Achmea's Distinction between Investment and Commercial Arbitration

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1. Introduction

The Achmea decision's possible effects on intra-EU investment arbitration, and particularly the uncertainties that it raises, have been brilliantly and extensively explained by Lucy Reed. I do not have much to add to her presentation. I have therefore decided to examine the basis upon which the Court of Justice of the European Union ("CJEU") concluded that investment arbitration does not ensure a uniform application of EU law and that therefore arbitration agreements contained in intra-EU investment treaties are not valid and binding. The basis for this conclusion may turn out to have effects well beyond the field of intra-EU investment arbitration.

The CJEU's conclusion is based on a distinction that the Court makes between investment and commercial arbitration. This distinction was necessary because, in its previous practice, that regarded commercial disputes, the Court had never expressed that disputes regarding matters of EU law are not arbitrable. In the Achmea case, however, the Court says that its practice of accepting the arbitrability of disputes regarding the interpretation of EU law refers only to commercial disputes, and not also to investment disputes.

The distinction the Court makes in this context between commercial and investment disputes, however, does not seem convincing. If the distinction is not acknowledged as solid, there is a risk that the Court in the future extends to commercial arbitration its conclusion that disputes regarding the interpretation of EU law are not arbitrable. Extending to commercial disputes the Court's verdict of inarbitrability would have detrimental effects for arbitration as an effective means for dispute resolution in Europe, as a large number of disputes assumes interpretation of EU law.

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2. Background for the distinction

The CJEU's reasoning in Achmea starts recalling the principles of mutual trust and of sincere cooperation between EU Member States. According to article 19 of the TFEU, these principles are preserved by the judicial system established under article 267 of the TFEU.[1] According to this provision, courts of Member States have to request preliminary rulings to the CJEU, whenever interpretation of EU law is necessary to render a decision on a given dispute. This permits to ensure consistency and uniformity of EU law.

The system of preliminary rulings is available to Member State courts. The CJEU has repeatedly[2] rejected requests of preliminary rulings submitted by commercial arbitral tribunals, as these are not deemed to be courts in the sense of article 267 of the TFEU. For investment tribunals, the Advocate General ("AG") suggested, in the opinion to the Achmea case,[3] that a different approach should be taken. According to the AG, investment tribunals are courts in the meaning of article 267 of the TFEU and can submit requests for preliminary ruling. In the AG's opinion, therefore, investment tribunals are part of the judicial system that ensures a uniform interpretation of EU law. The CJEU, however, rejected this suggestion and considered investment tribunals in line with commercial tribunals, as far as the possibility to submit a preliminary ruling goes.[4] Both commercial and investment arbitration, therefore, are excluded from the possibility of requesting preliminary rulings under article 267 of the TFEU.

As regards the consequences of this exclusion, however, the CJEU distinguishes the two types of arbitration. It is this distinction that interests here.

For commercial arbitration the CJEU has so far tacitly recognised that a uniform interpretation of EU law may be ensured thanks to the control that courts of Member States exercise on arbitral awards. As known, the domestic arbitration law of the country where the arbitral tribunal had its

1 Case C- 284/16 *Slovak Republic v Achmea BV* (ECLI:EU: C:2018: 158), paras 34 to 37.

2 The Opinion rendered by Advocate Generale Wathelet in the Achmea case on 19 September 2017 (ECLI:EU:C:2017:699) refers to the following cases: *Nordsee* (102/81, EU:C:1982:107); of 25 July 1991, *Rich* (C-190/89, EU:C:1991:319); of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269); of 27 January 2005, *Denuit and Cordenier* (C-125/04, EU:C:2005:69); of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675); of 10 February 2009, *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69); of 13 May 2015, *Gazprom* (C-536/13, EU:C:2015:316); and of 7 July 2016, *Genentech* (C-567/14, EU:C:2016:526).

3 Case C-284/16 (Achmea), AG Opinion, paras 100 to 131.

4 Case C-284/16 (Achmea), paras 43 to 49.

seat generally gives courts the possibility to control the award's validity.[5] Furthermore, the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards gives the enforcement court a certain possibility to control the award when it is requested to enforce it.[6] Court control in these contexts is restricted; for what is relevant here, it consists mainly in ensuring that the award does not infringe public policy (*ordre public*). I will not here dwell on the different theories regarding the intensity that court control may have in respect of the award's conformity with public policy. I have commented the dichotomy between minimalist and maximalist theory elsewhere.[7] Suffice here to mention that the Bundesgerichtshof ("BGH") in its referral of the Achmea case to the CJEU,[8] as well as the AG in the opinion for the Achmea case,[9] endorse the maximalist theory. The BGH and the AG assume that the controlling court of the Member State shall be entitled to independently evaluate whether EU law has been properly applied in the award. This means that, since the controlling Member State court may submit requests for preliminary rulings, court control on awards ensures uniformity of interpretation of EU law also in arbitration. The minimalist approach, on the contrary, assumes that Member State courts shall owe deference to the arbitral tribunal's evaluation made in the award.[10] In a previous case, the AG had affirmed that the minimalist approach would deprive court control of its meaning and would not be compatible with EU law. This is because having to accept the arbitral tribunal's evaluation effectively means delegating the matter to the arbitral tribunal. As arbitral tribunals may not

5 As an illustration can be mentioned article 34 of the UNCITRAL Model Law on International Commercial Arbitration. The Model Law was adopted in about 80 states. For a list of the countries that adopted the Model Law, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

6 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article V.

7 Giuditta Cordero-Moss, "Inherent Powers and Competition Law", *European International Arbitration Review*, 2017, vol 6.2, pp. 69–94; Giuditta Cordero-Moss, Mitsubishi: Balancing Arbitrability and Court Control", in Horatia Muir Watt, Lucia Bíziková. Agatha Brandão de Oliveira and Diego Fernández Arroyo (eds.), *Global Private International Law, Adjudication without Frontiers*, Elgar, 2019.

8 Bundesgerichtshof, 3 March 2016, I ZB 2/1 (ECLI:DE:BGH:2016:030316BIZB2.15.0).

9 Case C-284/16 (Achmea), AG Opinion, paras 251 to 260.

10 Luca Radicati di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23 *Am. Rev. Int'l Arb*. 49; Christophe Seraglini and Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, Domat Montchrestien, 2013, para 982.

request preliminary rulings under article 267 of the TFEU, the uniformity of the interpretation of EU law is not ensured.[11]

Notwithstanding that the AG has several times brought up the relationship between court control and the compatibility of (commercial) arbitration with EU law,[12] the CJEU has never expressed an opinion on the matter. It has, however, tacitly accepted that (commercial) disputes relating to EU law may be arbitrable, as pointed out by the AG in the Achmea opinion.[13] The CJEU seems in Achmea, indirectly and as an *obiter dictum*, to endorse the AG's opinion that commercial disputes regarding the interpretation of EU law may be subject to arbitration, as court control permits the court to review the interpretation of EU law made by the tribunal and, by requesting preliminary rulings, to ensure uniformity of the interpretation of EU law.[14]

However, and here comes the distinction that interests here, the CJEU in Achmea affirms that the just described approach may not be applied to investment arbitration.

In para 55, it affirms that: "While [commercial arbitration proceedings] originate in the freely expressed wishes of the parties, [investment arbitration proceedings] derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law […], disputes which may concern the application or interpretation of EU law."

The CJEU, therefore, does not accept that court control is sufficient, in investment arbitration, to ensure a uniform interpretation of EU law. The CJEU relies, thus, on an alleged difference between the freely expressed wishes of the parties in commercial proceedings and the removal of jurisdiction based on a treaty in investment arbitration. Moreover, the CJEU examines the arbitration agreement upon which the Achmea dispute was based, contained in the Bilateral Investment Treaty ("BIT") between the Slovak Republic and the Netherlands. The CJEU points out that the arbitration

[11] Case C-567/14 *Genentech v. Hoechst and Sanofi-Aventis Deutschland* (ECLI:EU:C:2016:526), opinion of AG Wathelet (ECLI:EU:C:2016:177).

[12] In addition to the already mentioned opinions in the Genentech and the Achmea case, that were both rendered by Whatelet, see also Case C-352/13 *CDC Hydrogen Peroxide v. Evonik Degussa and Others* (ECLI:EU:C:2015:335), opinion of AG Jääskinen (ECLI:EU:C:2014:2443).

[13] Case C-284/16 (Achmea), AG Opinion para 243.

[14] Case C-284/16 (Achmea), para 54.

agreement provided that the award would be final,[15] that the tribunal would apply its own procedure[16] and, by choosing the seat, would be able to determine which procedural law would govern,[17] and that court control on the award are restricted.[18]

On the basis of these characteristics, the CJEU affirms that, contrary to its practice in the field of commercial arbitration, it cannot consider investment arbitration as a mechanism for dispute resolution that ensures a uniform interpretation of EU law. Therefore, arbitration agreements contained in investment treaties (the CJEU mentions only intra-EU treaties, but the CJEU's logic seems applicable to any treaties) are not compatible with EU law.[19]

As a result of this ruling, the BGH annulled the award rendered in the Achmea case.[20]

3. Is the distinction convincing?

The characteristics listed by the CJEU and that led to the conclusion that investment arbitration, unlike commercial arbitration, is not compatible with EU law, are the following:

The award is final; the tribunal applies its own procedure and, by choosing the seat, is able to determine which procedural law governs; courts' possibility to control the award are restricted. With regard to this latter, the CJEU also mentions that commercial arbitration agreements are freely entered into between the parties, whereas investment arbitration is based on treaties removing jurisdiction from the state's courts and thus from the special judicial system provided for in article 267 of the TFEU.

A glance at these characteristics shows that they apply equally to investment and to commercial arbitration.

In particular, in the Achmea case, the arbitral tribunal was subject to the UNCITRAL Arbitration Rules. The UNCITRAL Arbitration Rules apply to ad hoc arbitral proceedings. They are originally meant to be applied to arbitral proceedings solving commercial disputes. However, they can be

15 Case C-284/16 (Achmea), para 51.
16 Ibid.
17 Ibid.
18 Case C-284/16 (Achmea), para 53.
19 Case C-284/16 (Achmea), paras 55 and 56.
20 BGH I ZB 2/15, 31 October 2018, (ECLI:DE:BGH:2018:311018BIZB2.15.0).

applied also to investment disputes. Also arbitration rules issued by institutions such as the SCC, the ICC or the LCIA are originally meant to be applied to commercial disputes, but can equally be applied to investment disputes if the basis for jurisdiction makes reference to them.

Arbitral proceedings subject to UNCITRAL Arbitration Rules, like all arbitral proceedings subject to institutional arbitration rules such as the SCC, the ICC or the LCIA, are subject to the same regime quite irrespective of whether they regard a commercial or an investment dispute. They will be subject to the parties' agreement, to the chosen arbitration rules and to the arbitration law of the country where the tribunal has it seat.

In the BIT that gave rise to the Achmea case, the seat of the arbitral tribunal was not pre-determined. This, however, is not a characteristic exclusive to investment arbitration. There are many commercial arbitration agreements that do not specify the seat of arbitration. That the seat shall be specified is not a condition for an arbitration agreement to be valid.[21]

Among the consequences of the common procedural regime to which commercial and investment disputes are subject, is that awards are subject to the same court control irrespective of whether they are rendered in a commercial or in an investment dispute.

A difference should be made for investment awards rendered under the ICSID Convention.[22] These awards are rendered under the special regime of the ICSID Convention, and not under the above mentioned procedural rules that apply also to commercial arbitration. ICSID awards are not subject to annulment proceedings before the courts of the country in which the tribunal had its seat,[23] and are not enforced under the New York Convention. This latter difference does not necessarily mean that the regime, for what is relevant here, is dramatically different from awards rendered under rules applicable to commercial arbitration. According to the ICSID Convention,[24] awards shall be enforced as if they were final judgements rendered in the country of enforcement. To the extent the enforcement court has, in respect of domestic judgments, the possibility to evaluate whether enforcement

[21] For example, it is not a requirement for validity of the arbitration agreement under article II of the New York Convention.

[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States – International Centre for Settlement of Investment Disputes, Washington 1965.

[23] ICSID awards may be annulled by an ad hoc committee under article 52 of the ICSID Convention.

[24] Article 54.

would be compatible with public policy, there is therefore a possibility to exercise court control also when enforcing ICSID awards. However, because ICSID arbitration has a different regime than investment arbitration that is carried out under UNCITRAL Rules or under other rules applicable also to commercial arbitration, the AG affirms in the Achmea opinion that choice of ICSID arbitration should be avoided.[25]

For all other investment awards that are not rendered under the ICSID convention, the AG points out that the procedural characteristics are the same as in commercial arbitration. In particular, court control can be exercised in the same way on commercial and on investment awards.[26]

In this particular context, the reasoning made by the AG is compelling. There appear to be no reasons for distinguishing between commercial and investment awards in this respect. Certainly there is in the applicable sources no expressed basis for treating court control on investment awards differently from court control on commercial awards, as long as both types of award are rendered under the same arbitration rules and arbitration laws. The very circumstance that the Achmea award was challenged before, and eventually annulled by, national courts in Germany, where the arbitral tribunal had its seat, is one of many examples that investment awards are subject to the same court control as commercial awards, when they are rendered under the same arbitration regime.

[25] Case C-284/16 (Achmea), AG Opinion, para 253. The AG mentions that it would be possible to bring action under articles 258 and 260 of the TFEU against a state who consented to an ICSID award which infringes EU law. The AG obviously assumes that EU law prevails over public international law commitments of Member States. An interesting example of conflict between EU law and a Member State's public international law commitments under the ICSID Convention is the saga relating to the ICSID award rendered in the Micula case. An ICSID award rendered in 2013 (Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20) ordered Romania to pay compensation to the foreign investors, the Micula brothers, for having withdrawn certain fiscal privileges that had been granted as incentive to invest. Romania had to withdraw these incentives when it joined the EU, because they were not in compliance with EU law on state aid. When Romania partially implemented the award, the European Commission decided that implementing the award constituted itself state aid and thus infringed EU law (decision 2014/C 393/03). The latest development at the moment of writing is the decision by the European Commission to refer Romania to the CJEU for not having recovered illegal state aid pursuant to article 16(3) of the EU Regulation No 2015/1589. The case is registered as State Aid case in the EU portal under SA.38517 Micula v Romania (ICSID arbitration award), and further references may be found there.

[26] Case C-284/16 (Achmea), AG Opinion, paras 244 to 250.

Particular attention should be devoted here to the argument made by the CJEU according to which commercial awards are based on an arbitration agreement freely entered into by the parties, whereas investment awards are based on a treaty by which the member State removes jurisdiction on the dispute from its own courts.

As was seen above, the CJEU seems to accept that, for commercial arbitration, the restricted court control is a sufficient means to ensure a uniform interpretation of EU law – because the controlling court may request preliminary rulings under article 267 of the TFEU. The CJEU emphasizes, however, that investment arbitration is based on treaties according to which the state removes jurisdiction on the dispute from its courts, and thus from the justice system that, under article 267 of the TFEU, is meant to ensure a uniform interpretation of EU law.

In my opinion, it is doubtful that this distinction from commercial arbitration has any bearing on the matter. The CJEU's reasoning may be split into four elements, that are examined below.

Firstly, it is not exclusive to investment disputes that arbitration is based on the removal of jurisdiction from the host state's courts. Also commercial arbitration is based on the removal of jurisdiction from state courts: according to article II of the New York Convention, for example, a court must decline jurisdiction if it is seized with a dispute that falls within the scope of an arbitration agreement. Thus, also commercial awards are based on the removal of jurisdiction from state courts.

Secondly, it is not exclusive to investment arbitration that arbitration may be removed from the justice system provided for by article 267 of the TFEU: if the parties to a commercial dispute choose a country outside of the EU as seat for the arbitral tribunal, courts of Member States will not have jurisdiction to annul the award. This applies also if the parties have not chosen a seat, and the (commercial) arbitral tribunal chooses a seat outside the EU. Furthermore, if the winning party enforces the award outside of the EU, courts of Member States will not have jurisdiction to control the award in the enforcement phase either. Thus, also commercial awards may be rendered outside of the system established by article 267 of the TFEU.

Thirdly, it is not exclusive to investment arbitration that the arbitration agreement is based on a treaty. Arbitration law is mainly based on domestic statutes or case law, but the 159 countries who have ratified the New York

Convention[27] have entered into a public international law commitment to ensure that, i.a., their courts decline jurisdiction if a dispute is covered by an arbitration agreement. They also have committed themselves to ensure that their courts enforce foreign arbitral awards, safe for the restricted control mentioned above. Thus, also commercial arbitration is based on a treaty.

All this is equivalent to saying that commercial arbitration is based on a treaty by which Member States agree to remove from the jurisdiction of their own courts disputes which may concern the application or interpretation of EU law. As was seen above, if the seat and the place of enforcement are outside of the EU, the treaty also leads to removing these disputes from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law. These sentences correspond to the sentences quoted in section 2 above and used by the CJEU to describe investment arbitration and to substantiate the distinction between commercial and investment arbitration.[28] However, as just shown, the description applies also to commercial arbitration. Hence, this is not a basis for distinguishing between the two types of arbitration.

Finally, it is not exclusive to commercial arbitration that the arbitration agreement is based on the parties' free will. The system of investment arbitration provides that the host state in a treaty, in a domestic investment statute, in a concession agreement or otherwise, gives investors an open offer to arbitrate. [29] If the investor initiates an arbitration, it is deemed to have accepted the offer. The investor is not obliged to initiate an arbitration: usually, the investor is free to pursue its rights before any national courts having jurisdiction. If the investor brings a claim for a national court, it will be deemed not to have (yet) accepted the open offer to arbitrate. Hence, courts will not have lost their jurisdiction. The arbitration agreement, therefore, is based on the parties' free will also in investment arbitration: The state's free will is embodied in the state's open offer to arbitrate, and the investor's free will is embodied in the commencement of arbitral proceedings, that can be construed as an acceptance of the offer. Also in investment arbitration, therefore, the arbitration agreement is based on the meeting of the parties' will.

[27] For an updated status of the signatories see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[28] Case C-284/16 (Achmea), para 55.

[29] Jan Paulsson, "Arbitration Without Privity" (1995) 10 ICSID Rev. – Foreign Inv. LJ 232, 234; Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd edn), 2009, paras 195 to 205.

The analysis made above shows that the CJEU in Achmea does not provide a proper basis for distinguishing between the two types of arbitration.

4. Possible effects beyond investment arbitration

If the distinction between commercial and investment arbitration made by the CJEU in the Achmea case is not acknowledged as solid, there is no reason for treating the issue of arbitrability differently in investment and in commercial arbitration.

The AG's opinion is based exactly on this idea. Admittedly, the AG's principal argument is that investment tribunals are entitled to request preliminary rulings by the CJEU on the application of EU law. In the AG's opinion, investment tribunals are deemed to be courts in the sense of article 267 of the TFEU, and to participate therefore in the special justice system of mutual trust and sincere cooperation.[30] Failing this argument, however (and this argument was actually rejected by the CJEU)[31] the AG opinion points out that in respect of court control there is no reason not to look at investment awards in the same way as at commercial awards.[32]

As the distinction between investment and commercial arbitration made in Achmea is not convincing, it cannot be excluded that the CJEU will eventually abandon it.

Abandoning the distinction may have two consequences: either investment disputes will be treated like the CJEU so far has treated commercial disputes, or commercial disputes will be treated like the CJEU treats investment disputes in the Achmea case.

The risk that may be envisaged is that, if the question of arbitrability is to be treated equally in commercial and in investment arbitration, the treatment given to investment arbitration will have the strongest attraction force and will be extended to commercial arbitration. The CJEU expressed in Achmea why it deems investment disputes relating to interpretation of EU law inarbitrable; these reasons are equally applicable to commercial arbitration; rather than extending to investment arbitration the regime of arbitrability that the CJEU so far implicitly has recognized to commercial dispute, it cannot be excluded that the CJEU conclusion of inarbitrability will be extended to commercial disputes.

30 Case C-284/16 (Achmea), AG Opinion, paras 100 to 131.
31 Case C-284/16 (Achmea), paras 43 to 49.
32 Case C-284/16 (Achmea), AG opinion, paras 242 to 260.

This will imply departing from the tacit acceptance of arbitrability that the CJEU has practiced in respect of commercial awards. However, this intellectual inconsistency is not necessarily harder to justify than the distinction between investment and commercial arbitration professed in Achmea.

This prospect assumes extending to commercial arbitration a conclusion that is premised on a false basis, as was seen in section 3 above. However, there are signs that arbitrability is being restricted also in commercial arbitration, and this prospect would not be incompatible with this regrettable trend. Courts in EU states such as Austria,[33] Belgium,[34] Germany[35] and England,[36] denied the arbitrability[37] of disputes regarding contracts of commercial agency. EU agency law is deemed to be necessary for the achievement of the internal market. Hence, some courts have affirmed that disputes concerning commercial agency should be decided by courts of EU member states: choosing a court outside the EU, or choosing arbitration, may endanger the effective enforcement of EU law.

This shows that domestic courts in a variety of EU member states are assuming a restrictive approach towards arbitrability.

5. Conclusion

The analysis made in this paper gives a dystopic view of a possible development of the CJEU train of thoughts relating to arbitrability in Achmea.

Combined with the excessive zeal shown by some national courts in the field of arbitrability, the prospect of a decreasing scope for arbitration seems to emerge.

Both under the New York Convention and under the Model Law, lack of arbitrability is a ground for not recognizing an arbitration agreement, for setting aside an arbitral award or for refusing its enforcement. Moreover, under the New York Convention courts decide on the basis of their own legal

33 OGH 1.3.2017, 5ob 72/16y, Ecolex 520 (2017).

34 Cour de Cassation, 16.11.2006, PAS. 2006, I, No. 11; Cour de Cassation, 14.1.2010, PAS. 2010, I, No. 12; Cour de Cassation, 3.11.2011 PAS. 2011, I, No. 1.

35 Bundesgerichtshof, 5.9.2012, *Neue juristische Wochenschrift* (2012).

36 *Accentuate Limited v. Asigra Inc.* [2009] EWHC (QB) 2655.

37 Or they deny the recognition of a contractual choice of forum in favour of a court not located within the EU. This responds to the same rationale, i.e. that matters relating to commercial agency shall be decided by courts located in the EU in order to ensure a uniform application of EU law. Therefore, it can be expected that the same courts would also deny arbitrability if the contract contained an arbitration clause.

system whether a certain subject matter is arbitrable or not. The threshold for restricting arbitrability, therefore, is not as high as it would be if arbitrability depended on international parameters.

A possible way to tackle this undesirable development is by ensuring that arbitration responds to the criteria of professionality, quality and efficiency that are expected for a method for dispute resolution deserving to be an alternative to courts. If courts are to decline jurisdiction whenever there is an arbitration agreement, if they are to confirm the validity of arbitral awards, if they are to lend their judicial power to enforce arbitral awards, it is because they trust that arbitration will ensure an accurate and fair solution of disputes.

Arbitration, therefore, should not be used to circumvent important policies that are applicable in a certain dispute; arbitral tribunals should strive to render decisions in accordance with predictable and objective criteria; arbitrators should hold high ethical standards, should ensure respect of due process, should avoid conflicts of interests, etc.; the courts should not be deprived of their role of controlling body in the (restricted) measure accorded them under the New York Convention.

The more advocates of the autonomy of arbitration insist on limiting arbitration's accountability in terms of accurate application of mandatory policies, the more they create a basis to distrust arbitration and to restrict the scope of arbitrability.