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The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union

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THE RELEVANCE OF THE ROME I REGULATION TO INTERNATIONAL COMMERCIAL ARBITRATION IN THE EUROPEAN UNION

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A. Introduction

The Regulation on the Law Applicable to Contractual Obligations ("the Rome I Regulation", "Rome I" or "the Regulation")[1] has been adopted as one of the Union instruments for the proper functioning of the internal market, with the aim of harmonising conflict-of-laws rules relating to contractual obligations in the European Union, by exercising the legal competence conferred upon the European Community under Article 65(b)[2] of the EC Treaty[3] as revised by the Treaty of Amsterdam[4] that entered into force in 1999.[5] It is one of the aims of the Regulation to ensure the application of the same national law, irrespective of in which Member State an action is brought,[6] with the purposes of facilitating the mutual recognition[7] and free movement of judgments[8] and improving both the predictability of the outcome of litigation and certainty as to the applicable law[9]. Pursuant to Articles 28 and 29, the Rome I Regulation applies

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1 Regulation (EC) No 593/2008 [2008] OJ L177/6.

2 Art 65(b) provides that:

> "Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include: . . . promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction."

3 The Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community [2006] OJ C321 E/1.

4 The Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C340/1.

5 Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations ("Rome I Proposal"), COM(2005) 650 final, 3–4.

6 Recital 6 to the Rome I Regulation.

7 Recital 4 to the Rome I Regulation.

8 Recital 6 to the Rome I Regulation.

9 *Ibid.*

to contracts concluded as from 17 December 2009[10] in all Member States with the exception of Denmark.

Article 2 of the Rome I Regulation provides for universal application so that the law of any country, whether or not it is the law of a Member State, must be applied. The Giuliano and Lagarde Report[11] explains the universal application in respect of the Rome Convention[12] as the application of the rules to both the nationals of Member States and persons domiciled or resident within the Union and to the nationals of third-country states and persons domiciled or resident therein.[13] In this regard, for the application of the Rome I Regulation, there is no requirement for the contractual parties or the contract itself to have any link with a Member State[14] although the Regulation is enacted as a Union measure.

The material scope of the Rome I Regulation is defined by Article 1. Article 1(1) sets out the general rule for the application of the Regulation, whereas Article 1(2) and (3) exclude certain matters from the scope. Under Article 1 of Rome I, the material scope of application is limited to contractual obligations in civil and commercial matters involving a conflict-of-laws problem and it does not cover revenue, customs or administrative matters. Thus, all civil and commercial contracts fall into the scope of the Regulation unless they are expressly excluded. Along with several other issues,[15] arbitration and choice-of-court agreements are expressly excluded by the Rome I Regulation.

[10] Art 28. See the Corrigendum to the Rome I Regulation ([2009] OJ L309/87) which states that "On page 16, Article 28, 'Application in time': *for:* 'This Regulation shall apply to contracts concluded after 17 December 2009.', *read:* 'This Regulation shall apply to contracts concluded as from 17 December 2009.'." Although the UK did not opt in to the Rome I Regulation within three months of the Commission making its proposal (see Art 3 of the UK and Ireland's Protocol on Title IV of the EC Treaty – now Protocol No 21 to the Treaty on the Functioning of the European Union, on the Position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice [2008] OJ C115/295), it exercised its right under Art 4 of the Protocol to notify the Commission that it wished to accept Rome I after it had been adopted by the Council and European Parliament. The UK made the notification on 24 July 2008 and the Commission subsequently decided that the Rome I Regulation would apply to the UK ([2009] OJ L10/22).

[11] Report on the Convention on the law applicable to contractual obligations by M Giuliano and P Lagarde [1980] OJ C282/1 ("Giuliano and Lagarde Report" or "Report").

[12] Convention 80/934/EEC on the law applicable to contractual obligations [1980] OJ L266/1 ("Rome Convention" or "Convention").

[13] Giuliano and Lagarde Report, *supra* n 11, 8.

[14] See eg JJ Fawcett, JM Carruthers and P North, *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 14th edn, 2008), 689; AE Anton and P Beaumont, *Anton and Beaumont's Civil Jurisdiction in Scotland: The Brussels and Lugano Conventions* (Edinburgh, W Green/Sweet & Maxwell, 2nd edn, 1995), 319; R Plender and M Wilderspin, *European Private International Law of Obligations* (London, Sweet & Maxwell, 3rd edn, 2009), paras 4-016–019.

[15] The status or legal capacity of natural persons; the obligations arising out of family relationships, and relationships deemed to have comparable effects, including maintenance obligations; the obligations arising out of matrimonial property regimes, property regimes of relationships deemed to have comparable effects to marriage, wills and succession; the obligations arising under bills of exchange, cheques, promissory notes and other negotiable instruments; obliga-

The provision is not free from doubt. There are different arguments on the applicability of the Rome I Regulation to arbitration. However, the issue has not been subject to a detailed analysis. The purpose of this paper is to analyse the relevance of the Rome I Regulation to international commercial arbitration seated in the EU by examining the extent of the arbitration agreements' exclusion under the Rome I Regulation and the application of the Regulation by arbitrators as a Union measure.

B. The Extent of the Arbitration Agreements' Exclusion under the Rome I Regulation

According to Article 1(2)(e), the Rome I Regulation does not apply to arbitration agreements. During the negotiations of the Rome Convention which had the same exclusion in Article 1(2)(d), the issue whether or not arbitration agreements should be excluded from the scope was debated as detailed in the Giuliano and Lagarde Report.[16] Some delegations, including the UK delegation, were against that exclusion on the ground that an arbitration agreement did not differ from other agreements as regards the contractual aspects.[17] They also argued that certain international conventions did not regulate the law applicable to arbitration agreements, while others were inadequate in this respect. In addition, they pointed out that the international conventions had not been ratified by all the Member States and the problem would not be solved as these conventions did not have universal application. Therefore, they asserted that if arbitration agreements were excluded from the scope of the Convention, there would not be unification within the Union on this issue. On the other hand, some delegations, including the German and French delegations, were for the exclusion as they did not support an increase in the number of conventions in this area. They underlined that the principle of severability was accepted in the draft which made the arbitration clause independent from the main contract and that this justified the exclusion. They also claimed that the concept of closest connection in the Rome Convention was difficult to

tions governed by company law; the questions whether an agent or an organ is able to bind a principal or a company in relation to a third party; the constitution of trusts and the relationships between their parties; the obligations arising out of dealings prior to the conclusion of a contract; certain types of insurance contracts; and, evidence and procedure.

[16] See Giuliano and Lagarde Report, *supra* n 11, 11–12.

[17] In English Law, the validity of agreements on jurisdiction and arbitration is generally subject to the law applicable to the contract as the issue is seen as contractual rather than procedural. See eg L Collins *et al*, *Dicey, Morris & Collins on the Conflict of Laws* (London, Sweet & Maxwell, 14th edn, 2006), paras 12–097-099; A Briggs, *The Conflict of Laws* (Oxford University Press, 2nd edn, 2008), 164–65; L Collins, "Contractual Obligations – The EEC Preliminary Draft Convention on Private International Law" (1976) 25 *International and Comparative Law Quarterly* 35, 42; Plender and Wilderspin, *supra* n 14, para 5-032.

apply to arbitration agreements. They argued that procedural and contractual aspects of an arbitration agreement were difficult to separate. They stressed the complexity of the matter and divergences in the experts' proposals. They asserted that since procedural matters and the question of arbitrability would in any case be excluded, the only matter to be regulated would be consent. At the end of the negotiations of the Rome Convention, the arbitration exclusion was accepted, as well as a proposal for a further study on this matter. However, no further study has been done in the EU.[18] Regarding the Rome I Regulation, the exclusion of arbitration agreements was maintained in the Commission proposal on the ground that the matter was already covered by satisfactory international regulations.[19]

1. The Scope of Exclusion

The scope of the arbitration agreements' exclusion is not clear in Article 1(2)(e) of the Rome I Regulation. It is not certain from the wording of Article 1(2)(e) what the exclusion really covers, since, in international commercial arbitration, more than one applicable law is considered. It is stated that these applicable laws are, at least, the law governing the arbitration agreement itself, the law governing the arbitration proceedings (the curial law or the *lex arbitri*) and the law governing the merits of the dispute (the applicable law, the governing law, the proper law or the substantive law).[20]

The law governing the arbitration agreement applies to the validity, scope, interpretation and effect of the agreement to arbitrate; and, dependent on these issues, the jurisdiction of the arbitrator.[21] The law governing arbitration proceedings applies to the conduct of the arbitral procedure, and, covers

[18] Nevertheless, it is argued that some legal actions may be taken in the EU on arbitration, particularly as the Green Paper on the Review of the Brussels I Regulation (COM(2009) 175 final) addresses the relationship to arbitration: see B Hess, "Should Arbitration and European Procedural Law Be Separated or Coordinated?" available at http://conflictoflaws.net/2010/guest-editorial-hess-should-arbitration-and-european-procedural-law-be-separated-or-coordinated/ (accessed 1 February 2011). See also Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2010) 748 final ("Commission's Proposal on the Review of Brussels I") which indicates improvement of the interface between arbitration and litigation and proposes a specific provision (Article 29(4)) in order to promote effectiveness of arbitration agreements in Europe, to prevent parallel proceedings and eliminate the incentive for abusive litigation tactics.

[19] See the Rome I Proposal, *supra* n 5, 5.

[20] For these and the other relevant applicable laws in international commercial arbitration, such as the law governing recognition and enforcement of the award or other applicable rules and non-binding guidelines and recommendations, see eg N Blackaby, C Partasides, A Redfern and M Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th edn, 2009), para 3.07; DJ Sutton, J Gill and M Gearing, *Russell on Arbitration* (London, Sweet & Maxwell, 23rd edn, 2007), para 2-088.

[21] Collins *et al.*, *supra* n 17, para 16-008; J Hill, *International Commercial Disputes in English Courts* (Oxford, Hart Publishing, 3rd edn, 2005), para 20.1.3; A Arzandeh and J Hill, "Ascertaining

internal and external procedural matters, such as the constitution of the arbitral tribunal, the powers of arbitrators and grounds for challenge, hearings, the assistance to arbitration by the national courts, and procedures for the review of the arbitration awards.[22] The law governing the merits of the dispute applies to material facts which the arbitral tribunal has to establish to give its award.[23] In other words, it is the law applicable to the substance of the dispute. The scope of the application of this law covers questions which arise between parties to a contract, such as the interpretation and validity of the contract, the rights and the obligations of the parties, the mode of performance, and the consequences of breaches of the contract.[24]

Besides the fact of the existence of more than one applicable law in international commercial arbitration, the distinction in the wording of the Brussels I Regulation[25] and the Rome I Regulation also produces uncertainty. Although Recital 7 to the Rome I Regulation underlines the consistency between the substantive scope and the provisions of these two instruments,[26] the Brussels I Regulation excludes "arbitration" from its scope by Article 1(2)(d) which applies to the whole arbitration proceedings and court proceedings ancillary to arbitration proceedings,[27] whereas the Rome I Regulation excludes "arbitration agreements".

This ambiguity in the provision gives rise to different interpretations, although it is generally argued that the exclusion in Rome I covers only the

the Proper Law of an Arbitration Clause under English Law" (2009) 5 *Journal of Private International Law* 425.

22 Redfern and Hunter, *supra* n 20, para 3.43; Collins *et al*, *supra* n 17, para 16-009; Hill, *supra* n 21, para 21.1.1.

23 Redfern and Hunter, *supra* n 20, para 3.88.

24 *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572, 603.

25 Regulation (EC) 44/2001 [2001] OJ L12/1 ("Brussels I Regulation" or "Brussels I").

26 Recital 7 provides that:

> "The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/ 2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)."

27 See the Schlosser Report on the 1978 Accession Convention ([1979] OJ C59/71) to the Brussels Convention ([1998] OJ C27/1) having the identical provision in Article 1(4), 92–3; C-190/89 *Marc Rich & Co AG v Società Italiana Impianti PA* [1991] ECR I-3855; P Kaye, "The EEC and Arbitration: the Unsettled Wake of The Atlantic Emperor" (1993) 9 *Arbitration International* 27. See also the Commission's Proposal on the review of Brussels I, *supra* n 18, where the scope of exclusion is maintained in proposed Art 1(2)(d) and detailed in proposed Recital 11 as:

> "This Regulation does not apply to arbitration, save in the limited case provided for therein. In particular, it does not apply to the form, existence, validity or effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards."

arbitration clause itself but not the dispute referred to arbitration.[28] In order to clarify the issue, the Giuliano and Lagarde Report can be of guidance. According to the Report:

> "The exclusion of arbitration agreements does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements. Where the arbitration clause forms an integral part of a contract, the exclusion relates only to the clause itself and not to the contract as a whole. This exclusion does not prevent such clauses being taken into consideration for the purposes of Article 3(1)."[29]

In defining the scope of the exclusion, the Report makes reference to not only the procedural aspects but also to the formation, the validity and the effects of arbitration agreements.[30] Therefore, it is quite clear that the exclusion covers both the law applicable to the arbitration agreement itself and the law applicable to arbitration procedure.[31] On the other hand, the Report does not explicitly specify the law applicable to the merits of the dispute within the scope of the exclusion. On the contrary, by giving an indirect reference to this matter, the Report separates the arbitration clause from the main contract that contains the arbitration clause[32] and states that the exclusion only covers the arbitration clause. On this basis, the Rome I Regulation is applicable to the remaining part of the contract, including the determination of the law applicable to the merits of the dispute.

[28] See eg Anton and Beaumont, *supra* n 14, 322, 360; Fawcett, Carruthers and North, *supra* n 14, 684; R Merkin, "The Rome I Regulation and Reinsurance" (2009) 5 *Journal of Private International Law* 69, 70; Collins *et al*, *supra* n 17, para 32-036; Redfern and Hunter, *supra* n 20, 196, n 118; P Nygh, *Choice of Forum and Law in International Commercial Arbitration* (The Hague, Kluwer Law International, 1997), 14; P Stone, *EU Private International Law: Harmonization of Laws* (Cheltenham, Edward Elgar Publishing, 2006), 267.

[29] Giuliano and Lagarde Report, *supra* n 11, 12.

[30] However, it is also argued that the rules of the Convention, if they differed from the common law rules, could be applied to the contractual aspects of an arbitration agreement by English courts by way of analogy, *cf Egon Oldendorff v Libera Corpn* [1995] 2 Lloyd's Rep 64 where the question whether an arbitration clause was validly incorporated into a contract was determined by the application of Article 3(1) of the Rome Convention. For this argument, see R Morse, "The Substantive Scope of Application of Brussels I and Rome I: Jurisdiction Clauses, Arbitration Clauses and ADR Agreements" in J Meeusen, M Pertegàs and G Straetmans (eds), *Enforcement of International Contracts in the European Union* (Antwerp, Intersentia, 2004), 191, n 69.

[31] See eg Plender and Wilderspin, *supra* n 14, para 5-030; R Merkin, *Arbitration Law* (London, LLP, 2004), paras 7.4, 7.20 and 7.63.

[32] This is a reflection of the principle of severability that accepts the possibility of subjecting the arbitration agreement and the main contract to different applicable laws. It is also recognised in s 7 of the Arbitration Act 1996 and s 5 of the Arbitration (Scotland) Act 2010. On the principle of severability, see eg GB Born, *International Commercial Arbitration* (Austin, Wolters Kluwer, 2009), 311–407; JDM Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), paras 6–7-24.

In addition to the explanation of the limits of the scope of the exclusion in the Giuliano and Lagarde Report, Recital 12[33] to the Rome I Regulation accepts an arbitration agreement agreed by the parties as one of the factors to be taken into account in determining the law applicable to the substance of the dispute under Article 3(1). This point is also underlined in the Giuliano and Lagarde Report, which says that "the choice of a place where disputes are to be settled by arbitration in circumstances indicating that the arbitrator should apply the law of that place" is to be considered as a real choice of law not expressly stated in the contract.[34] This leads to the conclusion that the Rome I Regulation regulates the law applicable to the substance of the dispute in international commercial arbitration; otherwise, the Regulation would either not consider arbitration at all or would expand the exclusion from "arbitration agreements" to "arbitration" as done by Article 1(2)(d) of Brussels I.

The same conclusion can be reached by the analogy of the choice-of-court agreements' exclusion in Rome I. Although, like arbitration agreements, they are excluded from the scope of the Rome I Regulation by Article 1(2)(e), this exclusion only covers the law applicable to the choice-of-court agreement itself[35] but not the law applicable to the substance of the dispute. The Rome I Regulation still applies in court litigation in case of choice of jurisdiction.[36] As they are both treated in the same way in Article 1(2)(e) of Rome I, it is concluded that the arbitration agreements' exclusion does not cover the choice-of-law rules which have to be applied to the main contract that contains the arbitration clause. The exclusion only relates to the arbitration clause itself; the other clauses in the contract are subject to the Rome I Regulation.[37]

[33] Recital 12 provides that: "An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated."

[34] See Giuliano and Lagarde Report, *supra* n 11, 17.

[35] For the law applicable to choice-of-court agreements, see eg P Beaumont and B Yüksel, "The Validity of Choice of Court Agreements under the Brussels I Regulation and the Hague Choice of Court Agreements Convention" in K Boele-Woelki, T Einhorn, D Girsberger and S Symeonides (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (The Hague, Eleven International Publishing, 2010), 563; P Beaumont and B Yüksel, "La reforma del reglamento de Bruselas I sobre acuerdos de sumisión y la preparación para la ratificación por la UE del Convenio de la Haya sobre acuerdos de elección de foro" (2009) 9 *Anuario Español de Derecho Internacional Privado* 129.

[36] See eg a recent English case: *Emeraldian Ltd Partnership v Wellmix Shipping Ltd* [2010] EWHC 1411 (Comm), where the law applicable to the letter of guarantee that purported to guarantee the obligations of the charterers under a charter party was determined according to the Rome Convention, even though the charter party contained an exclusive jurisdiction clause in the following terms: "This Charter Party shall be governed by English Law and any dispute arising out of or in connection with Charter shall be submitted to the exclusive Jurisdiction of the High Court of Justice of England and Wales."

[37] *Supra* n 28; Born, *supra* n 32, 2113; A Tweeddale and K Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, 2007), para 6.75; MW

The scope of the exclusion has also been interpreted in a similar way in a recent English case. In *Chalbury McCouat International Ltd v PG Foils Ltd*[38] the court dealt with an international arbitration claim in which the claimant sought the assistance of the court upon the failure of the appointment of an arbitral tribunal according to section 18 of the Arbitration Act 1996. The dispute between the parties – an English company having its principal place of business in England and an Indian company operating in Rajasthan – was referred to "arbitration as per prevailing laws of European Union in the Europe" but without any designation of the seat of arbitration. The judge had to consider the question whether the seat of arbitration was or would be within the jurisdiction or whether the conditions in section 2(4) of the Arbitration Act 1996[39] were satisfied since the court's power to make an appointment was dependent on it. As there was no designation of the seat of arbitration, he examined the connection with England and Wales and found that one of the matters relevant to this issue was the law applicable to the substance of the dispute. There was no express choice of law to be applied to the substance of the dispute. He took the view that the parties had chosen the laws of the EU as the law applicable to the arbitration procedure (*lex fori*).[40] Accordingly, on the ground that the determination of the *lex causae* depends on the determination of the connecting factor which has to be ascertained by the *lex fori*, he asserted that the proper law of the dispute should be determined under the laws of the EU which were set out in the Rome Convention signed by the Member States and enacted in English law by the Contracts (Applicable Law) Act 1990.[41] He applied the Rome Convention to ascertain the law applicable to the dispute which was referred to arbitration in spite of the arbitration agreements' exclusion in the Convention. By the application of Article 4 of the Rome Convention, the judge considered that the arbitral tribunal was likely to find that the proper law was English law.[42] On the basis of the arbitration clause, it followed that the seat of arbitration was likely to be in Europe, possibly in England, but was unlikely to be in India.[43] Besides, as a further connection, England was

Bühler and TH Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (London, Sweet & Maxwell, 2005), para 17-28; H Yu, "Choice of Laws for Arbitrators: Two Steps or Three" (2001) 4 *International Arbitration Law Review* 152, 154.

38 [2010] EWHC 2050 (TCC) ("*Chalbury McCouat*").

39 S 2(4) of the Arbitration Act 1996 provides that:

> "The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where (a) no seat of the arbitration has been designated or determined, and (b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so."

40 *Chalbury McCouat*, *supra* n 38, para 25.

41 *Ibid*, para 26.

42 *Ibid*, para 29.

43 *Ibid*.

the place of payment.[44] Because of the sufficient connection with England, the judge was satisfied that it was appropriate for the court to exercise its power to support the arbitral process under section 18 of the Arbitration Act 1996.[45]

2. The Use of the Rome I Regulation in International Commercial Arbitration

The issue whether the Rome I Regulation is applicable to international commercial arbitration is debated although it is generally agreed that the exclusion in the Regulation covers only the arbitration clause itself but not the dispute referred to arbitration.[46] There are arguments rejecting the compulsory use of the Rome I Regulation in arbitration.[47] Some argue that Brussels I is the complement to Rome I and therefore the latter applies only to the courts of the Member States, and not to arbitrators. Some advocate that although arbitrators may, in suitable cases, apply the choice-of-law rules contained in the Regulation, they do not have to. They accept that even though the Rome I Regulation is intended to be used by the courts of the Member States, arbitrators may in certain circumstances refer to the Regulation as one of the various methods of determining the applicable law in the absence of the parties' choice.[48]

The arbitration practice shows that some arbitral tribunals seated in Member States have applied the Rome Convention. The reasons why they have done

[44] *Ibid.*

[45] *Ibid*, para 32.

[46] For the debate and the conflicting arguments as regards the applicability of the Rome Convention to arbitration, see generally AJ Bělohlávek, "Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-laws rules and applicability of the Rome Convention, Rome I Regulation and other EU law standards in international arbitration", available at http://www.czechyearbook.org/law-applicable-to-the-merits-of-international-arbitration-and-current-developments-in-european-private-international-law-p-8.html (accessed 1 February 2011), particularly para 2.19; Born, *supra* n 32, 2113.

[47] For this argument regarding the Rome Convention, see eg *Syska v Vivendi Universal SA* [2008] EWHC 2155 (Comm), where it was stated at para 99 that the Rome Convention does not apply to arbitration.

[48] See eg F Marrella, "The New (Rome I) European Regulation on the Law Applicable to Contractual Obligations: What Has Changed?" (2008) 19 *ICC International Court of Arbitration Bulletin* 87, 107. For similar arguments regarding the Rome Convention, see eg CMV Clarkson and J Hill, *The Conflict of Laws* (Oxford University Press, 3rd edn, 2006), 256; AP Quinn, "The Rome Convention on Contracts – Its Relevance to Arbitration" (1994) 3 *Arbitration and Dispute Resolution Law Journal* 101, particularly 105–06; J Hill, "Some Private International Law Aspects of the Arbitration Act 1996" (1997) 46 *International and Comparative Law Quarterly* 274, 301; K Boele-Woelki and V Lazić, "Where Do We Stand on the Rome I Regulation?" available at http://igitur-archive.library.uu.nl/law/2008-0404-200555/Boele-Woelki%20Lazic%20-%20Wheer%20do%20we%20stand%20on%20the%20Rome%20I%20regulation.doc (accessed 1 February 2011); JDM Lew, "Relevance of Conflict of Law Rules in the Practice of Arbitration", in AJ van den Berg (ed), *Planning Efficient Arbitration Proceedings – The Law Applicable in International Arbitration* (The Hague, Kluwer Law International,1996), 447, 449; M Bogdan, *Concise Introduction to EU Private International Law* (Groningen, Europa Law Publishing, 2006), 117; Stone, *supra* n 28, 264.

so have varied, eg as the *lex fori* of the arbitration or as a reference suggested by the international conventions relating to arbitration such as the Geneva Convention (European Convention on International Commercial Arbitration of 1961) and the UNCITRAL Model Law on International Commercial Arbitration, or by Arbitration Rules such as the UNCITRAL Arbitration Rules of 1976 or the Arbitration Rules of the International Chamber of Commerce (ICC) which require the arbitrator to apply the law determined by the conflict-of-laws rules that he deems applicable or appropriate.[49] Moreover, the Rome Convention was applied irrespective of whether or not it was in force or was binding on the countries of which the parties were nationals.[50] For instance, an arbitral tribunal seated in Paris decided to apply the general principles of private international law in contractual matters to a dispute between a Belgian claimant and Iraqi respondents; and, in this respect, determined the applicable law in the absence of choice of law on the basis of the Rome Convention by pointing out that the Convention "forms the common law for the rules of conflicts of laws with regard to contractual obligations in the European Union" and constitutes "a universal authority in the meaning that it also applies if the law that it designates is that of a non-contracting state".[51] In parallel, with respect to a dispute between Austrian and Turkish parties, the tribunal seated in Rome referred to the Rome Convention as representative of the prevailing principles in private international law although neither of the states of which the parties were nationals had ratified the Convention.[52] In relation

[49] For a detailed analysis on these methods, see A Giardina, "International Conventions on Conflict of Laws and Substantive Law" in van den Berg (ed), *supra* n 48, 459.

[50] WL Craig, WW Park and J Paulsson, *International Chamber of Commerce Arbitration* (New York, Oceana Publications, 3rd edn, 2000), 328; JF Poudret and S Besson, *Comparative Law of International Arbitration* (London, Sweet & Maxwell, 2nd edn, 2007), para 687, 584–5.

[51] Third Partial Award of 1998 in ICC Case 7472 in HA Grigera Naón, "Choice-of-Law Problems in International Commercial Arbitration" (2001) 289 *Recueil des Cours* 9, 240. It should be noted that the Rome Convention had not yet entered into force when the contracts in question were concluded and that Iraq was not a party to the Convention: *ibid* 240–41.

[52] Final Award of 1991 in Case 6527 in (1996) 7 *ICC International Court of Arbitration Bulletin* 88. A similar decision was given by an arbitral tribunal sitting in London regarding a dispute related to a contract for the delivery of gasoil between a Greek agent of an Antiguan corporation having an office in Switzerland and a Greek company. The tribunal considered the Rome Convention, as well as the English and Greek conflict-of-laws rules, since it embodied the modern law applicable to contractual obligations and represented the general trend of modern international law although the tribunal found the Convention not applicable to the case on the ground that it came into force between Greece and the UK after the conclusion of the contract in question, see: Partial Award of 1993 in Case 7177 in (1996) 7 *ICC International Court of Arbitration Bulletin* 89. In parallel, with respect to a dispute between a French supplier and an Irish distributor, although the sole arbitrator sitting in Paris used the cumulative method in ascertaining Irish law as the applicable law, he stressed that he would have come to the same conclusion if he had chosen to apply generally recognised principles of the conflict of laws which would have made the rules of the Rome Convention applicable even though the Convention had not yet entered into force between France and Ireland when the distribution agreement was concluded, see: Partial Award of 1992 in Case 7319 in (1994) 5 *ICC International Court of Arbitration Bulletin* 56. Another reference to the Rome Convention on this ground was also given by an

to a dispute that arose out of a contract between a Turkish company and a German company, the arbitral tribunal seated in Paris decided to apply the Rome Convention in order to determine the applicable law in the absence of a choice-of-law clause since the place of arbitration was situated in France which had adopted the Convention.[53] Another tribunal seated in Milan also considered the conflict-of-laws rules in the Rome Convention, as a part of Italian law, in determining the applicable law.[54] As regards a dispute that arose between a Belgian company and a Dutch company, the sole arbitrator sitting in Brussels looked to the Rome Convention in the absence of a valid choice-of-law clause to ascertain the governing law, consistent with the position taken by the parties.[55] In a dispute between a French company and an Austrian company where both parties referred to the Rome Convention to determine the applicable law of their contractual obligations and which was subject to arbitration seated in Paris, the conflict-of-laws rules in the Rome Convention applied to the issues that fell into its scope.[56] Regarding a contract for the sale of equipment that did not include any choice-of-law clause and any indication of the methodology to be applied by an arbitral tribunal sitting in Paris to ascertain the governing law; the parties had agreed that the tribunal had wide discretion in determining the governing law and accordingly the tribunal asserted that it might apply any method in this respect and considered the relevant international conventions, ie the Vienna Convention,[57] the Hague Convention[58] and the Rome Convention, as they served as "evidence of trade usages and internationally recognised principles applicable to choice of law issues".[59] After stating that both the Vienna Convention and the Hague Convention did not apply to sales of equipment, the tribunal applied the Rome Convention on the grounds that the contract fell within the scope of the Convention and the arbitration agreements' exclusion was only related to the arbitration clause itself but not to the rest of the contract. In a dissenting opinion, the minority member thought a different law was applicable by considering the terms of contract and applying both the common law principles and the Rome Convention. Thus, as regards the appli-

arbitral tribunal seated in the Hague, see: Final Award of 1990 in Case 6360 in (1990) 1 *ICC International Court of Arbitration Bulletin* 24. For a similar arbitral award rendered by a tribunal sitting in Paris regarding a dispute between Korean and Jordanian parties that gave reference to the Rome Convention on the same ground, see: Interim Award of 1990 in Case 6149 in JJ Arnaldez, Y Derains and D Hascher (1997) *Collection of ICC Arbitral Awards 1991–1995*, 315.

53 Final Award of 2000 in Case 10303 in (2008) 19 *ICC International Court of Arbitration Bulletin* 114.

54 Final Award of 1998 in Case 8908 in (1999) 10 *ICC International Court of Arbitration Bulletin* 83.

55 Interim Award of 2002 in Case 11864 in (2008) 19 *ICC International Court of Arbitration Bulletin* 119.

56 Interim Award of 1999 in Case 9893 in (2008) 19 *ICC International Court of Arbitration Bulletin* 110.

57 United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG).

58 Convention of 15 June 1955 on the Law Applicable to International Sales of Goods.

59 Partial Award of 2004 in Case 12494 in (2008) 19 *ICC International Court of Arbitration Bulletin* 126.

cation of the Rome Convention, he agreed with the majority since it was one of the methods of determining the proper law of contract by the arbitral tribunal and if the law of the seat of the arbitration had been used to determine the proper law, the Convention would have applied.

Considering the practice of arbitration with respect to the application of the Rome Convention, it is concluded that the Rome I Regulation, like the Rome Convention, is applicable to international commercial arbitration in ascertaining the law applicable to the substance of the dispute. At this point, the only question remains whether an arbitrator seated in a Member State, like a judge of a court of a Member State, is under the duty of applying the Rome I Regulation as a Union measure.

C. The Application of the Rome I Regulation by Arbitrators as a Union Measure

Arbitration has not been considered in a Union instrument;[60] however, it does not mean that Union law is not relevant in arbitration at all. Written work and the relevant case-law have mostly considered the application of substantive rules of Union law by arbitrators. On the other hand, uncertainties exist regarding the application of private international law rules of Union law by arbitrators.

1. The Application of Substantive Rules of Union Law by Arbitrators

The case-law of the European Court of Justice (ECJ) confirms that the arbitrator has to apply Union law. In *C Broekmeulen v Huisarts Registratie Commissie*[61] it was decided that Member States have to take the necessary steps to ensure that within their own territory Union law is implemented in its entirety.[62] As stated in *Nordsee*,[63] parties to a contract do not have the authority to create exceptions to it.[64] On this basis, the arbitral tribunal established pursuant to a contract between the parties has to apply Union law if it is relevant to the issue.[65] It is

[60] It is stated that the reason is that the New York Convention and UNCITRAL have achieved a great deal on arbitration globally and that future improvements should be made globally rather than regionally, see eg CM Schmitthoff, "Arbitration and EEC Law" (1987) 24 *Common Market Law Review* 143, 143–44; Hess, *supra* n 18.

[61] Case 246/80 *C. Broekmeulen v Huisarts Registratie Commissie ("Broekmeulen")* [1981] ECR 2311.

[62] *Ibid*, para 16.

[63] Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstein AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG ("Nordsee")* [1982] ECR 1095.

[64] *Ibid*, para 14.

[65] Hill, *supra* n 21, para 22.3.1.

argued that since an arbitrator is a part of the Union legal order, he has to safeguard the principles of this order even though his power derives from the will of the parties.[66] It is also manifestly in the interest of the Union legal order that, in order to forestall differences of interpretation, every provision of Union law should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied.[67] It is stated that if the arbitrator deals with a dispute in accordance with the national law of an EU Member State, he has to apply the relevant provisions of Union law as an integral part of the national legal order in question.[68] From this point of view, there is no difference between an arbitrator and a judge in applying Union law.[69]

Furthermore, in certain cases, it is generally accepted that the arbitrators should apply Union law, in particular EU competition law, even *ex officio*. The ECJ, in *Eco Swiss*,[70] dealt with the questions of whether arbitrators are required to apply Article 81 of the EC Treaty (ex Article 85, which is now Article 101 of the Treaty on the Functioning of the EU[71]) of their own motion and whether national courts have the power to annul arbitral awards on the ground that they are contrary to the Union competition rules. Before *Eco Swiss*, the obligation of applying EU law *ex officio* had been discussed in *Van Schijndel*,[72] where it had been decided that in a civil suit, the national court is required to apply of its own motion the Union provisions having direct effect even if the party with an interest in the application of those provisions has not relied on them,

[66] J Erauw and M Piers, "The Law Applicable to the Substantive Rights in Arbitration under European Regulations and Draft Regulations", in SR Bond (ed), *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI* (Brussels, Bruylant, 2004), 175, 184.

[67] Joined cases C-297/88 and C-197/89 *Massam Dzodzi v Belgian State* [1990] ECR I-3763, para 37; reaffirmed in Case C-88/91 *Federazione Italiana dei Consorzi Agrari v Azienda di Stato per gli Interventi nel Mercato Agricolo* [1992] ECR I-4035, para 7 and Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV ("Eco Swiss")* [1999] ECR I-3055, para 40.

[68] See eg Schmitthoff, *supra* n 60, 144–7; Y Brulard and Y Quintin, "European Community Law and Arbitration: National Versus Community Public Policy" (2001) 18 *Journal of International Arbitration* 533, 536.

[69] Schmitthoff, *supra* n 60, 145. However, compared to national courts, not all the means to apply Union law, eg referring questions of Union law to the ECJ, are provided to arbitral tribunals based on the agreement of the parties. Referring questions of Union law to the ECJ by the arbitrators is only possible through the national courts, see eg *Nordsee*, *supra* n 63. For a further analysis on the issue, see also Anthony McClellan, "Commercial Arbitration and European Community Law" (1989) 5 *Arbitration International* 68; W Brown, "Commercial Arbitration and the European Economic Community" (1985) 2 *Journal of International Arbitration* 21; P Hetsch, "Arbitration in Community Law"(1995) 6 *ICC International Court of Arbitration Bulletin* 47; Schmitthoff, *supra* n 60, 147–54.

[70] *Supra* n 67.

[71] Consolidated version of the Treaty on the Functioning of the European Union [2010] OJ C83/47.

[72] Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten ("Van Schijndel")* [1995] ECR I-4705.

where domestic law allows such application by the national court.[73] However, it had been held that, this obligation does not exist if raising those provisions *ex officio* would oblige the courts to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts other than those on which the party with an interest in application of those provisions bases his claim.[74] Considering *Van Schijndel*, the national court, in *Eco Swiss*, asked the ECJ whether that obligation for national courts also exists for arbitrators. Advocate General Saggio was of the opinion that the arbitrators should not be required to consider issues relating to the observance of binding Union law automatically if that consideration would oblige them to abandon the passive role assigned to them.[75] The ECJ underlined the importance of the provision[76] and held that if a national court is required to grant an application for annulment of an arbitration award under its national procedural rules where such an application is founded on failure to observe national rules of public policy, it must also grant that application in case of inconsistency with the prohibition laid down in Article 81(1) of the EC Treaty.[77] The ECJ did not need to give a further answer to the question on the arbitrators' obligation to apply that provision *ex officio*.[78] However, it can be at least inferred from the decision that the arbitrators should apply EU competition law *ex officio* by considering possible challenges to annul their awards under the national laws or potential refusal of enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("the New York Convention").[79]

There is no exception to apply the rules of Union law even when acting as *amiable compositeur*. In *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij*[80]

[73] *Ibid*, para 15.

[74] *Ibid*, paras 20–22. See also K Lenaerts, D Arts and I Maselis, *Procedural Law of the European Union* (London, Sweet and Maxwell, 2nd edn, 2006), particularly paras 3-035–036.

[75] See the AG's Opinion in *Eco Swiss*, paras 21–26.

[76] *Eco Swiss*, *supra* n 67, para 36.

[77] *Ibid*, paras 37 and 41. It should be noted that the issue whether a national court can raise a question of law *ex officio* is mostly dependent on the procedure governing the case. However, there is a diversity of the types of procedures in the Member States. Generally speaking, in some Member States, the judge is deemed to know the law and therefore he has to raise and apply also the relevant provisions of another legal system not pleaded by the parties, whereas in others, eg England and Scotland, the judge, in principle, has no right or power to do so. It leads to the conclusion that a national court must apply a provision of Union law of its own motion only if it could apply a corresponding provision of national law of its own motion. It is the result of the balancing approach between the principles of primacy and direct effect of EU law on the one hand and the principle of national procedural autonomy on the other hand, through the principles of effectiveness and equivalence, see the Opinion of AG Jacobs in *Van Schijndel*, particularly paras 31–44.

[78] *Eco Swiss*, *supra* n 67, para 42.

[79] Redfern and Hunter, *supra* n 20, para 3.135; Lew, Mistelis and Kröll, *supra* n 32, paras 19-25–28 and 19-38–43. Brulard and Quintin, *supra* n 68, further argue that the decision establishes the arbitrators' duty to apply Union public policy *ex officio*.

[80] Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477.

the ECJ decided that a court of a Member State which determines an appeal against an arbitration award according to what appears fair and reasonable pursuant to the arbitration agreement between the parties must observe the rules of Union law, in particular competition law rules, because of the supremacy and uniform application of EU law.[81]

Besides the application of EU competition law, the arbitrators' duty to apply the secondary EU law can also be raised by considering the ECJ's decision in *Ingmar GB Ltd v Eaton Leonard Technologies Inc*.[82] In *Ingmar* the Court of Appeal of England and Wales asked the ECJ whether the provisions of the Commercial Agents Directive,[83] and in particular Articles 17–19, are applicable if the parties – the principal in the USA and its commercial agent in the UK – choose Californian law to be applied to their contract and if the agent carries out its activity in a Member State although the principal is established in a non-member country. The ECJ interpreted those provisions which are designed to protect commercial agents as mandatory and stated that they must be observed throughout the Union.[84] Having considered the Union legal order, it was held that the principal cannot simply evade those provisions by a choice-of-law clause.[85] In the light of the decision, the application of mandatory EU provisions by arbitrators can also be argued by taking account of a possible challenge of the arbitral award under the public policy exception in case of the non-application of those provisions, if such an exception is available in the arbitration law of the Member State in question.[86]

2. The Application of Private International Law Rules of Union Law by Arbitrators

As it has been examined in section B.2 of this article, there are cases in which private international rules of Union law are applied by arbitrators. However, the question whether that application is a duty of an arbitrator is doubtful. The acceptance or the refusal of this duty would mostly depend on the approach taken. From the Union law point of view, arbitration is similar to court litigation in applying EU law, whereas from the arbitration point of view, EU law constitutes just one of the legal sources to consider applying to the dispute.[87]

[81] *Ibid*, paras 23–24. See also the Opinion of AG Darmon, particularly, paras 35–43 and Hetsch, *supra* n 69, paras 2.1.1–2.

[82] See Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc ("Ingmar")* [2000] ECR I-9305; Lew, Mistelis and Kröll, *supra* n 32, paras 19-46–50.

[83] Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17.

[84] *Ingmar*, *supra* n 82, paras 20–24.

[85] *Ibid*, para 25.

[86] See Lew, Mistelis and Kröll, *supra* n 32, para 19–50.

[87] These two standpoints are distinguished in N Shelkoplyas, *The Application of EC Law in Arbitration Proceedings* (Nijmegen, Wolf Legal Publishers, 2003) and N Shelkoplyas, "European Community

On this basis, from the Union law perspective, there appears to be no strong reason to come to a different conclusion in the application of private international law rules of Union law by arbitrators. Therefore, private international law rules of Union law, like substantive rules of EU law, have to be applied by arbitrators under the principle of supremacy of EU law and its uniform application unless otherwise stated by the provision itself or by the instrument it is found in. Furthermore, pursuant to Article 288 of the Treaty on the Functioning of the EU, a Regulation has general application, is binding in its entirety and directly applicable in all Member States. As stated by the ECJ in *Simmenthal*,[88] direct applicability means that rules of Union law must be fully and uniformly applied in all the Member States from the date of their entry into force and for as long as they continue in force.[89] According to the principle of the precedence of Union law, directly applicable measures automatically render any conflicting provisions of current national law inapplicable, while they also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Union provisions since directly applicable measures are an integral part of and take precedence in the legal order in the territory of each of the Member States.[90]

When the Recitals to the Rome I Regulation are considered, it seems, at first glance, that the Regulation is binding only on courts but not on arbitral tribunals. For instance, Recital 6[91] gives reference to "the country of *the court* in which an action is brought". In the same way, Recital 8[92] mentions "the

Law and International Arbitration: Logics That Clash" (2002) 3 *European Business Organization Law Review* 569, 570.

88 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA ("Simmenthal")* [1978] ECR 629.

89 *Ibid*, para 14.

90 *Ibid*, para 17. On EU legislation, direct effect of Union law and supremacy of EU law, see eg S Weatherill and P Beaumont, *EU Law* (London, Penguin Books, 3rd edn, 1999), chs 5, 11 and 12; P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 4th edn, 2008), chs 8 and 10.

91 Recital 6 provides that:

> "The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought."

92 Recital 8 provides that:

> "Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised."

law of the Member State in which *the court* is seised". Similarly, Recital 16[93] considers "*the courts*" and Recital 37[94] addresses "*the courts of the Member States*". Correspondingly, Recital 4[95] concerns "the mutual recognition of *judgments*". On the other hand, Recital 1[96] supports a broader application of the Regulation by giving reference to "*judicial* cooperation in civil matters". There should not be any doubt that the courts of Member States and the arbitral tribunals seated in the Member States exercise similar judicial functions. This is affirmed by the ECJ to some extent in *Nordsee*:[97] as the arbitration is provided for within the framework of law, the arbitrator must decide according to law and his award has the force of *res judicata* between the parties and may be enforceable.[98] It is a fact that the arbitrator differs from the judge in many respects, particularly as to the source of their authority. However, it is also stated that arbitration is a judicial process since the decisions of arbitrators bind the parties and resolve a dispute.[99] These two aspects of the judicial nature of the arbitrators' role are also universally accepted in international conventions, such as the New York Convention.[100] Article II(1) of the New York Convention provides that "Each contracting State shall recognize an agreement in writing

[93] Recital 16 provides that:

> "To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation."

[94] Recital 37 provides that:

> "Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively."

[95] Recital 4 provides that:

> "On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments."

[96] Recital 1 provides that:

> "The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market."

[97] *Supra* n 63.

[98] *Ibid*, para 10. However, the ECJ did not find those characteristics sufficient to make a reference for a preliminary ruling pursuant to Art 177 of the EEC Treaty which is now Art 267 of the Treaty on the Functioning of the EU.

[99] See eg Tweeddale and Tweeddale, *supra* n 37, paras 2.02 and 2.11; E Gaillard and J Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague, Kluwer Law International, 1999), paras 12–14; Born, *supra* n 32, 247–52.

[100] Gaillard and Savage, *ibid*, para 30.

under which the parties undertake to submit to arbitration all or any *differences* which have arisen or which may arise between them."[101] Article III also states that "Each Contracting State shall recognize arbitral awards as *binding*."[102] It is argued that the contractual basis of arbitration does not weaken this judicial nature of arbitration or vice versa.[103] From this point of view, Recital 1 covers both court litigation and arbitration. Since the Union has power to regulate the law of arbitration,[104] the meaning of the term "*judicial*" should not be restricted to the courts of Member States unless the relevant Union instrument expressly excludes arbitration from its scope of application.[105] Consistent with this argument, Recital 12[106] and Recital 15[107] mention "*choice of tribunals*" as well as choice of courts regarding the determination of the law applicable to the dispute. It appears that the reference is made to "tribunals" based on the agreement between the parties or "the consensual arbitrator".[108] On this basis, since the Rome I Regulation, as a directly applicable measure, is binding upon all the Member States with the exception of Denmark, it takes precedence over all national law of the Member States in arbitration as well as in court litigation. In the case of a conflict between the provisions of the national arbitration legislation of a Member State and the Rome I Regulation with respect to the law applicable to the substance of the dispute, the latter should prevail. From the Union law perspective, the conclusion would be that the arbitrator, like the judge, is bound to apply the rules of the Rome I Regulation to the question of

[101] Emphasis added.

[102] Emphasis added.

[103] Gaillard and Savage, *supra* n 99, para 45. In the words of Donaldson J in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909, 921, as quoted by Schmitthoff, *supra* n 60, 153: "Courts and arbitrators are in the same business, namely, the administration of justice. The only difference is that the courts are in the public and arbitrators are in the private sector of the industry."

[104] See Art 81 of the Treaty on the Functioning of the EU.

[105] Art 1(2)(d) of the Brussels I Regulation is the example of this situation. Although the Union has power, it has preferred not to regulate this area by providing this exclusion and restricted the scope of Brussels I to the courts of Member States.

[106] See *supra* n 33.

[107] Recital 15 provides that:

> "Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations (the Rome Convention), the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007."

[108] The term "the consensual arbitrator" is used by Schmitthoff to distinguish the arbitrator whose jurisdiction derives from the agreement between the parties from "the statutory arbitrator" whose jurisdiction derives from a statute, see Schmitthoff, *supra* n 60, 147–48.

the law applicable to any contractual obligations within its scope.[109] However, this conclusion gives rise to another question as to how the arbitrator sitting in a Member State would apply the Rome I Regulation. This problem would arise particularly in cases where the parties have not pleaded the application of the rules of the Rome I Regulation. The case-law of the ECJ has required the application of EU law of the court's own motion only for the EU provisions having a public policy or mandatory nature. The court is not required to raise the EU provisions that do not have this nature of its own motion unless to do otherwise would breach the EU law principle of effectiveness.[110] In this context, the application of the Rome I Regulation by the courts *ex officio* or upon the parties' plea is dependent on the unharmonised procedural rules of the Member States. On this basis, the question whether the arbitrator sitting in a Member State is required to apply the rules of the Rome I Regulation *ex officio* would be left to the procedural law of the arbitration to the extent that the parties have been given an effective opportunity of enforcing their rights founded on EU law.

On the other hand, from the arbitration perspective, a contrary conclusion can be reached by starting from the special nature of arbitration and the differences between a judge and an arbitrator. It is well recognised that the arbitrator, unlike the judge of a state court, has no forum and *lex fori* which means that the arbitrator is not bound by the conflict-of-laws rules of the place of arbitration.[111] This principle is also supported in arbitral awards. For instance, it is stated in the *Sapphire* arbitration[112] that:

[109] See eg Bělohlávek, *supra* n 46, where the author states that the arbitrators have to apply the Rome I Regulation if they have to apply particular conflict-of-laws rules and they are those of a country bound by the Regulation as a part of Union law and directly applicable in all Member states, excluding Denmark. For the argument regarding the Rome Convention, see eg Anton and Beaumont, *supra* n 14, 360; Fawcett, Carruthers and North, *supra* n 14, 684; Yu, *supra* n 37, 153–54.

[110] See eg *J van der Weerd and Others v Minister van Landbouw, Natuur en Voedselkwaliteit* (Joined Cases C-222/05 to C-225/05 [2007] ECR I-4233), where it was concluded at para 42 that Union law does not require the national court to raise of its own motion a plea alleging infringement of the provisions of the EU directive in question since neither the principle of equivalence nor the principle of effectiveness require it to do so. As regards the principle of equivalence, it was held that the provisions of the EU directive in question cannot be considered as being equivalent to the national rules of public policy and therefore the court was not obliged to examine of its own motion the validity of the national measures in question (see paras 29–32). As regards the principle of effectiveness, it was stated that where the parties are given a genuine opportunity to raise a plea based on Union law before a national court, this principle does not require the national court to raise a plea based on a Union provision of its own motion irrespective of the importance of that provision to the Union legal order (see para 41). On the issue, see also K Lenaerts, "National Remedies for Private Parties in the Light of The EU Law Principles of Equivalence and Effectiveness" as yet unpublished but a paper presented to the Judicial Studies Committee in Scotland in October 2010.

[111] See eg Redfern and Hunter, *supra* n 20, paras 3.216–18.

[112] *Sapphire International Petroleums Ltd v National Iranian Oil Company* [1964] ICLQ 1011.

> "Contrary to a State judge, who is bound to conform to the conflict [of] law rules of the State in whose name he metes out justice, the arbitrator is not bound by such rules. He must look for the common intention of the parties, and use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities."[113]

On this basis, where there is no choice of law by the parties, the arbitrator has freedom and flexibility to choose any method to determine the law applicable to the substance of the dispute. Within this context, it is commonly argued that the arbitrator can decide to apply the conflict-of-laws rules to ascertain the substantive law or he can directly determine the substantive law without applying any conflict-of-laws rules. In the first case, it can be the conflict-of-laws rules of the seat of arbitration or of the state most closely connected to the dispute or which he considers applicable or appropriate. The arbitrator can follow the cumulative application approach by simultaneously considering different conflict-of-laws systems connected to the dispute. He can also apply the universally recognised conflict-of-laws rules.[114] In international commercial arbitration, either by the parties' choice or by the determination of the arbitrators, the law applicable to the substance of the dispute can be a national law or a non-national legal system or rules of law.[115] Besides, it is also accepted that arbitrators can even be empowered to decide *ex aequo et bono* or as *amiables compositeurs* by the parties which gives them freedom to settle the dispute according to fairness and common sense principles rather than the law.[116] Thus, from the arbitration point of view, the conclusion would be that the arbitrator, unlike the judge, is not bound to apply private international law rules of Union law.[117] Even if the duty is accepted, it is argued that it is not clear whether the

[113] The statement is quoted in Redfern and Hunter, *supra* n 20, para 3.218. For similar statements, see eg *Arabia v Arabian American Oil Company (Aramco)* [1963] 27 ILR 117; B Stern, "Trois arbitrages, un même problème, trois solutions: les nationalisations pétrolières libyennes devant l'arbitrage international" (1980) *Revue de l'arbitrage* 1, 3 as cited by M Rubino-Sammartano, *International Arbitration Law and Practice* (The Hague, Kluwer Law International, 2001), 426; Final Award of 1991 in Case 6527, *supra* n 52.

[114] For the arbitrator's autonomy to decide the applicable law and the methods used, see eg Lew, Mistelis and Kröll, *supra* n 32, paras 17-38–77; Born, *supra* n 32, 2111–48; Gaillard and Savage, *supra* n 99, part 5, ch 2; M Blessing, "Choice of Substantive Law in International Arbitration" (1997) 14 *Journal of International Arbitration* 39; M Blessing, "Regulations in Arbitration Rules on Choice of Law", in van den Berg (ed), *supra* n 48, 391. As an echo of this autonomy, see Art 1514 of the new French Law of Arbitration (Décret no 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage) which provides that: "Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies ou, à défaut, conformément à celles qu'il estime appropriées. Il tient compte, dans tous les cas, des usages du commerce."

[115] See eg Lew, Mistelis and Kröll, *supra* n 32, ch 18; Born, *supra* n 32, ch 18.

[116] Eg see Art 28(3) of the UNCITRAL Model Law. For a further analysis on the issue, see eg Redfern and Hunter, *supra* n 20, paras 3.198–202; Lew, Mistelis and Kröll, *supra* n 32, paras 18-86–96; Born, *supra* n 32, 2238–43.

[117] See eg Marrella, *supra* n 48, 107.

Rome I Regulation applies to international commercial arbitration.[118] It is further alleged that the Regulation does not apply to a private arbitration tribunal seated in a Member State since consensual arbitrators are not recognised in the context of "court or tribunal of a Member State" within the meaning of Article 267 of the Treaty on the Functioning of the EU.[119]

Both of these two arguments have serious legal consequences. In this regard, for instance, in an international commercial arbitration where the seat is in England and Wales or Northern Ireland and the curial law is English law, from the Union law point of view, section 46 of the Arbitration Act 1996[120] would no longer apply in order to determine the law applicable to the merits, regardless of the existence of a link with the Union, if the contract in question is concluded on or after 17 December 2009. The reason is that section 46 of the Arbitration Act 1996 is superseded by the rules of Rome I since the Rome I Regulation was opted in to by the UK and therefore it is binding on and directly applicable to the UK.[121] Similarly, in international commercial arbitration seated in Scotland,[122] the tribunal has to decide the law applicable to the substance of the dispute according to the provisions of the Rome I Regulation instead of rule 47 of the Arbitration (Scotland) Act 2010,[123] whereas the law governing the arbitration agreement is still subject to the Arbitration (Scotland)

[118] See eg Merkin, *supra* n 28, 75 where the author questions whether "tribunal" in Recital 12 includes an arbitral tribunal.

[119] Dickinson raises this argument for the Rome II Regulation (Regulation (EC) No 864/2007 [2007] OJ L199/40): see A Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford University Press, 2008), para 3.78.

[120] S 46 of the Arbitration Act 1996 provides that:

> "(1) The arbitral tribunal shall decide the dispute—
>
> (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
>
> (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
>
> (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.
>
> (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

[121] See s 2(4) of the European Communities Act 1972 which provides that any enactment in the UK "shall be construed and have effect subject to" the directly effective provisions of Union Law.

[122] For the situations where arbitration is deemed to be seated in Scotland, see s 3 of the Arbitration (Scotland) Act 2010. See also s 7 of the Arbitration (Scotland) Act 2010 which provides that: "The Scottish Arbitration Rules set out in schedule 1 are to govern every arbitration seated in Scotland (unless, in the case of a default rule, the parties otherwise agree)."

[123] Rule 47 provides that:

> "(1) The tribunal must decide the dispute in accordance with—
>
> (a) the law chosen by the parties as applicable to the substance of the dispute, or
>
> (b) if no such choice is made (or where a purported choice is unlawful), the law determined by the conflict of law rules which the tribunal considers applicable.

Act 2010 because of the arbitration agreements' exclusion in Article 1(2)(d) of Rome I. On the other hand, from the arbitration point of view, in that case, the relevant provisions of the Arbitration Act 1996 in England and Wales or Northern Ireland and the Arbitration (Scotland) Act 2010 in Scotland have to be applied unless the parties have agreed to the contrary since the choice-of-law rules of the Regulation are not binding on arbitrators.[124] In practice, in cases where the parties choose the law applicable to their contract, the application of the Arbitration Act 1996 or the Rome I Regulation would not change the result significantly as the principle of party autonomy in choice of law is accepted by both instruments.[125] The difference would appear if the parties wish to choose a non-state body of law, eg the *lex mercatoria*, or if they wish the arbitrators to decide *ex aequo et bono* or as *amiables compositeurs*. It is stated that both of these choices are intended to be allowed under section 46(1)(b) of the Arbitration Act 1996.[126] However, the position is not the same under the Rome I Regulation. The parties are not entitled to make such choices since the Regulation refers to "the law of a State" in its different provisions, eg Articles 2 and 3. Nonetheless, according to Recital 13, the parties are allowed to incorporate a non-state body of law or an international convention by reference into their contract. Furthermore, according to Recital 14, if the Union adopts rules of substantive contract law, including standard terms and conditions, in an appropriate legal instrument, that instrument may provide that the parties may choose to apply those rules. In this regard, it appears that choice of the *lex mercatoria* could be effective by incorporation into the contract,[127] whereas the

> (2) Accordingly, the tribunal must not decide the dispute on the basis of general considerations of justice, fairness or equity unless—
> (a) they form part of the law concerned, or
> (b) the parties otherwise agree.
>
> (3) When deciding the dispute, the tribunal must have regard to—
> (a) the provisions of any contract relating to the substance of the dispute,
> (b) the normal commercial or trade usage of any undefined terms in the provisions of any such contract,
> (c) any established commercial or trade customs or practices relevant to the substance of the dispute, and
> (d) any other matter which the parties agree is relevant in the circumstances."

[124] For this argument regarding the Rome Convention, see eg Stone, *supra* n 28, 264. See also MJ Mustill and SC Boyd, *The Law and Practice of Commercial Arbitration in England* (London/Edinburgh, Butterworths, 2nd edn, 1989), *2001 Companion Volume to the Second Edition*, 327–8, where the authors discuss the question of whether Parliament, in enacting the Arbitration Act 1996, intended to abolish the overriding effect of the Rome Convention. Considering the literal meaning of s 46, the authors answer the question positively.

[125] See s 46(1) of the Arbitration Act 1996 and Article 3(1) of the Rome I Regulation. Both instruments also reject *renvoi*: see s 46(2) of the Arbitration Act 1996 and Article 20 of the Rome I Regulation.

[126] See eg Collins *et al*, *supra* n 17, para 16.053; R Merkin, *Arbitration Act 1996: An Annotated Guide* (London, LLP, 1996), 76; Mustill and Boyd, *supra* n 124, 328.

[127] See eg O Lando and PA Nielsen, "The Rome I Regulation" (2008) 45 *Common Market Law Review* 1687, 1698; Plender and Wilderspin, *supra* n 14, para 6-012; Fawcett, Carruthers and

choice for *amiable composition* or arbitration *ex aequo et bono* would not be accepted under the Regulation. On the other hand, in the absence of any choice of law by the parties, the application of objective conflict-of-laws rules set out in Article 4 of the Rome I Regulation or section 46(3) of the Arbitration Act 1996 which requires the arbitrator to apply the law determined by the conflict-of-laws rules that he considers applicable would possibly change the result. In the latter case, it might be the conflict-of-laws rules of England or of any other legal system.[128] At this point, there are also other arguments which support that an arbitrator, sitting in England, would in most cases apply English conflict-of-laws rules at the first stage at which the arbitrator must choose the applicable conflict-of-laws rules and this would make Article 4 of Rome I relevant at the second stage at which the arbitrator must apply the conflict-of-laws rules in order to determine the law applicable to the substance.[129]

Regarding the Rome Convention, which had the same exclusion in Article 1(2)(d), the general consensus was that arbitrators were not bound to apply the Convention although they might apply it at their discretion.[130] On this basis, it might be assumed that replacing the Rome Convention with the Regulation and keeping the exclusion would not change the situation. However, the difference between the legal nature of an international treaty and an EU regulation is also to be taken into account. The Rome Convention was in the form of an international treaty. Its entry into force was subject to ratification, acceptance or approval by the signatory states[131] and it was in force only between the contracting states. It contained certain provisions which were questioned as regards their compatibility with the aim of establishing a genuine area of justice, such as Article 22 on the right of the Member States to enter reservations relating to specific provisions of the Convention, Article 23 on the right of the Member States to adopt new choice-of-law rules with respect to any particular category of contract, Article 24 on the right of the Member States to accede to multilateral Conventions on conflict of laws, and Article 30 on the limited

North, *supra* n 14, 699; TC Hartley, *International Commercial Litigation* (Cambridge University Press, 2009), 573–74.

[128] See eg Merkin, *supra* n 28, 77; Hill, *supra* n 48, 301; Collins *et al*, *supra* n 17, para 16-055. See also Mustill and Boyd, *supra* n 124, 327–28, where the authors argue that an arbitral tribunal sitting in England and Wales or Northern Ireland should be free to disregard even mandatory rules of the domestic and private international law of the UK, particularly in cases where the parties do not have a connection with the UK other than their choice of the seat.

[129] See Merkin, *supra* n 28, 77; Merkin, *supra* n 31, paras 7.40–42. However, it is also argued that there is still room for the arbitrator to choose to apply the conflict-of-laws rules of another jurisdiction to which the Rome I Regulation is irrelevant and that as the arbitrator exercises his statutory discretion under the Arbitration Act 1996 at that stage, that decision is not capable of challenge by the English courts. For this argument see Merkin, *supra* n 28, 77; Merkin, *supra* n 31, paras 7.40–41; Merkin, *supra* n 126, 76.

[130] See *supra* n 48 but *cf* Anton and Beaumont, *supra* n 14, 322, 360.

[131] See Art 28 of the Convention.

duration of the Convention.[132] It was not part of EU law referred to in Article 288 of the Treaty on the Functioning of the EU.[133] The precedence of Union law was also accepted by the Convention itself in Article 20. It was stated that the Convention would not affect the application of provisions which, in relatin to particular matters, laid down choice-of-law rules relating to contractual obligation and which were or would be contained in acts of the institutions of the European Communities, eg regulations and directives, and in national laws harmonised in implementation of such acts.[134] One of the reasons to convert the Convention into a Union instrument, particularly into a regulation, was direct applicability of a regulation in all Member States.[135] Unlike the Convention, the Regulation is part of EU law and takes precedence over national law upon its entry into force without any need for ratification, acceptance or approval. The difference between the legal nature of the Rome Convention and the Rome I Regulation strengthens the argument on the superseding effect of the Rome I Regulation over the specific provisions of national law providing choice of law rules for arbitrators.

It is obvious that the question is open to more than one interpretation until one of them is adopted by the ECJ. This article supports the Union law perspective. In determining the law applicable to the dispute concerning a contractual obligation, the arbitrator has to apply the choice-of-law rules of the Rome I Regulation in an arbitration seated in one of the Member States instead of the relevant provisions of the national arbitration legislation therein. However, where the parties have agreed to refer their dispute to institutional arbitration or to settle their dispute according to a set of arbitration rules such as UNCITRAL Arbitration Rules, the choice-of-law provisions of these arbitration rules, rather than the choice-of-law rules of Rome I, will be applied by the arbitrator in order to determine the law applicable to the substance of the dispute since the adaptation of such arbitration rules by incorporation into the contract by the parties is effective under the Rome I Regulation. The acceptance that the arbitrator is not bound by the conflict-of-laws rules of the seat does not affect the duty of arbitrators to apply the Rome I Regulation as this duty derives from the supremacy of EU law and the direct effect of EU Regulations but not directly from the conflict-of-laws rules of the seat. In addition, although the freedom of the parties to choose the applicable law of the dispute and the flexibility of the arbitrators to choose any method to determine it are well recognised in arbitration, granting and/or limiting this freedom and

[132] Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernisation ("Green Paper"), COM(2002) 654 final, 14; the Rome I Proposal, *supra* n 5, 4.

[133] See Bogdan, *supra* n 48, 115.

[134] See Art 20 of the Convention and the Giuliano and Lagarde Report, *supra* n 11, 39.

[135] See the Green Paper, *supra* n 132, 16.

flexibility depend on the legal regime of the place of arbitration.[136] In an arbitration seated in the EU, it is the Rome I Regulation which gives this freedom and flexibility and determines the limits of them. Furthermore, the fact that consensual arbitrators are not recognised in the context of "court or tribunal of a Member State" to make a reference to the ECJ for a preliminary ruling should not be taken as an implicit indication that arbitrators are not bound to apply Rome I. Arbitration is a process assisted by the national courts if necessary. As pointed out in *Nordsee*,[137] this assistance could be in the form of examining the issues, particularly regarding certain procedural matters or interpretation of the applicable law, in the context of the courts' collaboration with arbitral tribunals, or reviewing an arbitration award in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation. This assistance should not make any difference to the judicial activity of the arbitral tribunal in settling disputes and not prevent the application of Union instruments by them. Besides, the acceptance of the argument that the Rome I Regulation is binding on the courts but not on the arbitral tribunals would put arbitration agreements into a too advantageous position compared to choice-of-court agreements since the former would give the parties the opportunity to escape from the provisions of the Regulation which is indeed directly applicable and binding on all Member States. Therefore, the effectiveness of choice-of-court agreements, which is one of the aims indicated in the Commission's Proposal on the Review of Brussels I, would be jeopardised.

3. Consequences of the Non-Application of the Rome I Regulation by Arbitrators

The non-application of the Rome I Regulation would constitute an error of law[138] and also a breach of the Regulation, although it would not, in principle, affect the validity of the arbitral award.[139] Therefore, its consequences could derive from national laws and EU law. On this basis, error of law will raise the means of recourse through arbitration law, whereas the breach of Regulation will bring into consideration the means of recourse through EU law if

[136] Poudret and Besson, *supra* n 50, para 678. For the impact of national laws on the arbitral process, see also Blessing, *supra* n 114, 404–05; M Blessing, "The ICC Arbitral Process Part III: The Procedure Before the Arbitral Tribunal" (1992) 3 *ICC Bulletin* 18, 25–27; O Sandrock, "How Much Freedom Should an International Arbitrator Enjoy? – The Desire for Freedom From Law v The Promotion of International Arbitration" (1992) 3 *American Review: Essays in Honor of Hans Smit* 30.

[137] *Supra* n 63, para 14.

[138] A failure by the arbitrator to comply with Art 4 of the Rome I Regulation where he has chosen to apply English conflict-of-laws rules is characterised as an error of law by Merkin, *supra* n 28, 77.

[139] For this argument regarding the Rome Convention, see, Bělohlávek, *supra* n 46, para 2.20.

available. In both cases, ensuring the full and effective application of the Rome I Regulation to international commercial arbitration would be a requirement on the national courts of Member States.[140] It is also worth recalling that the national courts of Member States are under a duty to ensure uniform application of EU law.[141]

In arbitration law, it is widely accepted that error of law, on its own, is not a suitable ground for setting aside or refusal of recognition and enforcement of an arbitral award.[142] Although public policy, in general, is a basis for both annulment and non-enforcement of the award, in case of non-application of the Rome I Regulation, that ground could not be relied upon. At European level, even though a failure to apply EU provisions having a public policy or mandatory nature may result in the award being annulled by the courts of the seat or being refused enforcement in other Member States following from the decision of *Eco Swiss* and arguably of *Ingmar* as well,[143] the conflict-of-laws rules in the Regulation do not have that nature. Thus, arbitrators' decisions on choice of law are not generally subject to judicial review in the EU. However, England represents an exception since the appeal against the arbitral award on a point of law is possible either with the agreement of all the other parties to the proceedings or with the leave of the court[144] under section 69 of the Arbitration Act 1996.[145] Another exception is Scotland where a legal error appeal is permitted under rule 69 of the Arbitration (Scotland) Act 2010. According to rule 70, a legal error appeal under rule 69, which is a default rule, may be made only with the agreement of the parties or with the leave of the Outer House.[146]

[140] For an analysis on the *ex post* control of the arbitral award by the national courts of Member States, see eg Shelkoplyas, *supra* n 87, ch 12.

[141] See *supra* section C.1.

[142] See Redfern and Hunter, *supra* n 20, paras 10-62–74; Shelkoplyas, *supra* n 87, 355–87. For a detailed analysis on the grounds for annulling arbitral awards in different legal systems, see Born, *supra* n 32, ch 24. See also Art V of the New York Convention which does not list error of law as a ground to refuse recognition and enforcement of the award.

[143] See *supra* section C.1.

[144] See eg *Bulk Oil (Zug) AG v Sun International Ltd and Sun Oil Trading Co Ltd* ([1983] 1 Lloyd's Rep 655) where the permission to appeal was granted on a point of EU law by indicating that a question of EU law required a different approach from the purely domestic approach and if the case had been on a purely English question of law, the leave might not have been given. The judgment, which was approved by the Court of Appeal, is interpreted as meaning that the permission to appeal an arbitral award on a point of EU law is to be more freely given compared to that on a point of pure domestic law because of the duty of English courts to ensure the uniform application of EU law, see Merkin, *supra* n 31, paras 21.76 and 22.11.

[145] It is to be noted that s 69 of the Arbitration Act 1996 is a non-mandatory provision (see s 4(2)) so that the parties are free to agree to exclude the right of appeal. For a detailed analysis on judicial review of errors of law in arbitration awards in English law, see Merkin, *supra* n 31, ch 21.

[146] It is also to be noted that, in Ireland, an "error of law on the face of the award" is no longer a ground of challenge under the Irish Arbitration Act 2010 which repealed the Arbitration Acts 1954 to 1988 (see s 4). Due to the adaptation of the UNCITRAL Model Law (see s 6), an arbitral award may be set aside by the court on very specific grounds provided in Art 34(2) of

On the other hand, as a means of recourse through EU law, it is arguable whether the breach of the Regulation might raise state liability, and on this basis whether the aggrieved party could bring an action before national courts for damages due to non-compliance with EU law against the Member State where the arbitration was held. State liability was established as a principle of Union law by the ECJ in *Francovich*,[147] which was about a failure to transpose the Directive in question within the prescribed period. It was held that Member States are obliged to make good loss and damage caused to individuals by breaches of Union law for which they can be held responsible.[148] With respect to the conditions of state liability, it was stated that they depend on the nature of the breach of Union law giving rise to loss and damage.[149] The three conditions for liability were laid down in *Brasserie du Pêcheur*:[150] the EU rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious,[151] and there must be a direct causal link between the breach and the damage.[152] The principle has been developed and its scope of applicability has been extended by subsequent ECJ case-law. In *Brasserie du Pêcheur* it was held that the principle of state liability is applicable irrespective of the organ of the state to which the damage is attributable: it could be the national legislature, the judiciary or the executive which is responsible for the breach.[153] The ECJ rejected the argument that Member States are obliged to pay compensation for loss and damage caused to individuals by breach of Union law only where the provisions breached are not directly effective.[154] It, therefore, ruled that the application of the principle of state liability cannot be discarded where the provision breached is a provision of directly applica-

the UNCITRAL Model Law. However, the court has a common law jurisdiction to set aside or remit an award for an error of law on its face where the error is so fundamental that it cannot be allowed to stand: see: *Keenan v Shield Insurance Co Ltd* [1988] IR 89 and the recent Irish Supreme Court decision in *Galway City Council v Samuel Kingston Construction Limited and Geoffrey F Hawker* [2010] IESC 18.

147 Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357. On the principle of state liability for breach of EU law, see generally Weatherill and Beaumont, *supra* n 90, 423–32; Craig and de Búrca, *supra* n 90, 328–43; and S Moreira and W Heusel, *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle* (Cologne, Bundesanzeiger, 2004).

148 *Francovich*, *ibid*, para 37.

149 *Ibid*, para 38.

150 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029.

151 The decisive test for finding a sufficiently serious breach of Union law is whether the Member State manifestly and gravely disregarded the limits on its discretion: see *ibid*, para 55. The ECJ also listed certain factors which the national court may take into consideration in order to determine the State liability: see *ibid* para 56.

152 *Ibid*, para 51. The fault, intentional or negligent, is not required for the liability: see *ibid*, paras 75–80.

153 *Ibid*, paras 32–36.

154 *Ibid*, paras 18–19.

ble Union law.[155] In *Köbler*[156] it was held that the principle of state liability is also applicable where it is a national court of last instance which violates EU law.[157] It was pointed out that individuals should not be deprived of the possibility of rendering the state liable in order to obtain legal protection of their rights in cases where their rights given by Union law are breached by a final decision of a national court of last instance which cannot normally be corrected.[158] Considering the specific nature of the judicial function and the legitimate requirements of legal certainty in such cases, it was indicated that the breach is to be manifest in order to meet the second condition for liability.[159]

In arbitration law, it appears that, with the exceptions of England and Scotland, the non-application of Rome I by the arbitrators, on its own, would not be a ground for challenging the award. On the other hand, in EU law, it could be a possible basis for state liability due to the failure to comply with EU law by giving room to arbitrators to apply specific provisions of national law which conflict with, and are superseded by, the provisions of Rome I.[160] However, regarding the specific examples of England and Scotland, it is questionable whether the causal link between the alleged failure and the damage caused may be established in order to hold the state liable. Giving room to arbitrators to apply specific provisions of national law which conflict with, and are superseded by, the provisions of Rome I may not meet the conditions laid down in *Brasserie du Pêcheur* to attribute the damage to the legislature. In England, the Rome I Regulation entered into force after the Arbitration Act 1996 had been enacted. Accordingly, it is deemed that a later EU Regulation takes priority over an earlier Act. Furthermore, the legislature has already accepted the supremacy of Union Law in section 2(4) of the European Communities Act 1972 and required that any enactment in the UK "shall be construed and have effect subject to" the directly effective provisions of Union Law. Thus, it is difficult to establish the causal link to attribute the damage to the legislature. In Scotland, although the position is different, the conclusion regarding state liability would be the same. The Arbitration (Scotland) Act 2010 was enacted after the Rome I Regulation; however, the term "any enactment" in section 2(4) of the European Communities Act 1972 also includes a later Act. On the other

[155] See *ibid*, para 1 of the ruling.
[156] Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.
[157] See *ibid*, para 36.
[158] *Ibid*, para 34.
[159] *Ibid*, paras 53 and 59.
[160] Another means of recourse might be that the Commission could bring an action against a Member State for failure to comply with EU law under Arts 258 and 260 of the Treaty on the Functioning of the EU. However, this could only arise once it was clear that under English or Scots law the Arbitration Acts are given priority over Rome I where there is a conflict and the litigation would not help the parties whose EU law rights were violated before the decision of the ECJ except to help them establish state liability in an action for damages brought in the national courts.

hand, as the appeal against the arbitral award on an error of law is possible in England and Scotland, the state can be held liable under the *Köbler* criteria if their national courts violate EU law by confirming an award given by the non-application of the Rome I Regulation on the ground that Rome I does not override the relevant provisions of the arbitration legislation. The provisions of Rome I are likely to be held to be directly effective as they are "unconditional and sufficiently precise" and therefore such a failure by a national court would be a "manifest" breach of EU law in line with the *Köbler* criteria.

D. Conclusion

The Rome I Regulation applies to determine the law applicable to contractual obligations in civil and commercial matters involving a conflict-of-laws problem in the EU. However, the relevance of the Regulation to international commercial arbitration which takes place in a Member State is not free from doubt. This uncertainty derives from the scope of the arbitration agreements' exclusion in Article 1(2)(e) and from the debate as to whether an arbitrator sitting in a Member State, like a judge of a Member State's court, is bound to apply the rules of the Regulation.

Regarding the scope of the exclusion, as the literal meaning of the provision and the Explanatory Report of the Rome Convention are considered, it is generally agreed that the exclusion covers both the law applicable to the arbitration agreement itself and the law applicable to the arbitration procedure but not the law applicable to the substance of the dispute. The arbitration practice which has considered the conflict-of-laws rules of the Rome Convention in ascertaining the law applicable to the substance also supports this interpretation of the scope of the exclusion and the applicability of the Rome I Regulation to international commercial arbitration.

On the other hand, with respect to the debate on the duty of arbitrators to apply the rules of the Rome I Regulation, the issue is less clear. The Regulation in principle is required to be applied by all courts and tribunals in the EU. Recitals to the Rome I Regulation mostly refer to "*the courts*" whereas some of the Recitals address "*tribunals*". However, it is doubtful whether the word "*tribunals*" includes arbitral tribunals. It is argued in this paper that arbitral tribunals are included. It is a fact that there are differences between an arbitrator and a judge; however, the judicial function they exercise is similar. Their decisions are binding on the parties and do resolve a dispute. From the Union law point of view, arbitrators, like judges, are also a part of the Union legal order which obliges them to safeguard the principles of that order. As the Rome I Regulation has general application, is binding in its entirety and directly applicable in all Member States except Denmark, the rules of Rome I have to be applied,

instead of the relevant provisions of the national arbitration legislation of the Member States, by the arbitrators in determining the law applicable to the dispute concerning a contractual obligation within its scope if the arbitration takes place in the EU. This is not the denial or omission of the special nature of arbitration, but it is the legal conclusion of the supremacy of EU law and the direct effect of EU Regulations. However, on the question whether or not the arbitrators are required to apply the Rome I Regulation of their own motion, the direct effect and supremacy of EU law are not absolute norms. The answer depends on the arbitrators' right or power to raise issues of law of their own motion under the procedural law of the arbitration. If they have such a right or power under the procedural law of the arbitration, they will be required to raise issues of EU law including the Rome I Regulation of their own motion. However, if they are not enabled to raise issues of law of their own motion, they will not be required to apply the Regulation provided that the parties have been given an effective opportunity of enforcing their rights founded on EU law. The consequences of the non-application of the Rome I Regulation by arbitrators sitting in the EU would constitute an error of law and a breach of EU law. The arbitral award could be challenged if recourse to the courts for an error of law is available under the national law of the Member State in which the arbitration was held, such as English or Scots law. Due to the breach of EU law, the aggrieved party could also bring an action for damages against that Member State under the principle of state liability.