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European Court of Justice vs. Arbitral Tribunals: The Role of Preliminary Ruling When European "Public Policy" is at Stake

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Abstract

This paper considers, in a law and economics perspective, the effect of the interpretation given by the European Court of Justice of Article 267 TFEU (Treaty on the Functioning of the European Union) in private arbitration proceedings. The European Court of Justice's interpretation denies arbitral tribunals authority to refer for its preliminary ruling on the application of European Union Law. This implies that arbitrators have no power to prevent a national court of a Member State from setting the arbitral decision aside when it is requested recognition or enforcement of an arbitral award that involves European "public policy" rules (for instance when Competition Law is at stake). However, it is in the interest of efficient arbitration proceedings that any review of an arbitral award should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances. Conversely, the ultimate effect of the European Court of Justice's interpretation of article 267 TFEU risks to impair the very essence of arbitration.

Our purpose, here, is to test the efficiency of such interpretation on parties incentives, adapting the existing law and economics models on litigation (i.e. Priest-Klein's model on the selection of disputes for litigation and Dari Mattiacci-Parisi's model on dissipation of value and lost treasure in rent-seeking games, the latter inspired by Gordon Tullock's paradox). Our result provides an analytical argument for reviewing the current European Court of Justice's interpretation of article 267 TFEU. The intent is to increase legal certainty as well as procedural simplification and to enhance arbitration effectiveness.

Moreover it sets a building block for further studies on policy choices over a whole set of legal problems caused by the application of "public policy" rules in Alternative Dispute Resolution.

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