

**Czech (& Central European)  
Yearbook of Arbitration®**



# **Czech (& Central European) Yearbook of Arbitration®**

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**Interaction of Arbitration and Courts**

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**We regret to announce the death of our most reputable colleague Prof. Pierre Lalive from Switzerland. We are thankful for his efforts invested in our common project. His personality and wisdom will be deeply missed by the whole editorial team.**

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All contributions in this book are subject to academic review.

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## List of Abbreviations

<b>AAA</b>	American Arbitration Association
<b>AC</b>	Arbitration Court at the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic
<b>ACICA</b>	Australian Centre for International Commercial Arbitration.
<b>ADR</b>	Alternative Dispute Resolution
<b>ArbAct</b>	Act of the Czech Republic No. 216/1994 Coll., on Arbitration and the Enforcement of Arbitral Awards, as amended
<b>CC</b>	Act of the Czech Republic No. 89/2012 Coll., the Civil Code
<b>CCP</b>	Act of the Czech Republic No. 99/1963 Coll., the Code of Civil Procedure, as amended
<b>Charter</b>	Resolution of the Presidium of the Czech National Council No. 2/1993 Coll., on the promulgation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, as amended
<b>CIArb</b>	Chartered Institute of Arbitrators
<b>CIETAC</b>	China International Economic and Trade Arbitration Commission
<b>CivC</b>	Act of the Czech Republic No. 40/1964 Coll., the Civil Code, as amended
<b>CJA</b>	Act of the Czech Republic No. 6/2002 Coll., on Courts and Judges, as amended
<b>CJEU</b>	Court of Justice of the European Union

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<b>ComC</b>	Act of the Czech Republic No. 513/1991 Coll., the Commercial Code, in effect until December 31, 2013
<b>ConCourt</b>	Constitutional Court of the Czech Republic
<b>CPR</b>	Conflict Prevention and Resolution
<b>CR</b>	Czech Republic
<b>EBH</b>	Equal Treatment Authority
<b>ECHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>European Convention (1961)</b>	European Convention on International Commercial Arbitration, done in Geneva on 21 April 1961
<b>ExecC</b>	Act of the Czech Republic No. 120/2001 Coll., on Execution Agents and Execution, as amended
<b>Geneva Protocol (1923)</b>	Protocol on Arbitration Clauses, Geneva, 24 September 1923.
<b>IBA</b>	International Bar Association
<b>ICC Guide (2014)</b>	Effective Management of Arbitration. A Guide for In-House Counsel and Other Party Representatives
<b>ICC Rules</b>	Rules of Arbitration of the ICC International Court of Arbitration
<b>ICC</b>	International Chamber of Commerce (often used in terms International Court of Arbitration attached to the International Chamber of Commerce)
<b>ICJ</b>	International Court of Justice
<b>ICSID</b>	International Center for Settlement of Investment Disputes
<b>IJB</b>	International Judicial Bodies
<b>InsAct</b>	Act of the Czech Republic No. 182/2006 Coll., the Insolvency Act, as amended
<b>LCIA Rules</b>	LCIA Arbitration Rules – The London Court of International Arbitration (see also ‘LCIA’)
<b>LCIA</b>	London Court of International Arbitration (see also ‘LCIA Rules’)
<b>MDC</b>	Multi-door courthouses
<b>NAFTA</b>	North American Free Trade Agreement
<b>New York Convention (1958)</b>	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
<b>Panama Convention</b>	Inter-American Convention
<b>PCA</b>	Permanent Court of Arbitration
<b>PCIJ</b>	Permanent Court of International Justice
<b>Polish Lewiatan Rules</b>	Rules of the Court of Arbitration at PKPP Lewiatan
<b>SC</b>	Supreme Court of the Czech Republic

**List of Abbreviations**

<b>SCC Rules</b>	SCC Institute Arbitration Rules. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (see also <i>SCC</i> )
<b>SCC</b>	Stockholm Chamber of Commerce. In this book in the sense of the Arbitration Institute of the Stockholm Chamber of Commerce (see also ‘SCC Rules’)
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UML</b>	UNCITRAL Model Law on International Arbitration <sup>1</sup>
<b>UNCITRAL Rules 1976</b>	UNCITRAL Arbitration Rules within the meaning of the UN General Assembly resolution 31/98 of 15 December 1976 <sup>2</sup>
<b>UNCITRAL Rules 2010</b>	UNCITRAL Arbitration Rules within the meaning of the UN General Assembly resolution 31/98 of 15 December 1976, <sup>3</sup> as amended in 2010 by the UN General Assembly resolution 65/22 <sup>4</sup>
<b>UNCITRAL Rules</b>	UNCITRAL Arbitration Rules; either the UNCITRAL Rules 1976 or the UNCITRAL Rules 2010 or generally the standard of these rules, depending on the context. If in doubt, it is necessary to apply the last version, i.e. the UNCITRAL Rules 2010.
<b>UNCITRAL</b>	United Nations Commission on International Trade Law <sup>5</sup>
<b>VIAC</b>	Vienna International Arbitration Centre
<b>Vienna Rules</b>	Vienna Arbitration Rules

<sup>1</sup> The template was approved on 21 June 1985 as UN Document A/40/17, Annex I, within the framework of the unification program of the UN Commission on International Trade Law (UNCITRAL).

<sup>2</sup> Available online in English at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (accessed on 5 May 2014). Also available in other UN languages.

<sup>3</sup> Available online in English at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (accessed on 5 May 2014). Also available in other UN languages.

<sup>4</sup> Full text of the UNCITRAL Rules 2010 is available online in English at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (accessed on 5 May 2014).

<sup>5</sup> See [www.uncitral.org](http://www.uncitral.org).

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## Can Arbitral Tribunals Seek the Support of National Courts to Obtain a Preliminary Ruling by the CJEU in Matters Involving EU Competition?

**Key words:**

Arbitration | Arbitral tribunal | Arbitral award | Arbitrability | EU Competition Law | European Court of Justice/CJEU | Interim measure | Lex arbitri | Preliminary Ruling | Setting Aside

***Abstract** | Arbitral tribunals are not allowed to refer to the CJEU for a preliminary ruling, but need the support of state courts in doing so. In most jurisdictions of the EU Member States, arbitral tribunals are rather limited in seeking such support. This may lead to difficulties as arbitral tribunals are nonetheless bound to (correctly) apply EU law and EU competition law in particular, a field of law which often arises in international arbitration. This is problematic as EU competition law, an essential feature of the internal market, requires that the EU Commission and state courts cooperate so that the uniform application of EU competition law is guaranteed. However, within the EU, only six Member States provide for an implicit possibility of asking state courts for assistance in referring to the CJEU, while none of the other Member States except Denmark provide for general court assistance to arbitral tribunals; Denmark expressly permits arbitral tribunals to request the competent state court to refer to the CJEU for a preliminary ruling. In light of the ever-growing importance of arbitration as means of dispute resolution, it must be asked why only a single EU Member State ensures the uniform application of EU competition law during arbitral proceedings.*

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## I. Introduction

- 9.01.** As recently as October 2014, media reported on a landmark case: In setting aside proceedings, the French *Cour d'Appel de Paris* asked the Court of Justice of the European Union (CJEU) for a preliminary ruling to clarify an issue of EU competition law before it would decide whether to annul a series of ICC awards.<sup>1</sup> As far as can be seen, this was the first time a French court has made such a request to the CJEU in the context of setting aside proceedings. The *Cour d'Appel de Paris* essentially asked the CJEU for an interpretation of Art 101 TFEU, a core provision of EU competition law.
- 9.02.** However, this leaves the question of why the arbitral tribunal itself did not refer the question to the CJEU, but only the competent court in the setting aside proceedings finally asked for interpretation of EU law. The answer is simple: arbitral tribunals are – pursuant to the case law of the CJEU – still not allowed to refer to the CJEU for a preliminary ruling. Despite the fact that arbitration has become a very important mechanism of dispute resolution in recent years, arbitral tribunals still need the help of national courts for such referrals.
- 9.03.** This paper shall give an overview of the possibilities for arbitral tribunals to nonetheless receive a preliminary ruling on EU competition law issues from the CJEU and show the difficulties arbitral tribunals face in most jurisdictions of EU Member States in doing so. This paper has moreover to be seen in the special context of EU competition law as the set of rules of law on which the CJEU is asked for a preliminary ruling.

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<sup>1</sup> For more details on the case *see e.g.* Global Arbitration Review, *Yong*, Paris court turns to CJEU in set-aside case; available at: [http://www.eplawpatentblog.com/2014/October/2014-09-23\\_CA\\_Paris\\_Genentech\\_c\\_Hoechst\\_RG\\_12-21810\\_Translation.pdf](http://www.eplawpatentblog.com/2014/October/2014-09-23_CA_Paris_Genentech_c_Hoechst_RG_12-21810_Translation.pdf); <http://www.brevet-invention-philippeschmittblog.eu/contrat-technique-contractuelle/question-prejudicielle-cour-paris-recours-entente-arbitrale-clause-licence/>; <http://www.eplawpatentblog.com/eplaw/2014/10/fr-genentech-v-hoechst-and-sanofi-aventis-deutschland-referral-cjeu.html> (accessed on 7 November 2014).

## II. Preliminary Rulings

- 9.04.** Art 267 of the Treaty on the Functioning of the European Union (TFEU) provides for a preliminary ruling by the CJEU regarding the interpretation of EU law. A question referred to the CJEU must be relevant to a specific case (thus no hypothetical questions are allowed). Moreover, no interpretation of national law can be sought from the CJEU. It is the national courts that must then assess whether a referral to the CJEU is necessary in order to decide the specific case. The CJEU will not, however, decide on the underlying dispute, but only give an interpretation on the EU law in question. The purpose of Article 267, which plays an important role in the development of legal concepts under EU law, is to ensure the uniform interpretation and application of EU law within the EU Member States.
- 9.05.** Pursuant to Art 267 TFEU '*any court or tribunal of a Member State*' may bring a matter before the CJEU for a preliminary ruling. In its well-known decisions *Nordsee*<sup>2</sup> and *Denuit and Cordenier*,<sup>3</sup> the CJEU expressly held that this notion does not include arbitral tribunals, as '*the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator*'.<sup>4</sup> Consequently, arbitral tribunals are not allowed to refer directly to the CJEU for a preliminary ruling, but need the assistance of state courts that qualify as court or tribunal within the meaning of Art 267 TFEU.
- 9.06.** The *Nordsee* decision was issued in 1982 – 32 years ago. Although it is fair to say that, since then, arbitration has emerged as one of the most common and effective means for dispute resolution,<sup>5</sup> the CJEU has – until now – not taken the opportunity to reconsider its very strict position regarding arbitral tribunals seeking preliminary rulings from the CJEU.

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<sup>2</sup> C-102/81, *Nordsee v Reederei Mond*, [1982] ECR 1095, para. 13, confirmed in C-125/04, *Denuit and Cordenier*, [2005] ECR 923 and C-126/97, *Eco Swiss*, [1999] ECR 3055.

<sup>3</sup> C-125/04, *Denuit and Cordenier*, [2005] ECR 923.

<sup>4</sup> *Ibid*, para. 13.

<sup>5</sup> Siegfried H. Elsing, *Chapter I: Issues Specific to Arbitration in Europe, References by Arbitral Tribunals to the European Court of Justice for Preliminary Rulings*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 45–59 (Christian Klausegger; Peter Klein et al. (eds), 2013).

### III. Arbitral Tribunals and the Application of EU Competition Law

#### III.1. The Arbitral Tribunal's Competence to Decide on EU Competition Law

- 9.07. At a first glance, it is not self-evident that an arbitral tribunal is competent to decide on EU competition law at all. The major counter-argument with regard to the arbitrability of EU competition law is the claim that EU competition law and the maintenance of effective competition is a matter of public interest that should be adjudicated upon only by publicly responsible institutions; the purpose of competition law is to protect competition itself rather than competitors.<sup>6</sup> Competition law issues should thus not be referred to an institution that – mostly confidentially – decides upon commercial interests of private parties (e.g., an arbitral tribunal).
- 9.08. However, there is large consensus on the arbitrability of (EU) competition law among courts in the EU<sup>7</sup> and at least since the CJEU's decision *Eco Swiss*, there can be no doubt on the arbitrability of EU competition law: although the CJEU has never explicitly dealt with the question of whether or not the EU competition rules would be arbitrable, the CJEU's decision in *Eco Swiss* 'would be meaningless if arbitrators are excluded in principle from ruling upon and enforcing competition law'.<sup>8</sup> Arbitral tribunals are even bound to apply provisions of EU law including EU competition law. This can also be derived from the *Eco Swiss* decision, where the CJEU clearly stated that an arbitral award risks being set aside if the arbitral tribunal does not comply with EU competition law.
- 9.09. In conclusion of the above, this results in the absurd consequence that arbitral tribunals must (correctly) apply EU competition law but may not refer to the CJEU for a preliminary ruling. Unlike national courts, arbitral tribunals can thus not ask for guidance and interpretation of rules of law that they are obliged to apply.

<sup>6</sup> Jean-Claude Najjar, *Chapter 4: Arbitrating Competition Law: The User's Perspective*, in EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 119–154 (Gordon Blanke; Phillip Louis Landolt (eds), 2011).

<sup>7</sup> To take the example of Austria: see e.g. decision of the Austrian Supreme Court of 23/02/1998, 3Ob115/95; for further examples see Gordon Blanke, *Chapter I: The Arbitration Agreement and Arbitrability – EC Competition Law Claims in International Arbitration*, in AUSTRIAN ARBITRATION YEARBOOK 3–92 with further references (Christian Klausegger; Peter Klein et al. (eds), 2009).

<sup>8</sup> MICHAEL J MUSTILL; STEWART C BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 117 (1989).

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### Can Arbitral Tribunals Seek the Support of National Courts?

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- 9.10. In this context, the provisions laid down in Art101 and 102 TFEU, which, in brief, prohibit anti-competitive agreements and the abuse of a dominant market position, are especially relevant.<sup>9</sup> Competition law issues will mostly arise from an ‘*ordinary contractual dispute submitted to arbitration*,’<sup>10</sup> whereas most of the time competition law issues are not presented as principal claims but raised as a defence by opposing parties.<sup>11</sup> Less often, but not unheard of, are claimants submitting an action for abuse of a dominant position.<sup>12</sup>

### III.2 An Infringement of EU Competition Law Is a Ground to Set Aside an Arbitral Award

- 9.11. In general, there is no possibility of appeal against a decision of an arbitral tribunal. However, it is possible to refer to a state court to seek the annulment of such an award. Such annulment is generally limited to very specific and narrow grounds for setting aside, meaning some egregious errors must have occurred during the arbitral proceedings or in the arbitral award itself that must be corrected.
- 9.12. A ground to set aside an arbitral award that can be found in most jurisdictions is the protection of the national *ordre public* (or public policy). Arbitral awards may thus be annulled by the state court in case they violate public policy. The CJEU as well as a significant number of national courts in EU Member States<sup>13</sup> have recognised that EU competition law is part of each Member State’s *ordre public*. The CJEU clearly stated that: ‘*where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, 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 Art 101 TFEU].*’<sup>14</sup> Consequently, an award rendered in any EU Member State that is in contradiction with EU competition law or that failed to adequately consider EU competition law is at risk of being annulled by the relevant Member State’s national courts.

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<sup>9</sup> This article will not go into more details with regards to the specific EU competition law rules and does not claim to provide a complete list.

<sup>10</sup> Gordon Blanke, *supra* note 7, at 3–92.

<sup>11</sup> *Ibid*, at 3–92.

<sup>12</sup> *Ibid*.

<sup>13</sup> For Austria see e.g. decision of the Austrian Supreme Court of 23/02/1998, 3Ob115/95.

<sup>14</sup> C-126/97, *Eco Swiss*, [1999] ECR 3055, para. 37.

### III.3. Necessity of Uniform Application of EU Competition Law

- 9.13. There are several rules on special cooperation between national and EU institutions regarding the application of EU competition law in order to ensure a uniform application of EU law in general and EU competition law in particular.<sup>15</sup> The CJEU states that '[c]onsistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission.'<sup>16</sup> In this sense, Art 15(2) of Regulation 1/2003<sup>17</sup> requires all Member States to forward to the European Commission a copy of any written judgment by a national court deciding on the application of Art 101 or Art 102 TFEU. This measure is intended to guarantee the uniform application of EU competition law within the EU Member States. Already this unique duty imposed on the EU Member States can leave no doubt on the special role EU competition law plays within the body of EU law.
- 9.14. Moreover, the Member States' courts may not take decisions running counter to the decisions adopted by the European Commission;<sup>18</sup> they may request the European Commission to transmit to them information or its opinion on questions concerning the application of EU competition rules.<sup>19</sup> Even more, the European Commission itself may – acting on its own initiative – submit written observations to courts of Member States where the coherent application of EU competition law rules so requires.<sup>20</sup> These provisions show clearly that EU competition law and, above all, its uniform application plays a central role.
- 9.15. Pursuant to Art 3(g) of the EC Treaty, EU competition law constitutes a 'fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.'<sup>21</sup> This fundamental statement, as well as the fact that any agreement infringing EU competition law is automatically null and void, can leave no doubt on the particularly important position EU competition law has within the system of EU

<sup>15</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, recital 22.

<sup>16</sup> Ibid, recital 21.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid, Article 16.

<sup>19</sup> Ibid, Article 15 (1).

<sup>20</sup> Ibid, Article 15 (3).

<sup>21</sup> C-126/97, *Eco Swiss*, [1999] ECR 3055.

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law. Moreover, the CJEU has expressly held that EU competition law must be ‘automatically applied by national courts.’<sup>22</sup>

- 9.16. These provisions are completed by Art 267 EC Treaty stating that it ‘*is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.*’
- 9.17. The above referred examples can leave no doubt on the special role EU competition law has within the Community and how strict the CJEU as well as the European Commission are regarding the uniform application of EU competition law.
- 9.18. As a summary and first conclusion of the above, it is fair to say that EU competition law rules play a central role for the functioning of the internal market and that the CJEU as well as the European Commission have set up several mechanisms to ensure uniform application of EU competition law among the EU Member States.
- 9.19. The obligation to uniformly apply EU competition law also applies to arbitral tribunals, who risk their award being set aside in case they do not (correctly) apply EU competition law. Above all, while ‘courts and tribunals of Member States’ (within the meaning of TFEU Art 267) may refer to the CJEU for a preliminary ruling and thus interpretation of EU competition law rules, arbitral tribunals, on whom the obligation to uniformly apply EU competition law also applies and who risk their award being set aside in case they do not (correctly) apply EU competition law, are not allowed to refer to the CJEU for a preliminary ruling.
- 9.20. Taking into consideration that the CJEU has not yet reconsidered its 32-year old *Nordsee* decision,<sup>23</sup> it seems obvious that it should be very easy for arbitral tribunals with the seat of arbitration in one of the 28 EU Member States to seek the support of national courts to obtain a preliminary ruling by the CJEU. Or... is it?

#### IV. The Support Arbitral Tribunals Can Seek of National Courts in Obtaining a Preliminary Ruling by the CJEU in Matters Involving EU Competition Law

- 9.21. The question of whether or not and if so, to what extent, an arbitral tribunal may seek support of national courts in obtaining a preliminary ruling by the CJEU in matters involving competition law – or, for the

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<sup>22</sup> C- 295/04, *Manfredi* [2006] ECR 6619, para. 31.

<sup>23</sup> *Supra*, Section I.

sake of argument, in any matter involving EU law insofar as a preliminary ruling by the CJEU would be permissible<sup>24</sup> – depends on what *lex arbitri* is applicable to the arbitration.<sup>25</sup>

- 9.22. Depending on the *lex arbitri*, it is possible to identify four different approaches taken by the Member States, namely
- (i) Member States that, in their arbitration acts,<sup>26</sup> do not provide for general court assistance<sup>27</sup> to arbitral tribunals;
  - (ii) Member States that, in their arbitration acts, provide for an arbitral tribunal's possibility to seek enforcement of interim or provisional measures from state courts;
  - (iii) Member States that have introduced, in their arbitration acts, the possibility for arbitral tribunals to seek assistance from national courts in those instances the arbitral tribunal itself does not have the competence to conduct the judicial act it wishes to conduct; and
  - (iv) Member States that, in their arbitration acts, explicitly provide for an arbitral tribunal's possibility to request the competent state court to request the CJEU to give a preliminary ruling according to Art 267 TFEU.

#### IV.1 Member States that, in Their Arbitration Acts, Do Not Provide for General Court Assistance to Arbitral Tribunals

- 9.23. The term 'general court assistance' begs further clarification. What the authors intend to express with the term is explained easily by way of example. The Austrian Arbitration Act provides, in sec. 602 entitled 'Judicial Assistance', the following:
- 9.24. *'The arbitral tribunal, arbitrators who have been authorised accordingly by the arbitral tribunal, or a party with the approval of the arbitral*

<sup>24</sup> *Supra*, Section II.

<sup>25</sup> It is widely understood that this is the law of the place of arbitration. However, simply accepting this as a fact would be imprudent – see, for instance *Dharmananda*, *The Unconscious Choice - Reflections on Determining the Lex Arbitri*, *Journal of International Arbitration*, Volume 19 Issue 2 (2002).

<sup>26</sup> The term 'arbitration act', as used hereunder, is to be understood as the statutory rules of civil procedure governing the arbitration at the place of arbitration, regardless of whether such rules are contained in a distinct bill or contained as distinct section within the general rules of civil procedure (as would, to name but a few, be the case in Austria, France and Germany).

<sup>27</sup> The term general court assistance will be explained below, see Section IV.1.

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*tribunal, may request from the court to conduct judicial acts for which the arbitral tribunal has no authority.*<sup>28</sup> (emphasis added)

- 9.25. 'General court assistance' as used in this paper thus refers to judicial acts over which the arbitral tribunal has no authority. It is through this type of act that an arbitral tribunal, as will be explained below,<sup>29</sup> may generally request assistance from the court (and, as such, may seek the support of a national court in obtaining a preliminary ruling).
- 9.26. EU Member States not offering the possibility of 'general court assistance' include the following countries: Belgium, Bulgaria, Croatia, Cyprus, Finland, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Spain and Sweden.<sup>30</sup>

#### IV.2 Member States that, in Their Arbitration Acts, Provide for an Arbitral Tribunal's Possibility to Seek Enforcement of Interim or Provisional Measures from State Courts

- 9.27. At first sight, it may surprise what role interim measures in can play in obtaining a preliminary ruling from the CJEU under Art 267 TFEU. Some scholars, most notably *Assimakis Komninos*, who is among the most highly regarded scholars on this topic, is of the opinion that it is possible to – indirectly – obtain a preliminary ruling from the CJEU as per Art 267 by means of provisional measures:

Recourse to state courts of the seat of arbitration might also be call for in obtaining provisional and conservatory measures. Although the modern trend is that arbitral tribunals can grant provisional measures themselves, there are still jurisdictions where this is not possible. Then there are those measures which are inherently connected with the state power of coercion, such as attachment, that again may have to be granted by state courts only.

Provisional measures might be necessary to be taken in a foreign jurisdiction, different from the one of the seat of

<sup>28</sup> For an English version of the Austrian Arbitration Act, see AUSTRIAN ARBITRATION ACT SEC 577-618 Austrian Code of Civil Procedure, available at: <http://www.viac.eu/en/materials/83-recht/gesetze/200-zpo-as-amended-2013> (accessed on 7 November 2014).

<sup>29</sup> *Infra*, Section IV.3.

<sup>30</sup> For better readability, the authors decided not to provide links to every single Arbitration Act relevant within the EU. As a general rule, insofar as the language reader has the required language skills, all arbitration acts of the 28 EU Member States can be found online.

arbitration. This transnational element is very likely to exist in a dispute involving EC antitrust issues. Such measures can only be ordered by the state courts of that jurisdiction, on the condition that they are allowed by their procedural law to offer such assistance. Such an exceptional possibility exists under the 1968 Brussels Convention on the Recognition and Enforcement of Judgments, which applies also to provisional and protective measures, even in case of arbitral proceedings that have been or may be commenced in another signatory country.<sup>31</sup>

- 9.28. If case one ascribes to *Komninos'* view, arbitral tribunals could thus seek assistance from state courts in obtaining a preliminary ruling from the CJEU as per Art 267 also by means of provisional measures. The EU Member States which, according to their relevant Arbitration Acts, provide for the possibility of seeking interim measures are France, Romania, Slovakia and the United Kingdom.<sup>32</sup>

#### **IV.3 Member States that Have Introduced, in Their Arbitration Acts, the Possibility for Arbitral Tribunals to Seek Assistance from National Courts in Those Instances the Arbitral Tribunal Itself Does Not Have the Competence to Conduct the Judicial Act It Wishes to Conduct**

- 9.29. Contra to those states which do not provide for the possibility of seeking court assistance for judicial acts over which the arbitral tribunal has no authority,<sup>33</sup> there are several EU Member States which expressly allow arbitral tribunals bound by the Arbitration Act of that country as *lex arbitri* to seek the assistance of the state's courts. The Austrian example has already been highlighted above.
- 9.30. Another EU Member State offering arbitral tribunals the possibility of seeking assistance from national courts when it does not have the competence to conduct the judicial act it wishes to conduct itself is Germany. As such, sec. 1050 of the German Arbitration Act reads as follows:

<sup>31</sup> Assimakis P. Komninos, *Assistance to Arbitral Tribunals in the Application of EC Competition Law*, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC COMPETITION LAW 365 (Claus-Dieter Ehlermann, Isabela Atanasiu (eds), 2003).

<sup>32</sup> Those jurisdictions which were listed in Sections IV.3 and IV.4 were left out in this enumeration.

<sup>33</sup> *Supra*, Section IV.I.

The arbitral tribunal or, with the consent of the arbitral tribunal, a party may file a petition that the court provide support by taking evidence or **by taking any other actions reserved for judges that the arbitral tribunal is not authorised to take**. The court shall deal with the petition, unless it deems it to be inadmissible, in accordance with its procedural rules as applying to the taking of evidence or any other actions reserved for judges. The arbitral judges are entitled to attend the court hearing at which evidence is taken and to ask questions. (emphasis added)

- 9.31. Besides Austria and Germany, among the EU Member States also the Czech Republic, Estonia, Poland and Slovenia enable arbitral tribunals to seek assistance from national courts in those instances the arbitral tribunal itself does not have the competence to conduct the judicial act it wishes to conduct.
- 9.32. It is, therefore, accepted that when a question pertaining to the interpretation of EU competition law arises, an arbitral tribunal with its seat of arbitration in one of these countries would generally have the possibility of requesting a state court to refer this question to the CJEU.<sup>34</sup>

#### IV.4 Member States that, in Their Arbitration Acts, Explicitly Provide for an Arbitral Tribunal's Possibility to Request the Competent State Court to Request the CJEU to Give a Preliminary Ruling According to Art 267 TFEU

- 9.33. So far, 27 jurisdictions have been 'covered', with only one outstanding: Denmark. Denmark stands out as the sole example where it is possible for arbitral tribunals to request the national courts to request a preliminary ruling from the CJEU in accordance with Art 267 TFEU.
- 9.34. This is provided for in sec. 27(2) of the Danish Arbitration Act, which reads as follows:  
If the arbitral tribunal considers that a decision on a question of European Union law is necessary to enable it to make an award, the arbitral tribunal **may request the courts to request the Court of Justice of the European Communities to give a ruling thereon**. (emphasis added)
- 9.35. As such – and thereby accounting for the fact that arbitral tribunals may not refer a question of EU (competition) law to the CJEU directly – the Danish Arbitration Act expressly grants arbitral tribunals with

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<sup>34</sup> For Austria and Germany, see Assimakis P. Komninos, *supra* note 31, at 374 *et seq.*

the place of arbitration in Denmark the possibility of seeking the national courts' assistance.

## V. Conclusion

- 9.36. The famous quote from *Hamlet*, '*Something is rotten in the state of Denmark*', insofar as regards an arbitral tribunal's possibility to seek assistance of national courts in obtaining a preliminary ruling from the CJEU according to Art 267 TFEU, could well be changed to '*Something is rotten in all EU Member States except for Denmark*.'
- 9.37. The necessity of the uniform interpretation and application of EU (competition) law could not be stressed more; in fact, it is one of the key elements of EU law and indispensable for the functioning of the internal market! Therefore, when considering that arbitration is, internationally, the most important means of resolving disputes<sup>35</sup> and that arbitral awards, by means of the New York Conventional on the Recognition and Enforcement of Foreign Arbitral Awards (and, in Europe, in particular, the European Convention of 1961), are enforceable, it is simply unacceptable that a full 17 countries do not provide for any possibility at all for arbitral tribunals to refer a question of EU (competition) law to the CJEU, not even by relying on a state court's assistance.
- 9.38. The authors of this paper highly doubt the possibility of obtaining a preliminary ruling by the CJEU by means of interim measures, as suggested by *Komninos*: firstly, such request by a state court would run counter to the very means of an interim measure, which is generally understood to be an order issued to preserve evidence or to protect assets **in case of urgency**.<sup>36</sup> (emphasis added) Taking into consideration that the *Cour d'Appel de Paris* expects that a decision by the CJEU is not to be rendered within the two next years,<sup>37</sup> such interim measure would probably set the world record for the time elapsed between the application for an interim measure and the decision thereon. The authors, therefore, take the view that such option is of a rather theoretical nature only.

<sup>35</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Alphen aan den Rijn: Wolters Kluwer law & business 93 (2<sup>nd</sup> ed., 2014).

<sup>36</sup> The definition of interim measures differs widely even among the 28 EU Member States. For a general description of interim measures, see European Judicial Network, Interim and precautionary measures – General Information, available at: [http://ec.europa.eu/civiljustice/interim\\_measures/interim\\_measures\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/interim_measures/interim_measures_gen_en.htm) (accessed on 26 October 2014).

<sup>37</sup> Global Arbitration Review, *Yong*, Paris court turns to CJEU in set-aside case.

- 9.39.** Besides that, this paper explicitly deals with the possibility of seeking assistance by an arbitral tribunal. Therefore, *Komninos'* suggested – theoretical – option would have to be further limited to only those instances where an arbitral tribunal seeks the court's assistance in enforcing interim measures (as can only one of the parties can request interim measures be ordered directly by state courts, thus only leaving the requests of enforcement to state courts).
- 9.40.** In summary, the authors do not think that interim measures are a viable option for an arbitral tribunal seeking state court assistance in obtaining a preliminary ruling by the CJEU as per Art 267 TFEU.
- 9.41.** Thus, only six countries provide the implicit possibility of requesting state court assistance in order to be able to refer a case to the CJEU, while only Denmark expressly provides for such possibility.
- 9.42.** In light of the fact that arbitration has become an important means of dispute resolution, it must be doubted whether the CJEU's reluctance to allow arbitral tribunals to refer to the CJEU for preliminary ruling as well as the limited possibilities within the EU Member States to ask for the state court's assistance in referring to the CJEU should not be subject to revision. In particular, as the CJEU and the EU Commission promote the importance of a uniform application of EU law, it cannot be accepted that arbitral tribunals may not easily refer to the CJEU.
- 9.43.** Member States that do not provide a possibility for arbitral tribunals to request state courts to refer their case to the CJEU for a preliminary ruling, thus mutually accept that an arbitral award which is not compliant with EU competition law can only be corrected in setting aside proceedings before a state court. This implies that any party seeking annulment of an arbitral award due to the fact that the arbitrators did not (correctly) apply EU competition law will have to initiate setting aside proceedings before a national court. If the national court – with or without seeking a preliminary ruling – decides to annul the award, the parties will face the situation where they will have to initiate new arbitration proceedings in order to finally resolve their dispute. The possibility of seeking a preliminary ruling by the CJEU during arbitral proceedings via state courts can thus save the parties a lot of time and money.

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**Summaries****DEU** [**Können Schiedsgerichte die Hilfe staatlicher Gerichte in Anspruch nehmen, um eine Vorabentscheidung des EuGH in Fällen, die EU Kartellrecht betreffen, zu erhalten?**]

Schiedsgerichten ist es nach wie vor nicht erlaubt, sich direkt an den EuGH im Zuge eines Vorabentscheidungsverfahrens zu wenden. Vielmehr benötigen sie dazu die Unterstützung staatlicher Gerichte, die in den einzelnen Mitgliedstaaten der EU jedoch sehr limitiert ist. Dies ist insbesondere deshalb problematisch, weil Schiedsgerichte nichts desto trotz verpflichtet sind, EU Kartellrecht (korrekt) anzuwenden, sich aber nicht selbst an den EuGH zur Interpretation von EU Recht wenden können. Im Zusammenhang mit EU Kartellrecht gibt es darüber hinaus strenge Vorgaben für eine enge Zusammenarbeit der EU Kommission und der Gerichte, um die einheitliche Anwendung von EU Kartellrecht zu gewährleisten, was als unabdingbar für das Funktionieren des Binnenmarktes angesehen wird. Innerhalb der EU gibt es dennoch nur sechs Mitgliedstaaten, die eine indirekte Möglichkeit für Schiedsgerichte vorsehen, staatliche Gerichte um Unterstützung zur Einleitung eines Vorabentscheidungsverfahrens vor dem EuGH einzuleiten. Alle anderen Mitgliedstaaten sehen keine generelle Möglichkeit für Schiedsgerichte vor, staatliche Gerichte um Unterstützung zu ersuchen. Die einzige positive Ausnahme in diesem Zusammenhang ist Dänemark, wo Schiedsgerichte die zuständigen staatlichen Gerichte explizit um die Einleitung eines Vorabentscheidungsverfahrens anrufen können. Vor dem Hintergrund der wachsenden Wichtigkeit von Schiedsverfahren als Streitbeilegungsmechanismus bleibt es zu wünschen, dass in Zukunft noch mehrere Mitgliedstaaten dem positiven Beispiel Dänemarks folgen werden.

**CZE** [**Může rozhodčí soud žádat o podporu národních soudů za účelem získání vyjádření SD EU k předběžné otázce ve věcech soutěžního práva EU?**]

Rozhodčí senáty se nemohou obracet na SD EU s předběžnou otázkou, nýbrž potřebují v takovém případě podporu státních soudů. Ve většině právních řádů členských států EU jsou však rozhodčí soudy omezeny v souvislosti s takovými žádostmi. To může představovat komplikace obzvláště proto, že rozhodčí soudy jsou povinny (správně) aplikovat právo EU a zejména soutěžní právo EU, tedy oblast práva, kterého se často dotýkají spory projednávané v mezinárodním rozhodčím řízení. To přirozeně představuje problém, neboť soutěžní právo EU, které je esenciálním nástrojem vnitřního trhu, vyžaduje, aby Komise EU a státní soudy spolupracovaly a zajistily tak jednotnou aplikaci soutěžního

*práva EU. Pouze šest členských států EU však implicitně poskytuje možnost požádat státní soudy o pomoc při předávání žádostí SD EU; jediné Dánsko výslovně umožňuje rozhodčím soudům obracet se na příslušné státní soudy se žádostí o předání žádosti o vyjádření k předběžné otázce SD EU. Ve světle stále rostoucí důležitosti rozhodčího řízení jako prostředku pro rozhodování sporů je nutno položit si otázku, proč pouze jediný členský stát EU garantuje jednotnou aplikaci soutěžního práva EU v rozhodčím řízení.*

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**POL** [*Czy sąd arbitrażowy może wystąpić o pomoc do sądów krajowych w celu uzyskania opinii ETS UE odnośnie pytania prejudycjalnego w sprawach dotyczących prawa konkurencji UE?*]

*Zdaniem ETS UE sądy arbitrażowe mają obowiązek (słuszny) stosowania prawa konkurencji UE, jednak nadal nie mogą zwracać się do ETS UE z zapytaniem prejudycjalnym. Żadne z państw członkowskich UE nie umożliwią sądom powszechnym wspierania sądów arbitrażowych w tym zakresie. Jedynie w Danii jednoznacznie umożliwiono sądom arbitrażowym zwracanie się do właściwych sądów krajowych celem przekazania do ETS UE wniosku o opinię na temat zapytania prejudycjalnego.*

**FRA** [*Les Tribunaux d'Arbitrage ont-ils recours à une assistance des tribunaux étatiques pour lancer une procédure préjudicielle devant la CJUE concernant le droit européen de concurrence?*]

*Malgré leur responsabilité d'appliquer le droit européen de concurrence correctement, les tribunaux d'arbitrage n'ont pas le droit de lancer une procédure préjudicielle devant la CJUE, mais ont besoin des tribunaux étatiques pour recevoir une interprétation de la part de la CJUE. Parmi les états membres de l'UE, uniquement le Danemark connaît une règle générale selon laquelle, les tribunaux d'arbitrage peuvent explicitement demander aux tribunaux étatiques de lancer une procédure préjudicielle devant la CJUE.*

**RUS** [*Может ли арбитражный суд обратиться за поддержкой в национальные суды в целях получения мнения Суда Европейского Союза по предварительному вопросу из области конкурентного права ЕС?*]

*По мнению Суда Европейского Союза, арбитражные суды обязаны (правильно) применять закон ЕС о конкуренции, но все еще не могут обращаться в Суд Европейского Союза с предварительным*

вопросом. Ни одно из государств-членов Европейского Союза не позволяет судам общей юрисдикции оказывать поддержку арбитражным судам в этом отношении. Только Дания явно позволяет арбитражным судам обращаться в соответствующие государственные суды в связи с направлением запроса в Суд Европейского Союза для получения мнения последнего по предварительному вопросу.

**ESP** [*¿Podrá un tribunal arbitral solicitar apoyo a los tribunales nacionales con el fin de obtener una opinión del Tribunal de Justicia de la UE sobre la cuestión de previo pronunciamiento en materia de legislación de competencia comunitaria?*]

*Según el Tribunal de Justicia de la UE, los tribunales de arbitraje deben aplicar (correctamente) la legislación de competencia comunitaria, sin bien aún no pueden dirigirse al Tribunal de Justicia de la UE con una cuestión de previo pronunciamiento. Ninguno de los Estados miembros de la UE permite a los tribunales generales apoyar a los tribunales de arbitraje en este sentido. Solamente Dinamarca permite explícitamente a los tribunales de arbitraje dirigirse a los tribunales nacionales competentes con la solicitud de pronunciación sobre una cuestión de previo pronunciamiento del Tribunal de Justicia de la UE.*

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