the SPANISH YEARBOOK of INTERNATIONAL LAW

The Review of International Arbitral Awards for Breach of Human Rights and the EU Law, and the Spanish Practice regarding Review of Internal Arbitral Awards

Carlos J. MOREIRO GONZÁLEZ*

Abstract: The review of international arbitral awards by the internal jurisdictional bodies of the EU Member States can engender State liability. According to the case law of the ECtHR, national jurisdictions are required to exhaustively control the respect of certain rights of the ECHR in the adoption of the controversial arbitral award. The Spanish Practice regarding the control of internal arbitration awards is in line with international standards for the protection of human rights.

Keywords: EU Law- International Awards- State Liability-national jurisdiction- Human Rights- judicial review

(A)INTRODUCTION

This article analyzes the review of the legality of awards by the national jurisdictions of the Member States on grounds of a serious breach of public order of the European Union ('EU'), of which human rights are a part. The review of the legality of the awards can entail various legal consequences for the interested parties, especially in regard to the right of compensation for State liability attributable to the national jurisdiction of the case. Although there is still no case-law in Spain on this subject, it is possible to analyze a relevant case law on the review of the legality of the internal awards which has established criteria to be applied for future cases on the review of international awards.

In addition to this Introduction and the Final Remarks, the article is structured in four parts. The first part describes the state of relations between international commercial arbitration and EU Law, which is mainly grounded in the case law of the Court of Justice of the EU ('CJEU'). The second part analyzes the standards applied by the jurisdictions of the Member States of the EU to carry out the aforementioned review of the legality of the international awards. This analysis shows the existence of various criteria for the implementation of the standards of protection of public order. The third part identifies the

* Professor of International Law, J. Monnet "ad personam" Professor of EU Law. University Carlos III (Madrid). School of Law and Social Sciences.

 DOI: 10.17103/sybil.22.3

requirements established by the EU Law for liability of a jurisdictional body of a Member State, deriving from serious breach of EU Law. On the basis of this analysis, it is possible to foresee the existence of cases in which the liability of the national judge could be engendered by not carrying out an adequate review of the legality of an international award. In this context, the exhaustive review of an award for violation of public order derived from serious breach to human rights gets special relevance.

Finally, the fourth part offers an up-to-date perspective of Spanish case law regarding the review of the legality of internal awards for violation of public order. Given that it is a consolidated and well-founded case-law, it is presumable that it will be applicable to future cases regarding the review by Spanish judges of international awards.

(A) THE CONTROVERSIAL RELATIONS BETWEEN INTERNATIONAL ARBITRATION AND EU LAW

Arbitration was the subject of a specific provision in the Treaty establishing the European Economic Community ('TEEC'), Article 220 of which states, *inter alia*, that "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals [...] the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." Although this was a Community objective, its achievement and implementation were left to the Member States, not to Community Institutions. The resulting set of norms was not to be expressed in a treaty between the Community States, but in a *sui generis* instrument, which is a type of agreement concluded between Member States to achieve Community objectives and which are no longer covered by the existing Treaty regime.[1] As we know, no such international agreement for a framework on arbitration awards has ever been proposed or concluded.

Sixty years after the entry into force of the TEEC, arbitration was explicitly mentioned in another supranational regulatory provision, Recital 12 of European Parliament and Council Regulation 1215/2012, "Brussels Regulation I bis," on jurisdiction and the recognition and

[1] In fact, Member States did not have full autonomy to conclude such agreements, since they were obliged to negotiate them if the Commission deemed it necessary. These were, however, subsidiary objectives that also did not entail a reservation of sovereignty in favor of the Member States, since they could also be achieved by means of Community action on the basis of other Treaty provisions; see Huet, A., 'Commentaire. Article 220' [Commentary on Article 220] in Constantinesco, V., Jacqué J.P., Kovar, R. and Simon, D. (dir.): *Traité instituant la CEE. Commentaire article par article* [Treaty Establishing the EEC: Article-by-Article Commentary], Economica, 1992, 1377. The Treaty of Maastricht reproduced the content of Article 220 of the EEC Treaty in Article 293 of the EC Treaty, and this provision was ultimately repealed with the celebration of the Treaty of Lisbon on 13 December 2007.

enforcement of judgments in civil and commercial matters,[2] to exclude it from the scope thereof, though paradoxically that recital also refers to various aspects of the relationship with EU Law that were the subject of CJEU judgments, such as the recognition and enforcement of the awards, or the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or several aspects of such procedure.[3]

The keys to these complex relationships are established in a controversial jurisprudence of the CJEU, which to date has dealt with aspects as diverse as the nature of the arbitral institutions rendering the disputed awards, their rules of constitution and functioning and jurisdictional autonomy, the incidence of arbitral decisions on the dockets among courts of the Member States, and the framework for the review, recognition, and enforcement of awards.

Concerning to arbitral tribunals and the power of referring questions for preliminary ruling to the CJEU, this jurisdiction has set out a distinction in the light of Article 267 of the Treaty on the Functioning of The European Union ('TFEU'), according to which arbitral tribunals are strictly defined as those constituted by a voluntary act of the parties, as expressed in a clause or agreement that attributes dispute resolution jurisdiction to a private body.[4] Generally speaking, these arbitral bodies settle civil and commercial disputes (commercial arbitration) and, although there is a practice by which arbitrators with the consent of the parties, or the parties themselves, may request the cooperation of the European Commission to clarify matters relating to the EU law applicable to the dispute, as well as to access data or information that may be relevant to the resolution thereof,[5] CJEU case law has repeatedly denied them the possibility of referring questions for preliminary ruling since they are not courts of the Member

---

[2] Regulation of the European Parliament and of the Council of 12 December 2012, OJ 2012 L 351/1.

[3] Id. p. 2. The four paragraphs of Recital 12 provide for the full autonomy of the courts of Member States to determine the relevance of an arbitration agreement concluded by the parties on a case-by-case basis. In ruling on such questions, the national court must act in accordance with the rules of the jurisdiction, in any event foregoing the application of Regulation 1215/2012, and, without prejudice to its jurisdiction to rule on the recognition and enforcement of arbitration awards under the 1958 New York Convention, which takes precedence over the regulation.

The existence of this and other multilateral international conventions regulating arbitration was the precise reason for the failure to conclude the Convention foreseen in Article 220 of the TEEC and for the exclusion of arbitration from the scope of the Brussels Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention); see the report on the Brussels Convention by P. Jenard, OJ 1979, C59/1, 13.

[4] See the opinion of Advocate General Szpunar in the Ascendi case, C-377/13 [2014], EU:C:2014:246, points 19, 21, and 24. See also M. Szpunar, 'Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU', in F. Ferrari (ed.): *The impact of EU Law on International Commercial Arbitration*, (Juris,New York, 2017), 85, at 123-124.

[5] See, L. Idot, 'Arbitration and Competition' in OECD, DAF/COMP (2010) 40, 13 Dec. 2011, 51, 67-69; also, A. Komminos, 'Assistance by the European Commission and Member States Authorities in Arbitrations', in G. Blanke and P. Landolt (eds.): *EU and US Antitrust Arbitration: A Handbook for Practitioners*, (Kluwer Law International, Alphen aan den Rijn, 2011), 727 at paras. 21-042-048.

States.[6] This case law of the CJEU has been criticized by some scholars on the ground that it could damage the uniform interpretation and application of EU Law.[7] On the contrary, it is settled case law of the Court to recognize this power in respect of arbitral tribunals governed by public law.[8]

However, the CJEU has not recognized this power in respect of arbitral tribunals on international investment on Case C-284/16,[9] although their public nature and other operational features were recognized on the Opinion delivered to this case by Advocate General Wathelet.[10]

Regarding to the rules on the constitution and functioning of arbitral tribunals and their jurisdictional autonomy, the Rich case, which dealt with the appointment of an arbitrator by an English court even when the validity of the arbitration agreement was challenged, established the existing case law, according to which it is for the *lex fori* to rule on these questions.[11]

---

[6] See, e.g., the Nordsee case, 102/81 [1982], EU:C:1982:107, [10-13]; the Eco Swiss case, C-126/97 [1999], EU:C:1999:269, [34]; the Denuit et Cordenier case, C-125/04 [2005], EU:C:2005:69, [13]; and the Gazprom case, C-536/13 [2015], UE:C:2015:316, [36]. The CJEU emphasizes that it does not suffice if an arbitral tribunal renders decisions pursuant to the law, if its award has the authority of *res judicata* between the parties, or that it may constitute an enforceable instrument if it is granted an exequatur. For them to be deemed courts of a Member State, it is also necessary that their jurisdiction be mandatory for the parties, that their jurisdictional authority emanate directly from a public act and not from an act of the parties' free will, and that there be a sufficiently proximate link between the legal order of the Member State and the arbitration proceeding.

[7] See N. Landi, 'Arbitral Tribunals and Article 234 of the EC Treaty: A Two Speed Ssystem of Justice Within the European Union?' 11, (2007), Vindobona Journal of International Commercial Law and Arbitration, 173-186 at 185; See also, D. Terkildsen and S.L. Nelsen, 'Arbitral Tribunals and Article 267 of the Treaty on the Functioning of the European Union: The Danish By-Pass Rule', in Ch. Klausenegger, P. Klein, F. Kremslehner, A. Petsche, N. Pitkowitz, J. Power, I. Weiser, G. Zeiler (eds.), *Austrian Yearbook on International Arbitration* 2012, Beck, München, Wien, 201, 202, 195,203-205 etc.

[8] See, e.g., the Vaassen Göbbels case, 61/65 [1966], EU:C:1966:39 [1.A]; the Handels-og KfiD case, 109/88 [1989], EU:C:1989:383, [7-9]; the CJEU's Order in Merck Canada, C-555/13 [2014], EU:C:2014:92, [15-25]; and the Ascendi case, above n. 4 at [24-34]. See also a recent judgment of the CJEU in the case Santogal, C-26/16 [2017], EU:C:2017:453, regarding to a preliminary ruling from the Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal.

[9] Preliminary ruling referred by Bundesgerichtshof (Germany) in the case of Achmea BV, C-284/16, [2018], EU:C:2018:158, at [45-49]. Specially at [48] where the Court states <inter alia> that ... 'the arbitral tribunal at issue in the main proceedings is not as such a court common to a number of Member States (...)'. Thus, the arbitral award is not subject to review by a court of a Member State which ensures compatibility with EU Law. Among the contributions that have analyzed this CJEU Judgment see, C. Fouchar and M. Krestin, 'The Judgment of the CJEU in Slovak Republic v. Achmea. A loud clap of Thunder on the Intra-EU BIT Sky', Kluwer Arbitration Blog, 2018, March 7; S. G. Szilágyi, 'It is not just about Investor-State Arbitration.. A look at case C-284/16, Achmea Bv' 3(1), European Papers (2018), 357-373; H. Schepel, 'From conflict-rules to Field Preemption. Achmea and the Relationship between EU Law and International Investment Law and Arbitration', European Law Blog, 2018, March23.

[10] According to the Opinion of Advocate General Wathelet on case C-284/16 delivered on 19 September 2017, EU:C:2017:699 it should be recognized this power to Arbitral Tribunals, see Points 85-131. Advocate General Wathelet issues an explicit finding also in that regard in his Opinion in the Genentech case, C-567/14 [2016], EU:C:2016:177, at. n. 34 and 39.

[11] The Marc Rich case, C-190/89, [1991], EU:C:1991:319, [19]. Among the scholars that have analyzed this

On the more controversial issue of the incidence of arbitral decisions on the dockets among courts of the Member States, the CJEU has until now only addressed the question of the adoption of anti-suit injunctions by an arbitral tribunal in the Gazprom case.[12] Although the CJEU maintains that such measures do not affect the system of mutual recognition established in EU Law to determine the court's jurisdiction in the case[13] – reiterating what it had established for cases in which a court adopts them in its West Tankers case law,[14] Advocate General Wathelet in his Opinion delivered in the above mentioned Gazprom case defended the compatibility of the recognition and enforcement of such arbitration measures with EU Law.[15]

Gazprom nevertheless creates a situation of legal uncertainty given that even though it deprives anti-suit injunctions by arbitral tribunals of supranational enforceability[16], a court of a Member State may be bound by that measure under international law in view of the obligations arising for the Parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[17] since the CJEU expressly acknowledges this possibility.[18]

CJEU Judgment there is a broad consensus as to the correctness of the approach adopted on the relationship between arbitration and EU law; see, e.g., N. Dowers and Z.S. Tang, 'Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal', 3(1) *GIIL*: International Arbitration and Procedure, (2015), 125-146, at 128 and the Bibliography quoted at n. 15.

[12] Above n. 6.

[13] Ibid. at [35-39].

[14] The Allianz and Generalli AG/West Tankers case, C-185/07 [2009], EU:C:2009:69, [29-31].

[15] EU:C:2014:2414, Points 155 and 187-189.

[16] See A. Layton, Arbitration and Anti-suit Injunctions under EU Law', in F. Ferrari (ed.): *The Impact of EU Law on International Commercial Arbitration*, above n. 4, Chapter 3, 63, at 80-84.

[17] Adopted 10 June 1958, entered into force 7 June 1959, 330 UNTS 4739, 3. See also GA Res. 62/65, 6 December 2007. However, the New York Convention does not address the question of enforcement of provisional measures adopted by an arbitral tribunal, nor may one deduce a clear formula for enforcement under the provisions of Article 26 of the UNCITRAL Arbitration Rules (as revised in 2010), GA Res 65/22 (6 December 2010), available at www.uncitral.org. It is a question of determining whether such measures must be enforced as if there were an award or merely an incident of the arbitral proceedings on the merits, and in any event one must consider whether they would be subject to a possible subsequent review or annulment by the responsible arbitral tribunal (Article 26 (5) of the UNCITRAL Arbitration Rules) and that they may be subject to a prior review of compliance with the public order by the court of the Member State in which enforcement is sought; see P. Ewerlöf, 'Interim measures v. the New York Convention – Has the time come to refresh the application of the New York Convention?' 16(4), YAR-Young Arbitration Review, (2015), 9.

[18] The Gazprom case, above n. 6 at [38-39, 41-42]; in this regard, see the analysis of J. Hughes-Jennet and S. Baddeley: "EU: Arbitration anti-suit injunctions do not conflict with Brussels Regulation", Global Arbitration Review, (12.6.2015). Some scholars have underlined the importance of setting forth criteria of legal certainty in situations such as those arising in the West Tankers or Gazprom cases; e.g., G. Kaufmann-Kohler, 'How to Handle Parallel Proceedings: A Practical Approach to Issues Such As Competence-Competence and Anti-Suit Injunctions,' 2(1), Dispute Resolution International, (2008), 110-113. In a *lis pendens* context, however, these measures are shown to be effective for avoiding unjustified procedural damages; see, e.g., O. Vishnewskaya, 'Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?' (2015), *JIA*, (2015), 173-214, at 209.

Last, but not least, the courts of the Member States may legally review an arbitration award and decide, as appropriate, on its validity or invalidity in accordance with EU law. However, the exercise of that authority is based on two different sources that pursue different objectives, one of a supranational nature and another of an international nature. In practice this may lead to contradictory legal situations[19].

On the one hand, CJEU case law has established that, as national judges of EU law, such courts are empowered to facilitate the resolution of proceedings of arbitral tribunals constituted under arbitration agreements based on the free consent of the parties, and to clarify inquiries as to the applicable law, as well as to review the arbitration award if it were subject to appeal or opposition, or another national procedure, including an appeal concerning exequatur. In any of these situations, the national court may also refer questions to the CJEU for preliminary ruling to ensure that EU Law is fully respected.[20]

In sum, the aforementioned power of cooperation with the arbitral tribunals and the review of awards, in addition to safeguarding the principles of primacy and uniformity in the application of EU Law, also contributes to guaranteeing the fundamental right to effective judicial protection,[21] and prevents the creation of situations in which awards contrary to EU Law become binding.[22]

On the other hand, international agreements on arbitration binding on the Member States set forth specific provisions in this respect, empowering the national courts to examine the existence and effects of an arbitration clause. Accordingly, international law allows the national court to act with significant autonomy[23] since the court with jurisdiction may refuse to recognize and enforce the award at issue upon carrying out a review of its validity in accordance

---

[19] See N. Basener: *Investment Protection in the European Union*, Nomos-Dike, Baden-Baden/Zürich, 2017, at 465.

[20] See the Nord see case, above n. 6 at [14-15]. This statement is highly relevant given that within their scope of ordinary jurisdictional authority national courts must always ensure that EU Law is respected throughout the territory of the Member States. This duty is essential when dealing with the review of arbitration awards for a number of reasons: first, the arbitrators who are tribunals are not bound by this same duty as they are not part of the public institutions; second, arbitral tribunals are not entitled to refer questions to the CJEU for a preliminary ruling; and third, because domestic legislation usually limits the grounds for annulling an arbitral award to very serious cases of breach of public order, which would not allow the court with jurisdiction to carry out a comprehensive review of the application of EU Law. In this regard, see the Broekmeulen case, 246/80 (1981), EU:C:1981:218, [16-17].

[21] Article 47 of the EU Charter of Fundamental Rights,2007, OJ C 303/1, and 2010 C 83/1.

[22] See the Opinion of Advocate General Reischl in the Nordsee case, EU:C:1982:31, Point 3.b), Point 3.b, iii) and Point 3.bb, ii). The safeguarding of the right of judicial protection ensures that claimants that question the validity of an arbitration agreement have access to national courts. Courts that hear the case will make a ruling, on the basis of the applicable national procedural law and international law, if they must recognize and enforce the award; See the Gazprom case, above n.6 at [38].

[23] See, the Marc Rich case, above at [18]. Also, for example, the CJEU expressly referred to the obligation deriving from article II (3) of the New York Convention in the West Tankers case, above n. 14 at [33].

with its national law, which would not require it to refer the question for a preliminary ruling to the CJEU.[24]

(B) RULES FOR CONDUCTING A REVIEW OF INTERNATIONAL ARBITRATION AWARDS IN THE JURISDICTIONAL SYSTEM OF THE EU

As above stated, since there is no established regulatory standard, the national courts' review of the compliance of arbitration awards is conducted according to a different standard in view of the public order of the EU precisely as defined by the CJEU.[25]

This entails, on the one hand, the notion of public order in the EU's Legal System,[26] which includes the provisions and principles that constitute its legal foundation.[27] Only in limited cases has the CJEU classified a provision or principle of EU Law as a matter of public policy. For example, human rights,[28] and those Treaty provisions and deriving laws governing the EU's essential objectives, such as the functioning of the internal market,[29] or the area of freedom, security and justice.[30]

---

[24] This possibility is based on letter a) of article V (2) of the New York Convention, on which Advocate General Wathelet relied in his opinion on the Gazprom case, EU:C:2014:2414, points 142-143. The simultaneous existence of multiple sources of law on the basis of which the national court may decide a case is likely to create situations of legal uncertainty, even if only in exceptional cases. For example, divergent decisions may be taken between, on the one hand, the arbitral tribunal or the courts of the State of its seat, and on the other, the courts of another Member State with jurisdiction on the basis of the subject matter according to Regulation 1215/2012.See S. Hindeland, 'Repellent Forces: The CJEU and Investor-State Dispute Settlement', 53 Archiv des Völkerrechts (2015) 68-69. See, M. Illmer, 'The Arbitration Interface with the Brussels I Recast: Past, Present and Future', in F. Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration*, above n. 4, 31, at 60-62. In order to minimize or avoid harm arising from this situation, Advocate General Kokott in her Opinion on the West Tankers case proposed to the CJEU that arbitration be included in the regulatory system of Council Regulation 44/2001, of 22 December 2000, OJ 2001 L 12/1, the scope of application of which currently corresponds to Regulation 1215/2012. But the Court did not accept this proposal in its Judgment, EU:C:2008:466, Point 73. On the other hand, Advocate General Léger in his Opinion on the Van Uden case, points out that *Rich* accepts the possibility that an arbitration award and a Member State court decision may be incompatible and refers to existing formulas for resolving that dilemma, EU:C:1997:288, Point 47.

[25] See C. Liebscher, 'European Public Policy. A Black Box?' Journal of International Arbitration 17 (3), *JIA* (2000), 73-88 at 80-81.

[26] See, G. Karydis, 'L'ordre public dans l'ordre juridique Communautaire: un concept à contenu variable' [Public Order in the Community's Legal Order: A Concept with Variable Content], 38 (1), RTDE, (2002), 1- 26, at 12-14.

[27] See the Kadi case, C-415/05P (2008), EU:C:2008:461 at [304].

[28] See, *inter alia*, the Trade Agency case, C-619/10 (2012), EU:C:2012:531 at [52]; also, the Krombach case, C-7/98 (2000), EU:C:2000:164 at [38-39].

[29] The text of article 101 TFEU as of the Eco Swiss case, C-126/97 (1999), EU:C:1999:269 at [36].

[30] The principle of mutual recognition of the decisions of the courts of another Member State by the court responsible for recognizing or enforcing them; see, among others, the Openbaar Ministerie/A. case, C-463/15 PPU (2015), EU:C:2015:364 at [23-31]; and the P/Q case, C-455/15 PPU (2015), EU:C:2015:763 at [53].

However, the CJEU in the Kadi judgment has established controversial criteria according to which does not allow any derogation from the principles enshrined in Article 6 (1) of the Treaty of the European Union (TEU), even if they could arise from the obligation to implement measures deriving from the resolutions of the Security Council[31]. Thus, although the national judge that controls the legality of an international arbitral award is obliged in any circumstance to avoid the violation of a human right, has a margin of discretion to determine the seriousness of the violation.

Moreover, according to Advocate General Poiares Maduro, only some fundamental rights that holds a prominent place in the firmament of the EU Legal System, would be likely to be protected, and just in case of a serious breach to their very essence[32].

The CJEU has established in this line a case law which hold that human rights do not constitute unfettered prerogatives and may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a manifest and disproportionate breach of the rights thus guaranteed[33].

When the courts of the Member States exercise authority to review the validity of an arbitration award in the light of the public order of EU, they are bound to ensure the principle of the effectiveness and the useful effect of the relevant provisions.[34]

It must be underlined that CJEU doctrine sets forth the general obligation of the national court to review disputed international arbitration awards for compliance with the public order of the EU, but subject to the existence of national procedural rules (principle of equivalence),[35] and also, in certain circumstances, to that court's having the necessary facts and law to do so.[36]

According to the Bosphorus Decision by the ECtHR[37] , there is a Presumption on the level

---

31 See the Kadi case, abobe n 27, [303-305].

32 See the Opinion of Advocate General Poiares Maduro delivered on 16 January 2008 on case C-402/05P, Kadi, EU:C:2008:11, Point 52.

33 See the Trade Agency case, above n 28, [55]. On the other hand, the notion of public interest refers to those provisions that protect legal assets dependent on the implementation of public policies provided for in the Treaties to achieve the Union's objectives; some of the aforementioned provisions may be found in the field of consumer protection policy. See, *inter alia*, the Mostaza Claro case, C-168/05 (2006), EU:C:2006:675 at [37]; the Martín case, C-227/08 (2009), EU:C:2009:792 at [28]; and cases ac. Unicaja Banco and Caixabank, C-482/13, C-484/13, C-485/13, and C-487/13 (2015), EU:C:2015:21, at [30].

34 See the Van der Weerd case, C-222/05 (2007), EU:C:2007:318 at [35-41].

35 See, e.g., the Eco Swiss case, at [32]. See N. Blackbay, *et al.*: *Redfern and Huntern on International Commercial Arbitration*, (5th edition, Oxford UP, Oxford, 2009), at. 3, 135. According to these scholars, the Eco Swiss case provides an incentive for the arbitration tribunals to raise and apply issues of EU competition Law themselves if they are concerned about the enforceability of their awards in the EU.

36 See, e.g., the Order of the Court of Justice in the Pohotovost s.r.o. case, C-76/10 (2010), EU:C:2010:685, at [50-54].

37 See ECtHR Bosphorous v. Ireland, [2005], paras 155,159.

of protection offered by the EU Law in the field protected by the ECHR which is equivalent both, on substantive guarantees and on procedural guarantees to enforce substantive rights.

Nonetheless, this presumption can be rebutted if the protection is manifestly deficient for the specific case. This practical situation has significant implications for the safeguarding of the individual rights granted by the EU Law every time that the courts of the Member States, when dealing with the review, recognition or enforcement of international arbitration awards don't set aside those that could infringe human rights. Against this background, it could be triggered the individual's right to compensation by application of the principle of State liability owing to an infringement of EU Law.

(C) STATE LIABILITY FOR INFRINGEMENTS OF EU LAW DERIVING FROM THE CHALLENGE OF INTERNATIONAL ARBITRATION AWARDS FOR VIOLATION OF FUNDAMENTAL RIGHTS BEFORE THE JURISDICTIONS OF THE MEMBER STATES

(1) The Invocation of State Liability in the EU Law: General Background

As one author has pointed out, it may be somewhat paradoxical that the application of the principle of State liability for infringement of EU Law be governed by stricter criteria than those applied within a true federal structure, such as in the USA, where states of the federation enjoy certain margins of immunity for breaches of federal law.[38] The main reason, however, lies in the need to protect the "useful effect" of the relevant provisions of EU Law in the context of decentralized judicial protection.[39] In the absence of an EU federal judicial system, it is for the courts of its Member States to ensure the "effective judicial protection" (Article 19 TEU) of its legal provisions.

Accordingly, the CJEU's recognition of the principle of State liability for infringement of EU Law functionally complements the principles of primacy and direct effect[40] and is

[38] See, D.J. Meltzer, 'Member State Liability in Europe and the United States,' 4,(1), Int'l J. Const. L. (2006), 39-83, at 54-55.

[39] Ibid., at 66-67.

[40] Francovich and Bonifaci (C-6/90, C-9/90) [1991] EU:C:1991:424 at [31-34]. See also: R. Malcolm, 'Beyond Francovich,' 56 (1), Modern Law Review, (1993), 55-73, at 55-57, 60-62, and 72; J. Steiner, 'From Direct Effect to Francovich: Shifting Means of Enforcement of Community Law,' 18 (1) ELR (1993) 3-22 at 20-21. S. Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?', 17(2) EBLR (2006), 299-315, at 305. A. Ward, 'More than an 'Infant Disease.' Individual Rights, EC Directives and the Case for Uniform Remedies,' in J. Prissen and A. Eschrauwen (eds.): *Direct Effect. Rethinking a Classic of EC Legal Doctrine*, (Europa Law Publishing, Amsterdam, 2002), 45, 64-66, and 73-74; among others. CJEU doctrine on the principle of State liability initially focused on matters concerning the transposition of Directives, Wagner Miret (C-334/92) [1993], EU:C:1993:945, [22], Faccini Dori (C-91/92), [1994], EU:C:1994:292, [27]; and, El Corte Inglés/Blázquez Rivero, (C-192/94), [1996], EU:C:1996:88 [22].

enshrined as a general principle of EU Law[41] requiring specific protection in the Member States, in accordance with the principles of equivalence and effectiveness.[42]

The objective of the principle of State liability for infringement of EU Law is ambivalent. While it seeks to compensate individuals for unjustly caused damages by such breaches, which can hardly be done by means of Articles 258-260 TFEU,[43] it is also an additional instrument to reinforce the coercive nature of the rules of the EU.[44] This is confirmed by extensive CJEU case law, which has progressively extended the principle's scope of application to the point of attributing infringements of EU Law to any public authority of the Member State irrespective of its nature[45] or territorial location.[46]

---

41 See Francovich and Bonifaci, above n. 40 at [30-37].

42 See Francovich and Bonifaci, above n. 40 [42-43]; Danske Slagterier (C-445/06) [2009] EU:C:2009:178 [31]; Transportes Urbanos (C-118/08) [2010] EU:C:2010:39 [46-48]; Ferreira da Silva e Brito and others (C-160/14) [2015] EU:C:2015:565 [50]; etc.

43 Although the EC Treaty's amendment by the Maastricht Treaty, which introduced the specific provision of the current second paragraph of Article 260 of the TFEU, was swiftly implemented by the Commission and the CJEU (Commission/Greece) (C38/97) [2000], EU:C:2000:356 [78] and [99], its purpose is to enforce Members States' compliance with EU law. Therefore, it does not provide for an effective means for restoring private individuals for damages caused by said infringements; *see*, J. Marson, 'Holes in the Safety Net? State Liability and the Need for Private Law Enforcement,' 25 (2), Liverpool Law Review, (2004), 113-134, at.124. This is remedied through the enshrining of the principle of State liability for infringement of EU law; see T. Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich,'49(5) CML (2012), 1675-1702 at 1700; J. Tallberg. 'Supranational Influence in EU Enforcement: The ECJ and the Principle of State Liability,' 7(1) Journal of European Public Policy, (2000) 104-121, at. 108; J. Tuuli. 'State Liability: A Tool to Narrow the Gap Between the European Union and its Citizens,' M. Koskenniemi (ed.): *The Finnish Yearbook of International Law*, (Kluwer Law International, Alphen aan den Rijn 1999), 366, 368; among others.

44 See T. Lock, above n. 43 at 1677. See also, R. Rawlings, Engaged Elites Citizen Action and Institutional Attitudes in Commission Enforcement,' 6(1) ELJ (2000), 4-28, at 6; among others.

45 In the first cases cited above, at n. 40, the applicants alleged State liability for failure to transpose directives, even though the failure to act was the fault of the legislature. The CJEU judgments in Brasserie du Pêcheur and Factortame III (C-46/93 and C/48/93) [1996], EC:C:1996:79 [32-36] expressly provide for the possibility of attributing damages to the malfunctioning of a national legislature. Within the doctrine analyzing the impact of this Judgment, see P. Craig, 'Once More Unto the Breach: The Community, the State and Damages Liability,' 113 LQR, (1997), 67-94, at. 92-93; E. Deards, 'Brasserie du Pêcheur: Snatching Defeat from the Jaws of Victory?' 22, ELR, (1997), 620-625; W. Van Gerven, 'Bridging the Unbridgeable: Community and National Tort Law after Francovich and Brasserie'; 45(3), ICLQ, (1996), 507-544 at 540-543.

Based on the judgment in Köbler (C-224/01) [2003] EU:C:2003:513 [33-36], private individuals have been able to obtain redress before national courts for damages caused by the infringement of their rights under EU law due to decisions of a last resort court. Within the scholars analyzing the impact of this Judgment, see N.W. Barber and H. Scott, 'State Liability under Francovich for Decisions of National Courts,' 120, LQR, (2004) 403-406; M. Breuer, 'State Liability for Judicial Wrongs and Community Law: The Case of Gerhard Köbler v. Austria,' 29 (1) ELR (2004), 243-254; C. D. Classen, 'Annotation to Köbler,' 41 CMLR (2004), 813-815; P. Wattel, 'Köbler, CILFIT and Wethgrove: We Can't Go on Meeting Like This,' 41 CMLR (2004), 177-190.

46 Thus, for example, in the Judgment in Klaus Konle (C-302/97) [1999] EU:C:1999:271 [61-62], the Court established the duty of the State to make reparation for damage caused to individuals irrespective of the authority responsible for the breach of EU law, including within a decentralized internal system of competences of a federal

Although the invocation of the principle before us is a widespread occurrence across all the jurisdictions of the Member States,[47] it nonetheless occurs quite sporadically. Moreover, there are few cases in which the applicant obtains reparation in accordance with his or her expectations.[48]

The problem is not so much in the supposed existence of the reluctance or resistance of national jurisdictions to introducing a supranational instrument different from that provided in their own regulatory environments to compensate financially those harmed by the acts of public authorities,[49] as in the difficulty of applying the rules established by the CJEU for invoking the principle in question.[50]

In this regard, of the three necessary requirements for compensation, which are that: the purpose of the EU rule is to attribute rights to individuals, the breach is sufficiently serious,[51] and that there is a direct causal relationship between the breach and the damage suffered,[52] the second condition is difficult to prove.[53] Due to the wide margin of discretion public authorities

---

nature. Liability may also be claimed independently of the type of administrative body to which a sufficiently serious breach of EU law is attributed, see, e.g., the judgment in Larsy (C-118/00) [2001], EU:C:2001:368 [35]. Within the scholars analyzing the impact of this case law, see: A. Georgios: "The Allocation of Responsibility in State Liability. Actions for Breach of Community Law: A Modern Gordian Knot?" 26 *ELR* (2001), 139-158, id.: "Not as Unproblematic as You Might Think: The Establishment of Causation in Governmental Liability Actions," 27 *ELR* (2002), 663-667; A. Lengauer, 'Case C-302/97, Klaus Konle v. Republic of Austria,' 37 *CMLR* (2000),181-190; T. Tridimas, 'Liability for Breach of Community Law Growing Up and Mellowing Down?' 38 *CMLR* (2001) 301-332.

47 As shown by the research collectively undertaken at Instituto Universitario Europeo (Florence), *Bottom up or Rock Bottom Harmonization? Francovich State Liability in National Courts*, R. Condon and B. Leeuwen (eds.), EUI WP, Law 2015/03, which analyzes the impact on the jurisdictions of ten EU Member States representing different legal traditions (Common Law, Nordic Scandinavian, Continental and Eastern Bloc countries), between the years 2000-2013, especially p. 53.

48 See R. Condon and B. Van Leeuwen, cit. above n. 46, 54.

49 Thus, for example, the application in the jurisdictions of the UK of the so-called "eurotort" does not pose any issues; see M. Tomulic Vehovec, 'Member State Liability for Breach of EU Law before English Courts,' 8 *CrYbELP*, (2012), 369-410, at 376-377.

50 See T. Lock, above n. 43, 9-10; see also, C. Kremer, 'Liability for Breach of European Community Law: An Analysis of the New Remedy in the Light of English and German Law,' 22(1) *YEL*, (2003), 203-247.

51 The CJEU's case law is consistent in maintaining that in order to determine whether such a breach has occurred and can give rise to non-contractual liability for the EU, there must be a manifest and grave disregard on the part of the institution concerned to comply with the limits imposed on its authority for assessment. The decisive factor for this purpose is the field, circumstances, and context in which the contested act takes place. In that sense, the mere breach of the duty to act diligently, which is inherent in the principle of sound administration, does not constitute a sufficiently serious breach of EU law; see, e.g., the Defensor del Pueblo/Staelen case, C-337/15 P (2017), EU:C:2017:256 at [31][34][37][40][45]. That case law is applicable by analogy to acts committed by the bodies and institutions of the Member States.

52 See cases Brasserie du Pêcheur and Factortame III, above n. 45 at [51]; Danske Slagterier, above n. 5 at [20], etc.

53 See T. Lock, above n. 43, 13, arguing that it is difficult for the applicant to prove the existence of a "serious breach" provided that the State concerned has discretion to adopt the disputed measure.

usually have in these circumstances, the courts opt to confirm the validity of the actions of those public authorities except in flagrant cases of objective and grave breach of EU Law, such as the failure to transpose a directive within its stated deadline.[54]

A line of CJEU case law confirms the discretionary power of national authorities to derogate from fundamental rules and principles of EU Law directly invoked by individuals, provided the protection of human rights is at stake, with liability for breach of EU law being precluded in these circumstances.[55] However, the CJEU itself has interpreted this power restrictively.[56]

(2) Attribution of liability for Damage Caused by the jurisdictions of the Member States for Breach of EU Law

As discussed above, the national courts' role in reviewing arbitration awards, and the discretionary use of the standard of review to decide on their validity, could create situations that potentially allow an individual invoke the principle of State liability for malfunctions in the Justice System. The first step in that direction was taking in the *Köbler* case,[57] where the recognition of the possibility of compensation for damage caused to individuals by the malfunctioning of the justice system was subject to the fulfillment of certain requirements that were specifically defined to fit the judicial function: that the breach in question is due to a decision of a court or tribunal of last resort, and that such breach is sufficiently serious and manifest.[58] Regarding the notion of a court of last resort, although each national system has its own peculiarities which generally require examination on a case-by-case basis, the CJEU has established the possibility that such courts are not exclusively those which are supreme in each Member State, but rather any one whose decisions on national law are not subject to further judicial remedy.[59]

However, the CJEU has consistent case law delimiting the main criteria by which a national decision-maker can determine the existence of a "Serious Breach" of EU law; for example, the FuB case (C-429/09) [2010], EU:C:2010:717 at [51-52], establishes elements limiting the discretion of a Member State, which include the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, and the manifest disregard of the case law of the Court of Justice in the field relevant to the case.

[54] See T. Lock, above n. 43, 15-16.

[55] See, e.g., the Judgment in Schmidberger (C-112/00) [2003], EU:C:2003:333, at [65-69], [76] and [93-95]. See the analysis in C. Brown, 'Annotation to Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria,' 40 *CMLR* (2003) 1499-1510.

[56] See, e.g., the Judgment in AGM-COS.MET (C-470/03), [2007], EU:C:2007:213, at [72-73].

[57] Above n. 45.

[58] See, Köbler above n. 45 [59].

[59] See, e.g., the Judgment in Biuro podrózy Partner (C-119/15) [2016], EU:C:2016:987, at [48-54]; see also, Târçia (C-69/14) [2015], EU:C:2015:662, at [40]. The CJEU has pointed out in this regard that a court whose decisions are subject to judicial remedy may not be deemed a court of last resort when the appeal brought against a decision of that court has not been examined on the basis of the withdrawal of the appellant; see Aquino, C-3/16 [2017], EU:C:2017:209, at [38].

On the other hand, the CJEU has set forth narrow criteria for determining the liability of a national court for breach of EU Law, namely that the national court must take account of all the factors which characterize the situation put before it, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution, and noncompliance by the court in question with its obligation to make a reference for a preliminary ruling.[60]

It should be noted here that the CJEU itself has recognized that although a supreme court must bear in mind in its assessment that a case is pending in which a lower court has referred a question for a preliminary ruling, that fact alone does not preclude the supreme court from concluding that the case before it involves an "acte clair." Accordingly, it is not required to make a reference to the Court of Justice on the same question, nor is it required to wait until an answer to that question submitted by the lower court has been given.[61]

But these situations, apart from generating the undesirable circumstance of contradictory decisions issued by national courts, could also create the risk of a serious breach of EU law if the national court interprets one of its rules in a "manifestly erroneous" manner, especially without regard for CJEU case law or if it interprets its national law in violation of EU Law.[62]

(3) The Attribution of Liability to a National Court for Reviewing the Enforcement of a Disputed Award in the context of the protection of Human Rights

Questions concerning the validity of an international arbitration award may also arise in the context of a dispute concerning the application of EU Law, the central element of which is the manifest breach of a human right enshrined in the Charter of Human Rights of the EU (the Charter) or in the General Principles of EU law, and which forms part of the rights recognized in the European Convention on Human Rights (the Convention).

---

[60] The CJEU expressly affirms that such liability may only be claimed in the exceptional case where the court of last resort has manifestly infringed the applicable law, see Köbler above n. 45 [53-55].

[61] See the Judgment in joined cases X and Van Dijk (C-72/14 and C-197/14) [2015], EU:C:2015:564, at [60-63]. Similarly, a court of last resort may abstain from submitting a question for preliminary ruling if it rejects an appeal on grounds of inadmissibility proper to the procedure of that court, provided respect with the principles equivalence and effectiveness. See Aquino above n. 59 at [56].

[62] See Ferreira da Silva e Brito and others above n. 42 [57-60]. Similarly, State liability might be sought where the breach results from an assessment of facts and evidence, especially if this assessment leads to a "manifest infringement of applicable law" as regards the burden of proof, the value of the evidence or the admissibility thereof, or the legal characterization of the facts. This case law entails an extension of possible scenarios in which a national court might commit a "manifest" breach of EU Law. See the Judgment in Traghetti del Mediterráneo (C-173/03) [2006], EU:C:2006:391, at [37-45]. See B. Beutler, 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?' 46 *CMLR* (2009), 773-804, at 789.

In such circumstances, the standard of validity is based on the threshold determined by the doctrine of the European Court of Human Rights (ECtHR). In the light of this doctrine, there are a number of particularly relevant elements concerning the arbitration proceedings which gave rise to the disputed award[63], including whether the parties voluntarily submitted to it or not, the respect for the human rights recognized by the Convention in those proceedings, and the State's indirect intervention in the handling thereof, whether by acts that violate the rights of the interested parties due to the national rules on arbitration not conforming with the Convention or by the actions of the national courts concerned[64].

Although the ECtHR has not to date expressly ruled on the compatibility of arbitration with the Convention, there are numerous Judgments in which it conducts review of the procedures and decisions adopted by arbitral tribunals, especially those relating to civil and commercial arbitration,[65] within the scope of application of Article 6(1).[66] As is well known, this provision corresponds to the second paragraph of Article 47 of the Charter, which establishes the right of every person to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal established by law, and, to be counseled, defended, and represented.

In reality, reviews of compliance with the convention of arbitral tribunals go beyond the scope of Article 6(1) of the Convention and include the whole concept of the right to effective judicial protection,[67] also recognized in the first paragraph of Article 47 of the Charter, and in the case law of the CJEU as a General Principle of EU Law.[68] With these tribunals being excluded from consideration as State bodies,[69] the Court has however identified two possible

[63] See E. De Brabandere, 'Human Rights Considerations in International Investment Arbitration' in M. Fitzmaurice and P. Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, (Martinus, Nijhoff, Leiden, 2012) 183-215.

[64] See M. V. Benedettelli, 'The European Convention on Human Rights and Arbitration: The EU Law Perspective', in F. Ferrari (ed.): *The Impact of EU Law on International Commercial Arbitration*", above n.4, 463.

[65] See, ECtHR Regent Company v. Ukraine, [2008] paras 54-56. See also M. Závodná: *The European Convention of Human Rights and Arbitration*, (Diploma Thesis on file at the Faculty of Law Masaryk University, Brno, 2014), at 6-8.

[66] See *Application No. 28101/95 v. the Neetherlands*, DR 87-B, 112. See also, K. Svobodová: "Application of the Article 6(1) of the ECHR in International Commercial Arbitration", at 108, at 109. According to Svobodová quoting to other Scholars, the key point in solving the relationship between the Convention and arbitration is the above mentioned Article 6(1), which covers the right to access to justice, the right to an independent and impartial judge, the right to file a claim including the right to be heard, the principle of equal treatment, the right to receive a reasoned decision, the right to receive a decision within a reasonable time, and the right to public proceedings, among others.

[67] See S. Besson, 'Arbitration and Human Rights,' 24(3) ASA Bul.(2006), 395-416, at 402.

[68] See, e.g., CJEU Judgment in Johnston (C-122/84), [1986], EU:C:1986:206, at[18-19]; CJEU Judgment in Heylens (C-222/86), [1987], EU:C:1987:442, at [14-15]; CJEU Judgment in DEB (C-279/09) [2010], EU:C:2010:811, at [29-42], [59-60]; among others.

[69] See *Application No. 10881/84 v. Switzerland*, DR51, 83. In this regard, the Court agrees with the generally

grounds for invoking State liability for breach of the Convention as a result of the interested party's submission to arbitral proceedings.

On the one hand, the Court recognizes the horizontal direct effect of the Convention[70]. Accordingly, the rights recognized by the Convention are fully applicable to arbitration proceedings[71], since its provisions form part of the *lex loci arbitri* and the arbitrators have the duty to respect and safeguard them.[72] Consequently, it could be argued before the relevant domestic courts that an award adopted in violation of the Convention is unlawful[73], since the public order obligations arising therefrom prevail over the other obligations deriving from national or international rules in the field of arbitration.[74]

In this situation, the interested party may request the revision of the disputed award, and where appropriate, the adoption of interim measures, or its annulment or non-enforcement, before the relevant court of law.[75] However, it would need to be determined if this were possible in the event the interested party had previously, clearly, and expressly waived this right.[76]

---

accepted opinion according to which the arbitrators do not exercise any type of authority nor do they participate in public administration, since they fulfill only the mandate ascribed to them by the parties; thus, e.g., G. Born: *International Commercial Arbitration*, Vol. I, (Wolters Kluwer, Alpen aan den Rijn, 2009) 184.

[70] See, for a wide legal background on Challenging and enforcing awards, C.L. Lim, J. Ho and M. Paparinskis: *International Investment Law and Arbitration. Commentary, Awards and other Materials*, (Cambridge UP,Cambridge 2018, chapter 18.

[71] See S.L. Karamanian, 'The Place of Human Rights in Investor- State Arbitration', 17 (2) Lewis and Clark Law Review (2013) 423-447, at437.

[72] See, ECtHR, Transado Transportes Fluviais do Sado, S.A. v. Portugal, [2003], para 1. See also A. Jaksic: "Procedural Guarantees of Human Rights in Arbitration Proceedings: A Still Unsettled Problem?" 24(2) JIA (2007), 159-172 at 164.

[73] See E. Kleiman, 'The SNF v. International Chamber of Commerce Case and the Obligation to Conduct Arbitration Procedings with "Expected Dispatch"', in D. Bray and H. C. Bray (eds), *International Arbitration and Public Policy*, (Juris, New York, 2015), 49-92.

[74] See, e.g., the decision of the ECtHR (Fifth Section) of 28 October 2012, Suda v. the Czech Republic, [2012], para 55.

[75] See Application 1847/91 v. Germany, DR 83, where the Commission stated, *inter alia*, that "the (national) courts exercised a certain control and guarantee as to fairness and correctness of the arbitration proceedings which they considered to have been carried out in conformity with fundamental rights." According to A. Jaksic, there are several infringements to the Convention caused by arbitral tribunals which could be attributable to the State, such as, for example, the appointment of arbitrators depriving the claimant of his right of access to a court, the establishment of rules that provide for compulsory joinder of third parties or violating the principle of equality of the parties, above n. 72.

[76] This doctrine established by the Court admits the validity of a waiver of judicial review of the award, made under the above conditions, but provided that the arbitrators are presumed to act in accordance with the safeguarding of the human rights under the Convention; see ECtHR Noureddine Tabbane v. Switzerland, [2016] paras 25-31. See also, C.A. Kunz: "Waiver of Right to Challenge an International Arbitral Award Is Not Incompatible with ECHR: Tabbane v. Switzerland," 5(1) EIAR (2016), 125-132. In this regard, the Court itself has established that the waiver of certain rights under the Convention may only occur in relation to some of those provided for under article 6(1), such as judicial review of an arbitral award and the right to be heard; see, e.g., ECtHR, Osmo Suavaniemi and others v. Finland, [1999] Application No. 31737/96. See also G. Petrochilos:

On the other hand, certain acts directly or indirectly attributable to State authorities may also trigger their international liability for violations of the Convention. Directly attributable acts include failures by national courts to admit an application for the revision of an award without the interested party's having made an express and prior waiver to exercise this right,[77] or failures to hear challenges of the recognition or enforcement of arbitral awards rendered in violation of certain human rights under the Convention.[78]

International liability could also be enforced by indirectly attributable acts to a State authority such as for, e.g., the adoption of a law that does not guarantee the parties concerned the application of the human rights under the Convention in arbitration proceedings,[79] the lack of appropriate domestic regulatory instruments, or actions in obstruction of the enforcement of an award.[80]

Finally, the decisions of last instance national courts on the revision and, where applicable, on the annulment of an arbitral award, may trigger the State's international liability if these do not grant effective judicial protection within the broadest possible meaning of Article 6(1) of the Convention, to the applicant who alleged being subject to violations of the rights recognized in the Convention as a result of actions taken in the arbitration proceedings in which the disputed award was rendered.[81]

Procedural Law in International Arbitration, (1st. Ed., Oxford University Press,Oxford, 2004), 114. Moreover, there are other limits on the waiver: e.g., it does not imply waiver of the right to oppose the recognition and enforcement of the arbitral award, see G. Kauffmann-Kohler and A. Rigozzi: Arbitrage International. Droit et practique à la lumière de la LDIP, (2n. ed., Weblaw, Bern, 2010), 747. See also P. Bernardini: "The scope of Review in Annulment Proceedings," in D. Bray, H.L. Bray (eds.): *International Arbitration and Public Policy*, (Juris, New York, 2015) 167.

77 See Application 10881/84 . v. Switzerland, above n. 69.

78 See Application 1847/91 v. Germany, above n. 75. An analysis of the question at A. Samuel: "Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View," 21(5) JIA (2004), 413-437, at 424.

79 See ECtHR Suda v. the Czech Republic, [2012] above n. 74, paras 52-55. It should be noted that national law provides the basis for the constitution and functioning of arbitral tribunals, as well as the binding force of arbitral awards, which is absent in other forms of private dispute settlement such as mediation or conciliation; see G. Born, above n. 69, 187. In this regard, it is reasonable for the parties, by opting for arbitration as a means of dispute settlement, to seek a discreet method compatible with the right to waive public ordinary court proceedings. But this does not mean that the autonomy of the will also allows the parties to fully waive their right to defense, nor does it exempt national judges from granting the effective judicial protection thereof.

80 See ECtHR Regent Company v. Ukraine, [2008] above n. 65, paras 59-62. It should be emphasized in this context that under Article 13 of the Convention, Contracting States are required to provide effective remedies for violations thereof, even if these are caused by private individuals, including the actions and decisions of arbitral tribunals. On the horizontal direct effect of the Convention, see E. Engle: "Third Party Effect of Fundamental Rights (Drittwirkung), 5(2) Hanse LR (2009), 165-173, at 169. The ECtHR has established a settled doctrine on the attribution of international liability to Contracting States for violations caused by the acts of private individuals; thus, e.g., ECtHR A. v. the United Kingdom, [1998], paras 22-24.

81 See ECtHR Osmo Suavaniemi and others v. Finland, [1999] above n. 76. See also J.C. Landrove: "European

(D) THE SPANISH PRACTICE REGARDING REVIEW OF INTERNAL ARBITRAL AWARDS: THE LIKELY APPLICATION OF ESTABLISHED CRITERIA TO THE REVIEW OF INTERNATIONAL AWARDS

The Spanish Practice regarding review of arbitration awards is circumscribed to date to the decisions of internal scope and of a civil and commercial nature. However, relevant decisions have been adopted by the highest jurisdictional instances that have given rise to a jurisprudence that could be applied to similar situations such as those we have analyzed previously. In this sense, in addition to establishing the full capacity to control the award in question, the jurisdictional body must conduct a thorough assessment of its legality when a human right is at stake. As far as the later dimension is concerned, a Key decision was taken by the Spanish Supreme Court in the case "Agrumexport SA C. Bco. Popular"[82], where this jurisdiction stated on the implications of the Kompetenz-Kompetenz principle under the Spanish Arbitration Act (SAA)[83] Bco. Popular signed a framework netting agreement with Agrumexport which contained a clause whereby all disputes or conflicts resulting from the said agreement shall be finally settled by arbitration in equity. Sometime later, the two parties concluded a swap and a put. Nevertheless, Agrumexport sought the annulment of both derivatives before the judicial courts. Bco. Popular argued that the matter had to be decided in arbitration, but this argument was dismissed by the first instance court and the court of appeals.

The Supreme Court confirmed these decisions and held that the consent to refer disputes to arbitration must be explicit, clear, categorical and unequivocal. According to the Supreme Court, the SAA posits the soft interpretation of the *Kompetenz- Kompetenz* principle which leads to a full review of the arbitration agreement by judicial courts if one of the parties submits the dispute to said courts despite the arbitration agreement. Judicial courts may therefore rule on the validity and effectiveness of the arbitration agreement and on its applicability to the subject matter of the dispute without any limitation.

However, when the arbitrator has already decided that he has jurisdiction, then this decision can only be reviewed by judicial courts through an action seeking the setting aside of the award. This is the case when a violation of public policy may be at stake.

Convention on Human Rights' Impact on Consensual Arbitration," in S. Besson, M. Hottelier; F. Werro (eds.): *Human Rights at the Center*, (Schulthess, Zürich, 2006), 82. However, some authors maintain that in the event the interested party voluntarily and expressly waives annulment of the award, there is no obligation requiring the relevant court to take *ex officio* action; thus, e.g., see S. Besson, 'Arbitration and Human Rights,' above n. 67, 405; see also, N. Krausz, 'Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with ECHR, Article 6', 28(2) *JIA* (2011), 137-162.

[82] STS (Civil Chamber) 2500/2017, ES:TS:2017:2500

[83] Law 60/2003, 23 November 2003 (BOE nº 309, 26 December 2003), as amended by Law 11/2011, 20 May 2011,(BOE nº 21 May 2011).

Two judgments of the Spanish Supreme Court have followed this line. In a decision adopted in 2017, the plaintiff, "PumaSE", demanded two arbitrators who issued an award that was declared void by the Provincial High Court, since they excluded the third arbitrator appointed by "PumaSE". Thus, the Supreme Court confirmed this decision on the main ground that, the said two arbitrators "seriously violating the arbitration rules"[84].

Moreover, in a judgment of 2013, where the plaintiff requested the annulment of an arbitration award that dismissed her claim against a transport company that caused her an accident with bodily harm, because she was unable to obtain a supporting medical document in duly time, the Supreme Court stated that, "it must prevail the constitutional right to effective judicial protection (Article 24.1 of the Spanish Constitution, CE), by obtaining a resolution based on law that takes into consideration all the elements known by the organ that decides"[85].

It must be also underlined some case law of the Madrid Superior Court of Justice on this matter. In most of the cases, the party that had brought the action had invoked a violation of the due process principles seeking the annulment of an award. Thus, in a judgment delivered in February 2017, the Superior Court of Justice stated that was evident that the defendant's oppositions brief in the arbitral procedure has not been considered when adopting the award, with clear breach of its right of defense and with the consequent violation of public order[86]. In a judgment delivered in November 2017, the same Court stated in similar terms that, "the arbitrator adopted the award without the claimants being able to make allegations and propose evidence within a reasonable deadline"[87]. It is the prevailing view of the Madrid Superior Court of Justice that there is a public interest in removing from the legal order those awards that entail a violation of public order. On this ground, the Superior Court of Justice stated that the Courts have the duty to debug the legal order from those awards.

It must be underlined that, according to its judgment delivered on April 24, 2018[88], arbitrators and arbitral institutions may not have any involvement in the action to set aside an arbitral award. Thus, the parties to the annulment action are the claimant and the defendant in the arbitration, an only exceptionally may third parties intervene in the action, provided they prove they ignored the existence of the arbitration and are directly affected by the award, in particular because they should have been a party to the arbitration proceedings. Accordingly, when the parties invoked a violation of a human right that could be attributed to an arbitrator,

[84] STS (Civil Chamber) 362/2017, ES:TS:2017:362.

[85] STS (Civil Chamber) 832/2013, ES:TS:2017:6345.

[86] Judgement of the Madrid Superior Court of Justice (Civil and Criminal Chamber), delivered on February 21, 2017.

[87] Judgement of Madrid Superior Court of Justice (Civil and Criminal Chamber), delivered on November 28, 2017.

[88] Judgment n. 21/2018 of the Madrid Superior Court of Justice (Civil and Criminal Chamber).

they must suit an annulment action before judicial courts. Nonetheless, when the Spanish Courts review an award in the context of annulment proceedings they have some degree of autonomy to determine the existence of a violation of public order for breach of a human right. Thus, in a judgment delivered in October 2017, the Madrid Superior Court of Justice decided not to set aside an award on the main ground that, its foundations, do not incur arbitrary arbitrariness of article 24.1 CE for infringement of mandatory norms and applicable jurisprudence[89].

From the set of decisions that we have analyzed some consequences can be inferred applicable to future situations in which, any Spanish jurisdictional body, including those of last instance, must review an arbitral award:

In their capacity as national judges of EU Law they have to apply the criteria established by the CJEU regarding both, international commercial awards and on international investments awards. According to the soft interpretation of the Kompetenz-Kompetenz principle, as established by the Spanish Supreme Court, they have to make a full review of the award if a violation of public order is at stake;

Where it is about violations of human rights, every jurisdictional body has a certain degree of autonomy to determine if such violation is serious enough to annul the award.

Against this background, and for the purpose of determining the existence of situations in which a decision of a Spanish judicial body on the validity of an award could engender the State's liability for violation of the EU Law, they could only arise very exceptionally.

(E) FINAL REMARKS

The CJEU's continued refusal to establish any type of cooperation with commercial arbitral tribunals, primarily because these are private bodies created through the free consent of the parties, effectively hands responsibility for reviewing such bodies' application of EU Law over to the courts of the Member States.

Acting in their capacity as national courts of Law of the EU, these jurisdictions must take greater care to ensure that they do not enforce judgments contrary to the principles of primacy and uniformity of application. They must also ensure the protection of all the subjective rights of the interested parties arising under EU Law and, in any event, the fundamental right to effective judicial protection.

However, given the magnitude of these obligations, national courts have a broad degree of

[89] Judgement of the Madrid Superior Court of Justice (Civil and Criminal Chamber), delivered on October 31, 2017.

autonomy in adopting the appropriate decision, since that decision will be taken on the basis of domestic procedural law and applicable international law. In cases on the recognition and/or enforcement of a disputed award, the New York Convention empowers the national court to conduct a review of its validity without requiring it to submit a question for a preliminary ruling to the CJEU. This carries the corresponding risk for purposes of applying EU Law, regardless of the triggering of the "acte clair" doctrine in the event this is a court of last resort.

On the other hand, when dealing with the review of the validity of an award out of the need to protect the public order of the EU, national courts are required to engage in more advanced degree of diligence.

Where the review relates to award enforcement proceedings, two types of situations may arise where the effectiveness of the provisions at issue will depend on the discretion of the national court. First, if the court is required by its national law to conduct the review and has the appropriate legal and factual elements before it, it may order the enforcement of the award, despite its being based on clauses that infringe EU Law, provided the court does not find it to cause any manifest or sufficiently serious damage.

On the other hand, if the court is under no duty to conduct such review, it may limit itself to formally reviewing the award and approving its enforcement without reviewing the validity of clauses in manifest breach of EU Law.

Both scenarios would see the application of a binding decision of an arbitral tribunal with the usual undermining of the principle of legal certainty. The party affected by the breach of rights arising from the provisions in question would have a low probability of successfully invoking the principle of State liability for breach of EU law, despite the act being attributed to a court of last resort.

The standards established by the ECtHR could determine the existence of acts capable of triggering State liability in the context of a dispute concerning the breach of a human right of the Convention in an arbitral award.

In this sense, a wide range of decisions of the ECtHR, adopted primarily in relation to the scope of Article 6(1) of the Convention, have established two methods for interested parties to invoke State liability at the national level. This may be whether the relevant court does not review, annul, or decree the non-enforcement of an award adopted in breach of the Convention upon its being claimed illegal, or indirectly if certain acts attributable to State bodies render it impossible to apply the rights deriving from the Convention to the parties to the arbitration proceedings.

Nonetheless, with regard to the Spanish jurisdictional system, it is difficult to create situations in which, a bad implementation of the review of the legality of an award by a judicial body, engenders the State liability for violation of EU Law. If it is about the review of the

legality of an award for the violation of a human right, which is part of the public order of the EU, the national judge has to apply the soft interpretation of the *Kompetenz-Kompetenz* principle that guarantees that, such award, will be annulled or will not be executed.

 DOI: 10.17103/sybil.22.3