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# The Limits of International Commercial Arbitration in EU Law: Between Autonomy and Integration<sup>1</sup>

**Abstract:** The relationship between international commercial arbitration and EU law has evolved from complete separation to an increasingly close interconnection. Although arbitration formally remains outside the Union's institutional framework, EU law has a significant impact on arbitral proceedings, particularly when determining the jurisdiction of arbitral tribunals.

This article aims to provide a comprehensive analysis of the position of arbitral tribunals within the EU legal order and to examine how EU law influences the arbitral process. The research employs normative, doctrinal, analytical and comparative legal methods, supplemented by an analysis of the case law of the Court of Justice of the European Union and selected national courts. The article is based on the premise that, despite being formally absent from the Union's institutional structure, arbitral tribunals functionally participate in the application of EU law through indirect mechanisms, primarily by applying overriding mandatory rules and EU public policy when determining arbitral jurisdiction.

Furthermore, the article demonstrates that the absence of a uniform normative framework, particularly with regard to the ability of arbitral tribunals to refer preliminary questions to the Court of Justice of the European Union, leads to the fragmentation of EU law and legal uncertainty. Finally, the article emphasises the need for a more coherent approach that reconciles party autonomy with the requirement for the uniform application of EU law.

**Keywords:** international arbitration, EU law, arbitral tribunals, arbitrability, preliminary ruling procedure, party autonomy, public policy.

### 1. INTRODUCTORY REMARKS

For decades, international commercial arbitration and European Union (EU) law have developed as separate systems that, at first glance, appear to have little in common<sup>2</sup>. Tradi-

<sup>1</sup> This work results from research conducted at the Institute of Comparative Law in 2026, with financial support from the Ministry of Science, Technological Development and Innovation (Contract No. 451-03-33/2026-03/200049)

<sup>2</sup> George A. Bermann, „Navigating EU Law and the Law of

tionally, arbitration has been understood as an alternative method of dispute resolution that exists alongside judicial dispute settlement<sup>3</sup>. Arbitrators derive their jurisdiction from the parties' agreement to submit their dispute to arbitration and resolve it impartially through a final and binding arbitral award<sup>4</sup>.

Although arbitration operates as a parallel forum, it does not exist in a vacuum. In fact, an arbitral award is linked to the legal order of the seat of arbitration and is therefore subject to that jurisdiction's overriding mandatory rules and public policy. In other words, when deciding a particular dispute, an arbitral tribunal is required to apply the law chosen by the parties while also taking into account the mandatory rules of the law of the seat in order to ensure the smooth enforcement of the arbitral award<sup>5</sup>.

By contrast, EU law establishes a supranational legal order within which Member States transfer part of their sovereign powers to the Union's institutions<sup>6</sup>. This legal order is founded on the core principles of supremacy, direct effect and direct applicability of EU law within national legal systems<sup>7</sup>. A defining feature of EU law is the uniform application of its rules across Member States, safeguarded by the Court of Justice of the European Union, which is the Union's highest judicial authority<sup>8</sup>. Disputes arising from commercial relationships, in the absence of an arbitration agreement, are resolved by competent national courts in accordance with the rules on international and territorial jurisdiction. The relationship between national courts and the Court of Justice of the European Union is governed by primary and secondary sources of EU law to ensure the uniform interpretation and consistent application of EU law<sup>9</sup>.

International Arbitration", *Arbitration International*, No.28(3), 2012, p. 397.

- <sup>3</sup> Emmanuel Gaillard, *Legal Theory of International Arbitration*, Martinus Nijhoff, 2010, p. 15.
- <sup>4</sup> More about arbitration agreements, see: Jelena Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži*, Beograd, 2002, p. 41 ff.; Miodrag Trajković, *Međunarodno arbitražno pravo*, Beograd, 2000, pp. 231–323; Maja Stanković, *Međunarodna arbitraža*, Beograd, 2013, pp. 73–142; Gašo Knežević, *Međunarodna trgovinska arbitraža*, Beograd, 1999, pp. 32–50; Gašo Knežević, Vladimir Pavić, *Arbitraža i ADR*, Beograd, 2009, pp. 45–68; Jelena Vukadinović Marković, "Ugovor o arbitraži kao osnov derogacije sudske nadležnosti", *Aktuelna pitanja iz oblasti građanskog prava iz Bosne i Hercegovine – teorija i praksa*, Udruženje sudija Republike Srpske, Banja Luka, pp. 65–75; Gary B. Born, *International Commercial Arbitration*, 3rd edn, Kluwer Law International, 2021, Chapters 2–10.
- <sup>5</sup> For further discussion, see: Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 99 ff.
- <sup>6</sup> More about EU law see Radovan Vukadinović, Jelena Vukadinović Marković, *Uvod u institucije i pravo evropske unije*, Službeni glasnik 2020; Jelena Čeranić Perišić, *Diferencirane integracije u Evropskoj uniji*, Institut za uporedno pravo, 2025.
- <sup>7</sup> For a detailed discussion of direct effect and direct applicability, see in particular: Jelena Vukadinović Marković, Radovan Vukadinović, „Neuhvatljive posledice dejstva EU direktiva“, *Zbornik radova 35. susreta Kopaoničke škole prirodnog prava – Slobodan Perović*, Beograd, 2022, pp. 481–498; Vladimir Savković, „Neposredno dejstvo direktive Evropske unije i njegove alternative: kreativnost Suda pravde na djelu“, *Liber Amicorum Mirko Vasiljević*, (D. Popović ur.), Pravni fakultet i Beogradu, 2021, pp. 665–676.
- <sup>8</sup> Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, Hart Publishing 1998, p. 7.
- <sup>9</sup> Jelena Vukadinović Marković, Radovan Vukadinović, "Reforma odlučivanja o prethodnom pitanju u pravu EU", *Zbornik radova Kopaoničke škole prirodnog prava – Slobodan Perović Primena prava i pravna sigurnost*. Kopaonička škola prirodnog prava – Slobodan Perović,

Although EU law and international arbitration initially appear to be conceptually and institutionally distinct, almost like ‘oil and water’<sup>10</sup>, their development has led to an increasingly close interaction. What were once relatively autonomous and parallel normative orders now frequently intersect in practice, particularly in disputes involving the application of EU law in arbitral proceedings<sup>11</sup>. This growing interconnection is primarily driven by the expansion of EU law, particularly in areas governing private legal relationships. This creates a framework in which arbitral tribunals increasingly apply EU law as the applicable law in dispute resolution.

This interaction is particularly evident at the stage of determining arbitral jurisdiction, where the validity of the arbitration agreement and the arbitrability of the dispute are assessed. Conversely, following the conclusion of arbitral proceedings and the issuance of arbitral awards, these awards are subject to review by national courts at the stage of recognition and enforcement. During annulment and recognition and enforcement proceedings, national courts assess the compatibility of arbitral awards with public policy, including international and, where relevant, European standards<sup>12</sup>.

Against this background, the aim of this article is twofold. Firstly, it examines the institutional position of arbitral tribunals within the EU legal order. Secondly, it analyses the impact of EU law on arbitral proceedings, particularly at the stage of determining arbitral jurisdiction. The article’s central thesis is that, while arbitration is not formally part of the EU judicial system, it is functionally integrated into it through the role of national courts and the application of the Union’s mandatory rules.

This research is based on the normative and doctrinal legal method, combined with analytical and comparative legal approaches. The study examines the relevant provisions of EU primary and secondary law, as well as the case law of the Court of Justice of the European Union and selected national courts. Through comparative analysis and case-law examination, the paper evaluates the institutional position of arbitral tribunals within the EU legal order and assesses the impact of EU law on arbitral proceedings, particularly with regard to jurisdiction, arbitrability and public policy.

## 2. THE INSTITUTIONAL POSITION OF ARBITRAL TRIBUNALS IN EU LAW

The legal order of the European Union is based on a system of organised judicial cooperation between the national courts of the Member States and the Court of Justice of the European Union<sup>13</sup>. The preliminary ruling procedure under Article 267 of the Treaty

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Beograd, 2021, pp. 338 ff.

<sup>10</sup> Morten Broberg, Niels Fenger, „The Law of Arbitration and EU Law – Like Oil and Water? *Koninklijke Brill NV*, Leiden, 2023, p. 88.

<sup>11</sup> Jurgen Basedow, “EU Law in International Arbitration: Referrals to the European CJEU”, *Journal of International Arbitration* Vol. 32(4), 2015, p.367.

<sup>12</sup> For more see Shu Zhang, “Public Policy in International Arbitration Law” *The Public Policy Exception in the Judicial Review of International Commercial Arbitral Awards*, 2023, Springer, Berlin, Heidelberg, pp. 15-44.

<sup>13</sup> Judicial cooperation in EU law was originally governed by Article 220 of the Treaty establishing the European Economic Community, which, in its original formulation, expressly encompassed arbitral awards. That provision required Member States, where necessary, to enter into negotiations with a view to simplifying the formalities governing the mutual recognition and

on the Functioning of the European Union (hereinafter: TFEU) is the key mechanism for ensuring the uniform application of EU law<sup>14</sup>. This procedure allows national courts to request authoritative interpretations of EU law or rulings on the validity of EU institution acts, ensuring consistent application of EU law across all Member States<sup>15</sup>.

The right to refer questions to the Court of Justice is reserved for ‘courts or tribunals of a Member State’. The Court of Justice has developed this concept as an autonomous notion of EU law, independent of classifications in national legal systems. As early as the *Vaassen-Göbbels* case, the Court emphasised that the decisive factor is the body’s functional nature, rather than its formal designation under national law<sup>16</sup>. Subsequent case law has seen the Court develop a set of criteria to determine whether a body qualifies as

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enforcement of both judicial and arbitral decisions.

Following the Treaty of Amsterdam, this provision was renumbered as Article 293 of the Treaty establishing the European Community and was subsequently repealed by the Treaty of Lisbon. Nevertheless, its underlying rationale persists in Article 81 TFEU, which may be understood as its functional successor in the field of judicial cooperation.

<sup>14</sup> Article 177 of the Treaty establishing the European Economic Community (now Article 267 TFEU) confers jurisdiction on the Court of Justice to give preliminary rulings concerning: (a) the interpretation of the Treaty; (b) the validity and interpretation of acts adopted by the institutions of the Community; and (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

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

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

<sup>15</sup> See Jelena Vukadinović Marković, Radovan Vukadinović, „Reforma odlučivanja o prethodnom pitanju u pravu EU“, *Zbornik radova Kopaoničke škole prirodnog prava – Slobodan Perović Primena prava i pravna sigurnost*, Kopaonička škola prirodnog prava – Slobodan Perović, 2021, Beograd, pp. 337-358

<sup>16</sup> In his Opinion, the Advocate General emphasized that, although the organization of courts in the Member States is based on similar principles, differences arise due to historical and legal specificities. Consequently, the Court may classify a given body as a “court or tribunal” even where it is not so characterized under national law.

In the case at hand, it was necessary to determine whether the *Scheidsgerecht* possesses the essential characteristics of a body entrusted with the function of resolving disputes, particularly those arising in the context of the social security system. Although it bears the designation of an arbitral tribunal, the *Scheidsgerecht* differs significantly from classical arbitration: it is not established by agreement of the parties; it has a permanent character; it is constituted under rules of a fund subject to state supervision; its members are appointed by a minister who also determines the procedural rules; the members are independent from the fund and its affiliates; the procedure is judicial in nature (inter partes proceedings, hearing of the parties, taking of evidence); and it adjudicates rights arising under the social security system by applying legal rules rather than principles of equity.

The fact that a certain form of judicial review exists does not preclude its classification as a tribunal, but merely indicates that it is not a court of last instance. In light of all the above, the *Scheidsgerecht* exhibits the characteristics of a judicial body and may be regarded as a “court or tribunal” within the meaning of Article 177 of the Treaty (now Article 267 TFEU).

a ‘court or tribunal’ under Article 267 TFEU. These include establishment by law, permanence, compulsory jurisdiction, *inter partes* procedure, application of rules of law and institutional independence. While these criteria are not strictly cumulative, together they form the basis for determining whether a body participates in the Union’s system of judicial cooperation. It is precisely in light of these criteria that it becomes clear why traditional commercial arbitral tribunals do not fall within the category of ‘courts or tribunals of a Member State’<sup>17</sup>. Unlike state courts, arbitral tribunals derive their jurisdiction not from public authority, but from the agreement of the parties involved. Their jurisdiction is voluntary and stems from party autonomy, rather than a normative act of public power. This position was confirmed by the Court of Justice in the *Nordsee* judgment, in which the possibility of an arbitral tribunal submitting a request for a preliminary ruling was rejected<sup>18</sup>. The Court held that an arbitral tribunal is neither an organ of public authority of a Member State nor integrated into the institutional system of judicial cooperation that forms the basis of the EU legal order. Consequently, commercial arbitration formally remains outside the vertical structure of judicial cooperation established by the Treaties.

However, developments in the Court’s case law demonstrate that the relationship between international commercial arbitration and EU law is not merely institutional separation. While arbitral tribunals do not have direct access to the preliminary ruling mechanism, EU law indirectly influences arbitral proceedings, primarily through the role of national courts<sup>19</sup>.

In the *Achmea* judgment<sup>20</sup>, the Court of Justice emphasised that, unlike intra-EU investment arbitration, commercial arbitration may be compatible with the EU legal order precisely because it remains subject to judicial review by national courts. During annulment, recognition or enforcement proceedings, national courts can assess the alignment of arbitral awards with EU law and, if required, submit queries to the Court of Justice for a preliminary ruling.

This case law was further developed in the *International Skating Union (ISU)* judgment<sup>21</sup>, in which the Court of Justice stressed that private arbitral mechanisms must not undermine the effective judicial review of EU law. Specifically, the Court held that arbitral systems which effectively preclude access to the courts of the Member States or restrict their jurisdiction may be incompatible with the EU legal order, particularly with regard to the application of competition law and the principle of effective judicial protection.

The evolving relationship between arbitration and EU law is particularly evident in the context of the Brussels I bis Regulation<sup>22</sup> (Article 1(2)(d)), which formally excludes

<sup>17</sup> Jelena Vukadinović Marković, “Položaj arbitražnih tribunala u pravnom sistemu Evropske unije”, *Strani pravni život*, 62 (2), 2018, pp. 49-63.

<sup>18</sup> Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG*, Judgment of 23 March 1982, ECLI:EU:C:1982:107

<sup>19</sup> George A. Bermann (ed.), *EU Law in International Arbitration*, Kluwer Law International, 2017, pp. 45-48

<sup>20</sup> Case C-284/16, *Slowakische Republik v Achmea BV*, Judgment of 6 March 2018, ECLI:EU:C:2018:158.

<sup>21</sup> Case C-124/21 P, *International Skating Union v European Commission*, Judgment of 21 December 2023, ECLI:EU:C:2023:1013.

<sup>22</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial

arbitration from its scope yet continues to indirectly influence certain issues relating to jurisdiction and the recognition of decisions. Thus, the uniform application of EU law in arbitral proceedings is ensured indirectly, through the supervision exercised by national courts acting as ‘guardians’ of the EU legal order.

For this reason, contemporary scholarship increasingly refers to a model of institutional exclusion combined with functional integration in practice. This situation has also intensified academic debate on the need to incorporate arbitration into the EU legal framework. Recent research initiatives, such as the project led by the University of Paris I (Sorbonne) entitled ‘Towards an EU Law on International Commercial Arbitration?’<sup>23</sup>, suggest the possibility of targeted harmonisation of certain aspects of the relationship between arbitration and EU law. In particular, potential amendments to the Brussels Regulation have been considered, with the aim of regulating issues such as the jurisdiction of courts at the seat of arbitration, the recognition of court decisions relating to arbitration, and reducing fragmentation within the EU legal order<sup>24</sup>.

### 3. THE IMPACT OF EU LAW IN THE PRE-ARBITRAL AND JURISDICTIONAL PHASES OF ARBITRAL PROCEEDINGS

Although the interaction between EU law and international commercial arbitration is most commonly analysed in the context of the recognition and enforcement of arbitral awards, EU law’s influence begins much earlier, at the stage of determining the arbitral tribunal’s jurisdiction. When deciding on its jurisdiction (‘competence-competence’), an arbitral tribunal examines the validity of the arbitration agreement and the arbitrability of the dispute. It is precisely at this ‘pre-arbitral’ stage that party autonomy, a defining feature of commercial arbitration, first encounters the mandatory requirements of the EU legal order.

#### EU law and the validity of the arbitration agreement

The arbitration agreement constitutes the foundation of the arbitral tribunal’s jurisdiction<sup>25</sup>. To be operational, it must satisfy the legally prescribed requirements for the validity of contracts and relate to a dispute that can be resolved by arbitration. The arbitration agreement’s validity is determined by the applicable law, which may be the law chosen by the parties, the law of the arbitration’s seat, or the law governing the underlying contract.

If the seat of arbitration is located within the European Union, the arbitral tribunal will also take into account the relevant EU law rules, particularly those forming part of the law of the seat (*lex arbitri*)<sup>26</sup>. Otherwise, there is a risk that national courts may set aside

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matters (Brussels I bis Regulation)

<sup>23</sup> See A Sorbonne Law School Research Project (under the supervision of M Audit and S Bollée), *Towards an EU Law on International Commercial Arbitration?* (Université Paris 1 Panthéon-Sorbonne, 23 April 2025), p. 25ff.

<sup>24</sup> Adrian Briggs, “What remains of the Brussels I Regulation in the English conflict of laws?”, *Journal of Private International Law*, vol. 20(3), 2024, pp. 539–553.

<sup>25</sup> See Jelena Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži*, Beograd 2002, p. 45; Jelena Vukadinović Marković, *Postupak rešavanja sporova pred međunarodnim trgovinskim arbitražama*, Beograd 2022, p. 17.

<sup>26</sup> Jan Kleinheisterkamp, “The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements”, *World Arbitration & Mediation Review*, no. 3, 2009, p. 119.

or refuse to recognise the arbitral award due to its incompatibility with the mandatory rules of EU law.

In addition to arbitral tribunals, which decide on the validity of the arbitration agreement based on the principle of ‘competence-competence’, national courts may also review its interpretation. According to Article II(3) of the New York Convention, the courts of Contracting States must refer the parties to arbitration if one of them invokes the existence of an arbitration agreement, unless the court finds that the agreement is invalid, ineffective, or incapable of being performed<sup>27</sup>.

When assessing the validity of an arbitration agreement, national courts apply their own law (*lex fori*) and examine whether the arbitration agreement is compatible with the relevant legal order. At the same time, they determine whether the dispute can be resolved through arbitration by considering issues of arbitrability and whether the arbitration agreement is being used to circumvent mandatory national laws. This implies that, whenever the existence of a valid arbitration agreement is invoked, the question of arbitrability inevitably arises. EU law and in particular its overriding mandatory rules, may play a significant role in this respect.

In this context, recent case law from the Belgian Supreme Court is illustrative. Adopting a distinctly pro-arbitration approach, the Court held that disputes concerning the termination of an exclusive distribution agreement can be resolved through arbitration. Departing from earlier case law that treated such disputes as non-arbitrable, the Court found that the relevant provisions of Belgian distribution law governing the unilateral termination of open-ended contracts do not constitute internationally mandatory rules<sup>28</sup>.

Furthermore, the validity of an arbitration clause may be relevant in the context of the exclusive jurisdiction of the courts of the Member States under the Brussels I bis Regulation (Article 24)<sup>29</sup>. Although arbitration is formally excluded from its scope (Article 1(2)(d))<sup>30</sup>, judicial decisions concerning the existence or non-existence of an arbitration agreement may have an impact within the system of mutual recognition. Thus, EU law indirectly influences the initial assessment of the arbitral tribunal’s jurisdiction<sup>31</sup>.

<sup>27</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

<sup>28</sup> *Thibelo bv protiv Stölzle-Oberglass GmbH* [2023] Belgian Supreme Court C.21.0325.N, ECLI:BE:CASS:2023:ARR.20230407.1N.6.

<sup>29</sup> Article 24 Brussels I bis Regulation: Irrespective of the parties’ domicile, the following courts shall have exclusive jurisdiction: in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated; in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the legal person has its seat; in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept; in proceedings which have as their object the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for or has taken place; and in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment is to be enforced.

<sup>30</sup> Art. 1 (2)(d) Brussels I bis Regulations provides: “This Regulation shall not apply to arbitration.”

<sup>31</sup> See, in particular, the judgment in *Van Uden*. *Van Uden Maritime BV*, trading as *Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I-7091, *West Tankers*.

The Court of Justice of the European Union's case law development from the *Marc Rich*<sup>32</sup> and *Van Uden* cases to the landmark *West Tankers* decision<sup>33</sup> reveals a tension between the autonomy of arbitration and the requirement for the Brussels regime to be applied uniformly. While the exclusion of arbitration from the Brussels regime has traditionally been interpreted broadly, the prohibition of anti-suit injunctions appears to have weakened the procedural protection of arbitration agreements, opening the door to parallel proceedings and competing jurisdictions. This increases the risk of fragmented decision-making, as national courts and arbitral tribunals may rule on the same issues, including the validity of the arbitration agreement, simultaneously.

The Brussels I bis Regulation seeks to mitigate these systemic shortcomings, particularly through Recital 12 and Article 73(2)<sup>34</sup>, by reaffirming the priority of the New York Convention and the autonomy of the arbitral framework. However, this solution is normatively ambivalent in that it does not eliminate the risk of conflicting decisions but rather reshapes it by creating a potential 'race of decisions' between courts and arbitral tribunals. Therefore, Brussels I bis does not establish a coherent, hierarchical relationship between judicial and arbitral jurisdictions; rather, it confirms the existence of parallel, and occasionally competing, regimes<sup>35</sup>. This largely shifts the question of legal certainty from the sphere of normative regulation to that of the parties' procedural strategy.

### EU law and the question of arbitrability

Traditionally, arbitrability is defined as the suitability of a particular dispute to be resolved through arbitration. However, contemporary legal scholarship emphasises that it is neither uniform nor univocal but rather encompasses a variety of approaches and definitions depending on the legal system and its normative priorities. While this issue is primarily governed by national law, within the framework of EU law it takes on an additional dimension. As well as the limitations arising from national legal systems, EU law indirectly influences the scope of arbitrability, primarily through the application of its overriding mandatory rules and public policy standards.

One of the most significant examples of this is competition law. In the landmark *Eco Swiss* case<sup>36</sup>, the Court of Justice implicitly confirmed that disputes involving the application of competition rules are arbitrable, provided national courts can review the compatibility of arbitral awards with EU public policy in annulment or recognition proceedings. Therefore, EU law does not exclude the arbitrability of disputes relating to overriding Union norms but rather requires an adequate judicial control mechanism. Contemporary doctrine generally accepts that the range of disputes that can be resolved by arbitration is constantly growing, with arbitrability being the norm and non-arbitrability the excepti-

<sup>32</sup> Case C-190/89, *Rich v Società Italiana Impianti PA (Marc Rich & Co AG)*, EU:C:1991:319.

<sup>33</sup> Case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*, EU:C:2009:69

<sup>34</sup> Article 73 (2) stipulates: „This Regulation shall not affect the application of the 1958 New York Convention..”

<sup>35</sup> More about Brussel I bis see Trevor Hartley, *Civil Jurisdiction and Judgements in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention*, 2nd edn, Oxford Private International Law Series (2023; online edn, Oxford Law Pro).

<sup>36</sup> Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.

on<sup>37</sup>. In this sense, it is now widely accepted that arbitral tribunals are competent to apply EU law, including competition law, as part of the applicable law<sup>38</sup>.

However, case law from the Court of Justice in the *Achmea*<sup>39</sup>, *Komstroy*<sup>40</sup> and *PL Holdings*<sup>41</sup> cases demonstrates that arbitrability has its limits where disputes may undermine the autonomy of the EU legal order. In these cases, the Court did not challenge the substantive arbitrability but rather questioned whether certain arbitral frameworks were compatible with EU law. This was because such mechanisms may remove disputes from the system of judicial cooperation established by the Treaties.

Distinguishing between substantive arbitrability and institutional compatibility is crucial for understanding arbitration within the EU legal order. While EU law does not prohibit arbitration *per se*, it may limit its application in situations where it would threaten the fundamental structural principles of the Union's legal order, particularly the autonomy of EU law and the requirement for effective and uniform judicial protection<sup>42</sup>.

#### 4. EU PUBLIC POLICY AS AN INSTRUMENT FOR THE PROTECTION OF EU LAW IN ARBITRAL PROCEEDINGS

One of the most significant areas of overlap between international commercial arbitration and European Union law is the concept of European public policy. While the treaties do not provide an explicit definition of this notion, case law from the Court of Justice has gradually shaped it, evolving it from a procedural corrective into a normative instrument that safeguards the autonomy of the EU legal order.

This concept was first developed in the *Eco Swiss* judgment, in which the Court of Justice held that the competition rules set out in Article 101 TFEU constitute a 'fundamental provision' essential to the functioning of the Union's internal market. Consequently, when ruling on the annulment or recognition of an arbitral award, national courts must examine its compatibility with these rules where domestic law provides for review on public policy grounds. This clearly indicates that certain EU legal provisions have the status of public policy within the meaning of international arbitration<sup>43</sup>.

However, European public policy is not limited to competition law. The *Mostaza*

<sup>37</sup> Karim A. Youssef, "The Death of Inarbitrability", Loukas A. Mistelis, Stavros L. Brekoulakis (eds.), *Arbitrability – International and Comparative Perspective*, Kluwer Law International, 2009, pp. 46–67; Gary Born, *International Commercial Arbitration*, 3rd edn, Kluwer 2021, vol I, pp. 1045–1055.

<sup>38</sup> Bernard Hanotiau, Olivier Caprasse, "Public Policy in International Commercial Arbitration", Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, Cameron May 2008, p. 819.

<sup>39</sup> Case C-284/16, *Slovak Republic v Achmea BV*, EU:C:2018:158.

<sup>40</sup> Case C-741/19, *Republic of Moldova v Komstroy LLC*, EU:C:2021:655

<sup>41</sup> Case C-109/20, *PL Holdings Sàrl v Republic of Poland*, EU:C:2021:875

<sup>42</sup> Christina Eckes, "International Courts or Tribunals and the Autonomy of the EU Legal Order", *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures*, Oxford Studies in European Law, Oxford, 2019; online edn, Oxford Academic, 21 Mar. 2019, pp. 185-222.

<sup>43</sup> For more see Loukas Mistelis, "Mandatory Rules in International Arbitration: Too Much Too Early or Too Little Too Late", *American Review of International Arbitration*, vol. 18, 2008, pp. 217 – 228.

*Claro*<sup>44</sup> and *Asturcom* cases<sup>45</sup> demonstrate that consumer protection rules may also be regarded as part of public policy, particularly when they aim to protect the weaker party and preserve the balance of contractual relationships.

A further step in the constitutionalisation of this concept is reflected in the *Achmea* judgment. Although the Court of Justice does not explicitly refer to ‘European public policy’, it effectively safeguards the autonomy of the EU legal order against parallel dispute resolution mechanisms. In this context, public policy takes on a broader dimension. It is no longer limited to a set of mandatory rules but also covers the protection of the judicial cooperation system’s structure and the Court of Justice’s monopoly on interpreting EU law.

The *Komstroy* judgment further reinforces this approach, emphasising that international agreements involving Member States cannot derogate from the judicial cooperation system established by the Treaties. Thus, European public policy extends into the Union’s external dimension, limiting Member States’ ability to fragment the EU legal order through international commitments.

More recent developments, including the *International Skating Union (ISU)*<sup>46</sup> ruling, demonstrate that European public policy also incorporates the principle of effective judicial protection, as set out in Article 19 of the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights. Where private regulatory or arbitral mechanisms effectively preclude judicial review compatible with EU law, the Court of Justice intervenes to protect the Union’s fundamental constitutional principles. Consequently, European public policy assumes the function of safeguarding not only substantive rules, but also the institutional architecture of the EU legal order<sup>47</sup>. In legal scholarship, European public policy is often described as ‘transnational public policy’ or the ‘autonomous public policy of the Union’<sup>48</sup>. Its specificity lies in the fact that it is not dependent on national definitions of public policy but rather stems from the nature of EU law as an autonomous legal system. When reviewing an arbitral award, a national court must consider not only its own domestic public policy, but also the fundamental rules of EU law. This establishes a form of dual normative scrutiny.

However, it is important to emphasise that European public policy does not entail a full substantive review of arbitral awards. The Court of Justice consistently stresses that the efficiency requirements of arbitral proceedings justify limited judicial intervention. Nevertheless, this limitation ceases where a fundamental rule of EU law is at stake. In other words, European public policy acts as a minimal but highly significant constitutional corrective. Contemporary scholarship emphasises that judicial review of arbitration does not restrict its autonomy but is rather a necessary mechanism for safeguarding the rule of law. The relationship between these two principles is to be assessed through the lens of proportionality<sup>49</sup>.

<sup>44</sup> Case C-168/05, *Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421

<sup>45</sup> Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579.

<sup>46</sup> Case C-124/21 P, *International Skating Union v European Commission*, EU:C:2023:101

<sup>47</sup> C. Ecker, *op.cit.*

<sup>48</sup> Pierre Mayer, “Mandatory rules of law in international arbitration”, *Arbitration International*, Vol. 2, (4), 1986, pp. 274–293.

<sup>49</sup> Steve Ngo, “Arbitration and the Rule of Law: Preserving, Protecting and Proportionality”,

In this sense, European public policy can be seen as a normative bridge between the autonomy of arbitration and the supremacy of EU law. It allows these two systems to coexist, but only if arbitration does not produce outcomes that undermine the Union's fundamental values, structural principles or institutional architecture.

This confirms that the relationship between international commercial arbitration and EU law is not one of subordination or full equality, but of conditional tolerance. The limits of permissible arbitral autonomy are defined by European public policy.

## 5. CONCLUSION

The relationship between international commercial arbitration and European Union law is one of the most complex examples of interaction between autonomous legal systems in contemporary law. Although arbitration is traditionally considered a private dispute resolution mechanism based on party autonomy, the evolution of EU law shows that it cannot function entirely outside the EU legal order's normative scope.

The analysis of the institutional position of arbitral tribunals shows that they are not part of the system of judicial cooperation within the EU. Unlike national courts in EU Member States, arbitral tribunals cannot refer questions to the Court of Justice via the preliminary ruling procedure under Article 267 TFEU. Nor are they integrated into the vertical structure of judicial dialogue that ensures uniform EU law interpretation. Nevertheless, the absence of institutional integration does not imply the complete normative autonomy of arbitration with regard to EU law. On the contrary, contemporary case law from the Court of Justice shows that EU law significantly constrains arbitral decision-making. These constraints primarily stem from the doctrine of the autonomy of EU law, which requires the preservation of the unity and coherence of the EU legal order. While the Court of Justice accepts a model of 'limited coexistence' in the context of classical commercial arbitration, whereby arbitration remains permissible due to judicial review by national courts, its approach becomes considerably more restrictive where arbitral mechanisms may threaten the institutional structure of the EU legal order. This is particularly evident in the judgments in *Achmea*, *Komstroy* and *PL Holdings*.

The influence of EU law on arbitration extends beyond the recognition and enforcement of arbitral awards to earlier stages of the arbitral process. Even at the jurisdictional stage, for example, arbitral tribunals must consider questions relating to the validity of the arbitration agreement, the arbitrability of the dispute and the application of overriding mandatory EU law provisions. Thus, EU law indirectly influences how arbitral tribunals determine their own jurisdiction, prompting them to anticipate the standards of judicial review that will be applied by national courts in EU Member States.

The research demonstrates that arbitral tribunals occupy a hybrid position within the EU legal order. Although they remain institutionally excluded from the system of judicial cooperation established by Article 267 TFEU, they are functionally integrated through the indirect application of EU law and the supervisory role of national courts. The absence of a mechanism enabling arbitral tribunals to seek preliminary rulings contributes to legal fragmentation and may jeopardise the uniform interpretation of EU law. For this reason,

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*Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 90(4), 2024, pp. 473–475; Darius Chan, Elias Khong, "Re-calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards", *Journal of International Arbitration*, Vol. 41(3), 2024, pp. 280–285.

future development of EU law should focus on establishing a more coherent framework governing the relationship between arbitration and the EU judicial system, while preserving the fundamental principle of party autonomy that constitutes the cornerstone of international commercial arbitration.

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## Granice međunarodne trgovinske arbitraže u pravu EU: između autonomije i integracije

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**Apstrakt:** Odnos između međunarodne trgovinske arbitraže i prava Evropske unije (EU) prošao je put od potpune odvojenosti ka sve intenzivnijoj međusobnoj povezanosti. Iako je arbitraža formalno ostala izvan institucionalnog sistema Unije, pravo EU značajno utiče na arbitražne postupke, posebno u fazi konstituisanja nadležnosti arbitražnog tribunala. Ovaj rad ima za cilj da pruži sveobuhvatnu analizu položaja arbitražnih tribunala u pravnom poretku EU, kao i da ispita načine na koje pravo EU utiče na celokupni arbitražni postupak. Istraživanje se zasniva na primeni normativnog, dogmatskog, analitičkog i uporednopravnog metoda, uz analizu relevantne sudske prakse Suda pravde Evropske unije i odabраниh nacionalnih sudova. Polazi se od teze da, iako formalno odsutni u institucionalnoj integraciji, arbitražni tribunali funkcionalno učestvuju u sistemu primene prava EU putem posrednih mehanizama, pre svega kroz primenu imperativnih normi javnog poretka Evropske unije prilikom konstituisanja nadležnosti arbitražnog tribunala. Rad ukazuje na to da nepostojanje jedinstvenog normativnog okvira, posebno u pogledu mogućnosti obraćanja arbitražnih tribunala Suda pravde Evropske unije, dovodi do fragmentacije prava EU i pravne nesigurnosti. U zaključku se ističe potreba za uspostavljanjem koherentnijeg pristupa koji bi uskladio autonomiju stranaka sa zahtevom za jedinstvenom primenom prava EU.

**Ključne reči:** međunarodna arbitraža, pravo EU, arbitražni tribunali, arbitrabilnost, prethodno pitanje, autonomija stranaka, javni poredak

