CHAPTER 3

The Meaning and Scope of the Commercial Arbitration Exception in *Achmea*

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§3.01 INTRODUCTION

Since the delivery of the *Achmea* ruling by the Court of Justice of the European Union (the CJEU) six years ago, a revolution has occurred in the European Union (EU) with respect to international investment law.[1] All intra-EU bilateral investment protection treaties have been terminated because their Investor-State Dispute Settlement (ISDS) clauses were deemed incompatible with EU law.[2] The CJEU extended the *Achmea* ruling to intra-EU investor-State arbitration pursuant to Article 26 ECT.[3] It also found ad hoc arbitration agreements concluded between States and investors in respect of disputes under intra-EU bilateral investment treaties (BITs) to violate EU primary law.[4] At the same time, the CJEU approved investor-State arbitration clauses in extra-EU

1. *See* Case C-284/16, *Achmea*, 6 Mar. 2018, EU:C:2018:158. The CJEU found that EU primary law, and in particular the principles of autonomy, sincere cooperation and mutual trust, preclude Member States from entering into investor-State arbitration clauses in investment protection treaties concluded with each other.
2. *See* Agreement for the Termination of BITs between the Member States of the European Union [2020] OJ L169/1.
3. *See* Case C-741/19, *Republic of Moldova*, 2 Sep. 2021, EU:C:2021:655, paras 40-66. *See also* Alan Dashwood, *Republic of Moldova v. Komstroy LCC: Arbitration under Article 26 ECT Outlawed in Intra-EU Disputes by Obiter Dictum*, 47 Eur. L. Rev. 1 (2022); Mathias Audit, *Arbitrage international – Extension de la solution de l'arrêt Achmea à l'arbitrage d'investissement intra-européen fondé sur la Charte de l'énergie*, Journal du droit international 231 (2022); Paschalis Paschalidis, *Intra-EU Application of the Energy Charter Treaty: A Critical Analysis of the CJEU's Ruling in Republic of Moldova*, 7 Eur. Inv. L. & Arb. Rev. 3-35 (2022) https://doi.org/10.1163/24689017_0701002.
4. *See* Case C-109/20, *PL Holdings*, 26 Oct. 2021, EU:C:2021:875.

investment protection agreements as being compatible with EU primary law but only subject to very stringent conditions.[5]

Despite the upheaval caused by these developments, arbitration practitioners and investors felt reassured by the CJEU's willingness to distinguish commercial arbitration from investment treaty arbitration in *Achmea* by creating the 'commercial arbitration exception' for it.[6] The meaning and scope of the commercial arbitration exception in *Achmea* was also the subject of intense debate before the CJEU in *PL Holdings* but the CJEU did not seize the opportunity presented to it to define the contours of the exception.[7]

A relatively recent decision of the Greek Council of State (the country's supreme administrative court), rendered in *Athens International Airport*, casts doubt as to whether arbitration clauses contained in State contracts fall within the scope of the exception.[8] The Council of State considered the arbitration clause inserted in the contract concluded between the Greek State and a consortium of German companies exploiting the Athens International Airport to be contrary to the CJEU's rulings in *Achmea* and *PL Holdings*, as well as the principle of autonomy of EU law. According to the Council of State, the arbitration clause enabled the arbitral tribunal to rule on a dispute regarding the application of certain VAT conferred by the Greek State to the consortium through the contract, whereas VAT is a harmonised tax subject to EU Directive 2006/112. As a consequence, the administrative courts were not bound by the arbitral tribunal's decision regarding Athens International Airport SA's entitlement to VAT exemptions.

The purpose of the present contribution is to address the meaning and scope of the commercial arbitration exception in *Achmea* and to examine whether EU Member States can enter into arbitration clauses in their contracts with economic operators. To do so, it first presents the two competing interpretations of the commercial arbitration exception (§3.02) and then examines the conditions under which Member States can conclude commercial arbitration agreements (§3.03).

§3.02 COMPETING INTERPRETATIONS OF THE COMMERCIAL ARBITRATION EXCEPTION

It is established case law since 1982 that commercial arbitration tribunals cannot refer questions for a preliminary ruling to the CJEU because they do not constitute courts or

5. *See* Opinion 1/17, *EU-Canada CET Agreement* EU:C:2019:341. *See also* Emmanuel Gaillard, *CJUE. – ass. plén. – 30 avr. 2019. – avis 1/17. – JCP G 2019, 493*, Journal du Droit international 845 (2019); Paschalis Paschalidis, *CETA: une nouvelle ère pour la protection des investissements*, Journal du droit européen 241 (2019).
6. *See* Case C-284/16, *Achmea*, 6 Mar. 2018, EU:C:2018:158, paras 54-55.
7. *See* Opinion of AG Kokott, Case C-109/20, *PL Holdings*, 22 Apr. 2021, EU:C:2021:321, paras 43-65.
8. *See* Greek Council of State, Second Chamber, 9 Feb. 2022, *Independent Authority of Public Revenue v. Athens International Airport S.A.*, Case No. 246/2022. *See also* Polly Eftratiadi & Evanthia Kasiora, *The Achmea Ripple Effect: Greek Conseil d'Etat Finds That a Commercial Arbitral Tribunal Has No Jurisdiction to Deal with Matters of EU Law*, Cahiers de l'Arbitrage 111 (2023).

tribunals of a Member State within the meaning of Article 267 TFEU.[9] Indeed, Article 267 TFEU applies only to 'courts or tribunals of a Member State'. It is also accepted that Member State courts have to uphold EU public policy when trying an action to set aside or recognise and enforce an arbitral award.[10]

In *Achmea*, the CJEU was confronted with arbitration clauses contained in investment protection treaties for the first time. In his Opinion, AG Wathelet put forward a very different vision than the one adopted by the CJEU, arguing in favour of a system in which intra-EU investment tribunals are considered to be part of the EU's judicial architecture, hence enabling or requiring such tribunals to refer questions for a preliminary ruling to the CJEU.[11] However, the CJEU took a very different view. It held that investment treaty arbitration provided for by intra-EU BITs violated the principles of autonomy of EU law, sincere cooperation and mutual trust. According to the CJEU, intra-EU ISDS removed disputes governed by EU law from the courts and entrusted them to arbitral tribunals that cannot refer questions for preliminary ruling to the CJEU.[12] At the same time, the scope of review exercised by the courts in annulment or enforcement proceedings was not broad enough to guarantee the efficient and uniform application of EU law.[13]

These considerations could have also applied to commercial arbitration. However, in paragraphs 54-55 of the *Achmea* ruling, the CJEU distinguished commercial arbitration from investment treaty arbitration in the following terms:

> It is true that, in relation to commercial arbitration, the [CJEU] has held that the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling […].
>
> However, arbitration proceedings such as those referred to in Article 8 of the [Netherlands-Slovakia] BIT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former 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. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to

9. *See* Case 102/81, *Nordsee*, 23 Mar. 1982, EU:C:1982:107. *See also* Jürgen Basedow, *EU Law in International Arbitration: Referrals to the European Court of Justice*, 32(4) J. Int. Arb. 367 (2015) https://doi.org/10.54648/joia2015017; Paschalis Paschalidis, *Arbitral Tribunals and Preliminary References to the EU Court of Justice*, 33(4) Arb. Int. 663 (2017) https://doi.org/10.1093/arbint/aiw026, Maciej Szpunar, *Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU*, in *The Impact of EU Lax on International Commercial Arbitration* 85 (Federico Ferrari ed., JurisNet 2017).
10. *See* Case C-126/97, *Eco Swiss*, 1 Jun. 1999, EU:C:1999:269; Case C-567/14, *Genentech*, 7 Jul. 2016, EU:C:2016:526.
11. Opinion of AG Wathelet, Case C-284/16, *Achmea*, 19 Sep. 2017, EU:C:2017:699.
12. Case C-284/16, *Achmea*, 6 Mar. 2018, EU:C:2018:158, paras 39-49.
13. *Ibid.*, paras 50-53.

> arbitration proceedings such as those referred to in Article 8 of the [Netherlands-Slovakia] BIT.

This statement gave rise to essentially two competing lines of interpretation: a broad one that builds on 'freely expressed wishes' of the parties (§3.02[A]) and a restrictive one that focuses on the commercial nature of the dispute (§3.02[B]).

Before assessing each of these approaches (§3.02[C]), it is worth recalling that the CJEU had not used the term 'commercial arbitration' until its ruling in *Achmea*. Its previous case law referred to 'contractual arbitration' (*arbitrage conventionnel*),[14] i.e., arbitration based on clauses included in contracts.[15] The CJEU meant any arbitration in which 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 neither involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator'.[16]

However, commercial arbitration may be broader than contractual arbitration, covering matters arising from all relationships of a commercial nature, whether contractual or not.[17] In the absence of a definition of the terms by the CJEU, 'commercial arbitration' for the purposes of this analysis should not automatically be taken to mean the exact same thing as in arbitration practice. Indeed, subject to one's preference for the broad or restrictive interpretation of the terms 'commercial arbitration', these terms may have an autonomous meaning under EU law and exclude certain types of arbitration that may have otherwise been considered 'commercial'.

[A] The Broad Interpretation of the Commercial Arbitration Exception

The broad interpretation of the commercial arbitration exception grapples with the CJEU's reasoning for distinguishing commercial and investment treaty arbitration. According to the CJEU, commercial arbitration would be different to investment treaty arbitration because, unlike the latter, it 'originate[s] in the freely expressed wishes of the parties', whereas investment treaty arbitration originates in a treaty concluded between two States.[18]

One may find this passage of the judgment confusing insofar as it suggests that commercial arbitration would be based on freely expressed consent of the parties to the dispute, whereas investment treaty arbitration would not be based on consent. This is, of course, not the case. Investment treaty arbitration is as much consent-based as commercial arbitration: an arbitration agreement is formed through the investor's

14. *See*, *e.g.*, Case, 102/81, *Nordsee*, 23 Mar. 1982, EU:C:1982:107, para. 14; Case C-126/97, *Eco Swiss*, 1 Jun. 1999, EU:C:1999:269, paras 32 and 34; Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, 12 Jun. 2014, EU:C:2014:1754, para. 27.
15. *See*, *e.g.*, Case C-701/21 P and C-739/21 P, *Mytilinaios v. DEI and Commission*, 22 Feb. 2024, EU:C:2024:146, para. 101.
16. Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, 12 Jun. 2014, EU:C:2014:1754, para. 27.
17. *See* Julian D.M. Lew & Loukas A. Mistelis et al., *Comparative International Commercial Arbitration*, §§ 4.2-4.26, 50-57 (Kluwer 2003).
18. Case C-284/16, *Achmea*, 6 Mar. 2018, EU:C:2018:158, para. 55.

acceptance of the State's standing offer to arbitrate contained in the investment protection treaty.

Although perhaps not cast in the clearest possible terms, the idea that the CJEU seems to wish to convey is rather different. Commercial arbitration clauses are of two kinds. They are either (more commonly) arbitration agreements (*clauses compromissoires*) concluded before a dispute arises and normally included in a contract or, less commonly, agreements to submit a dispute that has already arisen to arbitration (*compromis*). In either case, commercial arbitration agreements are not a general, binding agreement to opt out of the judicial system but are limited to a specific existing dispute between two or more parties or to future disputes that may arise under a specific contract or other private-law relationship between two or more parties.

Investment treaty arbitration is not of the same kind. An ISDS clause is not an arbitration agreement but rather the State's advance consent to arbitration that any qualified investor can accept, thereby creating an arbitration agreement. Thus, the State's general submission to arbitration contained in an ISDS clause of an investment protection treaty is given in respect of all disputes that might arise in the future with investors of the other State party to the treaty. In this sense, investment treaty arbitration does not originate in the freely expressed wishes of the parties to the dispute. Rather, as noted by the CJEU, it originates in an *ex ante*, binding commitment given by the State to another State to remove all disputes from the jurisdiction of its courts, should the investors so wish.

AG Szpunar lent the support of his authority to this interpretation of the commercial arbitration exception in his Opinion in the *Republic of Moldova*:

> I would point out that there is a fundamental difference between [commercial arbitration and investment treaty arbitration]. Commercial arbitration proceedings presuppose the exercise by each party of its autonomy. They entail the conclusion of an arbitration agreement, either at the same time as the conclusion of the contract in respect of which related disputes will be subject to arbitration or once the dispute has arisen. In other words, the jurisdiction of a court or tribunal, in commercial arbitration, always derives from an arbitration agreement concerning a dispute specifically defined therein. The jurisdiction of such an arbitral tribunal cannot be regarded as falling within the system of jurisdictional protection established by the State. Rather, it derives from the autonomy of each of the parties involved in a commercial activity. Indeed, it is from that autonomy that the possibility arises for the parties to decide to settle disputes by recourse to commercial arbitration.[19]

In his view, investment treaty arbitration is fundamentally different because ISDS clauses 'constitute[] an offer of general and permanent arbitration, which it will be for the other party to accept or reject'.[20] Through this clause, 'the State waives the possibility that a dispute between it and an investor from another Member State falling within the scope of that agreement may be settled by the national courts'.[21] According

19. Opinion of AG Szpunar, Case C-741/19, *Republic of Moldova*, 3 Mar. 2021, EU:C:2021:164, para. 60.
20. *Ibid*., para. 61.
21. *Ibid*.

to AG Szpunar, the State's waiver is 'systemic in nature, in that it may relate to all disputes falling within the scope of that agreement' and results in the creation of 'a judicial protection mechanism, external to [the State's] judicial system'.[22]

This interpretation finds further basis in the CJEU's reasoning in *Achmea* according to which investment treaty arbitration is a mechanism through which Member States remove disputes (to which EU law may be applicable) from 'the system of judicial remedies which the second subparagraph of Article 19(1) [of the Treaty on European Union ("TEU")] requires them to establish in the fields covered by EU law'[23] and, hence, from the remit of the CJEU.

The CJEU perceived ISDS as a threat to the integrity of the EU legal order insofar as two Member States install, through a binding promise to arbitrate, an indefinite number of investor-State disputes with an indefinite number of investors having the nationality of the other Contracting State. Given that the cross-border investment lies at the very heart of the EU's internal market and integration project initiated by the 1957 Treaty of Rome, intra-EU ISDS was perceived as creating a system of justice regarding disputes that concern the EU's internal market that is parallel and competing to that established by Article 19(1) TEU, according to which the national courts in cooperation with the CJEU ensure the full effectiveness of EU law through the preliminary reference procedure. In other words, ISDS clauses threaten to empty the pool of internal market disputes of its content and deviate it to another system of remedies that operates outside the control of the EU and the CJEU.

Bearing this in mind, there is little surprise that in *PL Holdings*, the CJEU made clear that the breach of EU law is not committed by the investors but by the Member State.[24] The Member States had a duty not to create dispute resolution mechanisms that allow individuals and States to bypass the EU judicial system. In turn, this gives rise to the question of whether the breach of EU law at issue is sufficiently serious, namely whether the Member States manifestly and gravely disregarded the measure of discretion. If that is so, investors whose intra-EU awards were subsequently annulled could claim the costs of the arbitration procedure in damages for breach of EU law against the Member State pursuant to the *Francovich* and *Brasserie du Pêcheur and Factortame* line of case law. Similarly, a court may annul an award even when the Member State prevailed on the merits. It can thus annul the tribunal's award of costs in favour of the State on the basis that the arbitration was unlawful under EU law due to the Member State's decision to conclude the ISDS clause with another Member State.[25]

22. *Ibid*.
23. Case C-284/16, *Achmea*, 6 Mar. 2018, EU:C:2018:158, para. 55.
24. *See* Case C-109/20, *PL Holdings*, 26 Oct. 2021, EU:C:2021:875, para. 50.
25. *See*, to this effect, Svea Court of Appeal, 20 Dec. 2023, *Festorino Invest Limited and others v. Poland*, Case T 12646-21.

[B] The Restrictive Interpretation of the Commercial Arbitration Exception

The broad interpretation of the commercial arbitration exception is contested by the proponents of the restrictive interpretation. In *PL Holdings*, the European Commission, supported by several Member States, including Poland, Italy, Hungary, the Netherlands, and Slovakia, advocated a much narrower interpretation of the commercial arbitration exception.[26] According to this interpretation, it is not sufficient for the arbitration agreement to be based on an arbitration clause that reflects the 'freely expressed wishes' of the parties, even in the sense described above. Additionally, to be compatible with EU law, an arbitration agreement concluded by the State must concern a 'commercial' dispute.

The Commission considers that the term 'commercial arbitration' requires an autonomous interpretation under EU law.[27] Following the distinction drawn in the Brussels I Regulation (recast) between civil and commercial matters that fall within the scope of the Regulation and administrative matters or the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*), that fall outside its scope,[28] the Commission advocated the view that 'commercial arbitration' could only refer to disputes between non-State actors or, insofar as the State is involved, to disputes arising out of State conduct that is commercial in nature (*acta jure gestionis*).[29] The Commission thus accepted that, for example, States can lawfully include arbitration agreements in contracts for the purchase of commercial services, such as the installation of a toll system on highways, or in a concession agreement for the installation of a theme park.[30]

By contrast, according to the Commission, disputes calling into question the exercise of the State's prerogatives or sovereign powers (*acta jure imperii*) are not capable of falling within the scope of the commercial arbitration exception.[31] In its view, when a Member State exercises its sovereign powers, 'it is not free and autonomous in its will [but] acts on the basis of public law powers and, where appropriate, adopts acts (particularly of a coercive nature) that are binding on those subject to its jurisdiction'.[32] Similarly, where the Member States exercise their powers of public authority in areas covered by EU law and apply EU law, they are 'not autonomous and free to dispose of the rules of Union law by means of a civil or commercial law agreement, but is bound by those rules and subject to judicial review

26. *See* Opinion of AG Kokott, Case C-109/20, *PL Holdings*, 22 Apr. 2021, EU:C:2021:321, para. 54.
27. *See* European Commission, Written observations in Case C-284/16, *Achmea*, dated 16 Jul. 2020, § 62.
28. *See* Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351/1.
29. *See* European Commission, Written observations in Case C-284/16, *Achmea*, dated 16 Jul. 2020, § 67.
30. *Ibid*.
31. *Ibid.*, § 73.
32. *Ibid*.

under the second subparagraph of Article 19(1) TEU'.[33] The Commission took the view that in such circumstances, the State's counterparty is 'even less free to choose whether or not to submit to [the State's] prerogatives'.[34] It would thus not be possible to speak of a commercial arbitration originating in the freely expressed wishes of the parties.

It follows from the above that, according to the Commission's restrictive interpretation of paragraph 55 of the *Achmea* ruling, matters which are *acta jure imperii* are non-arbitrable by virtue of Article 19(1) TEU because neither the State nor its counterparties have the power to freely dispose of such matters.[35]

[C] Critical Assessment of the Broad and Restrictive Interpretations

Both interpretations of the commercial arbitration exception have been criticised. The proponents of the restrictive interpretation criticise the broad interpretation as being incoherent and leading to discriminatory treatment:

> Why should Member States be allowed to remove EU-law disputes from the EU judicial system in individual cases if they are not allowed to enter into a foreseeable general obligation of this kind? In addition to the risks to the uniform application of EU law, there would also be the risk of unequal treatment of different investors.[36]

The restrictive interpretation is not free of criticism either.

First, it is based on the flawed premise that States cannot enter into arbitration agreements regarding matters which are *acta jure imperii*. This is plainly wrong. There is no such rule in international law. On the contrary, according to the relevant rules of international law, States do not benefit from jurisdictional immunity in commercial matters, and they can even waive their jurisdictional immunity with respect to *acta jure imperii*, provided that the waiver is unequivocal.[37] Nor is there a rule of EU law preventing Member States from entering into arbitration agreements with economic operators in individual cases where such agreement is freely concluded.

Second, the Commission's restrictive interpretation is unworkable in practice for the reason that the compatibility of the arbitration agreement with EU law depends on the nature of the powers exercised by the State giving rise to the dispute.

During the hearing in *PL Holdings*, the Commission's agents gave the following example of the distinction the Commission wished to draw. In the hypothetical example of a concession to construct and operate a highway that would cross a natural

33. *Ibid*.
34. *Ibid*.
35. *Ibid*., § 74.
36. Opinion of AG Kokott, Case C-109/20, *PL Holdings*, 22 Apr. 2021, EU:C:2021:321, para. 51.
37. *See* European Convention on State Immunity, 16 May 1972, Art. 7(1); United Nations Convention on Jurisdictional Immunities of State and Their Property, 2 Jan. 2004, not yet in force, Art. 10(1); Yas Banifatemi, *Jurisdictional Immunity of States: Commercial Transactions*, in *The Cambridge Handbook of Immunities and International Law*, 125 (Tom Ruys, Nicolas Angelet and Luca Ferro, Cambridge University Press, 2019); Catherina Amifar, Waivers of Jurisdictional Immunity, in *The Cambridge Handbook of Immunities and International Law*, 167 (Tom Ruys, Nicolas Angelet and Luca Ferro, Cambridge University Press, 2019).

reserve area, the Commission argued that an arbitration agreement contained in the concession contract would be compatible with EU law if it concerned disputes regarding losses incurred by the Member State's violation of the concession agreement. However, if the scope of submission to arbitration included claims arising out of the fact that – contrary to its contractual commitments – the environmental impact assessment required the highway to go around the natural reserve area, the Commission considered that such an arbitration agreement would be contrary to EU law because it would (even indirectly) concern the exercise of sovereign powers by a Member State.

This is a highly problematic position because it makes it impossible to assess whether the arbitration agreement is compatible with EU law. Indeed, it is impossible to predict the manner in which a State may breach its contractual commitments. It may do so by acting as a party to the contract, but it may also do so by exercising its powers as a regulator or a sovereign (e.g., by enacting legislation or other measures nationalising the concession granted by contract). The Commission's position also ignored the fact that, very often, State contracts include provisions pursuant to which States commit to exercise or not to exercise their sovereign powers in a certain way (e.g., stabilisation clauses) or by guaranteeing certain treatment with respect to taxes or customs, etc.

Thus far, the CJEU does not appear to have been swayed by the Commission's position in *PL Holdings*. Indeed, despite the fact that its judgment in that case was not favourable to the investor, the CJEU did not endorse the Commission's restrictive interpretation of the commercial arbitration exception. Rather, its judgment focused exclusively on ad hoc arbitration agreements that have the effect of reinstating investor-State arbitrations under intra-EU BITs.[38]

Subsequent CJEU case law appears to be more in line with the broad than the restrictive interpretation of the commercial arbitration exception. Indeed, in *Mytilinaios v. DEI and Commission*, the CJEU did not take any issue with the fact that DEI, the Greek State-owned Public Power Corporation, had entered into an arbitration agreement with Mytilinaios, one of its industrial clients. Provided that the arbitration agreement had been freely entered into by the parties, the arbitral award setting the price of electricity could not qualify as a State aid measure, held the CJEU.[39] The fact that the arbitrators were selected from a list drawn up by the decision of the president of the Greek energy regulator and should demonstrate their independence and impartiality before their appointment did not alter the fact that the arbitration agreement fell within the commercial arbitration exception.[40]

In distinguishing this kind of arbitration from arbitration pursuant to ISDS clauses contained in BITs, the CJEU appears to have endorsed the understanding of *Achmea*

38. *See* Case C-109/20, *PL Holdings*, 26 Oct. 2021, EU:C:2021:875, paras 48-49.
39. Cases C-701/21 P and C-739/21 P, *Mytilinaios v. DEI and Commission*, EU:C:2024:146, para. 106. It could, however, have been otherwise 'if the arbitration procedure in its entirety, from the conclusion of the arbitration agreement until the arbitration award, had been the product of a scheme imposed by the Greek State on the undertakings concerned in order to use that procedure to circumvent the rules in the field of State aid' (*Ibid.*, para. 114).
40. *Ibid.*, para. 103.

according to which ISDS clauses in intra-EU investment protection treaties are unlawful – under EU law – not because they apply to *acta jure imperii* but because they create a parallel and competing system of justice by providing a general, advance consent to arbitration:

> the consent of a Member State to the possibility of litigation being brought against it in the context of the arbitration procedure provided for by a bilateral investment treaty, *unlike that which would have been given in contractual arbitration proceedings*, does not have its origin in a specific agreement reflecting the freely expressed wishes of the parties concerned, but is derived from a treaty concluded between two Member States in which they have, generally and in advance, agreed to exclude from the jurisdiction of their own courts disputes which may concern the interpretation or application of EU law in favour of arbitration proceedings.[41]

Finally, the commercial arbitration exception should not be interpreted with undue formalism. The fact that neither of the parties to an arbitration agreement contained in a contract are State actors does not automatically bring the arbitration agreement within the commercial arbitration exception or immunise it with regard to EU primary law.

In its judgment in *International Skating Union v. Commission*, the CJEU signalled that arbitration agreements concluded between private actors may also be scrutinised under EU primary law in a manner inspired by the *Achmea* ruling.[42] In its decision at issue in *International Skating Union v. Commission*, the Commission had taken the view that the systematic and exclusive references of disputes between the ISU and professional skaters to CAS arbitration in Switzerland did not constitute per se an infringement of EU competition law. However, they reinforced the infringement of Article 101(1) TFEU resulting from the ISU rules governing prior authorisation of competitions and athletes' eligibility to participate in competitions because it systematically precluded athletes from claiming their rights under Article 101(1) TFEU before the courts of the Member States. Indeed, CAS awards would be subject to an action to set aside only before the Swiss Federal Tribunal. The CJEU held that '[i]n the absence of such judicial review [i.e. judicial review by the courts of the Member States], the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured – and would therefore be ensured in the absence of such a mechanism – by the national rules relating to remedies'.[43]

Although the CJEU did not scrutinise CAS arbitration by reference to *Achmea*, it is clear that it did not consider CAS arbitration to fall within the commercial arbitration exception recognised by *Achmea*, despite the fact that both the ISU and the athletes are private parties.[44] On the contrary, several elements make the analogy between recourse

41. *Ibid.*, para. 109 (emphasis added).
42. C-124/21 P, *International Skating Union v. Commission*, 21 Dec. 2023, EU:C:2023:1012.
43. *Ibid.*, para. 194.
44. *See* Paschalis Paschalidis, *ISU v. Commission: Arbitration as a Reinforcement of Infringements of EU Competition Law*, Kluwer Competition Law Blog, 9 Jan. 2024.

to CAS arbitration in Switzerland and investment treaty arbitration stronger than with commercial arbitration. By virtue of its position as a regulator or quasi-regulator of international skating as an economic activity, the ISU had exorbitant powers in comparison to the athletes. Furthermore, submission to CAS arbitration was not voluntary. Recourse to CAS arbitration was not provided for in a specific agreement concluded with the athletes but was dictated in the ISU Statute, rules, codes, and communications that the athletes had to accept in order to become professional athletes.[45] Submission to CAS arbitration thus governed all possible disputes that might arise between the ISU and the athletes, without exception, including disputes regarding the rights conferred on the athletes by EU law. However, neither the CAS nor the Swiss Federal Tribunal (which would hear actions to set aside CAS awards) are courts or tribunals of a Member State that can refer questions for preliminary rulings to the CJEU pursuant to Article 267 TFEU.[46]

As the CJEU recalled, the requirement of effective judicial review mandates that the court seized of an action to set aside or, otherwise review the award, satisfy 'all the requirements under Article 267 TFEU, so that it is entitled, or, as the case may be, required, to refer a question to the Court of Justice where it considers that a decision of the Court is necessary concerning a matter of EU law raised in a case pending before it'.[47]

The CJEU case law discussed above suggests that the CJEU does not endorse the Commission's broad interpretation of the commercial arbitration exception. In fact, the position defended by the Commission in *Mytilinaios v. DEI and Commission* begs the question of whether the Commission maintains the position it took in *PL Holdings* with respect to the commercial arbitration exception. However, this does not necessarily suggest that economic operators and Member States can enter into any form of commercial arbitration agreement. Indeed, as will be explained below, several reasons may militate in favour of structuring arbitration agreements in State contracts in a manner that does not systematically or automatically foreclose any form of review of EU law matters by the EU courts.

§3.03 CAN MEMBER STATES INCLUDE ARBITRATION CLAUSES IN THEIR CONTRACTS WITH ECONOMIC OPERATORS?

The ability of Member States to enter into arbitration agreements in their contracts with economic operators has been recently called into question by the Greek Council of State's decision in *Athens International Airport*.[48] The Greek State and a consortium of

45. ECHR, *Case of Mutu and Pechstein v. Switzerland*, applications Nos 40575/10 and 67474/10, 2 Oct. 2018, CE:ECHR:2018:1002JUD004057510.
46. *See* Paschalis Paschalidis, *ISU v. Commission: Arbitration as a Reinforcement of Infringements of EU Competition Law*, Kluwer Competition Law Blog, 9 Jan. 2024.
C-124/21 P, *International Skating Union v. Commission*, 21 Dec. 2023, EU:C:2023:1012, para. 191.
47. *Ibid*., para. 198.
48. Greek Council of State, Second Chamber, 9 Feb. 2022, *Independent Authority of Public Revenue v. Athens International Airport S.A.*, Case No. 246/2022.

German companies had signed a thirty-year contract for the development and commercial operation of the Athens International Airport. The contract was ratified by an act of the Greek Parliament and provided for the settlement of disputes through LCIA arbitration in London. The contract also conferred certain treatment to the consortium in respect of VAT, which is a harmonised tax governed by the EU VAT Directive.

In an award rendered in 2013, an arbitral tribunal constituted pursuant to the contract ruled that the consortium did not owe the amounts of the imputed VAT and additional charges. The tribunal declared that the relevant act imposing these charges on Athens International Airport had been issued unlawfully, in breach of the contract and Greek law.

In parallel proceedings, Athens International Airport sought to challenge the validity of the decisions taken by the Greek VAT administration. The Greek administrative courts found that the VAT dispute was arbitrable and fell within the jurisdiction of the arbitral tribunal. According to these courts, the fact that the arbitral tribunal lacked the power to annul the administrative acts imposing VAT did not deprive it of the power to assess whether such act was lawful.[49] Thus, the Greek administrative courts were bound by the arbitral tribunal's findings with respect to the VAT exemptions.

The Greek State appealed to the Council of State, which reversed the decision of the lower courts, finding that investment agreements such as the one at issue in the case at hand could not affect the autonomy of EU law.[50] Basing itself on its understanding of the CJEU's rulings in *Achmea* and *PL Holdings*, the Greek Council of State recalled that, pursuant to Article 19 TEU, only the courts and tribunals of Member States and the CJEU are tasked with ensuring the full application of EU law.[51] Thus, disputes between the Greek State and Athens International Airport arising under the contract and concerning the interpretation and/or application of EU VAT law in the field of VAT could not be settled by arbitration before a tribunal that does not meet the requirements of Article 19 TEU and Article 267 TFEU.[52] For these reasons, the Greek Council of State held that the arbitration agreement was contrary to EU primary law and that the 2013 award had been issued in excess of the arbitral tribunal's jurisdiction.[53] It thus concluded that the award was not binding for the Greek administrative courts and remanded the case back to the Administrative Court of Appeal of Athens in order to give judgment on the merits of the VAT dispute.

While this interpretation of *Achmea* and *PL Holdings* is in line with the restrictive interpretation of the commercial arbitration exception advocated by the Commission, it is doubtful that it is in line with the more recent case law of the CJEU, notably *Mytilinaios v. DEI and Commission*. Pursuant to the more recent line of case law,

49. Polly Eftratiadi & Evanthia Kasiora, *The Achmea Ripple Effect: Greek Conseil d'Etat Finds That a Commercial Arbitral Tribunal Has No Jurisdiction to Deal with Matters of EU Law*, Cahiers de l'Arbitrage 111 (2023).
50. Greek Council of State, Second Chamber, 9 Feb. 2022, *Independent Authority of Public Revenue v. Athens International Airport S.A.*, Case No. 246/2022, § 6.
51. *Ibid*.
52. *Ibid*., § 7.
53. *Ibid*., § 8.

arbitration agreements fall within the commercial arbitration exception if they are freely entered into by the parties. Indeed, nothing suggests that the Greek State had imposed LCIA arbitration on the German consortium, nor was recourse to arbitration otherwise mandatory under Greek law. In this sense, the case was not analogous to that of ISU, which systematically and exclusively settled disputes with professional skaters through arbitration in non-EU countries.

Even if one were to adopt the Greek Council of State's view, the mere fact that a contract may grant authority to an arbitral tribunal to assess whether an individual administrative act in the field of VAT law is lawful is not *per se* a violation of the EU principle of autonomy.[54] The purpose of such an assessment is not to declare the act valid or invalid – a power which the tribunal lacks – but to decide whether, in adopting that act, the State breached its contractual commitments.

It is noteworthy that in Opinion 1/17, the CJEU took issue only with the ability of CETA tribunals to award damages to investors for measures of general application enacting policy (that are not otherwise arbitrary or discriminatory) but not with the power of such tribunals to award damages in respect of State conduct concerning individual investors.[55]

At the same time, one must not lose sight of the fact that Member States are not in the exact same position vis-à-vis EU law when they enter into commercial arbitration agreements as private parties. Unlike Member States, which are bound by Article 344 TFEU, private parties are not bound by the principle of autonomy and have not undertaken to respect the jurisdiction of the CJEU with respect to matters that concern the interpretation and application of EU law. Provided that private parties do not find themselves in a position of power such as that of the ISU and impose recourse to arbitration in a manner that systematically prevents their counterparts from having access to the EU courts, the action to set aside awards or the powers of review that courts have in recognition and enforcement proceedings are sufficient to guarantee the autonomy of EU law. The CJEU has recognised as much in *Eco Swiss* and *Achmea*.

However, it is not unreasonable to suppose that the principles laid down by the CJEU in *Eco Swiss* and *Achmea* may apply to the Member States when entering into commercial arbitration agreements in a different manner. There may be circumstances where Member States threaten the autonomy of EU law when they resort to arbitration in their contractual relations with economic operators if the arbitration clauses have the following characteristics: (i) they allow arbitral tribunals to rule on the lawfulness of the State's conduct when it implements EU law because it acts in its capacity as an

54. Such disputes may, however, be non-arbitrable under the laws of individual Member States. *See*, for example, French Council of State, 17 Oct. 2023, *Ryanair v. Syndicat mixte des aéroports de Charente*, No. 465761, §§ 3, 8-9, in which the French supreme administrative court recalled that, unless otherwise provided by domestic legislation or international treaty, French public bodies cannot opt out from the jurisdiction of the French courts in respect of disputes to which they are parties.

55. *See* Opinion 1/17 *(EU-Canada CET Agreement)*, 30 Apr. 2019, EU:C:2019:341, paras 137-161. Koen Lenaerts, *Le cadre constitutionnel de l'Union et l'autonomie fonctionnelle de son ordre juridique*, in *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux: Liber amicorum Jiří Malenovský* 285, 298-306 (David Petrlík et al. eds, Bruylant 2020).

administrative authority or a sovereign; and (ii) the arbitration process is arranged in a manner in which the EU courts will not be able to exercise any sort of supervising authority over the arbitral process. The latter is achieved when, as in the case of the ISU, a Member State accepts to place the seat of the arbitration outside the EU.

Indeed, in *International Skating Union v. Commission*, the CJEU underscored the fact that the ISU's recourse to arbitration was systematic and was arranged in a manner in which only the Swiss courts could review the awards rendered in disputes opposing the ISU with professional skaters.[56] However, in the words of the CJEU, 'judicial review [of awards] must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy'.[57]

Therefore, the fact that the Greek Council of State may have erroneously considered that an arbitration agreement did not benefit from the commercial arbitration exception for the mere fact that it may have covered matters governed by EU law does not mean that the CJEU would have accepted that Member States entrust the power to review the application of the VAT Directive – even with respect to specific taxpayers only – to arbitral tribunals seated outside the EU, and *a fortiori* if such referral to arbitration outside the EU is systematic. This may be the case where Member States systematically resort to, for example, LCIA arbitration in London in their contracts. It is natural for the economic operator to wish the seat to be in a location that is neutral to the dispute. However, there are several arbitration-friendly locations in the EU. There is thus no need to take the risk of placing the seat outside the EU.

§3.04 CONCLUSION

The meaning and scope of the commercial arbitration exception in *Achmea* has not yet been clarified by the CJEU with respect to arbitration clauses included in State contracts. However, subsequent CJEU case law seems to confirm that States can enter into commercial arbitration agreements without breaching EU law, provided that such agreements are freely entered into by the parties and they are not arranged in a manner that systematically rules out the power of the EU courts to uphold norms of EU public policy. This would be, for example, the case if the seat of the arbitration is placed outside the EU. In this sense, it would be wise for Member States and economic operators to avoid placing the seat of their arbitrations in London or Switzerland.

In this context, a recent decision by the Greek Council of State extending the scope of *Achmea* to arbitration agreements contained in contracts concluded by Member States may be going beyond what was imposed by the CJEU's ruling in *Achmea*. However, it cannot be excluded that the CJEU would take an issue with Member States submitting disputes regarding the application of EU law to arbitral tribunals seated outside the EU and thus limiting or excluding any possibility of review by the EU courts. In these circumstances, a more cautious approach may be warranted

56. C-124/21 P, *International Skating Union v. Commission* EU:C:2023:1012, paras 193, 194 and 198.
57. *Ibid.*, para. 193.

when Member States decide, on a specific occasion, to entrust arbitral tribunals with the task of applying EU law even in a commercial relationship. The fact that such caution may not be required in a dispute between two private parties (as was the case in *Eco Swiss*) does not mean that it may not be required of Member States when they act in their commercial capacity. This is due to the fact that, as Member States, they cannot entirely sign out of their obligations under the TFEU.