https://doi.org/10.5817/CZ.MUNI.P210-9497-2019-16

Applicability of Rome I Regulation in International Commercial Arbitration

*Filip Vlček**

Abstract

This contribution to the conference proceedings aims to describe the current views on the applicability of the Regulation on the law applicable to contractual obligations (Rome I Regulation) in international commercial arbitration. By means of literature review, the author introduces the arguments in favour and against its binding application before the arbitral tribunals. Furthermore, the author explains the consequences of its (non)application by an example of Czech law. Finally, the author draws attention to the difficulty of the proper application of EU law in arbitration on account of the *Nordsee* case.

Keywords

Rome I Regulation; EU Law; International Commercial Arbitration; Choice of Law; Determination of Applicable Law; Preliminary Reference.

1 Introduction

Since its entry into force in 2009, the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation") has been an indispensable instrument for the determination of applicable law in the international civil and commercial contracts within the European Union ("EU"). While it is indisputable that the Rome I Regulation must be obligatorily applied by the national courts within the EU, its binding effect on the arbitral tribunals is much more controversial. This work aims to discuss the scholarly opinions on the applicability of the Rome I Regulation in international

* Masaryk University, Faculty of Law, Department of International and European Law, Veveří 70, Brno, Czech Republic, Filip.Vlcek@law.muni.cz, ORCID: 0000-0001-8875-7339

commercial arbitration and to present a solution that is – at least in the author's opinion – the most compliant with the nature and objectives of the Rome I Regulation as well as with the principles of international commercial arbitration. Furthermore, the author examines the impact the Rome I Regulation would have if applied in the proceedings governed by the law of the Czech Republic. Finally, the author analyses the impracticability of the proper application of EU law before the arbitral tribunals in the light of the current case of the Court of Justice of the European Union ("CJEU").

2 The Rome Convention, The Rome I Regulation and Arbitration

In its Art. 1 (2)(d), the Rome Convention[1] ("Rome Convention") excluded arbitration agreements (along with agreements on the choice of court) from its scope. In the Giuliano-Lagarde Report[2], *Mario Giuliano* notes that there was a clash between the member states during the drafting of the Rome Convention as to such an exclusion.[3] Some member states, notably the United Kingdom, argued that arbitration agreements should be governed by the Rome Convention as they do not differ from other contractual agreements. These member states were further concerned with the fact that the existing international conventions dealing with the validity of arbitration agreements are inadequate in order to ensure a unification within the European Community ("EC"). On the other hand, certain member states such as Germany or France opposed such a view and refused to include arbitration agreements within the scope of the Rome Convention due to the independency of arbitration agreements and the complexity of arbitration as such.

Giuliano, however, adds that the exclusion does not prevent arbitration clauses being taken into consideration for the purposes of Art. 3 (1) that

1 Convention of 19 June 1980 on the law applicable to contractual obligations.

2 Council Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde. In: Official Journal No C 282/1 of 31 October 1980 ("Giuliano-Lagarde Report").

3 Art. 1 para. 5 Giuliano-Lagarde Report.

deals with the choice of law made by the parties.[4] This might be perceived as a clear signal that the Rome Convention might be applicable to the merits of the dispute. The arbitral tribunals seated within the member states of the EC have indeed tended to consider the Rome Convention as potentially applicable in order to determine the substantive law of the contract subject to international arbitration proceedings.[5]

Although the adoption of conflict rules applicable to arbitration was contemplated by the European Commission[6], the Rome I Regulation, replacing the Rome Convention in 2009, did not in any way revise the relationship between the uniform rules of the EU and international arbitration. The Rome I Regulation identically excludes its applicability on arbitration agreements[7] but does not address its potential applicability on the merits of the dispute before the arbitral tribunal.

It is, however, recognized by certain authors that the Rome I Regulation is applicable to the substance of the dispute in arbitration.[8] *Yüksel*[9] argues that had the Rome I Regulation served to exclude arbitration in its entirety, it would have either not considered arbitration at all or would have phrased the Art. 1 (2)(e) as excluding "arbitration" instead of mere

4 Ibid.

5 Born, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 2627, citing Final Award in ICC Case No. 9771; Third Partial Award in ICC Case No. 7472; Partial Award in ICC Case No. 7319; Award in ICC Case No. 7205; Partial Award in ICC Case No. 7319; Award in ICC Case No. 7205; Partial Award in ICC Case No. 7177; Final Award in ICC Case No. 6379; Final Award in ICC Case No. 6360; Award in ICC Case No. 4996 and Partial Award of 17 May 2002 and Final Award of 5 July 2005 of the Netherlands Arbitration Institute.

6 One of the questions the European Commission asked in the *Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation* of 2003 was whether one should envisage conflict rules applicable to arbitration and choice of forum clauses.

7 Art. 1 para. 2 letter e) Rome I Regulation.

8 See Bělohlávek, A. J. Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration. *Czech Yearbook of International Law*. 2010, Vol. 1, pp. 25–45; Lüttringhaus, J. D. Art. 1 para. 2. In: Ferrari, F. *Rome I Regulation Pocket Commentary*. Munich: Sellier European Law Publishers, 2015, p. 51.

9 Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, p. 155.

"arbitration agreements".[10] Besides, *Yüksel* points out to the analogy between the choice-of-court clauses which are similarly excluded from the Rome I Regulation by virtue of its Art. 1 (2)(e), but do not preclude the Rome I Regulation to be applicable to the substance of the dispute before national courts.[11] *Bělohlávek* is likewise convinced that the Rome I Regulation must be applied by arbitrators within the EU[12] while he justifies the absence of any reference to arbitration in its recitals by the potential criticism from the proponents of the so-called *transnational law*.[13] Furthermore, *Bělohlávek* regards the *West Tankers*[14] case decided by the CJEU in 2009 as a ground for the binding character of the EU law (and regulations of the EU in particular) in arbitration.[15]

On the other hand, the majority of authors do not consider the Rome I Regulation to be applicable to arbitration.[16] *Grimm* notes that implementation of national conflict-of-law rules for arbitration by member states of the EC after the Rome Convention came into force confirms that EC members did not want the Rome Convention (as well as the subsequent

10 *Yüksel* points out that this is the approach of Brussels I Regulation (recast) that contains the term "arbitration" in its exclusion provision of Art. 1 para. 2 letter d).

11 Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, p. 155. See also Plender, R., Wilderspin M. *The European private international law of obligations*. London: Sweet & Maxwell, 2009, p. 110.

12 Bělohlávek, A. J. Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration. *Czech Yearbook of International Law*. 2010, Vol. 1, p. 43.

13 Bělohlávek, A. J. *Rome Convention, Rome I Regulation: commentary*. New York: Juris, 2010, p. 419.

14 Judgment of the Court of Justice (Grand Chamber) of 10 February 2009, Case C-185/07. In this landmark case, the CJEU pronounced the incompatibility of the anti-suit injunctions with the Brussels I bis Regulation.

15 Bělohlávek, A. J. *Rome Convention, Rome I Regulation: commentary*. New York: Juris, 2010, p. 420.

16 See Miguel Asensio, P. A. De. The Rome I and Rome II Regulations in International Commercial Arbitration. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, pp. 177–243; Calvo Caravaca, A. L., Carrascosa González, J. Art. 1. In: Magnus, U., Mankowski, P. *European commentaries on private international law (ECPIL): commentary. Vol. II, Rome I regulation*. Köln: Otto Schmidt, 2017, p. 66; Grimm, A. Applicability of the Rome I and II Regulations to International Arbitration. In: Risse, J., Pickrahn, G. et al. (eds.). *SchiedsVZ*. 2012, Vol. 10, No. 4, pp. 190–191; Bříza, P. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, pp. 692–693.

Rome I Regulation) to apply in arbitration.[17] *Grimm* further uses restriction to party autonomy, inconsistency in the application of the Rome I Regulation and unenforceability of the Rome I Regulation as arguments against the applicability of the Rome I Regulation in arbitration.[18] *Bříza* puts forward that the conflict-of-law rules of the European Union are being adopted on the grounds of the "judicial" cooperation in civil matters[19]. Any conflict-of-law rules designated for arbitral proceedings would, therefore, be beyond the competences of the EU.[20] Furthermore, *Bříza* argues that the Rome I Regulation merely completes the Brussels I Regulation[21] that excludes arbitration in its entirety from its scope.[22] Lastly, *Bříza* points out that the application of the Rome I Regulation would contradict the European Convention on International Commercial Arbitration which allows arbitrators to apply "the law they deem applicable"[23]. It would be thus odd to conclude that the Rome I Regulation is derogating an international treaty without addressing their mutual relationship.[24] Finally, *De Miguel Asensio* rejects the obligatory application of the Rome I Regulation as he considers "special" arbitration rules drafted by the member states superior to the "ordinary" choice-of-law rules that were eventually replaced by the Rome I Regulation.[25]

17 Grimm, A. Applicability of the Rome I and II Regulations to International Arbitration. In: Risse, J., Pickrahn, G. et al. (eds.). *SchiedsVZ*. 2012, Vol. 10, No. 4, p. 191.

18 Ibid., pp. 191–200.

19 Art. 81 para. 1 TFEU stipulates that "*the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States*".

20 Bříza, P. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 692.

21 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

22 Ibid. This presumption is based on Recital 7 of the Regulation that pronounces the consistency of the Regulation's substantive scope with the Brussels I bis Regulation and the Rome II Regulation. It is, however, convincingly rebutted by *Mankowski* who argues that the procedural nature of the Brussels I Regulation and the significance of the New York Convention only in the context of international procedure favour a restrictive interpretation of the exclusion in Art. 1 para. 2 letter e) of the Regulation; See Mankowski, P. Rom I-VO und Schiedsverfahren. *Recht der internationalen Wirtshcaft*. 2011, No. 1, pp. 30–45.

23 Art. VII para. 1 European Convention on International Commercial Arbitration.

24 Bříza, P. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 693.

25 Miguel Asensio, P. A. De. The Rome I and Rome II Regulations in International Commercial Arbitration. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, p. 196.

The author is nevertheless convinced that the Rome I Regulation should be applicable in international commercial arbitration. Whilst arbitral proceedings indeed represent an alternative to litigation before the national courts of the EU to which the EU law applies primarily, it cannot be concluded that by choosing arbitration as a dispute resolution method the parties of such a dispute are free to disregard the EU law. Such a conclusion would be untenable in the context of the primacy of EU law[26] as well as the direct effect[27] of the Rome I Regulation.[28] Moreover, if the arbitrators had not been bound by the EU rules in the same way as the judges of the national courts, arbitration would be misused by entities with a view to avoiding the undesirable provisions of EU law. Admittedly, the wording of the Rome I Regulation is unclear as regards its applicability to arbitration as such. Yet, it is submitted that the arguments favouring the narrowness of the exclusion provision in Art. 1 (2)(e) and allowing its application on the merits of the dispute are – albeit advocated by the minority of authors – much more convincing. The author fully identifies with the opinion that had the lawmakers intended

26 See e. g. the landmark CJEU (former ECJ) cases of *Costa v. E.N.E.L.* ("*The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot, therefore, be inconsistent with that legal system.*") and *Simmenthal* ("*[…] the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but […] also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.*"). See Judgment of the Court of Justice of 15 July 1964, Case C-6/64 and Judgment of the Court of Justice of 9 March 1978 of 9 March 1978, Case C-106/77.

27 The direct effect of EU (former EC) law was firstly recognized within the case-law of the CJEU (former ECJ) in the landmark case of *Van Gend en Loos* in which the CJEU – *inter alia* – stated that "*[…] the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.*" See Judgment of the Court of Justice of 5 February 1963, Case C-26/62.

28 Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, p. 164.

to exclude arbitration in its entirety, they would have used wording identical to the one of Brussels I Regulation or Rome I Regulation. Thus, the exclusion cannot justify the reluctance of the authors to concede the applicability of the Rome I Regulation in arbitration.

It is further submitted that failure to comply with the rules set out within the Rome I Regulation might lead to a refusal of recognition of the arbitral award for the contradiction with the EU public policy on the grounds of Art. V (2)(b) of the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The CJEU (former ECJ) has concluded in *Eco Swiss* that the former Art. 81 of the Treaty establishing the European Economic Community (now Art. 101 of the Treaty on the Functioning of the European Union ("TFEU")) dealing with the prohibition of cartels which might affect trade between member states "*may be regarded as a matter of public policy within the meaning of the New York Convention*"[29]. The author is convinced that the disregard for the choice-of-law rules might lead to a similar conclusion.

3 Practical Impact of the Obligation to Apply the Rome I Regulation in case of Czech Law as *Lex Arbitri*

The purpose of this chapter is to examine the practical consequences of the (non)application of the Rome I Regulation by an example of the Czech law being the *lex arbitri*.[30]

3.1 The Choice of Law by the Parties

In case the Rome I Regulation was not applicable, the provision determining the applicable law for the merits of the international arbitration would

29 Judgment of the Court of Justice of 1 June 1999, Case C-126/97, para. 39.

30 It needs to be noted that the Czech Republic is among the 31 parties of the European Convention on International Commercial Arbitration of 1961. Even if the Rome I Regulation was applicable, it would, under Art. 24 para. 1 of the Rome I Regulation, not prejudice the application of the European Convention on International Commercial Arbitration of 1961 between a party from the Czech Republic and a non-EU party. On the other hand, under Art. 24 para. 2, the Rome I Regulation would apply if the dispute concerned a party from a member state.

be Section 119 of the Act No. 91/2012 Coll., on Private International Law (Czech Republic) ("Czech PILA"). Under this section, parties are free to select any law or body of laws.[31] Furthermore, the Czech PILA allows arbitrators to decide *ex aequo et bono* in case they were expressly authorized to do so. Consequently, parties are not in any way limited as to the applicable law they wish to choose. The only exception is the choice of law in consumer arbitration, which is limited by the consumer protection provisions of the law otherwise applicable and – in certain cases[32] – by the Czech consumer protection law. It must be, however, recalled that B2C disputes are no longer arbitrable in the Czech Republic. This provision is therefore only applicable to the B2C arbitration agreements concluded before 1 December 2016.

Supposing that the Rome I Regulation is applicable, the rules on the choice of law designated by the Rome I Regulation would take precedence over the rules prescribed within the Czech PILA. Thus, Art. 3 of the Rome I Regulation shall be applicable to the merits of the dispute. When compared to the Czech PILA, it is clear that the choice of law is much more limited.

The most significant example of such limitation is the object of a choice of law under the Rome I Regulation which includes state law only.[33] A choice of a non-state body of law (such as *lex mercatoria*) or even deciding *ex aequo et bono* would thus be very problematic if the Rome I Regulation was applicable. In the case of the former, the parties might overcome such an obstacle by incorporating the non-state body into their contract by virtue

31 The formal requirements for the choice-of-law clause might be inferred from the general provision embedded in Section 87 para. 1 of the Czech PILA which requires (i) an express choice, or (ii) a choice that is without any doubt apparent from the contract or the circumstances of the case.

32 The Section 119 refers to the Section 87 para. 2 of the Czech PILA which states that "*if the legal relationships established by a consumer contract are closely associated with the territory of any European Union member state, the consumer may not be relieved of any of the protection which applies in accordance with Czech law, if the proceedings take place in the Czech Republic, even if the law of another state which is not a member of the European Union state has been chosen for the contract or is to be otherwise applied.*".

33 Mankowski, P. Art. 3. In: Magnus, U., Mankowski, P. *European commentaries on private international law (ECPIL): commentary. Vol. II, Rome I regulation.* Köln: Otto Schmidt, 2017, pp. 185–190; In Recital 14, however, the Rome I Regulation creates a possibility of adopting the common rules of substantive contract law which might be subsequently chosen by the parties to be applicable.

of Recital 13 of the Rome I Regulation.[34] Yet, such a choice is downgraded to what a German legal doctrine calls "a material reference" (*materiellrechtliche Verweisung*), i. e. a choice that does not allow the parties to derogate from the mandatory rules of the otherwise applicable law.[35] Moreover, in the case of deciding *ex aequo et bono*, the authors agree on the fact that such a choice could not be acceptable under the Rome I Regulation.[36] In the context of international arbitration, this seems to be a very sensitive issue as the international treaties on arbitration (both commercial and investment) are based on the freedom of choice of applicable law, including the rules not developed by countries.[37] Moreover, such an approach leads to an absurd conclusion that in case of domestic disputes governed by national laws, arbitrators would be free to decide *ex aequo et bono*[38] or *amiable compositeur*[39], but in case of international disputes, such a method would be forbidden.

Furthermore, considerable limitations to the party autonomy might be found both within Art. 3 (3) and Art. 3 (4) of the Rome I Regulation which tend to prevent the parties from the so-called *fraude à la loi*. Under these provisions, a choice of foreign law in a purely domestic dispute does not prevent the domestic overriding mandatory provisions from its application (para. 3) and, in case of intra-EU dispute, the parties are not

34 Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, p. 170; Ragno, F. Art. 3. In: Ferrari, F. *Rome I Regulation Pocket Commentary*. Munich: Sellier European Law Publishers, 2015, pp. 84–88.

35 Mankowski, P. Art. 3. In: Magnus, U., Mankowski, P. *European commentaries on private international law (ECPIL): commentary. Vol. II, Rome I regulation*. Köln: Otto Schmidt, 2017, pp. 189–190; Ragno, F. Art. 3. In: Ferrari, F. *Rome I Regulation Pocket Commentary*. Munich: Sellier European Law Publishers, 2015, p. 85.

36 Hausmann, R. Anwendbares Recht vor deutschen und italienischen Schiedsgerichten – Bindung an die Rom I-Verordnung oder Sonderkollisionsrecht? In: Kronke, H., Thorn, K. *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag*. Bielefeld: Gieseking Verlag, 2011, p. 979; Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, pp. 170–171.

37 See Art. 28 para. 3 UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), Art. VII para. 2 European Convention on International Commercial Arbitration and Art. 42 para. 3 Convention on the settlement of investment disputes between States and nationals of other States (Washington Convention).

38 See under Section 25 para. 3 of the Czech Act on Arbitration Proceedings and the Enforcement of Arbitration Awards.

39 See under Section 1478 of the French Civil Procedure Code.

allowed to evade the mandatory provisions of the EU law even if they chose a non-EU law as applicable to their contract (para. 4). The Czech PILA, on the other hand, does not contain a provision similar to Art. 3 (3) and (4) of the Rome I Regulation. Therefore, if the Rome I Regulation were not applicable in arbitration, the arbitrators would not have to take overriding mandatory provisions of the law otherwise applicable into account.

3.2 Applicable Law in the Absence of Choice

In case the parties do not choose the law applicable to their contract, it would be the task of the arbitrators to determine the law applicable to the merits of the dispute. There are, however, substantial differences between the rules contained within the Czech PILA and the Rome I Regulation.

Whilst the Czech PILA merely uses the "state with which the contract is most closely associated" as a connecting factor[40], the rules prescribed by the Art. 4 of the Rome I Regulation are much more elaborated although they are based on the same principle. It needs to be noted that it is the very complexity of the Art. 4, not the disputed biding force of the EU choice-of-law rules on arbitrators, that the predecessor of the Rome I Regulation, the Rome Convention, has been used frequently by arbitrators in order to determine the applicable law in both the intra-EU disputes and the disputes concerning a non-EU based party.[41] Therefore, the application of the rules prescribed therein by arbitral tribunals is favoured even by the authors rejecting the binding character of the Rome I Regulation.[42]

40 Under Section 119 of the Czech PILA, arbitrators shall apply the conflict-of-laws rules embedded within the Czech PILA if the law had not been chosen by the parties. Thus, in case of contractual disputes, Section 87 para. 1 would be applicable to determine the law applicable to the merits of the case.

41 Miguel Asensio, P. A. De. The Rome I and Rome II Regulations in International Commercial Arbitration. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, pp. 220–221, citing the Interim Award of 10 February 2005 and the Final Award of 17 May 2005 of the Netherlands Arbitration Institute concerning a dispute between parties from the Netherlands and Italy and the Final Award of ICC Case No. 6283 concerning a dispute between parties from Belgium and the United States of America.

42 Ibid., pp. 219–220; Babić, D. Rome I Regulation: binding authority for arbitral tribunals in the European Union? *Journal of Private International Law*. 2017, Vol. 13, No. 1, p. 89.

4 The Proper Application of the Rome I Regulation in the International Commercial Arbitration

It was submitted above that the primacy and the direct effect of EU law compel the arbitrators to apply the Rome I Regulation. Yet, a correct application of EU law might only be achieved under the condition that the applying entity has the possibility to submit a preliminary reference to the CJEU. In *Nordsee,* however, the Luxembourg court denied the status of a "court or tribunal of a member state" to arbitrators and arbitral tribunals.[43] Thus, it would be very odd to conclude that arbitrators are obliged to apply EU law without having the possibility to apply it properly and in the same manner as national courts – with the possibility to request a preliminary ruling.

There are, in fact, three possible ways how to overcome such an obstacle. Two of them were explicitly mentioned by the CJEU in *Nordsee*[44] – the assistance of the national court during the arbitral ongoing arbitral dispute and its role during the review of an arbitration award. Both of them are, however, more or less problematic.

As regards the former solution, the national courts' assistance must be permitted by the *lex arbitri* of the dispute. This is a scarce situation as the assisting role is very limited either under Model Law[45], the European Convention of 1961 and most of the national arbitration laws. Code of Civil Procedure (Germany) (*Zivilprozessordnung*, "ZPO") represents a significant exception as the legislators, when implementing the Model Law in Germany, explicitly extended the scope of the rules dealing with the courts' assistance.[46] Section 1050 of the ZPO does not restrict the support of the court to evidence-taking, but also includes "any other actions reserved for judges that the arbitral tribunal is not authorized to take". Moreover, the ZPO might be applicable even in foreign arbitrations[47], allowing to ensure a proper application of EU law even in case the arbitration is – despite its

43 Judgment of the Court of Justice of 23 March 1982, Case C-102/81, para. 10.
44 Ibid., para. 14.
45 Under Art. 27 Model Law, the tribunal is merely allowed to seek assistance in taking evidence.
46 Basedow, J. EU Law in International Arbitration: Referrals to the European Court of Justice. *Journal of International Arbitration*. 2015, Vol. 32, No. 4, p. 375.
47 Art. 1025 para. 2 ZPO.

applicable law – not seated in the EU. Similarly, under Section 45 of the United Kingdom's Arbitration Act of 1996[48], the court might determine any question of law arising in the course of the proceedings. It has also been submitted that Art. 1044 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) which enables the arbitral tribunal to request information on foreign law might be used by international arbitral tribunals to submit a preliminary reference regarding EU law.[49] As regards the Czech law, Section 20 (2) of the Act on Arbitration Proceedings and the Enforcement of Arbitration Awards ("Czech Arbitration Act") stipulates that the procedural actions which cannot be performed by arbitrators shall be performed by the court. Such a court is obliged to do so unless such an action is prohibited by the law. It is submitted that this provision of the Czech Arbitration Act might be used by arbitrators to recourse to the court in order to seek a request for a preliminary ruling.[50]

That being said, most of the EU countries, including very popular venues for international arbitration such as France or Sweden, do not provide for such a "bridge" between the arbitral tribunals and national courts in their respective arbitration laws. Regrettably, this leads to the conclusion that ensuring the proper application of EU law through court assistance is unsatisfactory unless it is possible in all member states of the EU.

Second, the erroneous application of EU law might eventually lead to the challenge of the award before the national court, which might be entitled or even compelled to request the CJEU for a preliminary ruling.[51] The award might be subsequently set aside for not being compliant with EU law as it happened in the aforementioned *Eco Swiss* case.[52] It is, however, evident

48 The Arbitration Act of 1996 is biding only in England, Wales and Northern Ireland. The Scottish Arbitration Act of 2010, however, advocates a similar approach towards the issue in question in its Rule 41.

49 *Schelkoplyas* argues that since international arbitral tribunals do not have their own domestic law, any law, including EC (now EU) law is foreign to them. See Schelkoplyas, N. *The Application of EC law in Arbitration Proceedings*. Nijmegen: Wolf Legal Publishers, 2003, pp. 404–406.

50 Accord Bělohlávek, A. J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů*. Praha: C. H. Beck, 2012, pp. 786–787.

51 Basedow, J. The Transformation of the European Court of Justice and Arbitration Referrals. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris. 2017, p. 126.

52 Judgment of the Court of Justice of 1 June 1999, Case C-126/97.

that such a process towards the proper application of EU law is very costly (both financially and timewise) and might have severe consequences for the reputation of the arbitrators.[53] Thus, neither this form of an indirect request for preliminary reference is considered suitable by the author.

The third solution, cautiously outlined within scholarly writings[54], is far more radical as it endorses a direct request for preliminary reference by overruling or modifying the *Nordsee* judgment. In its opinion to the *Ascendi* case, advocate general *Szpunar* called upon the CJEU to adapt its interpretation of Art. 267 TFEU with regards to arbitral tribunals as they represent a "post-modern approach" to justice.[55] Likewise, *Basedow* points out that due to the major changes in the commercial arbitration in the EU, the CJEU should reconsider the criteria for the "tribunal"[56] within the meaning of the Art. 267 and allow arbitral tribunals to request a preliminary ruling.[57]

The author unequivocally agrees with the third solution as the current attitude of the CJEU seems to be very unbalanced. On the one hand, the CJEU requires the arbitrators to apply EU law and encourages the courts to set aside arbitral awards that are contrary to the overriding mandatory provisions of EU law. On the other hand, it does not allow the arbitrators to directly ascertain the proper application of the law they are required to apply. And while almost forty years have passed since the *Nordsee* judgment, the Luxembourg court is still reluctant to reflect the expansion of alternative dispute resolution in its case law. This "one-sided" approach is incorrect

53 Basedow, J. EU Law in International Arbitration: Referrals to the European Court of Justice. *Journal of International Arbitration*. 2015, Vol. 32, No. 4, p. 126.

54 The most prominent advocates of this approach are *Jürgen Basedow* and *Maciej Szpunar*. See Ibid; See also Szpunar, M. Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, pp. 85–123.

55 Opinion of Advocate General Szpunar of 8 April 2014, Case C-377/13, para. 50.

56 The referring body must (i) be established by law, (ii) be permanent, (iii) have a compulsory jurisdiction, (iv) guarantee an adversary (*inter partes*) procedure, (v) apply rules of law, (vi) be independent. See Judgment of the Court of Justice of 17 September 1997, Case C-54/96, para. 23 and Judgment of the Court of Justice of 30 June 1966, Case C-61/65.

57 *Basedow* quotes an extensive increase in the number of arbitration proceedings, a favourable approach of national legislatures towards commercial arbitration and the evolution of EU law as main arguments for the reconsideration. See Basedow, J. EU Law in International Arbitration: Referrals to the European Court of Justice. *Journal of International Arbitration*. 2015, Vol. 32, No. 4, pp. 381–385.

as the mandatory application of EU law must inevitably go hand in hand with its proper application and interpretation which might only be achieved by overruling *Nordsee* and enabling the arbitral tribunals to raise a request a preliminary ruling under Art. 267 TFEU.

On top of that, this solution would further chase away the fear that the intra-EU commercial arbitrations might be threatened by the recent *Achmea* judgment in which the CJEU held that arbitration agreements within the intra-EU investment treaties have an adverse effect on the autonomy of EU law[58]. Although the CJEU explicitly differentiated commercial arbitration from the investor-state arbitration, one might potentially extend the CJEU's conclusion that the limited scope of judicial review in investment arbitration prevents the dispute to be resolved in a manner that ensures the full effectiveness of EU law[59] to the (similarly limited) review of commercial arbitration awards. Giving the arbitral tribunals the possibility to request a preliminary reference would indeed be a strong argument in favour of the conformity of intra-EU arbitrations with the autonomy of EU law.

5 Conclusion

There is no consensus among scholars as to the application of the Rome I Regulation in proceedings before international arbitral tribunals. While most of the scholars reject the view that the application ought to be applied in the same manner as before national courts, the author is convinced that the opposite view is correct. This is mainly due to the primacy of EU law which cannot be rebutted by the specificity of arbitral proceedings. And however peripheral the question of the (non)application of the Rome I Regulation might seem, it is, in fact, a crucial one. If applicable, the Rome I Regulation would have a substantial impact on the choice of applicable law as well as on the determination of applicable law in case of no choice thereof. Yet, the proper application of the Rome I Regulation cannot be achieved without reconsidering the current case law of the CJEU

58 Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16, para. 55.

59 Ibid., para. 52-56.

concerning the interpretation of Art. 267 TFEU, which prevents the arbitral tribunals to submit a request for a preliminary ruling.

Literature

Babić, D. Rome I Regulation: binding authority for arbitral tribunals in the European Union? *Journal of Private International Law*. 2017, Vol. 13, No. 1, pp. 71–90. https://doi.org/10.1080/17441048.2017.1288471

Basedow, J. EU Law in International Arbitration: Referrals to the European Court of Justice. *Journal of International Arbitration*. 2015, Vol. 32, No. 4, pp. 367–386.

Basedow, J. The Transformation of the European Court of Justice and Arbitration Referrals. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris. 2017, pp. 125–138.

Bělohlávek, A. J. Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration. *Czech Yearbook of International Law*. 2010, Vol. 1, pp. 25–45.

Bělohlávek, A. J. *Rome Convention, Rome I Regulation: commentary*. New York: Juris, 2010, 2908 p.

Bělohlávek, A. J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů*. Praha: C. H. Beck, 2012, 1776 p.

Born, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, 4408 p.

Bříza, P. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, 768 p.

Calvo Caravaca, A. L., Carrascosa González, J. Art. 1. In: Magnus, U., Mankowski, P. *European commentaries on private international law (ECPIL): commentary. Vol. II, Rome I regulation*. Köln: Otto Schmidt, 2017, pp. 52–87.

Grimm, A. Applicability of the Rome I and II Regulations to International Arbitration. In: Risse, J., Pickrahn, G. et al. (eds.). *SchiedsVZ*. 2012, Vol. 10, No. 4, pp. 189–200.

Hausmann, R. Anwendbares Recht vor deutschen und italienischen Schiedsgerichten – Bindung an die Rom I-Verordnung oder Sonderkollisionsrecht? In: Kronke, H., Thorn, K. *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag*. Bielefeld: Gieseking Verlag, 2011, pp. 971–986.

Lüttringhaus, J. D. Art. 1 para. 2. In: Ferrari, F. *Rome I Regulation Pocket Commentary*. Munich: Sellier European Law Publishers, 2015, pp. 23–70.

Mankowski, P. Rom I-VO und Schiedsverfahren. *Recht der internationalen Wirtshcaft*. 2011, No. 1, pp. 30–44.

Miguel Asensio, P. A. De. The Rome I and Rome II Regulations in International Commercial Arbitration. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, pp. 177–243.

Plender, R., Wilderspin M. *The European private international law of obligations*. London: Sweet & Maxwell, 2009, 1158 p.

Ragno, F. Art. 3. In: Ferrari, F. *Rome I Regulation Pocket Commentary*. Munich: Sellier European Law Publishers, 2015, pp. 73–118.

Schelkoplyas, N. *The Application of EC law in Arbitration Proceedings*. Nijmegen: Wolf Legal Publishers, 2003, 488 p.

Szpunar, M. Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, pp. 85–123.

Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, pp. 149–178. https://doi.org/10.5235/174410411795375588