169/1.
[41] The EU has carried out a process of modernising the ECT with a view to excluding its intra-EU application. From the end of 2022, some Member States have withdrawn from this treaty or have announced that they will do so. At the end of June 2024, the EU also notified its withdrawal from this treaty. See European Commission Press Release IP/24/3513, 'EU notifies exit from Energy Charter Treaty and puts an end to intra-EU arbitration proceedings' (2024). In July 2024, the European Commission published a proposal for the Union to adopt the agreement reached with the Member States that the Energy Charter Treaty should be interpreted so as not to apply in intra-EU relations. See Commission Proposal for a Decision of the European Parliament and of the Council on the Adoption by the Union of the Agreement on the Interpretation and Application of the Energy Charter Treaty Between the European Union, the European Atomic Energy Community and their Member States [2024] COM (2024) 257 final annex, art 1. Finally, the modernisation process was completed in December 2024.
[42] *Achmea* (n 31), para 54.
[43] *Komstroy* (n 36), para 58.

(iii) ECJ case law on the exclusion of arbitration from the scope of application of the Brussels I Recast Regulation

32. Another important aspect of the ECJ case law regarding commercial arbitration is related to its exclusion from the scope of application of the 1968 Brussels Convention,[44] the Brussels I Regulation[45] and Brussels I Recast Regulation.

33. The first ruling addressing the extent to which arbitration was excluded from the 1968 Brussels Convention was the *Marc Rich* decision, in which the Court held that arbitration was 'exclude[d] [...] in its entirety, including proceedings brought before national courts'.[46] The case at hand dealt with the appointment of an arbitrator as well as the validity of the relevant arbitration agreement as a preliminary issue.[47] Next, in *Van Uden*, the Court ruled that where the parties had entered into an arbitration agreement, an application for provisional measures could still be filed to state courts, but only those which would have jurisdiction under article 24 of the 1968 Brussels Convention (now article 35 of the Brussels I Recast Regulation), which refers to the Member States' national law.[48]

34. Notably, the *West Tankers* ruling triggered the insertion of recital 12 in the 2012 Recast of the Regulation. In this decision, the Court ruled that it was 'incompatible with Regulation No 44/2001 [...] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement'.[49] In the *Gazprom* ruling, the Court took no issue with anti-suit injunctions granted by an arbitral tribunal in a situation where the courts of only one Member State were involved.[50]

[44] Convention (EEC) 72/454 on jurisdiction and the enforcement of judgments in civil and commercial matters (1968 Brussels Convention) [1968] OJ L299.
[45] Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels 1 Regulation) [2000] OJ L12/1.
[46] Case C-190/89 *Marc Rich v Società Italiana Impianti* [1991] ECR I-03855, para 18.
[47] *Ibid*. para 11.
[48] Case C-391/95 *Van Uden v Deco-Line* [1998] ECR I-07091, para 48.
[49] Case C-185/07 *Allianz v West Tankers* [2009] ECLI:EU:C:2009:69, para 19.
[50] Case C-536/13 *Gazprom v Republic of Lithuania* [2015] ECLI:EU:C:2015:316, paras 35-36.

35. Recital 12 did not stop the Court from deciding, in the controversial *London Steamship* ruling, that a judgment rendered by a court of a Member State in the terms of an arbitral award could not bar the recognition of an incompatible foreign judgment in that Member State if 'a judicial decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of that Member State without infringing the provisions and the fundamental objectives of that regulation, in particular as regards the relative effect of an arbitration clause included in the insurance contract in question and the rules on lis pendens', in effect submitting arbitral tribunals to 'provisions and the fundamental objectives' of Brussels I Recast Regulation.[51]

36. Thus, despite the exclusion of arbitration from the scope of application of the Brussels I Recast Regulation, the ECJ case law has had a non-negligible impact on arbitration and created uncertainty as to the further developments it might have in the future.

---

37. This brief overview of the existing legal frame work on arbitration in the EU shows that there is not a genuine setting apart of the two fields. In fact, while one focuses more specifically on the case law of the ECJ, it appears that arbitration practice and EU law recurrently overlap. The reason for this may be that arbitration, as an important form of dispute resolution in the commercial sector, cannot be completely immune from the scope of application of EU law. This may be a sufficient reason for EU law to take a further step towards including arbitration in its legal framework.

[51] Case C-700/20 *London Steam-Ship Owners Mut. Ins. Ass'n v Kingdom of Spain* [2022] ECLI:EU:C:2022:488, para 73.

II. RATIONALE FOR THE PROPOSAL TO TAKE ARBITRATION INTO ACCOUNT IN THE EU LEGAL FRAMEWORK

38. The opportunity of a Europeanisation of international commercial arbitration law cannot be discussed in broad and abstract terms. The issue has to be considered in relation with the paths such Europeanisation might take (II.1). In any case, these paths may be followed only if a competence of the EU in arbitration matters is grounded (II.2).

II.1. Possible paths for the introduction of European rules on international commercial arbitration

39. Three main reforms are conceivable. The first one is an EU harmonisation of commercial arbitration substantive law of every Member States (i). The introduction of rules concerning arbitration may also be considered within the framework of the Rome I Regulation (ii) or within the framework of the Brussels I Recast Regulation (iii).

(i) The perspective of an EU Regulation on international commercial arbitration

40. The most ambitious endeavour of Europeanising arbitration law could involve the introduction of substantive rules that would comprehensively cover the issues traditionally settled by the *lex arbitri*. A possible source of inspiration for such European

legislation would arguably be the UNCITRAL Model Law on International Commercial Arbitration.[52]

41. The effective uniformity of laws offers major advantages, particularly in terms of simplification, predictability and legal certainty. However, pragmatic considerations incite the Working Group to discuss the relevance and the feasibility of a sustained process of harmonisation. It also has its disadvantages, which are regularly highlighted by legal writers. In essence, it tends to eliminate legal pluralism.[53] Yet, for some authors, this is precisely a value to be defended, whether for moral, political, or even economic reasons. Uniformity hinders competition between laws Therefore, it is not surprising that this debate has extended to arbitration.[54] We are well aware of the importance attached to normative competition in this field.[55] In this respect, the excessive harmonisation of the rules of the Member States of the EU presents a major risk, that of reducing their attractiveness.

42. While the institutional framework of the EU undeniably facilitates the adoption of uniform rules, the process remains long and complex. Such a project raises several questions. Who would be responsible for drafting the rules? What would be the aims? What solutions and what method would be preferable to achieve them? While the syncretic approach seems more legitimate because it attempts to take account of the diversity of laws, it seems less credible for the same reason. It is more likely to produce imprecise or even incoherent rules. To achieve uniform regulations, drafters are often forced to give priority to ideological orientations, to the detriment of taking equidistant account of the laws. They often adopt the solutions they perceive to be the most appropriate.

43. Furthermore, the attachment that Member States may have to their conceptions should not be forgotten. They are particularly keen to preserve their attractiveness as an arbitration seat.[56] Certain

[52] UNCITRAL, 'UNCITRAL Model Law on International Commercial Arbitration 1985 With Amendments as Adopted in 2006' (2006) < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf > accessed 23 March 2025.
[53] See Pierre Legrand, 'Le primat de la culture' in Le Droit Privé Européen - Actes du Colloque Organisé à Reims les 30 Janvier et 1er Février 1997 (Economica 1998).
[54] René David, *Arbitrage et droit comparé* (1959) Vol 11 n 1 (RIDC 5-18); *contra* Pierre Tercier and Nhu-Hoàng Tran Thang, 'Du choc des cultures en arbitrage international (Quelques réflexions)' in Nassib G. Ziadé and others (eds), *Festschrift Ahmed Sadek El-Kosheri. From the Arab World to the Globalisation of International Law and Arbitration* (Kluwer Law International 2015), pp 175-92.
[55] Catherine Kessedjian, *Rapport sur les Relations entre le Règlement 44/2001 et l'Arbitrage* (European Group for Private International Law 2009), para 14.
[56] For example, in the *West Tankers* case, the House of Lords and the United Kingdom government, in their attempt to obtain that English jurisdiction be preferred to Italian jurisdiction, invoked the interest that anti-suit injunctions would have in guaranteeing the competitiveness of the London arbitration centre. See *West Tankers* (n 49), para 17; Sandrine Clavel, 'L'harmonisation des règles de compétence et des procédures de règlement des conflits exception de litispendance' in L'Espace Judiciaire Européen Civil et Pénal : *Regards Croisés* (Dalloz 2009), 45-55.

Member States see the uniqueness of their arbitration legislation as a means of distinguishing their national place of arbitration. Resistance to the project of an EU legislation is therefore bound to be encountered. Opposition had already been expressed when the extension of the scope of the Brussels I Regulation was being considered.[57] As wisely warned by the Heidelberg Report: 'harmonisation of international arbitration might be considered as a severe intrusion into the procedural culture of the Member States'.[58]

44. In addition, reaching a compromise on the rules to be adopted would require lengthy discussions, with no guarantee that the solutions adopted would increase the competitiveness of European arbitration. The harmonised regime would in turn need to be reformed after a certain period of time, at which point the same difficulties would appear.

45. Finally, experience tends to demonstrate that harmonisation, even if accompanied by the case law of the ECJ, may not prevent the re-emergence of pluralism in the application of the rules by the judges of the Member States.[59]

46. The search for harmonisation in international arbitration could be more interesting when it comes to the principles that are essential.[60] One might

[57] See generally Burkhard Hess and others (eds), *Report On The Application Of Regulation Brussels I In The Member States* (Ruprecht-Karls-Universität Heidelberg 2008) (Heidelberg Report).
[58] *Ibid*. para 126.
[59] Mathias Audit, 'L'interprétation autonome du droit international privé communautaire' (2004) 3/2004 JDI Clunet; Vincent Heuzé, 'De quelques infirmités congénitales du droit uniforme : l'exemple de l'article 5.1 de la Convention de Bruxelles du 27 septembre 1968' (2003) Rev. Crit. de Droit Int'l Privé, 595.
[60] Pierre Tercier and Nhu-Hoàng Tran Thang (n 54).

wonder, however, whether the degree of standardisation that could reasonably be expected has not already been achieved to a large extent, notably because of the UNCITRAL Model Law.[61] All EU Member States have already adopted modern legislation on arbitration. Progressively, they are taking the initiative to abolish archaic rules that might affect their competitiveness.[62] Without denying the significant differences that remain between them, it appears that the laws of the Member States converge at least on one essential point, namely preserving the effectiveness of arbitration. Even if *favor arbitrandum* is guaranteed to varying degrees, it remains a common objective of these States. As a matter of fact, the diversity of arbitration rules at the EU level does not seem to be considered as an issue.

47. In a nutshell, the prospect of a genuine European arbitration law might seem appealing, but is realistically a long shot. The risks of resistance are substantial (particularly in France, given the originality of French international arbitration law), and such an evolution would not be without disadvantages. It must indeed be emphasised that in effect, the diversity of national laws offers choices for arbitration users.

48. Therefore, this path is not favoured by the Working Group.

[61] The UNCITRAL Model Law 'is the dominant 'model' for national legislation dealing with international commercial arbitration.' Gary Born, *International Commercial Arbitration* (3rd ed, Kluwer L. Int'l 2021), para 1.04[B][1][a]. It has been a significant incentive for European States to modernise their arbitration legislation. The UNCITRAL website lists the States that have adopted legislation based on the Model Law or inspired by it. Of the one hundred and twenty-six States, seventeen are Member States of the EU: Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Germany, Greece, Hungary, Ireland, Lithuania, Malta, Poland, Slovakia, Slovenia and Spain. UNCITRAL, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 | United Nations Commission On International Trade Law' < https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status > accessed 23 March 2025. Although they have not adopted this model, France, Portugal, Latvia, the Netherlands, Sweden, Finland, Romania, Luxembourg, the Czeck Republic and Italy have nevertheless adopted modern arbitration legislation. For a comparative study, see Gary Born *supra*, para 1.04[B]; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd ed, Sweet & Maxwell 2007). The solutions provided by the Model Law have nonetheless influenced certain developments in these legal systems. The Model Law has particularly influenced Swedish arbitration law. *Ibid*. 67. Another particularly eloquent indication of this convergence of approaches to arbitration is the fact that all the Member States of the EU are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. New York Convention, 'Contracting States' < https://www.newyorkconvention.org/contracting-states/contracting-states > accessed 23 March 2025.

[62] Jean-François Poudret, 'Conflits entre juridictions étatiques en matière d'arbitrage international ou les lacunes des Conventions de Bruxelles et Lugano' in *Festchrift für Otto Sandrock zum 70. Geburstag* (2000), pp 761-80. See eg Risto Kurki-Suonio, 'L'influence sur la nouvelle loi finlandaise de la loi-type CNUDCI' (1944) Rev. Arb. 499-504; more recently, William Brillat-Capello, 'Tutto deve cambiare perché tutto cambi ? La réforme du droit italien de l'arbitrage' (2023) Rev. Arb. 959-990.

(ii) Within the framework of the Rome I Regulation

49. It could be envisaged to reconsider the exclusion of arbitration agreements in the Rome I Regulation (art 1(2)(e)) to introduce conflict-of-laws rules in this area. However, this possibility would likely have limited interest if a 'reference rule' pointing towards the law of the seat (or the law designated by its conflict-of-laws rules) were to be introduced in the Brussels I Recast Regulation, as proposed later in the present report.[63] Such solution would be symmetrical to article 25 of the Brussels I Recast Regulation and recital 20 of its preamble regarding the validity of jurisdiction clauses.[64] It would arguably improve foreseeability and legal certainty, as the rules deemed applicable to the arbitration agreement would be the same from the perspective of the courts of every Member States.

50. Therefore, an enlargement of the scope of the Rome I Regulation, aiming to extend it to arbitration agreement, is not favoured by the Working Group.

(iii) Within the framework of the Brussels I Recast Regulation

51. As already pointed out, article 1(2)(d) of the Brussels I Recast Regulation explicitly excludes arbitration from its scope. This orientation has given rise to intense discussions. In the past (especially at the time of the recast of the said Regulation), various proposals were made to the effect of introducing into the Regulation rules on conflicts of jurisdiction concerning – to a greater or lesser extent – arbitration. Notably, the following should be mentioned in this regard:

- Academic proposals, particularly from H. Van Houtte.[65] The proposal previously made by J.-F.

[63] See *infra*, Part III ('Proposal of the Working Group'), art 31 bis.
[64] Brussels I Recast Regulation (n 1), recital 20, art 25.
[65] Hans Van Houtte, 'Why Not Include Arbitration in the Brussels Jurisdiction Regulation?' (2005) 21 Arb. Int'l 509; see also Massimo V. Benedettelli, 'Communitarization' of International Arbitration: A New Spectre Haunting Europe?' (2011) 27 Arb. Int'l 583.

Poudret during the discussions concerning the *Hilmarton* case,[66] regarding the inclusion of arbitration within the scope of the 1968 Brussels Convention, may also be mentioned;

• The proposals contained in the Heidelberg Report, which attracted particular attention; [67]

• A proposal by the Commission,[68] which sought to improve the relationship between arbitration and Brussels I Regulation by introducing a rule on parallel proceedings. This rule would have granted priority to the courts of the Member State where the seat of the arbitration is located, in the event where a court of another Member State was seized and its jurisdiction was contested on the basis of an arbitration agreement.

52. It would be an understatement to say that no consensus emerged as to the opportunity of such removal – even partial – of the exclusion of arbitration. This was reflected by the Heidelberg Report, which conducted detailed consultations with national reporters and key stakeholders on whether the Judgment Regulation should be extended to arbitration.[69]

53. These ideas ultimately failed to inspire the Brussels I Recast Regulation. The exclusion of arbitration was indeed maintained in the very same terms in article 1(2)(d), and the drafters of the said Regulation merely added two elements of limited impact.[70] The first one was a new recital 12 in the preamble of the Regulation, which clarifies, to some extent, the meaning of the exclusion of arbitration.[71] The second one was a new article 73(2), which explicitly provides: 'This Regulation shall not affect the application of the 1958 New York Convention'.[72]

54. However, the debate should not be considered definitively closed. In fact, several considerations could be presented to justify the introduction of European rules in the field of international commercial arbitration.

55. The arguments in favour of introducing Euro-

[66] Jean-François Poudret, 'Quelle solution pour en finir avec l'affaire Hilmarton ? Réponse à Philippe Fouchard' (1998) Rev. Arb. 14.
[67] Heidelberg Report (n 57).
[68] Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2010] SEC (2010) 1548 final, 35.
[69] Heidelberg Report (n 57).
[70] Brussels I Recast Regulation (n 1), art 1.
[71] *Ibid.* para 12.
[72] Brussels I Recast Regulation (n 1), art 13.

pean rules primarily stem from uncertainties surrounding the interplay between arbitration and the Brussels I system. In theory, the relationship between them should follow a simple logic: arbitration is indeed excluded from the scope of the Regulation (art 1(2)(d)). However, the reality is much less simple, due to two factors.

56. First, as has long been noted,[73] the exclusion of arbitration leaves some important practical questions unresolved, all of which revolve around a fundamental issue: how should matters that straddle both the excluded and included aspects of the Regulation be addressed? A good example is the hypothesis where a judge of a Member State has rendered a judgment in civil and commercial matters after setting aside an arbitration agreement which, according to the judge of another Member State, is valid. What leeway might the second Member State have, if any, where the said judgment (and, as the case may be, a conflicting arbitral award) is invoked before its courts? The clarifications provided by recital 12 of the Brussels I Recast Regulation's preamble shed only limited light in this respect and there is arguably still room for discussion.

57. Second, while the case law of the ECJ has provided some clarifications as to the meaning and the scope of the exclusion of arbitration, the merit of some of these developments have been debated and have arguably generated additional uncertainties. This is especially true of the ECJ's reasoning in *London Steamship*, the implications and potential extensions of which appear quite unclear.[74]

58. Beyond these considerations, the adequacy of the way certain practical questions are resolved, *de lege lata*, can at the very least, be seriously discussed. The following examples can be given:

•In the event of conflicts between proceedings, the current solutions do not give any priority, where the validity or applicability of an arbitration agreement is contested, to the judge of the seat of arbitration

[73] See eg Bernard Audit, 'L'arbitre, le juge et la Convention de Bruxelles' in *L'internationalisation du droit: Mélanges en l'honneur de Yvon Loussouarn* (Dalloz 1994), 15; Jean-Paul Beraudo, 'The Arbitration Exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgements', (2001) 18(1) J. Int'l Arb. 13; Trevor C. Hartley, 'The Brussels I Regulation and Arbitration' (2014) 63(4) Int'l Compar. LQ 843 (2014); Sylvain Bollée and Etienne Farnoux, 'Arbitration and the Twists of Recital 12 of the Brussels I bis Regulation' in P. Mankowski (ed), *Research Handbook on the Brussels I bis Regulation* (Elgar 2020), p 40; Hélène Gaudemet-Tallon & Marie-Élodie Ancel, *Compétence et exécution des jugements en Europe* (7th ed, LGDJ 2024), para 54 et seq.
[74] *London Steam-Shi*p (n 51).

elected by the parties. Legal certainty, foreseeability and the good administration of justice would arguably be better served by a rule providing for such priority.

•As pointed out above, uncertainties remain regarding the leeway of a judge of a Member State faced with a judgment rendered on the merits by the judge of another Member State after the latter has dismissed an arbitration agreement. Clarification in this regard would be welcome.

•Litigation concerning the constitution of the arbitral tribunal can, at least in theory, give rise to conflicts of jurisdiction and procedural conflicts. From this perspective, the adoption of European rules could be regarded as a progress.

•Similarly, the circulation of decisions rendered by national courts (eg assisting judges) concerning the constitution of the arbitral tribunal are currently governed by national laws. It might be advantageous to introduce a uniform, clear, and favourable regime for the recognition of decisions at the European level.

•The circulation of national decisions relating to the validity of the award could also be ensured by a European recognition regime. Given the guarantees generally provided by the courts and the laws of the Member States in the field of international commercial arbitration, a recognition system based on mutual trust would arguably make sense. Such system would typically provide for the recognition of decisions rendered in the country of the seat – whether they have annulled or validated the award. Such a system could increase the attractiveness of arbitration places in Member States, as it would result in a form of 'European passport' for awards validated by the courts of the seat.

•The handling of conflicts between judgments and awards is fraught with uncertainties, especially

since the *London Steamship* judgment. The implications of this judgment might also raise questions of compatibility with the requirements of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention), although the application of this Convention is in theory guaranteed by article 73 (2) of the Brussels I Recast Regulation.[75]

59. On this series of points, proposals for provisions that could be introduced into the Brussels I Recast Regulation will be presented in Part III of the present report. In effect, they would give an increased weight to the location of the seat in a given Member State and, from this standpoint, 'reward' more significantly choices made by stakeholders. Beyond clear advantages in terms of foreseeability, legal certainty and international harmony, the advocated solutions might arguably reinforce the attractivity of arbitration seated in EU Member States.

60. Before considering such additions to the European arbitration framework, it is nevertheless essential to assess the EU's competence in this respect. This is necessary to ensure that any proposed reforms are consistent with the principles of subsidiarity and proportionality, thereby avoiding the risk of potential censorship or jurisdictional limitations.

II.2. Establishing EU competence to legislate

61. The principle of attribution indicates that any act of EU law must be adopted in accordance with a provision of the founding treaties. Thus, to determine the competence of the EU, it is necessary to establish whether there is a corresponding legal basis. The choice of legal basis is determined by the purpose and content of the act in question.[76] The legal context of a new regulation may also be taken into account.[77]

[75] Brussels I Recast Regulation (n 1), art 73.
[76] Case C-300/89 *Commission v Council* [1991] ECR I-2869.
[77] Case C-166/07 *Parliament v Council* [2009] ECR I-7166.

62. From the outset of European integration, the issue of arbitration has been a key concern, particularly in relation to the recognition and enforcement of arbitral awards. The original provision on judicial cooperation was established in article 220 of the Treaty establishing the European Economic Community.[78] In its original form this article explicitly mentioned arbitral awards, stating that the Member States should, if necessary, 'enter into negotiations with each other with a view to facilitating for their nationals [...] the simplification of formalities governing the reciprocal recognition and enforcement of judgments and arbitral awards'.[79] Renumbered as article 293 of the Treaty establishing the European Community by the Treaty of Amsterdam, this provision was repealed by the Treaty of Lisbon.[80] However, its spirit survives in article 81 TFEU,[81] which can be legally interpreted as its successor in terms of judicial cooperation and the simplification of formalities relating to the recognition and enforcement of judicial and extrajudicial decisions.[82] Article 81 TFEU would thus provide a logical legal basis for including in the Brussels I Recast Regulation provisions relating to arbitration.[83]

63. The Brussels I Recast Regulation is based on article 81(2) (a), (c) and (e) TFEU. It would be logical to use the same legal basis for the integration of arbitration that might be within the Regulation. Although the basis for Brussels I Recast Regulation includes article 81(2)(e), it should be noted that, according to article 67 TFEU, the fundamental principle underlying the justice aspect of the area of freedom, security and justice is the facilitation of access to justice.[84] Therefore, this principle should be a fundamental consideration in every measure adopted under article 81 TFEU. Consequently, if the new instrument on arbitration were to be adopted on the basis of article 81 TFUE, the subparagraph (e) could be excluded.

64. Article 81(2) (a) and (c) TFEU is therefore the most appropriate legal basis for the integration of arbitration into EU law, as it promotes judicial coo-

[78] Treaty Establishing the European Economic Community (Treaty of Rome) [1957] 298 UNTS 11, art 220.
[79] *Ibid*.
[80] Treaty of Rome (n 78) as amended by Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts (Treaty of Amsterdam) [1997] OJ C340/1, art 293; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1, p 130.
[81] Consolidated Versions of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C115/47, art 81 ("1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases [...] (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction [...] (e) effective access to justice").
[82] *Ibid.;* Manuel Kellerbauer and others (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2019), 1308.
[83] Especially in view of the fact that the Green Paper on the reform of the Brussels I Regulation mentions the inclusion of arbitration in the Brussels I Regulation. It also suggests that removing the exclusion of arbitration from the scope of the Regulation could improve the interface between arbitration and court proceedings. See Commission, Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM/2009/0175 final, pp 9-10.
[84] TFEU (n 81), art 67.

peration between Member States while at the same time seeking to protect legal certainty. The following section examines possible ways to introduce arbitration rules into the EU framework.

III. PROPOSAL OF THE WORKING GROUP

65. Based on the considerations exposed in the second part of this report, the Working Group has prepared a series of proposals that are framed to be included in a future reform of the Brussels I Recast Regulation. In other words, they have been drafted as amendments to existing articles and should therefore be read in conjunction with the Brussels I Recast Regulation as it currently stands.

(i) Scope of application limitedly extended to arbitration

Article 1
(...)
2. This Regulation shall not apply to:
(...)
(d) arbitration, save as provided for in Articles 25 *bis*, 31 *bis*, 45 1. (d) and 45 3.

66. COMMENTS: The exclusion of arbitration is maintained as a matter of principle. Its only exceptions are those provided in the draft articles 25 *bis*, 31 *bis*, 45 paragraph 1 (d) and 45 paragraph 3. It must be pointed out that the general provisions on jurisdiction laid down in articles 4 et seq. are not among the said exceptions, so that they remain inapplicable, in any case, to actions relating to arbitration matters.

(ii) Extension of the scope of Chapter III to judgments rendered in arbitration matters

Article 2
For the purposes of this Regulation:
(a)(...)
(...)
For the purposes of Chapter III, 'judgment' includes a judgment given by virtue of Article 25 *bis* paragraph 1 in the Member State where the seat of arbitration is located. It also includes a judgment given by virtue of Article 25 *bis* paragraph 1 (a) in another Member State the court of which was expressly designated by the parties. It does not include a judgment issued by the court of another Member State on matters referred to in Article 25 *bis* paragraph 1.
(b)(...)

67. COMMENTS: see *infra* comments on article 25 *bis*.

(iii) Jurisdiction of the courts of the seat of arbitration

Article 25 *bis*
1. If the parties, regardless of their domicile, have agreed to settle their dispute by arbitration with its seat in the territory of a Member State, the courts of that Member State shall have jurisdiction over the following actions:

(a) Actions relating to the support for the constitution of the arbitral tribunal or the conduct of the arbitration procedure. This should be without prejudice to the jurisdiction of any other court expressly designated by the parties;

(b) Actions relating to the existence, validity or enforceability of the arbitration agreement. This should be without prejudice to:
• provisions of the national law of that State Member empowering the arbitral tribunal to rule on its own jurisdiction and, as the case may be, recognising it a priority in this respect; and
• article 31 *bis* paragraph 2.

(c) Actions for annulment, recognition or enforcement of the arbitral award.

2. Actions referred to in paragraph 1 (a) and (b) may not be brought before a court of a Member State on the basis of national rules of jurisdiction.

3. Paragraph 1 (c) should be without prejudice to the right for a party to seek recognition and enforcement of an arbitral award before a court of a Member State on the basis of its national rules of jurisdiction.

4. The provisions of this article are without prejudice to the application of a rule of national law of the Member State where the seat of arbitration is located enabling the parties to waive their right to bring an action for annulment.

5. The provision of this article do not apply in disputes concerning matters referred to in Sections 3, 4 or 5 of Chapter II.

68. COMMENTS: As an exception to the exclusion of arbitration, the draft article 25 *bis* sets out rules of jurisdiction applicable to:

(1) actions relating to the support for the constitution of the arbitral tribunal or the conduct of the arbitration procedure;
(2) actions relating to the existence, validity or enforceability of the arbitration agreement;

(3) actions for annulment, recognition or enforcement of the arbitral award.

69. For these provisions to apply, it is required that the parties have agreed to locate the seat of the arbitration in the territory of a Member State. Thus, the draft article 25 *bis* would not apply in the event where the seat was designated by an arbitral institution, an assisting court or the arbitral tribunal itself. The underlying justification is that the rules provided by the draft article 25 *bis* generally aim to give a strong resonance to the agreement entered into between the parties regarding the choice of the arbitral seat. Absent any such agreement, it would make less sense to give so much weight to the location of the seat.

70. As far as the actions listed above are concerned, the competence of the court of the Member State where the seat is located has only limited exceptions. First, as to actions relating to the support for the constitution of the arbitral tribunal or the conduct of the arbitration procedure, the parties may still agree on the competence of another court. This solution is in line with the current state of a number of national laws that leave room for such contractual agreements. Second, as provided by the second paragraph, actions for recognition and enforcement of arbitral awards may be brought before the courts of any Member State if authorised by its national law.

71. It must also be highlighted that the jurisdiction rule provided by the draft article 25 *bis*, paragraph 1, would not preclude the application of a rule of the *lex loci arbitri* providing for the principle of competence-competence, including with a negative effect (i.e. by giving priority to the arbitral tribunal to rule on its own jurisdiction) (draft article 25 *bis* paragraph 2).

72. A key element of the proposed system lies in the application of Chapter III to decisions rendered by the courts of the Member State where the seat of

the arbitration is located – or, as the case may be, the Member State's court that the parties elected as assisting court under paragraph 1 (a). The applicability of Chapter III to such decisions flows from the proposed addition to article 2 (a) (*see supra*). A notable outcome is that a decision issued by the contemplated court on an action for annulment, recognition or enforcement, whether it held the award valid or invalid, would circulate in other Member States, subject only to the narrow grounds for non-recognition provided in Chapter III. In effect, this would amount (*inter alia*) to granting what may be called a 'European passport' to arbitral awards rendered in a Member State and validated by local courts. Such mechanism might be regarded as a positive factor from the perspective of good administration of justice and reinforce the attractivity of European places of arbitration.

73. Though the idea of introducing a circulation of judgments 'validating' arbitral awards in Europe may seem to contrast with a well-established tradition, the originality of this aspect has to be kept in perspective, since the recognition of such judgments is already a possibility in certain jurisdictions – for instance in Singapore, through the doctrine of 'transnational issue estoppel'.[85]

74. It is important to emphasise that the contemplated 'European passport' would not impose a 'double exequatur' to the party seeking recognition and enforcement in another Member State, since the said party would remain free to bring an action for recognition and enforcement directly in one Member State or another, without seeking a judgment validating the award in the Member State of the seat beforehand (paragraph 3). In such case, the judgment rendered in the enforcement Member State would not circulate under the provisions of Chapter III, as explicitly flows from the wording of the proposed addition to article 2 (a).

75. Besides, it should be recalled that as per article

[85] *Republic of India v Deutsche Telekom* [2023] SGCA(I) 10. See more generally, on the circulation of judgments relating to arbitral awards: Maxi Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?' (2013) Volume 4 Issue 3 Journal of International Dispute Settlement, pp 587–628

39 of the Brussels I Recast Regulation, a judgment which is enforceable in the Member State where it was given is enforceable in other Member States without any exequatur. This would apply to judgments rendered in arbitration matters and falling within the scope of Chapter III, which would further contradict the notion of 'double exequatur'.

76. The circulation of judgments setting aside or validating arbitral awards under Chapter III would arguably not conflict with the provisions of the 1958 New York Convention. This is clear as far as judgments validating awards are concerned, since the said Convention does not prohibit Contracting States from adopting a more favourable regime for the circulation of awards than that established by the Convention itself. This is reflected by the 'more favorable right provision' of article VII (1). Regarding annulment decisions, their circulation would not conflict with the 1958 New York Convention either, since the circumstance that the award has been set aside in the country in which it was made is a ground for non-recognition under article V (1) (e) of the 1958 New York Convention.

77. Finally, it must be pointed out that the provisions of the draft article 25 *bis* would not apply in disputes concerning matters referred to in Sections 3, 4 or 5 of Chapter II. Such disputes involve specific considerations in relation to the protection of weaker parties, which would arguably not be consistent with the application of a system giving increased weight to contractual agreements regarding the location of the seat.

(iv) Priority of jurisdiction of the courts of the seat of the arbitration

Article 31 *bis*

1. Where a court of a Member State is seized of an action and its jurisdiction is contested on the basis of an arbitration agreement establishing the seat of the arbitration in another Member State, it shall, on the application of the party seeking to rely upon the said agreement, stay the proceedings until the courts of this other Member State have ruled or may no longer rule on the existence, validity or enforceability of the arbitration agreement.

2. However the court whose jurisdiction is contested continues the proceedings if:

(a) the arbitration agreement is manifestly inexistent, invalid or unenforceable under the law of the Member State where the seat is located; or

(b) the arbitral tribunal was seized and declined jurisdiction, and the arbitration agreement is inexistent, invalid or unenforceable under the law of the Member State where the seat is located.

For the purposes of this paragraph, reference to the law of the Member State where the seat is located encompasses conflict-of-laws rules applicable in that Member State.

3. The provisions of this article are without prejudice of the application of a rule of national law of the Member State where the seat of arbitration is located empowering the arbitral tribunal to rule on its own jurisdiction and, as the case may be, recognising it a priority in this respect.

78. COMMENTS: the draft article 31 *bis* addresses the situation where an action on the merits is

brought before the court of a Member State and the jurisdiction of this court is challenged on the basis of an arbitration agreement. In such hypothesis, it is proposed to grant a priority to the courts of the Member State of the seat of arbitration to decide on the existence, validity or enforceability of the arbitration agreement. The underlying policy is to reinforce the rule of jurisdiction set out by the draft article 25 *bis* paragraph 1, ensure the full protection of contractual agreements regarding the location of the seat, but also prevent forum shopping. On balance, it is preferable that the court ruling on the existence, validity and enforceability of the arbitration agreement be that of the seat, which the parties have *prima facie* elected by mutual agreement, rather than a judge unilaterally seized by only one of the parties.

79. Such system would arguably not conflict with article II (3) of the 1958 New York Convention, according to which: 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed' (emphasis added). It is true that the outcome of the draft article 31 *bis* would be, to a large extent, to deprive the non-seat court from the possibility of assessing itself whether the arbitration agreement is valid and enforceable: instead, the decision issued in the Member State where the seat is located would eventually prevail. An answer to this, however, is that under the New York Convention, Contracting States remain free to establish a legal regime that grants more favourable rights to the party seeking to rely upon an arbitration agreement.[86] This is arguably the case of the system provided by the draft article 31 *bis* as it would only apply on the basis of an application made by the party invoking the arbitration agreement.

[86] See Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session < https://www.newyorkconvention.org/media/uploads/pdf/7/3/73_recommendations-2006-a-6-17.pdf > accessed 13 May 2025.

80. As indicated in paragraph 3, the draft article 31 *bis* is without prejudice of the application of a rule of national law of the Member State where the seat of arbitration is located enabling the arbitral tribunal to rule on its own jurisdiction and, as the case may be, recognising it a priority in this regard. If the legislation of the Member State of the seat is so oriented, the negative effect of competence-competence will thus have, in effect, a full European resonance. Again, the underlying policy is to 'reward' the choice made by the parties to elect a Member State as the seat of arbitration.

81. The priority mechanism provided for in the draft article 31 *bis* is not without limits. First, it will only apply if the party invoking the arbitration agreement applies for a stay of proceedings before the court whose jurisdiction is contested. Second, paragraph 2 enables this court to dismiss such application and continue the proceedings if:

(a) the arbitration agreement is manifestly inexistent, invalid or unenforceable under the law of the Member State where the seat is located; or

(b) the arbitral tribunal was seized and declined jurisdiction, and the arbitration agreement is inexistent, invalid or unenforceable under the law of the Member State where the seat is located.

82. In the general situation, contemplated in sub-paragraph (a), the possibility for the court whose jurisdiction is challenged to set aside the arbitration agreement is narrowly conceived, as reflected by the adverb 'manifestly': only a *prima facie* assessment is allowed. Sub-paragraph b) authorises a broader assessment, however, where the arbitral tribunal was seized (which may notably happen if the law of the seat provides for the negative effect of competence-competence) and declined jurisdiction. In this scenario, it is indeed more likely than not than the arbitration agreement is actually inexistent, invalid or unenforceable, and it would seem excessive

to impose a further stay of proceedings until the courts of the Member State where the seat is located have upheld the arbitral tribunal's findings. This is why the court before which an action on the merits has been brought is immediately empowered to perform a full assessment of the existence, validity and enforceability of the arbitration agreement.

83. In any case, in both situations contemplated by sub-paragraphs (a) and (b), the existence, validity and enforceability of the arbitration agreement should be assessed by reference to the law of the Member State where the seat is located, including its conflict-of-laws rules. Such solution, which is symmetrical to that provided by recital 20 of the Brussels I Recast Regulation's preamble regarding the validity of choice of court clauses, leaves the State of the seat of arbitration entirely free to determine which rules shall apply to the arbitration agreement. This 'reference rule' pointing towards the rules applicable in the Member State of the seat would arguably serve foreseeability and harmony of solutions. It would also 'reward', once again, the contractual election of a Member State of the seat of the arbitration.

84. Finally, it must be pointed out that no comparable rule on parallel proceedings is set out in the field of actions for annulment, recognition and enforcement of arbitral awards. Since decisions issued in the Member State of the seat of arbitration shall be recognised under Chapter III of the Regulation, the lack of any rule ensuring a priority to the courts of this Member State could *prima facie* appear as an inconsistent omission. In actuality, the explanation for the absence of any such rule, in the draft article 31 *bis* or another draft article, is that the application of article VII of the 1958 New York Convention may in that respect be regarded as sufficient. It must indeed be remembered that as per the said article VII:

'If an application for the setting aside or suspension of the award has been made to a competent autho-

rity referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security'.

Article 35

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State or an arbitral tribunal have jurisdiction as to the substance of the matter.

85. COMMENTS: Following the ECJ judgment in *Van Uden*[87] , it is accepted that even if an arbitration agreement has been concluded for the main proceedings, provisional measures can still be ordered by courts having jurisdiction according to article 35 in conjunction with domestic law. The present proposal merely seeks to make this apparent in the wording of article 35, which is not the case in the current wording. This is without prejudice to the debate on whether the Court rightly decided in the same case, that the arbitration agreement causes the court with jurisdiction in the main proceedings according to the regulation (under arts 4 or 7, para 1, for instance) to no longer be able to order provisional measures.[88]

[87] *Van Uden* (n 48), para 25 et seq.
[88] *Ibid.* para 24.

(v) Refusal of recognition

Article 45

1. On the application of any interested party, the recognition of a judgment shall be refused:
(...)

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State, or an arbitral award, involving the same cause of action and between the same parties, provided that the earlier judgment or arbitral award fulfils the conditions necessary for its recognition in the Member State addressed; or

(...)

3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction, including the rules governing the existence, validity or enforceability of arbitral agreements.

86. COMMENTS: The revision of art 45 paragraph 1 (d) seeks to add, as grounds for refusal of recognition and enforcement of a judgement, the irreconcilability with an arbitral award. The goal is to elevate the award on the same level as the two other categories of decisions currently susceptible of creating irreconcilability, namely 'an earlier judgment given in another Member State or in a third State'. This would be at the same conditions, namely that (i) the award was issued earlier than the judgment brought for recognition, (ii) both decisions involve the same cause of action and are between the same parties, and (iii) the earlier award fulfils the conditions necessary for its recognition in the Member State addressed.

87. This point addresses one of the major difficulties apparent after the *London Steamship*[89] case, namely that the award itself cannot be taken into account for the purpose of irreconcilability with the later decision of the court of a Member State, under the Brussels I system, without an exequatur. This unfavourable treatment is all the more unsatisfactory when the award benefits, under national law, from *de plano* recognition. It would mean that the award, having been recognised *de plano*, could then be challenged if subsequently the court of a Member State is seized, exercised jurisdiction and in turn issued a decision on the merits of the case. The compatibility with the 1958 New York Convention of such a turnaround in the fate of the award might be discussed. In any case, the practical result is unfortunate. The proposed provision reverses this solution and reinforces the potential *de plano res judicata* of the award, allowing it to bar recognition and enforcement of a later judgement issued by the court of a Member State.

88. The revision of article 45 paragraph 3 merely extends to the rules governing the existence, validity or enforceability of arbitral agreements, the existing prohibition against the application of the public policy exception to the rules relating to jurisdiction. This is to ensure that public policy is not instrumentalised to circumvent the circulation of a decision of the court of a Member State within the scope of art *25 bis* 1.

[89] *London Steam-Ship* (n 51).

Annex: Comparative table of proposed amendments to the Brussels I Recast Regulation (No. 1215/2012)

1. Scope of Regulation 1215/2012

Current Article 1.2 :	Proposed modification to Article 1.2 :
"This Regulation shall not apply to: (...) (d) arbitration (...)"	"This Regulation shall not apply to: (...) (d) arbitration, save as provided for in Articles 25 *bis*, 31 *bis*, 45 1. (d) and 45 3. (...)"

2. Extension of the Scope of Chapter III to Judgments Rendered in Arbitration Matters

Current Article 2 :

"For the purposes of this Regulation:

(a)(...)

For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;
(...)"

Proposed modification to Article 2 :

"For the purposes of this Regulation:

(a)(...)

For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;

For the purposes of Chapter III, 'judgment' includes a judgment given by virtue of Article 25 *bis* paragraph 1 in the Member State where the seat of arbitration is located. It also includes a judgment given by virtue of Article 25 *bis* paragraph 1 (a) in another Member State, the court of which was expressly designated by the parties. It does not include a judgment issued by the court of another Member State on matters referred to in Article 25 *bis* paragraph 1; (...)"

3. Jurisdiction of the courts of the seat of arbitration

Current Article 25 :

"1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;
(b) in a form which accords with practices which the parties have established between themselves; or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid."

Proposed Article 25 *bis*:

1. If the parties, regardless of their domicile, have agreed to settle their dispute by arbitration with its seat in the territory of a Member State, the courts of that Member State shall have jurisdiction over the following actions:

(a) Actions relating to the support for the constitution of the arbitral tribunal or the conduct of the arbitration procedure. This should be without prejudice to the jurisdiction of any other court expressly designated by the parties;

(b) Actions relating to the existence, validity or enforceability of the arbitration agreement. This should be without prejudice to:
- provisions of the national law of that State Member empowering the arbitral tribunal to rule on its own jurisdiction and, as the case may be, recognising it a priority in this respect; and
- article 31 bis paragraph 2.

(c) Actions for annulment, recognition or enforcement of the arbitral award.

2. Actions referred to in paragraph 1 (a) and (b) may not be brought before a court of a Member State on the basis of national rules of jurisdiction.

3. Paragraph 1 (c) should be without prejudice to the right for a party to seek recognition and enforcement of an arbitral award before a court of a Member State on the basis of its national rules of jurisdiction.

4. The provisions of this article are without prejudice to the application of a rule of national law of the Member State where the seat of arbitration is located enabling the parties to waive their right to bring an action for annulment.

5. The provision of this article do not apply in disputes concerning matters referred to in Sections 3, 4 or 5 of Chapter II.

4. Priority of jurisdiction of the courts of the seat of the arbitration

Current Article 31 :

"1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.
4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections."

Proposed Article 31 *bis* :

1. Where a court of a Member State is seized of an action and its jurisdiction is contested on the basis of an arbitration agreement establishing the seat of the arbitration in another Member State, it shall, on the application of the party seeking to rely upon the said agreement, stay the proceedings until the courts of this other Member State have ruled or may no longer rule on the existence, validity or enforceability of the arbitration agreement.

2. However the court whose jurisdiction is contested continues the proceedings if:

(a) the arbitration agreement is manifestly inexistent, invalid or unenforceable under the law of the Member State where the seat is located; or

(b) the arbitral tribunal was seized and declined jurisdiction, and the arbitration agreement is inexistent, invalid or unenforceable under the law of the Member State where the seat is located.

For the purposes of this paragraph, reference to the law of the Member State where the seat is located encompasses conflict-of-laws rules applicable in that Member State.

3. The provisions of this article are without prejudice of the application of a rule of national law of the Member State where the seat of arbitration is located empowering the arbitral tribunal to rule on its own jurisdiction and, as the case may be, recognizing it a priority in this respect.

Current Article 35 :

"Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter."

Proposed modification to Article 35 :

"Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State or an arbitral tribunal have jurisdiction as to the substance of the matter."

5. Refusal of recognition

Current Article 45 :

"1. On the application of any interested party, the recognition of a judgment shall be refused:

(...)

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or (...)

3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction."

Proposed modification to Article 45 :

"1. On the application of any interested party, the recognition of a judgment shall be refused:

(...)

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State, or an arbitral award, involving the same cause of action and between the same parties, provided that the earlier judgment or arbitral award fulfils the conditions necessary for its recognition in the Member State addressed; or (...)

3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction, including the rules governing the existence, validity or enforceability of arbitral agreements."


UNIVERSITÉ PARIS 1
PANTHÉON SORBONNE


IRJS
Institut de
Recherche
Juridique de
la Sorbonne
ANDRÉ TUNC