



BRILL

THE ITALIAN REVIEW OF INTERNATIONAL AND
COMPARATIVE LAW 1 (2021) 479–481

The Italian Review
of International and
Comparative Law

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Call for papers



The European Union and International Arbitration

One of the aims of the European Union (EU) has been to establish an area of “freedom, security and justice” founded, *inter alia*, on the freedom of circulation of people, goods and capitals, in which legal decisions rendered in a Member State are free to circulate within the Union. The functioning of this legal order is based on the mutual trust between domestic courts, according to which, as a matter of principle, all decisions rendered in a Member State are not to be reviewed in other Member States. Automatic circulation of judgments should possibly incentivize the recourse to domestic systems of justice and, in the opinion of the EU institutions, all domestic courts within the Union should be seen as equal and apt to grant an equivalent level of justice.

However, individuals and companies carrying out business activities still seem (at least partially) to distrust domestic systems of justice and to prefer recurring to international arbitration, which is sometimes perceived as a more neutral and efficient system of dispute settlement, more suitable for international commercial litigation. This consideration applies both in the field of purely commercial disputes – involving two private parties – as well in international investment arbitration – involving a foreign investor, on the one hand, and the host State where the former decided to carry out its business, on the other.

In the last decade, the EU, for its part, has confronted with the continuous recourse to international arbitration on several occasions. As regards the outcomes, however, a clear distinction has to be drawn between international commercial litigation and investor-State dispute settlement (ISDS).

As to international commercial arbitration, the EU legislator has been quite reluctant in regulating it within the normative framework of EU regulations on private international law. Arbitration is, indeed, expressly excluded by the Regulation No 1215/2012 (Brussels I-bis) and the extension of this exclusion is

only explained in a rather obscure Recital (n. 12). This circumstance, jointly with the wavering case law of the Court of Justice of the European Union (CJEU), has sparked a heated scholarly debate on several issues, such as the relationship between judicial and arbitral proceedings, the fate of arbitral awards on jurisdiction within the Union, the support that national courts may offer to arbitral proceedings (concerning, *inter alia*, the constitution of the tribunal and interim orders), the applicability of EU law by international arbitrators and the scrutiny that domestic courts shall exercise on the arbitral awards, in particular as regards the compatibility with public policy. All these issues are even more significant considering the legal consequences related to Brexit, considering that London is still one of the most prestigious arbitral seats and that English judges are keen to issue orders aimed at protecting arbitral proceedings seated in London, even to the point of interfering with foreign courts' jurisdiction.

Turning to ISDS, the EU gained the competence to rule on this matter by virtue of the 2007 Lisbon Treaty. Therefore, starting from the entry into force of that Treaty on 1st December 2009, the EU started to adopt measures aimed at exercising control over the subject. At the legislative level, while discussions concerning the creation of a multilateral investment court are still in course, various regulations have been adopted with the aim of regulating the investment relationships of the Union and Member States with third countries and some treaties (e.g. the Comprehensive Economic Trade Agreement between EU and Canada) have been entered into. At the judicial level, the CJEU mainly considered the fate of investments made by investors of European Countries in States which were not part of the Union when the investment was made and only afterwards joined it. In this regard – in the well-known *Achmea* (2018), *Komstroy* (2021) and *PL Holdings* (2021) decisions – the Court affirmed that ISDS, both grounded on treaties and on investment contracts, runs against EU law and is therefore precluded because it may create a prejudice for the autonomy of EU legal order. However, arbitral tribunals deciding on the same matters still consider that, on the basis of the relevant rules of treaty law, intra-EU investor-State disputes are arbitrable and, for this reason, they proceeded to judge on the merit of disputes. Investors who successfully concluded disputes, for their part, started enforcement proceedings in third countries and, notwithstanding the opposition of the EU Commission, were often successful.

On the basis of the above, the Italian Review of International and Comparative Law (IRIC) welcomes submissions for n. 1/2023 of papers analysing the public international law, private law and comparative law of the issues related to the interaction between the EU legal order and international arbitration, including, *inter alia*:

- The influence of EU law on the concept of arbitrability.
- The exclusion of commercial arbitration from the Bruxelles I-*bis* Regulation.
- The legal consequences of Brexit on international arbitration in Europe.
- The circulation of judgments concerning international arbitration within the EU;
- The future evolution of ISDS in the EU.
- The regulation of international investments between the EU, its Member States and third countries.
- Treaty law issues concerning the validity and the effectiveness of intra-EU bilateral investment treaties (BITs) and the use of public international law by the CJEU.
- The fate of the 1994 Energy Charter Treaty.
- The application of EU law by international arbitrators.
- International investment law before EU Member States domestic courts.
- The enforcement of arbitral decisions concerning intra-EU BITs in EU and third countries.
- EU law as a form of public policy precluding the enforcement of arbitral decisions.
- The potential effects of the CJEU's decisions concerning international commercial arbitration or ISDS.

Papers containing also a reference to Italy, or the Italian practice will be particularly appreciated.

The selection of papers will be based on the submission of abstracts of max. 1.000 words to iricsubmissions@gmail.com by 1 April 2022. Selected authors will be informed by 30 April 2022.

Final papers will have to be submitted by 15 September 2022 and may have one of the following forms:

- Essays (including footnotes): max. 10.000–12.000 words.
- Comments: max. 5.000–8.000 words.
- Case notes: max. 5.000 words.
- Recent developments: max. 1.000–3.000 words each.
- Review essays: max. 3.000 words.

Submitted abstracts will have to mention the tentative title of the paper and its form (to be chosen among one of the forms mentioned above).