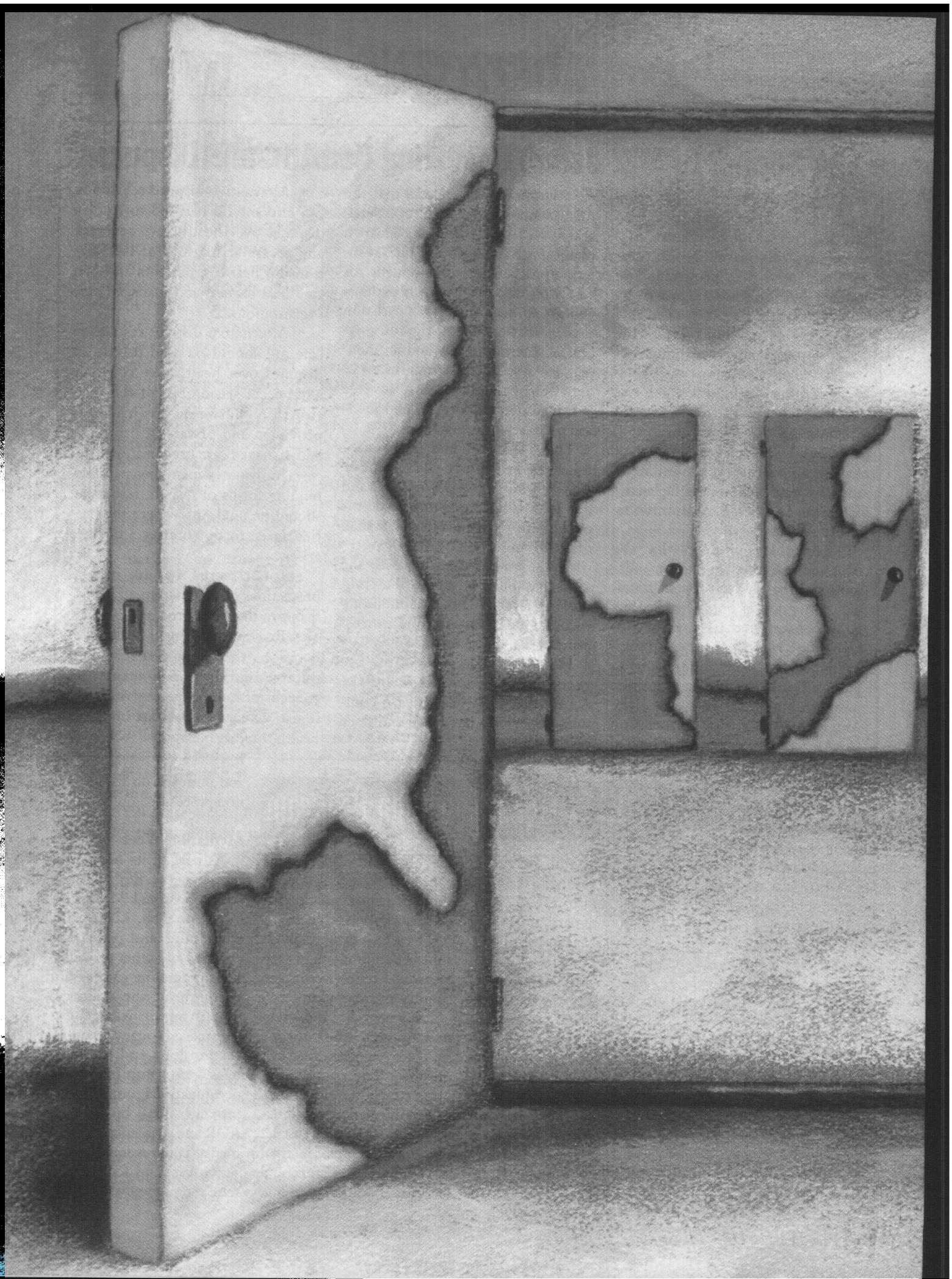

The Treatment of Arbitration Under EU Law

By Georgios I. Zekos

Arbitration is now a common process for resolving international commercial disputes. The author examines the extent to which arbitration is regarded and treated by European Union law and the European Court of Justice as an independent and alternative method to traditional litigation for resolving such disputes.

Arbitration is the process by which a difference among parties as to their mutual legal rights is referred and determined with binding effect by the application of law by an arbitral tribunal instead of a court. Arbitration is now a common method for resolving commercial disputes.[1] However, in earlier times,

arbitration as a dispute-resolving mechanism was viewed by the courts with suspicion because it was regarded as a competitor of judicial trials. This article will investigate whether arbitration, compared with litigation, is regarded and treated by EU law and the European Court of Justice as an equally independent and fully alternative method for resolving commercial disputes.

Fundamental Features of Arbitration

Arbitrations are of two types: *ad hoc* and administered. Administered arbitrations are those governed by rules of an arbitration society or association; *ad hoc* arbitrations are not regulated. The reference to arbitration may arise from the agreement of the parties or from statute.

A party entering into a contract has a free choice between arbitration and judicial litigation. In general, the right to arbitrate disputes has been codified in relevant Acts within the national legal framework of the member states of the European Union. Although arbitration is still consensual and not mandatory, compulsory arbitrations do exist.

In earlier times, arbitration as a dispute-resolving mechanism was viewed by the courts with suspicion because it was regarded as a competitor of judicial trials.

The majority of arbitrations are conducted without the necessity to resort to the courts. Arbitration has the advantages of speed, simplicity, and economy. Judicial involvement in the process should be kept to a minimum to avoid undermining those goals. In fact, in the resolution of disputes, judicial and arbitration proceedings coexist, complement each other, and compete with each other. Arbitration should reduce court dockets; on the other hand, courts enforce every arbitration award and orders issued by an arbitrator.

Arbitration statutes limit the right of judicial review of arbitration awards as much as possible. Limitation of judicial review is an efficient way of handling disputes with a minimum of procedure and a finality of result in a minimal amount of time. In setting aside arbitral proceedings, the function of the national court is restricted to the control with respect to fundamental principles of law and compliance with the *ordre public international.*

Finally, an important feature of arbitration is the *res judicata*, the binding effect of arbitral decisions that lead to a total or partial settlement of the dispute. The procedure for the setting aside of an award is an exception to the general rule of the finality of arbitral awards.

Arbitration and Preliminary Ruling of the ECJ

The specific tasks to be performed by the EU court are described in the treaties. Its jurisdiction is set out therein, the main provisions being Articles 226-243 of the European Community Treaty (formerly 169-186). Article 234 EC (formerly Article 177), which contains the preliminary ruling procedure, is one of the most interesting provisions of the EC Treaty. Article 177 has been of such significance to the development of EU law because it has been the vehicle through which concepts, such as direct effect and supremacy, have been shaped. Judgements of the court given in response to the request for a ruling from one member state are held to have either a *de facto* or *de jure* impact on all other national courts. It is a matter for the ECJ to decide whether a body is a court or tribunal for the purposes of Article 234.

The rapid development of arbitration as an alternative method of dispute resolution in international trade, including transactions involving EU trade, has increased the significance of questions relating to the application, enforcement, and interpretation of EU law, both in arbitration proceedings and in related court proceedings, aimed at setting aside or the recognition and enforcement of arbitration awards.

The Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of Sept. 27, 1968, which is founded on Article 220, provides that it should not apply to arbitration. On the other hand, the June 10, 1958, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable to member states of the EU. It is to be observed that arbitral tribunals do not fall within the terms of the EU Commission's Notice on Cooperation with National Courts.[2] The fact that arbitration is not regulated by EU measures does not mean that EU law is without significance in the context of arbitration. On the one hand, national courts of the member states in principle must apply EU law if it is relevant to the dispute before them. On the other hand, the application of EU law to the arbitral

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process is pretty uncertain, dependent upon the choice of the arbitrator.

Article 164 EC might be said to impose upon the court an overriding duty to ensure that the law is observed. The ECJ has generally given a broad interpretation to provisions of European law relating to its own powers.[3] Where the validity of a Community Act is challenged before a national court, such a court should ask the ECJ for a preliminary ruling before declaring the Act invalid. The national courts are not precluded from taking the step of preliminary ruling merely because the point of European law at issue has already been dealt with by the Court of Justice.[4] A national court may even make more than one reference in the same proceedings.[5] The ECJ does not have jurisdiction to provide the national courts with the criteria of interpretation relating to EU law which may enable them to assess the compatibility of existing or proposed national rules with EU law. Contracts between private parties vesting jurisdiction in the ECJ fall outside Article 177.[6] The ECJ has made it clear that parties other than those mentioned in Article 20 of the Statute of the Court have no rights to intervene in Article 234 proceedings, unless they had been granted leave to intervene in the national proceedings.[7]

Arbitration and EU Law

There are several situations in which EU law is relevant in arbitration proceedings. The arbitrator normally has to apply EU law if this is relevant to the issue before him. The arbitrator is in the same position as a judge. If the arbitrator concludes that the issue before him is governed by the national law of a member state and it raises a question of EU law, he has to consider this law and decide the point in issue. On the other hand, the arbitrator has the freedom to give freely his interpretation without taking into account any previous concept of the issue established by the practice of the courts. In general, the misinterpretation of the law is not a ground for the review of the award by the courts. Only the right statement of the law followed by its disregard in the arbitrator's decision is a ground for the review of an award.

Is the arbitrator treated as a judge by EU law required to apply EU law? As mentioned above, any national court, in a case within its jurisdiction, must apply EU law in its entirety. Even if a court gives its judgement *ex bono et aequo*, it follows from the principles of primacy of EU law and of its uniform application, in conjunction with Article 5 EC, that it must observe EU law. The arbitrator has to decide a point of EU law if relevant to his decision.[8] A judge will deal with issues which the parties place before him, but he can raise an issue on his own initiative. An arbitrator must deal with the matters which the parties' agreement mentions. Should the arbitrator raise an EU law point *ex officio*? Under the normal concept of arbitrability, the arbitrator only has to deal with the questions raised by the parties' agreement. If the parties do not claim a right and do not rely on EU law, the arbitrator need not raise the point *ex officio* and should not base his award on EU law.

The significance and the advantage of an arbitration is based on avoiding the strictly judicial approach concerning the proceedings. However, if the agreement is void but this invalidity is ignored by the parties in the procedure before the arbitrator, the arbitrator should take notice of this point *ex officio* and should not adjudicate on a contract which is null. Arbitration as an equal and alternative method of dispute settlement should follow the fundamental principles of law which have been established by the courts. Arbitration tribunals cannot establish contradictory fundamental principles of law which will be applicable to arbitration, otherwise confusion as to the notion of justice will arise. The arbitrator is not obliged to follow a court's procedure because arbitration means informality and not following strict rules of procedure. Besides, arbitration has been developed in the member states of the European Union in such a way that the courts can intervene and review the arbitrability of the dispute, which means they can also examine the validity of the parties' agreement to arbitrate. The merits of the agreement are a matter for the arbitrator to decide upon. For example, an arbitrator should refuse to adjudicate on the contract because, by virtue of Article 85(2), the contract is automatically void. To date, there are no court decisions on the obligation of arbitrators to apply EU law either when asked to do so or *sua sponte*. Furthermore, arbitral tribunals have not dealt with this matter because arbitration is not autonomous as an alternative and independent method of dispute settlement, but its legality is based upon the ruling of a court.

The fact that arbitration is not regulated by EU measures does not mean that EU law is without significance in the context of arbitration.

It is questionable if arbitral tribunals can serve as a means to evade the application of certain EU laws such as competition rules. For example, the parties to an arbitration agreement would agree

to exclude issues of EU law from their dispute so that arbitrators would not rule on these matters. The enforcement of arbitral awards would be contrary to public policy since there is a breach of a directly applicable rule. Although arbitrators are required to decide in accordance with the applicable law of a member state where provisions of EU law are directly applicable and form part of the national law, a misinterpretation of the law does not mean that the award can be set aside. On the other hand, rules which are not directly applicable can be easily excluded by the parties' agreement without any consequence to the validity of the award since it is not contrary to the public policy of the member state where the award is issued. If an arbitration tribunal has failed to consider relevant matters, including issues of EU law brought to the arbitrators' attention, it is likely that the award may be set aside for failing to deal with all the issues referred to it. To that extent, some regulations specify that the application of their provisions will be withdrawn if there is a violation resulting from an arbitral award or require arbitral awards to be notified to the commission.[9]

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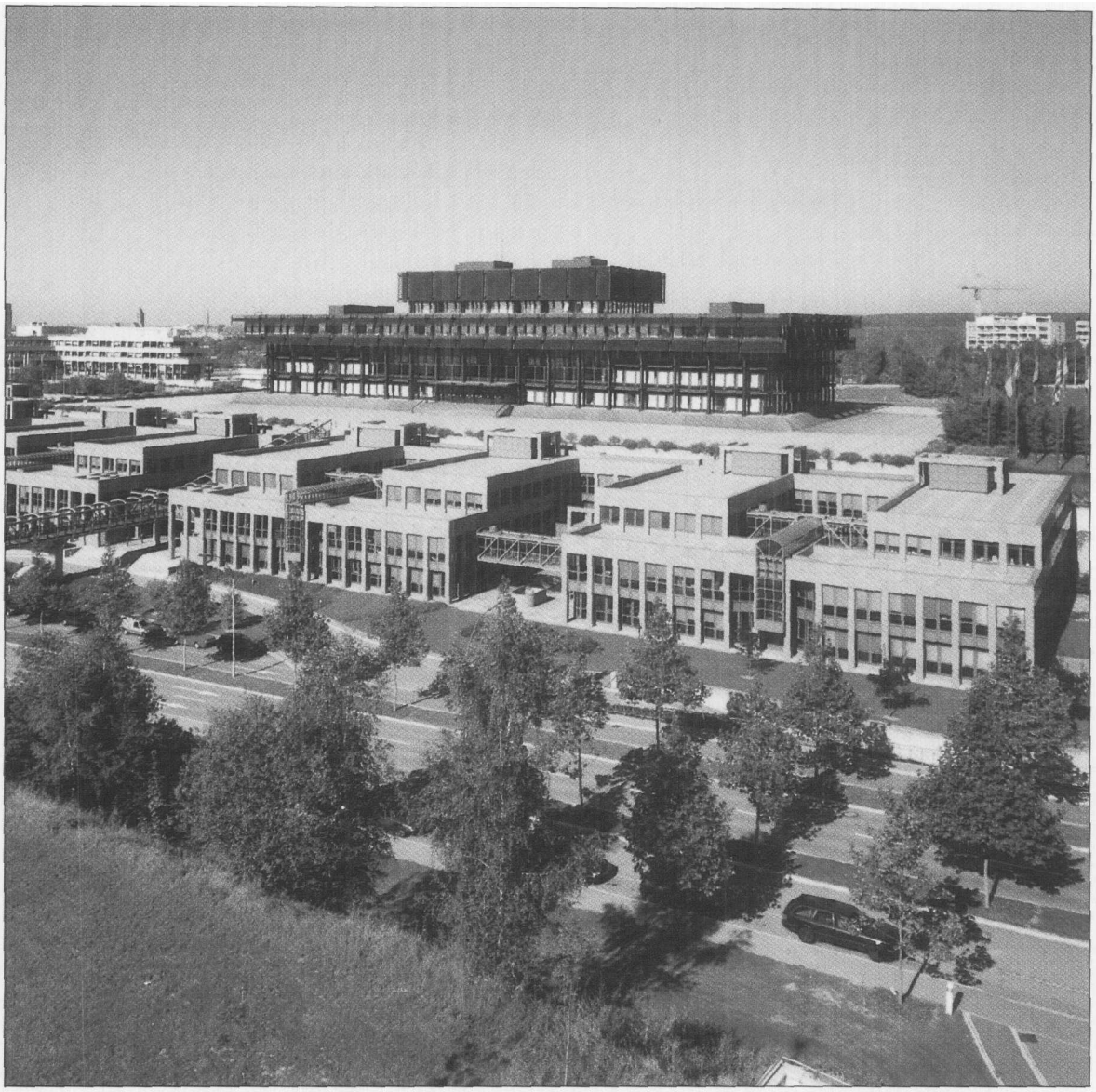
Are arbitrators entitled to ask the ECJ for preliminary rulings under article 177 EC? The commission does not oppose the arbitrability of disputes involving EU law. Besides, arbitrators are not institutions of the member state. Article 177 refers to jurisdiction which would suggest that it envisages national jurisdiction in the proper sense and does not take arbitration proceedings into consideration. A tribunal within the meaning of Article 177 must be established by law, be independent, have a permanent existence, exercise binding jurisdiction, be bound by rules of adversary procedure, and apply the rule of law.

The ECJ has developed EU criteria which it applies when examining whether or not a tribunal is a jurisdiction within the meaning of Article 177.[10] In defining the community notion of jurisdiction, the ECJ[11] found that the following elements were decisive: the statutory origin of the tribunal; its composition; its permanent nature; the adversary nature of the tribunal's rules of procedure similar in nature to those governing the courts; its compulsory jurisdiction; and the obligation of the tribunal to decide disputes on the basis of law and not of equity. Hence, the degree of governmental cooperation with, and supervision of, the tribunal is ultimately decisive in recognizing it as a tribunal under Article 177. Therefore, in *Nordee*,[12] the ECJ denied the legality of the tribunal on two grounds: first, the arbitration was not mandatory as the parties were free to have their dispute settled either by a court of law or by arbitration; and second, the public authorities were in no way, either directly of indirectly, involved in or associated with the arbitration proceedings. Thus, parties to a contract are not free to create exceptions to it. The classification of bodies which belong to the category of courts and tribunals encompassed by Article 177 depends on institutional factors. The principle of judicial independence has to be taken into consideration as well.[13] There are other questions. Exactly how much public involvement is required before the arbitrator in question can be regarded as a valid court or tribunal? In cases where even private arbitrations require some blessing on the part of the courts, will this suffice to confer judicial status on them for the purpose of Article 177?

The court attempted to ensure the application of the reference procedure under Article 177 through the intervention of the courts in arbitral process. It could be said that while national laws try to minimize the intervention of courts in arbitral proceedings, the ECJ further reinforces their intervention. This action does not establish arbitration as an independent alternative to litigation, but it widens the need for the court's assistance. A national court deciding an appeal on an arbitration award must be regarded as a court or tribunal within the meaning of Article 177. Thus, the control of arbitration founded on an agreement of the parties had to be left to the national courts and these courts could make a reference on an EU law question that had arisen in the arbitration to the ECJ. The control of the consensual arbitrator in matters of reference under Article 177 is the concern of national courts and not that of the ECJ. As a last resort, a reference may be ordered by the national court which is asked for leave to order the execution of the award. Hence, in questions of EU law raised in an arbitration resorted to by agreement, the courts may be called upon to interpret the applicable law or to review an award. As mentioned above, a reference to the ECJ on the ground that enforcement of the award may contravene the



The ECJ is vested with the authority to act as an arbitral tribunal, but at the same time, it does not regard consensual arbitration as an equal to litigation. Left: The buildings of the European Court of Justice located in Luxembourg.

EU law, such as the refusal of enforcement on grounds of public policy, may be made by the enforcing court *ex officio*. Although, in general, mere errors of law would not be a sufficient ground for a court to quash an award or refuse its enforcement. Furthermore, a preliminary ruling of the ECJ, requested by a court of law, would be of little help in an arbitration proceeding which had meanwhile been terminated and in which an award had already been made.[14]

The involvement of public authorities in creating an arbitration tribunal as well as its mandatory competence appear to be the most essential requirements for the establishment of a court or a tribunal within the meaning of Article 177. The ECJ has not taken into account the modern development of arbitration as an alternative to litigation. It has not considered the need for a uniform approach and interpretation of the application of EU law by arbitration tribunals and the need for equal consideration of these two means of dispute settlement. The exercise of this right by arbitral tribunals will promote the applicability of EU law and prevent it from being disregarded when taking into account the freedom of arbitrators to deal with the interpretation of rules and errors of law as a ground for review of an award. Arbitration is an important means of resolving conflicts in which issues of EU law can be relevant. The court demands the respect of the EU law by tribunals and courts but at the same time precludes arbitral tribunals from requesting a preliminary ruling which could ensure its correct and full respect of the EU law in a dispute.

The ECJ as an Arbitral Tribunal

Article 238 (formerly 181) vests jurisdiction in the ECJ to adjudicate an arbitration clause in a contract concluded by, or on behalf of, the EU whether the contract be governed by public or private law. To that extent, it is a consensual arbitration as well. Hence, the ECJ agrees to act as an arbitral tribunal, but at the same time it

refuses to regard consensual arbitration as an equal to litigation as a means of dispute settlement.

Contracts of public law are those specifically marked by reason of the governmental character of at least one of the parties, and of their purposes. Under such contracts, the applicable law will be determined by the contract, even though jurisdiction will be reserved to the court and in such cases the court will be specifically concerned with national rules.[15] The arbitration clause itself is governed by EU law. The employment of the term arbitration clause is not to be interpreted as rendering these submissions similar to submissions under national arbitration acts. The proceedings are governed by the normal rules of procedure before the court. A submission leads to a binding judgement enforceable under Articles 187 and 192. The jurisdiction of the ECJ in actions brought pursuant to Article 181 has been transferred to the Court of First Instance which applies to contracts concluded after Aug. 1, 1993. This jurisdiction under article 181 can only be exercised by agreement of the parties, in the same manner as an arbitrator's jurisdiction is derived from the arbitration agreement of the parties. An arbitration clause may be found in various kinds of contracts such as a contract between a community institution and a group of insurance companies.[16] Nevertheless, it is possible for disputes arising from certain employment relationships to come before the ECJ under an arbitration clause.[17] On the law governing a contract entered into by the community, it would find itself sued in a national court for breach of contract. This is why the EU encourages conflicts under contracts it signs or that are signed on its behalf to be resolved by an arbitration under the ECJ.

The arbitrator normally has to apply EU law if this is relevant to the issue before him.

Conclusion

The ECJ does not regard consensual arbitration as an alternative and independent method of dispute resolution despite the fact that consensual arbitration has been accepted as a method of resolution for disputes arising from contracts involving the European Union itself.

Arbitrators should apply EU law if it is relevant to the dispute. A uniformity in the application of the principles of EU law by arbitration will strengthen the need for full equality and independence of the arbitral tribunal and therefore avoid the complexity of the strict rules of litigation.

The ECJ should accept all arbitral tribunals as courts and tribunals under Article 177 and allow arbitrators to address questions of interpretation of EU law to the court for preliminary ruling. In fact, the principles of effective administration of justice and particularly the principle of party autonomy and the obligation to keep to the subject matter of the dispute are equally applicable to arbitration.

It is clear that the judgement of the ECJ in *Eco Swiss v. Benetton*[18] will clarify the duties of the arbitrators to apply competition rules, both when asked to do so and *ex officio*. It could be argued that the position of the court regarding the duties of arbitrators and the applicability of competition law, will in this case be applicable in an analogous way to any matter of EU law that the arbitrators can decide by themselves if the subject in question is clear or address questions of interpretation to the ECJ. ■

ENDNOTES

[1] See G. Zikos "Court's Intervention in Commercial and Maritime Arbitration under U.S. Law," *Journal of International Arbitration* 99, (1997). G. Zekos "The Role of Courts in Commercial and Maritime Arbitration under English Law," *Journal of International Arbitration* 51 (1998).

[2] (1993) OJ C 39/6.

[3] Case 22/70, *Commission v. Council*, ECR 263(1971), case 294/83, *Les Verts v. Parliament*, ECR 1339 (1986).

[4] Case 283/81 *CLIFIT v. Ministry of Health*, ERCR 3415 (1982).

[5] Case C-213/89 *Factortame*, ECR 12433 (1990), case 104/79, *Foglia v. Novello*, ECR 745 (1980).

[6] *Matheus v. Doego Fruchtimport*, ECR 2203 (1978).

[7] Case C-181/95, *Biogen Inc. v. Smithbline Beecham Biologicals SA*, 1 CMLR 704 (1997).

[8] *Bulk Oil Ltd. v. Sun International Ltd.*, 1 WLR 147 (1984).

[9] See Article 7, Regulation 2349/84. Article 5, Regulation 4056/86 for Maritime Transport, OJ L 378/4 (1986).

[10] Case 61/65, *Vassen v. Beambtenfonds Voor Het Mijnbedris*, ECR 261 (1966), case 99/80, *Galinsky v. Insurance Officer*, ECR 941 (1981), case 109/88 *Danfoss*, ECR 3199 (1989).

[11] Case 246/80, *Broekmewlen v. Huisarts Registrate Commissie*, ECR 2311 (1981).

[12] Case 102/81, *Nordee Deutsche v. rederei Mond*, ECR 1095 (1982).

[13] Case 24/92 *Corbiau*, ECR I 1278 (1993), case C-393/92, *Municipality of Almedlo v. Energiebedrijf NV*, ECR I 1477 (1994), case 14/86, *Pretose Di Salo*, ECR 2545 (1987), case 338/85, *Pardini*, ECR 2041 (1988).

[14] The requirement of the third paragraph of Article 177 will be satisfied provided that the court has given a ruling at some stage in the proceedings before the national court takes a final decision. See case C-337/95, *Parfums Cristian Dior v. Evora* BV, ECR I 6013 (1997).

[15] Case 23/76, *Pellegrinin v. Commission* (1976) ECR 1807.

[16] Case 23/81, *EC Commission v. SA Royale Belge*, ECR 2685 (1983).

[17] Case 109/81, *Pace Nee Porta v. EC Commission*, ECR 2469 (1982).

[18] Case C-126/97, *Eco Swiss China Ltd. v. Benetton International NV*, OJ C 166/9 (1997).