CHAPTER 12

Court Control on Arbitral Awards: Public Policy, Uniform Application of EU Law and Arbitrability

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§12.01 INTRODUCTION

Arbitration is increasingly criticized in the public debate.[1] Among the criticism being raised is that arbitration does not ensure an accurate application of the law.

The need to ensure an accurate application of European Union (EU) law led the Court of Justice of the European Union (CJEU), in the famous *Achmea* case,[2] to exclude the arbitrability of investment disputes between EU Member States. Thus, for *investment* arbitration, the CJEU denied arbitrability of disputes relating to EU law.

Also in *commercial* arbitration, various national courts have excluded the arbitrability of disputes that require an accurate application of EU law, notably in the field of commercial agency. The CJEU in *Achmea* seemed, to the contrary, to accept that commercial arbitral tribunals may solve disputes relating to EU law, as long as appropriate court control is possible. The different treatment of commercial and investment arbitrability was justified by the CJEU, quite unconvincingly as will be explained below, with a distinction between the respective sources of the arbitral power.

In this chapter, I will discuss how the intensity of the control that courts may exercise on arbitral awards may have an impact on the courts' willingness to accept

1. As a consequence of the growing criticism, two working groups of the UNCITRAL are discussing improvements to commercial arbitration (Working Group II) and to investment arbitration (Wokring Group III).
2. Case C-284/16 *Slovak Republic v. Achmea BV*.

arbitrability of disputes. This applies particularly to the court control on the award's compatibility with public policy (*ordre public*).

The thesis of this chapter is that courts may independently evaluate whether the award is compatible with public policy. This should be sufficient to prevent that confidence in arbitration is eroded. At the same time, this does not mean that courts shall be able to revise arbitral awards with regard to the merits.

The opposite attitude is to postulate that courts may not independently evaluate public policy issues but are bound by the evaluation of those issues that was made by the arbitral tribunal. This would mean that the courts are expected to delegate the question of public policy to arbitral tribunals. Such an attitude contributes to the growing suspicion against arbitration and may result in restricting the scope of what disputes are arbitrable.

Assuming that the courts owe deference to the arbitral tribunal's evaluation of the public policy issues might seem to be the most arbitration-friendly position, but it ends up damaging arbitration. Likewise, permitting independent court evaluation of the public policy issues seems to be a position hostile to arbitration, but it preserves a larger scope of arbitrability.

§12.02 COURT CONTROL

Courts may deal with arbitral awards in two contexts: at the initiative of the losing party, they may set aside an award; at the initiative of the winning party, they may enforce the award.

[A] Sources

The body which controls the validity or the enforceability of an award derives its jurisdiction from the applicable law.

In case of challenge to the award's validity, the applicable law is the arbitration law prevailing in the place of arbitration. This also applies to the relatively large part of investment disputes which is carried out under arbitration rules that are not designed specifically for investment arbitration, such as the UNCITRAL Arbitration Rules, the Rules of the Stockholm Chamber of Commerce (SCC) or the Arbitration Rules International Chamber of Commerce (ICC). These investment disputes will be subject to the regime applicable to commercial arbitration. For investment arbitration that is carried out under the ICSID Convention,[3] annulment of awards is regulated in Article 52 of the convention itself, without reference to national law.

3. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 Mar. 1965, entered into force 14 Oct. 1966) UNTS 575 (ICSID Convention or Washington Convention).

In case of enforcement of an award, the applicable law is, in the 161 countries which have ratified it, the New York Convention.[4] For investment arbitration that is carried out under the ICSID Convention, enforcement of awards is regulated in the convention itself, which creates in Article 54 an obligation to enforce the award as if it was a final court decision rendered in that state.

National arbitration law differs from country to country; therefore the court's process in case of challenge of the award's validity needs to be analysed on the basis of the national law that is applicable in the specific case. For the sake of simplicity, however, we will assume here that the national arbitration law corresponds to the UNCITRAL Model Law, as it does, more or less literally, in the eighty countries that are considered to be 'Model Law countries'.[5]

The court's powers, to the extent that is relevant here, are equivalent in the New York Convention and in the Model Law.[6] Therefore, the analysis can be made without distinguishing between court control carried out in connection with challenge to the award's validity and court control carried out in connection with enforcement of the award. It should be emphasized, however, that if the law applicable in a specific case does not belong to a Model Law country, or if it implements the Model Law with some discrepancies from the original, it will be necessary to verify whether the law applicable to annulment has diverging regulation.

The criteria contained in the New York Convention and the Model Law largely correspond to the criteria contained in Article 52 of the ICSID Convention. These criteria are the following.

An award rendered by an arbitral tribunal whose jurisdiction did not rest on a valid and binding arbitration agreement is not valid[7] and not enforceable.[8] An award rendered as a result of a proceeding that did not give each of the parties the possibility to present its case is not valid[9] and not enforceable.[10] An award rendered in excess of the jurisdiction granted on the arbitral tribunal is not valid[11] and not enforceable.[12] An award rendered by an arbitral tribunal that was not constituted in accordance with the parties' agreement or the applicable law, or as a result of proceedings that did not comply with the parties' agreement or the applicable procedural rules is not valid[13] and

4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 Jun. 1958, entered into force 7 Jun. 1959) UNTS 330 (New York Convention). For an updated status, *see* https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.
5. UNCITRAL, 1985 Model Law on International Commercial Arbitration, revised in 2006 http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. For an updated status, *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
6. This correspondence is intentional, *see* Gary Born, *International Commercial Arbitration* 2nd ed. (Alphen aan den Rijn, Kluwer Law International 2014), pp. 3186, 3340; Giuditta Cordero-Moss, *International Commercial Contracts* (Cambridge University Press 2014), p. 224.
7. Article 34(2)(a)(i) of the Model Law; Art. 52(1)(a) and (b) of the ICSID Convention.
8. Article 36(1)(a)(i) of the Model Law; Art. V(1)(a) of the New York Convention; Arts 25 and 26 of the ICSID Convention.
9. Article 34(2)(a)(ii) of the Model Law; Art. 52(1)(d) and (e) of the ICSID Convention.
10. Article 36(1)(a)(ii) of the Model Law; Art. V(1)(b) of the New York Convention.
11. Article 34(2)(a)(iii) of the Model Law; Art. 52(1)(b) of the ICSID Convention.
12. Article 36(1)(a)(iii) of the Model Law; Art. V(1)(c) of the New York Convention.
13. Article 34(2)(a)(iv) of the Model Law; Art. 52(1)(a) and (c) of the ICSID Convention.

not enforceable.[14] An award rendered on a non-arbitrable subject matter is not valid[15] and not enforceable.[16] An award infringing fundamental principles (public policy) is not valid[17] and not enforceable.[18] In addition, in the New York Convention and in the UNCITRAL Model Law, there is a rule on public policy which covers not only the procedural public policy but also the substantive public policy. While the ICSID Convention does not mention public policy as a ground to annul an award, it has a specific rule on the necessity that the award be reasoned. Regarding enforcement, ICSID awards are subject to the same regime as final court decisions in the enforcement country. To the extent the enforcement country has a public policy exception, therefore, it will also apply to ICSID awards.

[B] Court Control Is Not an Appeal

A glance at the abovementioned provisions shows that judicial control is not meant to be an appeal: setting aside or refusing enforcement of an award cannot be based on the sole circumstance that the award contains errors in fact or errors in law. It is only issues relating to the parties' consent to arbitrate or to fairness of the proceedings that can trigger annulment or refusal of enforcement – in addition to the issues of public policy and arbitrability.

Judicial control, therefore, is not the same as a review of the award on the merits, neither in respect of the assessment of facts nor in respect of the application of law. The direct consequence of this limitation of judicial control is that an award is final and binding, even if it contains errors of fact or errors of law. This is the basis upon which the system of arbitration, as we know it today, rests: international conventions, national laws, courts of law, legal doctrine and practitioners support the aim that arbitration is to be an effective and efficient means of dispute resolution. To achieve this aim, they widely recognize that awards must be final and binding. Effectiveness and efficiency of arbitration are important principles of arbitration law, and at the origin of the widespread arbitration-friendly attitude that has characterized legislation and case law in the past decades.

In respect of the public policy exception, the distinction between public policy review and appeal on the merits is founded on the very narrow scope of what can be deemed to infringe public policy. As will be seen below, an error in the application of the law does not qualify as public policy infringement. While the wrong application of the law may contribute to the award conflicting with public policy, it is certainly not a sufficient condition to set aside or refuse to enforce the award on this basis.

Erroneous application of the law is not even a relevant theme in the public policy review: the appropriate theme is whether the recognition or enforcement of the award

14. Article 36(1)(a)(iv) of the Model Law; Art. V(1)(d) of the New York Convention.
15. Article 34(2)(b)(i) of the Model Law; Art. 52(1)(b) of the ICSID Convention.
16. Article 36(1)(b)(i) of the Model Law; Art. V(2)(a) of the New York Convention; Arts 25 and 26 of the ICSID Convention.
17. Article 34(2)(b)(ii) of the Model Law; Art. 52(1)(d) of the ICSID Convention, with respect to procedural public policy.
18. Article 36(1)(b)(ii) of the Model Law and Art. V(2)(b) of the New York Convention.

would result in a serious breach of fundamental socio-economic principles in the court's socio-economic system. There may, of course, be overlapping between these two themes: but we should not lose sight of what the proper purpose of court review is: ensuring that the award does not infringe important principles – not ensuring that the award applies the law accurately.

§12.03 ARBITRABILITY

One of the grounds for setting aside an award or refusing its enforcement is that the dispute may not be solved by arbitration. There is no autonomous standard for arbitrability. The New York Convention specifies, in Article V(2)(a), that arbitrability is determined under national law. Likewise, the Model Law specifies, in Articles 34(2)(b)(i) and 36(2)(b)(i), that the standard for arbitrability is determined by the national law of the court. Hence, it is up to the national legislator or to the courts to determine whether a certain type of dispute may be solved by arbitration or not.

[A] Arbitrability and Court Control

As was mentioned above, one of the pillars of the institution of arbitration is that arbitral awards are final and are not subject to any form of appeal on the merits – be it on the evaluation of evidence and assessment of the facts, or on the application of the law. The tribunal's autonomy in determining and applying substantive law is a fundamental feature of arbitration.

However, there is a growing mistrust against this autonomy.

In commercial arbitration, some domestic courts have recently denied the arbitrability of disputes on commercial agency contracts out of a fear that the important policies of agency law may not be accurately applied.[19] In investment arbitration, concerns are voiced, among others, about the ability of arbitrators to understand public interest issues.[20]

As I have explained elsewhere,[21] the scope of arbitrability is linked to the degree of control that the court may exercise on the award.

Thirty years ago, the famous *Mitsubishi* decision[22] opened an era of arbitration-friendliness and permitted arbitrability of disputes relating to competition law. Until that time, disputes involving competition law were among those considered to involve too important and general interests to be arbitrable. The condition under which *Mitsubishi* extended the scope of arbitrability was that courts be permitted to give a

19. *See*, for references, footnotes 24–28 below.
20. Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 Apr. 2017), A/CN.9/935, paras 82–88; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of thirty-sixth session (Vienna, 29 Oct. 2018–2 Nov. 2018), A/CN.9/964, paras 64–108.
21. 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), 82–91.
22. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

'second look' on the accurate application of the law – notably, in the occasion of court control and, in particular, through the rule on public policy.

A similar opening was made by the CJEU with *Eco Swiss*.[23]

This approach permits the courts to review the determination of whether important policies (such as, in these cases, competition law) are applicable, as well as their application – as long as the interests at issue are such that they qualify to fall into the realm of public policy, and for the only purpose of verifying whether these interests were seriously infringed. The large scope of arbitrability, therefore, is directly linked to the existence of judicial control over the awards, albeit a restricted control.

The *Mitsubishi* decision introduced an era of constant expansion for arbitrability. The pendulum, however, seems today to be swinging towards a more restrictive approach. Courts in EU states such as Austria,[24] Belgium,[25] Germany[26] and England[27] have already denied arbitrability[28] of disputes regarding contracts of commercial agency. EU agency law is deemed to be necessary for the achievement of the internal market. Hence, these 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.

Moreover, the *Achmea* decision, discussed further below, denied arbitrability of investment disputes relating to EU law.

[B] Arbitrability and the Arbitral Tribunal's Independence from the Parties' Agreement

The legitimacy of arbitration is threatened by the fear that arbitration may become a mechanism by which the parties circumvent the application of important policies reflected in overriding mandatory rules such as competition law. By exercising their party autonomy, the parties may choose a governing law that permits them to avoid these rules. The fear is that arbitral tribunals, feeling bound by the parties' choice of law, lend themselves to the circumvention of important policies.

Arbitral tribunals may in fact fear that, if they consider these policies notwithstanding the parties' agreement on a different law, they may exceed their power and thus render an invalid and unenforceable award.

23. Case C-126/97, *Eco Swiss China Time Ltd. v. Benneton Int'l NV*, 1999 E.C.R. I-3079.
24. OGH 1.3.2017, 5ob 72/16y, Ecolex 520 (2017).
25. 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.
26. Bundesgerichtshof, 5.9.2012, *Neue juristische Wochenschrift* (2012).
27. *Accentuate Limited v. Asigra Inc.* [2009] EWHC (QB) 2655.
28. Or they deny the recognition of a contractual choice of forum in favour of a court not located within the EU, such as was the case for the German decision referred to in footnote 26 above. 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.

As I have discussed elsewhere,[29] the fear that courts may, in the name of excess of power, set aside or refuse enforcement of an award as a consequence of the tribunal's independent selection or application of the law, is ill-founded. While there are nuances particular to each legal system, most arbitration laws give the tribunal the power to make its own, independent legal reasoning. What the principle of due process requires in many systems, however, is that the tribunal informs the parties of its legal considerations, so that the parties are given the possibility to comment or present new evidence that becomes relevant in view of the tribunal's legal reasoning.[30]

There seems to be a growing awareness in the arbitration community of the necessity to ensure that the award gives due consideration to the law applicable to the merits.[31] Coupled with the courts' possibility to take a second look at awards to ensure that fundamental principles are not violated, this should be a sufficient basis to ensure the arbitration-friendly attitude opened by *Mitsubishi* – even though the second look is not a perfect system.[32]

Ambitions to enhance the autonomy of arbitration by restricting court control over awards may turn out to be counterproductive. Fears about the accuracy with which arbitral tribunals apply the law may affect the scope of arbitrability. Likewise, the scope of arbitrability is linked to the intensity of judicial control, as will be discussed below.

§12.04 PUBLIC POLICY: THE INTENSITY OF JUDICIAL CONTROL

One of the grounds for setting aside an award or refusing its enforcement is that the award conflicts with public policy. There is no autonomous standard for public policy. The New York Convention specifies, in Article V(2)(b), that the relevant public policy is that of the court. Likewise, the Model Law specifies, in Articles 34(2)(b)(ii) and 36(2)(b)(ii), that the standard for public policy is determined in accordance with the court's principles. Although the specific content of public policy is national, there is an autonomous interpretation of the criteria for defining public policy, as will be seen below.

29. Giuditta Cordero-Moss, 'The Arbitral Tribunal's Power in Respect of the Parties' Pleadings as a Limit to Party Autonomy (on Jura Novit Curia and Related Issues)', in Franco Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration* (Juris 2016), 289–330; Giuditta Cordero-Moss, 'EU Overriding Mandatory Provisions and the Law Applicable to the Merits', in Franco Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration* (Juris 2017), 317–349. For a comparative analysis of this issue in 14 national jurisdictions, as well as in international law, *see* Giuditta Cordero-Moss and Franco Ferrari (eds), *Iura Novit Curia in International Arbitration* (Juris 2018), with general report by Giuditta Cordero-Moss (463–487).
30. For a description of due process requirements in this context *see* Cordero-Moss and Ferrari, *Iura novit curia in international arbitration,* cit.
31. Luca Radicati di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23 *Am. Rev. Int'l Arb*. 49, 66ff.
32. Massimo Benedettelli, '"Communitarization" of International Arbitration: A New Spectre Haunting Europe?' (2011) 73(4) *Arbitration Int'l* 583, 597; William Park, 'Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration' (1986) 12 *Brook. J. Int'l L.* 642.

[A] Public Policy Review and Accurate Application of the Law

It is only serious breaches of fundamental principles that justify setting aside or refusing enforcement of an award on the basis of public policy.[33] The mere fact that the law was applied wrongly is not a sufficient basis to apply the public policy exception.

The scope of what may qualify as an infringement of public policy, therefore, is narrow. This is necessary to prevent that the public policy exception becomes a channel to review the award on the merits. Hence, review of the compatibility of an award with public policy is not the same as an appeal, because the review is not directed at evaluating whether the law was applied correctly. The review is meant to verify whether upholding or enforcing the award would seriously infringe fundamental principles. The threshold and the parameters in a public policy review are different from those of an appeal.

In his opinion in *Genentech*,[34] the Advocate General (AG) to the CJEU seemed to assume that public policy may be applied to any and all violations of competition law, given that the *Eco Swiss* decision had determined that competition law is of fundamental importance in the EU legal order. This, however, is not a correct assumption. That competition law may be deemed to be part of public policy does not mean that any and all violations of competition law infringe public policy. The CJEU has repeatedly stated that only serious violations of competition law lead to infringement of public policy, for example, in *Renault* and *Diageo*.[35]

The above is the result of balancing between the interest in maintaining the autonomy and efficiency of arbitration, on the one hand, and the interest in ensuring that fundamental principles are safeguarded, on the other hand. The narrow scope of the public policy review should be deemed sufficient to prevent that court control exceeds its borders and becomes an appeal on the merits.

However, as will be explained below, under the so-called minimalist theory, courts shall act under an additional restraint: if the arbitral tribunal has evaluated the issue of public policy, according to this theory, the court shall owe deference to the tribunal's evaluation. This may deprive judicial control of efficacy, which in turn may have negative effects on arbitrability.

33. Born, *International Commercial Arbitration*, cit., 3312, 3647; Cordero-Moss, *International Commercial Contracts,* cit., 246ff. *See also* Giuditta Cordero-Moss, 'Article 5 (2) (b), Public Policy', in Herbert Kronke, Dirk Otto, Patricia Nacimiento and Nicola Christine Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 2nd ed. (Wolters Kluwer).
34. Case C-567/14 (*Genentech*), AG Opinion, paras 70–72.
35. Cases C-38/98 (*Renault*) and C-68/13 (*Diageo*). These decisions were rendered in connection with recognition and enforcement of foreign court decisions under, respectively, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, and under the Brussels I Regulation (EC) No. 44/2001. More extensively, *see* Giuditta Cordero-Moss, 'Inherent Powers and Competition Law' (2017) 6(2) *Eur. Int'l Arb. Rev.* 69–94, 79f.

[B] Maximalist and Minimalist Approach

Elsewhere, I have discussed the different theories regarding the intensity of court control in respect of the award's conformity with public policy and commented the dichotomy between minimalist and maximalist theory.[36] Briefly, the minimalist theory postulates that courts are bound by the evaluation the arbitral tribunal made of the award's compliance with public policy; according to the maximalist theory, courts may independently verify whether the award infringes public policy.

The CJEU has so far not taken an explicit stance on which theory is compatible with EU law – although, as will be discussed below, the AG has repeatedly argued that the minimalist theory is not acceptable. However, for commercial arbitration, the CJEU in *Achmea*[37] has tacitly supported the maximalist approach. The CJEU assumed that a uniform interpretation of EU law may be ensured thanks to the control that courts of Member States exercise over arbitral awards. If the CJEU owed deference to the arbitral tribunal's evaluation, this assumption would not be possible to make. Hence, the CJEU assumed the maximalist approach. For investment arbitration, the CJEU took a different position in *Achmea*, as will be discussed in section §12.05 below.

The Bundesgerichtshof (BGH), in its referral of *Achmea* to the CJEU,[38] as well as the AG in the opinion for *Achmea*,[39] endorsed the maximalist theory. The BGH and the AG assumed that the controlling court of the Member State shall be entitled to independently evaluate whether the award is compatible with fundamental principles of EU law. This would mean that, since the controlling Member State court may submit requests for preliminary rulings, court control on awards would ensure uniformity of interpretation of EU law also in arbitration – at least as long as serious breaches of fundamental principles are concerned. This maximalist approach is in accordance with the abovementioned *Mitsubishi* and *Eco Swiss* approaches. Arbitrability of disputes concerning EU law is acceptable because of the possibility to exercise court control on the awards.

The minimalist approach, on the contrary, assumes that Member State courts shall owe deference to the arbitral tribunal's evaluation made in the award.[40] If the arbitral tribunal has evaluated the public policy issue, this evaluation will have to be accepted by the court. The minimalist approach was criticized by the AG in the already mentioned *Genentech*. The AG 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 request preliminary rulings

36. Cordero-Moss, 'Inherent Powers', cit.; Cordero-Moss, 'Mitsubishi: Balancing Arbitrability and Court Control', cit.
37. Case C-284/16 (*Achmea*).
38. Bundesgerichtshof, 3 Mar. 2016, I ZB 2/1.
39. Case C-284/16 (*Achmea*), Opinion of AG Wathelet., paras 251–260.
40. Radicati di Brozolo, 'Mandatory Rules and International Arbitration', cit.; *see also*, criticising this approach, Christophe Seraglini and Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, Domat Montchrestien, 2013, para. 982.

under Article 267 of the TFEU, the uniformity of the interpretation of EU law would not be not ensured.[41]

Notwithstanding that the AG had several times brought up the relationship between court control and the compatibility of (commercial) arbitration with EU law,[42] the CJEU had, prior to *Achmea*, never expressed an opinion on the matter. It had, however, tacitly accepted that (commercial) disputes relating to EU law may be arbitrable, as pointed out by the AG in the *Achmea* opinion.[43] 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.[44]Thus, the CJEU seems to endorse the maximalist theory.

However, as will be discussed in section §12.05 below, the CJEU has denied arbitrability of investment disputes based on intra-EU treaties, based on the lack of an effective method to control the uniform application of EU law.[45] The decision is based on an unconvincing distinction between commercial and investment arbitration.

That the distinction between commercial and investment arbitration is unconvincing, gives reason to fear that the distinction may be abandoned. Abandoning the distinction may have two possible outcomes: either the CJEU accepts the arbitrability of investment disputes (which is unlikely) or it expands the inarbitrability also to commercial disputes.

As was mentioned above, national courts in various EU Member States have already taken a very restrictive approach to arbitrability of disputes relating to commercial agency.

In such a climate of mistrust against arbitration, it does not seem that arbitration can be promoted by insisting on a minimalist approach to court control – quite the contrary.

In fact, in the context of corruption and economic crime, the minimalist theory seems to have been abandoned in its country of origin, France.[46]

41. Case C-567/14 *Genentech v. Hoechst and Sanofi-Aventis Deutschland*, Opinion of AG Wathelet.
42. 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*, Opinion of AG Jääskinen.
43. Case C-284/16 (*Achmea*), AG Opinion para. 243.
44. Case C-284/16 (*Achmea*), para. 54.
45. Case C-284/16 (*Achmea*).
46. *See*, in the areas of corruption and money laundering: Cour d'appel de Paris, 4.11.2014, nr. 13/10256; Cour d'appel de Paris, 25.11.2014, nr. 13/1333; Cour d'appel de Paris, 7.4.2015, nr. 14/00480; Cour d'appel de Paris, 14.4.2015, nr. 14/07043; Cour d'appel de Paris, 21.2.2017, nr. 15/01650; Cour d'appel de Paris, 16.1.2018, nr. 15/21703. *Contra*, *see* Cour d'appel de Paris, 20.1.2015, nr. 13/20318; Cour d'appel de Paris, 24.2.2015, nr. 13/23404. In the area of procedural fairness, *see* Cour d'appel de Paris, 8.11.2016, nr. 13/12002.

§12.05 *ACHMEA'S* DISTINCTION BETWEEN COMMERCIAL AND INVESTMENT ARBITRATION

The specific nature of investment disputes may require considerations that are not generally made in commercial disputes, in particular, due to the public interests involved in investment arbitration. However, it should be remembered that a considerable part of investment disputes is carried out under the rules applicable to commercial arbitration. From a procedural point of view and from the point of view of court control, investment disputes resolved under the rules for commercial arbitration do not differ from regular commercial disputes.[47]

A basis for distinguishing between commercial and investment arbitration is asserted by the CJEU in *Achmea*. This basis for distinction is not convincing.

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.[48] According to this provision, courts of Member States have to make a request for preliminary rulings to the CJEU whenever interpretation of EU law is necessary to render a decision on a given dispute. This ensures consistency and uniformity of EU law. The system of preliminary rulings is available to Member State courts. The CJEU has repeatedly[49] 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 AG suggested, in the opinion to *Achmea*,[50] 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 with respect to the possibility to submit a preliminary ruling.[51] 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 is of interest here.

As was mentioned in section §12.04 above, the CJEU has so far indirectly accepted the arbitrability of commercial disputes involving EU law. However, the CJEU in *Achmea* affirms that this approach may not be applied to investment arbitration.

47. Affirming that legitimacy issues shall be taken into consideration both in investment and in commercial arbitration, *see also* Diego P. Fernández Arroyo, 'Nothing Is for Free: The Prices to Pay for *Arbitrabilizing* Legal Disputes', in Loïc Cadiet, Burkard Hess, Marta Requejo Isidro (eds), *Privatizing Dispute Resolution* (Nomos 2019), 617–646, 632 ff.
48. Case C-284/16 (*Achmea*), paras 34–37.
49. The Opinion rendered by Advocate Generale Wathelet in the *Achmea* case refers to the following cases: *Nordsee* (C-102/81), *Rich* (C190/89), *Eco Swiss* (C-126/97), *Denuit and Cordenier* (C-125/04), *Mostaza Claro* (C-168/05), *Allianz and Generali Assicurazioni Generali* (C-185/07), *Gazprom* (C-536/13), *Genentech* (C-567/14).
50. Case C-284/16 (*Achmea*), AG Opinion, paras 100–131.
51. Case C-284/16 (*Achmea*), paras 43–49.

In paragraph 55, the CJEU 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, for investment arbitration, to ensure a uniform interpretation of EU law. The CJEU thus relies 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 agreement provided that the award would be final,[52] that the tribunal would apply its own procedure[53] and, by choosing the seat, would be able to determine which procedural law would govern the proceedings,[54] and that court control over the award is restricted.[55]

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.[56]

As a result of this ruling, the BGH annulled the award rendered in *Achmea*.[57]

§12.06 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 is 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 state courts and thus from the special judicial system provided for in Article 267 of the TFEU.

52. *Ibid*., para. 51.
53. *Ibid*.
54. *Ibid*.
55. *Ibid*., para. 53.
56. *Ibid*., paras 55 and 56.
57. BGH I ZB 2/15, 31 Oct. 2018.

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

In particular, in *Achmea*, 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 also be applied to investment disputes. Also arbitration rules issued by institutions such as the SCC, the ICC or the London Court of International Arbitration (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 governed by the same regime irrespective of whether they concern 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 its seat.

In the BIT that gave rise to *Achmea*, 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.[58] That arbitral proceedings are subject to the arbitration law of the seat, even though the seat was not chosen by the parties, has been accepted by the European Court of Human Rights.[59]

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 distinction should be made for investment awards under the ICSID Convention. These awards are rendered under the special regime of the ICSID Convention, and not under the abovementioned procedural rules that also apply to commercial arbitration. ICSID awards are not subject to annulment proceedings before the courts of the country in which the tribunal had its seat[60] and are not enforced under the New York Convention. As already mentioned, this latter difference does not necessarily mean that the regime, for what is relevant here, is structurally different from awards rendered under rules applicable to commercial arbitration. According to the ICSID Convention,[61] awards shall be enforced as if they were final judgments rendered in the country of enforcement. To the extent the enforcement court has, in respect of domestic judgments, the possibility to evaluate whether enforcement would be compatible with public policy, there is therefore a possibility to exercise court control also when

58. For example, it is not a requirement for validity of the arbitration agreement under Art. II of the New York Convention.
59. *Tabbane v. Switzerland,* para. 31.
60. ICSID awards may be annulled by an ad hoc committee under Art. 52 of the ICSID Convention.
61. ICSID Convention, Art. 54.

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 also applicable to commercial arbitration, the AG affirms in the Achmea opinion that choice of ICSID arbitration should be avoided.[62]

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.[63]

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.

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, 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 over 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.

First, 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, commercial awards are also based on the removal of jurisdiction from state courts.

Second, it is not exclusive to investment arbitration that arbitration may be removed from the justice system provided for by Article 267 of the TFEU: under some arbitration laws, parties may waive their right to challenge the validity of the award. If they do so, courts will not have the possibility to evaluate the award's compliance with

62. Case C-284/16 (*Achmea*), AG Opinion, para. 253.
63. *Ibid.*, paras 244–250.

fundamental principles of EU law. Moreover, 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 also applies 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, the courts of Member States will not have jurisdiction to control the award in the enforcement phase either. Thus, commercial awards may also be rendered outside of the system established by Article 267 of the TFEU.

Third, 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 161 countries who have ratified the New York Convention 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, save 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 court's 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. This description of commercial arbitration is equal to the description of investment arbitration quoted above and used by the CJEU to describe investment arbitration and to substantiate the distinction between commercial and investment arbitration.[64] In other words, as just shown, the description applies equally to commercial and to investment 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.[65] 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 before 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 also based on the parties' free will 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

64. Case C-284/16 (*Achmea*), para. 55.
65. Jan Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Rev. – Foreign Inv. LJ* 232, 234; Christoph Schreuer et al., *The ICSID Convention: A Commentary* 2nd ed. (Cambridge University Press 2009), paras 195–205.

offer. Also in investment arbitration, the arbitration agreement is based on the meeting of the parties' will.

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

§12.07 CONCLUDING REMARKS

To continue enjoying the friendly framework from which it has benefitted in the past forty years, arbitration also henceforth must show that it is capable of deserving the confidence of the legal systems.

Insisting on its unlimited autonomy, for example, insisting on the minimalist theory according to which courts owe deference to the public policy evaluations made in the award, deprives court control of any significance. This does not seem to be a productive route to gain confidence. To the contrary, it may provoke the opposite reaction and lead to arbitrability being restricted. It should be kept in mind that the scope of arbitrability is determined under national law. The threshold for determining that a dispute is not arbitrable, therefore, is easier to lower than if the standard were international. As we have seen above, courts in a number of states have already shown a restrictive approach to arbitrability.

Some may be reluctant to supporting the maximalist theory, out of fear that it would be equivalent to allowing an appeal against the award. This is a misunderstanding.

The maximalist approach permits a meaningful court control but does not mean that courts review the award on the merits. The court will make its own, independent evaluation of whether the award is compatible with fundamental principles. However, this is not the same as second-guessing the arbitral tribunal's evaluation of the facts or application of the law. The court and the tribunal may have a different opinion as to the infringement of fundamental principles, but this is a different theme from what the court would evaluate if it was revising the award on the merits. The court's opinion on how the facts should have been evaluated or the law should have been applied is not relevant. If the award contains errors, but the errors do not reach the high threshold required to breach public policy, the court may not set aside or refuse enforcement of the award. If the errors lead to a serious breach of fundamental principles, the court may set aside or refuse enforcement of the award because the award breaches public policy – not because the award misjudged the facts or applied the law wrongly.

It has been suggested,[66] in the context of the minimalist theory, that it should be possible to exercise court control by examining, in some detail, the reasoning of the award. Only in exceptional cases, such as when the award has no reasons, or the award did not consider the applicability of public policy rules, should the court be allowed to go further and examine the parties' pleadings or the evidence produced in the arbitral proceedings or, in extreme cases, to launch a full-fledged investigation. I can subscribe to this scale of court control intensity, with one addition: in order to safeguard the

66. Radicati di Brozolo, 'Mandatory Rules and International Arbitration', cit., 63f.

efficacy of the public policy rule, I would add that the court may go further and examine the pleadings and the evidence also when the court does not find the award's reasoning convincing. With this addition, the intensity of court control corresponds to the criteria laid down by the maximalist theory.

The narrow scope of the public policy exception permits preserving the difference between public policy review and review on the merits. This should be of comfort to those who are worried about the autonomy of arbitration.

The very same narrow scope, however, may give reason to question whether court control meets the high standard for arbitrability of investment disputes set in *Achmea*. If the CJEU seeks a mechanism by which uniform application of EU law is ensured in every detail, the public policy review is not the appropriate means. The public policy exception may be triggered only when the application of EU law is such that it seriously infringes EU fundamental principles. It could be argued, therefore, that the public policy review is not sufficient to meet the high standard postulated in *Achmea*.

However, it seems questionable that the uniformity standard in *Achmea* is as high as requiring full uniformity also in the details. As was seen above, according to the CJEU, court decisions that infringe competition law are enforceable under the Brussels Convention and under the Brussels I Regulation on the recognition and enforcement of civil decisions, as long as the infringements are not so serious that they conflict with public policy. Hence, non-uniform application of EU law does not seem to be inacceptable, as long as it is below the threshold of public policy.

If this is so for court decisions, there seem to be no reasons for having a different standard for arbitral awards. Admittedly, arbitral tribunals have no competence to refer to the CJEU questions for preliminary rulings. While it is true that arbitral tribunal are thereby deprived of the possibility to obtain the CJEU's view on the application of EU law, it does not mean that the dispute will be deprived of this possibility. If the award is subject to court control in an EU Member State, the court will have the possibility to request a preliminary ruling in the context of the public policy review.[67] Precisely this was recently done by the Swedish Supreme Court.[68] This will put the court decision on an arbitral award in the same situation as a court decision on the enforcement of a civil decision of another Member State under the Brussels Convention or the Brussels I Regulation. As seen above, the CJEU accepts the enforceability, under these instruments, of decisions that apply competition law wrongly, as long as they do not breach public policy. The same standard should apply to arbitral awards. Court control under the maximalist theory, therefore, is sufficient to safeguard the uniform application of EU law in the sense of the CJEU.

Court control according to the maximalist theory, in summary, permits to meet a balance between opposing interests: (i) it preserves the autonomy of arbitration,

67. Case C-567/14 (*Genentech*), AG Opinion, paras 59–62. The AG refers here to commercial arbitration. The same AG Wathelet expressed, in the *Achmea* case, the opinion that in investment arbitration the arbitral tribunal is entitled to refer questions to the CJEU, *see* footnote 50. This opinion, however, was not followed by the Court.
68. *Republic of Poland v. PL Holding*, Case No. T 1569-19.

thanks to the restricted scope of the public policy exception; (ii) it ensures the safeguard of the legal system's fundamental principles, thanks to the court's independent evaluation of the public policy issue; and (iii) it permits to ensure a uniform application of EU law, thanks to the court's possibility to request a preliminary ruling.

This balance seems to be a condition for maintaining the wide scope of arbitrability that was introduced by the *Mitsubishi* decision. Insisting on the minimalist approach to court control, on the contrary, will contribute to reversing the era of arbitration-friendliness that was initiated by *Mitsubishi*.