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The State of Research on Arbitration and EU Law: Quo Vadis European Arbitration?

Barbara Alicja Warwas

European University Institute
Department of Law

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Abstract

The goal of this article is to provide a systematic literature review of studies on arbitration in recent decades. The major focus is on emerging developments in arbitration and EU law. The review will thus map the research on these developments and summarize its major findings to provide a better understanding of new trends in the scholarly literature on arbitration and EU law, and to identify research gaps to be addressed in the future. Just as almost 20 years ago Pieter Sanders addressed the then emerging problems of arbitration practice and posed a question: "Quo Vadis Arbitration?" this paper asks the question "Quo Vadis European Arbitration"? Hence, it aims at depicting the current and future direction of EU law and arbitration by proposing a common platform for discussion on these two distinct yet increasingly overlapping fields.

Keywords

Arbitration, EU law, arbitration scholarship, empirical research, FIDIpro project

Table of contents

ABSTRACT 6

KEYWORDS 6

TABLE OF CONTENTS 7

INTRODUCTION 1

Arbitration and EU law: preliminary remarks 2

Methodology 3

Planning 3

Conducting the review 5

Reporting and dissemination 5

Definitions and categories 6

LITERATURE ON LEGAL ISSUES REGARDING ARBITRATION AND EU LAW 9

Procedural aspects 9

Arbitration and EU law: EU competences v. harmonization 10

Arbitration and EU procedural law: Brussels regime, anti-suit injunctions, enforcement of arbitral awards and judgments 14

Arbitral tribunals, CJEU, and preliminary rulings 17

EU Common Commercial Policy and investor-State arbitration 21

The increasing use of arbitration in EU sectors 28

Consumer arbitration/ADR 28

Arbitration and EU competition law 37

Arbitration and tax law 41

Arbitration/ADR in other (EU) sectors 43

Arbitration and WTO law 46

LITERATURE ON ARBITRATION PRACTICE 47

Transparency in arbitration 47

Accountability (liability) of private arbitration actors 53

Applicable law 56

EMPIRICAL STUDIES ON ARBITRATION 57

Most prevalent topics: setting the scene 58

Investor-State arbitration and arbitrator bias 61

Insights into decision making by arbitrators (including behavioural science research methods) 68

Arbitration of publicly oriented disputes 72

Arbitration and transparency 74

Summaries of selected ground-breaking empirical studies on arbitration 75

Yves Dezalay and Bryant G. Garth, “Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order” (1996) 75

Studies at Queen Mary School of International Arbitration (2006 – 2016) 75

Joshua Karton, "The Culture of International Arbitration and The Evolution of Contract Law" (2013) 79
Tony Cole, et al., Legal Instruments and Practice of Arbitration in the EU (2015) 80

FINDINGS 80
General findings 80
Findings in the context of the FIDIpro project 82

REFERENCES 85

APPENDIX: SELECTED LITERATURE 87

Introduction[1]

Academic studies of arbitration have proliferated in recent decades. This is partially the function of the professionalization of international arbitration practice. Such professionalization entailed the retirement or semi-retirement of the "grand old man" of arbitration and the development of new practitioners and arbitrators that left the door of arbitration practice ajar when their predecessors passed them the baton in the arbitration race. These studies are driven by varied objectives (e.g. purely academic, policy making, arbitration practice-oriented), imply different methodological techniques (e.g. doctrinal, empirical), and focus on a variety of topics, including but not limited to, the legal, political, and psychological issues that arbitration involves. Notably, this abundant arbitration scholarship follows two streams.

On the one hand, one can come across research largely revolving around the practicalities of arbitration whose main objective is to reveal how arbitration works in practice. Here, an impressive amount of empirical studies come to the fore. These studies provide insights (often informed by qualitative and/or quantitative analyses of data provided by arbitration practitioners) into legal and extra-legal factors that influence arbitrators' decision making, as well as into procedural and substantive developments in arbitration. This type of literature is written mostly by members of the arbitration community (who are often academics) but there are also an increasing amount of interdisciplinary studies on arbitration that test the ways in which arbitrators act in the course of arbitration, especially using methods of behavioural studies such as psychology.

On the other hand, one can find literature on the interplay between arbitration and law. This type of literature is often more critical than studies on the practice of arbitration. It addresses the deficiencies of private arbitration against the background of orthodox questions of the legitimacy of international law, powers of States to provide access to justice for citizens, or—most recently—of the legality of arbitration in its different variants *vis-à-vis* European Union (EU) law. Within the latter aspect, both the most recent and the most passionate contributions focus on the inclusion of Investor State Dispute Settlement (ISDS) mechanisms in EU trade and investment agreements with third parties and recent proposals by the European Commission for creation of an Investment Court System together with the implications for the regulatory and judicial competences of the EU. There are also increasing contributions that point to the growing promotion of arbitration or alternative dispute resolution (ADR) in other fields of EU law, in particular consumer arbitration (or ADR) and arbitration in EU sectoral disputes involving competition law, tax law, energy, telecommunications, and other publicly relevant types of dispute.

The goal of this article is to provide a systematic literature review of studies on arbitration in recent decades. The major focus is on emerging developments in arbitration and EU law. The review will thus map the research on these developments and summarize its major findings to provide a better understanding of new trends in the scholarly literature on arbitration and EU law, and to identify research gaps to be addressed in the future. Just as almost 20 years ago Pieter Sanders addressed the then emerging problems of arbitration practice and posed a question: "Quo Vadis Arbitration?" this paper asks the question "Quo Vadis European Arbitration"? Hence, it aims at depicting the current and future direction of EU law and arbitration by proposing a common platform for discussion on these two distinct yet increasingly overlapping fields.

[1] This paper was written within the framework of the Finland Distinguished Professor Programme (FIDIpro) project on *External Dimension of European Private Law,* sponsored by the Finnish Academy of Science and led by Professors Hans-W. Micklitz (European University Institute) and Pia Letto-Vanamo (University of Helsinki). For a description of the project see the website of the Institute of International and Economic Law of the University of Helsinki at: http://www.helsinki.fi/katti/english/FiDiPro_project.htm (accessed 25 November 2016).

Arbitration and EU law: preliminary remarks

Historically, arbitration and EU law were two mutually exclusive regimes. Arbitration was already excluded from the scope of application of the 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters and the 2001 Brussels Regulation, arbitral tribunals were categorically not permitted to seek preliminary rulings from the Court of Justice of the EU (CJEU), and businesses could not invoke arbitration provisions in their contracts with consumers. Most recently, this status quo has changed. The revisions of the 2001 Brussels Regulation entailed a discussion whether arbitration should remain outside the scope of the European Justice Area. Notably, it was the European Commission that proposed the integration of arbitration with the Brussels regime.[2] Although this proposal was eventually not implemented, it revived discussion on the desirable spot for arbitration within EU procedural law terrain.

Another change concerned the new EU exclusive competence in EU common commercial policy that—since the coming into force of the Lisbon Treaty—entails a new discussion on the role of the EU, in place of Member States, in concluding EU international trade and investment agreements and in negotiating ISDS mechanisms to be contained therein with non-EU countries as potential parties to such agreements. Moreover, the new EU competence in the field of foreign direct investment has also prompted a discussion on the future of around 190 bilateral investment treaties entered into by Member States prior to those changes (so-called intra-EU BITs) that the Commission now intends to terminate.

To add to this debate on the changing interplay between EU law and arbitration, the CJEU, by advancing the concept of EU public policy in *Eco Swiss,* opened the door for the potential annulment of arbitral awards by national courts based on the ground that an arbitral award is contrary to EU public policy including EU competition policy.[3] The debate on the role of EU public policy in arbitration, when confronted with recent discussion on the potential inclusion of ISDS in EU investment and trade agreements, also entails further proposals to "relax" EU procedural law in the field of preliminary reference procedure under Art. 267 of the Treaty of the Functioning of the EU (TFEU) to allow arbitral tribunals to seek preliminary rulings before the CJEU.[4]

Finally, the European Commission has recently either encouraged or directly imposed arbitration (and so-called "out-of-court dispute resolution") in a number of disputes concerning EU law. These entail the promotion of **consumer ADR** and online dispute resolution (**ODR**) under Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes. Additionally, arbitration has been promoted in a variety of sector-specific directives including, inter alia: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the **E-Commerce Directive**), Framework Directive 2002/21/EC on a common regulatory framework for **electronic communications networks and services** with further amendments, Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on **credit agreements for consumers**, Directive 2009/79/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the Internal Market in **electricity**, and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the Internal Market in **natural gas**. This list of EU directives that have increasingly adopted provisions on arbitration/ADR is not exhaustive. Nevertheless, it demonstrates the shifting approach toward arbitration by EU officials. The shifts from hostility toward promotion of ADR in different business to business (B2B) and business to consumer (B2C) disputes at

[2] George A. Bermann, "Reconciling European Union Law Demands with the Demands of International Arbitration," *Fordham International Law Journal* 34, no. 5 (2011): 1197.

[3] For discussion on the concept of EU public policy see ibid., 1200–1211.

[4] See Section entitled: "Arbitral tribunals, CJEU, and preliminary rulings".

the EU level give broad autonomy to Member States when creating new institutional and legal frameworks underpinning the operation of these ADR schemes at national levels. This may have different implications for the future development of European arbitration/ADR. From a long-term perspective, if wisely approached by the EU, these changes may result in a relative convergence of domestic regulations on arbitration and ADR or, to the contrary, they may deepen the inconsistency of ADR schemes in consumer and sector-specific disputes within the EU. The former scenario would equip the EU with a powerful weapon to utilize arbitration/ADR in line with its policies. The latter scenario would likely benefit businesses and powerful private stakeholders, who might start to manipulate these schemes for their own benefit and with detriment to EU citizens.

Against the background of all these developments, the objective of this review is to examine the existing literature on arbitration and EU law, to map the topics that it has covered, and to demonstrate to what extent the changing interplay between arbitration and EU law as described above has been addressed by scholarly writing. In particular, this review aims at addressing the following research questions:

1. What kind of research has been conducted in the field of arbitration and EU law?
2. What key categories have been covered?
3. What are the topics and findings of both theoretical and empirical studies on arbitration in the context of EU law?
4. What are the main conclusions stemming from the key categories identified with regard to the literature on arbitration and EU law (in the context of both theoretical and empirical research)?
5. What are the gaps to be addressed in future research?

Methodology

This literature review follows the methods, stages of research, and organization adopted in the paper by Ellen Eftestol-Wilhelmsson, Anu Bask, and Mervi Rajahonka on "Intermodal Transport Research: A Law and Logistics Literature Review with EU Focus."[5] Hence, it adopts the method of a systematic literature review of the core topics either expressing or directly relating to the interplay between arbitration and EU law. Based on the work of Ellen Eftestol-Wilhelmsson, Anu Bask, and Mervi Rajahonka, this review is organized as follows: (1) planning (goals); (2) conducting the review; and (3) reporting and dissemination.[6] Each of these stages will be described below.

Planning

The goal of this systematic review is to summarize the research to date and to identify the fields that such research has not yet addressed.[7] The main distinction when analysing the literature is based on the methodology adopted in the literature that was the subject of the review. Hence, the review distinguishes between literature regarding the **traditional, theoretical approach** to arbitration and writings representing **empirical research** on arbitration. The review of the first group of scholarship is focused on the *express* relationship between arbitration and EU law (here called "**literature on legal issues regarding arbitration and EU law"**) on the one side, and on the practice-oriented research that *suggests* new legal developments within the international arbitration and ADR movement that may have implications for the debate on the increasing functions of arbitration in the context of EU law (here called "**literature regarding arbitration practice**"), on the other side.

[5] Ellen Eftestöl-Wilhelmsson, Anu Bask, and Mervi Rajahonka, "Intermodal Transport Research: A Law and Logistics Literature Review with EU Focus," *European Transport Law* XLIX, no. 6 (2014): 609–74.

[6] Ibid., 612.

[7] Ibid.

In turn, the review of empirical studies on arbitration aims at the following. First, its goal is to map the most prevalent topics covered by such research and to explain their linkages with EU law (if any). Second, its aim is to identify the most common methods used in empirical studies on arbitration and also to identify their limitations (if any). Finally, the review of empirical studies on arbitration aims at summarizing the findings of ground breaking empirical studies on arbitration to formulate proposals for future empirical research on arbitration, particularly in the context of EU law.

There is also a second, underlying aspect of this literature review. It concerns the contribution that this paper aims to make to the already mentioned FIDIpro project on the *External Dimension of European Contract Law*. It is assumed that the application of arbitration and ADR within the internal dimension of European private law (i.e. the ways in which the EU treats arbitration internally, including in the context of contract law) will largely determine the role of these mechanisms in the context of the external dimension of European (private) law (i.e. for EU external relations including but not limited to concluding future EU investment agreements). These dynamics also affect the content of the message that EU officials generate to private contractors in and outside the EU, also through the possible manipulation of arbitration to achieve its own, as yet unknown, ends.

The FIDIpro project examines the evolution of European contract law from the perspective of the four following normative angles: (1) from substance to procedure, (2) from legal rules to legal practice, (3) experimentalist governance versus formal law, and (4) WTO law and its impact on (European) private law.[8] Based on these angles the following questions emerge in the context of the interplay between arbitration and EU law. (1) What is the interplay between substance and procedure when we speak about arbitration in the context of EU law? This question implies, in particular, whether arbitration in the EU is practiced based on substantive law (i.e. national arbitration laws) or based on more informal, local patters (be it legal or business). (2) To what extent does arbitration practice affect European private law? (3) Can we apply the assumptions of experimentalist governance to arbitration practice in and outside the EU?[9] And finally (4) what is the emerging interplay between arbitration, EU law and WTO law (if any)?

All these questions presuppose their own research categories to be addressed in this review. These include the following sub-questions. (1) Regarding the variable **"from procedure to substance"**, from the perspective of *substance*, what are the new types of arbitration in the EU and how do they affect private law making in different sectors? From the perspective of *procedure*, what are the legislative attempts to harmonize arbitration procedure at the EU level and how do these attempts influence external European private law? Here, procedural issues on the relationship between EU law and arbitration also need to be tackled. What is the treatment of arbitration by the CJEU? How is the work of arbitrators linked with EU law? Can arbitrators rely on the preliminary reference procedure in any way, for example, via domestic courts? Can the CJEU review arbitral awards? (2) Regarding the variable on the interplay between **legal rules and legal practice**, how does traditional commercial arbitration practice inform new forms of arbitration/ADR in the EU? (3) As regards the variable on **experimentalist governance**, how is the liability and accountability of arbitrators and arbitral institutions regulated? What are institutional practices regarding publication of arbitral awards? How are problems regarding the lack of transparency in arbitration approached by arbitration bodies? And finally, regarding the interplay between WTO law, EU law and private law, what are the prevailing research topics on arbitration and WTO law? Is arbitration discussed as a potential linkage between these normative systems? These preliminary questions will be further addressed below when formulating the research categories in Section on "Definitions and categories".

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[8] Hans-W. Micklitz, "The Internal vs. the External Dimension of European Private Law - A Conceptual Design and a Research Agenda," *EUI Working Paper LAW 2015/35 ERC-ERPL-13*, 1–17.

[9] See: Charles F. Sabel and Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU," *European Law Journal*, 2008.

Conducting the review

Most searches of articles and books in preparation for this review were conducted by using the Peace Palace general search tool, and the more specific catalogue on international arbitration. Here, I used keywords such as "international arbitration and EU law", "arbitration and the EU", "arbitration and EU law". This basic search allowed me to identify the most prevalent research categories and continue to select further categories and sources based on the so-called "snowballing technique". Then more specific keywords were used including "investor-State arbitration in the EU", "EU consumer arbitration/ADR", and the like.

As reads from the website of the Peace Palace Library, the specific focus within the international arbitration catalogue is on articles that are published in databases, e-journals, e-books, and other electronic sources. However, the hard copies of relevant sources were also consulted in the course of the review. Moreover, reports and studies commissioned by European bodies such as the European Parliament and the European Commission were included. Outside the scope of the review remain the statistics of different international law organizations or arbitral institutions.

Regarding the profile of publications that were consulted, it was the preliminary goal of the author to conduct distinct searches in scholarly journals not predominantly focused on arbitration but rather on EU law, on the one side, and in scholarly (peer-reviewed) journals dealing exclusively with arbitration, as well as in practice-oriented (non-peer reviewed) journals dealing exclusively with arbitration, on the other side. This idea was, however, abandoned due to its low practical relevance. This was so for several reasons.

First, most arbitration scholarship is contained in arbitration-specific journals, while publications on arbitration in EU-focused journals are rather scarce. This disproportion would prevent the author from identifying relevant research categories that could be the subject of further comparison. Second, the distinction between scholarly (peer-reviewed) journals dealing exclusively with arbitration and practice-oriented (non-peer reviewed) journals dealing exclusively with arbitration is in fact muddled. It is conventional knowledge that the editorial boards of not only practice-oriented, non-peer reviewed arbitration journals but also of peer-reviewed arbitration journals are composed of prominent arbitration practitioners. This makes it hard to claim that this presupposed distinction could in fact reflect the real-life representation of either the exclusive voice of practice or the exclusive voice of academia.[10] That is why this review focuses on analysis of research categories in isolation from analysis of the types of journal in which they appear. That being said, searches that were conducted in some research categories (mostly categories identified based on snowballing sampling) concerning topics that have attracted considerable attention from arbitration practitioners (especially in the field of investor-State arbitration) were additionally simultaneously conducted by using the search tool of one of the largest practice-oriented dispute resolution journals, the *Transnational Dispute Management Journal*.

Reporting and dissemination

The results presented in this paper correspond to the reporting and dissemination phase. The more detailed findings follow after presentation of definitions and categories below, whereas the general findings and analysis are presented in the final, concluding part of this review.

[10] Cf.: Corporate Europe Observatory, Chapter 6: Academia's Trojan Horse: Is the arbitration industry undermining independent research? Available at: http://corporateeurope.org/trade/2012/11/chapter-6-academias-trojan-horse-arbitration-industry-undermining-independent-research. Accessed 19 July 2016.

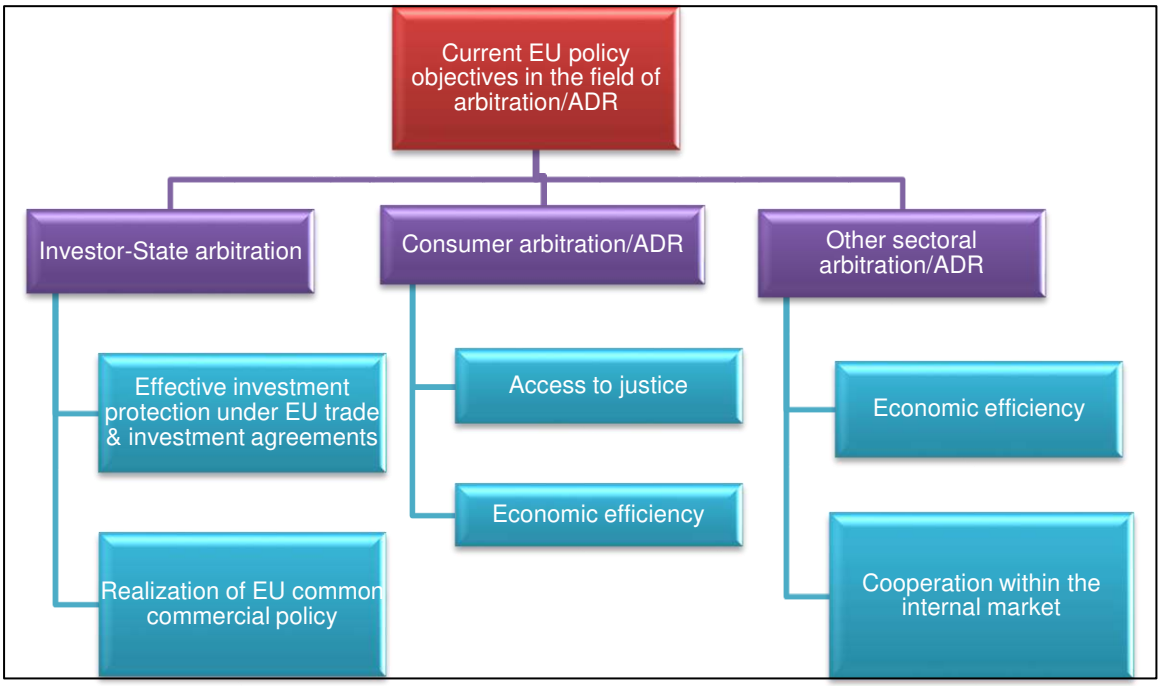
Definitions and categories

To date, neither the term arbitration nor the term ADR has been defined by EU officials. Consequently, these terms are also muddled in literature. This is particularly the case with consumer arbitration/ADR and other sector-specific forms of arbitration/ADR. This is also the reason why—although the predominant focus of this paper is on the interplay between EU law and arbitration—when examining some research categories, the paper adopts the broader terminology of "arbitration/ADR" to depict all possible forms of extra-judicial dispute resolution encouraged or imposed within the EU.

Before explaining the different categories of research on arbitration and EU law (see Figure 3), it is necessary to summarize both current EU policy objectives in the field of arbitration/ADR (see Figure 1) and the obstacles that hinder the EU from realizing those objectives (see Figure 2) as suggested in different communications by the Commission or as expressed in academic and public discussion on arbitration and EU law. Regarding EU policy objectives in the field of arbitration, these can be categorized based on the three main substantive legal areas where arbitration/ADR has recently been encouraged at the EU level. These include: (1) investor-State arbitration in the context of EU trade and investment agreements; (2) consumer arbitration/ADR; and (3) other sector-specific arbitration/ADR.

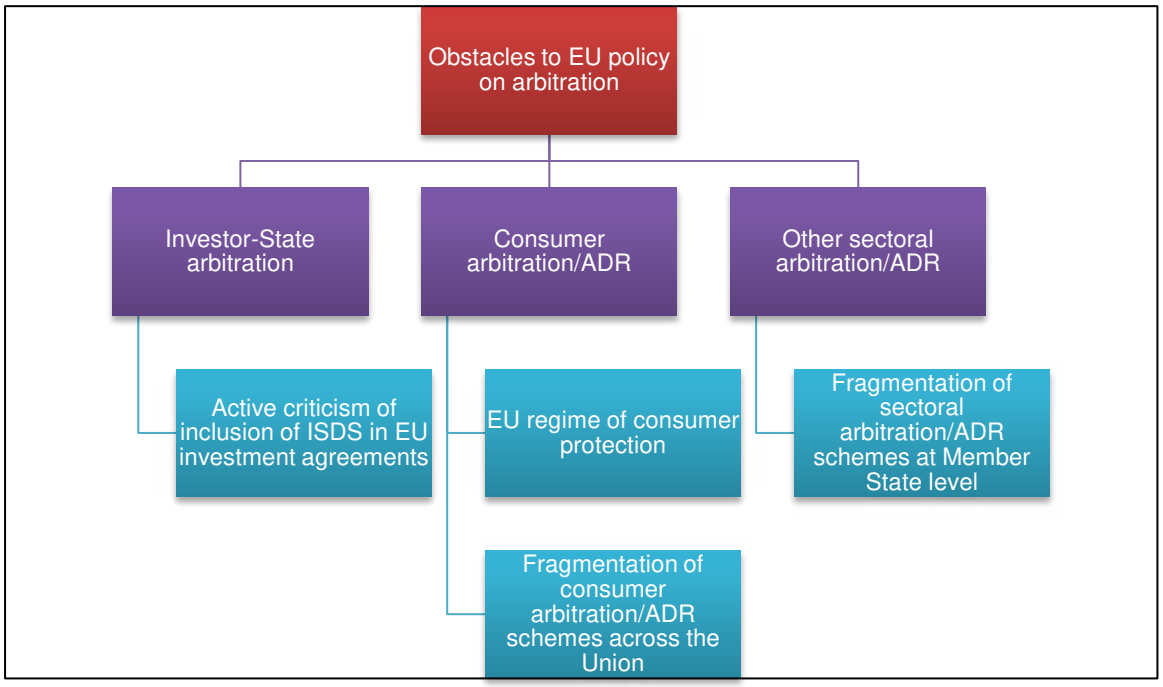
The common objective with regard to all three substantive fields mentioned above corresponds to the general preference expressed by the European Commission toward arbitration over court litigation voiced by the increasing promotion of private arbitration in the context of EU law. However, that preference seems to serve different ends with regard to each of these categories. First, in terms of potential EU investor-State arbitration, the Commission's objective is to guarantee that the system of investment protection contained in EU trade and investment agreements is effectively enforced. Another objective within this category concerns the EU's desire to exercise its new competencies in foreign investment and to rescind the existing intra-EU BITs concluded by Member States prior to the entry into force of the Lisbon Treaty that established exclusive EU competence in foreign direct investment. Second, regarding consumer arbitration/ADR, the EU aims at providing consumers with better access to justice and at increasing the economic efficiency of B2C disputes. Finally, as regards the use of arbitration/ADR in other sectoral disputes, the EU's goal is to enhance the efficiency of dispute resolution, and to strengthen cooperation within the internal market.

Figure 1. Current EU policy objectives in the field of arbitration and/or ADR



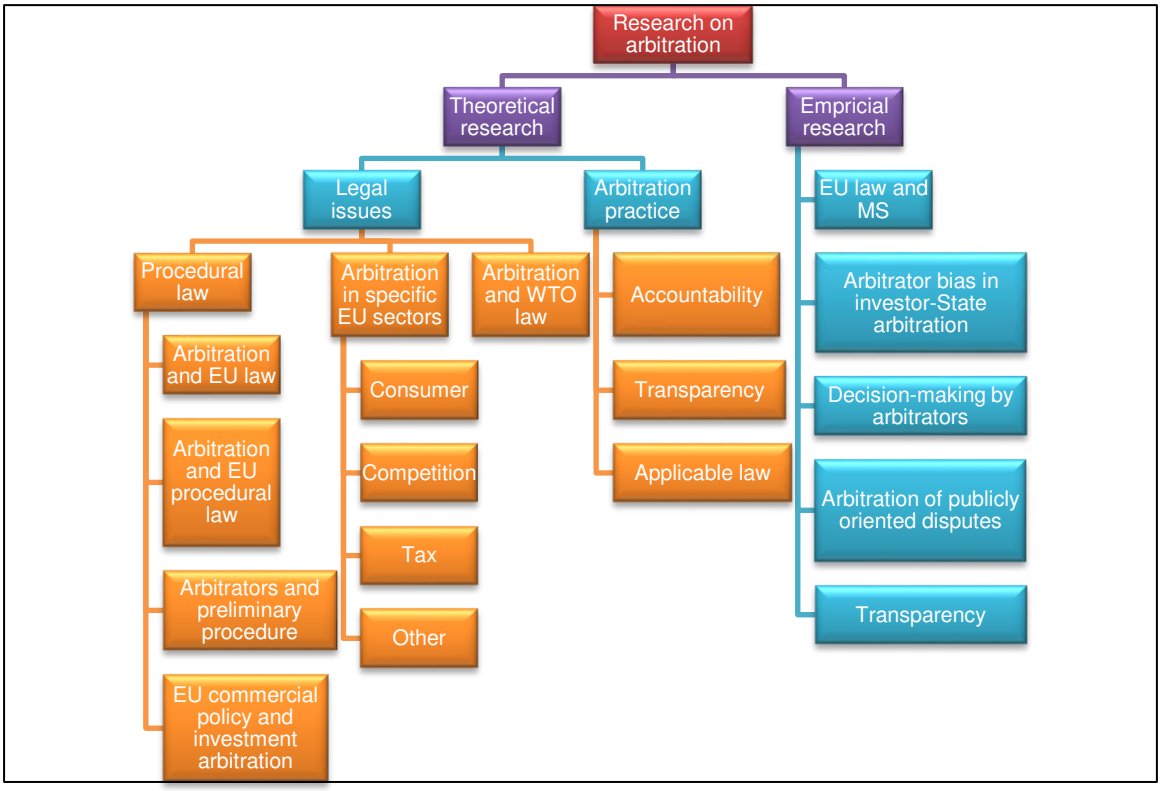
As already noted, a number of obstacles are also faced by the European Commission in realizing its policy to promote arbitration within EU law and the laws of Member States. These are included in Figure 2 below. Hence, in terms of investor-State arbitration, the promotion of ISDS in future EU investment agreements is hindered by increasing criticism of investor-State arbitration (including at the Member State level) in general and of ISDS in the context of EU law in particular. Regarding consumer arbitration/ADR, the requirement to include these schemes in disputes between EU consumers and traders is prevented by the necessary protection of consumers under EU law that detaches EU consumer arbitration/ADR from their traditional counterparts, as well as by the fragmentation of consumer arbitration/ADR schemes across the Union, which is—paradoxically—the function of vague EU regulations in this regard. Finally, concerning other sectoral arbitration/ADR, realization of Commission policy to promote ADR is hindered by fragmentation of these schemes, in the same manner as is the case with consumer arbitration/ADR.

Figure 2. Obstacles to EU policy on arbitration



Against the background of the above policy objectives regarding arbitration at the EU level, and given the objectives of the FIDIPro project within the framework of which this article is drafted, and finally also bearing in mind the specificity of the research on arbitration, the following research categories were identified. These are illustrated in Figure 3 below.

Figure 3. Research categories



As already noted, the review distinguishes between theoretical (doctrinal) and empirical research on arbitration (in juxtaposition to EU law, when applicable). Let us now explain the particular research categories that follow the distinction between these two types of research.

Theoretical research focuses on legal issues concerning arbitration and EU law, on the one side, and on research on arbitration practice, on the other side. The former concerns the three following categories: procedural law, arbitration in specific EU sectors, and the slightly more general category of "arbitration and WTO law." The purpose of the review of the literature on procedural law is to define the changing interplay between EU law and arbitration from strictly procedural points of view. These concern: arbitration and EU law (generally speaking and including EU competence in the field of arbitration); arbitration and EU procedural law (including issues on anti-suit injunctions, parallel arbitration and litigation proceedings and the recognition and enforcement of foreign awards and judgments); arbitrators and preliminary procedure (where the relationship between the CJEU and arbitrators is examined); EU investment policy and investor-State arbitration (where the focus is on the emergent literature on the new role of the EU in foreign direct investment). The category on "arbitration in specific EU sectors" aims at clarifying the emerging role of arbitration/ADR in EU sectoral disputes such as consumer disputes, competition law disputes, tax-related disputes and "other" types of dispute. The category on arbitration and WTO law reviews scholarly contributions that investigate the mutual relationship between these two normative orders. Next to the category on legal issues regarding arbitration and EU law is a category that examines literature on arbitration practice and its developments. Here, the following categories are distinguished: the role and accountability of arbitration actors, internal responses to problems with transparency, and the preferences of arbitration users regarding the applicable law.

In turn, the review of empirical studies on arbitration focuses on the most recent and the most prevalent topics (with an EU law focus or simply of relevance for a better understanding of the interplay between arbitration and EU law) covered by those studies. These concern: developments in arbitration at the EU and Member State level, the potential bias of arbitrators in investor-State arbitration, determinants of the decision-making choices by arbitrators, arbitration of publicly oriented disputes, and transparency.

Literature on legal issues regarding arbitration and EU law

This part of the review presents the literature on the historic dialogue between arbitration and EU law. As such it deals with the procedural interplay between these two regimes, on the one hand, and with substantive issues regarding the changing application of arbitration/ADR to disputes emerging in the context of EU law, on the other hand.

Procedural aspects

The review of literature on procedural aspects of the interplay between arbitration and EU law aims at presenting the desirable allocation of EU competence in arbitration.[11] Here, the scholarly explanation of the relationship between the EU, Member States, and arbitration practitioners is examined. First, the category on "arbitration and EU law" concerns EU competences in regulating commercial arbitration (if any), particularly with a view to possible harmonization of national laws on domestic and international arbitration. Second, the category on "arbitration and EU procedural law" concerns more specific procedural issues regarding regulation of arbitration under the Brussels regime, the possibility of anti-suit injunctions, and issues of recognition and enforcement of foreign awards and judgments within the EU. Third, the category on "arbitral tribunals, the CJEU, and preliminary rulings" explains academic proposals to connect arbitral tribunals with the CJEU by allowing arbitrators to seek preliminary references when faced with questions of EU law in arbitration proceedings. Finally, the

[11] Here, EU competence in arbitration is understood in general terms, hence concerning all forms of arbitration.

category on "EU Common Commercial Policy and Investment Arbitration" analyses the new competence of the EU in the field of foreign direct investment that implies new solutions when entering into EU investment agreements, often containing ISDS mechanisms, and also a new dialogue between the EU and Member States in this regard.

Arbitration and EU law: EU competences v. harmonization

The literature on the interplay between arbitration and EU law has examined the changing and desirable spot for arbitration within EU law as well as actual EU competence in the field of arbitration. As early as 1994, Bourque provided an excellent explanation of the then treatment of arbitration by the European Community. Bourque notes that there were two main ways in which the Community approached arbitration, that is, either in negative terms (by means of excluding arbitration from the scope of application of the Brussels Convention of 1968)[12] or incidentally (when mentioning arbitration clauses as unfair in the 17th example of clauses covered by the Council Directive on Unfair Terms in Consumer Contracts of 5 April 1993).[13] Bourque also recalls the expression "so far as is necessary" contained in Article 220 of the Treaty of Rome of 25 June 1957 to illustrate the then treatment of arbitration by Community law.[14] Indeed, as noted by Bourque, the Community long relied on the principle of subsidiarity in terms of arbitration, meaning that intervention at the Community level was required only if the treatment of arbitration by Member States turns out to be insufficient. As such, the author proposes to look at the legal context of arbitration from two parallel perspectives: that is, the framework established by means of European Treaties and the framework provided for by the legislation of Member States. In fact, this status quo has been acknowledged in other academic contributions on the topic at hand.

For example Brunni (1995) argued that although there are many similarities within the laws on arbitration of Member States there are also many particularities. Consequently, it remains to be seen, as claimed by Brunni, whether harmonization at the Community level will be possible in the future at all. Here, some authors openly suggest that there should be less dependency on the domestic particularities of arbitration, especially as far as European approaches to international regulations are concerned (Böckstiegel 1995).

The relationship between domestic and European regulation of arbitration has not been an easy one. In fact, as argued by Schlosser in 1997, whereas the EU legal order expresses a rather preferential treatment of arbitration, which is implied by means of the freedom of contract within the EU, arbitration still remains an issue of domestic public policy. At the same time, however, the increasing application of EU law by arbitrators could possibly lead to a decline in the authority of EU law (Nourissat, 2003). This is why it is safe to state that for many years the literature on arbitration and EU law has pointed to the lack of direct EU competence in the field of arbitration, which confirmed the almost exclusive competences of the Member States in regulation of arbitration and questioned the desirability of harmonization of the national arbitration laws of Member States at the EU level.

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[12] See also Section entitled: "Arbitration and EU procedural law: Brussels Regime, anti-suit injunctions, enforcement of arbitral awards and judgments".

[13] Jean-François Bourque, "The Legal Framework of Arbitration in the European Union," *International Commercial Arbitration in Europe - Special Supplement. The ICC International Court of Arbitration Bulletin*, November 1994, 8.

[14] The author also mentions Arts 181 and 182 of the Treaty of Rome where the jurisdiction of the European Court of Justice under an arbitration agreement was included. See ibid. Regarding the recent contribution on the competence of the CJEU to act as an arbitral tribunal in disputes between Member States see Rainer Lukits, "Arbitration before the European Court of Justice," *International Arbitration Law Review* 17, no. 1 (2014): 1–16.

This status quo has changed together with proposals by the Commission concerning possible amendment of the Brussels Regulation on the Jurisdiction and Enforcement of Judgments and discussion on the new EU competence in foreign direct investment to be contained in the Lisbon Treaty. In 2010 Bermann noted emergent changes in the traditional hostile approach to arbitration by EU law. Bermann calls these changes new "fault lines" and concludes that they are particularly visible in the field of the new EU common commercial policy. Because of these new fault lines, some authors have revived the debate on the possibility of harmonization of domestic laws on arbitration by the EU. In 2011 Benedettelli claimed that harmonization is possible in some fields that fall within EU fundamental policy or those driven by European integration. These involve areas concerning: arbitrability of disputes, the potential procedural competence of arbitral tribunals to request preliminary references from the CJEU under Art. 267 TFEU, common rules on jurisdiction on arbitral matters, and recognition and enforcement of judgments and awards. Most recently in a conference paper presented in Warsaw in 2015, Gaffney explained EU competence in harmonizing the arbitration laws of Member States and identified potential issues that could be the subject of harmonization. Regarding the latter issue, after having analysed the principles of conferral, subsidiarity and proportionality in the context of EU law, Gaffney notes that EU law permits only limited interference by the EU with arbitration; however, the principles of subsidiarity and proportionality could justify harmonization of arbitration if it was to create a more general "European area of justice". Then the following issues could fall within harmonization: "conflict" issues such as parallel arbitration and judicial proceedings and conflicts between arbitral awards and judgments. These issues will be explained in detail in the section below. It is relevant to stress here that empirical studies on arbitration—to be reviewed in the following part of this paper—reveal that arbitration practitioners are increasingly eager toward the possibility of the EU's harmonizing actions regarding domestic and international arbitration laws of Member States.[15] This desire stems from a number of factors including current differences between local arbitration practices that especially hinder the further development of arbitration in Member States where arbitration, at least in its traditional, commercial form, is still not a preferred dispute resolution mechanism, including in Eastern Europe.

Table 1. Arbitration and EU law (EU competences & harmonization)

Year	Title	Author(s)	Objectives	Results (concerning EU law)
1994	The Legal Framework of Arbitration in the European Union	Bourque	To assess the legal context of arbitration within the EU.	Presents a brief history of the dialogue between arbitration and EU law until 1994.
1995	The Problems Facing Arbitration in the European Union	Böckstiegel	To propose the future development of arbitration in the EU.	Future perspectives of arbitration in the EU will largely depend on society. There should be less dependency on national particularities in international arbitration.
1995	Arbitration Law & Practice within the European Union. Contrasts and Solutions	Bunni	To examine differences and similarities of arbitration in different European jurisdictions and to propose a solution to address the results.	A number of similarities exist in the field of arbitration within the laws of Member States - but also differences (e.g. in the field of evidence). Four main types of arbitration in the context of EU law were distinguished to propose future action.

[15] See Section entitled: "Predominant focus on arbitration at the EU and Member State level".

				Harmonization would be welcome but it remains to be seen if it will take place.
1997	L'arbitrage et le droit européen : actes du Colloque international du CEPANI du 25 avril 1997 = Arbitrage en Europees recht : rapporten van het Internationaal colloqium van CEPINA van 25 april 1997 = Arbitration and European law: reports of the International colloqium of CEPANI, April 25, 1997	Briner	Includes a contribution by Pieter Schlosser on the interplay between EU public policy and arbitration.	The EU legal order expresses preferential treatment with regard to arbitration. The possibility of recourse to arbitration was also provided in contractual freedom of the parties in the EU market. However, one cannot yet speak about the enforceability of arbitration as a rule of European public policy. Rather, it falls within domestic public policy.
2003	L'arbitrage commercial international face à l'ordre juridique communautaire : une ère nouvelle = International commercial arbitration and the European Community legal system: a new era?	Nourissat	To identify the changing relationship between EU law and arbitration (e.g. in the fields of EC competition law and EU Restrictive Agreements).	Two risks affect recent developments: (1) that arbitration will be compromised in line with other ADR mechanisms, and (2) that the authority of EC law will decline. Proposals follow.
2009	Questions of Arbitration and the Case Law of the European Court of Justice	Harmathy	To outline some principles concerning the treatment of arbitration by the CJEU	The Court's decisions touching upon the following issues were discussed: the validity of arbitration agreements, arbitrability, and the language of documents.
2011	'Communitarization' of International Arbitration: A New Spectre Haunting Europe?	Benedettelli	Is there room for the harmonization of Member State laws on arbitration by/within the EU?	In some areas that concern EU fundamental policy or those driven by European integration, harmonisation seems feasible (these involve arbitrability, the potential procedural competence of arbitral tribunals to refer questions to the CJEU under Art. 267 TFEU, common rules on jurisdiction on arbitral matters, related action, recognition and enforcement of judgments and awards).
2012	Reconciling European Union Law Demands with the	Bermann	To examine possible (and nascent) developments in the	Changes (called "new fault lines") are slowly more visible. This is mostly the

	Demands of International Arbitration		traditional (hostile) relationship between arbitration and EU law.	case with the EU's new competence in foreign direct investment that implies new dialogue between EU law, investment law, and arbitration.
2013	Private Arbitration and European Union Law	Lukits	Is EU law suitable as substantive law in private arbitration? To what extent is arbitration determined by the EU framework?	The major effect that the EU seems to have on arbitration is visible in the field of arbitral awards. This is why national court proceedings in this regard should be supported. Moreover, the application of free movement to arbitrators and arbitral institutions could significantly impact national arbitration laws. It may also be necessary to develop EU arbitration law or EU contract law in support of cross-border arbitration.
2014	Arbitration before the European Court of Justice	Lukits	To examine the procedure regarding arbitration before the ECJ (under Arts 272 and 273 TFEU)	Arbitration before the ECJ has gained importance. No case based on Art. 273 has been decided yet but the Court decided the procedure in the *Pringle* judgment. Also Member States have included arbitration clauses under Art. 273 in their agreements (e.g. Austria and Germany did so in the tax treaty of August 24, 2000). We may witness further developments in this regard in the future.
2015	Do We Need Separate European Regulation of Arbitration? (conference paper)	Gaffney	Is harmonization/ regulation of arbitration at the EU level necessary?	Harmonization/regulation could cover "conflict" issues such as parallel arbitration and judicial proceedings and conflicts between arbitral awards and judgments.

Arbitration and EU procedural law: Brussels regime, anti-suit injunctions, enforcement of arbitral awards and judgments[16]

The literature falling within this category analyses the scope of the exclusion of arbitration from the so-called Brussels regime that concerns recognition and enforcement of judgments within the European Judicial Area, and also the mechanism of anti-suit injunctions in parallel litigation and arbitration proceedings to protect the autonomy of arbitration by national courts, especially in the aftermath of the CJEU judgment in *West Tankers*.[17] Occasional contributions also investigate the scope of exclusion of arbitration from the Rome I Regulation, arguing that the exclusion of arbitration from the scope of application of the Rome I Regulation does not apply to the law applicable to the substance of the dispute (Yücksel 2011). The discussion on the Rome I Regulation and arbitration has not, however, been particularly popular in literature. This supports the hypothesis formulated by Hans Micklitz regarding the limited practical importance of the two Rome Regulations from the perspective of EU law.[18] Let us now address the topics identified in papers falling within the above-mentioned streams in more detail.

Regarding the exclusion of arbitration from the Brussels regime, arbitration was excluded from the following documents that enhance free movement of judgments within Member States but does not allow the same for arbitral awards. In chronological order they concern: the already mentioned Brussels Convention of 1968 and the Brussels I Regulation on the jurisdiction and enforcement of judgements in civil and commercial matters of 1968, Brussels Regulation 44/2001 of 2001, and the most recent version of the Brussels I Regulation 1215/2012 of 2012 (effective as of 10 January 2015), the so-called Brussels I recast. Whereas the exclusion of arbitration from the scope of application of the first two instruments was absolute, the recent changes incorporated in the Brussels I recast represent a moderate stance to the exclusion of arbitration.

Before analysing the latter, it is necessary to stress that—although controversial—for years the scope of exclusion of arbitration was not particularly troublesome in practice. Arbitration and EU procedural law were treated as two distinct orders. According to Carducci, referring to the famous Schlosser and Jenard Reports of 1979, the almost absolute exclusion of arbitration was justified by the "many international agreements" already existent in the field of arbitration (such as the United Nations (UN) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 adopted in New York (the New York Convention of 1958)—applicable to all foreign arbitral awards—and the European Convention of International Commercial Arbitration of 1961. In fact, Article 71 of the Brussels I Regulation expressly states that the Regulation will not undermine the duties of Member States under other international treaties regarding the jurisdiction, recognition, and enforcement of judgments.[19] Moreover, the CJEU has confirmed this broad exclusion of arbitration in several judgments concerning the admissibility of preliminary references from arbitral tribunals such as the *Marc Rich* case, *Van Uden*, and *West Tankers* (*Front Comor)* (Carducci 2011, Dowers & Tang 2015). Most problematic was the judgment in the *West Tankers* case that shed light on the efficiency of the arbitration exclusion under EU law and its consequences for *lis pendens* and parallel arbitration and litigation proceedings.

In a nutshell, the *West Tankers* case of 2009 was issued as a response to a preliminary reference procedure initiated by an English court that was faced with a request by the claimant, West Tankers, to issue an anti-suit injunction to stay proceedings in another Member State (here, Italy) because starting

[16] This section deals exclusively with EU procedural law issues. Any references to the enforcement of arbitral awards that would touch upon substantive law issues in the context of European public policy (including those issues relating to competition law) will be addressed in the following parts of this review.

[17] Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) and Generali Assicurazioni Generali SpA v West Tankers Inc, CJEU judgment in Case C-185/07).

[18] Micklitz, "The Internal vs. the External Dimension of European Private Law - A Conceptual Design and a Research Agenda," 6–7.

[19] Neil Dowers and Zheng Sophia Tang, "Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal," *Groningen Journal of International Law* 3, no. 1 (2015): 126.

such court proceedings was in violation of the parties' arbitration agreement, which provided for arbitration in England. Here, the CJEU needed to determine the scope of the exclusion of arbitration from the Brussels I Regulation. Surprisingly, the CJEU stated that the issues at stake, including those concerning the validity of the arbitration agreement, did fall within the scope of the Brussels I Regulation. Furthermore, the Court noted that granting an anti-suit injunction in the case before it was incompatible with EU law for policy reasons. This justification, although controversial for the arbitration community, had already been expressed in the literature before the judgment in question was passed (Illmer & Naumann 2007). Following the judgment in *West Tankers*, most authors claimed that new approaches were required to address jurisdictional challenges in the post-*West Tankers* era (Carducci, 2011). Such new approaches came quicker than expected as they concerned new proposals and the final amendment to the Brussels I Regulation itself.[20]

Before the proposed adoption of the Brussels I Regulation, scholars again debated on the desirable scope of the exclusion of arbitration. This debate contained proposals that can be classified into three groups: (1) proposals that exclusion should be abolished, (2) recommendations that exclusion should be maintained (and even that it should go much further), and (3) moderate proposals voicing the middle approach represented by the European Commission (Pisolle 2009, Illemer 2011).[21] In fact, the most fascinating was the last approach, which promoted a particular compromise between the proponents and opponents of exclusion. This was so not because of the content of the proposal but because of its author. Notably, the proposal was initiated by the Commission even against the Resolution of the European Parliament of 7 September 2010 (Carducci 2011). This compromise—preceded by a number of reports and policy papers produced (including the Heidelberg Report of 2005, and the Commission Green Paper of 2009) eventually resulted in the inclusion of new Recital 12 that clarified the relationship between the recast Regulation and arbitration, as well as of Article 73(2) where the supremacy of the New York Convention over the recast Regulation was confirmed. In fact, the compromise introduced in the reformed Brussels I Regulation has been criticised by academics. The authors have argued that it changed nothing in the Regulation, so that one cannot speak about any relevant reform that would address contentious issues regarding the exclusion of arbitration from Brussels I. For example, the recast Regulation failed to regulate parallel proceedings; this runs counter to the principle of mutual trust between Member States within the EU (Dowers & Tang, 2015). Bertoli openly admits that the recast Regulation was a lost opportunity.

Table 2. Arbitration and EU procedural law: Brussels regime, anti-suit injunctions, enforcement of awards and judgments

Year	Title	Author(s)	Objectives	Results (concerning EU law)
2007	Yet Another Blow: Anti-suit Injunctions in Support of Arbitration Agreements Within the European Union	Illmer, Naumann	To examine the relevance of anti-suit injunctions in arbitration within the EU.	Anti-suit injunctions are incompatible with EU law (i.e. with the principle of *effet utile* of EU procedural law).
2009	The Proposed Reform of Regulation 44//2001: a Poison Pill for Arbitration in the European Union?	Pisolle	To discuss the Commission proposals contained in the Green Paper on the review of Regulation 44/2001 on jurisdiction and enforcement of	The Green Paper's proposals (especially the extreme ones) could put an end to the evolution of arbitration within the EU because the proposed measures would result in

[20] The most recent CJEU case where the issue of anti-suit injunctions was debated concerned the so-called Gazprom case (C-536/13) of 13 May 2015.

[21] Martin Illmer, "Brussels I and Arbitration Revisited: The European Commission's Proposal COM(2010) 748 Final," *Rabel Journal of Comparative and International Private Law (RabelsZ)* 75, no. 3 (2011): 647.

			judgements in civil and commercial matters that suggested deleting the exclusion of arbitration from the scope of the Regulation.	"aligning EU legislation to that of the Member States which are least favourable to arbitration. They will most probably increase the number of parallel proceedings rather than reduce it, at the risk of discouraging users from international arbitration, and will put EU Member States at risk of violating their obligations under international conventions."
2009	"Mutual Trust" and "Arbitration Exception" in the European Judicial Area: the West Tankers Judgment of the ECJ	Crespi Reghizzi	A case analysis (West Tankers judgment) in the context of the concept of mutual trust.	Summarized the effects of arbitration agreements on the jurisdiction of national courts under recent changes to the Brussels I regime
2011	The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union	Yücksel	To analyse the application of the Rome I Regulation to international commercial arbitration (by investigating the extent of the exclusion of arbitration agreements from the scope of the Regulation and the application of Rome I by arbitrators when sitting in a Member State)	Exclusion applies to the law applicable to the arbitration agreement, the law applicable to the arbitration procedure but not to the law applicable to the substance of the dispute. It is unclear whether arbitrators should be bound by the provisions of the Rome I Regulation but it is argued in the article that they should, as arbitral tribunals, qualify as "tribunals" within the meaning of the Regulation.
2011	Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention — Notes on West Tankers, Revision of the Regulation and Perhaps of the Convention	Carducci	What is the law applicable to arbitration, anti-suit injunction, and *lis pendens* from a jurisdictional point of view?	The new approaches are required to address jurisdictional challenges in the post-*West Tankers* era.
2011	Brussels I and Arbitration Revisited : the European Commission's Proposal COM (2010) 748 final	Illmer	To analyse the new approach to the recast Brussels I	The EC's proposal regarding the middle approach to the exclusion of arbitration from Brussels I should be supported as it is extremely efficient.
2013	Anti-Arbitrations and Anti-Suit Injunctions: an Anglo-European Perspective	Layton	To provide a historic overview of anti-suit injunctions in English law and to discuss their recent developments in the	Brussels I recast may encourage national courts to re-open the debate in West Tankers. It remains to

			field of arbitration in the context of European law.	be seen whether this will in fact be the case.
2014	Parallel Proceedings in International Arbitration: a Comparative European Perspective	Erk-Kubat	To analyse the concept of parallel proceedings before national courts and arbitral tribunals to test what kind of pleadings the parties use to eliminate potential overlaps.	A number of pleadings are suggested that seem effective for the parties to combat negative consequences of parallel proceedings.
2014	Arbitration, the Brussels I Recast and the Need for European Arbitration Law	Bertoli	To examine the reasons for the arbitration exception from the Brussels I-bis Regulation in view of the efficiency of the EU judicial area and of international commercial arbitration.	Brussels I-bis (Recast) is "a lost opportunity". Most of the outstanding problems regarding arbitration and Brussels I remain unaddressed.
2014	European Perspectives on International Commercial Arbitration	Wilhelmsson	In view of the confusing treatment of arbitration under the proposed recast Regulation, this article aims at examining the issue of parallel proceedings before national courts and arbitration.	The risks stemming from the interplay between the Brussels I Regulation and international commercial arbitration are not necessarily an EU problem. These risks are inherent in clashes between Brussels I and international regulation of arbitration. If renegotiating international instruments such as the New York Convention is too complex, the EU could consider uniform interpretation of this Convention for all Member States.
2015	Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a new Proposal	Dowers, Tang	To present recent changes to the Brussels I Regulation.	Examination of recent "reforms", pointing to their insufficiency (in fact, the recast Regulation changed nothing), and formulate proposals for the future (such as a mandatory stay of proceedings, taking into account the seat of arbitration, and increasing the predictability of the legal framework established by means of the Regulation).

Arbitral tribunals, CJEU, and preliminary rulings

It has long been acknowledged in CJEU jurisprudence that arbitral tribunals, whether deciding in commercial or investment cases, do not benefit from the preliminary procedure set forth in Art. 267

TFEU (the former Art. 234 of the Treaty establishing the European Community). The CJEU determined the criteria to be met by a judicial body in order to be classified as "a court or tribunal of a Member State" as early as 1966 in Case 61/65 *Vaassen (neé Göbbels)*. These concerned the following:

1. The tribunal must be established by law
2. It must be permanent
3. It must respect the requirements of due process
4. It must apply rules of law
5. It must exercise compulsory jurisdiction over parties appearing before it.[22]

Arbitral tribunals, in the eyes of the CJEU, do not meet these criteria and exceptions from this CJEU reasoning are extremely rare. To date they were acknowledged in three cases only: in *Danfoss (Case 109/88)*, *Merck Canada (C-555/13),* and *Ascendi* (C-377/13). In the first case, the CJEU accepted a preliminary question from the arbitral tribunal because participation in the arbitration in question was mandatory for the parties, while in the second case the CJEU found that the arbitral tribunal was wholly integrated within the legal structure of the Member State and as such qualified for a preliminary ruling.[23] In the third case the CJEU found that the Portuguese Tax Arbitration Tribunal met the requirements of a jurisdictional body on a number of grounds including its permanent legal nature.

Because in investment arbitration and commercial arbitration there is no doctrine that would entail the existence of precedent in these forms of dispute resolution, it is often argued that arbitral awards, especially in investment arbitration, suffer from inconsistency. This is problematic in investment law when arbitral tribunals provide different interpretations of the clauses contained in investment treaties that are of fundamental relevance for foreign trade and investment such as umbrella clauses and most favoured nation clauses (Schreuer, 2008). Moreover, inconsistency within arbitral awards is also controversial in the context of EU law, when investment arbitral tribunals apply matters of EU law that fall within EU public policy.

The literature regarding the procedural competences of arbitral tribunals in the field of preliminary referrals contained proposals to connect arbitrators with different judicial bodies to provide them with a "proxy" when they address complex questions of EU law. In 2008 Schreuer—drawing from the success of the then Art. 234 TEC on preliminary procedure—proposed the creation of a central and permanent body to give preliminary rulings in response to legal questions from arbitral tribunals.

Most recently, proposals have been for linkages of investment tribunals with the CJEU, especially in cases when the former are faced with EU law. Most articles focus on EU competition law in this regard, which is the consequence of the famous CJEU judgement in *Eco Swiss* where the CJEU afforded national courts the possibility to annul arbitral awards in the course of vacatur proceedings when such awards appear to be inconsistent with EU competition policy.

The authors suggest that, as indicated by the CJEU in *Nordsee*, arbitral tribunals could submit preliminary questions to the CJEU indirectly through national courts. In this vein, Olík and Fyrbach (2011) argue that the specific dual role of Member States in investment arbitrations (that is, as parties and guarantors of the uniform application of EU law by investment tribunals) justifies such proposals. Moreover, Potocnik, Sippel, Willheim (2015) pose the question why only a single Member State (Denmark) provides for such an indirect preliminary procedure.

Proposals to link the CJEU with investment arbitrators are especially relevant in view of increasing discussion on the inclusion of ISDS mechanisms in future EU trade and investment agreements. This

[22] See: Tony Cole et al., "The Legal Instruments and Practice of Arbitration in the EU, A Study for the Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs" (European Union, Brussels 2014), 187 with further references.

[23] Ibid.

debate points to the weakening role of the CJEU in scrutinising the application of EU law. Once the preliminary procedure is introduced in EU substantive law, it could reaffirm the exclusive function of the CJEU in this regard. As described by Basedow (2015), there has already been a tendency to "relaxing" the CJEU's approach toward the arbitrators' right of referral. According to Basedow, the most recent CJEU case law seems to suggest that arbitral tribunals established under intra-EU BITs would be permitted to invoke such procedure in cases where the claimant would have an alternative option to initiate a case before the domestic court of a Member State based on such treaties. Also, as argued by Basedow, recent developments in international commercial arbitration as well as the expansion of EU law into private law suggest that similar tendencies concerning preliminary procedure could also be applicable in international commercial arbitration. This proposal relates to one of the original recommendations concerning the necessity for the arbitration community to address from the bottom the problem of non-admissibility of preliminary references from arbitral tribunals, by taking into account the unique, private nature of arbitration (Erauw, 1997).

These proposals appear extremely relevant if we take into account the inconsistency of arbitral awards and the limited authority of courts at the domestic and European levels to review the substance of arbitral awards. This brings us back to Schreuer and his proposal of 2008 for reform of the investment arbitration system through the preliminary procedure as a preventive action to combat inconsistency in arbitrators' decision making.

It seems that the CJEU could have finally resolved these issues in the eagerly awaited judgment in the so-called Genentech case (C-567/14)[24]. There, the *Paris cour d'appel* requested a preliminary ruling concerning the application by arbitrators of EU competition law and the possible infringement of Art. 101 TFEU. As explained by Havu and Vesala, the judgment could have significant effects to the extent that it could have addressed the question of what type of infringement of EU competition law should result in annulment of arbitral awards by national courts on public policy grounds. These issues were raised in the opinion of 17 March 2016 by Advocate General Wathelet, who expressly stated that limitations to the scope of the review of arbitral awards by domestic courts run contrary to the principle of effectiveness of EU law. In its decision of 7 July 2016 the CJEU remained silent regarding the desirable scope of review of arbitral awards under EU law. All these leave the issue of the interplay between arbitration and EU law unaddressed, which in fact prevents the further convergence of these two regimes.

Table 3. Arbitration and EU law: referrals to CJEU

Year	Title	Author(s)	Objectives	Results (concerning EU law)
1997	L'arbitrage et le droit européen : actes du Colloque international du CEPANI du 25 avril 1997 = Arbitrage en Europees recht : rapporten van het Internationaal colloqium van CEPINA van 25 april 1997 = Arbitration and European law: reports of the International	Briner	Includes a contribution by Johan Erauw on the admissibility of references for preliminary rulings from arbitral tribunals.	The non-admissibility of preliminary references from tribunals could be addressed by a consensual proposal from the arbitration community and corresponding with the unique private nature of arbitration.

[24] Cf. the opinion of Advocate General Wathelet of 17 March 2016, Case C-567/14, *Genentech Inc. v. Hoechst GmbH, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH.*

	colloqium of CEPANI, April 25, 1997			
2008	Preliminary Rulings in Investment Arbitration	Schreuer	To illustrate the shortcomings of (and to propose solutions to minimize) the inconsistency within case law delivered by arbitral tribunals.	There are two possible solutions to address inconsistency within the decision making of investment tribunals: an appeal procedure or the preliminary ruling procedure. The second seems more efficient since it allows for preventive action to combat inconsistency.
2011	The Competence of Investment Arbitration Tribunals to seek Preliminary Rulings from European Courts	Olík, Fyrbach	Could arbitral tribunals refer preliminary questions to the ECJ or ask national courts to do so on their behalf?	The specific, dual role of Member States in investment arbitration (as parties and as guarantors of uniform application of EU law) justifies the need for arbitral tribunals to request preliminary rulings before the ECJ
2015	EU Law in International Arbitration: Referrals to the European Court of Justice	Basedow	To examine the changing (softening) approach of the CJEU to the admissibility of preliminary questions from arbitral tribunals in investment arbitration.	Recent decisions of the CJEU suggest that arbitral tribunals constituted under Member State BITs could be entitled to preliminary procedure before the CJEU. The expansion of EU law into private law suggests that similar solutions could be considered in the case of commercial arbitration.
2015	Can Arbitral Tribunals Seek Support of National Courts to Obtain a Preliminary Ruling by the CJEU in Matters involving EU Competition?	Potocnik, Sippel, Willheim	Why does only a single Member State (Denmark) allow the general court assistance to arbitral tribunals providing for uniform application of EU competition law?	The only possibility to have an award annulled based on misapplication of EU competition law by arbitrators is to commence annulment proceedings before a national court. Once a national court annuls an award in these proceedings, the parties will need to initiate fresh arbitration proceedings. This is costly and time consuming. If arbitral tribunals were allowed to request preliminary ruling procedure, those problems could be mitigated.
2015	Case Comment Competition law implications of invalidation of intellectual property	Havu, Vesala	An analysis of, among other things, the isolated position of arbitral tribunals	Arbitral tribunals, unlike domestic courts, do not benefit from the preliminary reference procedure and do not qualify for official

	rights to licensing agreements: issues raised by Genentech (C-567/14) - request for a preliminary ruling from the Cour d'appel de Paris (France) lodged on December 9, 2014		in applying EU competition law.	cooperation with the Commission and domestic authorities. An upcoming CJEU judgment in the case in question will likely address the issue of what kind of infringement of EU competition law (whether direct or indirect, only leading towards "undermining" such law) should result in annulment of an arbitral award in domestic courts.

EU Common Commercial Policy and investor-State arbitration

The literature on EU Commercial Policy, just as the very new competence of the EU in foreign direct investment, is novel and represents stormy debates. One can identify two main streams here. First, the literature that concerns political arguments. Second, contributions that concern legal analyses of different issues stemming from shifting authority in the field of investment from Member States to the EU (and the European Commission, more specifically). Some authors even claim that there is not enough legal discussion, in isolation from political debates, on the compatibility with EU law of the ISDS mechanism to be contained in EU investment agreements (Client Earth 2013). In fact, the literature that addresses the political aspects of EU investor-State arbitration is mostly found within empirical studies on arbitration.[25] That being said, certain political conclusions also follow from the theoretical research. For example, Quick (2015), when providing arguments in favour of ISDS (in a reformed version) to be included in the Transatlantic Trade and Investment Partnership (TTIP) notes that ISDS could prove the leadership of the two political powers such as the EU and the US. Moreover, in terms of discussion on the suitability of ISDS in the context of EU investment policy, two main groups should be distinguished. First, the group comprising scholars that actively support ISDS (e.g. Schill 2011 and 2013, Alvarez, Blasikiewicz, van Hoolwerff, Koutouzi, Lavranos, Mitsi, Spiteri-Gonzi, Verdegay Mena, Wilinski, 2016) and academics that point to the shortcomings and dangers of ISDS (Van Harten et al. 2010, Van Harten 2015 and 2016, Saulino & Kallmer 2014).

The literature that is more concerned with legal rather than political aspects of ISDS (provided these two dimensions are separable in the context of arbitration) can be divided into three streams. The first stream concerns allocation of competence between the EU and Member States in current (intra-EU) BITs and future EU trade and investment agreements after the changes incorporated in the Lisbon Treaty. The literature within the second stream investigates two main questions: first, how to enhance the EU's success in investor-State arbitration given its relative inexperience in this form of dispute resolution; and, second, how to improve the linkages between investor-arbitrators and European courts (including at the European and Member State level) to permit the application of EU law in arbitration proceedings. Finally, the literature within the third stream concerns criticism of EU investor-State arbitration and proposals to counterbalance the shortcomings revealed by such criticism. Let us address each stream in turn.

The first stream features contributions on the future of intra-EU BITs under the new EU exclusive commercial policy in foreign direct investment. Here, the discussion concerns, inter alia, the possibility for the European Commission to act as amicus curiae in arbitration proceedings arising out of such BITs (Nisser & Blanke, 2008), and the lack of impact by the new provisions for EU exclusive competence on the possibility for investors to initiate arbitration proceedings under intra-EU BITs (Wehland 2009).

[25] See Section entitled: "Investor-State arbitration and arbitrator bias".

This stream also covers scholarly work on the ideal role of the EU, also vis-à-vis Member States, in the conclusion of future investment agreements containing investor-State arbitration chapters (if any). Here the authors analyse future *fora* for the resolution of disputes stemming from such agreements (Nappert 2009), and the exact competence of the Union in foreign direct investment, the scope of which remains unclear (possibly excluding portfolio investment), as well as the inability of the EU to become a party to the ICSID Convention, which may further increase the fragmentation of competences between the EU and Member States (Burgstaller 2010). Moreover, the allocation of competence between the EU and Member States was explained by Schill (2011, 2013) who argues that investor-State dispute resolution appears as a desirable dispute resolution mechanism if the relevant relationship between arbitral tribunals and the CJEU is worked out and provided that EU law remains autonomous vis-à-vis international investment law, which will confirm that EU constitutional principles are secured. In cases where no consensus can be found concerning allocation of authority between the EU and Member States, it is plausible that the CJEU will determine the scope of such allocation or that the authority to conclude international investment agreements will be transferred from the EU to Member State level (Bischoff 2015).

The second stream concerns proposals that the EU should work out a better relationship between EU law and international investment law, especially as far as the enforcement of foreign arbitral awards is concerned (Mazzini 2013). Additionally, the authors argue within this stream that incorporating ISDS into EU investment agreements would be feasible from a legal perspective if arbitral tribunals were better linked with either national courts or the CJEU (Strick 2010, Schill 2010, Hindelang 2012, Burgstaller 2012).

Finally, the third stream of the literature on EU commercial policy and investor-State arbitration concerns scholarly contributions that fundamentally criticise ISDS as a process that is not procedurally fair, also lacking openness and institutional independence (Van Harten et al. 2010, Van Harten 2012). It is also argued that the focus on foreign investors in ISDS is too narrow, and that private parties including investors should be able to refer to EU domestic courts under BITs, a possibility which is hindered under agreements currently being negotiated (Bronkers 2015). Based on this criticism, several proposals are set forth. These include proposals for reconciled versions of different contentious issues in the TTIP (Weaver 2014) and the necessity to re-evaluate the relevance of introducing an appellate system to ISDS (Legum 2015), as well as analysis of the most recent EU proposals for creation of an International Investment Court (Titi 2016). The last paper concludes that the system offers many positive solutions, which should be further addressed by the Commission. Accordingly, no single proposal is currently considered as providing satisfactory outcomes.

Table 4. EU Common Commercial policy and investor-State arbitration

Year	Title	Author(s)	Objectives	Results (concerning EU law)
2008	Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings	Nisser, Blanke	To examine the role of the European Commission in international arbitration and to propose "best practices" to be applied in their mutual relationships.	Cooperation should be established to ensure the advantages of arbitration in line with Commission expectations of the process.
2009	Potential EU Competence on Investment: Challenges for Investment Arbitration	Nappert	What forum will there be for investor-State arbitration under the new EU free trade agreements?	While developing a credible EU policy on foreign direct investment, the following need to be taken into account: the impact of emerging principles of investment law on

				investment, the need for a clear relationship between EU law and international law, and the role of international arbitration in further developing EU investment law.
2009	Intra-EU Investment Agreements and Arbitration: is European Community Law an Obstacle?	Wehland	To evaluate whether EC law can constitute an obstacle to arbitral proceedings initiated under intra-EU BITs (from both procedural and substantive perspectives).	Regardless of the potential impact of EC law on arbitration proceedings, EC law should not prevent investors from initiating such proceedings under intra-EU BITs.
2009	Intra-EU Investment Agreements and Arbitration: is European Community Law an Obstacle?	Wehland	To analyse the uneasy relationship between intra-EU Investment Agreements and EC law.	EC law should not constitute an obstacle to intra-EU investment agreements and arbitration.
2009	Bilateral Investment Treaties and the European Union: Recent Developments in Arbitration and before the ECJ	Potestà	What is the future of around 190 intra-EU BITs? An analysis of the arbitral tribunal's decision in *Eastern Sugar B.V.* v. *The Czech Republic* and the ECJ's recent case law.	The interplay between investment law and legal and economic issues stemming from the specificity of EU law will need to be monitored.
2010	Public Statement on the International Investment Regime	Van Harten et al.	To formulate the shortcomings and recommendations regarding the current landscape of investor-State arbitration, especially to be applied within the EU law context	The current system of investor-State arbitration is not fair and independent and needs revising to allow many shareholders and the public to actively participate in the debate on reshaping the system.
2010	European Law Challenges to Investment Arbitration	Burgstaller	To highlight some issues concerning EU law challenges to investor-State arbitration (validity and applicability of Member States' BITs; applicability of EU law in investment arbitration, EU law challenges regarding enforcement of investment arbitration awards, and competence issues).	The exact competence of the Union in unclear; it does not seem to cover direct investment such as portfolio investment; increased EU competence in FDI is a positive development to the extent that it may contribute to the development of an integrated investment policy. However, some issues are outstanding, such as the Union's inability to become a party to the ICSID Convention, which might further increase fragmentation of competences between the EU and Member States.
2010	From Washington with Love: Investor-State	Strik	What is the interplay between investor-State arbitration and EU law?	The finality of arbitral awards may be a problematic issue when investment arbitration

	Arbitration and the Jurisdictional Monopoly of the Court of Justice of the European Union			tribunals render conflicting awards on EU law in different States. However, rather than automatically rescinding intra-EU BITs, some safeguards should be incorporated into the procedure for decision making by arbitrators in the field of EU law (such as the "holding back" approach of arbitral tribunals if they assess that other measures before domestic courts would better address emerging EU law issues, and the participation of other parties in arbitration proceedings).
2011	Arbitration Procedure: the Role of the European Union and the Member States in Investor-State Arbitration	Schill	To address the following questions: "does the new competence [in FDI] affect the party status of Member States?" If not, who will represent the Member States in arbitration?" "What else are the duties of cooperation between the Commission and Member States in conducting investment treaty arbitration?"	Investor-State arbitration involving Member States remains possible if the appropriate relationship is worked out between arbitral tribunals and the CJEU (based on the principle of cooperation). The new EU competence in FDI should not affect or alter the right of Member States to represent themselves in investor-State arbitrations in which they appear as a party. At the same time, Member States are under obligation to cooperate with the Commission regarding investor-State arbitrations. This relates to the constitutional principle of sincere cooperation.
2012	EU, Investment Treaties, and Investment Treaty Arbitration - Current Developments and Challenges	TDM Special Issue	A number of contributions aiming at addressing the most recent developments concerning the new EU common commercial policy, their challenges, and potential solutions.	See individual contributions.
2012	Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration	Hindelang	Broadly speaking, the article investigates the sensitive question of the nature of EU law in the context of investment arbitration (arising out of "inter-se treaties of Member States.")	It is hoped that national courts or arbitral tribunals will refer questions to the CJEU to address the current inconsistency of arbitral awards where EU law is applied.

2012	Investor-State Arbitration in EU International Investment Agreements with Third States	Burgstaller	What are the main problems that hinder the application of investor-State arbitration to EU international investment agreements (IIAs)?	The only possibility to accommodate ISDS in EU IIAs with third countries would be changes in the perception of arbitral tribunals within EU law. Here, changes to primary law are required to allow arbitral tribunals to use the preliminary procedure under Art. 267 TFEU.
2013	The Relation of the European Union and its Member States in Investor-State Arbitration	Schill	To examine the new facet of EU external competence in FDI on the settlement of international investment disputes in general and investor-State arbitrations in particular (especially against the background of the recent conflicting international trend to withdraw from investor-State arbitration provisions in investment treaties.	Investor-State arbitration remains a desirable dispute resolution mechanism for future EU treaties. This, however, calls for the need of the appropriate autonomy of EU law (procedural and substantive) to respect EU constitutional principles.
2013	The European Union and Investor-State Arbitration: a Work in Progress	Mazzini	To present the emerging interplay between the EU and investor-State arbitration	Because the EU is a relatively new player in the field of investor-State arbitration, the relationship between these two issues remains underdeveloped. Further clarification is needed, especially to enhance recognition and enforcement of arbitral awards.
2014	The Emperor Has No Clothes: a Critique of the Debate Over Reform of the ISDS System	Saulino, Kallmer	To address the shortcomings of the current debate on the ISDS system	The current debate is inadequate simply because there is no “system” or “regime” of ISDS but a patchwork of different agreements and treaties that only suggest development of an ISDS system in the future.
2014	The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications	Weaver	To examine the conflicting TTIP provisions and to provide “reconciliation” between the US and EU texts.	Proposes for reconciled versions of different contentious issues in the TTIP
2015	Initial Hiccups or More? About the Efforts of the EU to Find its Future Role in	Bischoff	To prospectively describe how the EU ISDS may look.	The interplay between the EU and Member States over ISDS remains uncertain; if consensus is absent, perhaps the CJEU will need to interpret Art. 207 TFEU. It is also possible to

	International Investment Law			transfer competence from the EU back to Member States to conclude IIAs.
2015	The European Union Investment Arbitration Regime and Local Governments: the Need for a Synchronization of Efforts	Marian	To examine the EU investor-State arbitration regime after the coming into force of the Lisbon Treaty, especially in the context of the ECJ decision against Sweden of 2009.	Vattenfall I serves as an early warning that illustrates the potential tensions between the competencies of local governments, State liability and shared risks over intra-EU investment issues between the EU and Member States.
2015	The European Commission's Push to Consolidate and Expand ISDS: An Assessment of the Proposed Canada-Europe CETA and Europe-Singapore FTA	Van Harten	To examine the European Commission's approach to ISDS in CETA and FTA with Singapore (against four criteria: independence, fairness, openness, and balance).	The wording of ISDS in both agreements is very similar and suggests that the Commission did not negotiate a solution that would improve a US ISDS model. To the contrary, as far as a balanced criterion is concerned, the Commission seems to be doing even worse. This suggests that the Commission intends to engage in a "shady" dispute resolution system.
2015	Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?	Legum	The recent debate on Trans-Pacific Partnership and EU-US free trade agreements may provide an appropriate context to re-evaluate the appellate mechanism in investment arbitration.	Some shortcomings of the appellate system in investment arbitration are evident (e.g. it does not address different interpretations of facts by arbitral tribunals) but it may be worth reconsidering in the context of future EU-US free trade agreements.
2015	Is Investor-State Dispute Settlement (ISDS) Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements	Bronckers	To trace and analyse the EU policy shift toward ISDS.	The focus on foreign investors in ISDS is too narrow; private parties (here, also investors) should be able to refer to EU domestic courts under BITs; domestic courts in the EU should be upgraded so that recourse to investment tribunals is not necessary; in the meantime a broader international compliance system should be implemented to include all interested private stakeholders.
2015	Legality of investor-State dispute settlement (ISDS) under EU law: Legal study	Client Earth	To analyse the compatibility of the ISDS mechanism with EU law.	The study finds that the ISDS mechanism, including the recently proposed Investment Court System, may not be compatible with EU law.
2015	Why TTIP Should Have an Investment	Quick	Why ISDS (in its reformed version) should be included in the TTIP.	To improve the fragmented landscape of BITs and to prove leadership by two political

	Chapter Including ISDS			powers such as the EU and the US.
2015	"ISDS" in the TTIP: the devil is in the details	Fabry, Garbasso	Critical analysis of the pros and cons of ISDS (from the economic and legal perspectives).	A more balanced approach to ISDS is needed to address both legal and economic arguments for and against ISDS.
2016	A Response to the Criticism against ISDS by EFILA	Alvarez, Gloria Maria; Blasikiewicz, Blazej; van Hoolwerff,Tabe; Koutouzi, Kleopatra; Lavranos, Nikos; Mitsi, Mary; Spiteri-Gonzi, Emma; Verdegay Mena, Adrian, & Willinski, Piotr	To examine the validity of recent criticism of ISDS.	Most of the criticism is not supported by facts or insights from the practice of arbitral tribunals and case law. States are in fact winning more investment cases than investors. There are also incremental changes to the investment arbitration regime (increasing codes of conduct for arbitrators and increasing rules on transparency) that point to the suitability of ISDS in the context of EU IIAs.
2016	The European Commission and UNCTAD Reform Agendas: do they ensure Independence, Openness, and Fairness in Investor-State Arbitration?	Van Harten	To review the Commission's and UNCTAD's approaches to the reform of investor-State arbitration. Three main issues serve as standing points for the analysis: (1) the lack of institutional independence of this form of dispute resolution, (2) lack of openness, (3) lack of procedural fairness.	The proposed reforms do not provide for fair and independent investment arbitration. Two solutions could address this criticism: (1) inclusion of the judicial system in investment treaties, and (2) strengthening the regulatory powers of States under the treaties.
2016	TDM CETA Special	Different authors, preface: *Fortier*	To cover a variety of topics concerning CETA and its ISDS mechanism.	See particular contributions in TDM CETA Special.
2016	CETA: A Threat to Financial Stability? A Case for Regulatory Co-operation	Birr	Does the liberal approach to financial services under the recent CETA draft means the declining ability of States to regulate and protect their financial markets?	CETA provides for relative flexibility regarding the possibility of regulation of financial markets in times of crisis; however, the same is not the case in times of financial stability.
2016	Study on Investor-State Dispute Settlement (ISDS) and Alternatives to Dispute Resolution in International Investment Law	Hindelang	An analysis of the future application of ISDS to EU investment agreements	ISDS should continue to form part of EU investment agreements but reforms / improvements are required in the following fields: "(1) mitigating inconsistency, (2) securing the right balance between private and public interests, (3) establishing the integrity of arbitral proceedings, and (4) preventing misuse, allowing for error-correction and managing

				financial risk associated with ISDS."
2016	The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead	Titi	To evaluate the recent Commission proposal for the creation of an EU Investment Court.	Although ambitious, the proposal should concern further answers to questions that remain open.

The increasing use of arbitration in EU sectors

This part of the review presents the literature on emerging EU sectors in which arbitration/ADR has been recently implemented or encouraged. These concern consumer arbitration/ADR, matters concerning EU competition law, tax law, and "other" disputes.

Consumer arbitration/ADR

The literature on consumer arbitration/ADR in the EU naturally reflects the historic developments of these means at the EU level. As put together by Hodges, we can distinguish the following documents that carved out the current legal landscape of ADR at the EU level: Recommendation 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes of 1998; Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR; the Code of Conduct for Mediators of 2004; Directive 2008/52 on certain aspects of mediation in civil and commercial matters, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes.[26] Moreover, several sector-specific "out-of-court" dispute settlement schemes were either encouraged in EU directives such as the Distance Marketing of Financial services Directive, the Timeshare Directive, the E-commerce Directive, the Postal Services Directive, the Insurance Mediation Directive, the Markets in Financial Instruments Directive, or only linked with the duties of Member States to establish effective ADR schemes, such as directives in the telecom sector, the EU legislative framework in the energy sector, the Consumer Credit Directive, and the Payment Services Directive.[27]

This complex legal framework regarding both binding and non-binding EU regulations, including those presented above, was reflected in the emerging literature addressing the phenomenon of the changing EU regulation of arbitration/ADR. We shall start with terminology. As already noted, neither EU regulations nor the literature clearly distinguish between arbitration and ADR. As explained by Belohlávek, the reason why there is no uniform definition of consumer arbitration within the EU relates to the fact that consumer disputes have also been vaguely defined (2012). By referring to the Opinion of the Economic and Social Committee on the Green Paper on Access of Consumers to Justice and the Settlement of Consumer disputes in the Single Market (94/C 295/01), Belohlávek quotes the following justification for the lack of a uniform concept of consumer arbitration within the EU: "The concept of what constitutes a consumer will determine what constitutes a consumer dispute". This flexible approach to consumer disputes and consumer arbitration has also been reflected in other literature.

For example, according to Piers: "ADR or Alternative Dispute Resolution is understood to cover mechanisms of dispute resolution where the parties to the dispute have agreed that a third neutral person,

[26] Christopher Hodges, Iris Benoer, and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe*, 2012, 7–10.

[27] Ibid., 10–11.

other than a judge, will contribute to resolving the parties' dispute".[28] Piers puts more emphasis on a private person who will facilitate resolution of consumer ADR when explaining how this concept "is understood" in the EU. Others, including Hodges and Creutzfeldt-Banda, also point to confusion regarding the actual definition of ADR and arbitration (2013). Creutzfeldt-Banda refers to the Consultation paper on the use of alternative dispute resolution as a means to resolve disputes related to commercial transactions and practices in the European Union of 2011, where a similar explanation was given, namely that ADR "covers out-of-court mechanisms that lead to the settling of a dispute through the intervention of third party". Moreover, references are made to Regulation No 2006/2004 and the Consumer ADR Directive where ADR entities were explained as: "these entities [that] aim at resolving, out-of-court, disputes arising between parties, through the intervention of an entity (e.g. arbitrator, conciliator, mediator, ombudsman, complaints board)". This ambiguity at the EU level prompted some authors to provide their own definition of consumer ADR, at least for the purpose of academic analysis. Hence, Hodges, Benöhr, and Creutzfeldt-Banda (2013) in a ground breaking study *Consumer ADR in Europe* adopted the acronym "CADR" for consumer ADR and the acronym "CDR" for consumer dispute resolution. These acronyms aim at eliminating confusion over whether consumer ADR covers court-annexed ADR, which is not the case in their study. They are also different from traditional commercial ADR, although some techniques can be similar (Cortes 2015). As explained by Cortes, "CDR" and "CADR" differ from traditional ADR in civil and commercial matters because—whereas commercial parties can choose between ADR and litigation, so that ADR appears as an alternative to court litigation—consumers often do not have this option, so that ADR is not a real alternative for them. Moreover, Cortes notes that "CDR" is a "readjusted" form of ADR in order to reflect the disparity of power on the part of traders and consumers to which such schemes apply. All these make CDR and ADR two distinct models that overlap only every now and then in practice.

The diversity among ADR schemes available for consumers is also explained in that different ADR schemes serve different ends (Hodges 2014). For example, as noted by Hodges, arbitration-based ADR schemes have primarily dispute resolution functions, whereas other schemes (such as the ombudsman) play additional roles vis-à-vis consumers including giving advice to consumers and providing them with information on dispute resolution.

Finally, it is important to mention that the authors of the study for the European Parliament on the Legal Instruments and Practice of Arbitration also raise doubts regarding the issue whether the Consumer ADR Directive in fact applies to arbitration given the ambiguity of the terms it implies. Because of this confusion, it is claimed in the literature that more clarity is required concerning the terminology that deals with arbitration/ADR at the EU level.

Regarding the content of contributions on consumer arbitration/ADR, starting with the earliest contributions, more general questions have been posed on the suitability of ADR for European legal systems (Werner, 1993). Furthermore, scholars have turned to comparing the specific regime of consumer protection in the EU with developments in consumer arbitration in the US, by analysing, inter alia, different treatment of pre-dispute arbitration clauses in both jurisdictions (Drahozal & Friel, 2002 and 2005; Bates 2004). Although it is usually claimed that the EU model appears to provide consumers with a higher level of protection, some authors (Belohlávek 2012) claim that the US model of consumer arbitration is in fact more efficient than the European one because the latter creates more room for potential abuses. This was also confirmed by the authors of a recent study on arbitration in the EU and Switzerland (Cole at al. 2015) which pointed out different national approaches to the enforceability of pre-dispute arbitration clauses in B2C contracts, which invites manipulation by dishonest businesses vis-à-vis consumers. Most recently, scholars have studied the complex attempts to harmonize different national consumer schemes at the EU level, as well as the possibility of enforcing EU consumer law by means of ADR (Barral-Viñals, 2013). Other topics include: the possibility of collective redress and class

[28] Maud Piers, "Is Europe Skipping a Step? Exploring the Harmonization of ADR Agreements," *Maastricht Journal of European and Comparative Law* 20, no. 4 (2013): 508.

actions within the EU (Dunin-Wąsowicz 2011, Strong 2011, Hodges 2013), cross-border consumer ADR (Inchausti 2014), consumer ADR and appeals (Hodges 2014), a number of contributions on on-line arbitration (Cortes 2010, Liyange 2010, Alqudah 2011, Davies 2016), and more isolated papers on the social and economic impact of ADR/ODR schemes on the development of universal service obligations with a view to the new consumer citizenship objectives (Davies & Szyszczak, 2010) and of cross-border trade (Davies 2016).

Table 5: Arbitration/ADR in Consumer Disputes

Year	Title	Author(s)	Objectives	Results (concerning EU law)
1993	ADR: Will European Brains Be Set On Fire?	Werner	Is ADR suitable for Europe?	Although the article does not deal with consumer arbitration more specifically, it concerns the early European experience with ADR
2002	ADR in England and Wales	Mistelis	To examine the current organization of ADR in civil and commercial disputes in England and Wales. The term ADR encompasses predominantly mediation and conciliation.	Offers impressive analysis of various aspects of ADR in England and Wales (e.g. the development of ADR, institutional structures, court-annexed ADR, statistics regarding the use of ADR, pros and cons of ADR). The conclusion is that the success of ADR will depend on the future of private and public partnership in the ADR field.
2002	Consumer Arbitration in the European Union and the United States	Drahozal, Friel	To provide a comparative perspective on legal approaches to the use of pre-dispute arbitration agreements in B2C transactions in the US and in the EU.	The structure of consumer arbitration systems in the US and in the EU is largely shaped by different legal regimes for consumer protection in the US and in the EU. The possibilities of convergence remain unknown.
2004	A Consumer's Dream or Pandora's Box: is arbitration a viable option for cross-border consumer disputes?	Bates	To analyse the appropriateness of commercial arbitration in the US and in the EU for resolving cross-border consumer disputes.	Traditional arbitration is not an appropriate mechanism for resolving cross-border disputes. Arbitration should therefore be limited solely to B2B transactions.
2005	A Comparative View of Consumer Arbitration	Drahozal, Friel,	To examine different legal regimes of pre-dispute consumer arbitration agreements in the EU (in particular in the UK) and in the US.	Offers legal and political insights into regulation of pre-dispute arbitration agreements in the EU and in the US. Consumer interests are extensively protected in the EU, while in the US business lobbies have more incentives to oppose the regulation of arbitration (i.e. the availability of jury trials, class actions, punitive damages).
2006	ADR in England and Wales: a Successful Case of Public Private Partnership	Mistelis	Analyses the history and the increasing application of ADR to new types of	Notably, certain ADR schemes such as mediation have long been established in the UK in sensitive oriented matters such as community disputes,

			dispute, also in the context of liberalization and privatisation of the public sector.	neighbourhood disputes, school peer disputes, and victim-offender mediation. Surprisingly, business mediation gained its popularity *vis-à-vis* these publicly-sensitive mediation schemes.
2010	ADR: Effective Protection of Consumer Rights?	Davies, Szyszczak	To analyse the *Allasini* judgment (and also the mandatory pre-trial mediation procedure under Italian law) against a background of evolution of the enforcement of consumer rights in the liberalised EU sectors.	Encouraging a growing number of ADR schemes in B2C disputes undermines the "creation of stronger qualitative concepts of universal service obligations, which are at the heart of new consumer citizenship objectives in the European Union."
2010	Online Dispute Resolution for Consumers in the European Union	Cortes	What legal standards need to be implemented for online consumer arbitration to offer its deserved place for enforcement of consumer rights and resolution of e-commerce disputes?	Difficult to reach conclusion on ODR given the constant dynamics in the field. The book offers certain recommendations and predictions on how the field of ODR may look in the near future.
2010	Online Arbitration Compared to Offline Arbitration and the Reception of Online Consumer Arbitration: an Overview of the literature	Liyanage	The paper aims at (1) mapping the differences between online and offline arbitration, and (2) analysing the perception of academics and existing legal frameworks regarding online arbitration. It follows a literature review format.	Online arbitration is largely based on its traditional (offline) model and the main difference between the two types concerns the use of technology. An appropriate platform and access to technology need to be provided for consumers to enhance the legitimacy of online arbitration as well as to allow consumers to fully exercise their rights.
2011	Collective Redress in International Arbitration: an American Idea, a European Concept?	Dunin-Wasowicz	"How the changing European law of collective litigation may affect the bringing of class actions in international arbitration." It concerns a hypothetical scenario that situates international arbitration (class actions) in one of	Class arbitration seems suitable in some European jurisdictions (e.g. the Netherlands, Sweden, or Denmark) but not in others. One example is the settlement in the *Royal Dutch Shell* case. Also, class arbitration, once adopted in the EU, should provide for opt-in mechanisms and other procedural safeguards.

			the European jurisdictions.	
2011	Arbitration and Consumer's Disputes at a Complicated Crossroad	Ganchev	To critically analyse recent developments in EU consumer arbitration (e.g. unfair terms in arbitration clauses, ECJ treatment of such clauses, and jurisdictional problems related to consumer arbitration).	It suggests the need for harmonization of the procedural rules applicable in B2C arbitration within the EU (e.g. concerning the content of arbitration agreements so that they do not contain unfair terms).
2011	Collective Arbitration under the DIS Supplementary Rules for Corporate Law Disputes: a European Form of Class Arbitration?	Strong	To analyse the DIS Supplementary Rules (also in the context of the AAA Supplementary Rules).	The DIS Rules, although applicable solely to corporate disputes, lay down procedural foundations for class arbitrations in Europe and should be taken seriously by the local (German) and international arbitration communities.
2011	Enforceability of Arbitration Clauses in Online Business-to-Consumer Contracts	Alqudah	Enforcement of arbitration clauses in online B2C contracts will most likely follow the rules of the New York Convention of 1958. The article suggests two deficiencies of this enforcement model: the first stemming from the requirements regarding the validity of online arbitration clauses, and the second concerning the enforceability of such clauses in the context of the public policy exception.	A new regulatory model is required to overcome uncertainty relating to enforcement of arbitration clauses in online B2C contracts.
2011	Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations	Piers	To examine *why* and *how* arbitration and EU law continue to coexist as two distinct legal orders. It primarily concerns consumer arbitration	Certain limits to consumer arbitration exist at the EU level (e.g. pre-dispute arbitration agreements are not allowed and the validity of referrals to consumer arbitration depends on whether certain conditions have been met). The EU continues to intentionally exclude arbitration from its legal agenda. However, more cohesion between these two regimes (EU law and arbitration) is needed.

2012	B2C arbitration: consumer protection in arbitration	Belohlávek	Among other things, the book focuses on "the interaction between the power exercised by public authorities (primarily in court proceedings) and the power of arbitration in resolving consumer disputes.	An excellent study offering insights into the following: terminology in the context of consumer disputes and consumer arbitration, explanation of consumer protection under EU law (including ECJ case law), consumer arbitration in selected countries, and consumer arbitration as the subject matter of court proceedings.
2012	Autonomy in B2C Arbitration: Is the European Model of Consumer Protection Really Adequate?	Belohlávek	The author argues that the European model of consumer arbitration is inefficient. A comparison is made between the European, the US and German models.	The US model of consumer arbitration is more efficient than the European one because the latter often results in abuse of the system of consumer protection. Also, the German model serves as an efficient alternative as it is based on a compromise.
2012	Consumer-to-business dispute resolution: the power of CADR	Hodges, Benöhr, Creutzfeldt-Banda	Preliminary observations on the Oxford study of ADR schemes in 10 Member States	The article explains and analyses the ADR schemes in the Member States under analysis, sets forth their peculiarities, notes empirical findings, and signals the potential of these mechanisms to create a regulatory system offering collective redress and behaviour control of traders.
2013	Is Europe skipping a Step?: exploring the Harmonization of ADR Agreements	Piers	What action is required on the part of the EU to promote better access to justice by unifying the rules regarding the legal status of ADR agreements?	After having analysed (1) the substantive law and the procedural law requirements for the validity of an ADR agreement under EU law, (2) the content of the obligations of the parties to an ADR agreement, and (3) the rules on enforceability of an ADR agreement, the author proposes a set of rules to decrease the "obscure status" of an ADR agreement under EU law.
2013	Consumer ADR in Europe	Hodges, Creutzfeldt-Banda, Benöhr	The first study to analyse (by means of both theoretical and empirical research) consumer ADR (called CADR) at Member State level as well as EU regulation of CADR.	The first systematic study of CADR, focusing both on CADR schemes in selected Member States (Belgium, France, Germany, Lithuania, the Netherlands, Poland, Slovenia, Spain, Sweden and the United Kingdom) and ADR regulation at the EU level. The book presents the major findings concerning the nature of CADR in the EU and contains proposals for future policy.
2013	Resolving mass disputes: ADR and	Hodges	An edited volume containing a number of	Regarding the EU focus, the article analyses the procedure for collective settlements in, inter alia,

	settlement of mass claims		contributions categorized in two groups: (1) settlement of mass claims, and (2) consumer ADR.	the Netherlands, and England and Wales. Regarding consumer ADR, the contributions examine, inter alia, the origins and evolution of the consumer dispute resolution system in Europe, out-of-court dispute settlement of consumer disputes in financial services, and the interplay between public enforcement and A(O)DR.
2013	Consumer Complaints and Alternative Dispute Resolution: Harmonisation of the European ADR System (in: The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?)	Barral-Viñals	To shed light on the interplay between harmonization of consumer (contract) law and the necessary harmonization of EU enforcement legislation including national rules concerning the treatment of ADR. The case study concerns the Spanish consumer mediation system, which was the subject of a research project launched by the Catalan Ministry of Justice that resulted in the publication of a White Paper on Mediation in Catalonia.	Harmonization of ADR is needed to ensure better protection of consumers in the EU. The experiences of the research on Spanish mediation schemes can serve as a reference to depict the ADR standards necessary at the EU level.
2013	Regulating dispute resolution: ADR and access to justice at the crossroads	Steffek & Unberath (ed.)	To provide a Guide for Regulating Dispute Resolution. Here, dispute resolution is understood broadly; it concerns all its possible mechanisms such as negotiation, conciliation, arbitration, and court adjudication, just to mention a view.	Analyses and theoretical data covering the following countries are provided: Austria, Belgium, Denmark, England and Wales, France, Germany, Italy, Japan, the Netherlands, Norway, Switzerland, and the US.
2014	Consumer ADR and Appeals	Hodges	To examine the issue of appeals within consumer ADR (CDR) schemes.	If CDR schemes satisfy the requirements set forth in two recommendations and accompanying documents, there is no need to adopt appeal mechanisms from the decisions issued in the course of CDR proceedings. However, it is relevant to assure the possibility of

				referrals of points of law to relevant courts, the regulator, or legislator to provide necessary clarification prior to application of the law within CDR schemes.
2014	Fast, Effective and Low Cost Redress: How do Public and Private Enforcement and ADR Compare?	Hodges	To summarize empirical data regarding the means of enforcing competition law (among other things).	The findings of this study on enforcement of competition law reveal that competition law is increasingly enforced in private fora mostly used by businesses in commercial contracts (B2B). The question remains whether competition law could be better integrated with trading or consumer contracts or systems in order to be more effective?
2014	Consumer ombudsmen: better regulation and dispute resolution	Hodges	What kind of technique (or techniques) is suitable for resolving consumer disputes in the EU? Is arbitration still efficient? Is the ombudsman system more desirable? Also, what are the long-term aims of consumer dispute resolution, in particular from the perspective of market regulation and of legal systems in more general terms?	The consumer ADR Directive offers several possibilities to improve access to justice. Different ADR schemes serve different ends: for example, arbitration-based ADR schemes have a mostly dispute resolution function while other schemes (such as ombudsman) play additional roles in that they provide consumer advice and regulatory information. Finally, there is room for improvement of all existing ADR schemes. This calls for creation of a unified and more efficient EU dispute resolution system.
2014	Specific problems of cross-border Consumer ADR: what solutions? (Conference paper)	Inchausti	To identify specific problems regarding cross-border consumer ADR and to provide concrete solutions to combat them.	Institutionalization of a parallel system of justice for consumers that implies new obligations for States to ensure that ADR systems are in place and meet specific requirements. The Commission has undertaken significant efforts to create a system of cross-border ADR in e-commerce, which is an isolated sector in the context of cross-border ADR and cross-border litigation in the EU.
2014	Private law enforcement through ADR: Wonder drug or snake oil?	Wagner	"Will ADR help to improve enforcement of consumer law in Europe or will it rather dilute the incentives generated by substantive law?"	ADR is not an adequate means to secure enforcement of EU consumer law.

2015	The Legal Instruments and Practice of Arbitration in the EU, A study for the Directorate General for Internal Policies Policy Department of the European Parliament	Cole, Bantekas, Ferretti, Riefa, Warwas, Ortolani	An in-depth study on, inter alia, consumer arbitration.	Tighter control should be imposed on consumer arbitration within the EU.
2015	Is ADR a Superior Mechanism for Consumer Contractual Disputes?—an Assessment of the Incentivizing Effects of the ADR Directive	Weber	To assess what ends ADR serves in enforcing contractual rights of consumers under the new ADR Directive (law & economics analysis of incentives to use ADR procedures)	The requirements established under the ADR Directive contain some deficiencies (e.g. connections between ADR boards and traders); however, their actual assessment requires further research on incentives (to use ADR) preferably by means of sociological, psychological, and behavioural science methods
2015	The Impact of EU law on the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?	Cortes	To critically analyse the EU ADR regime under ADR Directive 2013/11/EU, to examine different ADR schemes in Italy, Spain, and the UK, and to analyse the grounds on which consumer complaints may be rejected by ADR bodies.	Although the EU ADR regime has real potential to enhance consumer redress, its efficiency will largely depend on State and business perceptions of ADR regimes.
2015	Equal Employment Disputes: ADR and the Role of the Equal Treatment Authority	Zaccaria	What is the effectiveness of the Equal Treatment Authority (ETA) in resolving equal employment disputes, also concerning discrimination?	The ETA should have a similar role to courts in resolving equal employment disputes.
2016	ADR/ODR: Too Much Optimism in the Promotion of Cross-Border Trade? (in: *EU Civil Justice: Current Issues and Future Outlook* / edited by Burkhard Hess, Maria Bergström and Evan Storskrubb)	Davies	Is the optimism regarding the new ADR/ODR schemes promoted by recent legislative attempts at the EU level in fact well founded? Also, to offer an additional perspective on the discussion about ADR/ODR means, namely, the role of these mechanisms in developing procedural and private law and in	The social and economic impact of the new ADR/ODR schemes is questionable. It does not seem likely that these schemes will contribute to an immediate boost in cross-border trade. However, they may be part of broader collective attempts to do so once a sufficient platform is put in place.

			enhancing the EU internal market.	
2016	Top-Level Domains and ADR: What Protection of Consumer Interests Under ICANN's New gTLD Program? (in: *EU Civil Justice: Current Issues and Future Outlook* / edited by Burkhard Hess, Maria Bergström and Evan Storskrubb)	Mariottini	If and how consumer interests are addressed within (inter alia) ICANN's new generic top level domains (gTLD) Dispute Resolution Procedure.	Consumer interests are neither addressed nor protected within ICANN's procedure in question (at least, not directly).

Arbitration and EU competition law

Regarding the literature on arbitration of EU competition law issues, two main distinctions can be made. The first concerns contributions pre- and post- the CJEU judgment in *Eco Swiss v Benetton International (Eco Swiss)* of 1999. The second relates to topics covered, with the most popular ones on the application of EU competition law by arbitrators, as well as on the scope of the review by national courts of awards that deal with EU competition law.

The landmark judgment in *Eco Swiss* confirmed the absence of formal obstacles for arbitral tribunals to decide on matters relating to EU competition law; however, domestic courts must review awards with a view to possible errors on the part of arbitrators in applying EU competition law, which falls within EU public policy (Furse, D'Arcy 1999). This review is possible even if the parties did not raise competition law issues in the course of arbitration proceedings.

Before this judgement, the literature mostly concerned the debate on the arbitrability of EU competition law issues by arbitrators (Hanotiou 1995), and on the safeguards available to the parties to correct possible errors by arbitrators in the application of such law (Weigand 1993). Following the rendering of the judgment, scholarly contributions included more determinative conclusions regarding shifts from State courts to arbitration in the field of competition law (Flere 2006). Even more disputes may be covered by arbitration in the future, since the EU Directive on antitrust damages is likely to increase the possibility of using arbitration and other forms of ADR (such as mediation and conciliation) to allow parties to obtain private damages in cases of infringement of competition law (Driessen-Reilly 2015). These contributions also openly speak about the obligation on the part of arbitrators to apply EU competition law within the EU even when the parties did not raise competition law issues in their submission, if they do not wish to have their awards vacated in domestic courts where recognition and enforcement is sought (Brulard & Quintin, 2001, Flere 2006, Komninos 2012). This is why it is postulated that a balanced approached is worked out between EU competition law (as reviewed by domestic courts) and arbitration not to undermine the autonomy of arbitration. Success in finding this desirable approach is contingent on the wisdom of courts and arbitrators (Radicati Di Brozolo 2011). In fact, many scholars see the possibility of review of arbitral awards as the most effective corrective and preventive procedure to diminish misapplication of EU competition law by arbitrators (Komninos 2001). It is also argued that the European Commission should take a firmer stance on the issue at hand, for example by means of some soft law mechanisms such as a notice laying down the EC competition law culture (Dempegiotis 2008).

Table 6. Arbitration and EU competition law

Year	Title	Author(s)	Objectives	Results (concerning EU law)
1993	Evading EC Competition Law by Resorting to Arbitration?	Weigand	Are widespread concerns about arbitration of anti-trust disputes (as expressed by the Commission and scholars and relating to the neglect of EC competition law by arbitrators) well founded?	There is not a sufficient bridge between the ways in which arbitrators apply EC competition law and EU law (e.g. lack of possibility to request preliminary rulings). This also implies more possibilities to avoid the "unpleasant consequences of EC competition law" by arbitrators. However, the parties may appeal against anti-trust issues in arbitral awards before national courts. In the absence of the parties' agreement in this regard, it is possible to do so if the arbitration took place in Belgium.
1995	Competition Law Issues in International Commercial Arbitration: an Arbitrator's Viewpoint	Hanotiau	To analyse the recent phenomenon of arbitration of EC competition law from the perspective of a practitioner.	The scope of arbitrability has been expanding and competition law disputes are now either expressly determined as arbitrable or perceived as such by arbitrators.
1997	EC Competition Law and the Proper Scope of Arbitration	Gharavi	To investigate the proper scope of arbitration of EC competition law.	It is extremely difficult to determine the scope of application of EC competition law by arbitrators. Therefore, it implies dangerous consequences when arbitrators with no expertise in economics are asked to decide on EC competition law and if the award will be excluded from the scope of review by a national court at enforcement level, which is permissible in Belgium or Switzerland. It is recommended that arbitrators are offered more assistance in applying competition law and that supervisory powers are established to monitor such practices.
1998	E.C. Competition Law and Arbitration: Opposing Principles?	Lugard	To analyse the status of arbitration *vis-à-vis* EC competition law (also ECJ case law in this regard).	It remains to be seen what guidance in regard to arbitration the ECJ will provide in its judgment in *Eco Swiss.*
1999	Eco Swiss China Time Ltd v. Benetton: E.C. Competition Law and Arbitration	Furse, D'Arcy	To analyse the *Eco Swiss* judgment.	The judgment established fundamental implications for domestic courts when reviewing arbitral awards in which issues of EC

				competition law are determined. The courts should annul such awards in cases in which they infringe EC competition law
2001	European Community Law and Arbitration: National Versus Community Public Policy	Brulard, Quintin	To analyse the ECJ judgment in *Eco Swiss* in view of the relationship between national courts and arbitral awards.	The only reason to compel arbitrators to apply Community competition law is the threat of vacating an arbitral award by a domestic court that will review its consistency with that law at the enforcement stage. Hence, arbitrators may not be compelled to apply EU law only when the award will be enforced outside the EU.
2001	Arbitration and the Modernisation of European Competition Law Enforcement	Komninos	To examine corrective and preventive measures to ensure consistency within arbitral awards dealing with competition law.	The most effective and far-reaching mechanisms to assure correct application of EC competition law by arbitrators concerns review of arbitral awards at enforcement level. It is suggested that the Commission takes up only soft-law initiatives to ensure further convergence (e.g. concerning cooperation between tribunals and the Commission) to strengthen the autonomy of arbitration.
2002	European Community Law and International Arbitration: Logics that Clash	Shelkoplyas	To present points of potential clashes between Community law and arbitration by analysing relevant case law incl. the CJEU judgment in *Eco Swiss*.	For these two different regimes to function properly a mutual understanding of their principles is required.
2003	Arbitration and the Modernization of EC Antitrust Law: New Opportunities and New Responsibilities	Dolmans, Grierson	To present a brief overview of EC competition rules and to discuss the main issues relating to application of those rules by arbitrators together with changes within the new regime.	The need for selection of expert counsel and arbitrators.
2006	Impact of EC Competition Law on Arbitration Proceedings	Flere	To examine issues concerning competition law and arbitration (e.g. arbitrability of antitrust disputes, duty for arbitrators to apply competition law *ex officio*, and the impact of the *Eco Swiss* judgment).	The concept of arbitrability of antitrust disputes has evolved from procedural to substantive law analyses and now falls within the concept of *lex mercatoria*. Arbitrators are now obliged to apply EC competition law and a shift has occurred from State authorities to private actors (arbitrators, arbitral institutions) in the field of EU

				competition law and its enforcement.
2006	Modernised EC Competition Law in International Arbitration	Landolt	To provide arbitration practitioners and EC competition law specialists with the tools necessary to bridge the gap between these two disciplines. The focus is on the arbitration laws of five major jurisdictions: France, Germany, England, Switzerland, and the Netherlands.	Provides a guide to application of EC competition law in arbitration proceedings regarding different stages of such proceedings.
2007	Practical Aspects of Arbitrating EC Competition law	Zuberbühler	What is the role of arbitration in private enforcement of EC competition law?	20 contributions on different topics concerning the interplay between arbitration and EC law.
2008	EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003: Conceptual Conflicts, Common Ground, and Corresponding Legal Issues	Dempegiotis	To shed light on the interplay between arbitration and EC Competition law, to point to major problems stemming from that interplay, and to examine whether arbitrators and domestic courts could establish a common approach to EC competition law by becoming its guardians.	Although inherent tensions exist between arbitration and EU competition law, it seems that effective preventive mechanisms are in place to ensure proper application of EC competition law by arbitrators. Also, the Commission should finally take a voice in this debate, preferably by means of some soft-law instruments such as a notice to "build an EC competition law culture" among arbitrators.
2011	EU and US Antitrust Arbitration: A Handbook for Practitioners	Blanke, Landolt (eds)	To address topics on EU and US antitrust arbitration.	Topics covered are, inter alia, EU Competition Law Arguments in International Arbitration: Practical Steps and Strategic Considerations, Arbitration and EU Competition Law in the Post-Modernization Era, The Application of EU Competition Law in International Arbitration in Switzerland, Remedies in Arbitration for EU Competition Law Violations.
2011	Arbitration and Competition Law: the Position of the Courts and of Arbitrators	Radicati Di Brozolo	To examine the relationship between arbitration and competition law (in two main fields: application by arbitrators of competition law and the review of awards containing determinations of competition law).	A balanced approach is needed to address the role of arbitration in determining competition law matters. This largely depends on the wisdom of courts and arbitrators.

2012	Arbitration and EU Competition Law	Komninos	To examine issues relating to the interplay between arbitration and EU competition law (e.g. historical use of arbitration in EU competition law matters, private international law questions concerning the subject matter) and to propose a balanced approach for the review by domestic courts of arbitral awards containing matters of EU competition law.	Arbitrators need to do their best to increase the enforceability of arbitral awards (see e.g. Art. 41 of the 2012 ICC Rules). Arbitrators should therefore be pragmatic when rendering arbitral awards. If issues of EU competition law are to be decided, they need to be approached by tribunals even if the parties did not expressly authorize arbitrators to address them. Setting aside arbitral awards by domestic courts seems to be the most effective corrective and deterrent factor for arbitrators when arbitrators misapply EU competition law.
2013	Antitrust Commitments and Arbitration in European Law	Carbone	What is the role of arbitrators in imposing commitments on undertakings in the context of anti-trust issues?	The imposition of such commitments should be reserved to the Commission and cannot be delegated to arbitrators.
2014	Public Policy Constraints in International Commercial Arbitration: Competition Law, Private Choices and Mandatory Rules	Collins	To address selected issues of public policy in arbitration, including those regarding application of competition law by arbitrators.	How to address the issue of scrutiny of awards by national courts without also interfering with arbitrators' discretion. Perhaps it would be advisable only to annul awards that manifestly violate EU competition law by taking a preliminary look at the substantive issues covered in such awards.
2015	Private Damages in EU Competition Law and Arbitration: a Changing Landscape	Driessen-Reilly	To examine the impact of the new EU Directive on antitrust damages on the use of arbitration to obtain private damages within the EU.	The EU Directive on antitrust damages is likely to increase the possibility of using arbitration but also other forms of ADR (mediation, conciliation) to obtain private damages in cases of infringements of competition law.

Arbitration and tax law

Literature on arbitration and tax law is rather scarce. Most papers and books focus on general discussion of the applicability of arbitration to international tax disputes (Ault 2001, Zueger 2001, Hinnekens 2002, Tillinghast 2003, Quiñones 2014, Nowland 2014) especially income tax disputes (Tillinghast 2003) and double taxation disputes (Bantekas 2007/8). Here are included recommendations for the future of international tax disputes where it is proposed to re-evaluate the relationship between arbitration and litigation from the taxpayer perspective, more active inclusion of taxpayers in arbitration, and enforceability of arbitral awards in tax matters under the New York Convention of 1958 (which is

advisable but after limiting the scope of grounds for refusal to enforce foreign arbitral awards) (Tillinghast 2003). Moreover, it is suggested that a three party system of State-State-taxpayer arbitration is implemented because it appears to be the most suitable system under international tax treaties (Nowland 2014). Finally, some contributions question the fairness of tax arbitration established under international tax treaties mostly given the broad powers of tax authorities to control most aspects of tax arbitration processes, which turn out to be detrimental for taxpayers (Ramos Muñoz, 2014).

Only isolated articles point to the shortcomings of tax arbitration under Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises of 23 July 1990 (the EU Arbitration Convention), that sets forth the procedure for resolving disputes concerning double taxation of enterprises in specific circumstances (Hinnekens 2002). Other studies reach out to selected Member States. One such study investigates Italian procedural law where the limited use of arbitration in the context of tax disputes was depicted (Lang, Pistone, Schuch 2011).

Table 7. Arbitration and tax (including but not limited to the EU tax regime)

Year	Title	Author(s)	Objectives	Results (concerning EU law)
2001	Arbitration in International Tax Matters: Some Structural Issues	Ault	To discuss dispute resolution techniques in particular in international tax issues.	For example, should the taxpayer participate in arbitration proceedings? It seems so, at least when presentation of the case before the panel is concerned (although usually taxpayers do not participate in proceedings before the competent administrative authorities). It seems necessary either to broaden the scope of Art. 25 of the OECD Model Convention to include a description of approaches to bilateral tax arbitration or to include a separate article in the Convention to contain a self-standing arbitration scheme.
2001	Arbitration under Tax Treaties: Improving Legal Protection in International Tax Law	Züger	To shed light on dispute resolution mechanisms in recent treaty practice.	Evaluates use of arbitration and other forms of dispute resolution in the context of tax disputes.
2002	The Search for an Effective Structure of International Tax Arbitration within and without the European Community	Hinnekens	To examine the need for applying international arbitration to national tax disputes.	A need exists to improve the EU Arbitration Convention. The shortcomings concern, e.g.: the poor contractual network (with respect to term), no supervisory authority over decisions, lack of uniformity in interpretation within Member States.
2003	Arbitration of Disputes under Income Tax Treaties: a Panel Overview	Tillinghast	To summarize the objectives of the International Tax Law Interest Group meeting of 3 April 2003 regarding inclusion of	Several issues were discussed: e.g. the relationship between arbitration and litigation from the taxpayer perspective, enforceability of arbitral awards in tax matters under

			arbitration in income tax treaties.	the New York Convention (advisable but after limiting the scope of grounds for refusal of enforcement), involvement of taxpayers in arbitration.
2007/ 2008	The Mutual Agreement Procedure and Arbitration of Double Taxation Disputes	Bantekas	To analyse two dispute settlement procedures (under the OECD First Model Tax Convention and the EU Tax Convention) with specific focus on disputes over imposition of double taxation.	It is hard to analyse these clauses mostly because of their secrecy. The only publicly available case under the OECD clause suggests that the system is not taxpayer-friendly and departs from standard arbitration practices.
2009	Tax Arbitration and Investor Protection	Park	To suggest a starting point for distinguishing legitimate and illegitimate taxes and their relationship with arbitration	We need to draw the line between legitimate (revenue raising) and illegitimate (aiming at seizing the most money) taxes.
2011	Arbitration Procedures in a Tax Treaty and Community Law	Lang, Pistone, Schuch, Staringer	To analyse the procedural rules applicable to tax disputes (among other things).	Analysis of Italian procedural rules demonstrated limited use of arbitration boards in the context of tax disputes.
2014	A Game of Snakes and Ladders - Tax Arbitration in an International and EU Setting	Ramos Muñoz	To present how different mechanisms of dispute resolution could work at the international and European levels.	Is tax arbitration really arbitration? Many obstacles bar the way to a fair system of tax arbitration mostly because tax authorities seem to control most aspects of tax arbitration processes, which is detrimental for taxpayers.
2014	International Tax Arbitration as an ADR Solution in a Time of Global Tax Demands	Quiñones	To investigate the need to adopt an international tax arbitration convention.	Both developed and developing countries expressed their willingness to participate in an international tax system. One needs to ensure that developing countries are in fact properly represented in further talks.
2014	Three's (Not) a Crowd in International Tax Arbitration: International Tax Arbitration as a Development of International Commercial Arbitration Rather than a MAP Fix	Nowland	What is the role of arbitration in international tax treaties?	The article recommends adoption of a three party system of State-State-taxpayer arbitration as the most suitable system under international tax treaties.

Arbitration/ADR in other (EU) sectors

The literature on the application of arbitration/ADR in other sector-specific disputes only partially refers to EU regulatory sectors. There are also contributions that present the increasing usage of arbitration in

international disputes in various regulatory fields. These concern disputes in: banking and finance (Boeglin 1998, Hanefeld 2013) where the potential use of arbitration is predicted in contractual relationships between banks and third parties (i.e. mergers, acquisitions, outsourcing agreements) and in self-regulatory fields (such as stock exchange regulations) (Boeglin 1998). Moreover, more specific schemes are analysed in different jurisdictions such as the resolution of domain name disputes ".eu" in the Czech Republic (Remmertz 2006), and ADR in air passenger claims in Germany (Bollweg 2013).

Regarding EU sectoral disputes and domestic disputes stemming from EU sectoral regulations, the following papers should be mentioned. First, an excellent article by Creutzfeldt (2013) that puts together all EU sectors in which the introduction of ADR by traders was recently required. These include telecoms, energy, consumer credit, and payment services. References are made to relevant ADR provisions in the directives. Moreover, the inclusion of ADR schemes in the financial services sectors (such as the insurance sector) in the EU and Member States was studied by Benöhr in 2013. Here, the author argues that there is a divergence within the models offered in Member States under analysis such as Germany, France and the UK. These differences deepen the gaps that emphasize quality issues. Similarly, the paper on the encouragement/requirement to use ADR in telecoms in Ireland, Poland, and the UK also concludes that no coherence can be found in the application of ADR to different categories of dispute across the Union (Warwas 2015). Finally, the paper by Block and Haverbeke of 2002 examines dispute resolution in the electricity and gas markets and especially Belgian experiences in implementing the Electricity and Gas Directives by creating new ADR schemes. These schemes concern different administrative levels. At the federal level the Conciliation and Arbitration Service and the Chamber of Disputes within the CREG were then established. At the regional level, similar bodies were put in place such as the VREG in Flanders, and the CWAPE in the Walloon region and in the Brussels region.

Table 8. Arbitration/ADR in other (EU) sectors

Year	Title	Author(s)	Objectives	Results concerning EU law
1998	The Use of Arbitration Clauses in the Field of Banking and Finance	Boeglin	To investigate the field of (then) contemporary banking and finance in which arbitration clauses are used.	The financial community has been increasingly resorting to arbitration (and also to conciliation/mediation). Relationships where arbitration may be beneficial are: contractual relationships between banks and third parties (e.g. merger, acquisition, outsourcing agreements), and in self-regulatory fields (e.g. stock exchange regulations)
2002	A Remarkable Example of Promotion of Arbitration and ADR: the Resolution of Disputes in the Belgian Newly Liberalized Energy Sector	Block, Haverbeke	To examine dispute resolution in the electricity and gas markets and to provide information on Belgian implementation of the Electricity and Gas Directives by creating new ADR schemes.	The dispute resolution landscape is the following. At the federal level, there exist the Conciliation and Arbitration Service and the Chamber of Disputes within the CREG. At the regional level, "similar bodies were created within the VREG in Flanders, the CWAPE in the Walloon Region and in the Brussels region."
2006	Alternative Dispute Resolution (ADR): an Alternative for EU	Remmertz	To examine the appropriateness and the pros and cons of the	Some aspects of the ADR procedure seem effective (regarding the possibility to

	Domain Name Disputes?		ADR procedure of the Czech Arbitration court over the "eu. Top level domain" especially vis-à-vis court litigation.	transfer a domain name to the complainant, in particular in cases of bad faith registration) while in others (complex issues where presentation of facts and legal arguments is necessary) court proceedings seem more appropriate.
2013	Arbitration in Banking and Finance	Hanefeld	To examine the rise of arbitration in the banking and finance sectors.	The future of arbitration in banking and finance will be contingent upon drafting effective arbitration clauses (e.g. with references to appropriate arbitral institutions) and also on the competitiveness of arbitration with State courts. As long as State courts remain efficient in resolving banking & finance disputes, the use of arbitration may be limited.
2013	Alternative Dispute Resolution (ADR) in the Aviation Sector in Germany	Bollweg	Could ADR via mediation benefit airlines and passengers?	Germany will adopt legislation regulating ADR in air passenger claims. This new system is believed to benefit mostly passengers.
2013	The Origins and Evolution of Consumer Dispute Resolution Systems in Europe	Creutzfeldt *(in Resolving Mass Disputes, Hodges ed.)*	To provide information on the definitions, and developments of different ADR schemes.	One part of the paper deals exclusively with sectoral disputes in the EU where ADR was first encouraged and later on required. Today, ADR is required in the following sectors: financial services, telecoms, postal services, and energy.
2013	Out-of-court Settlement of Consumer Disputes in Financial Services	Benöhr	To offer a comparative overview of consumer ADR schemes in the financial services sectors (in particular in the insurance sector) in the EU and Member States (Germany, France, the UK).	Divergence can be noticed within the models offered in Member States under analysis. The status of the schemes is also different (e.g. self-regulatory initiatives in Germany v schemes established by law (Financial Ombudsman Service in the UK). The differences increase the gaps that emphasize quality issues. The new ADR Directive should address these quality gaps.
2014	ADR in B2B Disputes in the EU Telecommunications Sector: Where Does the EU Stand and What Does the EU Stand for?	Warwas	To analyse the use of arbitration (or ADR) in disputes between telecommunications undertakings under the	Analysis of selected national approaches to ADR in the telecommunications sector demonstrates the continuous fragmentation of these approaches, from heavy handed national adjudication

			revised EU Telecoms Package	with no use of ADR (Poland), to more centralized dispute resolution processes in the UK and Ireland.

Arbitration and WTO law

The literature that deals with the WTO and arbitration concerns the relationship between the WTO and investor-State arbitration, on the one hand, and the interplay between the WTO and international commercial arbitration, on the other hand. Let us analyse the literature falling within these two groups.

Regarding the literature on the interplay between WTO law and investor-State arbitration, most contributions deal with the following topics. First, the methods of arbitrator decision making in investor-State arbitration are analysed to identify the reasons for inconsistency of arbitral awards, also of those awards that touch upon WTO law (Kurtz 2009). Furthermore, the WTO dispute settlement system and investor-State arbitration are compared with a view to their functions (Molinuevo 2012). These functions differ mostly in the field of the remedies that are offered to the parties to disputes under each system. Finally, the comparison also concerns the possibility of introducing an appellate system to investor-State (ICSID) arbitration following the solutions adopted by the WTO (Ngangjoh & Ajibo, 2015). This could increase the legitimacy and fairness of investor-State arbitration.

Regarding the literature on the relationship between commercial arbitration and WTO law, most contributions examine the impact of this system of dispute resolution on the development of international trade. Here, the literature provides a somewhat conflicting conclusion. On the one hand, some authors argue that international commercial arbitration is not an efficient system to be applied in the context of international trade (Dietz 2014). On the other hand, other authors claim that ratification of the New York Convention of 1958 by a State increases that State's international trade about half as much as joining the WTO (Hale 2014). Hale also claims that the impact of arbitration on international trade is higher in countries with weak judicial systems.

Table 9. Arbitration and WTO law

Year	Title	Author(s)	Objectives	Results concerning EU law
2009	The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents	Kurtz	To examine the norm of national treatment to analyse the methodological approaches of arbitrators to address inconsistency in their decision making.	It identifies the implications of problematic methods of decision making by arbitrators and formulates postulates for the future to avoid inconsistency.
2012	Protecting Investment in Services: Investor-State Arbitration versus WTO Dispute Settlement	Molinuevo	To map the conflicts and overlaps between international trade law and international investment law (concerning investment in services).	The functions of investor-State arbitration and WTO dispute settlement are different. While the former offers the parties pecuniary compensation (which is retroactive), WTO dispute settlement aims at allowing Members to demand withdrawal of a measure, thus obtaining a remedy.
2013	WTO Litigation, Investment Arbitration, and Commercial Arbitration	Huerta-Goldman, Romanetti, Stirnimann (eds.)	Different contributions on the specificity of each of the three dispute resolution systems.	See individual contributions.

2014	Does International Commercial Arbitration Provide Efficient Contract Enforcement Institutions For International Trade?	Dietz	Is arbitration so effective and efficient?	International arbitration is not so superior to court litigation and it barely brings about efficient and cost-effective results. This is so for many reasons, including the observation that arbitrators are too interlinked with inefficient national systems.
2014	What is the Effect of Commercial Arbitration on Trade?	Hale	Does arbitration contribute to development in international trade?	"Ratifying the New York Convention increases a country's foreign trade by about half as much as joining the World Trade Organization. Furthermore, the effect of NYC ratification is greater for countries with low-quality judicial institutions, suggesting that private transnational arbitration and public courts are to some extent substitutable."
2015	ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration	Ngangjoh, and Ajibo	To investigate the possibility of introducing an appellate system to investor-State arbitration, possibly by deriving from the experience of WTO dispute settlement.	An ICSID appellate system would increase the legitimacy and fairness of investor-State arbitration.
2015	The Relationship of WTO Law and Regional Trade Agreements in Dispute Settlement	Forere	How to find convergence between WTO dispute settlement and dispute settlement under regional trade agreements?	A World Trade Court should be created to act as the ultimate arbiter and interpreter of international investment law.

Literature on arbitration practice

The review of the literature on arbitration practice investigates how scholars perceive certain prevalent topics on arbitration (and EU law when applicable) directly involving the actors internal to arbitration (such as arbitrators, arbitral institutions, and the parties). These involve issues of transparency in arbitration, the accountability of arbitration actors, and the law applicable to arbitration proceedings. Each category will be addressed below.

Transparency in arbitration

Transparency in arbitration has long been interlinked with the parallel discussion on the confidentiality of arbitration. Some authors (e.g. Buys, Azzali) have posed the following questions concerning the interplay between transparency and confidentiality: what does confidentiality mean in the context of arbitration? Has it been defined? If so, where do we find definition(s) of confidentiality? Is the

arbitration process confidential *per se*? And finally, does the confidentiality of arbitration automatically imply lack of transparency?

According to Stefano Azzali, Secretary General of one of the most prominent and reformist arbitral institutions in Italy, the Milan Court of Arbitration (CAM), confidentiality has naturally been regarded as one of the main features of commercial arbitration. Azzali, in his brief but excellent article on "Balancing Confidentiality and Transparency", recalls a statement contained in *Le Figaro* in 2008 that "the custom is not to say who arbitrated what". He further continues with saying that, in practice, a rather limited number of arbitration clauses contain provisions on confidentiality, even though these are the parts that should regulate this issue in continuation of the principle of party autonomy. That leaves us with a statement that arbitration proceedings are not necessarily confidential *per se*, an issue that was already confirmed in some court proceedings initiated in connection with arbitrations at the beginning of the 1990s.[29] The approaches to this hypothesis are, however, not consistent in the literature. Azzali distinguishes between two groups of scholars: the first group that supports the inherent nature of confidentiality in arbitration, and the other group that departs from this reasoning, therefore assuming that "arbitration does not have a confidential nature per definition but it may be confidential if the parties so wish and expressly agree (directly, in ad hoc proceedings, or by reference to a set of rules, containing a provision on confidentiality, in administered arbitration)."[30] At the same time, Azzali mentions that analysis of this dualistic approach to confidentiality has little significance in practice. What is important, instead, is to investigate whether the parties' interest in confidentiality is a "real interest," on the one side, and if transparency is a "real need", on the other side.[31] He concludes that the interest in confidentiality is not a determinative factor for the parties to choose commercial arbitration today and in any case, if this was so, the parties could draft their arbitration clauses accordingly. This is why in some cases confidentiality can be "sacrificed" for the sake of contemporary legal and business needs for transparency. The latter are vital with regard to a number of stakeholders engaged in commercial arbitration proceedings, including the parties, "(good…)" arbitrators, and arbitral institutions. Increased transparency could contribute to greater predictability in arbitration, and it could also raise awareness among arbitration users as to how arbitrators render their awards, which should be to the benefit of "good" arbitrators, who do not fear public scrutiny and whose performance is of high quality. Azzali also suggests that publication of (anonymous) arbitral awards, the recent practice of the CAM, could be an important step towards increasing transparency, a process in which arbitral institutions should appear especially proactive. This could also contribute to increased scholarship in the field of arbitration.

A similar argument was proposed by Buys (2003), who mentions that all arbitral awards in different arbitration proceedings—from those involving public or semi-public cases (such as WTO or ICSID proceedings) to truly private, commercial arbitrations—should be made publicly available unless the parties object to publication. When mentioning the potential benefits of publication of awards, Buys points to aspects similar to those presented by Azzali (i.e. increased quality of arbitral awards in the long term, development of arbitration scholarship) but also presents additional arguments. These arguments concern the following: possible avoidance by the parties of making similar mistakes in future business

[29] See references to the judgment of the Austrian High Court in *Esso Australia Resources Limited v Plowman* (1995) (where the Court refused to acknowledge that the principle of confidentiality was inherent in arbitration and therefore allowed disclosure of documents produced in the course of the arbitration in question) and the decision of the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd v Al. Trade Finance Inc* (2000) in Stefano Azzali, "Balancing Confidentiality and Transparency," in *The Rise of Transparency in International Arbitration : The Case for the Anonymous Publication of Arbitral Awards* (Huntington, New York : JurisNet LLC, 2013), xxi. A similar distinction was set forth by Blavi in: Francisco Blavi, "A Case in Favour of Publicly Available Awards in International Commercial Arbitration: Transparency v. Confidentiality," *Revue de Droit Des Affaires Internationales*, no. 1 (January 2, 2016): 83.

[30] Azzali, "Balancing Confidentiality and Transparency," xxi.

[31] Ibid., xxii.

relations, hence avoiding future disputes, increased democratic accountability of the arbitration process, also implying increased public confidence in the process, to mention a couple.

In a similar vein, other authors formulate more detailed proposals to balance confidentiality and transparency in the context of publication of awards. For example, Zlatanska sets forth proposals regarding, among other things, invention of an automatic mechanism for the parties to mark exclusion of any potentially sensitive information from publicly accessible awards, introduction of award templates, and creation of a centralised body that could be responsible for publication of awards.

In fact, it is not only the issue of publication of arbitral awards that the scholarly debate on transparency has been recently concerned with. Somewhat in parallel we can identify two more general streams regarding calls for increased transparency of many other different aspects of arbitration. These calls can be distinguished in the debate on both commercial arbitration and investor-State arbitration, with the latter being especially preoccupied with the lack of transparency of future arbitrations emerging out of or in connection with EU investment agreements such as the TTIP and the Comprehensive Economic and Trade Agreement (CETA).

On the one hand, commercial arbitration users including corporate counsel, (McIlwrath, Schroeder) request from other arbitration actors (mostly from arbitral institutions) that their confidential arbitration practices be opened up. This could be done by providing data on the performance of arbitrators and arbitral institutions themselves, of which users themselves are not aware when their cases are being processed. These could involve providing access to the following information: the average resolution time of the institutional case, the length of specific stages of arbitration proceedings, the number of cases referred to mediation or settled in the course of arbitration, or the very definition of what "international arbitration" concerns to allow arbitration users to compare relevant data in this regard from different arbitral institutions.[32] On the other hand, academics that focus on the transparency of investor-State arbitration analyse the possibility of allowing third party participation in arbitration, as well as making public the hearings, documents submitted and produced, and arbitral awards for the sake of consistency and predictability in decision making (Knahr 2007, Zachariasiewicz 2012). Here, Zachariasiewicz suggests that participation by non-disputing parties in investor-State arbitration may increase the transparency and democratic legitimacy of this process and therefore amicus curiae should be granted even better access to documents and oral hearings.

The academic debate on transparency in investment-treaty arbitration intensified together with adoption of the UNCITRAL Rules on Transparency in Investor-State Arbitrations in 2014. Argen argues that adoption of these Rules should affect not only investor-State arbitration but also international commercial arbitration to end the so-called "blind spots of justice" that allow private international commercial arbitration tribunals to hear disputes involving matters of public interest, especially in the US context where arbitrators can hear a wider category of disputes such as those concerning environmental protection, public health and safety, and market competition than is the case in the EU.

Although some authors note that some EU treaties under negotiation already lead towards more transparency in dispute resolution (Ruscalla 2015), others (Salasky, Corinne Montineri 2014) note that the success of the final text of the UNCITRAL Rules on Transparency will largely depend on the further implementation of these rules by means of existing and future international treaties. Moreover, as argued by Malintoppi and Limbasan (2015), development of a coherent transparency policy will depend on the willingness of States to promptly accede to the Mauritius Convention on Transparency.

Similarly, as presented by Rogers (2006), the success of reforms regarding transparency in international commercial arbitration will be contingent on the willingness of private parties to further base their

[32] For detailed proposals see: Michael McIlwrath and Ronald Schroeder, "Users Need More Transparency in International Arbitration," in The Rise of Transparency in International Arbitration: The Case for the Anonymous Publication of Arbitral Awards, ed. Alberto Malatesta and Rinaldo Sali (JurisNet, LLC, 2013), 87–106.

dispute system on increased openness, transparency, and the rule of law. This, as argued by Born and Shenkman (2009), can only advance the efficiency and legitimacy of international commercial arbitration.

Table 11. Transparency in arbitration

Year	Title	Author(s)	Objectives	Results concerning EU law
2003	The Tensions Between Confidentiality and Transparency in International Arbitration	Buys	To challenge the idea that all aspects of arbitration need to be confidential.	In particular, arbitral awards should be made publicly available (unless the parties object) because the greater transparency may outweigh concerns relating to confidentiality of arbitration. Three case studies were analysed (private, semi-public and public arbitrations).
2006	The Transparency of International Arbitration: Process and Substance	Vedeer	To explore recent legal and practical developments regarding privacy and confidentiality of court proceedings initiated in connection with arbitrations	Privacy and confidentiality are assumed to be inherent in the nature of the parties' agreement to arbitration.
2006	Transparency in International Commercial Arbitration	Rogers	To explore normative and instrumentalist assumptions underpinning the debate on transparency.	Reforms regarding transparency (especially in its forcibly imposed variant) would need to be initiated at the international level. However, users of international commercial arbitration may not accept changes imposed on them externally and therefore the success of future reforms will depend on the willingness of private parties to further base their dispute system on more transparent rules and the rule of law.
2007	Transparency, Third Party Participation and Access to Documents in International Investment Arbitration	Knahr	Should third parties (e.g. NGOs) be given access to confidential investment arbitration proceedings and how to find a proper balance between transparency and confidentiality? What is the practice of ICSID tribunals in this regard?	There is an increasing practice of arbitral tribunals ruling on matters of international economic law (including but not limited to WTO law and investor-State arbitration under ICSID Rules) to allow the participation of third parties in arbitration. The parties to these arbitrations should be

				aware of that emerging trend.
2009	Confidentiality and Transparency in Commercial and Investor-State International Arbitration	Born, Shenkman	To explore recent discussions between proponents of confidentiality and transparency.	In commercial arbitration: if all leading arbitral institutions began to publish arbitral awards (while respecting confidentiality), this could increase the efficiency of the process. Investor-State arbitration needs a balanced approach between confidentiality and transparency. This could be achieved if arbitral awards were automatically published after completion of the proceedings where the parties would be allowed to petition arbitral tribunals for editing of sensitive information or information that should be protected from disclosure under the law applicable to the party.
2010	Transparency in International Arbitration: What Are Arbitrators and Institutions Afraid of?	McIlwrath, Schroeder	The former version of the article on "Users Need More Transparency in International Arbitration".	The success of changes within arbitration rules and policies of arbitral institutions to improve the functionality of arbitration will depend on institutional approaches to transparency.
2012	Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?	Zachariasiewicz	What is the role of third parties in increasing the transparency and democratic legitimacy of investment arbitration?	The participation of non-disputing parties may increase these aspects of investment arbitration and amicus curiae should be granted even better access to documents and oral hearings
2013	Users Need More Transparency in International Arbitration	McIlwrath, Schroeder	How can arbitration actors (especially arbitral institutions) increase transparency in international arbitration and why is it relevant for arbitration users?	The performance measure of arbitrators and arbitral institutions can be improved in many different ways. Arbitral institutions (or some certification bodies such as the IMI) should engage in dissemination of more detailed information regarding the performance of arbitrators and arbitral institutions with an active contribution from all stakeholders involved in arbitration.

2013	The Rise of Transparency in International Arbitration: the Case for Anonymous Publication of Arbitral Awards	Malatesta, Sali (ed.)	Several contributions addressing issues with transparency in international commercial arbitration and investment arbitration.	See individual contributions. The volume covers such issues as approaches to publication of arbitral awards in different institutions, or the balancing of confidentiality and transparency.
2015	To Publish, or Not to Publish Arbitral Awards: That is the Question…	Zlatanska	To review the pros and cons of systematic publication of arbitral awards.	A few proposals regarding an automatic mechanism for the parties to mark the exclusion of any potentially sensitive information from a publicly accessible award, introduction of award templates, the creation of a centralised body responsible for publication (among other things).
2015	Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration	Argen	To shed light on the inadequacy of the non-applicability of the new UNCITRAL Rules on Transparency to international commercial arbitration.	"Blind spot justice" that allows private international commercial arbitration tribunals to hear disputes involving matters of public interest (e.g. concerning environmental protection, public health and safety, market competition), especially as encouraged in the US in the *Mitsubishi* judgments, must be ended by UNCITRAL
2014	UN Commission on International Trade Law and Multilateral Rule-making Consensus, Sovereignty and the Role of International Organizations in the Preparation of the UNCITRAL Rules on Transparency	Salasky and Montineri	Provides insights into the rule-making process at UNCITRAL and explains the content of the UNCITRAL Rules on Transparency.	A compromise on the final text of the UNCITRAL Rules on transparency was reached between States that will need to further implement those Rules based on existing and future treaties.
2015	Living in Glass Houses? The Debate on Transparency in International Investment Arbitration	Malintoppi, Limbasan	To examine the parameters of transparency based on theoretical and practical arguments on investment arbitration.	Development of coherent transparency standards in investment arbitration will largely depend on the willingness of States to promptly accede to the Mauritius Convention.
2015	Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?	Ruscalla	Is there a need to codify the standard of transparency in	A trend is already existent concerning increased transparency in EU investment agreements

			international arbitration?	(e.g. the CETA refers directly to the UNCITRAL Transparency Rules). This allows one to look positively into the future.
2015	Regulating Opacity: Shaping How Tribunals Think	Caron	In an age of increased calls for transparency, the author examines if transparency is an appropriate regulatory tool *vis-à-vis* the opacity of arbitrators' decision making that is inherent in arbitration practice.	The debate on transparency in the context of arbitration cannot diminish the role of opacity when making arbitral awards that fall within the grey zone of arbitration process and may in itself be a value of the process.
2015	Transparency in international investment arbitration: a guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration	Euler	A guide on how to apply the new UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration.	Explanation of the application of the UNCITRAL Rules on transparency.
2016	A Case in Favour of Publicly Available Awards in International Commercial Arbitration: Transparency v. Confidentiality	Blavi	To present arguments to help redefine confidentiality in international commercial arbitration to allow the community to access the data contained in arbitral awards.	Confidentiality and transparency are vital for international commercial arbitration. A proper balance is needed between these two principles to increase the accessibility of arbitration data. E.g. awards could be published after having been edited.

Accountability (liability) of private arbitration actors

The topic of the liability of arbitral institutions has been a recurrent issue. Notably, most proposals concerning regulation of liability of arbitration actors were formulated about ten years ago. Additionally, practitioners remain reluctant to follow any of these proposals, which makes the issue particularly troublesome and controversial. The reason why the issue is controversial and difficult for academics to grasp relates to the fact that most national arbitration laws do not provide for liability of arbitrators (and barely mention arbitral institutions at all in regulations on arbitration). This allows arbitral institutions to exclude liability of arbitrators and members of institutional organs to the extent permissible by applicable law. This, in practice, grants arbitration actors almost blanket immunity based on arbitration rules that become binding contractual terms at the moment of formation of institutional contracts. In other words, the tendency is towards the almost blanket exclusion of liability for arbitrators and institutions and any forms of interference with this status quo entail a very hostile reaction from practitioners. Let us examine some of these proposals.

In 1989 Robine, while examining the basis for legal action against arbitration actors in France noted that—although the French courts were reluctant to open the Pandora's box and allow the possibility of holding arbitral institutions liable—some degree of liability is necessary in the future to increase the credibility and legitimacy of arbitration. Even a few years later, the practice of the French courts confirmed this prediction. In 2009 Kleiman provided an excellent academic examination of the changing approach to legal relationships produced in the course of institutional arbitration in France, by

explaining, inter alia, the decision of the Paris Court of Appeal in the so-called *Cubic* case, where the potential liability of an arbitral institution, the ICC, was eventually permitted by the Court.[33]

These and other developments (including those in different geographical locations) in the issue of arbitral liability have prompted legal scholars to formulate "ideal" proposals on arbitral liability. As early as 1998, Li proposed that arbitral institutions could be somehow responsible for the acts or omissions of arbitrators that render their awards under the aegis of those institutions. One year later, Guzman proposed to introduce arbitrator liability as a tool for the parties to sue arbitrators who refuse to apply mandatory rules of law. In line with this proposal, according to Guzman, arbitrators should continue to apply mandatory rules of law in the course of arbitration proceedings. In 2000, Franck suggested that a standard of qualified immunity for arbitrators should be developed. This, on the one hand, would provide arbitrators with the necessary level of discretion when rendering arbitral awards. On the other hand, qualified immunity would entail incidental liability of arbitrators for acts of bad faith. Similar proposals were set forth by Weston in 2004.

In turn, in 2002 Rassmusen recommended that arbitral institutions and arbitrators assume liability as a general rule. This rather novel recommendation was furthermore supported by Rutledge, who proposed that arbitral liability should stem from contract and hence its scope should be regulated by means of contract law. The most recent proposal, in 2016, authored by the drafter of this article, concerns the need to shift the debate on liability from arbitrators to arbitral institutions given their increasing private and public functions in and outside arbitration processes. These functions necessitate contractual liability for arbitral institutions for negligent performance of their contractual obligations, and to a certain degree also for the acts of arbitrators provided that these are a function of negligent supervision by arbitral institutions of conduct in arbitration. Hence, civil liability was connected with the increasing powers in arbitration of actors in new forms of arbitration, including so-called regulatory arbitrations that have recently been proliferating in Europe. Similarly, the need for public accountability of transnational arbitration actors in order to enhance the legitimacy of the process was recommended by Fernández Arroyo (2016).

Regarding online arbitration, and in particular the recent EU regulation of ODR, some isolated contributions propose introduction of liability of ODR providers that could form part of the potential developments of the Accreditation Scheme for ODR Services (Cortes, 2010). Beyond the proposals presented above, there are no contributions that would link the increasing powers of arbitrators and arbitral institutions in EU arbitrations, in all their emerging variants such as potential investor-State arbitration and consumer arbitration/ADR, with more liability in the arbitration process.

Table 12. Accountability (liability) of private arbitration actors

Year	Title	Author(s)	Objectives	Results concerning EU law
1989	The Liability of Arbitrators and Arbitral Institutions in International Arbitration under French Law	Robine	To examine the basis for action against arbitrators and arbitral institutions, in particular under French law	The courts remain reluctant to open up the possibility to hold arbitration actors liable but a certain level of liability must be allowed in the future.
1998	Arbitral Immunity: A Profession Comes of Age	Li	How to regulate liability in international arbitration?	Arbitral institutions could be somehow responsible for the acts of arbitrators that belong to them.

[33] Elie Kleiman, "The SNF v. International Chamber of Commerce Case and The Obligation to Conduct Arbitration Proceedings With 'Expected Dispatch,'" *Stockholm International Arbitration Review*, no. 1 (2009): 24–25.

1999	Arbitrator Liability: Reconciling Arbitration and Mandatory Rules	Guzman	How to address the interplay between use of mandatory rules in arbitration and liability?	Use of mandatory rules in arbitration should continue if the arbitrator's liability is implemented and invoked in cases in which the arbitrator ignores a mandatory rule.
2000	The Liability of International Arbitrators: A Comparative Analysis and Proposals for Qualified Immunity	Franck	To examine the relationship between arbitrators and the parties and selected existing solutions as to liability.	A qualified standard of immunity should be implemented that allows for relative discretion of arbitrators and incidental liability in cases of bad faith.
2002	Overextending Immunity: Arbitral Institutional Liability in the United States, England and France	Rassmusen	To examine the relationship between the parties and arbitral institutions and the scope of liability of the latter in selected jurisdictions.	Arbitral institutions should in principle be liable for their own acts/omissions.
2004	Toward a Contractual Approach to Arbitral Immunity	Rutledge	To propose novel recommendations in the field of liability of arbitrators and arbitral institutions.	Arbitrators and institutions should not be granted legal immunity. Instead, contractual liability should apply, its scope regulated by means of contract law.
2004	Re-examining Arbitral Immunity in an Age of Mandatory and Professional Arbitration	Weston	To examine the presumption that arbitrators and providers should be immune from liability per se.	A standard of qualified immunity is proposed to accommodate policy concerns (such as to allow arbitrators' decision making) and the need for increased accountability of the arbitration industry.
2009	The SNF v. International Chamber of Commerce case and the Obligation to Conduct Arbitration Proceedings with "Expected Dispatch"	Kleiman	To examine the legal relationship between institutional arbitration actors (parties, arbitrators, and arbitral institutions), their obligations, and the scope of their liability (if any) under selected case law and French law.	The ICC exclusion of liability clause should be unenforceable under French law as it would allow the ICC to avoid performance of its essential contractual obligations.
2010	Online Dispute Resolution for Consumers in the European Union	Cortes	What legal standards need to be implemented for online consumer arbitration to offer its deserved place in enforcement of consumer rights and resolution of e-commerce disputes?	Proposals for creation of an Accreditation Scheme for ODR Services that provides for the liability of ODR providers (at least in principle).
2016	The Liability of Arbitral Institutions: Legitimacy	Warwas	To propose a liability regime for arbitral	Arbitration actors (including arbitral

	Challenges and Functional Responses		institutions and to some extent also for institutional arbitrators.	institutions) should in principle be liable for their performance of contracts with arbitration users. This stems from the particular public function of arbitral institutions, exercised also in the context of EU law.
2016	The Legitimacy and Public Accountability of Global Litigation: The Particular Case of Transnational Arbitration	Fernández Arroyo	To analyse, among other things, what role accountability plays in the "arbitral legal order".	In order to increase the legitimacy of transnational arbitration, certain public accountability of the process is required.

Applicable law

The most relevant type of source, such as statistics from arbitral institutions, that might help understand the preferences of the parties as to the law governing their arbitration clauses, falls outside the scope of this review. Nevertheless the following presentation will summarize contributions on the law applicable in arbitration (with a focus on international commercial arbitration) to depict the most popular trends in the literature on this topic.

Most contributions on the applicable law try to examine who should decide on this matter (the parties and arbitrators) and what considerations should be taken into account (Audit 2014; Capper, Ljungström, Dépinay 2014). Another group of papers focuses on the relationship between the applicable law and other laws such as case law or mandatory provisions of law based on public policy (Berger 2014, de Boisséson 2014). The question emerges in these contributions whether arbitrators are bound by any other rules, in addition to the applicable law, when making arbitral awards. The most prevalent answer in this regard is no. Finally, there are papers that examine the relevance of the law merchant (*lex mercatoria*) to international commercial arbitration from a perspective of institutional arbitration (Ercuement Erden 2011) and English law (Connerty 2014). Whereas Ercuement Edren argues that trade usages such as Incoterms are extremely relevant for arbitration practice and decision making, Connerty notes that although there is a possibility to use *lex mercatoria* in the context of English arbitration, this possibility should be invoked only exceptionally. In fact, it is conventional knowledge that although *lex mercatoria* offers flexibility to the parties, it is rarely used in arbitration today, as the parties prefer to rely on the most predictable provisions of national laws in their arbitration agreements.

Table 13. Applicable law

Year	Title	Author(s)	Objectives	Results (concerning EU law)
2011	The Role of Trade Usages in ICC Arbitration	Erden	What is the role of trade usages in ICC arbitration?	Trade usages are extremely important and offer arbitrators much flexibility.
2014	Choice of The Applicable Law By the Parties	Audit	To analyse the applicable law based on the principle of (conflicts and substantive) autonomy of the parties.	From the perspective of conflicts autonomy the possibilities offered to the parties are broader (although they refer to national laws), from the perspective of substantive autonomy parties may choose a variety of laws (international conventions, national laws, trade usages,

				lex mercatoria, or international law).
2014	'Proving' the Contents of the Applicable Substantive Law(s)	Capper, Ljungström, Dépinay	How to establish the content of the applicable substantive law in international arbitration given the variety of laws that may be relevant (e.g. mandatory public policy rules, law established by the parties, law established by the tribunal, law applicable to the parties)	Basically two ways are available to establish the applicable law: by the parties and by legal experts (incl. arbitrators). The parties should decide which of these methods to apply as early as possible based on considerations relevant for the case in question.
2014	To What Extent Should Arbitrators Respect Domestic Case Law? The German Experience Regarding The Law On Standard Terms	Berger	Should arbitrators take into account domestic case law, especially the law on Standard Terms in Germany?	Arbitrators may find a number of legitimate reasons why not to apply this body of law.
2014	Substantive Applicable Law in International Arbitration: an Arbitrator's Perspective	De Boisséson	How to comply with the applicable law in view of the expectations of the parties to have their dispute resolved in a specific way?	Arbitrators should not necessarily follow the case law as there are no precedents in arbitration and arbitrators are not bound by any "higher" system of cases or even previous arbitration cases (only 15% of ICC arbitral awards cite other arbitral decisions).
2014	Lex Mercatoria: Reflections from an English Lawyer	Connerty	Is lex mercatoria relevant to international commercial arbitration?	Lex mercatoria is available to be used in England but this should be limited only to necessary cases.

Empirical studies on arbitration

For decades, arbitration fell outside the key academic focus mostly because it was extremely difficult to infiltrate the elite clubs of arbitration practitioners and obtain any sort of empirical data on what was successfully hidden behind the veil of confidentiality of arbitration practice. Today, empirical studies on arbitration have proliferated. This has also been noted by scholars. For example, Drahozal published two articles, one in 2006 and the other in 2016, that compared the number of empirical projects and studies over a period of ten years.[34] Whereas the list of these studies presented in the article of 2006 was

[34] Christopher R. Drahozal, "Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration," *Arbitration International* 22, no. 2 (2006): 291–307; Christopher R. Drahozal, "Chapter 32: The State of Empirical Research on International Commercial Arbitration: 10 Years Later," in *The Evolution and Future of International Arbitration: The Next 30 Years, Kluwer Law International* (Kluwer Law International, 2016), 1–8, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716377; Cf.: Daniel F.

rather scarce, the article of 2016 pointed to many new studies that appear to be more frequent and elaborate than their predecessors. This proliferation of empirical research on arbitration in the past decade can be explained by a combination of at least two factors.

First, the practice of international arbitration has professionalized, which has resulted in a loosening up of the traditional tight bonds between arbitration practitioners that for many years made the arbitration community an extremely exclusive arbitration club. This professionalization has also allowed some access to "outsiders" simply because promotion of the process as legitimate was increasingly important given the increasing popularity of this form of dispute resolution. The gradual opening up of the arbitration community toward the public was possible because of the changing approaches to confidentiality that were already presented above.

Second, because of the professionalization of arbitration practice there has been increasing criticism of some forms of arbitration (e.g. regarding secrecy of investor-State arbitration and potential bias of arbitrators towards investors) that required explanations from arbitration practitioners about their secretive conduct in and outside arbitration processes. This criticism has also encouraged practitioners to participate in interviews and surveys conducted within academic projects and to speak at academic and policy oriented conferences. This brings us toward the methods applied in empirical studies on arbitration.

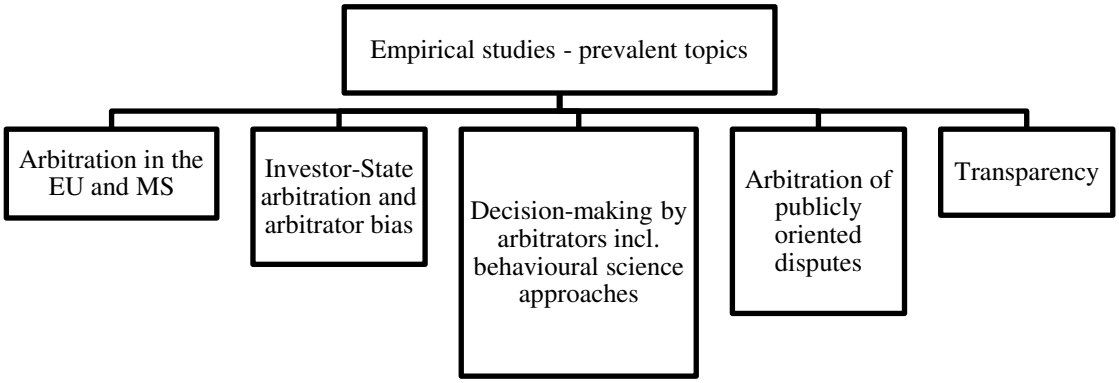
The two most common methods used by authors of empirical studies in the field of arbitration are: quantitative research (such as surveys, also called questionnaires containing a certain number of multiple choice questions) and qualitative research (such as interviews with arbitration practitioners, legislators, and policy makers). Moreover, scholars also use statistical methods of analysis, especially in articles in which potential bias on the part of arbitrators is tested, where a statistically significant percentage of coded arbitral awards were to be identified.[35] In fact, published arbitral awards are subject to many empirical studies on arbitration. Additionally, scholars working on arbitration have increasingly incorporated the tools used in behavioural science. This concerns, inter alia, profiling arbitrators to investigate how different behavioural aspects of arbitrators affect their decision making. The question remains how effective these methods are in the field of arbitration and whether they are able to help formulate accurate findings that would be representative of actual arbitration practices. This question will be addressed in the sections below.

Most prevalent topics: setting the scene

Undoubtedly, a vast number of empirical studies on arbitration deal with a variety of different topics. The categories below do not claim to be exhaustive. Rather, they illustrate the most prevalent topics that have recently been addressed by these studies, especially because of their direct or indirect EU law focus or their potential relevance for research on the interplay between arbitration and EU law. Hence, they involve discussions on: arbitration in the EU and Member States, investor-State arbitration and arbitrator bias, decision making by arbitrators including behavioural science approaches, arbitration of publicly oriented disputes, and transparency. Each category will now be addressed in turn.

Behn, "Empirical Studies on Legitimacy in International Investment Law," *PluriCourts Investment, Internal Working Paper 1/2014*, June 2014, 1–27. The information from most of the studies presented in these three articles was incorporated in this review.

[35] Stavros Brekoulakis, "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making," *Journal of International Dispute Settlement* 4, no. 3 (2013): 567–8.



Predominant Focus on Arbitration at the EU and Member State Level

Until very recently no empirical studies had dealt exclusively with developments in arbitration, in all its aspects, in the EU. The study on the "Legal Instruments and Practice of Arbitration in the EU and Switzerland," commissioned by the European Parliament to an academic team at Brunel University under the scientific supervision of Tony Cole, addressed this gap.[36] While the methods used in the study will be explained below, this part of the review will only address the topics covered and the main results of the study.

The project itself was highly ambitious as it involved research on the law and practice of commercial arbitration in every Member State and in Switzerland. The main goal was therefore to depict the potential diversity of local arbitration practices across the EU. Additionally, the study focused on other, more specialized topics such as consumer arbitration, online arbitration, investor-State arbitration, and other potential forms of arbitration (e.g. State-to-State arbitration) involving the EU and Member States. Hence, the latter analysis concerned discussions on developments in arbitration at the more horizontal, EU level. The results of the studies, also formulated in the form of recommendations for the European Parliament to guide it in its further legislative actions in the field of arbitration (if any), concerned the following. First, with regard to general results, the authors noted that although a certain level of uniformity exists among national laws on arbitration within the EU, the experience of practitioners from Member States demonstrates that arbitration is practiced predominantly at regional levels, which questions the transnational nature of commercial arbitration in Europe. Second, concerning investor-State arbitration, the study pointed to the advantages of investor-State arbitration in the context of EU investment agreements, provided that these agreements are carefully negotiated with the parties involved. Finally, with regard to consumer arbitration, as already noted above, it was recommended that tighter control should be imposed in this field to avoid potential abusive business practices vis-à-vis consumers.

Importantly, and quite surprisingly, the idea of harmonization of national laws on both domestic and international arbitration (containing mostly procedural norms) at the EU level has met with a positive

[36] Under contract IP/C/JURI/IC/2013-047. The European Parliament published the study in February 2015. See also: information about the study and also the report submitted together with the link to the study itself at: http://www.brunel.ac.uk/law/news-and-events/news/headline/ne_417966 (accessed 25 November 2016).

reaction from the European arbitration community. The results of a large-scale Survey of arbitration practitioners developed in the course of the study support this statement.[37] For example, when asked to evaluate the desirability of the European Union taking action to harmonize national arbitration laws across the Member States, 29.46% of respondents Survey-wide stated "desirable," 10.24% of respondents answered "very desirable," with only 14.52% of respondents answering "very undesirable," 25.59% of respondents remaining "neutral" and 20.19% of respondents providing the answer "undesirable." Similar results were generated in regard to the question on the desirability of the European Union taking action to harmonize laws applicable to international arbitration. Here, 32.23% of respondents answered "desirable" and 15.49% of respondents answered "very desirable." The answers to the Survey were provided by 871 arbitration practitioners from Europe, so they reflect quite a substantial practical voice from the European arbitration community.

The study in question contains rich empirical data (often included in Annexes) that were further analysed by some of the original authors of the study in follow-up articles and book chapters. These contributions aim to explain in more detail the local practices of arbitration in Europe. They focus on the following regions: Southern Europe, Eastern Europe, Western Europe, the Baltics and Scandinavia. The first article, on arbitration in Southern European countries, has been published in the *American Review of International Arbitration* and the three other contributions are being finalized and will appear as book chapters.[38] The added value of these papers is that they shift the discussion on arbitration from elite practitioners to more local arbitration practices to present the real life diversity in arbitration, which is contrary to the mainstream opinion that arbitration has only a transnational, elite dimension.

Table 1. Empirical Research: predominant focus on arbitration at the EU and Member State levels

Year	Title	Author(s)	Objectives	Results (concerning EU law)
2015	The Legal Instruments and Practice of Arbitration in the EU, A study for the Directorate General for Internal Policies Policy Department of the European Parliament	Cole, Bantekas, Ferretti, Riefa, Warwas, Ortolani	(1) An in-depth study of the law and practice of arbitration in each Member State and Switzerland. (2) An in-depth study of the involvement of Member States and the EU itself in arbitration.	(1) Arbitration in the EU (here mostly in its commercial variant) is mainly regional rather than transnational. (2) Investor-State arbitration constitutes a beneficial instrument of investment agreements (provided the latter are cautiously negotiated). (3) Tighter control should be imposed with regard to consumer arbitration within the EU.
2015	The Legal Instruments and Practice of Arbitration in the EU, A study for the Directorate General for Internal Policies Policy Department of	Cole, Bantekas, Ferretti, Riefa, Warwas, Ortolani	The release of rough empirical data/doctrinal research regarding: (1) the involvement of the EU and Member States in arbitration (investment, State to State, and	Comprehensive list of publicly available arbitration cases concerning the EU, Member States and Switzerland; particularities of local arbitration laws; empirical data regarding the following aspects of institutional arbitration (e.g.): statistics concerning caseload and types of dispute referred, transparency (including publication of awards and

[37] Cf. data from the Survey on the Law and Practice of Arbitration in the European Union available on the website of the Transnational Dispute Management Journal at: http://www.transnational-dispute- management.com/news.asp?key=568 (accessed 29 August 2016).

[38] In *The Legal Instruments and Practice of Arbitration in the EU: State by State Analysis*, by Tony Cole, Ilias Bantekas, Christine Riefa, Pietro Ortolani, and Barbara Warwas (forthcoming with Kluwer Law International in 2017).

	the European Parliament: Annexes		WTO arbitration) since 1999, (2) the key features of national arbitration laws of Member States and Switzerland, (3) a questionnaire completed by 30 arbitral institutions around the EU and Switzerland.	decisions on challenges to arbitral awards).
2015	Arbitration in Southern Europe: Insights from a Large-Scale Empirical Study	Cole, Ortolani, Warwas	To discuss the results of a survey of arbitration practitioners developed during a study for the European Parliament of six States: Cyprus, Greece, Italy, Malta, Portugal and Spain, to generate a picture of arbitration in each of those States.	Local particularities of arbitration in the six States under analysis; shift from elite to more general arbitration practices.

Investor-State arbitration and arbitrator bias

This category deals with empirical studies on the judicial behaviour of arbitrators exclusively in the context of potential arbitrator bias toward private investors over States in investor-State arbitration. These issues fall within an increasingly political debate in Europe. As described by Schultz, this debate is "fuelled" by antagonism about the political values that investment arbitration should represent in order to be regarded as a legitimate system. In his recent article, co-authored with Dupont, Schultz proposes to view investment arbitration as a political system (next to its legal dimension) to express the unique way in which it transforms the inputs of all actors involved into the system's outputs.[39] This argument also allows the application of empirical research methods to investment arbitration.[40]

In fact, the authors of empirical studies on arbitration have for years tried to answer the question whether private arbitrators sitting in investor-State arbitral tribunals favour either private investors or States. The academic assumption was that they do favour private investors. The answer to this question was tested by a number of empirical studies that will be described below. Before that, it may be relevant to note that it has been conventional knowledge that there are two groups of scholars and/or practitioners with two opposite views on this issue. On the one hand, those who favour arbitration in general terms (perhaps also in view of their simultaneous practice in the arbitration field) assume that this system does not favour private investors and that it is legitimate. On the other hand, those who are more sceptical about arbitration (mostly academics who do not practice arbitration and academic "activists") see arbitrators

[39] The article on "A New Heuristic Model of Investment Arbitration" constitutes an editorial note to the Special Issue on Empirical Studies on Investment Arbitration (cf.: the Journal of International Dispute Settlement, issue of February 2016).

[40] Ibid.

as actors with many connections with the private sector, which may question their neutrality. Here Schultz openly admits that some research on arbitration is in fact driven by self-interest of different kinds (e.g. self-interest to advance some thinking with which an individual or collective identify herself or themselves, or even regarding the desire for the arbitration business to remain popular).[41] Moreover, Schultz also admits that he is not aware of any specific study which would be conducted "from the bottom" of arbitration practice that would be particularly critical of arbitration.[42] That being said, let us analyse the main results of empirical studies on arbitrator bias, by taking into account these two approaches.

On the one side, the authors who did not find bias on the part of arbitrators conclude that: arbitration is a win-win system (Price 2005); there is no particular connection with the so-called development status of the country of origin of arbitrators and the outcome of investor-State arbitration (Franck 2009); and no bias exists on the part of investment arbitrators to prove their neutrality in order to secure future appointments (Kapeliuk 2010). Here also was tested the issue of how arbitration costs are allocated by arbitrators and the studies demonstrated that there are no major variations in the ways in which these issues are decided by arbitral tribunals, at least in the context of ICSID arbitration (Franck 2011).

On the other side, authors who did find bias on the part of arbitrators argue that: certain factors affect arbitrators' decision making in favour of investors, for example the very fact of the appointment of arbitrators by private investors makes those arbitrators more diligent when scrutinizing the actions of host States, the development status of the country of origin of arbitrators, and finally the full time nature of arbitrators' employment in private practice (Waibel & Wu 2011). Moreover, the authors falling within this group show a number of ties existing between arbitration practitioners and multinational companies and investors (Eberhardt & Olivet, 2012), and state that there is a tentative bias on the part of arbitrators toward investors (Van Harten, 2011). Moreover, some of these authors claim that so-called "symbolic capital" plays an important role in arbitration, which allows repeat players to benefit from systematic bias and continually secure their appointment as arbitrators (Puig, 2014).

Additionally, somewhat in between these dualistic approaches, the same scholars incidentally argue that arbitrators may also express a tendency to favour States in investor-State arbitration proceedings. In fact, similar opinions were presented by the authors of the already noted article on "Response to the Criticism against ISDS by EFILA", an organization that actively supports the development of investor-State arbitration and also represents the interests of arbitration stakeholders (2016)[43]. All these rather divergent opinions beg the question what kind of methods these empirical studies apply. The question is significant to the extent that if we find out that these methods are largely similar one would wonder why they allow such a self-excluding conclusion.

Most authors of these studies either derive their data from analyses of arbitral awards by means of sociological (statistical) methods (e.g. Franck 2007, 2009, 2011; Kapeliuk 2010) and/or examine the professional background of arbitrators (e.g. Waibel & Wu 2011 who collected information concerning such variables as nationality, gender, education, among 350 arbitrators deciding ICSID arbitration cases). The same scholars who conduct empirical research on the bias of arbitrators and other topics published articles in which they analyse the relevance of the methods they deploy given the specificity of the practice of (investor-State) arbitration. Although there seems to be consensus as to the necessity for empirical research in this type of arbitration per se and in international investment law, the accuracy of the findings of such research has been questioned by some scholars. For example, in 2011 Van Harten noted that, although useful, empirical methods may not lead to accurate results. The same author also pointed to the need for institutional safeguards to combat the problem of inaccuracy of findings.

[41] Thomas Schultz, "International Arbitration Scholarship: Forms, Determinants, Evolution," *King's College London Legal Studies Research Paper Series: Paper No. 2015-48, TLI Think! Paper 03/20*, 20–21.

[42] Ibid.

[43] See Section entitled: "EU Common Commercial Policy and investor-State arbitration".

Furthermore, a quite substantial academic disagreement arose between Franck and Van Harten concerning the ways in which the impact of the development status of the country of origin on decision making by an arbitrator, as well as bias by arbitrators toward States or investors, may be tested (in particular, Van Harten 2011 and the response in Franck, Garbin, Perkins 2011). Based on these deficiencies, most recently new proposals have been made for empirical research on investor-State arbitration. It was proposed to place empirical research in a broader context of research on international tribunals and international adjudication in more general terms (Rogers 2013); to base the analysis of arbitrator bias in a more institutional context of decision making by arbitrators (Brekoluakis 2013). This was also in line with the findings of Schulz and Cedric (2014), namely that arbitration serves more general aims such as promotion of the international rule of law, which justifies the need for a more holistic approach to the whole system.

Table 2. Empirical research: investor-State arbitration and arbitrator bias[44]

Year	Title	Author(s)	Objectives	Results (regarding EU law)
2005	Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field?	Price	To offer an alternative view to the assertion that it is the investor who wins and the State that loses.	Investment arbitration is a win-win system with no alarming bias towards investors.
2007	Empirically Evaluating Claims About Investment Treaty Arbitration	Franck	To provide empirical data on the various aspects of investment treaty arbitration (such as who the parties are, what the win rates are, what amounts are claimed and awarded) based on a collection of published awards (available before 1 June 2006).	Provides a preliminary summary of the data collected (these suggest that arbitration was used with regard to less than 5% of treaties analysed) and proposals for further empirical research in the field of investment arbitration.
2008	Empiricism and International Law: Insights for Investment Treaty Dispute Resolution	Franck	To examine the efficacy of empirical studies for getting insights into resolution of investment disputes and about international investment law.	Empirical studies should be incorporated in scholarship on investor-State arbitration and international investment law.
2009	Development and Outcomes of Investment Treaty Arbitration	Franck	Is there a "statistically significant" relationship between the development status (of respondent States) and the arbitration outcome. Empirical analysis to be conducted in the context of recent disagreements regarding the legitimacy and integrity of investment arbitration	There is no significant connection between development status and the outcome of investment arbitration cases under analysis.

[44] The list of articles largely follows the comprehensive summary of empirical studies of investor-State arbitration as provided in: Behn, "Empirical Studies on Legitimacy in International Investment Law," 1–4.

2010	Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes	Schneiderman	To analyse three awards against Argentina in view of the factors that could affect judicial behaviour	Strategic and institutional approaches better address and explain arbitrators' attitudes in decision making in investment law.
2010	Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration	Van Den Berg	Has the practice of dissenting opinions by party-appointed arbitrators gone too far? Do we need a unified procedure to regulate such opinions?	Decisions should be made *nemine dissentiente* as long as there is no uniform approach to dissenting opinions, which only questions the principle of neutrality in arbitrations.
2010	The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators	Kapeliuk	To analyse the judicial behaviour of repeat investment arbitrators.	No bias was shown on the part of repeat arbitrators. Rather, such arbitrators tend to render objective awards (which may not be the case with party-appointed arbitrators) to maintain their reputation and secure future appointments.
2010	Empirical Modalities: Lessons for the Future of International Investment	Franck	To examine empirical research on international investment law and to suggest its future development	New empirical methods are needed (quantitative, qualitative) as well as presentation of up to date data in view of the evolution of international investment law.
2011	Rationalizing Costs in Investment Treaty Arbitration	Franck	The increasing costs of awards being subject to investment arbitration (and of those arbitrations as such) aggregated by the opaque explanation by arbitrators of their decisions on costs (see *Eureko v Poland*, where the decision on costs amounted to two pages) require further "rationalization." This article aims to offer the techniques of such rationalization of costs.	More attention is required to the issue of costs. For example, this could be addressed by tribunals early, guidance could be provided in treaties or in arbitration rules.
2011	The ICSID Effect? Considering Potential Variations in Arbitration Awards	Franck	In light of increasing criticism of ICSID arbitration, the article analyses archival data (pre-2007) to test whether any variations exist in arbitration awards (e.g. in terms of costs) in ICSID arbitrations.	No major variations were demonstrated as compared to other arbitral forums.

2011	Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration.	Smith	Empirical study of cost allocation in investment (ICSID and in ad hoc, UNCITRAL) arbitrations	No unifying pattern exists in terms of recovery of costs awarded to claimants and respondents. Convergence is needed and so a model for unifying shifting costs is proposed. Tribunals are invited to propose their own solutions.
2011	Fairness and Independence in Investment Arbitration: A Critique of Susan Franck's Development and Outcomes of Investment Treaty Arbitration.	Van Harten	To criticise the results of the study by Franck on the relationship between development status, potential bias, and the outcome in investment arbitration.	The study by Franck suffers from a number of shortcomings: it is not based on reliable data (this resulted in 40-80% of error in most of the results), there is no valid measurement of development status, the study is valid from a systemic perspective but has no relevance for particular investment cases.
2011	Reply [to Franck, Garbin, and Perkins]	Van Harten	To address the arguments of Franck, Garbin, and Perkins that further supported Franck's empirical research regarding the lack of relationship between the development background (status) of arbitrators and their bias	Rebuttal of arguments and critique of the presentation of new empirical data (mostly by reduction of previous data) regarding lack of bias on the part of arbitrators. Van Harten claims that there are no reliable data in this regard that could suggest the existence or lack of such bias.
2011	The Use of Quantitative Methods to Examine Possible Bias in Investment Arbitration	Van Harten	What is the role of empirical methods in discussing potential bias in investment arbitration?	They may be useful but scholars should be careful when using them as the findings may not be fully accurate.
2011	Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration	Van Harten	To examine the opportunities of empirical research in investment arbitration (to test bias by arbitrators).	Empirical methods are useful but institutional safeguards are important for addressing the limitations of such research.
2011	Are Arbitrators Political?	Waibel & Wu	Are arbitrators biased toward the parties that appoint them?	The following factors influence arbitrators' decision making: when appointed by investors, arbitrators are more diligent when scrutinizing the actions of host States, the development status of the country of the origin of arbitrators, and full time private practice.

2011	Through the Looking Glass: Understanding Social Science Norms for Analysing International Investment Law	Franck, Garbin, Perkins	A response to the Gus Van Harten article.	"Future research can and should replicate initial scholarship to ascertain whether the pre-2007 historical snapshot continues to be valid as the population grows."
2012	Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fueling an Investment Arbitration Boom	Eberhardt & Olivet	How do law firms, arbitrators and financiers benefit from the investment arbitration boom?	A number of ties were identified that demonstrated strong links between arbitration practitioners and multinational companies and investors (among other findings).
2012	Arbitrator Behaviour In Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration	Van Harten	To study arbitrator behaviour in investment arbitration to test for potential bias. The methods are different from previous studies; instead of looking at outcomes, it looks at trends in legal interpretation of jurisdictional issues and admissibility by arbitrators.	There is tentative support for bias on the part of arbitrators.
2013	Systemic Bias and the Institution of International Arbitration: A new Approach to Arbitral Decision-Making	Brekoulakis	To put forward three main propositions regarding arbitrator decision making.	Three main proposals: (1) the concept of bias should be revisited (to include both apparent and implicit bias associated with individual arbitrators), (2) based on critical analysis of existing empirical literature on arbitrator decision-making and bias (that do not provide an "empirically proven conclusion based on causation"), studies should also take into account the institutional context of arbitrator decision-making, (3) the need for comprehensive examination of the structures, processes and actors in the field of international arbitration.
2013	Domestic Institutions, Capacity Limitations, and Compliance Costs: Host Country Determinants of Investment Treaty Arbitrations 1987-2007	Freeman	To test if countries with a greater institutional framework and capacity do not experience fewer claims by investors and as such are subject to fewer investment arbitrations.	Although investment treaties are designed to benefit developing countries, in practice these countries pay more costs associated with such treaties.
2013	Is the Truth in the Eyes of the Beholder? The Perils	Giorgetti	Reference to Rogers' article on The Politics and Empirics of International	Empirical methods can be useful provided they reflect certain standards.

	and Benefits of Empirical Research in International Investment Arbitration		Investment Arbitrators to further reflect on the suitability of empirical research in investment law.	
2013	Assessing Treaty-Based Investor-State Dispute Settlement: Abandon, Retain or Reform?	Campbell, Nappert, Nottage	What should be the reaction of States to criticism of ISDS?	Survey results generated responses that can be categorized into three groups: 22 (out of 25) respondents stated that ISDS should be included in trade agreements after minor reforms, three respondents said that ISDS should remain as it is, and none stated it should be abandoned.
2013	The Politics of International Investment Arbitrators	Rogers	Examination of the state of empirical research on investment arbitration to formulate a conclusion regarding the condition of, and recommended future developments in, international adjudication.	Empirical research on investment arbitration (in particular on the systemic bias of arbitrators) should be conducted in the broader context of research on other international tribunals and international adjudication in more general terms.
2013	Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration	Van Harten	To empirically assess how arbitrators exercise their authority.	Arbitrators tend to favour States in their decision making. Their decision making should thus be restrained by similar factors as is in the case of judicial review at domestic levels.
2014	Profiting from Crisis: How Corporations and Lawyers are Scavenging Profits from Europe's Crisis Countries	Eberhardt & Olivet	To examine investor-State cases filed against EU countries in the context of the recent economic crises.	The report shows the motivation of investors to sue host States in the aftermath of economic crises and it links these practices with the performance of international law firms that seek to gain more profits.
2014	Social Capital in the Arbitration Market	Puig	Application of social networks theory to arbitration to study the impacts of social capital in arbitration.	Concerns data from arbitration practitioners worldwide (also from Europe). Based on the factors studied (in addition to good timing and imperfect information), key arbitrators tend to benefit from systemic bias and as such they secure more appointments.
2014	Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of	Simmons	To critically analyse the development and operation of the international investment regime, especially from the	BITs attract foreign capital. However, they also allow for power asymmetries and as such can challenge

	International Investment		perspective of economic governance.	democratic governance more generally.
2014	Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study	Schultz, Cédric	What ends does investment arbitration serve? Three hypotheses are empirically tested: (1) arbitration is a tool for investors against government, (2) investment arbitration addresses the deficiencies of dysfunctional courts, (3) arbitration facilitates promotion of international investment law.	Although historically investment arbitration was used for the benefit of States and still does so to a limited extent, today it mostly serves promotion of the international rule of law.
2016	Towards a New Heuristic Model: Investment Arbitration as a Political System	Schultz, Dupont	To offer a new heuristic model to approach the way in which one thinks of investment arbitration.	By viewing investment arbitration as a political system (one that incorporates the inputs and outputs of key actors) next to its legal characteristics may help grasp the unique dynamics inherent in this system.

Insights into decision making by arbitrators (including behavioural science research methods)

Because arbitration practice is extremely opaque and confidential, an increasing number of scholars have tried to unfold this practice to examine factors that determine ways in which arbitrators render arbitral awards. The main question underlying these studies is how to classify decision making by arbitrators; whether this is an art, profession, science or simply sport (Reed, 2012). Notably, most of these studies are interdisciplinary in nature, often involving insights from disciplines other than law such as behavioural science in general and sociology and psychology in particular.

Two main trends are to be identified here. First, regarding the topics covered, the overwhelming majority of these studies concern investor-State arbitration as opposed to international commercial arbitration. Second, regarding the methodology applied, these studies tend to suffer from similar methodological shortcomings. Consequently, the authors of these studies often formulate very general recommendations based on scarce data.

Regarding the first observation, empirical studies that try to test arbitrator decision making in investor-State arbitration focus mostly on the (in)consistency of arbitral awards and the role of precedent in investor-State arbitration. Most authors notice a visible tendency toward increased coherence in arbitrator decision making in investor-State arbitration and they argue that this trend needs to be continued (Fauchald, 2008). The same authors (in particular Commission, 2007) point to the increasing role of precedent in investor-State arbitration that resembles the role of precedent in common law England together with its doctrine of *stare decisis.* The success of the further development of this doctrine will, however, depend on the attitudes of arbitrators themselves (Commission, 2007). Although isolated, there are also sporadic studies that test the so-called "psychology of international commercial arbitration". This research examines the interplay between the psychology of arbitrator decision making and the parties' behaviour (for example, to what extent the behaviour of arbitrators affects the parties' inclination to reach a settlement (Kaufmann-Kohler & Bonnin, 2008), or simply the parties' compliance with arbitral awards (Diamond, 2003). Here, one can find more critical studies that point to a number of "psychological misbehaviours" on the part of arbitrators that largely affect the parties' attitudes to arbitration (Giovannini, 2003; Reed, 2012). Finally, other empirical studies that do not deal *exclusively* with investor-State arbitration concern the psychological preconditions for arbitration, in particular from

the perspective of the efficiency and effectiveness of the process (Flader, Nappert & Calamita, 2012; Stipanovich & Urlich, 214 and 2015).

Finally, as to the second observation, most of these studies suffer from very similar methodological weaknesses. Data analysed in the course of these studies are collected by means of surveys, interviews, and analyses of selected (or simply the only publicly available) arbitral awards. Although these traditional methods of legal and sociological research are in principle very effective, when applied to research on arbitration they help formulate often fragmented characteristics and recommendations. This is so because of the limited scope of participants in surveys and interviews or the sole focus of studies on elite groups of practitioners, on the one side, and the limited amount of publicly available arbitral awards and other documents produced in the course of arbitration proceedings, on the other side. Accordingly, the scientific relevance of these impressive and important studies is still largely hindered by the exclusiveness and confidentiality of real-life arbitration practices.

Table 3. Empirical studies: insights into decision-making by arbitrators (including psychological and behavioural science research methods)

Year	Title	Authors	Objectives	Results (concerning EU law)
2003	Psychological Aspects of Dispute Resolution: Issues for International Arbitration	Diamond	To address two issues: (1) what is the perception of dispute resolution by litigants (from the perspective of fairness), and (2) how can the psychology of a decision maker influence the outcome of a case.	Acceptance of a decision is largely determined by how the litigants (or the parties) perceive the process as such (whether it is fair or not). Also, it is very likely that arbitrators are influenced by their background and experience when making awards.
2003	The Psychological Aspects of Dispute Resolution	Whitesell	To highlight the role of arbitral institutions in dealing with the psychological aspects of arbitration	It is not only the parties and arbitrators that affect the psychological aspects of arbitration proceedings. Arbitral institutions play a vital role in this regard as well.
2003	The Psychological Aspects of Dispute Resolution Commentary	Giovannini	To shed light on arbitrators' psychological misbehaviour that can undermine the authority and legitimacy of international arbitration (real-life examples from past arbitration cases)	Such psychological misbehaviour as the personal attitude of arbitrators or the way in which a case is examined, as well as how the outcome of a case is presented to the parties corresponds with the satisfaction of the parties with dispute resolution. As such this misbehaviour can undermine the legitimacy and fairness of the decision and of the institution.
2007	Precedent in Investment Treaty Arbitration: A Citation Analysis of Developing Jurisprudence	Commission	What is the role of precedent in early ICSID and non-ICSID arbitration tribunals?	The role that precedent has played in investment arbitration resembles the role of precedent in

			"This article presents a quantitative and qualitative citation analysis of (…) case law, surveying and reviewing the role that precedent has played in the 207 publicly available decisions, awards, and orders rendered since 1972, including decisions rendered by early ICSID tribunals (where jurisdiction was not predicated on consent in an investment treaty), and ICSID, ICSID (AF), and certain non-ICSID investment treaty tribunals."	common law England and its doctrine of *stare decisis*. The full development of this doctrine will, however, depend on the attitudes of arbitrators.
2008	The Legal Reasoning of ICSID Tribunals: An Empirical Analysis.	Fauchald	An analysis of almost 100 cases decided by ad hoc ICSID tribunals to determine the arguments used by arbitrators, and whether they are predictable enough to contribute to the development of a coherent body of international investment law.	There is a visible tendency towards a coherent (homogenous) methodology of investment law but further alignment within interpretative approaches is still welcome.
2008	Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background	Kaufmann-Kohler, Bonnin	Is there any interplay between the legal background of arbitrators and their inclination to encourage settlement?	There is some correlation between the legal background of arbitrators and their inclination to propose settlements. Also, this affects the varied perceptions of the role of arbitrators (be it as adjudicators or conciliators).
2012	Arbitral Decision-Making: Art, Science or Sport? (2012 Neil Kaplan Lecture)	Reed	How do arbitrators make decisions? Is it an art, science, or sport?	Points to a number of biases on the part of arbitrators and answers the main questions affirmatively: arbitrators' decision making is all three: art, science, and sport.
2012	The Psychological/Communicative Preconditions for the International Arbitral Process: Initial Findings of a Research Project and its Methodology	Flader, Nappert & Calamita	To summarize the research project, two pilot studies (in international commercial and investment	Questions for the future: how different methodological tools (especially qualitative interviews) can address (and assess) questions of

			arbitration), pose questions for the future. The main research question: how do different psychological/ communicative challenges (such as lack of appeal, complexity of cases, global aspects) arising in arbitration proceedings influence the decision-making processes of international arbitrators.	the quality and efficiency of international arbitration.
2012	The Quality of Arbitral Decision Making and Justification	Bishop	What constitutes a well-reasoned arbitral award?	Provides tests regarding arbitral awards and suggests the importance of the topic for achieving the main goals of the arbitral process.
2014	Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play	Stipanowich & Ulrich	What is the role of arbitrators in promoting settlement?	Based on interpretation of the data regarding the College of Commercial Arbitrators (CCA)-Straus Institute Survey, an increasing number of prehearing and pre-award settlements feature in arbitration. The article provides further guidance for arbitrators on encouraging settlements between the parties.
2014	Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals	Stipanowich	How effective is arbitration practice in the US and internationally?	Focused on the distinction between the challenges, opportunities, and proposals in the following aspects of arbitration: control and choice, promoting confidence and certainty, promoting economy and efficiency, effective decision makers, effective legal advocacy, arbitration in the landscape of conflict management, looking ahead (transformative trends).
2015	Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators	Stipanowich & Ulrich	To summarize data on developments in arbitration practice.	Provides a detailed summary of the data generated by the CCA/Strauss Institute Survey of CCA arbitrators

2016	The Role of Psychology in International Arbitration (edited volume)	Cole (ed.)	To present cross-disciplinary approaches to the topic of psychology in international arbitration.	The topics covered revolve around the following categories of contribution: decision-making by arbitrators, the resolution of disputes in arbitration, the arbitral procedure and the context of international arbitration.

Arbitration of publicly oriented disputes

First it is crucial to notice that several empirical studies of non-commercial, publicly oriented arbitrations have been conducted all over the world. It is, however, unfeasible to mention all of them, either in this part of the analysis or in the table below. Instead, I focus on the most prominent studies that may have important implications for existent or emergent studies that aim to examine the interplay between publicly oriented arbitration and EU law. One important observation emerges with regard to these studies. Most of them have been conducted in the US, which can be explained by the overwhelming application of arbitration to different types of sensitive dispute in the American context. Here, the topics concern employment arbitration (Colvin 2011, Ware 2013), and credit card agreements (Drahozal & Rutledge 2012). Other studies investigate the inclination of businesses to rely on arbitration clauses in franchise agreements after adoption by judges of a more favourable approach towards arbitration, including by means of the famous judgment in *AT&T Mobility LLC v. Conception*, where such an approach was adopted (Drahozal & Rutledge, 2014). Here, too, the results of studies appear to be divergent.

On the one hand, some authors claim that in the context of employment disputes employees' win rates and the amount allocated for employees in arbitral awards happen to be lower in cases in which the employer is involved in multiple arbitration cases that affect the employer's experience in dispute resolution of this sort as well as the employer's success rate (Colvin 2011). On the other hand, most authors do not find a direct correlation between the favourable legal framework for arbitration in the US and the increasing use of arbitration in particular types of contract such as credit card agreements (Drahozal & Rutledge 2012) and franchise agreements (Drahozal & Rutledge 2014).

Furthermore, it can be argued that empirical studies on publicly oriented arbitration/ADR in the EU are still rather scarce. There are three most prominent studies to be distinguished in this regard, namely the study on consumer redress in 28 jurisdictions including 25 Member States, Canada, Australia, and the US prepared by the Centre for Consumer Law at the Katholieke Universiteit Leuven, the study already mentioned by Professor Hodges and his team on consumer ADR in Europe (2013), as well as the study on the Legal Instruments and Practice of Arbitration in the EU and Switzerland by Tony Cole et al. As far as the latter study is concerned, the part on the involvement of the EU and Member States in any forms of arbitration since 1999 provides a few categories of arbitration in which these actors participate most frequently (e.g. investor-State arbitration in the case of Member States prior to changes in EU common commercial policy). This also aimed at providing recommendations on the most likely arbitration *fora* in which the EU and Member States may be involved in the future. Certainly, a limited number of empirical studies on more sensitive arbitrations/ADR is the result of the relative novelty of the topics that these studies entail within the EU. One may expect more such studies to proliferate in the near future.

Table 4. Empirical research: arbitration of publicly oriented disputes

Year	Title	Author(s)	Objectives	Results (concerning EU law)
2007	An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings (Final Report)	Prof. Dr. Jules Stuyck, Prof. Dr. Evelyne Terryn, Dr Veerle Colaert, Dr Tom Van Dyck, Mr Neil Peretz, Ms Nele Hoekx and Dr Piotr Tereszkiewicz assisted by Ms Beatrijs Gielen	To assess and analyse different forms of consumer ADR in the EU, Australia, Canada, and the US in order to inform the European Commission.	Ten recommendations; no particular system of ADR can be distinguished, all States under analysis have developed a unique mix of different methods.
2011	An Empirical Study of Employment Arbitration: Cases Outcomes and Processes	Colvin	A study of 3,945 arbitration cases administered by the American Arbitration Association (AAA) under the California Code	None; predominantly with a US (AAA) focus (concerning, inter alia, employee win rates, costs of proceedings and attorney's fees).
2012	Arbitration Clauses in Credit Card Agreements	Drahozal & Rutledge	The first in-depth study of why credit card issuers use arbitration agreements	The main observation is that although the majority of credit card agreements contain arbitration clauses, the majority of credit card issuers (247 out of 298 testes) do not use arbitration clauses in their credit card agreements.
2013	The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration	Ware	To assess the effects of the so-called Gilmer rule (which States that pre-dispute employment arbitration clauses are in principle enforceable).	Notes that notwithstanding increasing calls for more empirical studies on the effects of the Gilmer rule, these studies are not leading towards an adequate understanding of these effects in employment (discrimination) disputes.
2014	Sticky Arbitration Clauses	Drahozal & Rutledge	To analyse to what extent businesses (franchisers) began to use arbitration after the controversial decision in *AT&T Mobility LLC v. Concepcion* where that trend (accompanied by a class action waiver) was encouraged.	After examining two samples of franchise agreements (the first group concerns changes as of 1999 and the second group focusing on changes introduced just before the Conception judgment, that is, from 2011 onwards) the authors conclude that there was an increased use of arbitration in both types of franchise agreement but that it was not substantial.

2013	Consumer ADR in Europe	Hodges, Creutzfeldt-Banda, Benöhr	The first study to analyse (by means of both theoretical and empirical research—involving survey research and about 100 interviews) consumer ADR (called CADR) at Member State level as well as EU regulation of CADR.	The first systemic study of CADR, focusing on both CADR schemes in selected Member States (Belgium, France, Germany, Lithuania, the Netherlands, Poland, Slovenia, Spain, Sweden and the United Kingdom) and ADR regulation at the EU level. The book presents the major findings concerning the nature of CADR in the EU and contains proposals for future policy.
2015	The Legal Instruments and Practice of Arbitration in the EU and Switzerland (part on consumer arbitration and arbitration involving EU and Member States)	Cole et al.	To formulate recommendations regarding the involvement to date of the EU and Member States in any form of arbitration after 1999 until the time of the study with the aim of providing guidance on the most likely types of arbitration in which the EU can be involved in the future.	Provides comprehensive analysis of the statistical data available to the authors via secondary sources (e.g. reports of international organizations) and also data collected during interviews with arbitral institutions. Additionally, data were analysed via traditional, theoretical research. A number of arbitrations were identified that fell within the following categories: Commercial arbitration, State-to-State arbitration, WTO dispute settlement, investment arbitration, and other arbitration.

Arbitration and transparency

In addition to the theoretical literature on transparency of arbitration, it is important to mention here one prominent, ongoing project whose goal is to continuously provide practitioners and scholars with more data on international arbitration, hence to increase its transparency, fairness and accountability. The author of this project, Professor Rogers, created a portal called "Arbitrator Intelligence" where basically anyone with an interest in arbitration and the relevant knowledge of an arbitral award that was recently rendered may upload a summary of this award to the website. This project is extremely innovative and promising. Most recent statistics (accessed on 29 August 2016) demonstrate that theretofore 1365 arbitral awards and procedural orders had already been uploaded. Hopefully, many more documents of this type are yet to be disclosed.

Table 5. Arbitration and Transparency

Year	Title	Author(s)	Objectives	Results (concerning EU law)
2014	Arbitrator Intelligence: The Pilot Project and Beyond (Kluwer Arbitration Blog Post)	Rogers & Wiker	To collect arbitral awards and increase transparency, fairness and accountability in international arbitration	Most recent statistics (29 August 2016): 1365 arbitral awards and procedural orders (published and unpublished)

Summaries of selected ground-breaking empirical studies on arbitration

This part of the review aims at presenting the most ground breaking empirical studies on arbitration that do not necessarily explicitly fall within any of the research categories identified in this review. The major focus is on an explanation of the methods applied and topics covered by these studies.

Yves Dezalay and Bryant G. Garth, "Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order" (1996)

This ground breaking work by Dezalay and Garth was one of the most innovative studies of the international arbitration community of the time. Yves Dezelay, a prominent sociologist together with Bryan Garth, a trained lawyer and currently Chancellor's Professor of Law at the University of California-Irvine, provided the first empirical insights into the practice of elite international arbitrators in view of the progressive globalization of the legal profession. The study (conducted over a three year period) benefited from impressive methodological approaches. It involved almost three hundred face-to-face interviews (lasting, on average, almost two hours and conducted directly by the two principal investigators) with prominent arbitration practitioners from twenty-five countries in Europe, North America, the Middle East, Latin America, North Africa, and Asia.[45] The study focused mostly on elite practitioners and as such it also identified repeat players in the field of arbitration whose services were then "on demand" on both sides of the Atlantic. Practitioners that fell within this group were called the "grand old men" of arbitration, members of a "mafia" or members of a close-knit "club" (also because at the time of the study no woman was identified as a prominent figure in arbitration and because younger practitioners (at the time of the research in their forties) were only starting their careers in arbitration).[46] This work (often referred to as a "classic" in international arbitration), although impressive, seems to have mostly historical relevance today. Because of rapid developments in the international (transnational) arbitration field in recent decades, the study appears to be out-dated and missing insights into new geographical and sociological developments in arbitration.[47] These involve the increasing regionalization of arbitration as identified in the Study on the Legal Instruments and Practice of Arbitration conducted for the European Parliament under the scientific coordination of Tony Cole in 2014 (see below), on the one side,[48] and the professionalization of arbitration that has gradually opened up local arbitration communities to new entrants calling for regulation(s) of professional conduct and ethics in international arbitration, on the other side.[49]

Studies at Queen Mary School of International Arbitration (2006 – 2016)

Since 2006 the School of International Arbitration at Queen Mary University London (Queen Mary School of Arbitration), headed by Professor Loukas Mistelis, in collaboration with Pricewaterhousecoopers and White & Case LLP have conducted six surveys of arbitration practitioners worldwide. Most recently, in 2016 Queen Mary School of Arbitration launched a new survey, sponsored by Pinsent Masons LLP, entitled: "**An Insight into resolving Technology, Media, and Telecoms**

[45] Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University Of Chicago Press, 1998), 9.

[46] Ibid., 10.

[47] For a follow-up study that suggests the development of the new generation of arbitrators called "managers" see Thomas Schultz and Robert Kovacs, "The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth," *Arbitration International* 28, no. 2: 161–71.

[48] Cole et al., "The Legal Instruments and Practice of Arbitration in the EU, A Study for the Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs"; Tony Cole et al., "The Legal Instruments and Practice of Arbitration in the EU: Annexes. A Study for the Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs," 2014.

[49] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014).

Disputes." As reads from the website of Queen Mary School of Arbitration, the aim of the survey is to "reveal common practices for resolving technology, media and telecoms (TMT) disputes, including the use of ADR mechanisms, thereby allowing stakeholders to benchmark their own businesses' internal practices."[50] The survey was scheduled to be closed on 17 July 2016. Following completion of the Survey, the authors of the study began to conduct a number of individual interviews that were to take place between June and July 2016. The results of the study, reflecting the quantitative and qualitative research methods, were expected to be published in September 2016.[51] The brief analysis below explains the major goals and findings of the empirical studies that encompassed the data generated by each of these surveys between 2006 and 2015.

Queen Mary School of International Arbitration, Corporate Attitudes and Practices (2006)

This pioneering survey dealt with corporate attitudes toward arbitration. More specifically, it concerned questions of the use of arbitration in the corporate context as a risk mitigation tool. As reads from the website of Queen Mary School of Arbitration, it was the largest empirical survey carried out independently at the time.[52] The empirical data that were gathered over a period of six months concerned both 103 responses to the survey and information provided by means of 40 qualitative interviews mainly with renowned in-house counsel. The questions revolved around the following twelve topics: (1) use of international arbitration in a corporate environment, (2) advantages and disadvantages of the process, (3) dispute resolution policy considerations, (4) international arbitration clauses, (5) forms of arbitration (ad hoc v institutional arbitration), (6) venues for the seat and conduct of international arbitration, (7) possibilities of appeal on the merits, (8) appointment of arbitrators, (9) selection of legal representatives (law firms), (10), the level of knowledge in the area of arbitration on the part of corporate counsel, and (11) the use of arbitration by corporations in the future.[53] Major shortcomings of the study concern a lack of accurate information on methodology and a profile of the respondents. The following questions remain open: which sectors of industry were represented in the survey research? What were the nationalities of the respondents? What geographical locations were covered by the survey? Finally, what methods of data analysis did the author adopt? The report on the study was written up into an article by its author, Professor Loukas Mistelis, that was published in 2006.[54] However, the results of the survey have been subject to some criticism coming from prominent arbitration counsel themselves. For example, Michael McIlwrath, Chief Global Litigation Counsel at GE Oul & Gas, in his article of 2008 on "Ignoring the Elephant in the Room" questioned the relevance of the data regarding corporate counsel's satisfaction with arbitration, which was described as high and corresponding to 86% of participating corporate counsel. According to McIlwrath, this does not correspond to reality, at least the one reflecting his own experience. McIlwrath further argues that empirical research on arbitration should be conducted after carefully drafting relevant questions that would in fact correspond to the understanding of arbitration and its variables by arbitration users themselves.

[50] Queen Mary University of London, School of Arbitration, "2016 International Dispute Resolution Survey: An Insight into Resolving Technology, Media and Telecoms Disputes," accessed May 25, 2016, http://www.arbitration.qmul.ac.uk/research/2016/index.html.

[51] The link to the PDF version of the survey is available at: http://www.arbitration.qmul.ac.uk/docs/177165.pdf. Accessed 7 June 2016.

[52] Queen Mary University of London, School of Arbitration, "2006 International Arbitration Study: Corporate Attitudes and Practices," accessed May 25, 2016, http://www.arbitration.qmul.ac.uk/research/2006/123975.html.

[53] Ibid., 5–22.

[54] Loukas Mistelis, "International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report," *American Review of International Arbitration*, (published in 2006) 2004.

Queen Mary School of International Arbitration, Recognition and Enforcement of Foreign Awards (2008)

This study was conducted in continuation of the previous empirical research on corporate attitudes toward arbitration, this time focusing solely on recognition and enforcement of foreign arbitral awards. The study concerned a survey of arbitration practitioners (mainly in-house counsel) worldwide, as well as follow-up qualitative interviews. The authors of the study collected 87 responses to the survey and conducted 47 interviews that demonstrated the experience of around 129 major corporations "from Europe (40% of the participating corporations), North America (30%), Central and South America (11%), Asia and Pacific (15%) and Africa (4%)."[55] The major questions involved the following:[56] (1) does arbitration remain an effective method of dispute resolution in a corporate environment? (2) What are the most common outcomes of international arbitration (e.g. voluntary compliance, settlement, or arbitral awards to be enforced in courts)? (3) What are the practicalities of reaching settlements? (4) How are arbitral awards complied with by the parties? (5) Are settlements negotiated after an arbitral award? (6) What are the difficulties regarding recognition and enforcement of arbitral awards? (7) Are there any obstacles that would prevent the enforcement of arbitral awards against States and State entities? And, (8) what is the usage of institutional arbitration? The major findings of this study concerned: (1) the increasing satisfaction of corporate counsel with international arbitration mostly in its (2) institutional variant (86% of the arbitral awards concerning respondents were rendered by arbitral institutions), and (3) the relative success in enforcement of arbitral awards, usually within one year of rendering of awards by recovering around 75% of the value of such awards.

Queen Mary School of International Arbitration, Choices in International Arbitration (2010)

The survey—launched for this study—concerned more specific issues (commercial and legal) that, as assumed by the authors, had an impact on corporate choices regarding arbitration. Some of the questions addressed in the survey involved the following: "how are decisions made about arbitration, who influences these decisions and what considerations are uppermost in the minds of corporate counsel when they negotiate arbitration clauses?"[57] The survey also concerned such issues as "the appointment of arbitrators, confidentiality and time and delay."[58] The study summarized the responses of 136 respondents (being general and other corporate counsel), as well as data collected as a result of 167 in-depth interviews. The key findings concerned discussions on the factors that influenced the following: (1) choices regarding international arbitration, (2) choice of law governing the substance of the dispute, (3) choice of the seat of arbitration, (4) choice of arbitral institutions, (5) considerations when appointing arbitrators, (6) the relevance of confidentiality, (7) factors affecting time and delays.[59]

Queen Mary School of International Arbitration, Current and Preferred Practices in the Arbitral Process (2012)

The added value of this study concerned the involvement of private practitioners and arbitrators, in addition to in-house counsel that had exclusively taken part in the previous editions of the surveys. This was therefore the first attempt to infiltrate the real world of arbitration practitioners. Stavros Brekoulakis, in his introductory note to the report on the study, mentioned that: "for the very first time, the closed

[55] Queen Mary University of London, School of Arbitration, "2008 International Arbitration Study - Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards," accessed May 25, 2016, http://www.arbitration.qmul.ac.uk/research/2008/index.html.

[56] Ibid., 5–18.

[57] Queen Mary University of London, School of Arbitration, "2010 International Arbitration Survey: Choices in International Arbitration," accessed May 30, 2016, http://www.arbitration.qmul.ac.uk/research/2010/index.html.

[58] Ibid.

[59] Ibid.

doors of international arbitration – a private dispute resolution mechanism – have been opened up for the world to look behind."[60] Moreover, the study contained, for the first time, a detailed section on methodology. The study comprised two phases. The first phase concerned launching a survey (an online questionnaire) of 100 questions, while the second phase featured telephone interviews mainly following completion of the questionnaire, from May to July 2012.[61] The survey generated vast interest amongst arbitration practitioners and the questions were completed by 710 respondents, the majority of whom (71%) had been involved in more than five arbitrations in the past five years representing different stakeholders (e.g. arbitration practitioners, arbitrators, academics, in-house counsel, counsel from arbitral institutions and expert witnesses). Furthermore, the results of the survey were compared by taking into account different categories of respondent, as determined by their legal background, location, industry sector, and the like. The major survey topics revolved around the following issues: (1) selection of arbitrators, (2) organising arbitral proceedings, (3) document production, (4) fact and expert witnesses, (5) pleadings and hearings, (6) the arbitral award, and (7) costs.

Queen Mary School of International Arbitration, Corporate Choices in International Arbitration: Industry Perspectives (2013)

This study was conducted between 1 March 2012 and 31 December 2012 by Remy Gerbay and Loukas Mistelis. The research was divided into two phases. The first phase involved launching a survey (an online questionnaire) of 82 questions that generated responses from 101 respondents (between 13 June 2012 and 18 December 2012) while the second phase concerned over 30 interviews with corporate counsel that took place between October and December 2012. The respondents to the survey were identified primarily as corporate counsel (general counsel and in-house counsel).

The survey developed for this study contained more specific questions that aimed at revealing new sectors of industry that rely on arbitration. Here, the focus was on three key industries, namely financial services, energy, and construction, although the survey data also demonstrated the minor use of arbitration in other sectors including transportation, shipping/commodity trading, real-estate (non-construction), mining (non-energy)/natural resources, industrial/manufacturing, government/public services/education, consultancy (non-financial)/legal, agricultural/food production, aerospace/defence, insurance/re-insurance, telecommunications/IT, and other. As reads from the Executive Summary, respondents who identified their primary industry as being financial services involved: "*rating agencies, investment research providers and financial consultancy"*. Energy excludes *"mining and natural resources"*. Construction includes *"engineering and infrastructure"*."[62]

The survey was also to collect data on the role of the 2008 financial crisis and the 2012 Eurozone crisis on the frequency and complexity of disputes, and ways of resolving them. Furthermore, the questions contained in the survey concerned such prevailing issues of arbitration practice as choice of external counsel and fee arrangements, as well as the practicalities of third party funding. The survey results demonstrated that arbitration is the preferred form of dispute resolution in the construction and energy sectors, while remaining less popular in financial services.[63] However, the final findings showed that most corporations in financial services consider arbitration "well-suited" for the resolution of disputes in this industry.[64] Regarding the impact of the financial crises on the increase in the number of disputes, the survey results demonstrated it to have been minimal. Regarding the practicalities of funding, the

[60] Queen Mary University of London, School of Arbitration, "2012 Current and Preferred Practices in the Arbitral Process: Findings," accessed May 30, 2016, ttp://www.arbitration.qmul.ac.uk/research/2012/index.html.

[61] Ibid., 44.

[62] Queen Mary University of London, School of Arbitration, "2013 Corporate Choices in International Arbitration: Industry Perspectives: Findings," 4, accessed May 30, 2016, http://www.arbitration.qmul.ac.uk/research/2013/index.html.

[63] Ibid.

[64] Ibid.

survey results showed that the use of third party funding was still marginal, although some corporations (11%) reported that they had to withdraw from proceedings due to lack of financial resources following the decision to arbitrate a dispute. Finally, the survey demonstrated the voices of criticism regarding the costs, time, and "judicialization" of arbitration proceedings as the main threats facing arbitration.

Queen Mary School of International Arbitration, Improvements and Innovations in International Arbitration (2015)

This study concerned the largest survey of arbitration practitioners amongst all the surveys launched to date by Queen Mary School of International Arbitration. The study, conducted by Rutger Metsch and Loukas Mistelis between February and July 2015, featured two phases. The first stage of research concerned development of an online questionnaire of 80 questions, which generated 763 responses, while the second phase involved 105 face-to-face or phone interviews. Respondents fell within the following professional groups: academics (4%), arbitral institutions (staff) (2%), arbitrators (11%), "arbitrator and counsel in equal proportion" (12%), expert witnesses (2%), in-house counsel (8%), private practitioners (49%) and "others" (12%) such as judges, mediators, and third party funders.[65] The key findings revolved around the following issues: (1) views on international arbitration regarding the popularity and therefore also (at least indirectly) the efficiency of international arbitration in contemporary international legal practice, (2) preferred and improved seats of arbitration (here the respondents showed their major preferences towards London, Paris, Hong Kong, Singapore, and Geneva), (3) preferred and improved institutions (here, the preference was expressed towards the ICC, LCIA, HKIAC, SIAC, and SCC), (4) possible innovations aiming at reducing the time and costs of arbitration proceedings, (5) opinions regarding the increasing proliferation of soft law and guidelines in addition to existing rules and laws (positive), (6) opinions regarding the possible regulation of new roles and specific actors in international arbitration such as tribunal secretaries and third party funding (positive).[66] Notably, and in line with recent criticism regarding the judicialization of institutional arbitration, the survey revealed an emerging perception among respondents that arbitration, especially in its institutional variant, could benefit from an increase in the transparency of arbitration proceedings. Here, particular focus was placed on arbitral institutions identified by respondents as actors that could incorporate certain improvements of the proceedings including publication of data regarding the average length of proceedings and the time devoted by each individual arbitrator to issuing arbitral awards. Moreover, respondents expressed the opinion that increased transparency is also needed at the stages of the appointment of, and challenges to arbitrators, as far as institutional decisions in these regards were concerned.

Joshua Karton, "The Culture of International Arbitration and The Evolution of Contract Law" (2013)

This impressive book by Joshua Karton aimed at investigating the implications of decision making by international commercial arbitrators—largely affected by the dynamics of the arbitration community to which they belong or better to say "culture"— for the evolution of contract law. Essentially, Karton argues that the legal and social norms specific to international commercial arbitration and therefore different from the norms developed in any national legal system, in fact determine the ways in which arbitrators issue their awards. These ways largely depart from analysis of substantive law by domestic

[65] Queen Mary University of London, School of Arbitration, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," 51, accessed May 31, 2016, http://www.arbitration.qmul.ac.uk/research/2015/.

[66] Queen Mary University of London, School of Arbitration, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration."

judges after disputes arise between the parties.[67] Karton focuses solely on international commercial arbitration, understood in its traditional sense, that is, concerning disputes stemming from cross-border commercial transactions between commercial parties and/or State entities acting in their commercial capacity.[68] All potential publicly oriented disputes (e.g. consumer or employment disputes) are excluded from the scope of analysis. The data originated in the three main categories of sources: (1) twenty (20) individual interviews with the most prominent international commercial arbitrators, (2) academic articles and conference presentations by arbitrators, and (3) a few publicly accessible arbitral awards.[69] One of Karton's main arguments is that the outcomes of arbitration are largely the function of the self-perception by arbitrators of their role in dispute resolution vis-à-vis the parties. That is, the study demonstrated that more and more arbitrators see themselves as parties' service providers when interpreting questions of fact and law, in addition to the classic perception of the arbitrator's profession, namely of a private judge sitting in a panel to decide on a particular case.

Tony Cole, et al., Legal Instruments and Practice of Arbitration in the EU (2015)

This study was conducted by the Brunel team including Ilias Bantekas, Christine Riefa, Federico Ferretti, Barbara Warwas, and Pietro Ortolani, and the Principal Investigator on the Project, Tony Cole, over a ten-month term between 2014 and 2015. It concerned both traditional theoretical research, as well as empirical research involving development of a large-scale arbitration survey of about 900 arbitration practitioners (including 871 complete answers), close collaboration with national reporters (mostly arbitration practitioners and academics) from each Member State and Switzerland, and direct interviews with the members of over 20 arbitral institutions in Europe. All these efforts were to assure that the information included in the final report was accurate, expressing actual arbitration practice. As already preliminarily noted, what makes the study particularly innovative is an almost pedantic focus on local arbitration practices in all Member States that, to date, fell outside the scope of mainstream arbitration scholarship. This allowed the authors to present innovative results, which is the first step to shifting the discussion on arbitration from elite clubs to more local practices.

Findings

General findings

This review of the literature on the interplay between EU law and arbitration demonstrates that—although arbitration and EU law still operate as two distinct normative regimes—there is an increasing trend toward bridging the two systems. This is supported by the literature reflecting both theoretical and empirical research on arbitration and EU law.

We could pose two general questions as to how the legal discourse on arbitration and EU has been shaped and whether there are any overarching narratives in the legal literature on arbitration and EU law. First, following the observations of Thomas Schultz, we certainly have witnessed a proliferation of papers on arbitration in recent decades. These are written by commercial lawyers, trade lawyers, public lawyers, public international lawyers, and EU lawyers.[70] The question remains whether these lawyers, wearing very specific "hats" representing a discipline-specific methodology, in fact understand each other to the extent necessary to formulate more holistic, legal recommendations regarding the new

[67] Joshua D. H. Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press, USA, 2013), 5.

[68] Ibid., 7.

[69] Ibid., 8.

[70] Thomas Schultz, "Editorial: The Evolution of International Arbitration as an Academic Field," *Journal of International Dispute Settlement* 6 (2015): 1–4.

dynamics governing the interplay between arbitration and EU law (in the words of George Bermann – new "fault lines"). It seems this is still not the case today and that a truly legal discussion on how to utilize arbitration in the EU law context is losing to political arguments in favour or against further merger of arbitration and EU law. Regarding the second question, the following fields can be identified as attracting the most attention from legal scholars: the scope of exclusion of arbitration from the Brussels regime, anti-suit injunctions, the competence of arbitrators to decide matters of EU public policy including EU competition law, and EU investor-State arbitration. At the same time, however, some issues are only scarcely discussed or in whose areas the discussion lacks the necessary focus line. These concern issues regarding application of arbitration to the Rome Regulations, arbitration of publicly oriented disputes falling beyond consumer disputes, the role of arbitration/ADR in both private enforcement of EU law and development of EU contract law.

As demonstrated by theoretical research on arbitration, from the perspective of procedural and substantive EU law, new approaches are required to address long standing tensions between arbitration and EU law. The discussion on EU competence regarding further regulation (harmonization) of arbitration demonstrates that there is room for such regulation insofar as it falls within the European Judicial Area. The question remains whether the EU chooses to take up concrete action in this regard aiming at increasing the consistency of different ADR and arbitration schemes or decides to acknowledge the current status quo but allowing greater discretion in this regard on the part of Member States. In case the latter scenario prevails, the risk is that businesses and especially big businesses may use this situation to their advantage (i.e. by manipulating dispute resolution schemes), which could be detrimental to EU citizens (consumers).

Fields where new solutions are recommended involve:

- Conclusive discussion on the desirable relationship between arbitration and EU private international law (especially in the context of the recast Brussels regulation that is considered a failure in that it did not regulate the most contentious issues on parallel proceedings).
- The necessary linkages between arbitral tribunals (mostly in investor-State arbitration) with the CJEU.
- Better allocation of competence between the EU and Member States in foreign direct investment (here also concerning the future of arbitration arising out of or in connection with the former intra-EU BITs).
- Final considerations on a desirable system of dispute resolution to be included in EU investment and trade agreements (including new proposals for creation of an EU investment court system).
- Necessary definition of what constitutes arbitration and what constitutes ADR, and what these mechanisms/techniques imply, especially in the context of consumer arbitration/ADR and other sector-specific disputes. The lack of clarity in this regard only deepens the confusion among users regarding these schemes, preventing them from further development in a manner consistent with EU law. The reason for the EU's hesitance to determine these issues should also be addressed by scholars.

Additionally, it is important to stress here that theoretical research on arbitration and EU law confirms the types of dispute in which arbitration has been used for some time already (EU competition law, consumer arbitration/ADR), as well as relatively new types of (sectoral) disputes where ADR was recently "required" (and no longer only "encouraged") in EU law, including energy, telecoms, consumer credit and payment services. At the same time, the review does not demonstrate extensive use of arbitration in (EU law related) tax disputes.

Research on arbitration practice shows that internal actors that represent the arbitration community, including arbitrators, arbitral institutions, and parties, are also eager to support new developments to increase the functionality of arbitration. In fact, it is increasingly important to conduct research on

arbitration that would be informed by actual practice as opposed to solely theoretical research. Here, the most relevant is literature on the need for increased transparency in arbitration (be it international commercial arbitration or investor-State arbitration) by the publication of arbitral awards in their redacted forms, and literature on the need for clarity with regard to laws applicable to arbitration proceedings. The latter topic should also be further explored in future research. This is so as it entails many unanswered questions regarding the relationship between the applicable law (to be determined at different levels), trade usages, and legal practice including the allocation of competence to determine such law (i.e. among arbitrators and parties). It is also necessary to investigate to what extent, under different laws, arbitrators are in fact obliged to determine questions of EU law and what should be the scope of such determination. The recent eagerness by practitioners to engage in public dialogue on arbitration suggests the readiness of arbitration actors for bigger reforms, which could be seen by EU officials as an opportunity to further promote their goals in the field of arbitration.

Regarding empirical research on arbitration, it can be seen that some research topics overlap with topics included in strictly theoretical research (transparency, EU investment arbitration, arbitration of publicly oriented disputes). Nevertheless, empirical research methods (such as quantitative surveys of arbitration practitioners and policy makers, qualitative interviews, coding arbitral awards, and profiling arbitrators) allow this type of research to produce more insights into arbitration practice that is hidden behind the veil of confidentiality. Moreover, an increasing number of studies investigate the decision making patterns of arbitrators by means of behavioural science methods, including psychology. The question remains regarding the effectiveness of these methods. Some authors question results presented by means of empirical research, although it is a general opinion that this type of research is important and necessary to address such a practical topic as arbitration. It seems that larger-scale studies are necessary to generate more accurate results and represent the opinions and experience of a more substantial number of arbitration practitioners. This is valid in particular in the context of European arbitration practice, with regard to which empirical research is still rather scarce. Moreover, more focus is needed on local arbitration practice instead of looking at elite groups of arbitration practitioners (which was identified in the majority of ground breaking empirical studies on arbitration).

Lastly, it should be stressed that the antagonism between the proponents and the opponents of arbitration as a form of dispute resolution, visible in both the theoretical and the empirical literature, should be balanced. Arbitration is a unique form of dispute resolution that has long been kept behind the closed doors of confidential arbitration practices. The recent trend regarding opening up toward the public should be seen as a positive development. It seems, however, that no changes within the arbitration community can be appreciated by legal scholars, who constantly point to the shortcomings of the system. A similar observation is valid the other way around. Arbitration scholars who also work as practitioners seem to be deaf to criticisms of arbitration by legal scholars, even if that criticism is reasonable and well grounded. If no dialogue is found between these two trends, it will be hard to find satisfactory solutions to recent developments in arbitration and EU law. Just as an appropriate balance is needed in the treatment of arbitration by EU law and vice versa, an appropriate synergy between law and practice is required in research on arbitration and law in more general terms.

Findings in the context of the FIDIpro project

This review also generates preliminary findings with regard to questions that may be of relevance for the FIDIpro project. These questions—contained in Section entitled “Planning”—will now be recalled and addressed.

Q: Regarding the variable **“from procedure to substance”**, from the perspective of *substance*, what are the new types of arbitration in the EU and how do they affect private law making in different sectors?

A: The new types of dispute concern those in the banking and financial sectors (here at the international level and within the EU), energy (including oil and gas), telecoms; there are also other types of dispute

in which arbitration/ADR has been used for some time: EU competition law, and consumer arbitration/ADR.

Q: From the perspective of *procedure*, what are the legislative attempts to harmonize the arbitration procedure at the EU level and how does this influence external European private law? Here, procedural issues on the relationship between EU law and arbitration also need to be tackled. What is the treatment of arbitration by the CJEU? How is the work of arbitrators linked with EU law? Can arbitrators rely on the preliminary reference procedure in any way, for example, via domestic courts? Can the CJEU review arbitral awards?

A: So far, there has been no attempt towards harmonization of national laws on arbitration across the Union, although there is a desire in this regard from an overwhelming number of arbitration practitioners. The CJEU has confirmed the exclusion of arbitration from application of the Brussels I Convention save in cases concerning the validity of arbitration agreements to be assessed prior to the grant of anti-suit injunctions by national courts, which may fall within the scope of the Regulation for public policy reasons. Arbitral tribunals cannot request preliminary rulings, and the CJEU cannot review arbitral awards: this competence falls within the prerogatives of national courts (within the scope of the New York Convention of 1958 but with a view to EU public policy, especially in the field of EU competition law).

Q: Regarding the variable on the interplay between **legal rules and legal practice**, how does traditional commercial arbitration practice inform new forms of arbitration/ADR in the EU?

A: It appears that traditional arbitration/ADR needed to be readjusted to new types of arbitration/ADR in different EU sectoral disputes. This is particularly visible in the field of consumer arbitration/ADR where the disparity of powers between traders and consumers was taken into account. This is the reason why in the literature these new, "EU" forms of arbitration/ADR are also called differently (e.g. CADR or CDR).

Q: As regards the variable on **experimentalist governance**, how is the liability and accountability of arbitrators and arbitral institutions regulated? What are the institutional practices regarding the publication of arbitral awards? How are the problems regarding lack of transparency in arbitration approached by arbitration bodies?

A: Regarding the liability of arbitrators and arbitral institutions, there is a general tendency toward the exclusion of liability to the extent permissible under applicable law (blanket exclusions of liability). Regarding the transparency and publication of arbitral awards, as already noted, the arbitration community—especially some arbitral institutions—are open towards calls for increased transparency of arbitration. Some prominent arbitral institutions such as the ICC Court of Arbitration and CAM have already implemented required changes such as publication of arbitral awards and other documents produced in the course of arbitration. These two fields (liability and transparency) are particularly relevant for analysis of the arbitration procedural or public relations tendencies through the lenses of theory on experimentalist governance.

Q: And finally, regarding the interplay between WTO law, EU law and private law, what are the prevailing research topics on arbitration and WTO law?

A: The literature on arbitration and WTO is divided into two categories: topics concerning investor-State arbitration and the WTO and topics regarding WTO law and international commercial arbitration. Regarding the former category, the main topics include: methods of decision making by arbitrators with a view to the inconsistency of arbitral awards, also dealing with WTO law, comparisons between WTO dispute settlement and investor-State arbitration systems to identify overlapping fields, the possibility of introducing an appellate system to investor-State arbitration based on WTO solutions. Regarding the second category (comprising rather scarce contributions), the main topic involves investigation between the impact of international commercial arbitration on the development of international trade. In general, more contributions are welcome in this research category.

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