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Finding a New (Old?) Way Forward

International Arbitration as a Supplementary Tool for Fundamental Rights Violations

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9.1 INTRODUCTION

This chapter examines what legal space exists within the EU judicial system for arbitration to be used as a supplementary tool to remedy fundamental rights violations. This exercise is more creative and theoretical in nature since arbitration is not currently used to remedy violations by the EU. Moreover, arbitration exists outside the scope of the EU judicial system. However, since arbitration is a valuable dispute resolution mechanism, this chapter will assess whether it is possible to have more space to use such a tool in situations where an individual has had their rights violated and has no access to a court. The premise for this chapter primarily lies in the fact that the EU judicial system has been established and used for many years. In the eyes of the Court of Justice of the European Union (CJEU), there exists a full system of remedies.[1] The EU judicial system has been essential to the process of integration ever since the creation of the EU. The judicial system has been later enhanced through extensive treaty revision and case law of the CJEU. The use of arbitration in certain sectors has shown that parties prefer to opt for private dispute resolution mechanisms or private enforcement.[2] With the expanding competence of the EU and the far-reaching policies that can be found in the EU Treaties, a significant gap has emerged between EU policy objectives and provision of an effective remedy in practice. Against this background, this chapter will explore the legal room for using international arbitration where no access to court is available in practice in fundamental rights violations by

[1] Case C-294/83 *Les Verts v Parliament* [1986] ECLI:EU:C:1986:166, para 23.
[2] See, for example, fields of law such as the energy sector and competition law.

the EU. This analysis will provide a view of whether and to what extent international arbitration can be used to close the enforcement gap that has become apparent when dealing with fundamental rights violations by the EU.

This chapter is divided into three sections. Firstly, the chapter begins by outlining what international arbitration is, the strengths and weaknesses of the system, and how it is being used within the EU. Moreover, the relationship between the EU judicial system and private international law is highlighted. Secondly, the chapter assesses the constitutional limits imposed through the CJEU approach and Treaty provisions where arbitration is concerned. Finally, the chapter will analyse the constitutional potential and practical implications of introducing arbitration as a dispute resolution avenue. In doing so, this chapter uses inter-state arbitration and investment-treaty arbitration cases as examples; however, the framework for these is excluded from the discussion.

9.2 THE MODEL OF INTERNATIONAL ARBITRATION

9.2.1 *Defining International Arbitration*

International arbitration can be defined as an extra-judicial mechanism of dispute resolution, which is considered one of the alternative dispute resolution mechanisms.[3] The term *international commercial arbitration* refers to a procedure where disputes between private individuals or corporations are resolved.[4] Moreover, it can also be between a state acting in its private capacity and a private party. The mechanism is considered to be part of the adjudication system of any legal order.[5] There is a group of scholars who are of the opinion that all arbitration is private, even when it concerns a dispute between an investor and a state. This idea mainly stems from the fact that the arbitrators who adjudicate on the dispute are appointed by the parties, rather than belonging to a judicial institution. However, this is not always the case.

[3] Georgios Zekos, 'The Historical Appearance of Arbitration as a Dispute Mechanism' in Georgis Zekos *International Commercial and Marine arbitration* (Routledge-Cavendish 2008) 1. <www.lawcatalog.com/media/productattach/n/j/nj_arbitration_handbook_ch01_1.pdf>; Sarah Rudolph, 'Blackstone's Vision of Alternative Dispute Resolution' (1992) 22(2) Memphis University Law Review 279.

[4] John Merrils, *International Dispute Settlement* (4th edn, Cambridge University Press 2005) 117; Chukwudi Ojiegbe, *International Commercial Arbitration in the European Union* (1st edn, Edward Elgar 2020) 78.

[5] Gus van Harten, 'The public-private distinction in the international arbitration of individual claims against the state' (2007) 56(2) International and comparative corporate law quarterly 381; Burkhard Hess, *The Private-Public Divide in International Dispute Resolution* (Brill Nijhoff 2018) 192.

The fact that it may be a private dispute resolution system does not take away from the fact that it is a mechanism that guarantees access to justice and has final and binding arbitral awards. The author is of the opinion that private arbitration concerns disputes that are brought by private parties or between a private party and a state acting in its private capacity.

Private arbitration allows the parties to create their own arbitration process.[6] This is done through the principle of private autonomy, as it is an integral principle of arbitration. Hence, this also means that the elements of the arbitration process result from choices the parties make. For example, the seat of arbitration, which procedural rules apply, and the arbitrators are all choices that the parties make themselves. This means that there also has to be consent given by the parties to arbitration or it needs to be provided in an agreement. Therefore, arbitration is usually an agreed form of dispute settlement.

9.2.2 *Benefits of International Arbitration*

International arbitration has become the preferred mechanism for many cross-border commercial disputes due to three main benefits.[7] The first is the flexibility in proceedings. The parties to the arbitration agreement may choose the type of tribunal that will hear the dispute, the applicable law (*lex arbitri*), the seat of arbitration, and which conflict of laws to use. Hence, the parties are able to choose the evidence rules and the time limits since most of these rules are outlined in the applicable and chosen law. Therefore, the parties are able to design their own proceedings.

A second benefit of arbitration is the ability to choose one's arbitrators.[8] Since disputes that arise come from different fields, they require different types of expertise to resolve the dispute at hand. The parties to a dispute are free to choose arbitrators according to their expertise.[9] There are arbitrators who are

[6] Ojiegbe (n 4) 2.

[7] White & Case and Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (*White & Case*, 2018), <www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf> charts 1 and 2; Singapore Management University, School of Law, Singapore International Dispute Resolution Academy (SIDRA), SIDRA International Dispute Resolution Survey: 2020 Final Report (*Sidra*, 2020) <https://sidra.smu.edu.sg/sidra-international-dispute-resolution-survey-final-report-2020> exhibit 4.1. all; S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (Cambridge University Press 2022).

[8] General Principles of Law in International Commercial Arbitration, (1988) 101(1) Harvard Law Review, 1817.

[9] Ibid 1818.

either professors or practitioners in different fields of law and beyond. This is particularly advantageous when the resolution of a dispute hinges on specific technical expertise that judges may not always possess.

A third benefit of arbitration is that an arbitral award is final and binding.[10] The arbitral award has *res judicata* effects.[11] Unlike other private dispute resolution mechanisms, an arbitral award can and should be enforced in any national jurisdiction.[12] Since arbitral awards are recognised and enforced in national jurisdictions, this means that the arbitrators will do their utmost best to resolve the case, as any arbitral tribunal would strive for the award to be enforceable (depending especially on whether the state signed the New York Convention).[13] Therefore, although arbitration is considered a private dispute resolution mechanism, all the regulations that concern the protection of the weaker party or fundamental rights are still applied in arbitral proceedings. Hence, while doing their jobs, arbitral tribunalstend to apply, even if not obligated to, laws and norms that any national court would apply, in order to achieve enforceability of the arbitral award.[14]

9.2.3 *Limitations of International Arbitration*

As with any system, there are also a few limitations that can be attributed to using arbitration as a dispute resolution mechanism. The first limitation concerns the confidentiality of the dispute resolution process.[15] It poses a limit to commercial arbitration since awards are not always publicly available. It poses risks that decision-making in arbitration proceedings does not adhere to any sort of check and transparency. For EU law purposes, this is a limitation since it is not possible to check how EU law was interpreted in a dispute. Moreover, this translates into issues with legal certainty since it then becomes difficult to establish a common line taken in awards is in a certain situation.[16] Hence, it poses a limit to using arbitration.

[10] Zekos (n 3) 14.
[11] Allan Rosas, 'The EU and International Dispute Settlement' (2017) 1(1) Europe and the World Law Review 1, 14; Konstanze von Papp, *EU Law and International Arbitration: Managing Distrust Through Dialogue* (1st edn, Hart 2021) 58.
[12] Zekos (n 3) 14.
[13] Von Papp (n 11) 3.
[14] Christophe Hillion and Ramses Wessel, 'The European Union and International Dispute Settlement: Mapping Principles and Conditions' in Marise Cremona, Anne Thies, and Ramses A Wessel (eds), *The European Union and International Dispute Settlement* (Hart 2017) 8.
[15] Zekos (n 3) 5.
[16] Ibid 6.

A second limitation of arbitration, which ties into the previous one, concerns the issue of transparency and consistency.[17] Due to some arbitral awards not being made public, this raises the question of how disputes are in fact resolved by the arbitrators. This also plays into decision-making of arbitral tribunals not being public, hence not transparent. A limitation exists here in the sense that when a dispute deals with private and public interests and is not transparent, that is a problem. Since public interest can be violated when a private interest is decided, it becomes crucial for national courts who enforce the award to check this. This poses a risk that national courts when enforcing the award will want to carry out a full review.

A third limitation is that arbitration can form a limit to effective judicial protection within the EU. Given the fact that international arbitration exists outside the scope of the EU judicial mechanism, if a party to a dispute decides to take a dispute to arbitration, that party is in fact deciding to take the dispute out of the EU judicial system. From an EU perspective, practically this means that effective judicial protection as guaranteed under Article 47 Charter of Fundamental Rights of the European Union ('the Charter') is not achieved.[18] On the EU level, more specifically, Article 47 Charter recognises access to justice as a '*core fundamental right*'.[19] This means that arbitration undermines this fundamental principle of EU law. Secondly, if an arbitration clause in a contract or agreement exists, the dispute will go to arbitration, which means that a national court can only enforce or annul the arbitral award, hence a limited judicial review.[20] Although this does not mean that it is a breach of fundamental rights per se, it does mean that the EU threshold of effective judicial protection might not be met. Therefore, from an EU law perspective, the limited review stemming from the *res judicata* of arbitral awards may undermine effective judicial protection.

[17] Fabrizio Cafaggi, 'Private Regulation in European Private Law' EUI RSCAS WP 2009/31, 6; Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 (1) Modern Law Review 24.

[18] Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (CFR); Norbert Reich, 'More Clarity after "*Claro*"? Arbitration Clauses in Consumer Contracts as an ADR (Alternative Dispute Resolution) Mechanism for Effective and Speedy Conflict Resolution, or as "Deni de Justice"?' (2007) 1 European Review of Contract Law 41.

[19] CFR, art 47; Malik Dahlan, Rosa Lastra, and Gustavo Rochette, *Research Handbook on EU Energy Law and Policy* (1st edn, Edward Elgar 2022) 318.

[20] Anna van Duin, *Effective Judicial Protection in Consumer Litigation* (Intersentia 2022) 76; Norbert Reich, 'Party Autonomy and Consumer Arbitration in Conflict: A "Trojan Horse" in the Access to Justice in the E.U. ADR-Directive 2013/11?' (2015) Penn State Journal of Law & International Affairs 290, 320; Clare Ambrose, 'Arbitration and the Free Movement of Judgments' (2003) Arbitration International Law 3, 8.

9.3 SETTING THE SCENE: INTERNATIONAL ARBITRATION AND EU LAW

This section outlines where arbitration fits under the EU framework. Firstly, the development of private international law in the EU will be outlined. Secondly, an overview of the legal instruments on the EU level will allow an understanding of what room exists for arbitration.

9.3.1 *The EU's Competence and Arbitration*

International arbitration is considered to belong to a branch of private international law, which predominantly relies on party autonomy and expression of will from parties to a dispute. There is no fully-fledged European Private International Law, although it is becoming more regulated within the EU sphere.[21] Since arbitration mainly depends on private law and domestic procedural law, it is also dependent on private international law. Hence why this framework is relevant for using arbitration.

Even though the EU has expanded its regulation into numerous policy areas, private international law has been an area of law that was originally left untouched.[22] This is also evident from the EU's competences in matters of private international law. There is no specific field of 'EU arbitration law' that would be regulated in the Treaty on the Functioning of the European Union (TFEU).[23] Generally, there is no provision in the Treaties that explicitly refers to, or deals with, arbitration.[24] However, this was not always the case. A provision was inserted into the Treaty of European Economic Community (hereinafter, 'EEC'), under Article 220 EEC.[25] Here, the

[21] Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare* [2013] EU:C:2013:663; European Private International Law is imbedded in the Rome I Regulation, more specifically recital 11; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177; see interesting observations in Martina Mantovani, EU Private International Law before the ECJ: A Look into Empirical Data (The European Association of Private International Law, 19 September 2022) <https://eapil.org/2022/09/19/eu-private-international-law-before-the-ecj-a-look-into-empirical-data/>.

[22] Federico Ferretti, 'EU Internal Market Law and the Law of International Commercial Arbitration: Have the EU Chickens Come Home to Roost?' (2020) 20(1) Cambridge Yearbook of European Studies 141.

[23] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

[24] Jürgen Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) 32(4) Journal of International Arbitration 368.

[25] Ibid 368.

following is established: 'Member States shall, in so far as necessary, engage in negotiations with each other with the view to securing to the benefit of their nationals: ... the simplification of the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.'[26]

The Maastricht Treaty did not include private international law, even though there were important legal architecture changes being made. A 'Three-Pillar Structure' was created and placed judicial cooperation into the third pillar.[27] This created important substantive changes for the Treaty. For private international law, this meant that the integration was less than in fields that found themselves in the first pillar. Through the pillar structure, Member States gained more room for cooperation.[28] This was seen as a compromise whereby Member States achieved more ways for cooperation within the Pillar Structure but were not subject to the supranational integration approach and the sensitivity of the fields was still respected.[29] This approach also allowed the European Council to still retain its powers. Therefore, a middle ground was found to address these more sensitive topics.

Only within the framework of Communitarisation, in the Treaty of Amsterdam, did private international law become part of the first pillar.[30] Ever since then, international arbitration and EU law have come into closer contact.[31] Though in practice, the interaction of arbitration and the EU legal order differs to varying degrees depending on the field of EU law and the competence that the EU and Member States have in the given fields.[32]

The inclusion of private international law in the first pillar created a shift in the competence divide between the EU and Member States. What was originally a matter for Member States to decide, given that the area contains private relations, now gave the EU competence.[33] The EU has competence to 'take measures in the field of judicial cooperation in civil matters having cross-border implications', as long as this relates to the proper functioning of the

[26] Treaty establishing the European Economic Community [1957] OJ C340/173 (TEC), art 220.
[27] Ojiegbe (n 4) 197.
[28] Catherine Barnard and Steve Peers, *European Law* (Oxford University Press 2018) 21.
[29] Ibid 21.
[30] Ojiegbe (n 4) 224.
[31] George Bermann, 'Reconciling European Union law demands with the demands of International Arbitration' (2011) 34(1) Fordham International Law Journal 1195.
[32] Sophie Nappert, 'International Arbitration as a Tool of Global Governance: The Use (and Abuse) of Discretion' in Eric Brousseau, Jean-Michel Glachant, and Jérôme Sgard (eds), *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (Oxford University Press 2019) 14.
[33] Ferretti (n 22) 141.

internal market.[34] As stated under Article 3(2) Treaty on the European Union (TEU), a common area and the development of cooperation in civil matters having cross-border effects is possible with the legal basis under Articles 67 and 81 TFEU.[35]

Later, with the Treaty of Lisbon, the Union only gained powers to initiate development of alternative dispute settlement methods, which most of the time excludes arbitration as discussed in this chapter.[36] These powers are not absolute, but this explains why there has been more reference to alternative dispute settlement as a potential remedy in secondary legislation.

Treaty amendments meant that the EU and Member States now have a shared competence in the field of private international law. For arbitration, Member States still retain most powers since most arbitration is governed domestically.[37] The principles of conferral, subsidiarity, and proportionality apply.[38] As also stated under Article 3(2) TEU, what can be seen within the EU is that a common area and the development of cooperation in civil matters having cross-border effects is possible with the legal basis under Article 81 TFEU.[39] On the other hand, given the shared competence, EU institutions can enact legislation.[40]

9.3.2 *Legal Instruments That Regulate Arbitration*

On the international level, the New York Convention is an essential multilateral international treaty in the field of arbitration.[41] The Convention deals

[34] Consolidated Version of the Treaty Establishing the European Community, arts 61 and 65.

[35] Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU); TFEU, art 81; for more information on this, please see Herman-Josef Blake and Stelio Mangiameli, *Treaty on the Functioning of the European Union – A Commentary* (Springer Commentaries on International and European Law 2021).

[36] Basedow (n 24) 369; TFEU, art 81(2)(g); Although the EU's conferred power for alternative dispute resolution is found under article 81, some of the legal instruments adopted on the EU level have been under article 114 TFEU. See Directive (EU) 2013/11 of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation 2005/2004 (EC) and Directive 2009/22/EC, 2013 OJ L165/63; Regulation 524/2013 (EU) of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation 2006/2004 (EC) and Directive 2009/22/EC ('Regulation on Consumer ODR') [2013] OJ L165/1.

[37] Von Papp (n 11) 14.

[38] TEU, arts 61 and 65; Kieran Bradley, 'Activities of the European Community in the Field of Private International Law in 2007' (2007) Yearbook of Private International Law 399, 401.

[39] TFEU, art 81; for more information on this, please see Blake and Mangiameli(n 35).

[40] Ojiegbe (n 4) 175.

[41] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York 1958; Von Papp (n 11) 2.

with enforcement and recognition of arbitral awards and ensures that arbitral agreements are upheld. All Member States are also signatories to the New York Convention. The EU itself is not a signatory to the New York Convention and there is no equivalent that exists on the EU level. There is the Brussels I bis Regulation, the successor of the Brussels Convention, which deals with the free movement of judgments in cross-border situations.[42] The Brussels I bis Regulation covers all civil and commercial matters. The term 'civil and commercial matters' is not defined under the regulation itself; the concept has gained an autonomous interpretation under EU law.[43] The main aim of the Brussels I bis Regulation is ensuring the proper functioning of the internal market, judicial fairness, and international comity.[44] Arbitration is, however, excluded from the scope of the regulation. This is provided in recital 12 and Article 2(d) of the regulation.

The reasoning behind the arbitration exclusion was mainly due to prior existence of international conventions, specifically the New York Convention, which dealt with arbitration when the Regulation was enforced. This is why most issues of arbitration are left to the New York Convention and national legislation to deal with. This way EU legislation avoided overlap with existing international conventions.

On the national level, each jurisdiction has their own rules that regulate arbitration. It is only on this level that one can find codes of civil procedure and rules on how arbitral tribunals and courts should interact (together with the rules that exist on the international level).

9.4 CONSTITUTIONAL LIMITS TO ARBITRATION WITHIN THE EU JUDICIAL SYSTEM

9.4.1 *The CJEU Approach to International Arbitration*

Constitutional limits are crucial in assessing the legal space that exists for arbitration within the EU judicial system. The main limit has developed through the CJEU's approach to arbitration. Therefore, this section will

[42] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (Regulation (EU) No 1215/2012); Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/1.

[43] This interpretation can be found in case law, for example Case C-292/05 *Erini Lechouritou and Others v Dimosio tis Omospondiakis* [2007] ECLI:EU:C:2007:102.

[44] Regulation (EU) No 1215/2012, recitals 12 and 20.

outline the leading case law that deals with arbitration. The section is structured in a way that resembles the argumentation used by the CJEU when dealing with arbitration, namely in light of the autonomy of EU law and the uniform application of EU law.

9.4.1.1 The Principle of Autonomy and International Arbitration

The notion of the autonomy of EU law is central to the CJEU's approach to arbitration. It forms the main constitutional limit to the use of international arbitration where a dispute concerns an element of EU law. In the CJEU's case law, the type of relation between the CJEU and an international dispute settlement body and the type of dispute resolution body are the main aspects that determine whether a specific dispute resolution mechanism is contrary to the principle of autonomy. While relationships with commercial arbitration are not contrary to EU law, relationships of interaction, for example, in *Opinion 2/13*, have been declared contrary to EU law.[45]

One prominent example of when the EU and a dispute resolution body coexist can be seen in *Opinion 2/13*. This judgment concerned the question of whether EU law is compatible with the draft agreement for the accession to the European Convention on Human Rights. The Court stated that it would undermine the autonomy of EU law if the EU acceded to the Charter of Human Rights under the 'old' agreement that was in front of the Court.[46] As stated in *Opinion 2/13*, an agreement or dispute settlement mechanism outside the scope of EU law cannot affect the powers fixed by the Treaties and the autonomy of the EU legal system.[47] The Opinion also stated that Member States should not submit a dispute that deals with the Treaties to any 'other method of settlement other than those provided therein'.[48]

In the same vein, judgments such as *Achmea* and *Komstroy* show that the arbitration procedure under the arbitral agreement in the given case is contrary to EU law and undermines the autonomy of EU law.[49] The case in

[45] Case *Opinion 2/13 – Accession of the EU to the ECHR* [2014] ECLI:EU:C:2014:2454.
[46] Ibid.
[47] Ibid para 201.
[48] Ibid para 201; Case *Opinion 1/91 – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] ECLI:EU:C:1991:490, para 35; Case *Opinion 1/00 – Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] ECLI:EU:C:2002:231, paras 11–12.
[49] Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV ('Achmea')* [2018] ECLI:EU:C:2018:158; Case C-741/19 *Republic of Moldova v Komstroy LLC ('Komstroy')* [2021] EU:C:2021:655.

Achmea concerned the question of whether Article 344 TFEU precluded the application of a bilateral investment protection agreement when the contracting state acceded to the EU.[50] The CJEU established that the intra-EU bilateral investment treaty would be against EU law since it would take the dispute outside the CJEU jurisdiction.[51] The CJEU relied on the principle of autonomy of the EU to state that international agreements cannot affect the powers laid down in the Treaties.[52] Relying on the ruling in *Opinion 2/13*, the Court reiterated that the legal system was designed to ensure the uniformity of the interpretation of EU law.[53] The Court went on to make a differentiation between investor-state arbitration and commercial arbitration. With commercial arbitration, since it is expressly based on the will of the parties, it does not have the same effect on the legal system as investor-state arbitration. Therefore, in these circumstances, there is more legal space provided to choose to go to commercial arbitration.

In *Komstroy*, the Court followed a similar logic.[54] The dispute arose because of a Moldovan investor and a Ukrainian investor having a dispute about the definition of 'investment'.[55] The dispute was referred to the CJEU by a preliminary ruling reference from the Paris Court of Appeal. The judgment confirmed the same distinction with regards to commercial arbitration, where the Court reasoned that since arbitral awards are reviewed by national courts, the principles of EU law can be examined in the process of that review.

In conclusion, when investor-state arbitration is concerned, autonomy is used as a limit. In situations of commercial arbitration, where the parties to a dispute choose to turn to arbitration, following the reasoning of the Court this is not barred by autonomy. On the other hand, in situations where arbitration affects the powers as envisaged by the Treaties, then the principle of autonomy is used as a bar. This distinction requires some attention. Although this may be a way for the CJEU to give commercial arbitration more space and accept it, it is still questionable whether that review will be accepted by the CJEU. Since this would mean that arbitral tribunals would interpret EU law without a review from the CJEU, it is hard to believe it will be accepted.

[50] Ibid para 23.
[51] Ibid.
[52] Ibid para 32.
[53] Ibid para 35; *Opinion 2/13* (n 45) para 174.
[54] *Komstroy* (n 49) para 43.
[55] Ibid para 15.

9.4.1.2 Argument of Uniform Application of EU Law and Arbitration

Ensuring effective and uniform application of EU law is another central argument used by the CJEU when it deals with limiting arbitration. It serves as a limit to arbitration when arbitral tribunals apply EU law and that application then needs to be checked. In the case of arbitration, this check is done by national courts in the post-award stage, which results either in the annulment or enforcement of the arbitral award. According to the CJEU's case law, when a case concerns the validity of an arbitration agreement or annulment of such an award that deals with EU law, national courts should have the possibility to review the application of EU law. However, this review is quite limited in practice.

Given the fact that arbitral awards enjoy *res judicata* effects, judicial review is limited to either enforcing the award or annulling it.[56] This means that if an error in law occurred, it is not possible to remedy the error in one part of the arbitral award.[57] The only remedy a national court would have would be to annul the arbitral award. This annulment is based on a violation of the uniform and effective application of EU law.

The limit on arbitration in the form of rendering it a violation of the uniform application of EU law is relevant when arbitration poses a risk to the effectiveness of any EU law norm. This is so when the balancing act between the benefits of arbitration and the potential violations it brings no longer favours the EU legal order. Hence, the uniform application of EU law argument becomes a bar to arbitration.

A good illustration of this is the *Mostaza Claro* judgment.[58] Although it is a case that stems from the field of consumer protection, which is quite specific and has a lot of secondary legislation for the protection of the weaker party, nevertheless it serves the purpose of showing how effective judicial protection is used by the Court. In general, the enforcement of consumer rights has been limited to the principles of effectiveness and equivalence by the case law of the CJEU.[59] However, the CJEU also made clear that domestic procedural rules should not make it extremely difficult for private parties, in this case consumers, to use their substantive rights under EU law. The Court went

[56] Manuel Penades Fons, 'The Effectiveness of EU law and Private Arbitration' (2020) 57(1) Common Market Law Review 1072.

[57] Ibid.

[58] Case C-168/05 *Mostaza Claro v Centro Móvil Milenium SL* [2006] ECLI:EU:C:2006:675.

[59] Pieter Jan Kuijper, Fabian Amtenbrink, Deirdre Curtin, Bruno De Witte, Alison McDonnell, Stefaan van den Bogaert, *The Law of the European Union* (5th edn, Wolters Kluwer International 2018) 1162.

further in stating that in order to ensure the effectiveness of the EU legal order, it is necessary to allow national courts to examine the validity of arbitration agreements in the post-award phase.[60] The CJEU justified this more intrusive approach as being 'necessary for ensuring that the consumer enjoys effective protection, in view of the real risk that he is unaware of his rights or encounters difficulties in enforcing them'.[61] The Court relied on the principle of equivalence, as it had previously also done in *Eco Swiss*, to rule that domestic public policy and EU public policy are complementary.[62]

Similar reasoning to *Mostaza Claro* can be found in the *Asturcom* judgment.[63] This case concerned a consumer who had not participated in the arbitration proceedings; however, the arbitral award was later issued and not annulled by the consumer. The arbitral award was enforced in Spain.[64] Firstly, it is clear from the case that the consumer was given the opportunity to annul the award in front of the Spanish courts.[65] Given this context, and once again relying on the principles of effectiveness and equivalence, the CJEU stated that if it were to put the obligation on the Spanish court to review and annul the award, this would go against the principle of *res judicata* and would impose 'an unjustifiable high price on the Member States'.[66]

9.4.2 *Interim Conclusion*

This section shows that the CJEU's approach limits arbitration based on autonomy and ensuring effective application of EU law. Although these arguments are quite reasonable from the point of view of ensuring and protecting the EU legal order from external influence, this cautious view may not be working in the CJEU's favour. Although this section has focused on the most integral cases while mapping out the legal room for arbitration, the discussion has also shown a broader 'cost' that would be incurred if international arbitration were used. This cost is twofold.

Firstly, for international arbitration to have room within the EU, a broader definition of autonomy needs to be applied. A softer definition of autonomy

[60] Penades Fons (n 56) 1072.
[61] *Mostaza Claro* (n 58) para 28.
[62] Ibid para 35.
[63] Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECLI:EU:C:2009:615, para 52.
[64] Ibid paras 39–46.
[65] Ibid para 37.
[66] Ibid paras 39–46.

would allow the EU to interact with external bodies, such as arbitral tribunals, without it posing a risk to constitutional norms of the EU. The 'cost' would be that arbitrators apply EU law in each case. This of course poses the risk that EU law would be interpreted incorrectly and would dilute the uniform application of EU law. However, as the system currently stands, arbitrators already apply EU law when dealing with an arbitration proceeding. Hence, it may be better for the EU to reduce the risks by opening up to the possibility of using arbitration as a dispute settlement mechanism.

Secondly, from the EU perspective, having more arbitration means a balancing act needs to be struck between effective judicial protection as enshrined under Article 47 Charter and having arbitration achieve access to justice from the international perspective. From the EU perspective, utilising arbitration comes at a cost of taking the dispute outside the scope of the EU judicial system, meaning that individuals would not receive the same guarantees as envisaged under Article 47 Charter. Paradoxically, though, on the flip side, this then means that using arbitration could resolve the problem individuals have in enforcing their rights.

From the international law perspective, these safeguards exist in the international domain within the arbitration practice. This, however, is not a gamble that the CJEU is willing to take, since there is no guarantee that these safeguards would be used. Therefore, it is necessary to perform a balancing act between the principles at stake.

9.5 CONSTITUTIONAL POTENTIAL FOR ARBITRATION WITHIN THE EU JUDICIAL SYSTEM

This section zooms in on how international arbitration could be utilised by the EU in order to guarantee individuals an opportunity to enforce their rights. This could take the form of a 'rights-compatible' process and a mechanism that would allow for access to court where a court is not available.[67] This section is divided into two sub-sections. Section 9.5.1 will discuss the ways forward in possibly using arbitration and Section 9.5.2 will analyse the practical implications of using arbitration alongside the EU judicial system. It will also draw together the whole discussion in order to see whether it is possible to use arbitration as a 'rights guarantor' mechanism and a supplementary tool to the EU judicial system and, if so, how this could be possible.

[67] The term rights-compatible is used in other fields, see, for example, Van Duin (n 20) 92.

9.5.1 *Way Forward for Potentially Using Arbitration in Fundamental Rights Violations*

A distinction should be made between law enforcement and rights enforcement in the EU when arbitration could potentially be used as a supplementary tool. Since the crux of using arbitration is to induce rights enforcement, this is the main focus. The reason for this distinction is twofold. Firstly, the main argument of the CJEU where arbitration is concerned has been that it needs to be limited mainly for the purposes of ensuring effective and uniform application of EU law; this can be related to law enforcement grounds.[68] This means that arbitration, as a consensual (commercial) dispute resolution mechanism, can be used since the parties know (or at least should) that they take the dispute out of the scope of the EU judicial system. Therefore, it comes down to a balancing act between application of EU law and party autonomy in order to guarantee rights enforcement.

It is not disputed that the EU judicial system operates on the idea that individuals derive rights from EU law, which should entail a possible remedy if such rights are infringed.[69] This presumption also operates on the basis that a right to an effective remedy should not be harmed by national procedural requirements that place grave burdens on the individual and possibly harm a claim to be lodged.[70] The CJEU has stated in numerous instances that an individual should not have their substantive rights hindered due to overburdensome procedural requirements of a Member State court system.[71] In precisely these situations, where strict national procedural rules hinder the possibility of access to court, for example, arbitration could be used to enforce rights. Since arbitration is predominantly made up of civil procedure, contract law, and private international law, it can be a fitting adjudication system to serve as a rights enforcement mechanism.[72] This way, an individual seeking to enforce their substantive rights would be able to do so with arbitration, avoiding the strict procedural hurdles of national courts or the limited standing before the CJEU.

[68] *Mostaza Claro* (n 58); Van Duin (n 20) 58.

[69] Opinion of AG Kokott in C-176/17 *Profi Credit Polska* [2018] ECLI:EU:C:2018:711, points 71–73.

[70] Case C-176/17 *Profi Credit Polska* [2018] ECLI:EU:C:2018:71, paras 61 and 69; Case C-49/14 *Finanmadrid* [2016] ECLI:EU:C:2016:98, para 52.

[71] In particular, this deals with time limits and costs, together with strict administrative requirements and other procedural rules. See, for example, Case C-433/11 *SKP k.s. v Kveta Polhošová* [2012] ECLI:EU:C:2012:702, para 34; *Credit Polska* (n 70) paras 63–64.

[72] George Bermann, *International Arbitration and Private International Law* (Brill Nijhoff 2017).

If one were to extrapolate the reasoning of the CJEU in consumer protection cases where the Court deals with situations involving a restriction of rights of consumers to an effective remedy and an exercise of rights conferred by the Unfair Terms in Consumer Contracts Directive, much could be used as an inspiration for using arbitration.[73] Given the fact that EU competences are expanding, and with it more secondary legislation is being drafted, there are more rights that are derived and need a viable remedy available. The expanding competences also result in the EU having more room to potentially violate fundamental rights, since it has more involvement within various fields. This means that a judicial system is necessary to mirror this – this is where arbitration could come in.

The caveat here is that it comes at the price of taking a dispute outside the scope of the EU judicial system and EU law would be interpreted by arbitrators. Therefore, this becomes a balancing exercise where the balance needs to be struck between effectively interpreting EU law and ensuring that individuals have a venue to seek redress for fundamental rights violations. The argument put forward in this chapter is that international arbitration should in no way replace the EU judicial system. The thesis is that arbitration could be used as a supplementary mechanism for when there is an enforcement gap in the EU. In addition to being an alternative way to remedy fundamental rights violations by the EU, arbitration can serve as a tool for rights compliance, hence stepping in when no access to an effective remedy is possible.

9.5.2 *Practical Implications for Using Arbitration within the EU Judicial System*

It is quite a bold statement to say that international arbitration should be used in situations where the EU violates fundamental rights of individuals, since in practice this would mean that arbitrators would apply and interpret EU law in situations where the EU has violated fundamental rights and the EU would allow for this (one would need consent for this from both sides). However, if one follows the reasoning that an individual who derives rights from EU law should also have a remedy available when those rights are violated, it would be beneficial for the EU to use arbitration as a supplementary mechanism, instead of not having any possibility to enforce their rights. Simply put, the balancing act rests with the question of whether it is better to use international

[73] Van Duin (n 20) 92; Case C-266/18 *Aqua Med* [2019] ECLI:EU:C:2019:282, paras 50–51; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1998] OJ L95/29.

arbitration and risk potentially diluting EU law than not having access to court available in situations of fundamental rights violation. This is because in practice arbitral tribunals apply EU law as developed by the CJEU because these tribunals want their arbitral awards enforced. Therefore, one could understand why the CJEU makes the argument of autonomy and uses a guarded approach in relation to arbitration, however, this approach harms the EU, especially as a global actor.

Institutionally speaking, the competence to act in this field is already established by the Treaties as discussed before, therefore no Treaty amendments would need to be made (neither are they desired). What is required, however, is a shift in approach. This is dependent on whether Member States could reach a common approach in how to treat arbitration, since most rules are still governed by domestic law. Moreover, it depends on the approach that the CJEU continues to develop towards arbitration. The question still stands whether commercial arbitration will keep being treated differently from investor-state arbitration or whether the lines will soon blur, depending on the cases that the Court receives.

The CJEU's approach also develops constitutional principles such as proportionality, subsidiarity, and conferral, which remain the principles at the EU's disposal to resolve questions that deal with arbitration.[74] Therefore, it is a matter of approach and using the principles in the EU's 'toolbox' in the relationship with arbitration. Practically speaking, at the time of writing, this may be hard to achieve since arbitration and the EU are not in a state of full cooperation as the two systems function independently. Taking this coexistence of systems together with the constitutionalisation of EU law, the abovementioned discussion shows the costs that come with using arbitration. With this said, the analysis has also shown openness and some space for arbitration within the EU legal order. This is something that both Member States and the EU should keep in mind.

9.6 CONCLUSION

In conclusion, the discussion on the relationship between EU law and international arbitration is left divided in practice. Although there are numerous benefits that can be derived from using arbitration as a dispute settlement mechanism, the fact that it exists outside the scope of the EU judicial system is an issue from the EU perspective. Given the growing EU competences and the rise in disputes that concern international trade matters, arbitration has

[74] Ferretti (n 22) 152.

become a favoured dispute resolution approach. Against this backdrop, the chapter has analysed how much legal space there actually is for international arbitration. This chapter has analysed what limits have emerged when arbitration enters the EU system. Reflecting on this, the concluding section has shown how international arbitration can be utilised within the EU judicial system in a way that would avoid diluting the EU's legal system but where the mechanism could be used in situations of rights enforcement for individuals.

Since one of the main objectives of the EU is to ensure proper access to justice, it is time to make more use of arbitration for EU law disputes. A way forward would be to allow more space for arbitration to provide a rights enforcement mechanism where no remedy is available on the EU level. What is required in order for this to be achieved at this stage mainly concerns a softer approach from the CJEU. This in no way means that international arbitration should replace the EU judicial system or undermine the autonomy and effectiveness of EU law. However, in situations where arbitration can and does serve as a dispute resolution mechanism in fundamental rights violations – here, the CJEU should be more understanding. Most importantly, this would guarantee individuals a chance to bring claims in situations of fundamental rights violations and therefore indeed fulfil the promise of a full system of remedies.

Given the benefits of using arbitration, it may be time to reconcile some of the tensions that arise in the relationship between arbitration and the EU. In no way does this chapter argue that arbitration should replace the existing judicial framework, but it may be time to ponder the question of how to move towards a more peaceful coexistence in order to allow a more welcoming use of arbitration. Given the costs that come with using this form of dispute settlement from the EU perspective, it may be time to perform a balancing act in trying to see how to utilise the adjudication method without hindering too many EU principles. In any case, this chapter has engaged in a more theoretical exercise on how the legal space could allow for arbitration to be used in fundamental rights violations.