Procedural Ordre Public in Intra EU Investment Arbitration

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1. Introduction

Since the adoption of the New York Convention in 1958 arbitration has grown to be a successful and in many instances preferable way to solve international commercial disputes.[1] Due to the design and strength of the convention, with its focus on recognition and enforcement, arbitration also proves to be one of few alternatives to traditional court proceedings that is in compliance with international law requirement of fair trial.[2] The days of glory, however, is challenged and we might very well encounter a reality where arbitration is a weak alternative to court proceedings or even, in some instances, a dead end.

In this paper I will investigate this issue in light of a recent decision from the Supreme Court in Sweden – the case "*Investeringsavtalet*" – which in this context exemplifies the death of arbitration in intra EU investment dispute settlements.[3]

I will briefly present and discuss the case and the arguments put forward. The decisive argument was framed under the heading of procedural ordre public and the main focus of my paper is to investigate the nature of this argument further.

A general starting point for my interest in this issue is the fact that I console myself to the idea that it is important to develop efficient settlement systems for commercial disputes, not least for cross-border disputes.

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1 The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed in 1958 and ratified by Sweden in 1972. See further: https://www.newyorkconvention.org.

2 Maunsbach, L. *Avtal om rätten till domstolsprövning*, Norstedts Juridik, 2015, pp. 10–117, sec. 10.3 & chapt. 11.

3 NJA 2022 s. 965 (*Investeringsavtalet*).

In this regard it may be relevant to point out that I am a professor in private international law and that I primarily get in contact with arbitration issues in relation to questions of enforcement and recognition. Put differently, amongst the different arguments that can be posed in favour of alternatives for commercial dispute settlement, my primary concern is that of efficient enforcement.[4]

2. The Case

2.1 Taking off

The case *Investeringsavtalet* has as its starting point a bilateral investment treaty signed by Belgium, Luxembourg and Poland in 1987, which entered into force in 1991 (the Treaty). Under this Treaty a company registered in Luxembourg, PL Holdings S.á.r.l. (PL), initiated proceedings against Poland in 2014. The reason was that PL claimed that polish authorities had expropriated assets belonging to PL in violation of the Treaty.

The expropriation claim was that PL had, during some years, acquired shares in two polish banks. When these banks later merged, PL became the majority owner. After the merger, polish financial authorities decided to suspend the voting rights attached to PLs shares in the new bank and forced PL to sell those shares. Hence, PL initiated proceedings against Poland, arguing that this activity was to be regarded as expropriation, in violation of provisions in the Treaty.

The Treaty allowed for the initiation of arbitration and the Arbitration Institute of the Stockholm Chamber of Commers was one (of several) agreed venues for such an arbitration.[5] Hence, it turned out to be Stockholm that became the situs for the dispute and PL lodged it's request for arbitration to the institute in Stockholm in November 2014. From the outset Poland took part in the arbitration proceedings but later (November 2015) it challenged the jurisdiction of the arbitral tribunal and continued to do so during pleadings in May 2016. These arguments, however, was disregarded by the arbitral tribunal, i.a. because Poland contested the jurisdiction of the tribunal at a late stage of the process.

[4] Some additional arguments would be secrecy, possibility to appoint experts, own control, flexibility (etc.). Se e.g. Lindskog, S. *Skiljeförfarande – en kommentar*, 3 ed., Norstedts Juridik, 2020, pp. 42–43 (with further references).

[5] The arbitration clause is found in article 9 of the bilateral investment treaty. An extract of that article is reproduced in the case C-109/20, ECLI:EU:C:2021:875, para. 3.

In June 2017 the arbitration tribunal decided (in a special decision) that Polen had violated the Treaty and in September the same year the tribunal handed down is final decision, where it was concluded that Polen was to pay damages to PL for its infringement of the Treaty.[6]

2.2 The road to Sweden

In late September 2017 Poland brought actions before Svea Court of Appeal (Svea Hovrätt) in Stockholm seeking (among other things) to have both arbitral awards declared invalid. According to the Swedish Arbitration Act it is not possible to challenge an arbitral award on its merits, but the law acknowledges possibilities to challenge awards on the basis of procedural arguments and to declare arbitral awards invalid or to the set them aside.[7] This challenge procedure can be described as a way to exercise control over the procedural aspects of the arbitration, with a focus to ensure a (minimum standard of) fair trial.[8]

As regards the Swedish Arbitration Act ("SAA") it is important to note that there is a difference between the rule regarding invalidity (§ 33 of the SAA), which can be invoked without time restrictions and the rule regarding challenge of an award in order to set it wholly or partially aside (§ 34 of the SAA), which can only be invoked if such action is brought within two months from the date upon which the parties received the award (§ 34, section 3 of the SAA). As regards the grounds to challenge provided for in § 34 it is also important to note that a party is not entitled to invoke circumstances that would provide a ground for setting an award aside if that party, through participation in the proceedings without objection, have waived its right to challenge the award on that particular ground (§ 34, section 2 of the SAA). A final point to observe is that the purpose of both § 33 and § 34 of the SAA is to secure the right to a fair trial. However, when § 34 is designed to take into account the interest of the parties involved in the arbitration, § 33 is designed to secure the interest of the state (or third parties).

Poland raised several issues in the *Investeringsavtalet*-case. The first argument (and the one that later proved to be decisive) related to the fact that

6 The background of the case is further discussed in NJA 2022 s. 965 (*Investeringsavtalet*), pp. 965–966, 986–987 & 993–994.

7 See further Lindskog, *supra* n. 4, pp. 892–899 and Hobér, K., *International Commercial Arbitration in Sweden*, Oxford University Press, 2011, pp. 293–301.

8 See Hobér, *supra* n. 7, pp. 293–294.

article 9 of the Treaty was contrary to EU law and that the arbitral awards therefore, Poland argued, were to be regarded as invalid.

In parallel to the proceedings in Stockholm, the CJEU handed down its decision in the *Achmea*-case.[9] In its judgment, the CJEU delivers its frequently cited death sentence for intra EU investment arbitration as it states that:

> "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States […] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."[10]

The *Achmea*-case was decided 6 March 2018 and the Svea Court of Appeals delivered its judgement in the *Investeringsavtalet*-case 13 June 2018. Hence, the Swedish Court had the opportunity to take into account the clarifications in Achmea.

The *Achmea*-decision is clear in its statement, but the Svea Court of Appeal nevertheless ruled in favour of PL Holdings. The Court acknowledges the fact that arbitration based on an investment treaty was to be regarded as contrary to EU-law. However, in the case at hand, since Poland apparently had accepted (at first) the jurisdiction of the arbitral tribunal, a new agreement between the parties had emerged, a specific ad-hoc arbitral agreement. As the dispute was no longer based on the Treaty as such, but on a specific inter-partes agreement, the arbitral award was not to be regarded as contrary to EU-law and thus valid. The Court also concluded that Poland had, through participation without objection, accepted the new ad-hoc agreement and that it therefore had waived its potential right to challenge the award.

Poland sought relief before the Swedish Supreme Court and pleaded, among other things, that the arbitral awards (both the special decision and the final decision) should be declared invalid according to § 33 of the Swedish Arbitration Act (and not to be regarded as a ground to challenge that could be precluded due to the time limit in § 34 of the SAA). Due to uncertainty regarding the interpretation of EU-law in this matter, the Swedish

[9] C-284/16 (*Achmea*), ECLI:EU:C:2018:158. See also C-741/19 (*Komstroy*), ECLI:EU:C:2021:665.

[10] C-284/16 (*Achmea*), ECLI:EU:C:2018:158, para 60.

Supreme Court stayed its proceedings and referred a request for a preliminary ruling to the CJEU.

2.3 A question and an answer

The question referred to the CJEU related to the new situation in PL-holdings (compared to e.g. *Achmea*), *i.e.* that the parties had concluded a new agreement after the initiation of the arbitration and to what extent such an ad-hoc agreement should be valid.

The question, partly modified by the CJEU, was whether Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to those articles.[11]

CJEUs answer to this question was clear. National legislation which allows a Member State to conclude an ad-hoc arbitration agreement, as the one described in the question, is precluded and the agreement is thus invalid since it is contrary to EU-law (more precisely Article 267 and 344 TFEU).

In essence, according to the CJEU, an ad-hoc arbitration agreement creates the same effect as an agreement directly based on the investment treaty. In addition, the circumvention of EU-law (facilitated by the investment treaties) is no less serious because of the isolated inter-parties nature of an ad-hoc agreement.[12] The CJEU also emphasises that Member States have an obligation to make sure that disputes concerning the application and interpretation of EU-law is not removed from the judicial system of the European Union.[13]

Hence, the ad-hoc agreement concluded in the *PL-Holdings* case was invalid. On a personal note, I would like to emphasise one argument that I think that the CJEU did not address properly. The ad-hoc agreement must be regarded as an inter-party agreement concluded for a specific dispute which is precisely the type of commercial disputes that an arbitral tribunal would normally be allowed to adjudicate. In my opinion, there is a considerable difference between a situation where you agree to arbitration in

[11] C-109/20 (*PL Holdings*), ECLI:EU:C:2021:875, para 37.
[12] C-109/20 (*PL Holdings*), ECLI:EU:C:2021:875, para 48 and 49.
[13] C-109/20 (*PL Holdings*), ECLI:EU:C:2021:875, para 52.

relation to a specific case compared to the situation where a Member State is forced to accept arbitration in general under an investment treaty. In the field of private law, where parties are allowed to settle, I do think that the risk of circumvention of EU-law is limited, if ad-hoc arbitration were to be allowed also in intra EU investment disputes. In such a situation both parties (the investor and the Member State) would agree that they would like to be assisted by an arbitral tribunal in settling a specific dispute. And why would this be contrary to EU-law when it is, of course, perfectly alright if the parties to that same dispute manage to settle without arbitration? My perception is that the logic fails in this case. In relation to arbitration based on investment treaties I am willing to agree with the CJEU and the *Achmea*-solution, but I do think that, in ad-hoc situations, the arguments in favour of allowing arbitration are stronger.

In this regard it may be important to remember that the CJEU, in its ruling in *PL-holdings*, expressly states that ad-hoc agreements are precluded only if they make it possible to continue arbitration proceedings initiated on the basis of an (invalid) investment treaty.[14] Hence, the question remains whether or not an ad-hoc investment dispute arbitration agreement, with no connection to an invalid treaty, would be possible to uphold. I strongly support that it should be upheld. A conclusion to the contrary would hamper party autonomy which is, indeed, another interest protected and encouraged by EU-law.

However, irrespective of the fact that there might be arguments against the position by the CJEU in the *PL Holdings*-case it needs to be emphasised that the statement from the CJEU leaves little room for debate and that the answer to the questions from the Swedish Supreme Court is clear. Ad-hoc agreements is not ok (in the specific circumstances described).

2.4 The Swedish Supreme Court finally decides

After the decision from the CJEU it was for the Swedish Supreme Court to decide in the case at hand and explain how the findings from the CJEU should be understood in relation to the SAA. Poland had (*i.a.*) argued that the arbitral award should be declared invalid as contrary to fundamental principles of Swedish law (since it was contrary to EU-law).

In light of the clear statements from the CJEU, the Swedish Supreme Court found that the "new" ground for setting aside an arbitral award,

[14] C-109/20 (*PL Holdings*), ECLI:EU:C:2021:875, para 56.

namely that the arbitration agreement is contrary to EU-law, is to be handled within the frames of the ordre public provision in § 33 subsection 2 of the SAA.[15] This provision states:

> 33 §
> An award is invalid:
> […]
> 2. where the arbitration award or the manner in which it was arrived at is manifestly incompatible with the Swedish legal order,[16]

This provision is to be applied ex officio by the court and with strict caution. The ordre public provision in the SAA should, according to the Swedish preparatory works, be applied in exceptional situations that is manifestly contrary to fundamental principles of Swedish law.[17]

Within the restrictive sphere of ordre public, it is acknowledged that ordre public can be both substantive (related to e.g. the application of a foreign law that is manifestly incompatible with the Swedish legal order) or related to manifest flaws in the procedure which indicate that the procedure has not been fair to a party or to the parties involved.[18] The difference between substantive and procedural ordre public is evident from the wording of § 33 section 2 of the SAA where "the arbitration award" (as such) is separated from "the manner in which the award arose".

In the *Investeringsavtalet*-case, the Swedish Supreme Court classified, *in casu*, "contrary to EU-law" as procedural ordre public and with that classification the Court also, *stricto sensu*, decided the case. It became quite apparent that the only available outcome was to declare the decisions from the arbitral tribunal invalid and thus deciding in favour of Poland.

The question remains, however, what the concept of procedural ordre public really entails.

15 NJA 2022 s. 965 para 48.

16 An English translation of the entire Swedish Arbitration Act is available in Hobér, *supra* n 7, appendix 1, pp. 375–387. This translation is from 2011 and does not include later amendments of the Act. Translations, which includes amendments until 2020, is also available in Madsen, F., *Commercial Arbitration in Sweden – A commentary on the Arbitration Act*, 5th ed., Jure, 2020. In Madsen's commentary the separate paragraphs of the Swedish Arbitration Act are presented in a continuous nature.

17 Prop. 1998/99:35 pp. 139–140. See also NJA 2022 s. 965 para 53.

18 Lindskog, S. *supra* n 4, pp. 909–910.

3. Procedural ordre public…

The concept of ordre public is an old and flexible concept that is relative to changes in public policy and morality.[19] Ordre public provisions are either framed in relation to the application of foreign law or in relation to recognition of foreign judgement and it provides a possibility for national courts to evade the consequences of an application (or recognition) that would be manifestly contrary to the Swedish legal system.[20] Irrespective of whether or not an ordre public argument appears as a question of applicable law or as a question of the non-recognition of a foreign judgement it is a concept that is to be used with strict caution.[21]

There are still some important differences. When an ordre public argument is raised in relation to the application of foreign law, it is the foreign law as such that is put under scrutiny (or more correctly, the effect of an application of that law). When ordre public is raised as an objection to recognise a foreign judgement (or an arbitral award) however, the concept of ordre public can entail arguments as regards the consequences of an application of the foreign law as such and arguments that relate to procedural errors related to the foreign decision that is sought to be recognised.[22]

The divide between substantive and procedural ordre public, is evident in the Brussels I Regulation, in its grounds for objection regarding enforcement of foreign judgements.[23] The existence of procedural ordre public is acknowledged by the CJEU, in the *Krombach*-case.[24]

In this case it is clarified that the notion of ordre public is a domestic concept but it is also stated that the CJEU is required to review the limits of the concept (as it is understood in the Brussels I Regulation).[25] Despite

[19] Bogdan, M. & Hellner, M., *Svensk internationell privat- och processrätt*, 9 ed., Norstedts Juridik, 2020, p. 82.

[20] Bogdan, M. & Hellner, M., *supra* n 19, pp. 77–85.

[21] Bogdan, M. & Hellner, M., *supra* n 19, pp. 77–85. See also Maunsbach, U., *Sweden*, in *Public Policy and Private International Law – A Comparative Guide*, Meyer, O. (eds), Edvard Elgar Publishing, 2022, pp. 373–388.

[22] Hellner, M. & Pålsson, L., *Europeisk internationell civilprocessrätt*, 1 ed, Norstedts Juridik, 2023, p. 392.

[23] Regulation, (Brussels I Regulation), art. 45.

[24] C-7/98 (Krombach), ECLI:EU:C:2000:164. See also Magnus, U. & Mankovski, P., *Brussels I Regulation*, 2 ed, Sellier European Law Publishers, 2012, pp. 657–672. See also Hellner, M. & Pålsson, L., *supra* n 22, pp. 391–395.

[25] C-7/98 (*Krombach*), ECLI:EU:C:2000:164, p. 22 & 23. Note that the *Krombach*-case relates to the Brussels Convention in which the ordre public provision was found in

the restrictive nature of ordre public the CJEU concludes that recourse to public policy must be possible in exceptional cases where the guarantees laid down in the legislation of the State of origin are insufficient to protect the defendant's rights to a fair trial.[26]

In this regard, within the frames of EU-law (e.g. the Brussels I Regulation), ordre public is influenced by EU-law and the CJEU. It is, however, still a domestic concept and it is a matter for national courts to decide, in specific situations, if ordre public shall be given effect in the case at hand. Ordre public, put differently, is a domestic concept, the application of the provision is to be restrictive, also within the frames of the Brussels I Regulation, and it should only be applied in exceptional cases.[27]

In sum, procedural ordre public is a rather narrow concept that aims at correcting the failure of a court to comply with fundamental fair trial rules. It is not a general concept with a broad interpretation, and it is, by nature, a domestic concept. In particularly so, in relation to ordre public provisions that is not based directly on EU-law, as is the case with § 33 in the SAA.

As regards procedural ordre public in § 33 of the SAA there is another dimension. The notion needs to be aligned with the rules regarding procedural irregularities in § 34 subsection 7 of the same Act, which is also aimed at securing a fair trial. Lindskog concludes that the delimitation between procedural irregularities in § 34 subsection 7 and procedural ordre public in § 33 subsection 2 of the SAA can be difficult and that there is no sharp limit between the two provisions.[28] And this classification is important. Whether or not a specific "error" is to be dealt with in accordance with § 34 or § 33 of the SAA is crucial for the outcome of a dispute, due to the fact that § 34 obliges the parties to actively object within two months from receipt of the award (§ 34 section 3 of the SAA) whereas § 33 of the SAA shall be applied *ex officio* without time limit.

In the *Investeringsavtalet*-case I agree with the classification and the fact that the argument in the case should be dealt with under § 33 of the SAA. It is, however, possible that other arbitral awards based on different agreements

article 27. Today we would apply the Brussels I Regulation from 2012 but the *Krombach*-case is still relevant for the interpretation of article 45 in this Regulation.

26 C-7/98 (*Krombach*), ECLI:EU:C:2000:164, p. 44. The *Krombach*-case related a manifest breach of the defendants right to effectively defend himself.

27 Magnus, U. & Mankovski, P., *Brussels I Regulation*, 2 ed, Sellier European Law Publishers, 2012, pp. 658–660.

28 Lindskog, S. *supra* n. 4, pp. 912–913. See also NJA 2022 s. 965 p. 47.

should be treated differently and that an issue classified as a procedural error may be dealt with either by § 33 of the SAA (as procedural ordre public, in order to protect fundamental interests of the Swedish legal system) or by § 34 subsection 7 of the SAA (as a procedural irregularity, in order to protect the interest of the parties involved).[29]

This whole line of reasoning, however, builds on the presumption that it is correct to regard the argument "contrary to EU-law" as procedural ordre public. This may be so in some situations, but my opinion in this matter is that we are faced with an argument of a *sui generis* nature. A ground for invalidity on its own merits.[30]

4. … or a separate ground for invalidity?

In view of the analysis above I think that it is fair to conclude that the argument that intra EU-investment dispute arbitration is contrary to EU-law is not really a procedural argument. Nor is it a substantive argument, whereas it does not relate to the fact that an effect of the application of foreign law in a specific case should be contrary to fundamental principles of Swedish law. Contrary to EU-law is not a "domestic" concept that may be owned by domestic courts, and it is thus, in my opinion, not an argument that fits within the traditional notion of ordre public.

In my view, the decision from the CJEU as regards this issue is clear and Swedish courts are therefore left with no other alternative than to handle this kind of issue as a ground for invalidity that presumably needs to be observed ex officio, within the frames of § 33 of the SAA (according to which provision an arbitral award can be declared invalid). With the current design of the SAA, I also agree that there is no other option than to handle this new argument within § 33 subsection 2 of the SAA. I think, however, that it is

[29] The CJEU ruling in the *Eco Swiss* case (C-126/97, EU:C:1999:269) provides opportunities for an argument that domestic rules that limits the possibilities to challenge arbitral awards in time is to be respected. In the case, mandatory EU competition law was regarded as fundamental and as such a part of ordre public, but it was accepted that an objection related to these fundamental rules could be made dependent on time-restrictions for objections. Hence, the Eco Swiss case supports the argument that an ordre public objection can be made dependent on time restrictions and thus not necessarily an argument that the court are to consider ordre public *ex officio*. NJA 2022 s. 965 para 51, C-126/97 (*Eco Swiss*), EU:C:1999:269 para. 35–40 & 44–45.

[30] This argument is also supported, briefly, by Michael Bogdan, in his reference to the PL-holding case in SvJT 2023 p. 263 (praxisbilaga 2023:3).

misleading to frame the argument as ordre public in a traditional sense and I do not think that "contrary to EU-law" in these specific situations should be defined as procedural ordre public. Such an interpretation creates uncertainty as regards the meaning of the concept of ordre public. It also transfers the power to control what the concept of ordre public entails from the courts of the Member States to the CJEU. I think that ordre public is a notion that needs to be anchored in the national legal systems and in the courts that is to address these questions. EU-law is, of course, part of national law. However, whether a decision or an award is "manifestly incompatible with the national legal order" or "manifestly contrary to (national) public policy" are not harmonised concepts and harmonisation in this area, within the different legal systems of the EU Member States, is not likely to appear (in the foreseeable future).[31] Thus, it would, in my opinion, be more appropriate to regard this specific argument – invalidity due to the arbitration agreement being contrary to EU law – relevant only in intra EU investment disputes, as a ground for invalidity on its own merits.[32]

This may be regarded as a hypothetical problem. The outcome of the *Investeringsavtalet*-case would be the same, irrespective of whether the "contrary to EU-law" argument is dealt with as procedural ordre public or as a separate ground for invalidity. I think, however, that this is more than an academic question. In and of itself I agree with the Swedish Supreme Court that it is inevitable to treat the "contrary to EU-law" argument, considering the CJEUs decisions, under § 33 of the SAA and its subsection 2. My only concern is how the concept is classified. That may prove to be important when we now face the challenge of handling this type of disputes, when arbitration as we know it, is not an alternative. With a classification that defines "contrary to EU-law" as a ground for invalidity on its own merits, it is possible to approach this argument separate from the discussion of ordre public. Such a separation may allow a legal development where the "contrary to EU-law" argument can follow its own path.

[31] See further Meyer, O. (eds), *Public Policy and Private International Law – A Comparative Guide*, Edvard Elgar Publishing, 2022.

[32] A similar way of reasoning appears in NJA 1998 s. 817, which dealt with both an argument that enforcement of a foreign judgement was contrary to the right to freedom of expression (ECHR art. 10) and an argument that this enforcement was contrary to ordre public. In the case the Swedish Supreme Court regarded these two arguments as separate grounds for refusal of recognition.

5. Concluding remarks

In conclusion, I think that it is important to keep the ordre public provision restricted and to let procedural ordre public remain procedural. The "contrary to EU-law" argument is better framed as a ground for invalidity on its own merits, still handled within § 33 subsection 2 of the SAA, with possibilities to develop this ground for invalidity separate from the development of the traditional ordre public argument. Such a development could, perhaps, include a separation of this argument also in a future amendment of the Swedish Arbitration Act, in which this specific argument would be time-barred (as is the case with the grounds to challenge arbitral awards in § 34 of the SAA). In this regard the CJEU is not consistent. The *Achmea* and *PL-holdings*-cases seem to indicate that the "contrary to EU-law" argument must be observed *ex officio*, but the *Eco Swiss*-case indicates that it is left to the legal systems of the Member States to decide to what extent invalidity claims can be time-barred.[33]

Another aspect of the development is the CJEU's obvious intention and strong underlining of the necessity that EU-law should be up-held by courts in the Member States, rather than by alternative judicial forums such as arbitral tribunals.[34] With that we are left with the question if national courts are designed to handle this kind of disputes? It will prove to be both resource- and time consuming for national courts to take on this challenge and I do not think that this aspect of the recent development has been emphasised enough. Is the solution to design national court systems that is better suited to handle commercial disputes? Specialised (national)courts for intra EU investment disputes?

The decisive question in this regard, as it seems, is the limited (non-existent) possibility for arbitral tribunals to refer questions to the CJEU, as regards the proper interpretation of EU-law.[35] Then, another solution is perhaps to create new possibilities to challenge arbitral awards? Or should we, perhaps, allow arbitral tribunals the right to be able to address preliminary questions to the CJEU?

There are several questions with the common denominator that they all need to be further addressed based on further research and investigation. In

[33] C-126/97 (*Eco Swiss*), EU:C:1999:269 para 44–45.

[34] NJA 2022 s. 965 para 55.

[35] See e.g. C-102/81 (*Nordsee*), ECLI:EU:C:1982:107, para 10 & C-377/13 (*Ascendi*) ECLI:EU:C:2014:1754 para 23–25. See also C-741/19 (*Komstroy*), ECLI:EU:C:2021:665.

this brief paper, I stand by the conclusion that arbitration is still a valid alternative for commercial disputes in general, with intra EU-investments disputes as a clear exception, and that there is a need to continue the discussion as to how we best handle these disputes in a manageable way in the future. Right now, we only know what not to do. Intra-EU investment dispute arbitration is not compliant with EU-law and hence a dead end for the resolution of such disputes. There is, however, one thing that we can do immediately. We can agree that "contrary to EU-law" in this regard is an argument that should be treated separated from the traditional notion of ordre public and allow ourselves the possibility to give special treatment to this argument.