



TOWARDS A ONE-SPEED SYSTEM OF JUSTICE: ARBITRAL TRIBUNALS AND ARTICLE 267 TFEU

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ABSTRACT: In several cases the ECJ refused to give a preliminary ruling as requested by an arbitral tribunal, holding that arbitral tribunals could not be considered tribunals of a Member State pursuant to and in accordance with Article 267 TFEU. However, discriminating between courts, which may apply for a preliminary ruling, and arbitral tribunals which are precluded from doing so, gave origin to what research defined «a two-speed system of justice within the European Union». This article tries to highlight some aspects of this issue, hypothesizing some possible solutions to the emerged criticalities.

KEYWORDS: Preliminary ruling, ECJ, Cooperation between national courts and arbitral tribunals, European Union Law, Arbitration Act, Arbitration, David Anderson, Marie Demetriou, Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, John Fairhurst, Ketilbjørn Hertz.

RIASSUNTO: L'art. 267 del TFUE attribuisce alla Corte di Giustizia la competenza a pronunciarsi, in via pregiudiziale, sull'interpretazione dei trattati e sulla validità e l'interpretazione degli atti compiuti dalle istituzioni, dagli organi o dagli organismi dell'Unione Europea. La maggior parte dei più importanti principi di diritto dell'Unione Europea è stata affermata all'interno di pronunce pregiudiziali, e dunque si può affermare che questa procedura svolge un ruolo fondamentale nello sviluppo e nell'applicazione del diritto europeo. Tuttavia, in diversi casi la Corte di Giustizia si è rifiutata di emettere una pronuncia pregiudiziale richiestale da un tribunale arbitrale, ritenendo che i tribunali arbitrali non possano essere considerati tribunali di uno Stato membro i sensi dell'Art. 267 TFUE. Tale discriminazione tra corti (che possono richiedere alla Corte di Giustizia una pronuncia pregiudiziale) e tribunali arbitrali (che non possono farlo), ha indotto alcuni studiosi a qualificare il sistema di giustizia dell'Unione Europea come «un sistema a due velocità». Il presente articolo si propone di illustrare alcuni aspetti della tematica in esame, evincendone le criticità e ipotizzando alcune possibili soluzioni.

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Introduction

According to Article 267 TFEU the ECJ has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties, and preliminary rulings concerning the validity and interpretation of acts taken by the institutions, bodies, offices or agencies of the Union (Terkildsen & Nielsen, 2012).

In effect, almost all the major principles established by the ECJ were decided responding to a request for a preliminary ruling under Article 177 EEC, then Art. 234 EC, now Art. 267 TFEU. Since 1993, the ECJ has received more than 200 requests per year for a preliminary ruling (Fairhurst, 2010); the procedure accounts for over 50% of all cases heard by the Court, and plays therefore a central part in the development and enforcement of EU law (Steiner & Twigg-Flesner, 2006). Indeed, in its report to the 1996 IGC, the ECJ was firmly of the view that:

The preliminary ruling system is the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the Treaties retains its [Union] character with a view to guaranteeing that the law has the same effect in all circumstances in all of the Member States of the European Union (Report, 1995).

However, in several cases, the ECJ refused to give a preliminary ruling as requested by an arbitral tribunal, holding that the arbitral tribunal could not be considered a tribunal of a Member State as stated in Article 267 of the Treaty (Terkildsen & Nielsen, 2012).

Yet, it should be considered that, on one hand, besides stating that the court or tribunal must be located in a Member State, Article 267 does not define the characteristics which could grant the power of requesting the ECJ to render a preliminary ruling. On the other hand, it should be considered that an arbitral tribunal has essentially the same role as state courts.

In the opinion of the authors, the conservative approach taken by the ECJ, which under certain circumstances impedes arbitral tribunals to make a request for a preliminary ruling, may put at risk the uniform application of European law: in fact, courts and those tribunals which fall within the narrow definition of the ECJ's ruling may apply for a preliminary ruling, whilst other arbitral tribunals are precluded from doing so, even if they too make final and legally binding awards for the parties applying European law (Landi, 2007).

Research defined this paradox "a two-speed system of justice within the European Union" (Landi, 2007).

2. The wording of Article 267

Art. 267 TFEU, (ex Article 234 TEC, ex Article 177 EEC) provides that

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the

validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

3. Jurisdiction of the ECJ

Under Art. 267 TFEU a reference may be made to the ECJ with regard to the interpretation of: i) the Treaties (this wording refers to the TEU and TFEU), and ii) acts of the Institutions of the EU (this wording encompasses the binding and non-binding acts provided for in Art. 288 TFEU, as well as the treaties concluded on behalf of the EU by the Council with non-Member States².

The initiative of referring the question must emanate from a court or tribunal of a Member State, either of its own motion or acting on a request made by one of the parties in proceedings before it. National procedural law may not place impediments in the way of the right to seek a preliminary ruling (Landi, 2007)³.

A request for a preliminary ruling may be brought to the ECJ for all sorts of proceedings (such as civil law, commercial law, social law, tax law, constitutional law and administrative law) (Isaac & Blanquet, 2006).

National courts have the widest discretion in referring matters to the ECJ if they consider that a case pending before them and necessitating a decision on their part, raises questions involving interpretation of the EU law, or concerns about provisions of national law in the light of EU law, (Landi, 2007)⁴.

A court or tribunal against whose decisions there is no judicial remedy under national law – such as the *Corte di Cassazione* in Italy⁵ or the High Court of Justice (England and Wales)⁶ – is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the ECJ unless it has established: (a) that the question raised is irrelevant; (b) that the Community provision in question has already been interpreted by the ECJ; or

² Case 181/73, *Haegemann v. Belgian State*, and Arts.218 and 352 TFEU (ex Articles 300 and 308 EC, respectively).

³ A national court or tribunal is not empowered to bring a matter before the ECJ by way of a reference for a preliminary ruling unless a dispute is pending before it in the context of which it is called upon to give a decision capable of taking into account the preliminary ruling. Conversely, the ECJ has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the court making it has already been terminated (see Case 338/85, *Fratelli Pardini SpA v Ministero del Commercio con l'Estero and Banca Toscana (Lucca branch)* [1988] ECR 2041, at para. 11.

⁴ Case C-261/95, *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-4025, at para. 20.

⁵ Case 283/81, *Srl CILFIT e Lanificio di Gavardo SpA v Ministero della sanità* [1982] ECR 3415.

⁶ Case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECR I-403.

(c) that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt⁷.

The interpretation the ECJ gives to a rule of EU law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted must be applied by all the courts in the Member States, even to legal relationships arising and established before the judgment, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied⁸.

Research underlined that the preliminary ruling presupposes direct effect, that is the possibility for a party to appeal to Union rules in national courts and the duty for the national judge to uphold any rights ensuing from those rules (Mathijssen, 2010); some scholars highlighted that in *Mazzala*⁹ the ECJ itself held that even an act which is not directly effective may be subject to interpretation (Steiner & Twigg-Flesner, 2006).

The ECJ is limited to giving preliminary rulings on matters of interpretation and validity: this necessarily precludes its jurisdiction in relation to: (i) matters of national law; (ii) the *application*, as opposed to interpretation, of EU law; (iii) and in deciding when a national court should make a reference¹⁰.

4. Purposes or Functions of Preliminary Rulings

Therefore, a preliminary ruling serves at least two functions: (i) legal integration; and (ii) enhancement of individuals' interests. As regards (i), legal integration is achieved via the preservation of the EU law, its uniform interpretation and application – by means of general principles, direct effect or supremacy – of EU law throughout the Member States¹¹. As regards (ii), individuals who have no other remedy, or have recourse only to inadequate remedies, may seek redress against a Member State, or against EU institutions, for violating their rights granted by the EU.

The duty of the ECJ under Art. 267 TFEU is to supply all courts in the EU with the information on the interpretation of EU law which is necessary to enable them to settle the disputes which are brought before them¹².

⁷ Case C-495/03, *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] ECR I-8151, at para. 33.

⁸ Case 61/79, *Amministrazione delle finanze dello Stato v Denkavit italiana Srl* [1980] ECR 1205, at para. 16. In Case 69/85, *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany* [1986] ECR 947, at para. 13, the ECJ stated that 'a judgment in which the court gives a preliminary ruling on the interpretation or validity of an act of a community institution conclusively determines a question or questions of community law and is binding on the national court for the purposes of the decision to be given by it in the main proceedings'.

⁹ Case C-111/75, *Mazzalai*.

¹⁰ This was confirmed in *Case 338/85, Pardini*, where it was declared that 'it is for the national court to decide *at what stage* of the procedure it is necessary for it to refer a question to the court of justice for a preliminary ruling'.

¹¹ In *Case 166/73, Reinmüller-Düsseldorf* it was stated that: (Tovey): "Article 177EEC *now Art. 267 TFEU is essential for the preservation of the Community [now Union] character of the law established by the Treaty [now Treaties] and has the object of ensuring that in all circumstances the law is the same in all the States of the Community *Union".

¹² Case C-338/91, *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel* [1993] ECR I-5475, at para. 25 and *Case C-369/89, Piageme and others v BVBA*

6. Refusal to Give a Preliminary Ruling

In some cases the ECJ may refuse to give a preliminary ruling. This occurs:

a) if the proceedings before the national court was terminated prior to the ruling being delivered¹³;

b) if the ECJ considers that the reference has been made from proceedings in which there is no 'genuine' dispute¹⁴. Vice-versa, if 'there is nothing in the file on the case which provides grounds for doubting that the dispute is genuine ... there is no reason for concluding that the Court has no jurisdiction', also in case of criminal proceedings¹⁵;

c) if the questions are of a hypothetical nature¹⁶ or if the proceeding from which the reference was made is not intended to lead to a decision of a judicial nature¹⁷;

d) if the reference was made by a body not recognized as a court or tribunal within the scope of Art.267¹⁸. The latter case gave rise to some criticism by scholars, who highlighted that a refusal based on this point could give rise to disparities between citizens of the EU, failing to ensure that EU law is equally effective all over the EU. This point will be focused on in the next paragraphs.

7. A 'national court or tribunal of a member state' pursuant to article 267 TFEU

Whereas the EU does not define the term 'national court or tribunal of a Member State'; the ECJ on its part has set out a number of criteria for guidance, which take account of specific factors, such as: i) whether the body is established by law, ii) whether it is permanent, iii) whether it applies rules of law, iv) whether its jurisdiction is compulsory, v) whether its procedure is *inter partes*, and vi) whether it is independent¹⁹.

However, some scholars claim that the case-law on this concept appears to be flexible and inconsistent, giving rise to a lack of legal certainty²⁰.

Peeters [1991] ECR I-2971, at para. 7. It is settled case law that the fact that a measure of Community law has no binding effect does not preclude the ECJ from ruling on its interpretation in proceedings for a preliminary ruling. See Case C-188/91, *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg* [1993] ECR I-363, at para. 18.

¹³ Case 338/85, *Pardini*.

¹⁴ Case 104/79, *Foglia v Novello*.

¹⁵ Case 261/81, *Walter Rau v. de Smedt*.

¹⁶ Cases C-244/80 *Foglia v. Novello*., C-83/91, *Meilicke*; and joined cases C-320 – C-322/90, *Telemarsicabruzzo*; Case C-157/92, *Banchero*; and Case C-386/92, *Monin Automobiles*. However, in Case C-111/94, *Job Centre Coop. ARL* [1995] ECR I-3361, the ECJ declared that a body hearing an appeal brought against a decision adopted in non-contentious proceedings exercises a judicial function.

¹⁷ Case C-134/97, *Victoria Film* [1998] ECR I-7023, at para. 14; and *Österreichischer Gewerkschaftsbund*, *supra* fn 15, at para. 25.

¹⁸ Case C-138/80, *Borker*. Case C-246/80, *Broekmeulen*.

¹⁹ Case 61/65, *Vassen-Göbbels* [1966] ECR 377; Case C-54/96, *Dorsch Consult* [1997] ECR I-4961, at para. 23; joined Cases C-110/98 to C-147/98, *Gabalfrisa and Others* [2000] ECR I-1577, at para. 33; Case C-195/98, *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, at para. 24; and Case C-516/99, *Schmid* [2002] ECR I-4573, at para. 34.

²⁰ Opinion of Advocate General Colomer delivered on 28 June 2001, in Case C-17/00, *François De Coster v Collège des bourgmestre et échevin de Watermael-Boitsfort* [2001] ECR I-9445, at para. 14. The Advocate General pointed out that: 'The case-law is casuistic, very elastic and not

The jurisprudence has remained unchanged in respect of the first three requirements; on the contrary, some experts claimed, the three latter ones have been interpreted in a 'hesitant and, on occasions, confused' way²¹. For instance, as regards the criterion of independence, the ECJ stated in *Corbiau* that the body seeking the preliminary ruling should act as a third party in relation to the authority which adopts the decision forming the subject-matter of the proceeding²²; vice-versa, in *Dorsch*, the ECJ seemed to overlooked the requirement that the body taking the decision should not be linked to the parties, focusing on the point that its objective should be to carry out its task independently and under its own responsibility²³.

As pointed out by the Advocate General Colomer²⁴, the gradual relaxation observed in the ECJ's case law in relation to the requirement of independence, culminates in the judgment in *Gabalfrisa*. In this case, in spite of the contrary views expressed by the Advocate General Saggio²⁵, the ECJ granted the status of 'courts or tribunals of a Member State' to the *Tribunales Económico-Administrativos* (Spanish Economic-Administrative Courts) which are not part of the judiciary, and are even organically linked to the Ministry of Economic Affairs and Finance²⁶.

Moreover, the scope of the requirement that proceedings should be *inter partes* has been narrowed by the ECJ, such that the ECJ does not make the adversarial nature of the proceedings a precondition for a reference for a preliminary ruling to be admissible²⁷.

8. *Arbitral Tribunals in the Jurisprudence of the ECJ*

Under the ECJ's case law, an arbitral tribunal is not, in principle, a 'court or tribunal of a Member State' within the meaning of Art. 267 TFEU (Lenaerts, Arts & Maselis, 2006; Anderson & Demetriou, 2002).

very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted'.

²¹ Opinion of the Advocate General Colomer delivered on 28 June 2001, *supra* fn 14, at para. 18.

²² Case C-24/92, *Pierre Corbiau v Administration des Contributions* [1993] ECR I-1277, at para. 15.

²³ Case C-54/96, *supra* fn 15. See also Case C-103/97, *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz* [1999] ECR I-551, at paras. 19 ff., in which the ECJ held that the independence of the members of the *Tiroler Landesvergabeamt* (Public Procurement Office of the Land of Tyrol) – established by the Law of the Land of Tyrol on the Award of Contracts to review procedures for the award of public contracts – was guaranteed by the application of the General Law on Administrative Procedure, which contained very specific provisions on the circumstances in which members of the body in question must withdraw, failure to comply with that obligation constituting a procedural defect which may be challenged by the parties concerned. In addition, the giving of instructions to its members in the performance of their duties was prohibited.

²⁴ Opinion of the Advocate General Colomer delivered on 28 June 2001, *supra* fn 14, at para. 26.

²⁵ Opinion of the Advocate General Saggio delivered on 7 October 1999, in joined Cases C-110/98 to C-147/98, *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT)* [2000] ECR I-1577.

²⁶ Joined Cases C-110/98 to C-147/98, *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT)* [2000] ECR I-1577, at paras. 15 ff.

²⁷ Case 110-76, *Pretore di Cento*, [1977] ECR 851; and Case 162-73, *Birra Dreher SpA v l'Administration italienne des finances* [1974] ECR 201.

In *Nordsee*²⁸ the leading case in this field, the ECJ recognized that there were 'certain similarities' between the activities of the arbitral tribunal in question and those of an ordinary court or tribunal inasmuch as the arbitration was provided for within the framework of the law, that the arbitrator must decide according to law and that his award had, as between the parties, the force of *res judicata*, and may be enforceable if leave to issue execution was obtained.

However, the ECJ stated, (a) the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration; indeed, the arbitral tribunal was established pursuant to a contract (*ad hoc* arbitration) between private individuals. As a consequence, the requirement of compulsory jurisdiction was not met; and (b) the German public authorities were not involved in the decision to opt for arbitration nor were they called upon to intervene automatically in the proceedings before the sole arbitrator.

The ECJ concluded that '*the link between the arbitration procedure and the organization of legal remedies*' through the courts in Germany was not sufficiently close to give the arbitrator the status of a court or tribunal of a Member State within the meaning of Art. 234 EC.

However, in order to guarantee in any case the uniform application of the Community law throughout the territory of all the Member States, the ECJ affirmed that:

If questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award.

Therefore, it can be argued that the courts can refer preliminary questions to the ECJ from an arbitral tribunal: i) if such a reference ensues as part of setting aside proceedings; ii) if it results as part of the courts assistance to the arbitral tribunal.

In *Danfoss*, the ECJ considered the Faglige Voldgiftsret (Danish Industrial Arbitration Board) as a court or tribunal of a Member State, on the assumption that:

(a) it regularly intervened at last instance granting final jurisdiction by law for disputes relating to collective agreements between employees' organizations and employers; and

(b) its jurisdiction did not depend upon the parties' agreement, as either party may bring a case before the Faglige Voldgiftsret irrespective of the objections of the other²⁹.

In addition, the ECJ pointed out that the composition of the Faglige Voldgiftsret was not entirely within the parties' discretion due to the fact that Danish law partially governed the procedure of appointment³⁰.

²⁸ Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH* [1982] ECR 1095.

²⁹ Case C-109/88, *Danfoss*.

³⁰ Case 109/88, *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199, at paras. 7 and 8. See the Opinion of Mr Advocate General Lenz delivered on 31 May 1989 in this case [1989] ECR 3199, at paras. 16 ff.

Other researchers criticized the ECJ's line of reasoning, claiming that for the board to have jurisdiction agreement is still required between the relevant parties, at least in the form of a collective bargaining agreement, for instance between employers and employees (Terkildsen & Nielsen, 2012).

In *Almelo* the ECJ adopted a consistent approach to the *Danfoss* decision, accepting to give a preliminary ruling in an appeal against an arbitration award. Interestingly, the ECJ accepted jurisdiction on the reference made by a national court, the *Gerechtshof te Arnhem* (Regional Court of Appeal of Arnhem), even though this court was obliged to rule *ex aequo et bono*³¹.

Similarly, in *Eco Swiss*, the ECJ held that, although «arbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law, however, it is manifestly in the interest of the Community legal order (...) to forestall differences of interpretation». For this reason, the ECJ stated that «questions concerning the interpretation (...) of the Treaty should be open to examination by national courts», which should be able to refer questions, «if necessary, to the Court of Justice for a preliminary ruling»³².

Research pointed out that this decision highlighted the importance of EU law in international arbitration and thus the very unsatisfactory situation where Arbitral Tribunals cannot refer questions directly to the ECJ (Terkildsen & Nielsen, 2012). Moreover, some scholars claimed, this judgment created an incentive for arbitral tribunals to raise such issues in order not to have an arbitral award annulled (Blackaby, Partasides, Redfern & Hunter, 2009).

In Case C-125/04 *Guy Denuit and Betty Cordenier v. Transorient-Mosaïque Voyages et Culture SA* the ECJ, a dispute between two travelers and a travel agency, the request for a preliminary ruling was submitted to the ECJ by the *Collège d'arbitrage de la Commission de Litiges Voyages* (Arbitration Panel of the Travel Dispute Committee), a non-profit-making association governed by Belgian law. The ECJ declared itself not competent to rule on these questions, claiming that the *Collège d'arbitrage* should not be regarded as a court or tribunal for the purposes of Art. 234 EC. The ECJ pointed out that:

(a) submission of the matter to the *Collège d'arbitrage* stemmed from an arbitration agreement entered into between the parties; and

(b) Belgian law did not lay down recourse to this arbitration board as the sole means of resolving a dispute between an individual and a travel agency.

As a consequence, the jurisdiction of the *Collège d'arbitrage* was not considered mandatory: in fact, in the absence of an arbitration agreement entered into between the parties, an individual may have applied to the ordinary courts for the resolution of the dispute³³.

In other cases the main issue has been whether or not the requesting tribunal/committee was sufficiently independent to fall within the meaning of "courts or tribunals". Among them were Case C-118/09, *Koller*, where the Oberste Berufungs- und Disziplinarkommissionen (Austria) jurisdiction was mandatory and thus satisfied the meaning of courts or tribunal; Case C-246/05, *Häupl*, where the Oberster Patent- und Markensat were also held to be a court

³¹ Case 393/92, *Municipality of Almelo v N.V. Energiebedrijf Ijsselmij* [1994] ECR I-1477, at paras. 20 ff.

³² Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, at para 40.

³³ *Denuit*, *supra* fn 1, at para. 16.

or tribunal; Case C-516/99, *Schmid*, where the Berufungssenat V der Finanzlandesdirektion für Wien was not considered a court or tribunal due to its lack of independence from the tax authorities as such; and Case C-54/96 *Dorsch*, where the Vergabeüberwachungsausschuss des Bundes (Germany) was considered to be sufficiently independent to qualify as a “court or tribunal”.

Furthermore, the judgment in Case C-196/09, *The European Schools Complaints Board*, stated that also a tribunal which has no connection to an individual Member State does not meet the requirements set in Art 267 TFEU, and is therefore unable to submit questions to the ECJ.

9. Advantages of cooperation v risks of divergences

Art. 267 states that the ECJ has to cooperate with the courts located in the European Union, supplying them with information on the interpretation of EU law: in fact, a court which has to settle a genuine dispute brought before it may request a preliminary ruling of the ECJ, in order to know whether a piece of primary or secondary national legislation, which is relevant to the case, can be considered consistent with EU law³⁴.

Already in 1961 Advocate General Lagrange pointed out that «*applied judiciously (...) the provisions of Article [267 TFEU] must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the [EU] with mutual regard for their respective jurisdictions*»³⁵.

The ECJ itself underlined the «direct and complementary contributions» which can be made in this way at the national and the supranational level³⁶ ensuring that in all circumstances the law, its interpretation³⁷ and application are the same in all Member States, strengthening the effectiveness «of the provisions of the Treaties and of the secondary European law»³⁸.

Also many scholars highlighted that the procedure of the preliminary ruling introduces an effective instrument for judicial cooperation between the national courts of the Member States and the ECJ (Landi, 2007; Terkildsen & Nielsen, 2012; Lew, Mistelis, & Kröll, 2003). Yet, some researchers claimed (Landi, 2007; Terkildsen & Nielsen, 2012), above all when the validity of an EU Act is in question, divergences between national courts of different Member States could jeopardize the unity of the European legal order, the fundamental requirement

³⁴ Case 104/79, *Pasquale Foglia v Mariella Novello* [1980] ECR 745, at para. 11. See Case C-338/91, *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel* [1993] ECR I-5475, at para. 25 and Case C-369/89, *Piageme and others v BVBA Peeters* [1991] ECR I-2971, at para. 7. It is settled case law that the fact that a measure of Community law has no binding effect does not preclude the ECJ from ruling on its interpretation in proceedings for a preliminary ruling (see Case C-188/91, *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg* [1993] ECR I-363, at para. 18).

³⁵ Case 13/61, *Bosch v de Geus*.

³⁶ Case 16/65, *Firma G. Schwarze v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877, at para. 3.

³⁷ In Case C-88/91, *Federazione Italiana dei Consorzi Agrari v Azienda di Stato per gli Interventi nel Mercato Agricolo* [1992] ECR I-4035, at para. 7, the ECJ stated that ‘it was manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it was to be applied’.

³⁸ Case 166/73, *Rheinmühlen-Düsseldorf v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, at para. 2.

of legal certainty (Landi, 2007; Terkildsen & Nielsen, 2012)³⁹, resulting somewhat unsatisfactory from the point of view of substantive justice.

In effect, since arbitral tribunals are requested to take EU law into consideration as a part of public policy, and, on one hand, arbitration is of growing importance in the legal life and the economies of the EU Member States, and on the other, the importance of EU law for contractual relationships between private parties has increased considerably with a growing number of regulations and directives affecting core issues of contract law (Lew, Mistelis, & Kröll, 2003), an immense quantity of arbitral awards which are binding on the parties⁴⁰ will be decided applying EU without any kind of control or help by the ECJ: this could lead to errors of law in the interpretation of a rule of EU law (Lew, Mistelis, & Kröll, 2003).

It could be objected, that, as stated in *Nordsee*, national courts may make a request for a preliminary ruling in the course of a review of an arbitration award. Yet clearly this chance does not prevent the risk of non-uniformity in the application of EU law, because the parties could choose to not challenge an award vitiated by an error of EU law before a national court, and indeed there is an immense number of awards never challenged by parties (Landi, 2007). Moreover, even if the award will be challenged, the relevant question will be submitted to the ECJ for a preliminary ruling at a much later stage, with a considerable waste (Lew, Mistelis, & Kröll, 2003) of time and resources

10. Possible solutions

A first possible solution of this problem could be that the ECJ reverses its case-law, allowing arbitral tribunals to refer a question to it for a preliminary ruling. Of course, research claimed, if this were to occur, the ECJ may face a substantial increase in the number of the requests and additional costs. However, reasons relying on procedural economy should never prevail over principles of substantive justice. On the other hand, for sure arbitrators would use the right provided for in Art. 267 EU sparingly and would be disinclined to refer general or hypothetical questions to the ECJ, as the duration of proceedings before the ECJ is apt to delay the arbitral decisions (Landi, 2007).

The second solution could be to interpret Article 267 EU and paragraphs 14 and 15 of the *Nordsee* decision in order to allow national courts, even in the absence of any specific provisions, to refer preliminary questions to the ECJ as an integrated part of the national courts assistance to arbitral tribunals

³⁹ In Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, at para. 17, the ECJ affirmed that where the validity of a Community Act is challenged before a national court the power to declare the act invalid must also be reserved to the ECJ. Elsewhere, the ECJ made clear that the possibility of a national court ruling on the invalidity of a Community Act is likewise incompatible with the necessary coherence of the system of judicial protection instituted by the EC Treaty. It is important to note in that regard that references for a preliminary ruling on validity constitute, on the same basis as actions for annulment, a means of reviewing the legality of Community Acts (see Case C-461/03, *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR 10513, at para. 22). See also Case 66/80 *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato* [1981] ECR 1191, at para. 11; and Case 246/80, *C. Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311, at para. 16.

⁴⁰ For example, Art. 824-bis of the Italian Code of Civil Procedure states that: ‘the award [...] is to produce the effects of the judgment given by the judicial authority’.

(Terkildsen & Nielsen, 2012). However, this does not necessarily mean that such a request will be accepted by the ECJ.

The third solution could be creation of an ad hoc chamber of the ECJ to which arbitrators may submit questions, in order to receive rapid and informal guidance on the correct interpretation of EU law (Landi, 2007).

The fourth solution could be to add a specific provision establishing a closer relationship between arbitral tribunals and the ordinary courts: this would make it more likely that the ECJ would accept such a request from a national court.

In effect, a similar situation occurred in Norway, which as is common knowledge, belongs to the EFTA. In order to give arbitral tribunals the authority to challenge the EFTA Court regarding the interpretation of the EEA Agreement, the Norwegian Arbitration Act includes under Article 30 (2) the following specific provision: *«When an arbitral tribunal is obliged to take a position on interpretation of the EEA agreement, including its protocols, exhibits and the legislative acts with which such exhibits are concerned, it may, unless otherwise agreed by the parties of its own accord or at the request of a party, request the courts to submit issues of interpretation to the EFTA Court pursuant to the provisions of section 51a of the Court of Justice Act. The courts may seek an advisory opinion from the EFTA Court as to the interpretation of the EEA Agreement»*⁴¹.

The Danish Arbitration Act was passed in 2005: taking the Norwegian Arbitration Act as an example, it states under Article 27 (2): *«If the arbitral tribunal considers that a decision on a question of European Union law is necessary to enable it to make an award, the arbitral tribunal may request the courts to request the Court of Justice of the European Communities to give a ruling thereon»* (Hertz, 2005).

The purpose of Article 27 (2) is therefore to allow an arbitral tribunal to present questions of European law to the ECJ, to the same extent as a national court. The procedure envisages a court's decision on whether (and in case with which wording) to forward the questions to the ECJ, and an ECJ's decision on whether accept to give a preliminary ruling on the proposed questions. Research highlighted that the procedure whereby the questions are worded by the court could counter the often heard argument that arbitral tribunals might not have sufficient experience in drafting preliminary questions to the ECJ (Terkildsen & Nielsen, 2012).

However, some researchers underline that, since this procedure is quite complex, the request for a preliminary reference could be misused in order to bring arbitration proceedings to a halt and delay the rendering of an award (Lew, Mistelis, & Kröll, 2003). Other scholars, on the contrary, maintain that arbitrators would use the right to request a preliminary reference sparingly, and emphasize that reasons relying on procedural economy should never prevail over principles of substantive justice, especially when the proper functioning of the EU market is at stake (Landi, 2007).

⁴¹ Norwegian Arbitration Act, <http://folk.uio.no/olavt/Forarbeider/NOU/2001-33/hov022-bu.html> (accessed on 25 October 2015).

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