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**SYMPOSIUM –
THE LEGAL RESEARCH NETWORK
(LRN) PAPERS**

Editorial and Preface to the Legal Research Network – Autonomy Papers

In September 2019, the Faculty of Law of ELTE Budapest hosted the Annual Conference of the Legal Research Network (LRN). This cooperation was initially founded in 2006 by the Faculties of Law of the Universities of Groningen, Turku and Uppsala: the Universities of Bristol, Budapest (ELTE), Ghent, Göttingen and Lille-Nord de France have since joined the network. Thematically, the LRN is a general network, which aims at improving the international profile of its members, strengthening thematic research cooperation between its staff, and promoting the international scientific perspectives of its young researchers. The most important event of the Network is its Annual Conference, which is held at one of the member universities around specific themes that can be approached from different fields of legal research. These conferences are organized year after year on the basis of an annual rotation system. Therefore, after the first opportunity in 2012, the Annual Conference of the LRN was again hosted in September 2019 by the Faculty of Law of ELTE University Budapest. It offered a common space for both senior and junior scholars to present and discuss their research in a stimulating international environment, which transcended the traditional boundaries of legal sub-disciplines. The conference was also dedicated to fostering the progress of PhD students, by senior academic staff actively taking part in the discussions following the presentations.

The conference theme for the Annual Conference in 2019 was autonomy, which is a basic principle and indispensable value of modern society, as well as of each and every legal system. Across all fields of law, the concept of autonomy has its special implications. Law protects the autonomy of individuals and associations by defending the boundaries of their own self-rule. Autonomy has not only to be assured and protected, but its content has to be defined and its limits set. Autonomy cannot be absolute and should not lead to the detriment of other values. Complex questions therefore arise, which may be addressed from different angles and on different levels: autonomy is certainly a theme that is approachable through various fields of legal research.

The conference had a very rich 3-day programme, covering a great number of disciplines, from criminal law to labour law and across civil procedure and constitutional law, just to name a few. In the present edition of the *ELTE Law Journal*, you can find a selection of the themes of the conference, which already represent this wide range of subjects. Besides the main theme of autonomy, the methods of comparative law also link the articles. Their richness of thought clearly shows that the concept of the LRN is valid and viable. As a member of the Legal Research Network, we see these articles, representative of the conference contributions, as

strong evidence that this cooperation is an essential and predominantly beneficial mechanism. Together with Dean Prof. Pál Sonnevend, chair, and Dr. Éva Gellérné Lukács, member of the organising committee, we express our hope that, despite the pandemic we will be able to meet soon at the next similarly fruitful annual conference.

Budapest, 10th March 2020

Krisztina Rozsnyai
vice-dean for international relations
member of the organising committee

Private Autonomy and Its Restrictions in Roman Law: An Overview Regarding the Law of Contracts and Succession

I Introduction

According to the famous statement of Heinrich Heine, *Corpus iuris* is the ‘Bible of egoism’. Although Heine’s conclusion is somewhat excessive, it is out of question that private autonomy had great importance in Roman law, and not only in *private law*¹ in which autonomy had a fundamental importance (especially in the *law of contracts*, which primarily contains ‘dispositive’ rules, from which the parties may differ by mutual consent, and in the *law of succession*, considering the principle of testamentary freedom)², but in *public law*³ as well.

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¹ The division of law into ‘private’ and ‘public’ law branches itself (a distinction that, as is well-known, has no fundamental importance in the legal thinking of common law jurisdictions) was based on the dichotomy of *utilitas privata* (private interest) and *utilitas publica* (public interest); cf. Ulp. D. 1, 1, 1, 2. On the problem of the distinction between private and public law, see e.g. Gábor Hamza, ‘Reflections on the Classification (divisio) into ‘Branches’ of Modern Legal Systems and Roman Law Traditions’ in Cosimo Cascione and others (eds), *Fides Humanitas Ius. Studii in onore di Luigi Labruna*, vol 4 (Editoriale Scientifica 2007, Napoli, 2449–2476) 2449ff.

² As for the *law of things*, we can refer, *inter alia*, to Hadrian’s and Justinian’s regime on treasure trove (cf. *Vita Hadr.* 18, 6 and Inst. 2, 1, 39). According to Inst. 2, 1, 39, if anyone found treasure in his own land, the Emperor Hadrian, following natural equity, adjudged to him the ownership of it. Hadrian established the same rule when the treasure was found by accident in a sacred or religious place. If the treasure was found in the land of another by accident, and without specially searching for it, Hadrian gave half to the finder, half to the owner of the land; and upon this principle, if the treasure was found in a land belonging to the Emperor, he decided that half should belong to the latter, and half to the finder. Consistently with this, if anyone finds treasure in a land belonging to the imperial treasury, or in a public place, half belongs to the finder, and half to the treasury (*fiscus*), or the *civitas*. The individualist and liberal approach of Roman law is reflected in this regime on treasure trove, as a kind of expression of private autonomy. (The original concept by Hadrian related to treasure trove is currently amended with numerous ‘public law elements’, even in those legal systems that are based on the Roman law tradition, since it is obvious that nowadays treasures of great archaeological and cultural importance would not be awarded exclusively to the finder or for the landowner. An exclusively ‘private law approach’ seems to be unsustainable today, as the ruling of treasure trove deserves a complex approach, according to which any treasure could be regarded as a national heritage or even a kind of common heritage of mankind.)

³ Without a detailed discussion we can refer e.g. to the Italian and provincial administrative units (*civitas*; *municipium*; *colonia*; *res publica*; *vicus*; *pagus*) having autonomy. In this regard, we note that *civitates* were considered as private individuals in Roman law (see Gai. D. 50, 16, 16: ‘*civitates... privatorum loco habentur*’), having their own legal capacity (cf. Flor. D. 46, 1, 22).

‘Autonomy’ is a modern concept (the idea of *autonomy* and *individualism* was only developed in the legal science of the 19th century⁴)⁵ but its application to Roman law cannot be considered as anachronistic or unhistorical. In Roman society, privacy was largely respected. The private law legislation intruded into the private sphere relatively rarely but, if the legislator did so, the relating legal norms often became unpopular (in this regard, we can refer e.g. to the Augustan laws on family relations⁶).

As an example of Roman aversion to the law’s intrusion into the private sphere, one can refer, *inter alia*, to the problem of expropriation. Expropriation did not win a wide range of applications in classical Roman law.⁷ It tended to be applied instead in the age of the later Roman Empire, which was not so ‘sensitive’ to private sphere.⁸

⁴ See Alfons Bürge, *Das französische Privatrecht im 19. Jahrhundert* (2nd edn, Klostermann 1995, Frankfurt am Main) 65.

⁵ One can refer in this regard, for example, to the concept of legal relation (*Rechtsverhältnis*), which was elaborated by *Friedrich Carl von Savigny*, on the basis of the Kantian concept of autonomy of will. In Savigny’s famous ‘*System des heutigen römischen Rechts*’ (the theory of private law of which can be regarded as the philosophy of positive law based on *Kant’s* works), the ‘great Lord’ of legal science emphasised that the essence of legal relation is the independent reign of individual will. On this topic, see from the modern literature e.g. Alejandro Guzmán Brito, ‘Los orígenes del concepto de “Relación Jurídica”’ (2006) 28 *Revista de estudios histórico-jurídicos* 187–226, 187ff. The modern concept of contract developed by the Pandectist legal science in the 19th century was also based on the Kantian concept of autonomy of will. As for the juridical act (legal transaction), the Pandectist concept of juridical act matches the principle of private autonomy perfectly [cf. Werner Flume, *Allgemeiner Teil des bürgerlichen Rechts*, vol 2, *Das Rechtsgeschäft*, (4th edn, Springer 1992, Berlin – Heidelberg – New York) 23]; juridical act is an act regarding the manifestation of private autonomy; in other words, a juridical act is a private declaration of will (i.e. declaration of will made by a private individual). [However, as for the autonomy of contractual will, it already appeared e.g. in the works of *Pothier*, who strongly accentuated the importance of the contractual will of the parties. Cf. e.g. Robert-Joseph Pothier, *Traité des obligations*, vol 1 (Debure l’ainé 1764, Paris) 9. It also deserves mentioning that the modern concept of private autonomy has its roots in canon law, too. On this problem see e.g. Peter Landau, ‘Pacta sunt servanda. Zu den kanonistischen Grundlagen der Privatautonomie’ in Mario Ascheri and others (eds), *Ins Wasser geworfen und Ozeane durchquert. Festschrift für Knut Wolfgang Nörr* (Böhlau 2003, Köln 457–474) 457ff.]

⁶ See the *lex Iulia de maritandis ordinibus* and *lex Papia Poppaea*, which granted various privileges to married people and parents of children, but imposed several economic and social disadvantages on unmarried persons and childless married persons. On this topic see e.g. Pál Csillag, *The Augustan laws on family relations* (Akadémiai Kiadó 1976, Budapest); Riccardo Astolfi, *La ‘lex Iulia et Papia’* (4th edn, CEDAM 1996, Padova); Dieter Nörr, ‘Planung in der Antike. Über die Ehegesetze des Augustus’ in Tiziana J. Chiussi, Wolfgang Kaiser, Hans-Dieter Spengler (eds), *Historiae iuris antiqui. Gesammelte Schriften*, vol 2 (Keip, 2003, Goldbach bei Aschaffenburg) 1093ff; Hans Hermann Seiler, ‘Römische Ehe und augusteische Ehegesetzgebung’ in Hans Hermann Seiler, *Geschichte und Gegenwart im Zivilrecht. Ausgewählte Schriften* (Elke Hermann ed, Heymanns 2004, Köln–Berlin–München) 117ff.

⁷ Instead of expropriation, which is an institution of ‘administrative law’, purchases were concluded instead – sometimes under political pressure – with the persons concerned.

⁸ By nature, Roman ownership (*dominium, proprietas*) had some other limits, too. It was by no means an unrestricted right. Among the restrictions on ownership, one can also refer to the *iura vicinitatis*, or e.g. to the prohibitions of alienation. Confiscation was often applied in Roman law as punishment. Moreover, the origin of modern prohibition of abuse of rights is rooted in Roman law, too [cf. e.g. *XII tab.* 4, 2b (regarding the sanction of three times sale of a *filius familias*); Ulp. D. 8, 5, 8, 5 (the famous case of *taberna casiarum*)], although – as an

It is beyond question that the autonomy of the will shows its clearest expression in the law of contracts and in the law of succession. In this paper, we only want to deal with a few problems of autonomy in the context of the law of contracts and law of succession, with somewhat generalised references to some famous topics of Roman law in the context of private autonomy and its restrictions.

II Some Questions of Private Autonomy in the Roman Law of Contracts

The question of autonomy in the context of the law of contracts is a very complex issue.

On the one hand, the law of contracts is based, in theory, on the freedom of parties, for whom it is allowed to decide to enter or not to enter into a contractual relationship; and, if they want to, they are permitted to decide, in what type, form, and content to conclude the contract. The contracting parties may differ from the provisions of positive law if it is not prohibited by a mandatory rule (*ius cogens* – see e.g. the provisions limiting interest rates).⁹ This is the essence of the modern principle of *contractual freedom*.

On the other hand, *formalism* (ritual forms) had a great importance in the archaic age of Roman law. In this period, the essence of contract was not the individual will of the parties but the rite. The fundament of the binding force of a contract was the form containing ritual elements (see, for example, the institution of *sponsio* which was a contract of a ritual nature). The principle ‘*voluntas mater contractuum est*’ [(contractual) will is the mother of conventions] is only valid in the developed Roman law, in which the contractual will of the parties (*voluntas*) has great importance, and in which many contracts are formless. Nevertheless, the ‘requirement of standardisation’ (*Typenzwang*) remained in the whole history of Roman law, although it had been significantly dissolved by means of (praetorian) *actiones in factum conceptae*; by means of expanding the scope of actionable pacts; or by means of giving an *actio praescriptis verbis*, etc. The principle of ‘*pacta sunt servanda*’ was not the outcome of Roman law but this fundamental principle was developed by the scholars of canon law and, later, by the representatives of natural law in the modern age.¹⁰ The distinction between ‘*pactum*’ and ‘*contractus*’ has an important role in Justinianic law, too: only parties to

expression of private autonomy – ‘no one who does what he has a right to do is considered to commit fraud’ (*Nullus videtur dolo facere, qui suo iure utitur*; see Gai. D. 50, 17, 55).

⁹ In general, it should be noted that violation of a mandatory rule may lead to invalidity in Roman law, too. The system of causes of invalidity is a strong restriction of the private autonomy of the contracting parties. A contract may be invalid, for instance, due to a mistake, deception, or because it is against the law or good morals, or because the contract was made in circumvention of the law. The relevant rules are constraints of private autonomy.

¹⁰ For the roots of the *pacta sunt servanda* principle, see from canon law e.g. the relevant discussions of Bernardus Papiensis, Vincentius Bellovacensis, and Hostiensis. Cf. especially the statement ‘*pax servetur, pacta custodiantur*’ in *Liber Extra* 1, 35, 1 *de pactis*: ‘*Pacta quantumcunque nuda servanda sunt*’. From the later (rationalist) natural law literature see primarily *Grotius*, *De iure belli ac pacis*, 2, 11 *De promissis*.

agreements with a so-called *civilis causa* (the legal basis for the contract to be sued) were legally compellable, even in this period of Roman law.

Apart from contractual formalities, the private autonomy of the contracting parties was respected, and it was only rarely restricted.

According to the famous sentence of Cervidius Scaevola, '*ius civile vigilantibus scriptum est*': civil law was written for vigilant people (Scaev. D. 42, 8, 24), i.e. it was made for those who are diligent in protecting their own rights. According to Reinhard Zimmermann, there was very little in the Roman law of contracts to limit this core feature of economic liberalism. The law merely provides the framework within which the individuals may operate.¹¹

Except in, for example, the system of causes of invalidity or the problems of *novatio*, this paper only brings up the following examples of private autonomy.

a) It was permitted in Roman law to have a special agreement regarding the liability of the parties or the risks.

As for the *contractual liability*, it was permitted in classical and in Justinianic Roman law as well, to soften or to intensify the liability of the parties (compared to the provisions of positive law). For example, on the one hand, liability only for *dolus* ('deceit' or 'fraud') instead of liability for *culpa* ('fault' or 'negligence'), or a responsibility for *culpa* instead of *custodia*-liability was allowed to be specified, and, on the other hand, the establishment of a more rigorous *culpa*- or an objective *custodia*-liability ('safekeeping') instead of *dolus*- or *culpa*-liability was also permitted. Nevertheless, the contractual freedom of the parties had its limits. The liability for *dolus* – since *dolus* is contrary to the objective principle of *bona fides* – was not allowed to be excluded; such an agreement was null and void in Roman law,¹² too. It should generally be noted that *bona fides* (good faith and fair dealing) can itself be considered as a limit of contractual autonomy,¹³ too.¹⁴

As for the *allocation of risks*, it was based decisively on the private autonomy of the parties. An agreement regarding the risks can have a special importance, for example in a contract of sale. According to the principle '*periculum est emptoris*', the purchaser, when the sale has been completed, must assume the risk.¹⁵ This rule was only concerned, however,

¹¹ Reinhard Zimmermann, *The law of obligations. Roman foundations of the civilian tradition* (3rd edn, Oxford University Press 1996, Oxford) 258.

¹² Cf. Paul. D. 13, 6, 17 *pr.* regarding *commodatum* (loan for use); Ulp. D. 16, 3, 1, 7 regarding *depositum* (deposit); Ulp. D. 50, 17, 23 regarding, in general, the *bonae fidei iudicia*; see, in addition, Paul. D. 2, 14, 27, 3.

¹³ Cf. Giovanni Meruzzi, *L'exceptio doli dal diritto civile al diritto commerciale* (CEDAM 2005, Padova), 203ff ('come limite all'autonomia contrattuale').

¹⁴ On the problems of *bona fides* see from the Hungarian literature the works of András Földi, e.g.: András Földi, *A jóhiszeműség és tisztesség elve* [(Principle of good faith and fair dealing) ELTE ÁJK 2001, Budapest].

¹⁵ Cf. Paul. D. 18, 6, 8 *pr.*: '[...] perfecta emptione periculum ad emptorem respiciet'. On the principle '*periculum est emptoris*' see e.g. Wolfgang Ernst, 'Periculum est emptoris' (1982) 99 (1) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 216–248, 216ff; Martin Bauer, '*Periculum emptoris*'. *Eine dogmengeschichtliche Untersuchung zur Gefahrtragung beim Kauf* (Duncker & Humblot 1998, Berlin); Éva Jakab, *Risikomanagement beim Weinkauf* (C. H. Beck 2009, München).

with ‘acts of God’ (*vis maior*; i.e. events which human weakness cannot prevent¹⁶), and the allocation of other contract-specific risks was the object of the agreement of the parties. Other examples of the special clauses concerning the allocation of risks can be mentioned from the sphere of *locatio conductio* [cf. e.g. Flor. D. 19, 22, 36 on the topic of *locatio conductio operis* (contract of enterprise)].

b) A good example of the restriction of contractual autonomy is the rule of *laesio enormis* in postclassical Roman law.

According to classical law, the determination of the purchase price was fully an object of the parties’ agreement. In this regard, the ‘economic liberalism’ and private autonomy were fully respected. Taking advantage of one another was ‘naturally’ permitted for the contracting parties (cf. Ulp. D. 4, 4, 16, 4: ‘...in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire.’). In a transaction of purchase and sale it is naturally conceded that the parties can either purchase or sell something for more or for less, and hence mutually circumvent one another (cf. Paul. D. 19, 2, 22, 3). The law of contracts primarily provides a framework within which individuals may operate, and it does not usually have a protective function. A notable exception was the Roman legislation against usury, but it is out of the topic of the contract of sale. No attempts were made in classical Roman law to interfere with the freedom of the parties to a contract of sale to fix the price.¹⁷

The rescission of the sale – due to the lack of equivalence – was originally and even later excluded. However, in case of *laesio enormis*,¹⁸ which was a product of the economic crisis in the end of the 3rd century, the freedom to determine the purchase price was already restricted, but only in the sale of real estate. By means of the disputed legal institution of *laesio enormis*, the legislator restricted the private autonomy of the parties with regard to the sale of real estate, which could be rescinded by the seller if he did not receive even half of the real value of the estate.¹⁹ The legal construction of *laesio enormis* (which rule shows an entirely

¹⁶ See Gai. D. 44, 7, 1, 4. Furthermore, see Gai. D. 13, 6, 18 *pr.*; Ulp. D. 19, 2, 15, 2; C. 4, 65, 28. As for the literature on *vis maior* see, for example, Adolf Exner, *Der Begriff der höheren Gewalt ('vis maior') im römischen und heutigen Verkehrsrecht* (Hölder 1883, Wien); Alfredo De Medio, ‘Caso fortuito e forza maggiore in diritto romano’ (1908) 20 *Bullettino dell’Istituto di Diritto Romano ‘Vittorio Scialoja’* 157–209, 157ff; Theo Mayer-Maly, ‘Höhere Gewalt: Falltypen und Begriffsbildung’ in Hermann Baltl (ed), *Festschrift für A. Steinwenter* (Hermann Böhlau Nachfolger 1958, Graz–Köln, 58–77) 58ff; Wolfgang Ernst, ‘Wandlungen des “vis maior”-Begriffes in der Entwicklung der römischen Rechtswissenschaft’ (1994) 22 *Index. Studi camerti di studi romanistici* 293–321, 293ff; Felix Wubbe, ‘Vi tempestatis’ in Jean-François Gerkens (ed), *Mélanges F. Sturm*, vol 1 (Editions juridiques de l’Université de Liège 1999, Liège, 579–593) 579ff.

¹⁷ See Zimmermann (n 11) 258.

¹⁸ See C. 4, 44, 2 and 8.

¹⁹ From the virtually boundless literature of *laesio enormis*, see e.g. René Dekkers, *La lésion énorme* (Librairie du Recueil Sirey 1937, Paris); Boudewijn Sirks, ‘La “laesio enormis” en droit romain et byzantin’ (1985) 53 *Tijdschrift voor rechtsgeschiedenis* 291–307, 291ff; Martin Pennitz, ‘Zur Anfechtung wegen “laesio enormis” im römischen Recht’ in Martin J. Schermaier, J. Michael Rainer and Laurens C. Winkel (eds), *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly* (Böhlau 2002, Köln–Weimar–Wien, 575–589) 575ff; Matthias Armgardt, ‘Zur Dogmengeschichte der „laesio enormis” – eine historische und rechtsvergleichende Betrachtung’ in Karl Riesenhuber, Ioannis K. Karakostas (eds), *Inhaltskontrolle im nationalen und Europäischen Privatrecht* (De Gruyter 2009, Berlin, 3–18)

different approach compared to classical law) can be regarded, in our opinion,²⁰ as one of the cases of annulment according to *ius civile* in Roman law.

III Private Autonomy in the Roman Law of Succession

Private autonomy is of great importance, by nature, in the law of succession, too.

Testamentary freedom is undoubtedly one of the most important expressions of private autonomy. The testator's freedom to make a last will was already provided by the Twelve Tables (cf. *XII tab.* 5, 3²¹). However, in Roman law, testamentary freedom was restricted from several aspects. Two examples are highlighted as follows.

a) The testator's freedom was significantly restricted through the *statutes on the limits of legacies*. Such were the *lex Furia testamentaria*, which fixed the maximum amount of a legacy at one thousand *asses* (this was the earliest statute setting limits for legacies²²); the *lex Voconia*, according to which nobody could receive by legacy more than the heir;²³ and the *lex Falcidia*, which provided that legacies should not exceed three quarters of the testator's estate.²⁴ These laws can be considered as sharp restrictions of testamentary freedom and, therefore, can be regarded as relatively rare signs of Roman law interventions into the private sphere.

b) Another significant limitation of testamentary freedom was the regulation considering *debita portio*, from the classical era of Roman law. According to this, the descendants, or, in their absence, the ascendants, or, in their absence, the siblings of the testator shall have at least one fourth of the legitimate portion of inheritance (cf. Ulp. D. 5, 2, 1; Inst. 2, 18, 1). In modern jurisdictions, *reserved portion* can be regarded as the most significant limit of testamentary freedom. In civil law jurisdictions, reserved portion is an essential part of the inheritance law, contrary to *modern English law*, in which all property may be disposed of by

3ff; Daniil Tuzov, 'La "rescissio" della compravendita nel diritto romano tardoclassico e postclassico' in Luigi Garofalo (ed) *Actio in rem' e actio in personam. In ricordo di Mario Talamanca* (CEDAM 2011, Padova, 835–891) 835ff; Aleksander Grebieniow, 'La "laesio enormis" e la stabilità contrattuale' (2014) 61 *Revue internationale des droits de l'Antiquité* 195–216, 195ff; Paola Lambrini, 'Ipotesi in tema di rescissione per "lesione enorme"' in Zuzanna Benincasa, Jakub Urbanik (eds) *Mater familias. Scritti romanistici per Maria Zabłocka* (2016, Warszawa, 453–464) 453ff. – From Diocletian's time, the other famous example of the direct intervention into the price was the *edictum de pretiis rerum venalium* (301) [cf. Siegfried Lauffer (ed), *Diokletians Preisedikt* (De Gruyter 1971, Berlin)].

²⁰ See Iván Siklósi, *A nemlétező, érvénytelen és hatálytalan jogügyletek elméleti és dogmatikai kérdései a római jogban és a modern jogokban* [(Theoretical and dogmatic questions of the inexistence, invalidity, and ineffectiveness of juridical acts in Roman law and in modern legal systems), ELTE Eötvös Kiadó 2014, Budapest] 234ff.

²¹ *XII tab.* 5, 3 (of which several versions are known, cf. Cic. *De invent.* 2, 50, 148; Pomp. D. 50, 16, 120; Paul. D. 50, 16, 53 *pr.*) provides the opportunity to bequeath [by will (probably by *mancipatio familiae – testamentum per aes et libram*)] the property (*familia pecuniaque*) of a Roman citizen *sui iuris*.

²² Cf. Gai. 2, 225; L. s. reg. 1, 2.

²³ Cf. Gai. 2, 226.

²⁴ Cf. e.g. Gai. 2, 227.

will, and in which a reasonable part or a reserved portion is currently not institutionalised (as opposed to early *English Common law* in which a writ *de rationabili parte bonorum* was available for the wife and the children of the deceased).

When it comes to the private autonomy in the law of succession, it is particularly important to refer to the Roman principle of *favor testamenti*, too. From the classical period of Roman law, this principle became a widely applied rule.²⁵ According to *favor testamenti*, in conditions mentioned in wills, the intention, rather than the words of the testator, should be considered. (In connection with the principle of *favor testamenti*, the partial invalidity e.g. had of greater importance in the Roman law of succession,²⁶ than that in the law of contracts.)

²⁵ Cf., in general, Pap. D. 35, 1, 101 *pr.*; Paul. D. 50, 17, 12; Marc. D. 34, 5, 24.

²⁶ Cf. e.g. Pap. D. 5, 2, 15, 2; Pap. D. 5, 2, 28; Paul. D. 5, 2, 19; Paul. D. 28, 5, 20, 2; Ulp. D. 5, 2, 24; Marci. D. 28, 7, 14; Inst. 2, 14, 10.

Do Human Rights Belong Exclusively to Humans? The Concept of the Organisation from a Human Rights Perspective

‘a corporation [...] has no soul to be damned, and no body to be kicked’
(*Edward, First Baron Thurlow*)

I Introduction

The idea of an organisation holding human rights appears to be inherently contradictory, an oxymoron.¹ How can it be possible that organisations can invoke rights especially designed for the protection of living human beings? Human rights is the discourse that entails a claim based on the notion of the inherent dignity and the embodied vulnerability of human beings.² By contrast, organisations don’t have a conscience, don’t breathe or eat, can’t be enslaved and can’t give birth, but they can live forever, can change identity in a day, cut off parts of themselves and turn into new ‘persons’, and can have simultaneous residences in many different countries.³ However, to others, the concept of organisations’ human rights is relatively unproblematic, as organisations may have rights and obligations as legal subjects.⁴ Moreover, some have lobbied for granting organisations the right to freedom of religion, free speech, and other constitutional protections.⁵ By invoking the concept of human rights, organisations extend their claims for rights to invoke something approaching a form of legal

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¹ Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave MacMillan 2010) 1.

² Anna Grear, ‘Challenging Corporate Humanity Legal Disembodiment, Embodiment and Human Rights’ (2007) 7 (3) *Human Rights Law Review* 511–543, 516.

³ Thom Hartmann, *Unequal Protection How Corporations Became “People” – and How You Can Fight Back* (2nd edn, Berrett-Koehler Publishers 2010) 10.

⁴ Grear, *Redirecting Human Rights...* (n 1).

⁵ See *Citizens United v Federal Election Commission* No. 08–205. Decided January 21, 2010 and *Burwell, Secretary of Health and Human Services, et al. v Hobby Lobby Stores Inc.* Decided June 30, 2014.

humanity.⁶ This tendency can lead very easily to treating organisations as the moral equivalent of living human beings.⁷

Taking this threat into account, the extension of human rights to organisations as beneficiaries should be investigated closely.⁸ Many difficulties need to be solved in order to ensure an adequate level of human rights protection for human beings and organisations as well. To avoid contingency, thinking in a coherent system based on objective considerations is vital in this context. This goal can be achieved by creating a problem map based on two significant aspects. The first lays emphasis on the organisation, and the second focuses on human rights, in accordance with the German constitutional approach. According to Article 19 (3) of the German Constitution, the *Grundgesetz*, fundamental rights also apply to domestic legal persons to the extent that their nature permits.⁹ When applying this provision, the German Constitutional Court has regard to both the nature of the rights and to the nature of the legal person.¹⁰

Space restrictions do not permit us to consider all the aspects of the problem map of organisations as human rights-holders, so in the following sections only its main frames will be underlined to facilitate a better understanding of the context of this paper. When focusing on organisations as the designated first part of the problem map, many questions emerge. For instance, when organisations vindicate human rights protection, are the individuals or the organisations the real right-holders? It is unequivocal that people are human rights holders, even when they join or form an organisation. However, the question is, whether the organisation itself can be a right-holder, and not just the individuals behind it. In this regard, three different approaches can logically be distinguished. The first is that only human beings are human rights beneficiaries, and for this reason organisations are excluded from human rights protection. The second is an instrumental justification, according to which the inclusion of organisations under the protective ambit of human rights serves only as a means of defending the human rights of human beings. There is a third option, whereby the human rights protection of organisations is independent from the individuals' human rights protection. In this case, the organisation is a human rights beneficiary in its own right. The choice between these competing concepts demands the elaboration of human rights justification for the involvement of organisations, which is not the subject of this paper, for this reason this issue will not be examined in more detail. However, attention needs to be drawn to the fact that many courts accept applications claiming human rights abuses from organisations including

⁶ Grear, 'Challenging Corporate Humanity...' (n 2).

⁷ Grear, 'Human Rights – Human Bodies? Some Reflections on Corporate Human Rights Distortion, The Legal Subject, Embodiment and Human Rights' (2006) (July) *Theory Law Critique* 171–199, 189.

⁸ Grear, 'Challenging Corporate Humanity...' (n 2) 7.

⁹ In this paper, the words human rights and fundamental rights are interchangeable. Human rights will be used to refer to international context and fundamental rights will be used to the rights guaranteed by national constitutions.

¹⁰ Peter Oliver, 'Companies and their fundamental rights: A comparative Perspective' (2015) 64 (June) *International Law Quarterly*, 661–696, 692.

the European Court of Human Rights, the Hungarian and the aforementioned German Constitutional Court as well.¹¹ In conclusion, pursuant to these organs, organisations are included in human rights protection. Based on this practice, this paper does not bring this status into question, it accepts organisations as human rights beneficiaries.¹²

The second part of the problem map focuses on human rights and the question of which rights can be invoked by organisations and for what reason. When examining whether a certain human right can be possessed by an organisation or not, first the major difference between a human being and an organisation needs to be clarified from a fundamental rights approach. This aspect appears in many case law as the very nature of the human rights.¹³ Based on this aspect, the organisations' fundamental rights can be roughly divided into three groups.¹⁴ The first group contains the rights which are wholly inapplicable to organisations, for instance prohibition of torture, inhuman or degrading punishment.¹⁵ Other rights are always and without discussion regarded as applicable to organisations, such as protection of property.¹⁶ The third group of human rights is in the middle, meaning that the applicability of these rights is open to debate, for instance the protection of home or the freedom of expression in a commercial context.¹⁷ In addition, a third facet of the problem map should be mentioned, namely the extent of being a human rights holder as an organisation. In a broad sense, this is included in the second question concerning human rights, although considering its significance, it shall be mentioned specifically.¹⁸

These are the main directions which shall be interrogated as a whole in order to decide whether an organisation can be a human rights-holder in a specific case or not. Nevertheless, in the following, this paper focuses on the concept of the organisation from a human rights

¹¹ See at the Article 34 European Convention on Human Rights, the Article I Section (4) of the Hungarian Constitution and the Article 19 (3) of the *Grundgesetz*. Pursuant to Article 34 of European Convention on Human Rights, the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.

¹² This paper accepts organisations as human rights beneficiaries and tries to shed light on the fact that there is a need for an original concept of the organisation from a human rights perspective, as will be discussed later in more detail.

¹³ The European Court of Human Rights, the Hungarian and the German Constitutional Court's case law have examined the nature of the given fundamental right to decide whether it can be invoked by a corporate entity or not.

¹⁴ See the study by Marius Emberland, *The Human Rights of Companies* (Oxford University Press 2006, Oxford).

¹⁵ Winfried H.A.M. van den Muijsenbergh, Sam Rezai, 'Corporations and the European Convention on Human Rights' (2012) 25 *Pac. McGeorge Global Bus. & Dev. L.J.* 43–68, 50. See also *Verein Kontakt-Information-Therapie (KIT) v Austria*, Appl. No. 11921/86, See also the study by Emberland (n 14).

¹⁶ Article 1 of Protocol 1 to the European Convention on Human Rights says every natural or legal person is entitled to the peaceful enjoyment of his possessions.

¹⁷ See the study by Marius Emberland (n 14).

¹⁸ This part might contain the aspects, which determine the extent of the human rights protection of organisations. For instance, what is the role of the purposes and objectives of the organisation in question? Can a profit-oriented organisation claim the freedom of religion or can a private military organisation rely on human rights standards, or do these purposes preclude these organisations from the protective ambit of human rights?

perspective. In this regard, the future purpose is to determine an own positive definition of an organisation for the Hungarian fundamental rights practice, with the help of the Hungarian, the German and the European human rights perspective. However, this essay now takes just the first step to do so by naming three aspects which determine a negative definition of this term. To achieve this first objective, the European Court of Human Rights' case law and the Hungarian views will assist. The Hungarian perspective is fundamental for this essay, because it is not possible to provide an adequate concept for organisation from a human rights perspective without a profound understanding of the Hungarian views and practice concerning organisations' fundamental rights. The European Court of Human Rights' case law is relevant in this context for numerous reasons. Due to the fact that corporate entities were always intrinsically favoured by the framers of the European Convention on Human Rights, the European Court of Human Rights does not limit human rights standards to natural persons.¹⁹ For this reason, the European Court of Human Rights' case law has thorough views in relation to organisations' human rights.²⁰ Besides all these reasons, it is also very important that the European Convention system is widely thought to be the most juridically mature supranational human rights regime and there is a widespread perception that the European Court of Human Rights is the most developed and successful international human rights forum.²¹ Taking these perceptions into account, the practice of Strasbourg cannot be avoided when analysing the concept of the organisation from a human rights perspective.

In the following, the three elements of the negative definition of the organisation from a human rights approach will be presented through the results of these two practices. The main statements of the relevant cases of Strasbourg and Hungary will demonstrate the existence and the necessity of these three elements.

II Why Organisations?

Before identifying the three aspects of the negative definition, a preliminary issue needs to be elaborated, namely why the potential human rights-holder is called an organisation and what this term intends to cover. It seems to be obvious that entities established by individuals refer to artificial persons, as opposed to natural persons, and comprise all bodies which are not natural persons. However, artificial persons may have a wider scope of non-human beings than organisations, because nowadays this term may encompass artificial intelligence, rivers, whole ecosystems or animals as well.²² These non-human beings can be seen also as artificial persons

¹⁹ Grear, *Redirecting Human Rights...* (n 1) 25.

²⁰ See Emberland (n 14).

²¹ Grear, *Redirecting Human Rights...* (n 1) 24.

²² Robert van den Hoven van Genderen, 'Do We Need New Legal Personhood in the Age of Robots and AI?' in *Robotics, AI and the future of Law* (Springer Nature Singapore 2018). See also <<https://www.theguardian.com/global-development-professionals-network/2017/apr/21/rivers-legal-human-rights-ganges-whanganui>>

that may claim legal or even constitutional protection.²³ For this reason, artificial persons cannot be appropriate for this writing. The phrase of legal person cannot be an adequate concept either, especially if thinking about entities that have no legal personality under national law or private law but still can be bearer of rights and obligations in a limited way, such as civil companies in Hungarian private law.²⁴ On the basis of these aspects, the term of organisation seems to be suitable in this context. In particular, as this paper tries to cover those entities that are formed by human beings and act for the benefit of human beings in a broad interpretation, this does not definitely imply the recognition of legal personality by the state. Nevertheless, these entities shall be independent entities, the existence of which shall be independent of their members.²⁵ If otherwise, certain human rights would be held by the several individuals who make up the organisation and the right would be 'their' right and not 'its' right.²⁶ The notion of the organisation is also supported by the fact that the European Convention on Human Rights encompasses the term of non-governmental organisations as human right holders.

Regarding the category of the organisations entitled to apply for human rights protection, the scope is broad; there are non-profit associations, labour unions, political parties, foundations, churches, monasteries, and all sorts of economic enterprises, such as limited liability companies, limited partnerships and building societies.²⁷ This indicates that these entities can be large or small to different degrees, they can have very different purposes and different levels of legal personality. Among these organisations, there are legal entities recognised as bearers of rights and duties in a limited way but lacking the legal status of a legal person, and there are legal entities having legal personality.²⁸ There are partnerships based on the personal involvement of their members too, like cooperative societies, or legal entities such as the unification of funds, foundations, or entities with financial interests, such as limited liability companies.²⁹

accessed 3 November 2019; <<https://www.climatechangenews.com/2017/04/03/indian-court-awards-legal-rights-person-nature/>> accessed 3 November 2019.

²³ Lawrence B. Solum, 'Legal Personhood for Artificial Intelligences' (1992) 70 N.C. L. Rev. 1231–1287.

²⁴ This topic will be discussed in more detail in the following. See more information about civil companies in Section 5/A of the Act CLXXV of 2011 on the Freedom of Association, on Public-Benefit Status, and on the Activities of and Support for Civil Society Organizations.

²⁵ Gear, 'Challenging Corporate Humanity...' (n 2) 7.

²⁶ Peter Jones, 'Human Rights, Group Rights, Peoples Rights' (1999) 21 (1) Human Rights Quarterly 86; Gear, 'Challenging Corporate Humanity...' (n 2) 8.

²⁷ Tom Zwart, *The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee* (Martinus Nijhoff Publishers 1994, Dordrecht) 47.

²⁸ For instance, civil companies in Hungarian law or oHG, KG, GbR in German law.

²⁹ See at the Section 3:325 (1), Section 3:88, Section 3:378 and Section 3:88 of the Hungarian Act V of 2013 on the Civil Code. See also at Samuli Skurnik, 'The Role of Cooperative Entrepreneurship and Firms in Organising Economic Activities – Past, Present and Future' <<https://pdfs.semanticscholar.org/91dc/b354eab58ad8d7bb6fa8973e8ba404977808.pdf>> accessed 27 January 2020. See also Jerker Nilsson, Organisational principles for co-operative firms (2001) 17 (3) Scand. J. Mgmt. 341.

To determine the concept of an organisation from a human rights perspective, the common features of these organisations shall be examined and identified in a general context, with a special focus on the human rights approach. By reviewing the common features of these organisations, the elements of the negative definition appear.

III Three Elements of the Negative Definition

1 No Legal Personality Under National Law

To identify what makes an artificial person become an organisation, first it needs to be examined from when an organisation can exist. Based on the beginning of the organisations' existence, it can be stated that the concept of organisation from a human rights perspective has a wider scope than being a legal personality under national law, as it was mentioned before. Under national law, legal personality is often conferred on a body, which has reached a certain level of organisation, while other entities, although they may be bearers of rights and duties in a more limited way, are not recognised by the state as legal persons. Considering this, the concept of the organisation from a human rights perspective is not equivalent to legal persons under national law. Although most of the organisations bringing applications before constitutional or human rights courts are legal persons, having a legal personality is not a prerequisite.³⁰ This conclusion can be found in the European Court of Human Rights' case law in three different ways, which will be presented with the relevant cases in the following.

a) The dissolution of organisation

The first element concerns the dissolution of an organisation, for which the suitable example is the case of *Freedom and Democracy Party (ÖZDEP) v Turkey*. In this case, the Turkish authorities applied to the Constitutional Court to have the party dissolved.³¹ Shortly afterwards, the founding members of ÖZDEP decided to dissolve the party voluntarily. Nevertheless, the proceedings before the Commission and the Court were continued with ÖZDEP as applicant.³² The European Court of Human Rights found that the members of ÖZDEP had resolved to dissolve their party in the hope of avoiding certain effects of the dissolution by the Constitutional Court, in their case a ban on holding similar office in any other political body.³³ Thus, the decision of ÖZDEP's leaders had not been taken freely.³⁴ Moreover, the Turkish law on the regulation of political parties provided that if a decision to dissolve a political party had been taken by the competent body of the party after an application for its dissolution had

³⁰ Zwart (n 27) 46.

³¹ *Freedom and Democracy Party (ÖZDEP) v Turkey*, no. 23885/94, § 9, 8 December 1999.

³² Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press 2005, New York) 248.

³³ *Freedom and Democracy Party (ÖZDEP)* (n 31) § 26.

³⁴ *Ibid.*

been lodged by the authorities, this should not prevent the proceedings before the Constitutional Court from continuing, or depriving any dissolution order of its legal effects.³⁵ As domestic law provided that a voluntarily dissolved political party remained in existence for the purposes of dissolution by the Constitutional Court, the Government could not contend before the European Court of Human Rights that ÖZDEP was no longer in existence when the dissolution order was made, and for this reason the government's preliminary objection was dismissed.³⁶ Taking these aspects of the case into account, the European Court of Human Rights found a violation of Article 11 of the Convention and the judgement was issued in the name of the party even after its dissolution.³⁷ Based on the statements of this case, the dissolution of an organisation does not hinder it from being a human rights beneficiary. In addition, this case indicates that if the domestic law treats an organisation as a still existing entity after its dissolution then it can be a bearer of rights and duties in a very limited way, then its human rights protection is necessary.

b) Unregistered organisation

The second situation is when an organisation has not been registered yet and still can bring an application claiming its human rights violation before the European Court of Human Rights, resulting in being a human right holder without legal personality under national law.³⁸ This happened in the case of *Stankov and United Macedonian Organisation Ilinden v Bulgaria*, in which the question arose whether an organisation that had been refused registration could be accepted as an applicant before the Commission.³⁹ The Bulgarian Government argued that where a non-governmental organisation lacks legal standing under domestic law and where it is not open to the Commission to examine the conformity with the Convention of the decision that led to such legal situation, then the non-governmental organisation has no standing to submit a petition.⁴⁰ The Commission recalled that in its case-law in cases concerning non-governmental organisations which had been refused registration or had been dissolved and the complaints concerned *inter alia* the very fact of the dissolution or of the refusal of registration, the Commission had not questioned the applicants' *locus standi* as non-governmental organisations within the meaning of the Convention.⁴¹ The Commission stated that any other solution would lead to a substantial degree of restriction of the rights of non-governmental organisations to petition under the European Convention

³⁵ Lindblom (n 32) 248.

³⁶ *Freedom and Democracy Party (ÖZDEP)* (n 31) § 26. It should be noted here that the Turkish government did not raise the objection that ÖZDEP was no longer a party to the proceedings because it did not exist legally, but only that it could not be considered a victim because of the decision to dissolve the organisation voluntarily.

³⁷ Lindblom (n 32) 248.

³⁸ Because in accordance with a lot of legal systems organisations obtain their legal personality under national law by the virtue of their court registration.

³⁹ *Stankov and United Macedonian Organisation Ilinden v Bulgaria*, no. 29221/95 and 29225/95, Admissibility Decision, 29 June 1998.

⁴⁰ Lindblom (n 32) 248.

⁴¹ *Stankov* (n 39).

on Human Rights.⁴² Furthermore, the Commission also noted that the refusal of registration of an association did not amount to interference with the association's right to freedom of assembly if the association was able to perform its activities without registration however, if the authorities sought to suppress the activities of such an association following the refusal of registration, there must be a possibility for it to submit a complaint under Article 11 of the Convention.⁴³ These statements prove that an organisation without registration can also invoke protection against arbitrariness by the state, which jeopardises the free existence and functioning of an organisation.

This also supports that being an organisation, from a human rights perspective, does not necessarily entail legal personality under national law. Any other conclusion would lead to the exclusion of unregistered organisations from human rights protection and would leave organisations unprotected against governmental arbitrariness during its registration process. This issue also appeared in the case of *APEH Üldözötteinek Szövetsége and Others v Hungary*, in which an unregistered organisation alleged, in particular, that the registration procedure had been unfair, in breach of Article 6 of the Convention.⁴⁴ The European Court of Human Rights found the application admissible, and stated that there had been a violation of Article 6 (1), as the principle of equality of arms had not been respected in the registration procedure.⁴⁵ This was the conclusion, in spite of the fact that, according to Hungarian law, associations obtain their legal existence only by virtue of their court registration.⁴⁶ This case again underlined the need for human rights protection of unregistered organisations and strengthened the view that organisations from a human rights perspective need to be differentiated from organisations according to national law.

c) De facto organisation without legal personality under national law

Beside these two cases, a third situation can also be identified. This is when organisations as bearers of rights and duties in a limited way under national law are still human rights holders. This instance appears in the *Zumtobel v Austria* case, in which one of the applicants was a limited partnership, which did not have legal personality under Austrian law, yet the application was admissible.⁴⁷ This case strengthens the conclusion that the concept of the organisation from a human rights perspective is independent from the concept of legal personality under national law, since entities having legal personality under national law have a narrower scope than organisations being potential human rights holders, due to the fact that there are entities which may be bearers of rights and duties in a limited way, but not recognised as legal persons under national law. These entities are called *de facto* organisations

⁴² Ibid.

⁴³ *Stankov* (n 39).

⁴⁴ *APEH Üldözötteinek Szövetsége and Others v Hungary* Application no. 32367/96 5 October 2000.

⁴⁵ *APEH Üldözötteinek Szövetsége* (n 44).

⁴⁶ Lindblom (n 32) 174.

⁴⁷ *Zumtobel v Austria* no. 12235/86, 30 June 1992.

in this paper, because they can actually function and perform their activities without legal personality under national law.

Another appropriate example for *de facto* organisations as human rights beneficiaries is the *Canea Catholic Church v Greece* case, in which the application was treated by the Commission and the European Court of Human Rights as filed by the church as such, in spite of the fact that the Greek government denied that the church had legal personality.⁴⁸ The church claimed the refusal of the Canea Court of First Instance and the Court of Cassation to recognise the church as a legal person with capacity to bring or defend legal proceedings violated, *inter alia*, Article 6 and 9 of the European Convention on Human Rights.⁴⁹ The European Court of Human Rights noted that the Court of Cassation's ruling, that the church had no capacity to take legal proceedings, had imposed a real restriction on it, preventing it from having any dispute relating to its property rights determined by the courts.⁵⁰ Therefore the European Court of Human Rights concluded that such a limitation impaired the very substance of the church's right to a court and constituted the breach of Article 6 of the Convention.⁵¹

Based on the conclusions of these cases, it can be stated that the conception of an organisation from a human rights perspective has a wider scope than an organisation having legal personality under national law. Questioning the *locus standi* of a non-governmental organisation as an applicant when it has not been registered yet or has been dissolved or is just a *de facto* organisation – meaning the organisation has no legal personality under national law – would result a substantial restriction on being a human rights beneficiary as an organisation. In conclusion, organisations as human rights holders need real existence and function, but do not necessarily need legal personality under national law. Any other conclusion would result that the state bearing primary responsibility for the respect and protection of human rights would determine in which cases it is obliged to do so and in which it is not. This option would leave dissolved, unregistered and *de facto* organisations unprotected, and it would generate an arbitrary practice which would undermine and jeopardise the human rights protection of human beings and organisations by abolishing the very essence of human rights, protection against unrestricted governmental arbitrariness.⁵²

⁴⁸ *Canea Catholic Church v Greece*, no. 25528/94, 16 December 1997.

⁴⁹ *Canea* (n 48) § 32.

⁵⁰ Lindblom (n 32) 249.

⁵¹ *Canea* (n 48) § 42.

⁵² For the purpose of human rights see Sári János, Somody Bernadette, *Alapjogok Alkotmánytan II.* (Osiris Kiadó 2008, Budapest) 33; van den Muijsenbergh, Rezai (n 15) 56.

2 Different Term from the Organisation Recognised Under Private Law

The second aspect of the negative definition of the organisation from a fundamental rights approach comes from the need for a distinction between the private and the public law definition of legal entity.⁵³ With regard to legal capacity, the Hungarian Constitutional Court emphasised that the transposition of a concept into another branch of law could be done only with a special focus on the characteristics of the certain field.⁵⁴ This statement shed light on the fact that the substantial difference between private and public law must be taken into account. Whereas private law concerns the property and personal relationships of human beings based on horizontal relationships, constitutional law applies to the rights guaranteeing the freedom and dignity of individuals against the state based on vertical relationships.⁵⁵ It follows that fundamental rights within public law have their own peculiarities. Without considering them, the term ‘organisation’ could be seen exactly as an organisation having legal personality under private law, which does not necessarily cover all organisations having rights and obligations. For example, until 2013, limited and general partnerships had no legal personality under private law in Hungary.⁵⁶ Moreover, nowadays there are civil companies, editorships and other bodies, which have no legal personality under private law, but still can have rights or duties in some way and, for this reason, they may in certain cases request constitutional protection against governmental arbitrariness.⁵⁷ If the term ‘organisation’ from a human rights approach would be the same as the organisation under private law, these organisations could not be fundamental right-holders, although there is no reason for this restriction in the field of fundamental rights.⁵⁸ Despite the need for this distinction, the Hungarian Constitutional Court’s interpretation does not point in this direction; on the contrary, one of the Constitutional Court’s decisions stated that the Constitution ensures the protection of fundamental rights specifically to entities having legal personality.⁵⁹ This statement may indicate that the Hungarian Constitutional Court does not differentiate between a legal entity under private law and a legal entity from a fundamental rights perspective. However, this would be necessary because there can be such entities that have no legal personality under private law, but are still victims of fundamental rights breaches.⁶⁰ This indicates that the scope

⁵³ This perception is connected with the first element of the negative definition of the organisation from a human rights perspective, named no legal personality under national law.

⁵⁴ Decision 36/2000. (X. 27.) of the Hungarian Constitutional Court.

⁵⁵ Somody Bernadette, Szabó Máté Dániel, Vissy Beatrix, Dojcsák Dalma, *Alapjogi Tanok* (HVG-ORAC 2018, Budapest) 160.

⁵⁶ Act IV of 2006 on business organisations 2. § (2).

⁵⁷ See Section 5/A of Act CLXXV of 2011 on the Freedom of Association, on Public-Benefit Status, and on the Activities of and Support for Civil Society Organizations. See also the case of Equal Treatment Authority EBH/HJF/243/2019 for the claim of an editorship.

⁵⁸ There are oHG, KG and GbR in German law as well, which have no legal personality, but still can be human rights beneficiaries.

⁵⁹ Decision 25/2012. (V. 28.) of the Hungarian Constitutional Court.

⁶⁰ This is supported by the European Court of Human Rights’ views as well, which sheds light on why being a legal person under national law is not a prerequisite.

of an organisation as a fundamental rights-holder is wider than an organisation having legal personality under private law.

Moreover, this distinction is needed not only because the scope of the organisation can be wider than its private law counterpart, but also because this term may consist of fewer entities than legal persons under private law. Hence, by virtue of the human rights approach within public law, governmental organs cannot be right-holders, based on the main function of human rights that is protecting individual's autonomy, and freedom against governmental power.⁶¹ Taking into account the main function of fundamental rights, the case law of the Hungarian Constitutional Court excludes governmental organs from fundamental right-holders. According to one decision of the Constitutional Court, an organ entitled to exercise public authority is obliged to secure and protect fundamental rights, therefore any breach of its fundamental rights is not possible.⁶² In another case, in which the Hungarian tax authority claimed the protection of its fundamental rights, the Constitutional Court strengthened the aforementioned case law by concluding that the organ entitled to exercise public authority is obliged to secure and protect fundamental rights, therefore the breach of its fundamental rights is not possible.⁶³ As opposed to this case law, the concept of being a right-holder under private law does not preclude governmental organs from being right holders, because in private law the aforementioned requirement does not exist.⁶⁴ In conclusion, borrowing the private law definition of legal entity for the benefit of fundamental rights discourse is not possible without considering the peculiarities of the fundamental rights discussion, as the scope of fundamental rights-holders from a fundamental rights perspective can be wider and narrower than legal persons under private law.

3 Excluding Governmental Organs from the Concept

By recognising the exclusion of governmental organs from the protective ambit of fundamental rights, the third aspect of the negative definition is identified. This statement is supported by the European Court of Human Rights' case law as well, which specifies the term 'governmental organs'.

The Commission made it clear during its first session that non-governmental organisations are private organisations, as opposed to public entities.⁶⁵ According to the European Court of Human Rights' case law for the qualification as a governmental organisation, the organ at

⁶¹ Sári, Somody (n 52).

⁶² Decision 23/2009. (III. 6.) of the Hungarian Constitutional Court.

⁶³ Decision 3317/2012. (XI. 12.) of the Hungarian Constitutional Court, which was after entry into force of the new Constitution (*Alaptörvény*).

⁶⁴ According to Section 3:405 (1) of the Hungarian Civil Code, the State shall participate in civil relations as a legal person.

⁶⁵ Peter van Dijk and Fried van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998, Hague) 46.

issue needs not only to be a public entity, but also has to have the power to exercise public authority. Taking this consideration into account in the Holy Monasteries case, the European Court of Human Rights noted that monasteries are non-governmental organisations within the meaning of the European Convention of Human Rights, because they do not exercise governmental powers.⁶⁶ It stated that, from the classification as public law entities, it could only be inferred that the legislature wished to afford them legal protection against third parties.⁶⁷ The monasteries came under the spiritual supervision of the local archbishop, not under the supervision of the State, of which they were completely independent.⁶⁸ The European Court of Human Rights concluded that the applicant monasteries were therefore to be regarded as non-governmental organisations.⁶⁹ The statements of this decision indicate that the category of governmental organisation includes legal entities which participate in the exercise of governmental powers or act under the control of the state.⁷⁰ In addition, in the case of 16 Austrian Communes and some of their *Councillors v Austria*, the Commission stated that local government organisations such as communes, which exercise public functions on behalf of the State, are clearly governmental organisations and for this reason they cannot bring an application.⁷¹ So the European case law not only classifies the central institutions of a state as governmental organisations, but also decentralised local institutions, such as communes and municipalities, or administrative bodies in which municipalities participate in order to fulfil their public functions. This opinion was strengthened by the case of *Danderyds Kommun v Sweden*, in which the European Court of Human Rights reiterated that it is not only the central organs of the state that are clearly governmental organisations, as opposed to non-governmental organisations, but also decentralised authorities that exercise public functions, and added that this is the case notwithstanding the extent of the decentralised authorities' autonomy against the central organs.⁷² The European Court of Human Rights underlined that this is the case even if the municipality claims that, in the particular case, it is acting as a private organ.⁷³ A conflict between a central state organ and a municipality is rather a conflict of jurisdiction which is not for Strasbourg to solve.⁷⁴ Hence, for the

⁶⁶ *Holy Monasteries v Greece*, no. 13092/87 and 13984/88, § 49, 9 December 1994. See also *Finska församlingen i Stockholm and Hautaniemi v Sweden*, Admissibility decision, 11 April 1996.

⁶⁷ *Ibid.*

⁶⁸ *Holy Monasteries* (n 66).

⁶⁹ *Ibid.* See also *Finska församlingen i Stockholm and Hautaniemi v Sweden*, Admissibility Decision, 11 April 1996.

⁷⁰ A typical example for the last one is running a public service under governmental control. See *Practical Guide on Admissibility Criteria* 13, <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 18 November 2019.

⁷¹ 16 Austrian Communes and some of their *Councillors v Austria*, Admissibility decision, 31 May 1974; *Ayuntamiento de X. v Spain*, Admissibility decision, 7 January 1991; *Ayuntamiento de Mula v Spain*, Admissibility decision, 1 February 2001. See also in van Dijk and van Hoof (n 65) 46; Lindblom (n 32) 250.

⁷² *Danderyds Kommun v Sweden*, no. 52559/99, Admissibility Decision, 7 June 2001.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

qualification as governmental organisation, it is decisive that the organisation at issue has in general the power to exercise public authority, although it is not necessary that it does so in the specific case.⁷⁵ This results that both central and decentralised organs of the state are governmental, and for this reason they cannot be human rights holders. However, it cannot be decisive whether they are public entities or not, because the only thing to be inferred from their being classified as a public law entity is that the legislature wished to afford them legal protection against third parties. Therefore, governmental organisations that normally exercise public functions and activities related either to the exercise of public power or to state-controlled activities in the field of public services are precluded from exercising human rights.⁷⁶ On the other hand, a private association is not deprived of its non-governmental status if it pursues aims that are also pursued by the state or fulfils functions that have been recognised by state organs as being of public interest.⁷⁷

This case law indicates that, in order to determine whether a legal entity falls within the category of governmental organisation, its legal status, the nature of the activity it carries out and the context in which it is carried out shall be taken into consideration.⁷⁸ This results that the decision, whether an organisation is a human rights holder or not, entails a profound examination of the certain organisation's characteristics, with a special focus on its power to exercise public authority.

The Hungarian fundamental rights discussion also has many aspects to examine in relation to governmental organs' human rights.⁷⁹ However, as opposed to the European Court of Human Rights' views, nowadays municipalities and other organisations with public authority in Hungary may invoke fundamental rights if the organisation in the specific case does not exercise public authority and acts as a private organ instead.⁸⁰ For instance, as compared to the previous case law of the Hungarian Constitutional Court, which excluded municipalities from the protective ambit of fundamental rights, in Decision 3178/2014. (VI. 18.) the Hungarian Constitutional Court did not investigate the municipality's entitlement to fundamental rights protection, the complaint was rejected on other grounds, which is equivalent to accepting municipalities as human rights beneficiaries. Furthermore, in another case, due to the municipality acting as a private organ in the certain situation, the Hungarian Constitutional Court considered irrelevant that the applicant exercises public authority in general and stated that the municipality can be a fundamental rights holder.⁸¹ In addition, another decision of the Hungarian Constitutional Court accepted an application claiming the

⁷⁵ No. 13252/87.

⁷⁶ Zwart (n 27) 46.

⁷⁷ Ibid.

⁷⁸ *Practical Guide* (n 70).

⁷⁹ Decision 23/2009. (III. 6.); Decision 3149/2016. (VII. 22.); Decision, 3091/2016. (V. 12.) and Decision 23/2018. (XII. 28.) of the Hungarian Constitutional Court.

⁸⁰ Decision 3149/2016. (VII. 22.) and Decision 3091/2016. (V. 12.) of the Hungarian Constitutional Court.

⁸¹ Decision 3149/2016. (VII. 22.) of the Hungarian Constitutional Court.

protection of the right to a fair trial by a public authority and stated the violation of its right guaranteed by Article XXVIII (1) of the Hungarian Constitution.⁸²

This case law raises the question whether having public authority is part of the negative definition of an organisation from a fundamental rights perspective or an obstacle for being a fundamental rights holder in the specific case. In the first case, an organisation having public authority cannot be a fundamental right-holder anyway, because it would be conceptually impossible.⁸³ In the second case, this would depend on the circumstances. If the organisation having public authority would act as a private organ, then it may invoke the protection of fundamental rights. This direction appears in the Hungarian constitutional discourse, taking into account the new case law of the Hungarian Constitutional Court and the new provision of the Act on the Constitutional Court, according to which an entity exercising public authority might be a beneficiary of a right guaranteed by the Constitution.⁸⁴

In conclusion, having public authority may be criteria of the negative definition of an organisation from a human rights perspective, but there is also an opportunity for 'just' being an obstacle in certain cases. However, it is certain that exercising public authority in the given case is part of a negative definition of an organisation from a human rights approach.⁸⁵

IV Conclusion

The negative organisation definition from a human rights perspective has three main elements, which underline the necessity of an autonomous, positive concept of the organisation based on fundamental rights characteristics. The first element is independence from the legal personality under national law, as legal personality is often conferred on a body that has reached a certain level of organisation, while other entities, although they may be bearers of rights and duties in a more limited way, are not recognised by the state as legal persons. Considering this, three different ways can prove the existence and the necessity of this element. The first is when an organisation has not been registered yet by the state, which in most cases means that the organisation has no legal personality under national law.⁸⁶ The second is when an organisation has been dissolved, which results that the organisation has no

⁸² Decision 23/2018. (XII. 28.) of the Hungarian Constitutional Court. According to Article XXVIII (1), in the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

⁸³ This is the case according to the European Court of Human Rights.

⁸⁴ Section 27 (3) of Act CLI of 2011 on the Constitutional Court, according to which, with regard to a petitioner exercising public authority, it is necessary to examine whether it is entitled to the right guaranteed by the Constitution.

⁸⁵ In spite of that, according to Decision 3/2018. (XII. 28.) of the Hungarian Constitutional Court, an entity exercising public authority in the specific case can be a beneficiary of the right to a fair trial guaranteed by the Hungarian Constitution.

⁸⁶ *Stankov* (n 39), *APEH Üldözötteinek Szövetsége* (n 44).

longer legal personality under national law.⁸⁷ The third situation is when an organisation exists and functions without legal personality under national law, this entity is called *de facto* organisation in this paper.⁸⁸ These cases prove that organisations may claim human rights protection before, after and even without their legal personality being guaranteed by the state. Any other solution would result that the state, which is obliged to ensure and protect human rights, would define in which cases this obligation exists and this option may lead to an arbitrary practice. This would undermine and jeopardise the human rights protection of human beings and organisations as well, by abolishing the very essence of the human rights discussion: the protection against unrestricted governmental arbitrariness.⁸⁹

The second aspect of the negative definition of the organisation from a fundamental rights approach is coming from the need for a distinction between the private and public law concepts of the legal entity, since the transposition of a concept into another branch of law can only be done with a special focus on the characteristics of the certain field.⁹⁰ It should be noted that there is a substantial difference between private and public law, because private law concerns the horizontal relationships of human beings, and fundamental rights include rights guaranteeing the freedom and dignity of individuals against the state based on vertical relationships. This characteristic of public law should be considered, and it follows from this that the scope of organisations under private law can be narrower than its human rights counterpart.⁹¹ However, at the same time, legal persons under private law can cover more entities than organisations from a fundamental rights perspective, because private law does not preclude governmental organs from being right-holders.⁹² Nevertheless, by virtue of the fundamental rights approach within public law, governmental organs cannot be right-holders, based on the main function of human rights, namely protecting individuals' autonomy and freedom against governmental power.⁹³

This conclusion leads us to the third aspect of the negative definition of the organisation from a human rights approach, namely the exclusion of governmental organs from the protection of human rights. Based on the views of the European Court of Human Rights' and the Hungarian practice, the category of governmental organisation includes legal entities that exercise governmental powers and act under governmental control. Hence, to be excluded from the protective ambit of human rights as a governmental organisation it is decisive that the organisation at issue has the power to exercise public authority. This results that it is not only the central organs of the state that are clearly governmental organisations, as opposed

⁸⁷ *Freedom and Democracy Party (ÖZDEP)* (n 31).

⁸⁸ *Zumtobel* (n 47); *Canea* (n 48).

⁸⁹ Sári, Somody (n 52); van den Muijsenbergh, Rezai (n 15) 56.

⁹⁰ Decision 36/2000. (X. 27.) of the Hungarian Constitutional Court.

⁹¹ See civil companies in Hungary, the *Zumtobel* case of the European Court of Human Rights and oHG, KG, and GbR forms in German law as well, which have no legal personality, but still can be human rights beneficiaries.

⁹² According to Section 3:405 (1) of the Hungarian Civil Code, the State shall participate in civil relations as a legal person.

⁹³ Sári, Somody (n 52).

to non-governmental organisations, but also decentralised authorities that exercise public functions, notwithstanding the extent of their autonomy against the central organs.⁹⁴ In relation to this question, the European Court of Human Rights and the Hungarian Constitutional Court take a different view, as nowadays municipalities and other organisations with public authority in Hungary may invoke fundamental rights if the entity in the certain case does not exercise public authority and acts as a private organ.⁹⁵ Despite this difference, it can be concluded that exercising public authority is part of the negative definition of the organisation from a human rights perspective, taking into account the European case law and the very essence of the fundamental rights discussion, namely the protection of human dignity and autonomy against governmental authority.

In conclusion, the negative definition of the organisation from a human rights perspective is independent from legal persons under national law or private law, and excludes governmental organs exercising public authority.

⁹⁴ *Danderyds Kommun* (n 72).

⁹⁵ Decision 3149/2016. (VII. 22.), 3091/2016. (V. 12.) of the Hungarian Constitutional Court.

The Inclusion of Strategic Autonomy in the EU Law: Efficiency or Ambiguity?

The strategic autonomy (SA) of the European Union (EU) is a political concept that recently emerged in the field of the EU's foreign policy. The concept was introduced by the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission (HR/VP) in June 2016, when she presented the EU Global Strategy¹ (EUGS) to the European Council. This document, encompassing the EU's external action guidelines, aims to reach an 'appropriate level'² of SA in the field of defence and security.

Within the EU framework, the defence and security field is traditionally and primarily seen as a Member State's prerogative. The Common Security and Defence Policy (CSDP) is a perfect example of this intergovernmental approach. This policy, established and organised in a section within Title V of the *Treaty on EU*, constitutes the operational arm of the EU. The section provides a strict framework, unanimity-based governance and a set of objectives for this policy.³ It also includes the possibility for the Member States to launch a Permanent structured Cooperation⁴ (PESCO), a member states-driven form of cooperation further described in a dedicated protocol.⁵ Nevertheless, the European Commission also acted in this field, from an economic point of view, by adopting its two defence Directives of 2009⁶ in order to establish a single European defence market.

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¹ High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, Shared Vision, Common Action: A Stronger Europe [2016] (EUGS).

² Ibid, 19.

³ *Consolidated Version of the Treaty on European Union* [2016] OJ C 202/38–39 art 42–46 (*Treaty on European Union*).

⁴ *Treaty on European Union*, OJ C202/38–39 art 42.6, OJ C202/40–41 art 46.

⁵ *Treaty on European Union*, Protocol (No 10) on Permanent Structured Cooperation established by Article 42 of the Treaty on European Union [2016] OJ C202/275–277.

⁶ Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community [2009] OJ L 146/1–36; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L 216/76–136.

Since the presentation of the EUGS, the activity of the Member States and the European Commission has increased considerably, launching a whole set of initiatives such as PESCO and the European Defence Fund (EDF). Each on its own contributes to the implementation of the EUGS and its new concept of SA.

However, there is no precise and clear definition of what SA means. The EUGS remains quite vague, if not ambiguous on the content and significance of this concept. Controversy arises when this concept starts to be used in legally binding documents, because its legal implications may be affected by the lack of clarity.

Therefore, one could wonder about the relevance of having introduced this vague concept in the framework of EU law. This paper aims to explain what SA is and why it emerged in EU law. It will also demonstrate that the inclusion of SA in the EU law will not be effective and fruitful if the concept remains unclear.

I A Jump from Strategic Thinking to Law

1 SA: What's in the Vague Concept?

SA is a complex concept to grasp. It is used in different ways by different countries in different geopolitical contexts.⁷ The presentation of SA, in this paper, will be limited to the field of defence and security in the European context.

The first thing to highlight is that there is no clear and unanimous definition of SA regarding defence and security, shared at EU level. However, on a theoretical level, the concept appears to suggest the will from a political entity to become autonomous in the field of defence and security, in other words to be able to conduct its defence and security policy without depending on any external actor(s).

Second, the SA concept shall be distinguished from the international public law notion of *sovereignty*. Indeed, the latter is related to the absence of legal submission of a political entity to any other power. SA does not correspond to such a definition, because one can be legally sovereign without being factually strategically autonomous. This helps us to understand that SA shouldn't be understood as a legal status, but more as a factual situation.

Third, this *de facto* status is linked to the power and the freedom that a political entity has in the international arena. Thus, the political entity is evolving on a spectrum ranging from complete dependence on other partners to absolute independence from any partner. Absolute independence represents an unachievable objective, given the current interdependence that

⁷ Chilamkuri Raja Mohan, 'Raja Mandala: Two discourses on strategic autonomy' The Indian Express (18 September 2018) <<https://indianexpress.com/article/opinion/columns/indian-foreign-policy-us-european-union-narendra-modi-govt-donald-trump-5361329/>> accessed 15 November 2019.

governs international relations.⁸ Therefore, aiming to reach a certain degree of SA is the result of the impossibility of being totally independent and of the political will not to be fully dependent.

Finally, the expression ‘autonomy’ can imply a *freedom to*, which means the ability to do things on one’s own, and/or a *freedom from*, which is the ability to do things without being subject to external control.⁹ These two sides of the same coin tend to confirm that SA is a factual situation that can be assessed internally (regarding one’s own capacity for action) and externally (regarding one’s relations with others).

In the EU, the Member State that has most developed the concept of SA is France.¹⁰ It refers to this concept as one of the main principles of its national defence policy, considering it as a condition of its sovereignty (*freedom from*) and ability to play a full role in international relations (*freedom to*)¹¹. France is also a promoter of the extension of its SA concept to the European level.¹² The French influence is apparent in the development of the concept in the current European strategic thinking,¹³ as well as in the scientific literature. In its 2017 strategic review, France considers that ‘strategic autonomy rests on a *political foundation* comprised of two pillars: a high degree of *industrial and technological autonomy* on the one hand, and the means and resources to ensure *operational autonomy* on the other’¹⁴. This approach remains to this day the most agreed outline of SA in the scientific literature.¹⁵ There is a relative convergence to present SA as the combination of Political autonomy, Operational autonomy and Industrial autonomy.

⁸ Bastian Giegerich, Eva Gross, ‘Squaring the Circle? Leadership and Legitimacy in European Security and Defence Cooperation’ (2006) 43 (4) *International politics* 500–509.

⁹ Daniel Fiott, ‘Strategic autonomy: towards “European sovereignty” in defence?’ [2018] European Union Institute for Security Studies, Brief <www.iss.europa.eu/sites/default/files/EUISSFiles/Brief%2012__Strategic%20Autonomy.pdf> accessed 15 November 2019.

¹⁰ Frederic Mauro, ‘Strategic Autonomy under the Spotlight: The New Holy Grail of European Defence’ [2018] Group for Research and Information on Peace and Security, GRIP Report <www.grip.org/sites/grip.org/files/RAPPORTS/2018/Rapport_2018-1_EN.pdf> accessed 15 November 2019; Corentin Brustlein, ‘European Strategic Autonomy: Balancing Ambition and Responsibility’ [2018] Institut français des relations internationales, Éditoriaux de l’Ifri, 2–3 <www.ifri.org/sites/default/files/atoms/files/brustlein_european_strategic_autonomy_2018.pdf> accessed 15 November 2019.

¹¹ Ministère de la Défense/SGA/SPAC, ‘French White Paper on Defence and National Security’ [2013] 19–22 <www.defense.gouv.fr/english/dgris/defence-policy/white-paper-2013/white-paper-2013> accessed 15 November 2019.

¹² La Délégation à l’information et à la communication de la défense – Bureau des éditions, ‘Defence and National Security Strategic Review’ [2017] 56–59 (DNSSR) <<https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/DEFENCE%20AND%20NATIONAL%20SECURITY%20STRATEGIC%20REVIEW%202017.pdf>> accessed 15 November 2019.

¹³ Mauro (n 10) 4–16.

¹⁴ DNSSR, 52.

¹⁵ Felix Arteaga, ‘Strategic Autonomy and European Defence’ [2017] Real Instituto Elcano; Ronja Kempin, Barbara Kunz, ‘France, Germany, and the Quest for European Strategic Autonomy: Franco-German Defence Cooperation in A New Era’ [2017] Notes de l’Ifri, Notes du CERFA 141, Stiftung Wissenschaft und Politik; Mauro (n 10); European Political Strategy Center, ‘Rethinking Strategic Autonomy in the Digital Age’ [2019] EPSC Strategic Notes, Issue 30.

Although there is no clear definition and explanation of what SA means precisely in the EUGS, different elements contained in this document reflect the three dimensions of SA. The following extract tends to confirm this approach adopted in the EUGS: ‘The EU will systematically encourage defence cooperation and strive to create a *solid European defence industry*, which is critical for Europe’s *autonomy of decision and action*¹⁶.

The EUGS echoes operational autonomy, as the document states that ‘European security and defence efforts should enable the EU to act autonomously’¹⁷. The EUGS refers several times to the idea of autonomous action, which implicitly reflects operational autonomy. The EUGS also emphasises industrial autonomy, as we can see in this other statement: ‘A sustainable, innovative and competitive European defence industry is essential for Europe’s strategic autonomy and for a credible CSDP’¹⁸. The document emphasises many times on the importance of the industrial autonomy. Although it is less obvious, the EUGS does not exclude political autonomy. The document provides for the EU’s ‘decision-making autonomy’, in particular in relation to its potential defence and security partners, as we can see in the following extract: ‘The EU will deepen its cooperation with the North Atlantic Alliance in a complementary manner and with full respect for each other’s [...] decision-making autonomy’¹⁹.

Moreover, the EUGS entails both the *freedom to*, as it states that ‘We [Europeans] must be ready and able to deter, respond to, and protect ourselves against external threats’²⁰ and the *freedom from*, given the fact it provides that ‘While NATO exists’²¹ Europeans must be able to act autonomously ‘if and when necessary’²². However, the document is vague regarding the exact degree of ‘freedom from’ it foresees. Indeed, the EUGS intentionally remains unclear on the content of SA it seeks for the EU and its Member States. In fact, the document uses the expression ‘appropriate level of [...] strategic autonomy’²³. This wording shows that the EUGS refuses to give details on the exact content of the SA. With such an expression, the EUGS leaves the opportunity to determine this appropriate level of SA to the Member States and the EU.

2 Why SA Has Been Included in EU Law?

One could wonder about the relevance of including this new concept in the EU law, and not keeping it in non-legal documents. To confine SA to the political domain would have seemed more appropriate given its lack of clarity. However, the EU and its Member States intended to include the concept in EU law.

¹⁶ EUGS, 11.

¹⁷ *Ibid.*, 20.

¹⁸ *Ibid.*, 46.

¹⁹ *Ibid.*, 20.

²⁰ *Ibid.*, 19.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

The first mention of SA in EU law occurred before the EUGS, in a regulation on the Galileo programme in 2013.²⁴ However, this first inclusion was isolated and very limited. Its real emergence at the EU level should be dated from the EUGS, because, based on this crucial document, the concept will progressively enter in the EU law. In order to explain the willingness of the EU and its Member States to do so, it is important to present its main factors. We can distinguish three contextual drivers.

First was the intention to build a strategy to face new challenges in the field of defence and security. Indeed, outside the EU, an arc of instability, with lasting security troubles appeared from the Eastern border of the EU (crisis in Ukraine), to its Southern border (instability in the Sahel-Saharan area), passing through the war against Isis in the Middle East and the Syrian civil war. Inside the EU, Member States suffered from multiple terrorist attacks. It is because of the rise of these security challenges that the European Council asked the HR/VP to work on a new global strategy for the EU external action.²⁵ The SA concept ended up as one of the most significant outcomes of this documents, as evidenced by the foreword of the HR/VP.²⁶

The second driver was the willingness to deliver results in the field of defence and security, after Brexit. On 23rd June 2016, the UK decided by referendum to leave the EU. On one hand, it is one of the strongest opponents of the emergence of a common defence policy within the EU that decided to leave this framework, but on the other hand, it is one of the most capable member states from a military perspective. The Bratislava summit, on 16th September 2016, clearly stressed the necessity for the remaining 27 Member States to provide results regarding different issues, including external security and defence.²⁷ Therefore, we can consider that Brexit helped and disinhibited Member States from developing the concept of SA in the field of defence and security at the European level.

The third driver was that the SA concept appeared to be an appropriate way to address concerns about the reliability on the US: on the 8th November 2016, Donald Trump, a candidate who repeatedly expressed his scepticism towards NATO,²⁸ was elected to the White House. This new administration created real concerns on the other side of the Atlantic. Although the long term trend of the US external policy was already to switch progressively towards the Pacific area, the arrival of Donald Trump at the White House and the ensuing

²⁴ Regulation (EU) 1285/2013 of the European Parliament and of the Council of 11 December 2013 on the implementation and exploitation of European satellite navigation systems and repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council [2013] OJ L347/1–24.

²⁵ European Council, 'European Council meeting (25 and 26 June 2015) – Conclusions' [2015] 5 <www.consilium.europa.eu/media/21717/euco-conclusions-25-26-june-2015.pdf> accessed 15 November 2019.

²⁶ EUGS, 4.

²⁷ European Council, 'The Bratislava Declaration' [2016] <www.consilium.europa.eu/media/21250/160916-bratislava-declaration-and-roadmapen16.pdf> accessed 15 November 2019.

²⁸ Ashley Parker, 'Donald Trump Says NATO is "Obsolete", UN is "Political Game"' The New York Times (2 April 2016) <www.nytimes.com/politics/first-draft/2016/04/02/donald-trump-tells-crowd-hed-be-fine-if-nato-broke-up/> accessed 15 November 2019.

destabilisation of the transatlantic link,²⁹ had a real catalytic effect on the emergence of the SA concept at the EU level.³⁰ This also explains why the debate on SA is often linked to transatlantic relations, highlighting at the same time the question of the degree of *freedom from* sought by the Europeans.

Given this tense geopolitical context, the EU and its Member States nurtured the will to develop the concept of SA. However, although the EUGS gave them the opportunity, the member States decided to avoid a complicated debate over the SA content. It is because of their great diversity (there are differences in national defence expenditure, strategic culture, threat perception, perception of the role of the EU in the field of defence, relation with the US, etc.) that Member States didn't want to confront each other on this question. The content of the SA is a sensitive political issue, on which a compromise for the 27 remaining Member States after Brexit would be difficult to reach. Up to this day, the perception of the concrete meaning of SA among Member States is very heterogeneous, as evidenced by a recent study by the ECFR.³¹ This is because such a compromise is made on a ranging scale between total dependence and complete independence, having potential major and structural implications for the defence policies of Member States. The difficulty of conducting such a debate may explain why the EU and Member States have bypassed the political obstacle by using the legal path.

Indeed, the EU and the Member States decided to adopt a pragmatic approach. They avoided a tedious and uncertain debate on the exact meaning of this concept. Instead, they preferred to reach a quicker compromise on the tools and structures, based on which the SA would be further developed and defined in practice. This approach is quite common for the EU. Margriet Drent (former senior research fellow at Clingendael Institute), when talking about SA, explained that 'Leaving all kinds of ambiguity is of course not a new phenomenon for processes related to European integration. It serves a purpose to leave a concept somewhat vague, as it relieves the Member States of the obligation to address the differences of opinion on the matter'³².

These new tools and structures were created through EU secondary law. EU law appeared to be a pragmatic way to ensure outcomes, as it can either encourage (in the case of Soft law) or force (in the case of Hard law) Member States to comply with the rule of law, and thus guides their behaviour. In this way, the inclusion of the concept in EU law could contribute to ensuring the development and durability of this concept.

In order to understand whether this *bypassing strategy* can contribute to the SA, it is important to analyse how the concept progressively entered secondary law.

²⁹ Cat Contiguglia, 'Trump: EU is one of United States' biggest foes' Politico (15 July 2018) <www.politico.eu/article/donald-trump-putin-russia-europe-one-of-united-states-biggest-foes/> accessed 15 November 2019.

³⁰ Ulrike Franke, Tara Varma, 'Independence Play: Europe's Pursuit of Strategic Autonomy' [2019] European Council on Foreign Relations, 6 <www.ecfr.eu/page/-/ECFR_Independence_play_Europe_pursuit_strategic_autonomy.pdf> accessed 15 November 2019.

³¹ Franke, Varma (n 30).

³² Margriet Drent, 'European strategic autonomy: Going it alone?' [2018] Clingendael Netherlands Institute of International Relations, Policy Brief, 5 <www.clingendael.org/sites/default/files/2018-08/PB_European_Strategic_Autonomy.pdf> accessed 15 November 2019.

II A Fruitful Inclusion of SA in the EU Law?

1 The Progressive Inclusion of SA in the EU Law

To take a closer look to the inclusion of SA in EU law, we will take the examples of two recent initiatives launched after the EUGS and that refer to this new concept in their legal corpus.

The first example is PESCO, a treaty-based cooperation, created by the Council of the EU (Council)³³ to foster cooperation between its participating Member States (pMS) in the field of defence. The second example is the European Defence Industrial Development Programme (EDIDP), an EU regulation³⁴ proposed by the European Commission to support the competitiveness of Europe's defence technological and industrial base (EDTIB). This pilot programme is envisaged as the first step before a more ambitious regulation called the 'European defence fund' following the same objective.

The inclusion of SA in the legal provision of these two initiatives has been progressive, by first becoming part of Soft law, and secondly being extended to EU Hard law. In 2016, the concept was introduced into Soft law, understood here as non-binding law, in other words legal provisions that encourage rather than impose. We include, for example, the Conclusions of the Council and the Communication of the European Commission in this category, as they fulfil the complementary function of preparatory work prior to the adoption of binding law/Hard law.³⁵ In the case of PESCO, the Council conclusions on implementing the EUGS in the area of Security and Defence include some references to the SA as an objective to follow.³⁶ In the case of EDIDP, The European defence action plan includes some references to SA as well.³⁷ For both initiatives Soft law was an antechamber between the EUGS (in the political domain) and Hard law.

Since 2017, the concept has entered Hard law. Legally binding provisions officially mention and entail the objective of SA. In the case of PESCO, the Council decision of December 2017 encompasses elements referring to the SA concept. Given that a 'decision

³³ Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States [2017] OJ L331/57-77 (Decision establishing PESCO).

³⁴ Regulation (EU) 2018/1092 of the European Parliament and of the Council of 18 July 2018 establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovation capacity of the Union's defence industry [2018] OJ L200/30-43 (Regulation Union's defence industry).

³⁵ Stamatina Xeferi, 'La soft law dans l'ordre juridique de l'Union européenne, Revekka-Emmanouela Papadopoulou – Interview, part. 3' [2019] Blog droit européen <<https://blogdroiteuropeen.com/2019/02/19/le-soft-law-dans-lordre-juridique-de-lunion-europeenne-revekka-emmanouela-papadopoulou-interview-part-3/>> accessed 15 November 2019.

³⁶ Council of the European Union, 'Council conclusions on implementing the EU Global Strategy in the area of Security and Defence – Council conclusions (14 November 2016)' [2016] <www.consilium.europa.eu/media/22459/eugs-conclusions-st14149en16.pdf> accessed 15 November 2019.

³⁷ Commission, 'European Defence Action Plan' (Communication) COM(2016) 950 final, 3 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0950&from=en>> accessed 15 November 2019.

shall be binding in its entirety,³⁸ there is no doubt about the effect of these different references. In this document, Member States agreed on 20 binding commitments to foster their cooperation in the field of defence. The Council's Decision states that the list of commitments must 'strengthen the strategic autonomy of both Europeans and the EU'³⁹. Thus, all commitment should be implemented in the light of this objective. One specific commitment even provides that the capability projects adopted in the framework of PESCO 'shall increase Europe's strategic autonomy and strengthen the European Defence Technological and Industrial Base (EDTIB)⁴⁰. Therefore, the action carried out within the PESCO framework is legally oriented towards the achievement of the SA objective.

In the case of the EDIDP, the regulation emphasises the industrial autonomy of the EU by stating that 'actions proposed for funding under the Programme shall be evaluated on the basis of each of the following criteria: [...] contribution to the industrial autonomy of the European defence industry and to the security and defence interests of the Union'⁴¹. This means that the EDIDP will only fund actions which contribute to the industrial dimension of the EU. Furthermore, the regulation refers to the SA as one of the objectives of the programme, as evidenced in the following statement: 'The Programme shall have the following objectives: [...] to foster the competitiveness, efficiency and innovation capacity of the defence industry throughout the Union, which contributes to the Union's strategic autonomy'⁴². This first objective of the EDIDP shows that the SA concept, as provided for in the EUGS, underlies the spirit of this regulation.

This progressive inclusion of the SA concept creates a form of continuity and coherence between the EUGS' SA approach and the one entailed in the two initiatives' legal provisions. It ensures a minimum of understanding regarding the concept's outlines. As regards the content of SA, the EU law has two effects that can address this issue over time.

First, the inclusion of SA in EU law forces Member States to implement the SA. The purpose of the EU law is to ensure the development and definition of the concept through practice. Indeed, by setting it as an objective in PESCO, or in the EDIDP, we can expect the Member States to seek to achieve it. Given the absence of an initial political compromise on its content, it is the implementation by Member States of these legal provisions that could bring about the observable content of SA that is eventually sought.

Second, it forces Member States to develop and structure the legal provisions of SA. The inclusion of SA in EU law is still work in progress, hence it forces the legislative actors to agree on new political compromises in order to set some new rules and limits in order to have functional and applicable legalisation. In the case of the EDIDP, it was necessary for the Member States to find a political agreement on the question of the eligible entities, even

³⁸ *Consolidated version of the Treaty on the Functioning of the European Union* [2012] OJ C326/171–172, art 288.

³⁹ Decision establishing PESCO, OJ L331/71.

⁴⁰ *Ibid.*, OJ L331/63.

⁴¹ Regulation Union's defence industry, art 10(d).

⁴² *Ibid.*, art 3(a).

though it was a sensitive issue given its implication on the content of SA, which was eventually decided. The EDIDP regulation now allows external entities to benefit from grants but with some restrictions, in order to protect SA.⁴³ More flexible rules on this issue could have meant a less ambitious degree of SA. In a very similar way, the participation of third states to projects adopted in the PESCO framework is an important issue, which the pMS are politically forced to agree on.⁴⁴ Restrictive or flexible rules will give an insight into the degree of SA in this framework. In this way, the inclusion of SA in EU law forces the legislative actors to reach political compromise in order to develop the concept.

2 A Political Obstacle Bypassed or Postponed?

The *bypassing strategy* doesn't erase the political issue. The EU legislative actors cannot escape indefinitely from the political question on the content of SA. This issue will have to be solved if the EU and its Member States wish to ensure an effective implementation of the legal provisions referring to SA. Indeed, some criticism of this inclusion of SA in EU law must be highlighted. The benefits of such an inclusion shouldn't hide the problem of uncertainty it faces in the long run.

It starts with semantic uncertainty. The legal provisions that refer to the SA concept are usually unsatisfactory because they are ambiguous. They use, in almost undifferentiated ways, the expressions 'European strategic autonomy', the 'European Union's strategic autonomy' and the 'strategic autonomy of Europeans'. These expressions refer to different States (Member States of the EU, European states outside of the EU) and thereby have completely different legal implications. These various expressions can be used in political documents but as soon as they enter the EU law the legislative actors must be a lot more rigorous.

Moreover, the inclusion of SA in EU law is uncertain in its implementation. Indeed, the control competence of the Court of justice of the EU (CJEU) is limited regarding the provisions relating to the common foreign and security policy and to the acts adopted on the basis of those provisions.⁴⁵ Thus, even if the CJEU can potentially control and interpret the legal provisions referring to SA in the EDIDP regulation, it can't do the same for PESCO. The legal provisions of the decision creating PESCO remain beyond the legal control of the Court of Justice of the EU. On the contrary, this competence is in the hand of the pMS of PESCO. This framework only has a mechanism of evaluating the implementation of the commitments to control the implementation of the SA objective. This mechanism, led by the HR/VP and supported by the PESCO secretariat, is ultimately under the political control of the Council. Thereby, the control of the implementation of the SA objective in the PESCO framework becomes a political issue again. Given the difficulties that the pMS of PESCO have to politically agree on regarding the

⁴³ Ibid, art 7.

⁴⁴ Decision establishing PESCO, art 9.1.

⁴⁵ *Treaty on European Union* [2012] OJ C326/30–31 art 24; *Consolidated version of the Treaty on the Functioning of the European Union* [2012] OJ C326/166–166 art 275.

content of SA, the PESCO evaluation mechanism might fail over time. A recent study assessing the first results of the PESCO contribution to SA tend to demonstrate this.⁴⁶

This situation also raises the potential difficulty of implementing a common understanding of SA between PESCO and the EDIDP. Indeed, the involvement of different actors (the Council for PESCO and the European Commission for the EDIDP), different purposes (a broad purpose of deepening defence cooperation for PESCO and a more economic purpose of supporting EDTIB for the EDIDP), served by the two initiatives might contribute to divergent concepts or implementations of the SA concept. However, a common understanding of the SA concept is essential if the EU wants to ensure a consistent action in the defence field.

The SA inclusion in EU law is also uncertain in its further development of the legal structure. Indeed, the legal provisions on SA are the result of political compromise between the legislative actors. Therefore, they can be vulnerable to political changes at the European level. A good example is the current negotiations on the EDF (the following step after the EDIDP programme). Some may wonder about the impact of recent American interference⁴⁷ on the negotiation of the new Regulation (specifically concerning the degree of industrial autonomy to be sought in this programme). The same thing can be said about the PESCO negotiations on third states' participation in projects.

Furthermore, some might consider that the current blocking of negotiations on third states' participation in PESCO projects demonstrates the limits of the inclusion of SA in the EU law. Although the pMS are forced to find a political agreement on this specific issue, so far they have failed to do so. As a result, the PESCO legislation is incomplete and resolving this problem's has been constantly postponed since the end of 2018.

As we can see, the *bypassing strategy* chosen by the EU and its Member States can potentially lead to a chaotic and uncertain implementation and development of the SA concept. The fact that the inclusion of the SA concept could be hampered in the long run by the lack of political compromise over the content of SA demonstrates that sooner or later the Member States have to put this issue at the top of their political agenda. The inclusion of SA in EU law can facilitate the maturation of this debate and highlight the concrete questions to be answered, but at the end the solution can only be a political one. In other words, the inclusion of the SA concept in EU law can help to develop this concept at the EU level, if its legislative actors, in particular the Member States, agree to set the political content of SA.

⁴⁶ Lucie Béraud-Sudreau, Yvonne-Stefania Efstathiou, Conor Hannigan, 'Keeping the momentum in European defence collaboration: an early assessment of PESCO implementation' [2019] *The International Institute for Strategic Studies* 10–13.

⁴⁷ Letter from Ellen M. Lord, Andrea L. Thompson to Federica Mogherini (1 May 2019).

More Autonomy for Member States in So-called ‘Purely Internal Situations’?

Recently, some member states of the EU have become more outspoken about their autonomy in an ever more completed internal market. The central focus of study in this contribution is the actual role and function of the ‘purely internal (or domestic) situation’ in the case law of the CJEU. Is this concept able to aid member states in their quest for more autonomy and flexibility? And if not, can it be adapted in such a way that it helps the autonomy of the member states and the national judiciary in situations where the interests of the EU and of the internal market are not really at stake?

I The Concept of ‘Internal’ or ‘Domestic’ Situation

The internal market used to be the core construct and policy of the EU, and probably it still is.¹ The Court of Justice of the EU (CJEU or the Court) has played an important role in its creation and development. The four economic or ‘fundamental’ freedoms, of goods, persons, services and capital, have been interpreted very widely and exceptions have been narrowly interpreted. An economic freedom presupposes the crossing of a border between two member states. If a crossing does not take place, there is a so-called ‘purely internal situation’, in which all the relevant factual elements are located within one and the same member state. In this contribution, the ‘purely internal situation’ case law of the CJEU of the last ten years (2009–2019) will be analysed. I prefer to speak of a ‘domestic’ situation, as the word ‘internal’ is confusing since we are also speaking of an ‘internal’ EU market. In the old case of *Saunders*, the Court already used the terminology ‘wholly domestic situation’². In recent case law, the Court sometimes uses ‘purely domestic situation’³. In the literature, the terms ‘purely’ and

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¹ Jacques Pelkmans, ‘Why the Single Market Remains the EU’s Core Business’ (2016) 39 (5) *West European Politics* 1095–1113.

² Case C-175/78 *Saunders* [1979] ECR 1129.

³ Joined cases C-532/15 and C-538/15 *Eurosaneamientos*, ECLI:EU:C:2016:932.

‘situation’ are criticised as being too vague.⁴ This is part of the problem to be addressed in this contribution.

Recently, member states are more outspoken about their autonomy in an ever more completed internal market. In the Treaty of Lisbon, the scope of the EU Charter of Fundamental Rights has been explicitly tied to the scope of the Treaty (art. 51, para 2 Charter). In the area of European citizenship, we find recent case law that may qualify as a retreat or ‘partial eclipse’ of EU citizenship.⁵ The central focus of study in this contribution is the actual role and function of the ‘purely domestic situation’ in the case law of the CJEU. Is this concept able to aid member states in their quest for more autonomy and flexibility? In cases such as *Omega*⁶ and *Sayn-Wittgenstein*,⁷ the CJEU already pays respect to some national issues related to public order and national identity when at the same time the overall damage to the internal market is not too severe.⁸ This undoubtedly involves balancing, an act that lawyers and judges are good at. In both *Omega* and *Sayn-Wittgenstein*, the balancing took place at the justification stage; there were no purely domestic situations in these two cases. Does this kind of balancing also occur in the ‘domestic situation’ case law?

I will look at the most interesting cases of the last ten years concerning the ‘purely domestic situation’ and try to find if there is a balancing act here as well and of what this balancing act consists. Is autonomy an element in the balancing or is the internal market further ‘radicalised’ and completed through the case law of the CJEU? In the academic literature, there is scepticism concerning the domestic situation’s ability to safeguard the autonomy of member states. Mataija is very outspoken: the internal situation rule is ‘largely inadequate for the purpose of protecting Member States competences’⁹. He prefers a substantive criterion to distinguish internal situations from EU situations without reference to the simple act of moving from one country to the other.¹⁰ Nic Shuibne admits that the threshold to decide whether there is a cross-border connection has been significantly diluted.¹¹ Iglesias Sánchez even asks herself whether the notion of a purely internal situation should be abolished.¹² This point of view is illogical, as the Court hardly goes directly against its established case law.¹³ The concept of a ‘purely

⁴ Sara Iglesias Sánchez, ‘Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?’ (2018) 14 (1) *European Constitutional Law Review* 7–36, at page 23 and 24.

⁵ Julio Baquero Cruz, *What’s Left of the Law of Integration? Decay and Resistance in European Union Law* (Oxford University Press 2018) at page 87, it is the title of his ch 5.

⁶ Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

⁷ Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693.

⁸ Koen Lenaerts, ‘The Court’s outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice’ in Maurice Adams et al. (eds), *Judging Europe’s Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2015, Oxford and Portland, Oregon) 59–60.

⁹ Mislav Mataija, ‘Internal Situations in Community Law: An Uncertain Safeguard of Competences within the Internal Market’ (2009) (5) *CYELP* 5 at page 31.

¹⁰ Mataija (n 9) on page 33.

¹¹ Niamh Nic Shuibne, *The Coherence of EU Free Movement Law. Constitutional Responsibility and the Court of Justice*, (Studies in European Law, Oxford University Press 2013) 124.

¹² See (n 4).

¹³ A famous exception is joined cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097.

domestic situation' will therefore remain relevant, but the question is how relevant? Or is it too easy for a national court asking preliminary questions to circumvent this concept? There is, indeed, a concern in the literature that the CJEU is too easily admitting preliminary questions in purely domestic situations.¹⁴

II The Case Law of the CJEU on the Scope of the Internal Market – a Layered Approach

The four fundamental or economic freedoms, the free movement of goods, persons, services and capital, have been interpreted widely by the Court in order to oversee the creation and operation of the European internal market. Exceptions were interpreted strictly with help of the rule of reason; reasonable national measures were still acceptable if there is a legitimate aim for the national measure and if the measure fulfils the requirements of proportionality.¹⁵ An internal market is defined in art. 26, para (2) TFEU as an area without internal frontiers. It is not exactly crystal clear what an area without internal frontiers is. If there are purely domestic situations then an internal market should not cover internal situations within one and the same member state. The most radical interpretation is with respect to customs duties, as the Court in the at the time much criticized case of *Lancry* held that even customs duties levied at a border *within* one member state are prohibited.¹⁶ This radical approach has not been followed in those freedoms where the movement of persons is inherent in the effective use of the freedom. This became clear in case law concerning the federation of Belgium, for example case *Commission versus Belgium*¹⁷. Crossing the border between Flanders and Wallonia is not always sufficient in order to pass the threshold of applicability of art. 45, 49 and 56 TFEU. Weatherill implicitly submits that the CJEU uses a threshold for the applicability of the economic freedoms, e.g. in the event there is a *considerable* influence on consumer behaviour in another member state or if there is a *serious* inconvenience because of the existence of a national measure then EU law would be applicable.¹⁸ These qualifications suggest balancing by the European Court; this balancing is, however, not made explicit.

There is case law, however, in which the Court could not invoke one of the four freedoms, as these freedoms pre-suppose a cross-border movement within the member states. Either the cross-border movement is too weak and indirect, or the situation before the judges is

¹⁴ See for example Jasper Krommendijk, 'Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations' (2017) 18 (6) German Law Journal 1359–1394.

¹⁵ Annette Schrauwen (ed), *Rule of Reason. Rethinking another Classic of European Legal Doctrine* (Europa Law Publishing 2005).

¹⁶ Case C-363, 407-411/93 *Lancry* [1994] ECR I-3957.

¹⁷ Case C-250/08 *Commission versus Belgium* [2011] I-12341.

¹⁸ Considerable influence on consumer behaviour is taken from the Court's case C-142/05 *Åklagaren v Mickelson and Roos* [2009] ECR I-4273 and serious inconvenience to an affected person from the case law on EU citizenship. Stephen Weatherill, 'The Court's Case Law on the Internal Market: A Circumloquacious Statement of the Result, rather than a Reason for Arriving at it' in Maurice Adams et al. (n 8) at page 91.

confined in all its factual aspects to one and the same member state. After several decades, we find essentially three clusters or layers of the Court's case law in which the 'relevance' of an issue is to be determined before a substantive answer may be given in a case. These layers need to be separated:

– There is the case law on the 'relevance' of a preliminary question from a national judge of one of the member states. If the preliminary question does not relate to a real conflict or only concerns a 'hypothetical' conflict or problem, the Court will generally not give an answer. If the national judge needs an answer to the preliminary question to solve a real conflict before the national court, the CJEU will give an answer. There is some discretion for the national judge to formulate the preliminary question(s); sometimes the CJEU will reformulate the questions so as to be able to interpret EU law and not national law, for which the Luxembourg-based court is not competent. In the words of the CJEU, 'questions concerning EU law enjoy a presumption of relevance' and may only be refused 'where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose'¹⁹. The test used by the CJEU is largely jurisdictional, and also partly on the merits. The implicit question, of whether there is a link with EU law, is a substantive test; even the notion 'quite obvious' has to be dealt with in a substantive manner.

– Subsequently, there is the case law concerning the 'purely internal/domestic situation', in which all the 'legally relevant' factors and/or the facts are confined to one single member state and none of the four economic freedoms is deemed to be applicable. It is possible that the national court asking the preliminary question did not bring concrete information on the cross-border character of an issue before it. EU law is not 'relevant' for a solution in this case. The 'situation' is outside the scope of EU law and the CJEU is not competent in this respect. In four exceptional situations, the Court is now willing to give an answer even when all the factual elements are located within one and the same member state; first if a national judge needs an answer in a 'purely internal situation' in order to ban cases of 'reverse discrimination' prohibited by national law and where a national is 'discriminated' because a national of another EU member state has rights under one of the economic freedoms of the internal market. This is a matter of the national law concerned, and not an issue of EU law.²⁰ Nevertheless, the Court gives an answer to the national court. The second is where national law directly applies provisions of EU law for internal situations, and in this respect the Court gives an answer because two different lines of interpretation are not in the Union's interest. These two exceptions will not be dealt with in this contribution: I will focus on the other two, where the nature of the cross-border effects are the determining factor. The third is the so-called *Blanco Pérez* case law.²¹ indistinctly applicable national measures may dissuade nationals of other member states from making use of their rights to free movement. Finally, there is the *Libert*

¹⁹ See joined cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] I-4629 at para 36.

²⁰ See Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International 2009) who is vehemently against cases of reverse discrimination.

²¹ Joined cases C-570 and 571/07, *Blanco Pérez and Chao Gómez* [2010] I-4629.

case law:²² this concerns proceedings to annul provisions of national law that are indistinctly applicable and therefore also might be relevant for nationals of the other member states. Here there seems to be a mixture of a jurisdictional and a substantive test. These two latter exceptions are very interesting for this contribution, as the link with the exercise of economic freedoms takes centre stage. There has to be evidence to substantiate this connection.

– Finally, there is the case law in which the link with one of the economic fundamental freedoms is substantively tested. The *Dassonville* test or criterion, in order to decide whether there is a measure of equivalent effect as a quantitative import restriction,²³ is famous and extremely wide so as to cover many different kinds of national measures that may subsequently be justified by a rule of reason. Nevertheless, there are cases with a too indirect or too tenuous link with free movement of goods. In that situation, there is no violation of Article 34 TFEU. This test is substantive, on the merits; hypothetical situations are not covered by this wide test but virtual or potential cross-border situations are on the other hand covered. How is it possible to distinguish between hypothetical at the one hand and potential on the other? For the other three economic freedoms, a slightly different rule but still with comparable scope applies.

– There is a fourth layer as well, but in this layer we are definitely within the scope of EU law. This layer deals with the justification stage and the rule of reason. This layer, of a different nature, is not treated in this contribution, but there is definitely much balancing by the CJEU in it.

In this contribution I will first and foremost deal with the second layer, the case law concerning the purely domestic situation, and will study how it differs from the two other layers. It was thought by some of the earlier commentators that 'purely internal situations' would gradually disappear as the internal market freedoms would become more popular. Internal situations, in the words of one author, were so-called growing pains or initial problems, and we would have to deal with these issues for a certain while.²⁴ However, if we have a look at the number of cases dealing with 'purely internal/domestic situations' in the period from 1 September 2009 until 1 January 2020, it is clear that this cluster of case law has not disappeared. One may even argue that this cluster of cases will become larger after the *Ullens de Schooten* case.²⁵ In the next chapter, I will discuss this important case and the major cases concerning domestic situations in the period under research.

²² Joined cases C-197/11 and 203/11 *Libert a.o.*, ECLI:EU:C:2013:288.

²³ Case 8/74 *Dassonville* [1974] 837.

²⁴ Kamiel J. M. Mortelmans, 'Omgekeerde discriminatie in het gemeenschapsrecht' (1979) SEW: Sociaal-Economische Wetgeving at page 654.

²⁵ Case C-268/15 *Ullens de Schooten*, ECLI:EU:C:2016:874.

III The Case *Ullens de Schooten*: Change of Approach by the CJEU?

1 Case Law Prior to *Ullens de Schooten*

Before introducing the case mentioned in the heading of this chapter from 2016, two seemingly conflicting approaches will have to be dealt with first. In 2010, the CJEU issued two comparable cases within one month. On 1st June, in *Blanco Pérez and Chao Gómez*, the CJEU argued that the answer to the preliminary question of the Spanish *Tribunal Superior de Justicia de Asturias* was useful in order to enable that national court to decide on the lawfulness of the national legislation at issue related to license policies for establishing pharmacies in specific areas, based on population density and maximum distance between pharmacies.²⁶ The Grand Chamber of the Court decided that it is ‘not obvious’ that the problem at stake is hypothetical and that ‘it is far from inconceivable’ that nationals from other member states might get in trouble with this restrictive legislation. The CJEU added that the legislation is capable of falling within the scope of EU law only if there are ‘situations connected with trade’ between member states. Apparently this connection was present and a detailed analysis of the national legislation followed. A case with an opposite outcome (*Sbarigia*) was issued one month later, on the 1st of July 2010.²⁷ An owner of a pharmacy in the centre of Rome asked for an exemption from closing times and periods, especially during summer. This was several times refused by the authorities. The national court asking the preliminary questions, the regional administrative tribunal for the province of Lazio, deemed the legislative provisions to be too excessive and unjustified. The first layer of case law distinguished in chapter 2 is easily passed. The preliminary question enjoys a presumption of relevance. However, at the next layer, the CJEU confronts this case with *Blanco Pérez and Chao Gómez*. The general system of rules behind the Italian legislation is not in dispute, as in *Sbarigia* only the decision to refuse exemption from closing times was disputed. Neither the free movement of services, nor the freedom of establishment was at stake. The CJEU did not mention the purely domestic situation, but added that a national of another member state, if he or she would be in the same situation as *Sbarigia*, would either ask for an exemption to the rules or be already established in Italy on a permanent basis. It is ‘quite obvious’ that the answer to be given to this preliminary ruling was not ‘relevant’ and therefore the reference for a preliminary ruling was inadmissible. Both cases have a different outcome and in both cases there was a purely domestic situation. The difference between the two is ‘the general system of rules,’ which is not the same as only closing times and periods that are apparently not so relevant for one of the four freedoms.²⁸ *Airport Shuttle Express*, an example of a purely domestic situation, an Italian operator also protested against the temporary suspension of an authorisation by an Italian

²⁶ See (n 21).

²⁷ Case C-393/08 *Sbarigia* [2010] ECR I-6337.

²⁸ This reminds us of the concept of ‘selling arrangements’ in the case law since *Keck & Mithouard*, joined cases C-267/91 and 268/91, [1993] ECR, I-6097.

municipality because of failure to observe certain conditions.²⁹ The preliminary question was inadmissible; free movement of establishment was not at stake and more evidence of a cross-border link is needed.³⁰ A failure to observe conditions linked to an authorization of an Italian in Italy does not have implications for cross-border economic activities.

Omalet is about two contracting partners who are both established in Belgium, therefore art. 49 TFEU is cannot be applied.³¹ In this decision, the Court referred to an earlier case, *Woningstichting Sint Servatius*, but there the Court argued that there was a restriction because a scheme of prior authorisation before somebody from another EU member state could invest in a public housing scheme leads to a clear restriction of art. 56 TFEU, the free movement of capital.³² A general system of prior authorisation is particularly sensitive and not the same as relations between two contracting parties. A system of prior authorisation was at stake in *Venturini*,³³ where the ruling in *Blanco Pérez and Chao Gómez* was repeated, because here was a 'potential' effect for cross-border situations. The focus is on the general capability of the national legislation in question to produce effects outside the member state itself. However, if there would be a potential effect on cross-border situation then it is not a purely domestic situation and this would have to be explicitly tested in the third layer of case law distinguished in the previous chapter. This is the substantive test of whether there is a restriction of one of the four freedoms. The second and third layers of the scope of the internal market are blurred. I submit that a hypothetical and future effect must be separated from a potential and more nearby effect on cross-border situations. Neither in *Blanco Pérez and Chao Gómez*, nor in *Venturini*, were there nationals of other member states involved. The CJEU only uses the general term 'not inconceivable'. How can 'not inconceivable' be substantiated?³⁴ One element is clear, though; it is always possible that prior authorisation schemes will restrict economic activities, including cross-border ones. The Court is particularly explicit in its approach to bring this kind of scheme within the scope of the internal market, even if there is not yet a subject from another member state interested in investing or becoming an economic operator in the member state with the prior authorisation scheme. This is not the same as complaints concerning opening times and periods, or specific authorisations. Moreover, measures such as in *Blanco Pérez* and *Venturini* were against an established line of earlier case law of the Court. Why then not treating this kind of measures as situations confined in all aspects in one and the same member state? The second and third layers set out in chapter Two are not separated well enough.

²⁹ Joined cases C-162/12 and 163/12, *Airport Shuttle Express*, ECLI:EU:C:2014:74.

³⁰ Joined cases C-419/12 and 420/12, *Crono Service v Roma Capitale*, ECLI:EU:C:2014:81 is a comparable case. The general system of rules seems not to be in dispute.

³¹ Case C-245/09 *Omalet* [2010] I-13771.

³² Case C-567/07 *Woningstichting Sint Servatius* [2009] I-9021.

³³ Joined cases C-159/12 and 161/12, ECLI:EU:C:2013:791. Sara Iglesias Sánchez, 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?' (2018) 14 (1) *European Constitutional Law Review*, calls this the '*Venturini line*' of case law, at page 16.

³⁴ See also Krommendijk (n 14) at page 1377. The threshold is not clear. At page 1369 in reference 67 he submits that the criterion 'not inconceivable' is derived from earlier case concerning public procurement.

The number of cases before 2016 in which the Court used the famous ‘not inconceivable’ terminology in cases where the facts related to one and the same member state is quite large. It is not inconceivable that, for example, companies established in other member states have been or are interested in selling motor fuel in Italy and are concerned by an Italian rule where mandatory minimum distances were imposed on new roadside service stations selling fuel or LPG.³⁵ This would deter newcomers from other member states, as the already established companies would not move. This would lead to discrimination against newcomers. A deterrent effect on the potential exercise of one of the economic freedoms comes within the scope of EU law. In *Libert a.o.* a Flemish regulation limiting purchases or leases of immovable property located in some municipalities brought the CJEU to the same remark: ‘it is by no means inconceivable that individuals or undertakings established in member states other than the Kingdom of Belgium have been or are interested’ in buying or leasing property.³⁶ The Flemish measure tried to hinder French and Walloon persons or undertakings from buying or leasing property in Flanders. Concerning a Latvian case, *Garkalns*, related to betting and gaming the CJEU again reiterated: ‘it is far from inconceivable that operators established in member states others than the Republic of Latvia have been or are interested in opening amusement arcades in Latvia’³⁷. In *Citroën Benelux NV*, the CJEU submitted that

in the present case, however, it is conceivable that businesses established in member states other than the Kingdom of Belgium are interested in making, in that member state, combined offers involving at least one financial component, such as the offer at issue in the main proceedings.³⁸

In all these cases, the facts were confined to the territory of one member state. The CJEU could have concluded that these were purely domestic situations. The Court deems it, however, not inconceivable that the general capability of the national measure at stake is relevant from the viewpoint of one of the four economic freedoms. This blurs the second and third layers of our scheme mentioned in Chapter Two. In *Berlington*, at last, a cross-border element was specifically mentioned: Since, from 2004, EU citizens holidaying in Hungary were still within the Single Market, a national piece of legislation prohibiting the operation of slot machines outside casinos fell within the scope of the free movement of services.³⁹ The case of *Ragn-Sells* is a rare example where the Court is more strict.⁴⁰ The case is a purely Latvian one and, because it was not shown that actors from other member states were interested in treatment of waste, one of the economic freedoms was not applicable. A Latvian company protested against a municipality awarding an exclusive right to treat types of waste collected on its territory. One specific and individual case of awarding is apparently not the same as a ‘general’ deterrent effect on cross-border economic activity.

³⁵ Case C-384/08 *Attanasio Group* [2010] ECR I-2055.

³⁶ Joined cases C-197/11 and C-203/11 *Libert a.o.*, ECLI:EU:C:2013:288.

³⁷ Case C-470/11 *Garkalns*; ECLI:EU:C:2012:505.

³⁸ Case C-265/12 *Citroën Benelux NV*, ECLI:EU:C:2013:498.

³⁹ Case C-98/14 *Berlington*, ECLI:EU:C:2015:386.

⁴⁰ Case C-292/12 *Ragn-Sells AS v Sillamäe Linnavalitsus*, ECLI:EU:C:2013:820.

2 *Ullens de Schooten* (2016)

The judgment in the *Ullens de Schooten*, case delivered on 15 November 2016 is often seen as a turning point with a stricter approach to the purely domestic situation.⁴¹ Advocate-General Bot argued against the 'strict application' of the purely domestic situations case-law in point 48 of his conclusion and the Grand Chamber of the CJEU decided that, nevertheless, there was a domestic situation confined in all its aspects within the Kingdom of Belgium.⁴² In this conflict, many legal battles had been fought before Belgian courts and even one before the European Court of Human Rights, on art. 6 of the European Convention of Human Rights⁴³ concerning the laboratory of *Ullens de Schooten*, declared insolvent in the year 2000. Prior to the date of insolvency, *Ullens de Schooten* was fined and imprisoned for tax evasion and for the illegal operation of a laboratory, contrary to a Belgian legal provision. He complained that the Belgian provisions were not compatible with EU law, since the fact that he was not able to operate his laboratory was contrary to the freedom of establishment, the freedom to provide services and the free movement of capital. The Belgian Constitutional Court argued earlier that all aspects of this case were confined within the Kingdom of Belgium. The Belgian Supreme Court asked the preliminary questions.

The criteria stressed by the Court, apparently because the Advocate-General had another view in this matter, are that 'specific factors' have to be made explicit in the request for a preliminary question that show a link 'between the subject or circumstances' of a conflict and one of the economic freedoms. In other words, the 'connecting factor' with the freedoms has to be apparent, in order to protect individuals planning, deciding, or effectively making use of one or more of the economic freedoms. In *Ullens de Schooten*, there is no such factor present, or the national court did not set it out in its order for reference in sufficient detail. Advocate-General Bot argued differently, that there might still be 'potential' infringements of EU law existing, especially for economic operators established in member states other than Belgium. Access to the Belgian market in medical analysis laboratories was at stake and therefore the Advocate-General was of the opinion that the Belgian legislation is capable of producing cross-border effects. Even the European Commission argued earlier that the Belgian provision was against the freedom of establishment. The CJEU did not follow this view for the reasons stated earlier. However, a deeper reason may have been the importance of the violations of Belgian law, including tax evasion, in this case. The opinion of the CJEU needed to be aligned perfectly with an earlier ECJ case, in *Commission v Belgium*⁴⁴. There the Court decided that the non-reimbursement under the Belgian social security laws of clinical biology services from laboratories that are operated by a legal person under private law and where the members, partners or directors are not all natural persons is not against the

⁴¹ See for example Krommendijk (n 14) pages 1359–1394, who argues that *Ullens de Schooten* is a step in the right direction. The CJEU should not leave its gates too open.

⁴² Case C-268/15 *Ullens de Schooten*; ECLI:EU:C:2016:874.

⁴³ ECLI:CE:ECHR:2011:0920JUD000398907.

⁴⁴ Case 221/85 [1987] ECR 719.

freedom of establishment. Nationals from other member states were still allowed to operate such a laboratory and therefore the important principle of non-discrimination was upheld. In that older case, the Court focused on issue whether the Belgian legislation under scrutiny had been adopted for discriminatory purposes or whether it produced discriminatory effects. This was not the case for both. Therefore, in *Ullens de Schooten*, the Belgian provision was applied without distinction and did not ban nationals of other member states from operating a laboratory in the Kingdom of Belgium. The criminal aspects of the case could strengthen this domestic nature, in the sense that the CJEU is in that case less likely to intervene in domestic situations. In this respect it reminds us of the *Saunders* case, where a criminal aspect was involved as well.⁴⁵

The Advocate-General was right, though, that the Court in earlier cases did focus on ‘potential effects’ and the general capability of a national measure to hinder freedom of movement, apart from its non-discriminatory nature. However, again, this capability was not an issue in the dispute subject to a preliminary ruling. Wahl and Prete argue that the Court has become stricter in questions of jurisdiction and admissibility; the number of preliminary questions by national courts of the member states threatened to become too high.⁴⁶ That is why the onus was, from then on, more on the national court, asking the preliminary questions, to substantiate with sufficient evidence that there is a relevant cross-border link, notwithstanding the circumstance that the facts are all confined within one and the same member state. It is good that the national court is now forced to bring sufficient evidence for a ‘potential’ effect on cross-border economic relations; it is problematic that in a purely domestic situation there might still be potential cross-border effects of the measure, as it would limit autonomy. Again, as stated before, the second layer of the purely domestic situation and the third layer of whether there is a restriction of one of the freedoms are too much blurred.

3 Case Law After *Ullens de Schooten*

Ullens de Schooten has indeed been some kind of a turning point. In *Queisser Pharma versus Federal Republic of Germany* from January 2017, *Ullens de Schooten* was already quoted in a decision concerning the free movement of goods.⁴⁷ Articles 34 to 36 TFEU are not applicable to a German regulation prohibiting a certain food supplement with the possibility of a temporary derogation in a ‘purely domestic situation’. As it the free movement of goods here, the Court adds that the regulation may not have ‘as object or effect disadvantaging exports, vis-à-vis internal commerce’⁴⁸. The substance of the turning point is the duty of national courts to bring more evidence to show the cross-border link. A case strongly related to the *Ullens de Schooten* affair is *Mastromartino versus Consob*, in which an Italian so-called

⁴⁵ Case 175/78 [1979] ECR 1129.

⁴⁶ Nils Wahl, Luca Prete, ‘The Gatekeepers of Article 267 TFEU: on Jurisdiction and Admissibility of References for Preliminary Rulings’ (2018) 55 (2) Common Market Law Review 511–548 at page 535.

⁴⁷ C-282/15, ECLI:EU:C:2017:26.

⁴⁸ Case 282/15 *Queisser Pharma*, para 39.

'tied agent' to an investment company was temporarily banned for one year from doing his job by Consob, the Italian authority supervising the stock exchange, because a disciplinary procedure had been introduced against him.⁴⁹ The position of 'tied agents' operating outside the premises of a financial corporation was, as such, not regulated by Directive 2004/39 concerning markets for financial instruments. There were some provisions in that directive about tied agents, but only related to the responsibility for their work. The national judge asking the preliminary question, was of the opinion that a cross-border element was present, in that a temporary ban would have consequences for the activities of the agent and that those activities could be of cross-border nature. As in *Ullens de Schooten*, the CJEU is very reserved in this case. As there is no link with the substance of the directive, the cross-border element is not given. In the request from the national court for a preliminary ruling, there were insufficient concrete elements to substantiate the relevance of one of the fundamental economic freedoms of the internal market, not even for the potential exercise of the freedom of establishment and the freedom to provide services.⁵⁰ The CJEU added the important words that even a link with a 'potential exercise' of one of the economic freedoms was not present. This is helpful, because it implies that the test in the third layer of case law distinguished in chapter two is not satisfied. If there had been a sufficiently substantiated potential impact on cross-border economic relations, the Court would have passed layer three. Nevertheless, the CJEU had some doubts: in para 36 it admits that it cannot be completely excluded that a national measure, as the Italian regulation (applicable without distinction to nationals and nationals of other member states) could still have consequences that might 'produce effects' outside the confines of Italy.⁵¹ This doubt is not helpful: it matters that there is a focus on the potential effect on cross-border situations. This potential effect needs to be substantiated. A hypothetical or theoretical cross-border situation is not sufficient. The distinction between 'potential' and 'hypothetical' effect must be better explained addressed by the CJEU. Here is where the threshold is between layers two and three.

Let us have a look at two other interesting cases after which we shall try to establish a conclusive argument on what is a purely domestic situation. The first case is *NKBM*, where Directive 2003/98/EC was at stake.⁵² After the CJEU argued that this directive was not applicable to the case, there was an argument over whether the freedom to conduct a business in art. 16 of the Charter of Fundamental Rights of the European Union and articles 49, 56 and 63 TFEU were applicable. Is the Slovenian dispute of a cross-border nature? Advocate-General Bobek focused, in his conclusion, on the remarks of the national court asking the preliminary questions; according to the national court, there were no cross-border elements at the material time of the conflict, only subsequently, and answering the question of conformity with the economic freedoms was therefore deemed to be hypothetical. The CJEU

⁴⁹ Case C-53/18, ECLI:EU:C:2019:380.

⁵⁰ See paragraph 37 of the case.

⁵¹ In the Dutch translation of this paragraph the word 'merkbaar' ('noticeable') appears. This term might suggest a *de minimis* approach.

⁵² Case C-215/17 *NKBM*, ECLI:EU:C:2018:901.

was also of the opinion that the cross-border elements, e.g. the acquisition after the material time of the dispute of a subsidiary in Austria, were not ‘relevant’ to the case. As Wahl and Prete submit, preliminary questions are ‘hypothetical’ when an EU rule is not applicable *ratione temporis* to the facts of the case.⁵³ A potential deterrent effect of the Slovenian regulation for service-providers in other member states was not substantiated with concrete evidence. It is specific evidence and not hypothetical considerations that are needed in order to establish a linking or connecting factor to one of the four economic freedoms. Complaints of operators from other member states, for example, are necessary in this case. This blurs the line between potential and actual; is an ‘actual’ exercise the required threshold for applicability of one of the four freedoms or is a ‘potential’ exercise sufficient?

The second case is *Fremoluc*, a purely Belgian case.⁵⁴ The European Court returned to its older case law, where specific factors on the basis of the facts were essential. The Court needs ‘objective and consistent evidence’ that there is an impact on competitors from other member states. In this case, it led to inadmissibility of the preliminary question, because there was no such evidence. In *Fremoluc*, a so-called priority rule for government agencies responsible for housing policy to purchase lands in Flanders was at stake. A major distinction with the earlier mentioned case of *Libert a.o.* is that, in that case, a general effect of the measure, absolutely limiting purchases, brought it within the scope of the economic freedoms, while the company *Fremoluc* only demanded the annulment of a contract between the owners of some land and the government agency responsible for housing policy. This might explain the distinction in the outcome.

From the discussion of the cases it becomes clear that the purely domestic situation did not wither away in the case law. Since *Ullens de Schooten*, it seems to be stronger than ever. Specific evidence is needed to transform the domestic situation into an EU-related one. One could submit, though, that the purely domestic situation was increasingly merged with the admissibility of the preliminary question, layer one, where the ‘relevance’ of the question for EU law is at stake. In *Fremoluc*, the CJEU referred explicitly to its recommendations to national courts in relation to the initiation of preliminary ruling proceedings.⁵⁵ In other recent cases, the purely domestic situation is directly linked with the relevance of the preliminary question asked by the national court. In some of these cases, the CJEU deems the preliminary questions to be ‘manifestly inadmissible’ and refers to *Ullens de Schooten*. One such case is *Emmea and Commercial Hub*⁵⁶. In this dispute, a regional regulation concerning necessary permits for activities was disputed, but there was lack of factual information of why one of the economic freedoms could be relevant. In *Bán*, it was a Hungarian private law regulation making possible the annulment of contracts concerning the use of arable land in Hungary.⁵⁷ The national judge was of the opinion that such a rule could deter operators from other member states, in

⁵³ Wahl, Prete (n 46) at page 533.

⁵⁴ Case C-343/17 *Fremoluc*, ECLI:EU:C:2018:754.

⁵⁵ OJ 2016 C 439, 1.

⁵⁶ Case C-595/16 *Emmea and Commercial Hub*, ECLI:EU:C:2017:320.

⁵⁷ Case C-24/18 *Bán*, ECLI:EU:C:2018:376.

that their contracts could be annulled without compensation as a consequence of this Hungarian law. Although deterrence or dissuasion of operators from other member states is an important criterion for applying the four economic freedoms, the CJEU referred again to *Ullens de Schooten* and argued that the TFEU freedoms only protect persons who *effectively* made or make use of one of the freedoms. This case also substantiates 'potential' effects: effective exercise is needed for the CJEU to deal with a Hungarian private law rule such as the one mentioned above. This reasoning is against a long line of case law where potential effects on interstate trade within the EU were sufficient to pass the threshold. It is submitted that 'effective exercise' by a national of another member state of the EU is a higher threshold than only 'potential' effects on a certain economic freedom.

IV More Autonomy in Purely Domestic Situations?

What distinguishes the cases *Ullens de Schooten*, *NKBM* and *Fremoluc* from other cases, where the CJEU concluded that it is conceivable or at least not inconceivable that there is a potential impact on one of the four economic freedoms? In the three cases mentioned, even a potential impact on one of the economic freedoms could not be established. Some points are, in my opinion, important in this respect.

First, the information the national court gives in its request for a preliminary question is important. When the national court already admits that a situation does not have a cross-border component or such a component is only hypothetical, the CJEU might be more easily convinced that there is a purely domestic situation. Second, the general and abstract capability of the national regulation to produce potential effects on interstate trade is an element to be taken into account, notwithstanding the confinement of the case to only one member-state of the EU. This general ability of the national law to restrict one of the four freedoms is also the central question at the third layer, and there is again, the confusion between the two layers. The general ability has to be substantiated by sufficient concrete evidence concerning the relation of the disputants and the facts of the dispute with one of the economic freedoms of the internal market. I submit that this evidence must be specific and linked to the immediate exercise of one of the economic freedoms. Again, a hypothetical or future exercise is not a potential one. The term 'potential' must be sufficiently substantiated, and if that is not possible, we should change this term to 'immediate'. There is an important threshold between the exercise of the right to free movement and the mere relevance of a future and hypothetical event. For free movement of goods, this is explicitly stated by the Court in *New Valmar BVBA*, where the drawing-up of an invoice has a direct impact on free movement of goods.⁵⁸ In this case, from the Flemish-speaking part of Belgium, invoices were null and void if they were not drafted in the Dutch language. This was not proportionate and therefore contrary to the free movement of goods.

⁵⁸ Case C-15/15 *New Valmar BVBA*, ECLI:EU:C:2016, at para 46.

Third, in *Ullens de Schooten* and *NKBM*, criminal procedures were at issue, where nationals of the member state in question were penalised. How is a criminal conviction of a national to be linked with the exercise of one of the economic freedoms? To invoke provisions of EU internal market law in such a context is not the issue.⁵⁹ That is the criminal procedure itself. This might be an application of a so-called ‘object-or-effect’ approach: both the object (conviction of a national in a national criminal procedure) and the effect (no cross-border elements involved) add up, and the outcome of this combination of effect and object is that there is a purely domestic situation. It is submitted, however, that the main test in layer three is also an ‘object-or-effect’ approach. Hence, the object does matter and there is a kind of (hidden) balancing by the CJEU involved, both at layer two (the purely domestic situation) as in layer three (the substantive test of one of the four freedoms).

Fourth, the peculiar nature of the preliminary rulings procedure is an element of importance as well. In this kind of procedure, an answer to the national courts’ questions must be necessary for the national dispute to be solved. On the other hand, there is the infringement procedure the European Commission starts against a member state for violating or neglecting EU law. In this last procedure, the CJEU will focus on the more general ability of a national measure to impact on one of the four economic freedoms. This distinction can be explained by the purposes of these two procedures. The purpose of the preliminary procedure is to help in solving a legal dispute before a national court.⁶⁰ Cooperation between the CJEU and the national courts is essential in this specific procedure. If the actors in this dispute do not *effectively* make use of EU law, there is, clearly, no need to give an answer to the question of the national court.

Concluding, this recent case law upholds the formal relevance of the purely domestic situation, at least in the preliminary procedure.⁶¹ It is submitted that the CJEU may have taken this direction for efficiency reasons, in order to limit the amount of questions from national judges.⁶² It is therefore questionable whether the older *Venturini* line or also the *Blanco Pérez*-line of case law, on the ‘not inconceivability’ of relevance for one of the economic freedoms in situations where all the facts of the case are limited within one and the same member state, is still valid in preliminary rulings procedures. A very recent judgment from 19 December 2019 gives the answer. As long as there is sufficient concrete evidence, given by the national court that asks the preliminary questions, it is still ‘not inconceivable’ that an indistinctly applicable measure produces cross-border effects, even in a situation where all of

⁵⁹ Sacha Prechal mentions the option of introducing a so-called *Schutznorm* in this respect; does the economic freedom really protect the interests of the person who invokes one of the economic freedoms? Sacha Prechal, ‘Interne situaties en prejudiciële vragen’ (2015) (11) SEW: Sociaal-Economische Wetgeving 494–496. See also Jasper Krommendijk (n 14) n 35 above at page 1376.

⁶⁰ In the words of an old publication from a Dutch academic, it takes two to tango. Martijn van Empel, ‘It takes two to tango. Over de samenwerking tussen Hof van Justitie en nationale rechter in het kader van art. 177 EEG-Verdrag’ in *Een goede procesorde: opstellen aangeboden aan mr. W.L. Haardt* (Kluwer 1983) 271.

⁶¹ See also Shuibne (n 11) at page 129.

⁶² See concerning this argument especially the article by Wahl and Prete referred to in n. 46 above at page 511.

the facts are confined within one and the same member state. In *Comune di Bernareggio* concerning the sale of a pharmacy under a tendering procedure, the referring judge successfully produced evidence that the value of the tendering was 580,000 euro, that the acquisition is open to any EU citizen with the required professional qualifications and that there is a mutual recognition of such qualifications under an EU directive.⁶³ Under these circumstances, an unconditional right of pre-emption granted by regulation to only those pharmacists in the service of the municipal pharmacy is against the freedom of establishment. This recent case shows that the turning point in *Ullens de Schooten* is not as huge as originally thought. It is only by the national court asking the preliminary question to bring sufficient evidence that cross-border economic relations may potentially be affected.

An important distinction is the one between hypothetical and potential. A potential effect on a cross-border type of situation may trigger the applicability of one of the four economic freedoms. Only a hypothetical situation is definitely not sufficient. In the old *Moser* case, a German citizen who was not allowed to enter postgraduate training to become a teacher tried to invoke the free movement of workers.⁶⁴ If he could not enter vocational training, he could not become a teacher and later work in another member state. This relationship with one of the economic freedoms is hypothetical, according to the Court. Moser was a member of the German Communist party and in the 1980s these members were banned from several jobs because of the applicable *Berufsverbote*, including the job of teacher. This case may be an example of the object-or-effect test mentioned earlier. The effects on the free movement of workers are hypothetical because Moser could only go to another EU country after finishing vocational training. The object of the case is the sensitive issue of the *Berufsverbote*, an object the European Court, in relation to its effects on cross-border movement, apparently considered to be too tenuous. The causal relation between not being able to access vocational training and the movement to another member state is simply too indirect.

V Conclusion: Towards a Solution

It is the overlap between a formal or jurisdictional and a substantive approach to purely domestic situations that is confusing. The jurisdictional approach in the preliminary rulings procedure, with a stronger focus on the purely domestic situation, might not be sufficient in the end to restrain national judges from asking preliminary questions in cases where all elements are confined within the territory of one and the same member state. Moreover, the European Commission could still start an infringement procedure against this member state. This makes the purely domestic situation not suitable for increasing the autonomy of and flexibility within the member states of the EU. Autonomy is easier to be expected after an application of the proportionality principle in the justification stage of the test whether

⁶³ Case C-465/18 *AV, BLI versus Comune di Bernareggio*, ECLI:C:EU:2019:1125.

⁶⁴ Case C-180/83 *Moser v Land Baden Württemberg*, [1984] ECR 2539.

a national measure is justified, notwithstanding its meagre impact on one of the four economic freedoms. The *Sayn-Wittgenstein* and *Omega* cases mentioned in the beginning of this contribution are proof of this. The purely domestic situation case law is less prone to increase the autonomy of the member states.

Nevertheless, I submit that the balancing between impact on the internal market and the preservation of public order and national identity at the level of the individual member states also does take place in the decision on whether there is a purely domestic situation or not. Here there is also an object-or-effect test, clearly more hidden and implicit, and it is not only actual movement that matters. I agree with Mataija that it may be better, for the sake of predictability and legal certainty, to have a substantive test to decide whether one of the four economic freedoms is at stake and whether there is a purely domestic situation or a sufficient connection with an EU-relevant situation.⁶⁵ He even derives inspiration from other branches of EU law, such as competition and public procurement law, to find the substantive threshold. This threshold is, according to him, ‘where the effectiveness of the internal market is substantially affected’⁶⁶. This specific threshold may indeed protect in a better manner the competences and the autonomy of the member states. His approach, however, is against the *acquis communautaire* built over several decades, as the term ‘substantially’ also introduces a kind of *de minimis* approach, in that minor impediments on the freedoms are still to be accepted.⁶⁷ The term ‘substantially affected’ is, on the other hand, an improvement in comparison with the ‘not inconceivable’ line of case law.

We are indeed in need of explicit thresholds between domestic and EU-related situations. In my view, it is better to integrate the three layers of case law mentioned in Chapter Two, because, in all three layers, decisions by the CJEU are partly or wholly made on the merits, whether hidden or not. An object-or-effect-test to decide whether a national rule does not comply with one of the four economic freedoms is the best option. It is not only cross-border movement or economic activity *per se*⁶⁸ that is sufficient; this activity should also be assessed in light of the object of the national rule in question. Purely an effect-based approach would open the door to a *de minimis* approach that would be inconsistent with EU internal market law.

In conclusion, we should work with two instead of three layers. The first layer is on the relevance of the preliminary question, on the production of evidence by the national court that asks the question and on the presence of a purely domestic situation if there is insufficient evidence for a cross-border link. The second layer is a more substantive test of whether there is a sufficient connection with one of the economic freedoms. If there is a hypothetical or a too indirect link with one of the four freedoms, the result would also be a purely domestic

⁶⁵ Mataija (n 9) at page 63.

⁶⁶ *Ibid.*, at page 63.

⁶⁷ The concept of *de minimis* is known from EU competition law.

⁶⁸ Okeoghene Odudu, ‘Economic Activity as a Limit to Community law’ in Catherine Barnard, Okeoghene Odudu (eds), *The Outer Limits of European Economic Law* (Hart Publishing 2009, Oxford and Portland) at page 225.

situation. As such, we could have a purely domestic situation both at layers one and two. We could easily use the example of the Roman god of Janus, with which Wahl and Prete started their article, here as well.⁶⁹ Here this example of the god with the two faces, one directed to the past and the other to the future, is used in another manner. One face, layer one, is directed to the national court asking the preliminary questions. The other one, layer two, is about the scope and the outer limit of the EU internal market law and EU law in general.

⁶⁹ See the contribution of Wahl, Prete mentioned in n 46 at page 511.

Party Autonomy in the Brussels I Recast Regulation and Asymmetric Jurisdiction Clauses

I Introduction

Party autonomy is given and bound by law. It allows private parties to step outside default jurisdiction rules to choose the court that will decide their (future) disputes. They are, however, not completely free in their choice. Within the EU, the Brussels I Recast Regulation regulates jurisdiction in civil and commercial matters.¹ Article 25 provides for the autonomy of the parties. When the parties have reached an agreement on jurisdiction, the chosen court is competent, unless the agreement is null and void under the law of the courts of the chosen Member States (hereinafter: the *lex fori prorogatum*) or if it was not concluded in accordance with the formal requirements of Article 25 Brussels I Recast. This is a complex provision that has been applied in different ways by the courts of various Member States, including Bulgaria,² France,³ Poland⁴ and England,⁵ where the validity of asymmetric jurisdiction agreements is concerned. These diverging approaches have led to legal uncertainty regarding the validity of these clauses.

In this contribution I first give a brief introduction to jurisdiction clauses and explain what constitutes an asymmetric clause. Second, I introduce the Brussels Regime, which aims to enhance the predictability of jurisdictional rules in the EU. Article 25 of the Brussels I Recast provides for procedural party autonomy but is very complicated. Third, I discuss the case law in France and England regarding the validity of asymmetric jurisdiction clauses.⁶

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¹ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L351/11 2012.

² Decision No. 71 under Commercial Case No. 1193/2010, Second Commercial Chamber of the Bulgarian Supreme Court of Cassation, 2 September 2011.

³ Cour de cassation (French Supreme Court) 26 September 2012, case no. 11-26.002, *Mme X v Banque Privée Edmond de Rothschild Europe*.

⁴ Decision of 19/10/2012, V CSK 503/11; Decision of 24/11/2010, II CSK 291/10.

⁵ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* [2019] EWHC 1747 (Comm) (05 July 2019).

⁶ Due to a language barrier I leave the Bulgarian and Polish cases out of this analysis.

Whereas in France such clauses are subject to scrutiny by the courts, the English have no compunctions about enforcing them. Courts in both jurisdictions, however, have applied Article 25 in ways that raise questions about its interpretation. I will argue that there is no reason that asymmetric jurisdiction agreements should be inadmissible under the Brussels I Recast Regulation, and that the Court of Justice of the European Union should clarify this matter. However, the problems with asymmetric choice of forum agreements highlight several issues that are inherent to the current Article 25.

II Jurisdiction Clauses

Choice of forum agreements or jurisdiction clauses occur when parties agree on the court that has jurisdiction over their (future) disputes.⁷ They may agree on a specific court in a particular jurisdiction, or they may designate multiple courts or an arbitral tribunal. Jurisdiction clauses generally have a dual effect: they convey jurisdiction to the chosen court – prorogation – and they exclude the jurisdiction of other forums – derogation.⁸ The most important reason for parties to choose a forum is legal certainty. International transactions can be complex and the predictability offered by a jurisdiction clause is a significant advantage.⁹

There are several types of jurisdiction clauses. The first are exclusive jurisdiction agreements, which designate a single forum to the exclusion of all other courts.¹⁰ Second are non-exclusive jurisdiction agreements, which only confer jurisdiction and do not exclude the competence of other forums.¹¹ The law is designed to fit jurisdiction agreements into this

⁷ For a comprehensive discussion see Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008, Oxford); Hélène van Lith, *International Jurisdiction and Commercial Litigation* (TMC Asser Press 2009, The Hague) 597.

⁸ Pieter H. L. M. Kuypers, *Forumkeuze in Het Nederlandse Internationaal Privaatrecht* (Kluwer 2008, Deventer) 147; Rainer Hausmann, 'Vereinbarung über die Zuständigkeit (Art. 23–24)' in Thomas Simons and Rainer Hausmann (eds), *Brüssel I-Verordnung: Kommentar zur VO (EG) Nr. 44/2001 und zum Übereinkommen von Lugano 2007* (IPR Verlag 2012, Munich) 487.

⁹ Kuypers (n 8) 38–39.

¹⁰ An example of an exclusive jurisdiction clause: 'Any claim arising under or relating to this Agreement shall be governed by the internal substantive laws of [X] and the parties submit to the exclusive jurisdiction of the [X] courts'; also see Briggs (n 7) para 4.09.

¹¹ Hausmann (n 8) 487. An example of a non-exclusive agreement found in EWHC Civ. 725 (2009) *Highland Crusader Offshore Partners LP v Deutsche Bank AG*: 'This Agreement shall be governed by and construed in accordance with the laws of [X]. Buyer and Seller hereby irrevocably submit for all purposes of or in connection with this Agreement and each Transaction to the jurisdiction of the Courts of [X]. [...] Nothing in this paragraph shall limit the right of any party to take proceedings in the courts of any other country of competent jurisdiction.' The distinction between exclusive and non-exclusive agreements is important to both the Brussels I Recast and other international instruments on choice of forum. The Hague Convention on Choice of Court Agreements. Article 25 of the Recast creates an assumption of exclusivity by stating that 'Such jurisdiction shall be exclusive unless the parties have agreed otherwise'. In a similar vein, the CJEU ruled that a jurisdiction clause is exclusive under the Brussels regime if it excluded the jurisdiction of all other courts for both parties. Additionally, the reverse *lis pendens* rule of Article 31(2) applies only to exclusive agreements.

binary system of exclusive and non-exclusive clauses but not all jurisdiction agreements fit this framework.¹² In some areas of international commerce – banking and finance, for example – parties tend to include both exclusive and non-exclusive elements in their choice of forum agreement. A typical example of a hybrid clause can be found in the *Rothschild* case:

Any dispute which arises between the client and the Bank will be submitted to the exclusive jurisdiction of the courts of Luxembourg. The Bank nonetheless reserves the right to proceed against the client in the courts of the client's domicile or before any other court with jurisdiction in default of an election of the preceding jurisdiction.¹³

This clause is non-exclusive for the financial institution, giving it the advantage of choosing a court at a later date while covering its risks of being sued in an unexpected location by binding the other party to one court.¹⁴ Because they confer unequal procedural rights to the parties, hybrid clauses are also called asymmetric jurisdiction agreements.

The principle that gives effect to these agreements is called party autonomy.¹⁵ When the law recognises international procedural autonomy, parties may expect that their choice of forum will be enforced.¹⁶ Procedural party autonomy is central to European PIL and the subject of international instruments such as the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Hague Convention of 30 June 2005 on Choice of Court Agreements.¹⁷ Aided by these policies, choice of forum is fundamental to international dispute settlement.¹⁸

III Choice of Forum Under the Brussels Regime

1 Purpose

The goal of the Brussels I Recast Regulation is to enhance access to justice by providing highly predictable rules on jurisdiction¹⁹ and choice of forum plays an important part in this.²⁰

¹² David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (3rd edn, Sweet & Maxwell 2015, London) para 4.03; Briggs (n 7) para 4.23.

¹³ Cour de cassation (French Supreme Court) 26 September 2012, case no. 11-26.002, *Mme X v Banque Privée Edmond de Rothschild Europe*.

¹⁴ Richard Fentiman, 'Unilateral Jurisdiction Agreements in Europe' (2013) 72 (1) *The Cambridge Law Journal* 24.

¹⁵ Horatia Muir Watt, 'Party Autonomy' in *International Contracts: From the Makings of a Myth to the Requirements of Global Governance* (2010) 6 (3) *European Review of Contract Law* 250–283.

¹⁶ Briggs (n 7) para 1.22.

¹⁷ David Paulus, Evgenia Peiffer, Max Peiffer, *Europäische Gerichtsstands- Und Vollstreckungsverordnung (Brüssel Ia): Kommentar Zur Verordnung (EU) Nr. 1215/2012 (EuGVVO)* (C. H. Beck 2017, Munich), 489–490; Peter Mankowski, Ulrich Magnus, *Brussels I Bis Regulation* (Verlag Otto Schmidt 2016, Cologne), 583.

¹⁸ van Lith (n 7) 7; Paulus, Peiffer and Peiffer (n 17) 489–490; Kuypers (n 8) 2.

¹⁹ Recital 1 and 15 of the Brussels I Recast.

²⁰ Recital 15 of the Brussels I Recast; Paulus, Peiffer and Peiffer (n 17) 490; Karl Kreuzer, Eva E Wagner, Wolfgang Reder, 'Gerichtsstandsvereinbarungen (Art. 25 EuGVVO)' in Manfred A. Daus, Markus Ludwigs (eds),

Article 25 protects the autonomy of the parties by giving effect to their agreements on jurisdiction.²¹ According to the CJEU, this deference to party autonomy ‘is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to disputes falling within the scope of the [Brussels regime]’²². Article 25 thus aims at a wide recognition of choice of court agreements.²³ This is only justified, however, if the parties truly consented and the choice of forum represents their unimpeded will.²⁴ Consent to choice of forum is key and must be clearly and precisely demonstrated.²⁵

Inherent to the recognition and protection of party autonomy is the need for boundaries to this principle.²⁶ Unbridled contractual freedom is likely to undermine broader public interests protected by the Regulation, such as the efficient allocation of cases and the protection of weaker parties. The Brussels I Recast sets out several restrictions in this regard. First, there are cases where the division of bargaining power between the parties is so unequal that the weaker parties should be protected.²⁷ Choice of forum with insurance policy holders, consumers and employees is only allowed under certain circumstances, such as that the parties concluded their jurisdiction agreement after a dispute arose.²⁸ Choice of forum with weaker parties is therefore only effective when the parties already disagree about a certain issue and intend to take it to court.²⁹ Jurisdiction clauses that create more forums for the weaker party are also allowed.³⁰ Second, Article 24 sets out several grounds for exclusive jurisdiction. These grounds are not aimed at the protection of weaker parties but rather at the factual and legal proximity of certain cases to a particular court, which ensures the effective settlement of these disputes.³¹

Handbuch des EU-Wirtschaftsrechts (Verlag C. H. Beck 2019, Munich) para 53; Reinhard Gaier, ‘Brüssel I-VO Art. 25: Zulässigkeit von Gerichtsstandsvereinbarungen’ in Volkert Vorwerk, Christian Wolf (eds), *BeckOK ZPO* (Verlag C. H. Beck 2019, Munich) para 1.

²¹ Andrew Dickinson, Eva Lein, *The Brussels I Regulation Recast* (Oxford University Press 2015, Oxford) para 9.06; Paulus, Peiffer, Peiffer (n 17) 489–490; Gaier (n 20) para 1.1.

²² Case C-23/78 *Meeth v Glacetal* [1978]; Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000].

²³ Mankowski, Magnus (n 17) 593.

²⁴ Para 7.

²⁵ Case C-24/76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Rütwa Polstereimaschinen GmbH* [1976] para 7; Case C-25/76 *Segoura v Bonakdarian* [1976], para 6; Case C-106/95 *MSG v Gravières Rhénanes* [1997] para 15; Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] para 13.

²⁶ Briggs (n 7) para 1.22; Gaier (n 20) para 2.

²⁷ Gaier (n 20) para 2.1.

²⁸ Articles 15(1), 19(1) and 23(1) Brussels I Recast.

²⁹ Peter F Schlosser, Burkhard Hess, *EuZPR: EU-Zivilprozessrecht Mit EuGVVO, EuMahnVO, EuBagVO, EuZVO, EuBVO – Kommentar* (Verlag C. H. Beck 2015, Munich) 110.

³⁰ Articles 15(2), 19(2) and 23(2) Brussels I Recast.

³¹ Gaier (n 20) para 3.

2 Legislative History

Choice of forum was first addressed in the Brussels Convention of 1968, the original European instrument on jurisdiction in civil and commercial matters. Article 17 of this Convention dealt with prorogation of justice. The original text required only that choice of forum agreements should be ‘in writing or evidenced in writing’. This changed with the 1978 Accession Convention,³² adapting the Article to European case law to add international trade usages. The 1989 Accession Convention inserted a reference to practices between the parties.³³ Article 17(5) is especially noteworthy:

If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

This paragraph therefore specifically included the possibility of asymmetric jurisdiction agreements. Article 17(5) was removed from the 2001 Brussels I Regulation.³⁴

Article 23 of the Brussels I Regulation provided that an agreement on jurisdiction was binding and must be given effect by the chosen court and by all other courts. The Article furthermore set out several standards for the validity of choice of forum agreements that mostly resembled that of Article 17 of the Convention. In theory, the validity of the choice of forum agreements was settled definitively by the court seized, in accordance with the European guidelines laid down in the Brussels I Regulation. However, Article 23 did not specify how to determine the material validity of choice of forum agreements. The CJEU created several uniform criteria to determine whether there was real consent between the parties on choice of forum agreements, for example where the agreement was part of the general terms and conditions.³⁵

For other matters concerning the substantive validity of jurisdiction agreements, the courts of the Member States were dependent on national contract laws. However, when

³² Article 11 of the 1978 Council Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (78/884/EEC).

³³ Article 7 of the 1989 Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic (89/535/EEC).

³⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 12/1 2001.

³⁵ Case C-214/89 *Powell Duffryn v Petereit* [1992], analysing whether a choice of forum clause in the by-laws of a company constitutes sufficient consent; Case C-106/95, *MSG Mainschiffahrtsgenossenschaft v Gravières Rhénanes SARL* [1997].

the question arose as to which national law should be applied, the Rome I Regulation did not provide an answer.³⁶ Several solutions were proposed by scholars across the EU.³⁷ Some favoured the application of the *lex fori* because, as a procedural contract, the choice of forum agreement should be subject to the law of the seized court.³⁸ Others argued for the application of the *lex contractus* unless the parties had chosen a different law for their choice of forum agreement.³⁹ These divergences suggested that a jurisdiction clause might be substantively valid in one Member State and inadmissible in another.

3 Article 25 Brussels I Recast

Article 25 aimed to solve this problem by regulating substantive validity as well as formal validity. It now requires that choice of forum agreements are based on real consent and that they meet certain formal requirements.

a) Formal validity

The formal validity of choice of forum agreements is an EU autonomous concept.⁴⁰ A jurisdiction agreement must be either: *a)* concluded in writing, *b)* in a form that is established between the parties, or *c)* in international commerce, in a form that corresponds with a trade usage. The effect of the formal requirements is twofold: they ensure the consent of the parties and provide proof of this consent.⁴¹ The main purpose of the formal requirements of Article 25 is to give effect to the free and independent will of the parties and to ensure that the consensus between the parties is established.

b) Substantive validity

The European legislator tried to tackle the issue of substantive validity in the Brussels I Recast but, in doing so, it created other problems.⁴² The new Article 25 provides the national courts

³⁶ Choice of forum agreements are explicitly excluded from its scope Article 1(2)(e) of Regulation (EC) no. 593/2008 on the law applicable to contractual obligations (Rome I Regulation), OJ L177/6 2008.

³⁷ Thomas Rauscher, *Europäisches Zivilprozess- Und Kollisionsrecht EuZPR/EuIPR* (Verlag Otto Schmidt 2016, Cologne) 713–714; Dickinson, Lein (n 21) para 9.56–61; the Heidelberg Report on the Application of Regulation Brussels I in the Member States (2005); Case C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] opinion of Adv Gen Slynn 1697–1698; The negotiations of the Recast Regulation (e.g. Council Document 9474/11 ADD 14 [2011]).

³⁸ Case C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] Opinion of Advocate General Gen Slynn 1697–1698.

³⁹ This was proposed by the French and Danish delegations during the negotiations for the Recast Regulation, Council Document, 9474/11 ADD 14, 16 June 2011, p. 10-11.

⁴⁰ Schlosser, Hess (n 29) 154.

⁴¹ Case C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] para 26; Case C-221/84 *Berghofer GmbH v ASA SA* [1985] para 13; Case C-269/95 *Benincasa v Dentalkit Srl* [1997] paras 28–29; Case C-159/97 *Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] paras 34 and 48.

⁴² Mankowski, Magnus (n 17) 593.

with some guidelines regarding substantive validity: an agreement on jurisdiction is valid unless it is null and void as to its substantive validity under the law of the chosen court. This is also a reference to the conflict of laws rules of that jurisdiction.⁴³

The new rule on substantive validity is problematic for several reasons, especially where asymmetric choice of forum agreements are concerned.⁴⁴ First, the reference to the law of the chosen court includes a reference to the conflict of laws rules of that jurisdiction.⁴⁵ Choice of forum agreements, however, are excluded from the Rome I Regulation⁴⁶ and consequently there are diverging conflict of laws rules in the Member States. In this situation, it may be difficult to predict which law will eventually be designated to determine the substantive validity of an agreement on jurisdiction. Second, Article 25 creates difficulties when the choice of forum agreement confers jurisdiction upon courts in multiple Member States, as is the case with asymmetric choices of forum. Which of the chosen jurisdictions should determine the validity? Third, once the appropriate law has been found, determining the substantive validity can be a complicated affair. The uncertainty stems from the ambiguous nature of the scope of the reference.⁴⁷ It is not clear which issues regarding the agreement's validity fall within the autonomously determined requirements, and how they may affect the enforcement of choice of forum clauses. In principle, the reference to national law must be interpreted strictly. So far, it only includes the grounds for material invalidity based on defects of consent – and consequently the existence of the agreement – and generally not illegality or public policy.⁴⁸ In practice, it is left to the courts of the Member States to determine on a case-by-case basis in which category a certain issue falls.

IV Asymmetric Choice of Forum in France

While choice of forum agreements are generally valid in France, the status of asymmetric jurisdiction clauses is more complicated.⁴⁹ There have been several cases by the *Cour de*

⁴³ Recital 20 Brussels I Recast.

⁴⁴ Peter Mankowski, 'The Role of Party Autonomy in the Allocation of Jurisdiction in Contractual Matters' in Franco Ferrari and Francesca Ragno (eds), *Cross-border Litigation in Europe: the Brussels I Recast Regulation as a panacea?* (Wolters Kluwer 2015, Italy) 102.

⁴⁵ Recital 20.

⁴⁶ 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) Official Journal of the European Union L 177/6.

⁴⁷ Dickinson, Lein (n 21) paras 9.35–9.36; Mankowski, Magnus (n 17) 628–631.

⁴⁸ Like fraud, mistake, duress and misrepresentation. See Trevor Hartley, Masato Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (2013) <<https://www.hcch.net/en/publications-and-studies/details4/?pid=3959>> accessed 3 May 2020, para 126.

⁴⁹ François Mailhé, 'France: A Game of Asymmetries, Optional and Asymmetrical Choice of Court Agreements Under French Case Law' in Mary Keyes (ed), *Optional Choice of Court Agreements in Private International Law* (Springer 2020, New York) 197; Alexandre Bailly, Xavier Haranger, *Litigation and Enforcement in France: Overview* (Westlaw Practical Law 2018) para 26.

cassation (the French Supreme Court), which developed a test for the validity of such agreements.⁵⁰

1 The Rothschild doctrine

The first and most famous of the French cases is the *Rothschild* decision.⁵¹ In the winter of 2006, Mme X opened a bank account with the Banque Privée Edmond de Rothschild Europe through the bank's French branch, the Compagnie Financière Edmond de Rothschild. Clause 27-2 of the general conditions provided that:

Any dispute which arises between the client and the Bank will be submitted to the exclusive jurisdiction of the courts of Luxembourg. The Bank nonetheless reserves the right to proceed against the client in the courts of the client's domicile or before any other court with jurisdiction in default of an election of the preceding jurisdiction.

After suffering significant losses on her investments, Mme X brought proceedings against the Bank and its French branch in Paris. The court of first instance and the *Cour d'appel* (French court of appeals) rejected the clause and assumed jurisdiction.⁵² The latter court reasoned that although the Brussels regime allows for clauses that favour one of the parties, the principle of Article 17 'does not allow for a clause to give to one party complete discretion to choose whatever court it pleases.'⁵³ The Bank appealed and submitted to the Cour de cassation that unilateral jurisdiction clauses are valid under Article 23 of the Brussels I Regulation. It argued that the Cour d'appel had misread the clause, as it was not intended to refer to any court in any jurisdiction, but only to courts competent under the Regulation.⁵⁴ Under this latter interpretation, the Bank deferred to the jurisdictional grounds set out by the Regulation and thus to its aims of securing foreseeability and legal certainty as to jurisdiction. Finally, the Bank submitted that the Cour d'appel had set aside the whole clause, while only the first phrase of the clause (i.e. Mme X's obligation to sue in Luxembourg) was at issue. The Cour de cassation dismissed the appeal:

⁵⁰ The French issue with asymmetric choice of forum agreements seemingly stems from the doctrine of the *condition potestative* (Article 1174 *Code Civil*). This doctrine prohibits conditions that are completely dependent on the will of the promisor for their existence.

⁵¹ Cour de cassation (French Supreme Court) 26 September 2012, case no. 11-26.002, *Mme X v Banque Privée Edmond de Rothschild Europe*.

⁵² Tribunal de grande instance (Paris) 18 January 2011, no. 09/16659, translation by Keyes and Marshall, 'Jurisdiction agreements: exclusive, optional and asymmetric' (2011) 15 (3) *Journal of Private International Law* 368; Cour d'appel de Paris 18 October 2011, no. 11/003572.

⁵³ Cour d'appel de Paris 18 October 2011, no. 11/003572.

⁵⁴ 'tout autre tribunal compétent'.

Having noted that the clause, under which the Bank reserved the right to sue in Mme X's domicile or before any other competent court, solely bound Mme X to bring proceedings in Luxembourg, the Cour d'appel correctly inferred that the clause had a *potestative character* with respect to the bank so that it was contrary to the objective and purpose of prorogation of jurisdiction under Article 23.⁵⁵

It seems the Cour de cassation applied national contract law to determine what was acceptable under the Brussels I Regulation. This approach was much criticised in practice, as well as by legal scholars.⁵⁶ For example, Ancel and Cuniberti rightly argue that, under French national law, the clause in *Rothschild* cannot be potestative.⁵⁷ Article 1174 CC provides for the nullity of a potestative clause, i.e. an agreement that is completely subjected to the will of one of the parties. However, in *Rothschild*, it is clear that the choice of forum agreement was binding, but that it gave Rothschild extra options with regard to the competent forum. As such, it was not the existence of the clause that was dependent on the will of Rothschild, but its implementation, and there was no potestativity under French law. More importantly, the Cour de cassation should not have applied French law at all. Although the substantive validity of the clause fell under Article 23, which contained no conflicts rule, the different theories regarding the law applicable to the choice of forum agreement would probably have led to the application of Luxembourg law.⁵⁸ Additionally, as argued by Keyes and Marshall, and Cobussen, the judgment destabilises a well-established international practice, resulting in legal uncertainty.⁵⁹ Cobussen further argues that the limited scope of the reference to national law does not allow for choice of forum agreements to be subjected to the doctrine of the *condition potestative*⁶⁰ and I agree with him. Asymmetry does not seem to be an issue of consent.

Despite the international critiques, the Cour de cassation confirmed its approach to asymmetric clauses, this time in relation to the *Lugano Convention*.⁶¹ In the 2015 *ICH v Crédit Suisse*⁶² case, the parties had agreed on a financing package under which returns on the clients

⁵⁵ Cour de cassation 26 September 2012, case no. 11-26.002, *Mme X v Banque Privée Edmond de Rothschild Europe* (emphasis added).

⁵⁶ Elisabeth Omes, 'Commentaire: La Clause Attributive de Jurisdiction Potestative, Ou Quand La Fin Justifie Les Moins' (2013) (51) *Bulletin Droit & Banque* 29–33; Pascal Ancel, Gilles Cuniberti, 'One Sided Jurisdiction Clauses – A Casenote on Rothschild' [2013] *Journal des Tribunaux Luxembourg* 9–12.

⁵⁷ Maxi Scherer, 'The French Rothschild Case: A Threat for Unilateral Jurisdiction Clauses?' (2013) <<http://kluwerarbitrationblog.com/2013/07/18/the-french-rothschild-case-a-threat-for-unilateral-dispute-resolution-clauses/>> accessed 3 May 2020; Omes (n 56) 29–33; Ancel, Cuniberti (n 56) 9–12; Deyan Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' (2014) 31 (1) *Journal of International Arbitration* 33; Mankowski (n 44) 117; R. A. B. Cobussen, 'Asymmetrische Forumkeuzes Binnen de Franse Rechtsfeer' (2017) 114 *Nederlands Tijdschrift voor Internationaal Privaatrecht* 24–28.

⁵⁸ The different theories regarding the law applicable to the choice of forum agreement probably lead to Luxembourg, see Kuypers (n 8) 204.

⁵⁹ Keyes, Marshall (n 52) 345–378; Mukarrum Ahmed, 'The Legal Regulation and Enforcement of Asymmetric Jurisdiction Agreements in the European Union' (2017) 28 *European Business Law Review* 410; Cobussen (n 57) 27.

⁶⁰ Cobussen (n 57) 26–27.

⁶¹ Article 23 *Lugano Convention* is a verbatim adoption of Article 23 *Brussels I Regulation*.

⁶² Cour de cassation 25 March 2015, case no. 13-27264 *ICH v Credit Suisse*.

investments were to be used to repay its secured loan to *Crédit Suisse*. The credit facility agreement contained a jurisdiction agreement, which provided that:

The borrower acknowledges that the exclusive forum for all procedures is Zurich or the place of the Bank's branch where the relationship [between the parties] was established. The Bank, however, reserves the right to take action against the borrower before *any other competent court*.⁶³

The investments were not as lucrative as hoped, and ICH brought proceedings against the bank before the *Tribunal de Grande Instance d'Angers*. The Tribunal held that it had no jurisdiction, as it was neither the court of the domicile of either bank nor the Court of Zurich. The *Cour d'appel d'Angers* confirmed this decision. It briefly addressed the asymmetric nature of the clause and stated that the imbalance in such an agreement, concluded between parties in different countries, does not suffice to make it irregular under the 2007 Lugano Convention. The Cour de cassation overturned this decision, reasoning that:

[W]ithout considering whether the jurisdiction clause – which required only ICH to bring its claims before the Swiss courts, while it reserved for the Bank the right to proceed against any court with jurisdiction and did not specify the objective elements on which this alternative jurisdiction was based – was potestative and contrary to the objectives of predictability and legal certainty of prorogation of justice opened by Article 23 of the Lugano Convention of 30 October 2007, the Cour d'appel has rendered its decision without a legal basis.

The Cour de cassation, as it did in *Rothschild*, incorporated French contract law in its decision by referencing the doctrine of the condition potestative. Furthermore, the decision seemed to be inspired by *Coreck Maritime v Handelsveem*. In this case, the CJEU ruled that, although a jurisdiction clause need not nominate a single judge, it must be sufficiently precise so that a seized judge can determine their competence on the basis of the clause.⁶⁴ The clause must therefore clearly state the objective criteria that establish jurisdiction.⁶⁵ The Cour de cassation's interpretation of *Coreck Maritime v Handelsveem* has been criticised in the literature because the bank is limited to the courts that are competent under the Brussels regime.⁶⁶ I agree that it should therefore not be contrary to its purpose of predictability.

The Cour de cassation further clarified its approach to asymmetric choice of forum agreements in its 2015 *eBizzuss* decision.⁶⁷ This case concerned a dispute between Apple Sales International, an Irish company and eBizzuss, an authorised reseller of Apple products seated in Paris. eBizzuss initiated proceedings before the *Tribunal de commerce de Paris* (the Paris commercial court), contending that Apple Sales International had made eBizzuss commercially and economically dependent and then violated this relationship by giving

⁶³ Emphasis added.

⁶⁴ Case C-387/98 *Coreck maritime v Handelsveem*, [2000]; Cobussen (n 57) 1, 24.

⁶⁵ Case C-387/98 *Coreck maritime v Handelsveem*, [2000], para 15.

⁶⁶ Cobussen (n 57) 31–32.

⁶⁷ Cour de cassation 7 October 2015, no. 14-16898 *Apple Sales International v eBizzuss*.

preference to its own Apple stores. The Tribunal did not follow this reasoning and declared that it had no jurisdiction on the basis of the relevant jurisdiction clause:

[T]he parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple reserves the right to institute proceedings against Reseller in the courts having jurisdiction in *the place where Reseller has its seat or in any jurisdiction where a harm to Apple is occurring*.⁶⁸

eBizzcuss appealed to the Cour d'appel, arguing that the clause was contrary to the objectives of predictability and legal certainty of the Brussels I Regulation. The Cour d'appel rejected this argument, holding that the clause was certain to the extent that it allowed for the identification of the courts before which disputes might be brought. eBizzcuss proceeded to file an appeal before the Cour de cassation. The Cour de cassation took the opportunity to clarify its earlier case law from *Rothschild* and *ICH* that asymmetric jurisdiction clauses can be valid as long as they provide objective elements that allow the parties to identify the courts which might hear disputes. In this case, the Cour de cassation considered that the clause contained objective elements that do not allow Apple Sales International to choose any competent jurisdiction it pleases. It was limited to the choice between the courts of eBizzcuss' domicile or the courts of the place where Apple incurred damages. It seems that the Cour de cassation required objective factors and that leaving the beneficiary of the clause the choice of 'any other competent court' was enough to render the jurisdiction agreement invalid.

2 Reversal and Confirmation of the Rothschild Doctrine

For a brief time in 2017, the Cour de cassation abandoned the Rothschild approach. The *Diemme Enologia* case⁶⁹ concerned a distribution contract for wine production machines. The distribution contract provided for the exclusive jurisdiction of the courts of Ravenna (Italy) but left Diemme the option to choose any other competent court in accordance with the legal procedural rules. The Cour d'appel had previously set aside the clause because of its potestative character but the Cour de cassation quashed the decision, stating that it did not matter that the clause bound only one of the parties.⁷⁰ This was widely believed to be the end of the Rothschild doctrine by French legal authorities.⁷¹

⁶⁸ Emphasis added.

⁶⁹ Cour de cassation, civile, Chambre commerciale, 11 May 2017, no. 15-18.758 *Diemme Enologia v Etablissements Chambon & fils*.

⁷⁰ 'Qu'en statuant ainsi, alors qu'elle avait constaté la volonté des parties de convenir d'une prorogation de compétence dans les termes du contrat, peu important que cette clause attributive ne s'impose qu'à l'une des parties, la cour d'appel, qui n'a pas tiré les conséquences légales de ses constatations, a violé le texte susvisé.'

⁷¹ François Maillé 'Les clauses attributives de compétence asymétriques dans les relations d'affaires' (2018) 1 *La revue de droit international d'Assas* 433; Alexandra Szekely, 'Asymmetric Jurisdiction Clauses: Now Valid Again?' (2017) <<https://www.linkedin.com/pulse/asymmetric-jurisdiction-clauses-now-valid-again-alexandra-szekely/>> accessed 15 November 2019; Marie-Élodie Ancel, Léa Marion, 'Case Note' (2017) 4 *Journal du droit international (Clunet)* 1338; Dominique Bureau, 'Confirmation du retour en grâce de la clause attributive de juridiction dissymétrique' (2017) (3) *Revue Critique de Droit International Privé* 483–498.

Then, in February and October 2018, the Cour de cassation reaffirmed its opposition to asymmetric clauses in *Crédit Suisse II*⁷² and *Saint-Joseph*.⁷³ In *Crédit Suisse II*, the Cour de cassation was asked to rule again on the clause between the bank and its client. The Cour stated that a jurisdiction clause must be sufficiently precise to ensure the Brussels Regime's objectives of predictability and legal certainty. The asymmetric clause in *Crédit Suisse II* did not contain any objective factors that would indicate where the Bank could bring proceedings, nor did it refer to a particular legal rule or system on which the alternative jurisdiction would be based. Therefore, the parties had not agreed in a clear and precise manner on the court or courts to which they intended to submit their disputes. The Cour de cassation further clarified this test in *Saint-Joseph*. Referring to *Coreck Maritime v Handelsveem*,⁷⁴ it first stated that, although a jurisdiction agreement need not identify the specific court to which it attributes competence, the clause must contain some objective elements on the basis of which the parties have agreed to choose the court or courts to which they will submit their disputes. These factors must be sufficiently precise so that a seized court can determine whether it has jurisdiction. This test is then applied to the jurisdiction clause:

If French law allows it, disputes relating to this contract are subjected to the courts of Luxembourg. However, the bank reserves the right to derogate from this attribution of jurisdiction if it considers it appropriate.

The Cour de cassation decided that this clause failed to meet the objective of predictability because it lacked an objective element; neither did it reference any rule of jurisdiction that was applicable in a Member State of the European Union.

At present, the *Rothschild* doctrine therefore requires asymmetric jurisdiction agreements to either contain an objective element – such as the place where damage was incurred (*eBizzcus*) – or to explicitly refer to a jurisdictional rule that is applicable in a EU Member State.⁷⁵

V Asymmetric Choice of Forum Agreements in England

Jurisdiction clauses are *prima facie* valid and strongly favoured by the English courts.⁷⁶ This affirmative attitude also extends to asymmetric choice of forum agreements, although there is some evidence that suggests that English courts may not have fully applied the conflicts rule of Article 25 Brussels I Recast.⁷⁷

⁷² Cour de cassation, civile, Chambre civile 1, 7 February 2018, 16-24.497 *Crédit Suisse II*.

⁷³ Cour de cassation, civile, Chambre civile 1, 3 October 2018 no. 17-21.309 *Saint-Joseph*.

⁷⁴ Case C-387/98 *Coreck maritime v Handelsveem* [2000].

⁷⁵ Mailhé (n 49) 208.

⁷⁶ EWHC 1970 2P 94-106 T *Eleftheria*; also see: Juan Alberto Salmerón Henríquez, *Freedom of Contract, Bargaining Power & Forum Selection in Bills of Lading* (Rijksuniversiteit Groningen 2016, Groningen) 283.

⁷⁷ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* [2019] EWHC 1747 (Comm) (05 July 2019).

1 *Continental Bank v Aekos Compania Naviera*

Continental Bank is the 1994 English landmark case on asymmetric jurisdiction agreements.⁷⁸ It was one of the first cases to address the issue of the validity of asymmetric choice of forum agreements in England under the (then) Brussels Convention.⁷⁹ A loan agreement between parties from England and Greece contained a choice of law and choice of forum agreement stating that '[e]ach of the borrowers [...] irrevocably submits to the jurisdiction of the English courts [...] but the bank reserves the right to proceed under this agreement in the courts of any other country claiming or having jurisdiction in respect thereof'⁸⁰. The borrowers defaulted and initiated litigation in Greece. Hoping to restrain these proceedings, the bank applied for an anti-suit injunction before the English Courts. The issue was whether the jurisdiction clause was exclusive so far as the borrowers were concerned. The Court of Appeal noted that the clause was simultaneously non-exclusive for the bank and exclusive for the borrowers.⁸¹ *Continental Bank* received its anti-suit injunction and the borrowers did not challenge the validity of the asymmetric agreement. Thus, the Court of Appeal implicitly assumed that asymmetric clauses are valid and enforceable against the non-option holder.

2 *Lornamead Acquisitions Ltd v Kaupthing Bank Hf*

In *Lornamead*, it was the option-holder that challenged the asymmetric choice of forum agreement.⁸² *Kaupthing*, an Icelandic bank, collapsed during the financial crises of 2008. Prior to its demise, the bank had provided loan facilities to *Lornamead*. The loan agreement provided for English law and stated that the English courts had exclusive jurisdiction, but that the jurisdiction clause was only binding for *Lornamead*. *Lornamead* complied with the clause, and brought proceedings in England, hoping to be released from its obligations to *Kaupthing*. However, *Kaupthing* challenged the jurisdiction of the English Courts. The Court held that Article 17 of the Lugano Convention, which at the time was the same as Article 17 of the Brussels Convention, did not entitle the option holder to 'unilaterally [...] challenge proceedings previously brought by *Lornamead* against *Kaupthing* in England in accordance with the terms of the English jurisdiction clause'⁸³. *Kaupthing* did not dispute this ruling and accepted that the *lis pendens* rule in the Lugano Convention restricted its freedom to litigate in Iceland, based on the clauses' relative non-exclusivity now that proceedings had been started before the English Courts.

⁷⁸ *Continental Bank NA v Aekos Compania Naviera SA* [1994] 1 WLR 588, 594.

⁷⁹ Keyes, Marshall (n 52) 373.

⁸⁰ *Continental Bank*, no 31.

⁸¹ Maura E. Wilson, 'Let Go of That Case – British Anti-Suit Injunctions against Brussels Convention Members' (2003) 36 (1) *Cornell International Law Journal* 217.

⁸² EWHC 18 October 2011, 2611 *Lornamead Acquisitions Ltd. v Kaupthing Bank HF*.

⁸³ EWHC 18 October 2011, 2611 *Lornamead Acquisitions Ltd. v Kaupthing Bank HF* no. 112.

3 *Commerzbank Aktiengesellschaft v Liquimar Tankers Management*

In *Commerzbank*, the High Court of Justice held that asymmetric choice of forum agreements are valid under the Brussels I Recast.⁸⁴ Commerzbank agreed to finance the building of ships by Liquimar. The loan agreement contained an asymmetric jurisdiction clause, giving the Bank the prerogative to commence proceedings in any competent court, while the non-option holders were limited to England. There were two parallel proceedings, one in England and the other in Greece. Liquimar sought to stay the English proceedings and, so, as to avoid triggering the reverse *lis pendens* rule of Article 31(2) of the Brussels I Recast, contended that asymmetric agreements are not compatible with Article 25. It argued that Article 25 requires the parties to have designated the courts of a Member State to enable the law applicable to the substantive validity to be identified and to provide certainty as to where a non-beneficiary can expect to be sued. Furthermore, Liquimar invoked the French *Rothschild* case. Cranston J. did not follow this argument:

There is nothing in Article 25 that a valid jurisdiction agreement has to exclude any courts, in particular non EU Courts. Article 17, penultimate paragraph, of the Brussels Convention recognised asymmetric jurisdiction clauses. To my mind, it would need a strong indication that the Brussels I Recast somehow renders what is a regular feature of financial documentation in the EU ineffective.⁸⁵

4 *LIC Telecommunications et al v VTB Capital et al.*

In 2019, the EWHC applied Article 25 Brussels I Recast to determine the validity of an asymmetric jurisdiction clause under Luxembourg law.⁸⁶ The case concerned ownership of the Vivacom Group, which is a major player in the Bulgarian telecommunications industry. Clause 19 of the Directorship Agreement provided that the courts of Luxembourg would have jurisdiction, but that the Manager could also bring proceedings ‘against the company in any other court of competent jurisdiction or concurrently in more than one jurisdiction’. Moulder J interpreted Article 25 in the following terms:

The issue in relation to the clause is whether such asymmetric clauses are valid as a matter of EU law. It is now common ground that it is a *question of autonomous EU law* and not a question of national law. (It was I believe accepted that the proviso ‘unless the agreement is null and void as to its substantive validity’ refers to issues such as capacity, fraud and mistake, not whether particular kinds of ‘choice of court’ agreements are permitted under the Regulation).⁸⁷

⁸⁴ EWHC 3 February 2017 WL 00430746, *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc.*

⁸⁵ EWHC 3 February 2017 WL 00430746, *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* no. 80.

⁸⁶ EWHC 5 July 2019 *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors.*

⁸⁷ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* para 254 (emphasis added).

The court next heard evidence on Luxembourg’s law’s position on asymmetric choice of forum agreements. Moulder J then stated that ‘in my view the evidence that Luxembourg courts, applying EU law, would not uphold such clauses was not made out on the evidence’⁸⁸.

VI Article 25 of the Brussels I Recast and the Validity of Asymmetric Choice of Forum Agreements

The Brussels I Recast Regulation serves several purposes that are relevant for asymmetric jurisdiction agreements, such as predictability, party autonomy, and the protection of weaker parties. Taking into account the findings from the previous paragraphs, I will now analyse how the French and English courts apply the Recast Regulation and their impact on the way Article 25 serves the objectives of the Brussels Regime.

1 Analysis of the Case Law

a) France

The Cour de cassation does not seem to refer to the conflicts rule of the *lex fori prorogatum* in its case law, and has instead created its own set of criteria for the validity of asymmetric jurisdiction clauses.⁸⁹ This development started with the *Rothschild* case, in which the Cour de cassation ruled that the unequal character of the jurisdiction clause was contrary to the purposes of the Brussels Regime. In later case law, it specified that it was referring to predictability and legal certainty.⁹⁰

In *Crédit Suisse II* and *Saint-Joseph*, the Cour de cassation ruled that an asymmetric jurisdiction clause must either contain objective elements or a reference to a specific set of jurisdiction rules. Fentiman,⁹¹ Ahmed,⁹² and Cobussen⁹³ have written that asymmetric clauses do not lead to unpredictability if they refer the beneficiary to any other competent court under the Brussels I Recast. I share their view. The option-holder may choose between the forums provided by the other Sections of the Recast Regulation. Relying on these jurisdiction rules can surely not result in unacceptable uncertainty as to the competent court. Additionally, EU-external situations may require further thought. When there is a real possibility that the beneficiary of an optional clause would choose the courts of a third country, it would be unclear which jurisdiction rules those courts would apply to determine their competence.⁹⁴

⁸⁸ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* para 261.

⁸⁹ The presence of objective elements or a referral to a jurisdiction rule that is applicable in a Member State.

⁹⁰ Although Mailhé believes that the protection of weaker parties also played a role. See Mailhé (n 49) 206–207.

⁹¹ Fentiman (n 14) 26.

⁹² Ahmed (n 59) 415.

⁹³ Cobussen (n 57) 31–32.

⁹⁴ Keyes, Marshall (n 52) 378 discuss the possibility that an asymmetric clause would not allow the parties to reasonably foresee where they may be sued but do not mention third countries.

That being said, the current French doctrine does not seem to be in accordance with Article 25 Brussels I Recast.⁹⁵ The French courts do not apply the *lex fori prorogatum* to determine the substantive validity of asymmetric choice of forum clauses, and require that the jurisdiction clause either contains objective factors or that it refers to a specific set of jurisdictional rules. Although there may have been some room for interpretation under the Brussels I Regulation, the Recast clarified the issue by providing the appropriate conflicts rule. The general objectives of the Brussels regime should not be used to bypass Article 25 Brussels I Recast. I agree with Fentiman,⁹⁶ Ahmed⁹⁷ and Mailhé⁹⁸ that the CJEU should get the opportunity to rule on the interpretation of Article 25 in relation to asymmetric choice of forum agreements, although it is unlikely that the Cour de cassation will make such a request after recently confirming its *Rothschild* doctrine.

b) England

Under English law, the validity of asymmetric choice of forum agreements is not problematic.⁹⁹ It is, however, interesting to see how the EWHC interprets the scope of the reference to the *lex fori prorogatum* and how it applies this conflicts rule to the asymmetric clause in *LIC Telecommunications*. Moulder J observes that

The issue in relation to the clause is whether such asymmetric clauses are valid as a matter of EU law. It is now common ground that it is a *question of autonomous EU law and not a question of national law*.¹⁰⁰

Is the Court stating that it believes asymmetry to fall outside the scope of ‘null and void’? To my knowledge, this matter has not yet been clarified in EU case law concerning Article 25, nor is there consensus as to the scope among legal scholars.¹⁰¹ There is a growing group of authors that favours the view that unreasonability and public policy also fall within the referral.¹⁰² As such, there remains some room for discussion as to whether asymmetry would fall under

⁹⁵ Mailhé (n 49) 209–210.

⁹⁶ Fentiman (n 14) 26.

⁹⁷ Ahmed (n 59) 418–420.

⁹⁸ Mailhé (n 49) 209–210.

⁹⁹ Louise Merrett and Janeen Carruthers, ‘United Kingdom: Giving Effect to Optional of Court Agreements—Interpretation, Operation and Enforcement’ in Keyes (n 49) 458–462.

¹⁰⁰ EWHC 5 July 2019 *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* para 254 (emphasis added).

¹⁰¹ Geert van Calster, ‘LIC Telecommunications et Al v VTB Capital et Al. High Court Suggests Autonomous EU Approach to Asymmetric Choice of Court. Also Discusses Contract and Tort Distinction, and Abuse of Process.’ (17 July 2019) <<https://gavclaw.com/2019/07/17/lic-telecommunications-et-al-v-vtb-capital-et-al-high-court-suggests-autonomous-eu-approach-to-asymmetric-choice-of-court-also-discusses-contract-and-tort-distinction-and-abuse-of-process>> accessed 14 November 2019.

¹⁰² See Mankowski, Magnus (n 17) 592 with reference to P. Gottwald in Münchener Kommentar zur ZPO Art. 23 EuGVÜ note 15 and 60; R. Hausmann in Staudinger IntVertrVerf note 294; Hk-ZPO/Dörner Art. 23 note 23; Hüßtege in Thomas/Putzo, Art. 23 note 18; Kropholler/von Hein Art. 23 note 89 (cautiously); Leible/Röder, RIW 2007, 481; Mankowski in Rauscher Art. 23 note 12h; Musielak/Stadler Art. 23 note 1; Pfeiffer in FS Rolf A. Schütze (1999) 671, 675 et seq and for Art. 25 Brussels Ibis Magnus in FS Dieter Martiny (2014) 785, 801.

‘null and void’. And, if the Court believes that asymmetry is not a matter for the *lex fori prorogatum*, Moulder J in theory may have investigated whether there are defects in consent that she would consider to fall within the scope of the reference. This did not happen, however. The Court heard evidence on Luxembourg’s position on asymmetric jurisdiction agreements, and on that basis concluded that it did not believe the Luxembourg courts would invalidate the clause in *LIC Communications*.¹⁰³ How does this approach correspond to the Court’s apparent opinion that asymmetry does not fall within the scope of the reference? Moreover, it does not appear from the judgment that the Court heard evidence on Luxembourg’s private international law, nor is it clear whether the Court applied Luxembourg PIL to find the law that determines the substantive validity of the clause. This decision has not yet received much attention in the legal literature,¹⁰⁴ but it demonstrates the complexity of (the scope of) the conflicts rule for the substantive validity of asymmetric clauses.

2 Article 25 Brussels I Recast and Asymmetric Jurisdiction Agreements

From the above, it has become clear that there are some issues with Article 25 Brussels I Recast and its application. It should first be noted, however, that asymmetric choice of forum agreements are, in theory, compatible with Article 25.¹⁰⁵ Asymmetric clauses were expressly provided for in the original Brussels Convention. According to Fentiman, the provision was removed from the Brussels I Regulation because the new instrument endorsed non-exclusive agreements in general and there was no need to mention asymmetric clauses specifically.¹⁰⁶

In practice, however, the issues of Article 25 Brussels I Recast seem to be magnified by asymmetric choice of forum agreements.¹⁰⁷ Article 25 refers the clause to the national law of the chosen court for its substantive validity, including that jurisdiction’s PIL. There are two problems that underlie this rule. The first relates to the nature of the conflicts rule. Article 25 requires the seized court to apply the national law, including conflict of laws, of the prorogated court. This raises the question of which of the potential courts’ law should decide the substantive validity of the clause. The Brussels I Recast Regulation does not provide a solution for this matter, as it operates under the assumption that only one Member State will be nominated in any given choice of forum agreement. Second, the scope of the reference to national law is also unclear: a jurisdiction agreement is invalid if it is ‘null and void’ under the *lex fori prorogatum*. The scope of this reference, however, is unclear. It is generally understood to refer to matters of consent or capacity of the parties,¹⁰⁸ but there is no

In this context, it would be interesting and useful to compare the (scope of the) conflicts rule for substantive validity from Article 25 Brussels I Recast to similar rules found in other European PIL Regulations.

¹⁰³ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* paras 254–261.

¹⁰⁴ See van Calster (n 101).

¹⁰⁵ Ahmed (n 59) 411–412.

¹⁰⁶ Fentiman (n 14) 26.

¹⁰⁷ Dickinson, Lein (n 21) para 9.65.

¹⁰⁸ Dickinson, Lein (n 21) para 9.69.

consensus on the issue.¹⁰⁹ It is therefore uncertain whether asymmetry falls within the scope of the reference.

The next issue is not a result of Article 25 itself but rather of the lack of an autonomous conflicts rule for choice of court agreements. In the current situation, the Member States should apply the PIL of the chosen court to asymmetric jurisdiction agreements, and the connecting factors and the subsequent referral may vary. However, from what I have gathered from the above case law, the Cour de cassation applied French contract law even if the French courts were not chosen and it also did not apply PIL to determine the validity of the clause. The EWHC did apply Luxembourg law, but did not look at Luxembourg PIL as required by the Brussels I Recast.¹¹⁰ Considering that the purpose of the referral to the law of the chosen court was to ensure ‘a similar outcome on this matter whatever the court seized’¹¹¹, it seems that the conflicts rule of Article 25 misses its goal in this regard. One possible solution is to exclude *renvoi*, but I believe it would be better to create a EU conflicts rule for finding the *lex causae* of choice of forum agreements. The nature and formulation of such a rule require further research, but ideally it would lead to the application of the law that is most closely connected with the jurisdiction clause, while taking other objectives of the Brussels Regime into account.

VII Conclusion

Party autonomy is one of the underlying principles of the Brussels I Recast Regulation. Choice of forum agreements are presumed to be valid if they meet the formal requirements of Article 25 Brussels I Recast unless they are ‘null and void as to [their] substantive validity’ under the law of the chosen court. This is a complicated rule that makes it difficult to determine the status of asymmetric jurisdiction agreements in the EU. The judicial application of Article 25 differs in the Member States. In France, the Cour de cassation developed a doctrine based on French contract law and EU case law to determine whether asymmetric jurisdiction agreements are valid. Its arguments for doing so are that these clauses are unequal and/or that their outcome is insufficiently predictable. I do not agree with this assessment: the Brussels Regime does not prohibit unequal clauses nor does the optionality of the clause lead to unacceptable uncertainty in the EU. Although the English courts do not perceive any issues with

¹⁰⁹ Mankowski, Magnus (n 17) 592 with reference to P. Gottwald in Münchener Kommentar zur ZPO Art. 23 EuGVÜ note 15 and 60; R. Hausmann in Staudinger IntVertrVerf (n 102); Hk-ZPO/Dörner Art. 23 note 23; Hüßtege in Thomas/Putzo, Art. 23 note 18; Kropholler/von Hein Art. 23 note 89 (cautiously); Leible/Röder, RIW 2007, 481; Mankowski in Rauscher Art. 23 note 12h; Musielak/Stadler Art. 23 note 1; Pfeiffer in *FS Rolf A. Schütze* (1999) 671, 675 et seq and for Art. 25 Brussels Ibis Magnus in *FS Dieter Martiny* (2014) 785, 801.

¹¹⁰ Recital 20 and Article 25 Brussels I Recast; *LIC Telecommunications* paras 244-261.

¹¹¹ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)’ COM (2010) 0748 Final, para 3.1.3.

asymmetric choice of forum agreements, the EWHC gave an interesting interpretation of Article 25. On the basis of these observations, I make two recommendations. The first is that the CJEU should rule on the interpretation of Article 25 in relation to the admissibility of asymmetric clauses and the *Rothschild* doctrine. The second is that further research is required to look into the possibility, nature and text of a EU conflicts rule for choice of court agreements.

Reinterpretation of the Requirements to Preserve the Autonomy of the EU Legal Order in Opinion 1/17**

I Introduction

On 30 April 2019, the Court of Justice of the European Union (CJEU), sitting as a full court, delivered its long-awaited Opinion 1/17¹ on the compatibility of the new investor-State dispute settlement (ISDS) mechanism proposed in the Comprehensive Economic and Trade Agreement² (CETA) between the EU and Canada with European Union (EU) law. The outcome of the Opinion is somewhat surprising, because the CJEU, in the past, seemed to be overly protective of its own jurisdiction when it came to the establishment of a new international court or the accession to an international agreement providing for its own court and usually rejected the participation of the EU and the Member States in the competing international dispute settlement mechanisms.

Indeed, the CJEU has laid down in its case-law extremely strict criteria that a dispute settlement mechanism has to fulfil in order to be found compatible with EU law. These criteria have been mostly spelled out in the CJEU's opinions³ given under Article 218(11) TFEU,⁴ which allows the CJEU to rule on the compatibility of an international agreement with EU law prior to the conclusion of the agreement.

One of the main arguments used by the CJEU in the course of the assessment of the envisaged adjudicatory mechanisms, based on which the CJEU has usually established incompatibilities, was the *protection of the autonomy of the EU legal order*. Even though this notion is not elaborated on in the EU Treaties, the CJEU has developed an extensive case-law

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¹ Opinion 1/17 of the Court (Full Court) of 30 April 2019 [2019] OJ C220/02 (Opinion 1/17).

² Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, Chapter 8, Section F <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>> accessed 3 May 2020 (CETA).

³ Although at first glance the CJEU's opinion may seem only advisory, in case of an adverse opinion, 'the agreement envisaged may not enter into force unless it is amended or the Treaties are revised'.

⁴ *Consolidated version of the Treaty on the Functioning of the European Union* [2012] OJ C326/1.

on the autonomy of EU law, which is usually accompanied by the notions of very foundations,⁵ very nature⁶ and essential characteristics.⁷ In other words, as long as a new dispute settlement mechanism has no adverse effect on the very core elements of EU law, the preservation of the autonomy of the EU legal order can be ensured and the envisaged mechanism is likely to be compatible with the EU Treaties.

However, particularly in the latest opinions of the CJEU, the autonomy of the EU legal order has gained a broader interpretation compared to the CJEU's previous case-law on autonomy, which gave rise to uncertainties as regards the exact meaning and boundaries of the term. This shift has been heavily criticised in the legal literature, concluding that autonomy is still 'partially nebulous'⁸ and describing the CJEU as being 'selfish'⁹ and 'jealous'¹⁰.

In addition to the uncertainties as to what autonomy is supposed to protect exactly and how the autonomy of the EU legal order may be preserved within the framework of the new ISDS mechanism envisaged by the CETA, there was another event that added further aspects to the legal situation surrounding Opinion 1/17. This was the *Achmea* decision,¹¹ in which the Grand Chamber of the CJEU held that the investment arbitration clause contained in the Dutch–Czech–Slovakian intra-EU Bilateral Investment Treaty had an adverse effect on the autonomy of the EU legal order and was, therefore, incompatible with EU law. Although the *Achmea* decision relates to the incompatibility of an intra-EU dispute settlement mechanism with EU law and, therefore, it has no direct implications on the assessment of an extra-EU adjudication, the CJEU, by referring to its previous opinions, noted in *Achmea* that

[...] *an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law.* The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, *provided that the autonomy of the EU and its legal order is respected* [...].¹²

⁵ Opinion 1/91 of the Court of 14 December 1991 [1991] ECR I-6079, paras 46, 71 (Opinion 1/91).

⁶ Opinion 1/09 of the Court (Full Court) of 8 March 2011 [2011] OJ C211/03, paras 85, 89 (Opinion 1/09); Opinion 2/13 of the Court (Full Court) of 18 December 2014, [2015] OJ C065/02, para 212 (Opinion 2/13).

⁷ Opinion 1/91 (n 5) para 21; Opinion 1/00 of the Court of 18 April 2002 [2002] ECR I-3493 paras 14, 18, 21, 23, 26 (Opinion 1/00).

⁸ Cristina Contartese, 'The autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again' (2017) 54 (6) Common Market Law Review 1627–1672, 1627.

⁹ Bruno de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in Marise Cremona, Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014, Oxford-Portland, 33–46) 33ff.

¹⁰ Paul Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR' in Wolfgang Benedek and others (eds), *European Yearbook of Human Rights* (Neuer Wissenschaftlicher Verlag 2015, Vienna, 27–50) 27ff.

¹¹ Case C-284/16 *Slowakische Republik v Achmea BV* [2018] ECLI:EU:C:2018:158.

¹² *Ibid.*, para 57, emphasis added.

Consequently, the CJEU, having in mind the then ongoing procedure initiated for the opinion of the CJEU on the compatibility of the international investment court envisaged in the CETA, confirmed that as long as the autonomy of the EU legal order is respected by an international regime with a binding dispute settlement mechanism, this system, as a matter of principle, cannot be considered incompatible with EU law. Thus, *Achmea* may also be read as guidance as to how an ISDS mechanism may be lawfully integrated into the framework of the EU Treaties.¹³

With all these considerations in mind, in Opinion 1/17 the CJEU gave a green light to the ISDS mechanism proposed in the new generation bilateral free trade agreements, stating that the envisaged international investment court ‘does not adversely affect the autonomy of the EU legal order.’¹⁴ With this decision, however, the CJEU has departed, to a certain extent, from its latest opinions and reinterpreted the requirements that must be met for the preservation of the autonomy of the EU legal order.

This paper seeks to examine how and to what extent the CJEU reconsidered its assessment on the autonomy of the EU legal order in Opinion 1/17 and how this recent opinion can be reconciled with the previous case-law of the CJEU in connection with other extra-EU dispute settlement mechanisms. First, we give a brief overview of the factual and legal background that led to the delivery of Opinion 1/17 (II). Subsequently, the development of the concept of autonomy will be discussed in more detail, by describing the CJEU’s most relevant opinions on the external dimension of autonomy (III). Following this, we will focus on Opinion 1/17 and the main elements of the CJEU’s argumentation on how the autonomy of the EU legal order may be preserved in relation to the new ISDS mechanism envisaged in the CETA (IV). Finally, we close this paper with our conclusions (V).

II The Way Leading to the CETA Opinion

Over the last decade, the prevailing system of international investment arbitration faced a ‘*legitimacy crisis*,’¹⁵ which necessitated radical changes to the traditional ISDS mechanism. The main concerns that have been raised against investor-State arbitration include the lack of consistency, coherence, and predictability of the awards and the lack of transparency, as well as the lack of an impartial and independent procedure flowing from the nature of the arbitrators’ appointment.¹⁶

¹³ Burkhard Hess, ‘The Fate of Investment Dispute Resolution after the *Achmea* Decision of the European Court of Justice’ MPILux Research Paper 3/2018, 18 <https://www.mpi.lu/fileadmin/mpi/medien/events/2018/4/3/WPS3_2018_The_Fate_of_Investment_Dispute_Resolution_after_the_Achmea_Decision_of_the_European_Court_of_Justice> accessed 3 May 2020.

¹⁴ Opinion 1/17 (n 1) para 161.

¹⁵ UNCTAD, ‘World Investment Report Reforming International Investment Governance’ (2015) 128 <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> accessed 3 May 2020 (World Investment Report 2015).

¹⁶ Gabrielle Kaufmann-Kohler, Michele Potestà, ‘Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal

In response to the various criticisms, the EU, under its new competence conferred by the Lisbon Treaty,¹⁷ launched a two-step reform process with the aim of fundamentally reforming investor-State arbitration. As a first, preliminary step, investment arbitration is intended to be gradually replaced with a bilateral two-tier *investment court system* (ICS) envisaged in the investment agreements concluded with third States and, as a second, final move, this process is expected to culminate in the establishment of a *multilateral investment court*, which will be entitled, in the long run, to adjudicate investment disputes covered by the new generation agreements.¹⁸

The details of the ICS mechanism have been spelled out in the investment chapter of the CETA and also appear in the free trade agreement negotiated with Mexico,¹⁹ as well as in the investment protection agreements concluded with Singapore²⁰ and Vietnam.²¹ This new EU-led approach provides, for the first time in an investment protection context, an appellate mechanism in order to ensure the consistency and predictability of the ICS awards and, thereby, to remedy one of the main deficiencies of investor-State arbitration. This means that the ICS comprises a standing first instance Tribunal and an Appellate Tribunal, which may review the Tribunal's awards for errors in the application or interpretation of the law as well as in the appreciation of facts.²²

In addition to the appellate review, the selection method of the members of the permanent tribunals is another remarkable feature of the new system because the disputing parties have no say in the appointment of their own adjudicators. Instead of this, a joint committee,

mechanism? – Analysis and roadmap' (2016) CIDS – Geneva Center for International Dispute Settlement Research Paper (2016), 12–14 <http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf> accessed 3 May 2020; Michael Waibel and others, 'The Backlash against Investment Arbitration: Perceptions and Reality' in Michael Waibel and others (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010, xxxvii-li) xxxviii; Richard Happ, Sebastian Wuschka, 'From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma' (2017) VI Indian Journal of Arbitration Law 113–132, 113; World Investment Report 2015 (n 15) 128; Giovanni Zarra, 'Orderliness and Coherence in International Investment Law and Arbitration: An Analysis Through the Lens of State of Necessity' (2017) 34 (4) Journal of International Arbitration 653–678, 656.

¹⁷ Art 3(1) e) and 207(1) TFEU.

¹⁸ Art 8.29 CETA.

¹⁹ Draft Text of the EU-Mexico Trade Agreement, Section [X] Resolution of Investment Disputes, <https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf> accessed 3 May 2020.

²⁰ Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part, Chapter 3 <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 3 May 2020.

²¹ Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part, Chapter 3 <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 3 May 2020.

²² Elsa Sardinha, 'The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement' (2017) 32 (3) ICSID Review – Foreign Investment Law Journal 625–672, 626; N. Jansen Calamita, 'The Challenge of Establishing a Multilateral Investment Tribunal at ICSID' (2017) 32 (3) ICSID Review – Foreign Investment Law Journal 611–624, 612; Art 8.28 2. a)–b) CETA.

consisting of representatives of the contracting parties,²³ is responsible for the appointment of the members of the tribunals and the case-allocation to a division of the Tribunals occurs in a ‘random and unpredictable’ way.²⁴

Since it was not entirely clear under the Lisbon Treaty whether the EU had the necessary competence to sign and ratify the EU–Singapore free trade agreement, which contained an investment chapter similar to the one set forth in the CETA, on its own, the European Commission asked the CJEU to opine on this question pursuant to Article 218(11) TFEU.²⁵ The CJEU made clear in its Opinion 2/15 that the agreement in question had the characteristics of a mixed agreement, which means that the ISDS provisions of the investment Chapter of the agreement ‘fall within the competence shared between the European Union and the Member States’²⁶. Consequently, the provisions on the ICS mechanism may not enter into force until each individual EU Member State has completed its own internal ratification procedure.

Since the Commission did not raise any question about the compatibility of the new ISDS mechanism with EU law in its request, the CJEU did not touch upon this delicate issue in Opinion 2/15 but rather left this compatibility question open and only stated that

this opinion of the Court relates only to the nature of the competence of the European Union to sign and conclude the envisaged agreement. It is entirely without prejudice to the question of whether the content of the agreement’s provisions is compatible with EU law.²⁷

Therefore, during the ratification process of the CETA, Belgium submitted a request for an opinion of the CJEU pursuant to Article 218(11) TFEU on the compatibility of the ICS model with the EU Treaties, including with fundamental rights.²⁸ The doubts Belgium raised as to the envisaged ISDS mechanism can be grouped into three categories, which are its compatibility with the autonomy of the EU legal order, its compatibility with the general principle of equal treatment and the requirement of effectiveness, as well as its compatibility with the right of access to an independent tribunal.

Although the CJEU in its Opinion 1/17 concluded that the ICS mechanism was compatible with all three requirements indicated by Belgium and, thus, gave the green light

²³ Art 26.1(1) CETA.

²⁴ Art 8.27(7) CETA; Michele Potestà, ‘Chapter IV: Investment Arbitration, Challenges And Prospects For The Establishment Of A Multilateral Investment Court: Quo Vadis Enforcement?’ in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration* (Manzsche Verlags- und Universitätsbuchhandlung 2018, Vienna, 157–178) 162.

²⁵ Commission, ‘Singapore: The Commission to Request a Court of Justice Opinion on the trade deal’ (Press Release) IP/14/1235 <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1235> accessed 3 May 2020.

²⁶ Opinion 2/15 of the Court (Full Court) of 16 May 2017 [2017] OJ C239/03, para 305.

²⁷ *Ibid* para 30, repeated in paras 290, 300.

²⁸ Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17) [2017] OJ C369/2.

for the EU and the Member States to participate in the new extra-EU dispute settlement mechanism, only the conclusions of the CJEU on the compatibility of the ICS model with the autonomy of the EU legal order will be discussed in more detail in this paper. Before turning to the findings of the CETA Opinion, however, the subsequent section will focus on the case-law of the CJEU on the autonomy of the EU legal order, i.e. how this concept has been developed in a series of opinions of the CJEU in order to find incompatibilities with the rival extra-EU dispute settlement mechanisms.

III The Concept of the Autonomy of the EU Legal Order

1 The Development of Autonomy in the CJEU's Case-Law

Even though the autonomy of the EU legal order is not mentioned in the text of the EU Treaties, the roots of this concept had already appeared in the case-law of the CJEU in the early 60s. Whereas in *Van Gend en Loos*²⁹ the CJEU laid down the foundations for the principle of autonomy of the EU legal order by describing EU law as 'a new legal order of international law', in *Costa*,³⁰ EU law was recognised as 'an independent source of law' which cannot 'be overridden by domestic legal provisions'. At this time, the autonomy of the EU legal order had only been interpreted *vis-à-vis* the domestic legal order of the Member States and its main purpose was to guarantee the essential characteristics of EU law, such as primacy and direct effect, in relation to the legal order of the Member States across the whole EU.³¹

Nevertheless, over time, the EU has gained more competences in the field of external relations and this brought up the question of how and to what extent the EU's relationship with third States and other international organisations may affect EU law.³² The CJEU answered the question by referring to the external dimension of autonomy. Based on this, the autonomy of the EU legal order has been relied on to limit the effects of public international law on EU law and, thus, to safeguard the very core elements of EU law from any external influences. Hence, from an external relations law perspective, the principle of autonomy has

²⁹ Case C-26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

³⁰ Case C-6/64 *Flaminio Costa kontra E.N.E.L.* [1964] ECR 585.

³¹ Steffen Hindelang, 'The Autonomy of the European Legal Order – EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-Related Agreements' in Marc Bungenberg, Christoph Herrmann (eds), *Common Commercial Policy after Lisbon, Special Issue to the European Yearbook of International Economic Law* (Springer 2013, Berlin–Heidelberg, 187–198) 189; Szilárd Gáspár Szilágyi, 'A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union' (2016) 17 (5) *Journal of World Investment & Trade* 701–742, 704.

³² Jed Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (2016) *European University Institute Working Papers, Max Weber Programme 2016/17*, 1 <https://cadmus.eui.eu/bitstream/handle/1814/41046/MWP_2016_07.pdf?sequence=1> accessed 3 May 2020.

been used to protect, *inter alia*, fundamental rights³³ or the CJEU's exclusive competence to interpret EU law.³⁴

This ultimate authority of the CJEU on the interpretation and application of EU law is of paramount importance in the context of EU constitutional law because this allows the CJEU to guarantee the uniform and consistent interpretation and application of EU law throughout the entire EU. This constitutional role of the CJEU can be derived from the joint application of *Article 19(1) TEU*,³⁵ as well as *Articles 267 and 344(1) TFEU*. While Article 267 TFEU provides for the preliminary reference procedure that establishes direct cooperation between the CJEU and the domestic courts of the Member States in order to ensure the correct application and uniform interpretation of EU law, Article 19(1) TEU states that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'. In addition, Article 344 TFEU can be regarded as an 'archetypal exclusive jurisdiction clause',³⁶ which provides that 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

Nevertheless, all these constitutional norms seem to interfere with the increasing political will set out in the Lisbon Treaty, based on which the EU intends to be a more active participant in the international scene and, thus, to contribute to the development of international law.³⁷ This openness of the EU towards international law also implies that the EU should foster the various extra-EU dispute settlement mechanisms in order to strengthen the enforcement of rights set forth in the international treaties concluded with third States.³⁸ The interference between 'the exclusive jurisdiction [of the CJEU] over the definitive interpretation of EU law'³⁹ and the jurisdiction of these other mechanisms arises at this point, because the EU has been following the monist approach to international law since the CJEU's judgment in the *Haegeman*⁴⁰ case.⁴¹ In this case, the CJEU held that the provisions of an international

³³ Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351.

³⁴ Opinion 1/91 (n 5); Opinion 1/00 (n 7); Opinion 1/09 (n 6); Opinion 2/13 (n 6); Christina Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?' (2016) CLEER PAPERS 2016/2, 12 <https://www.asser.nl/media/3002/cleer16-2_complete_web.pdf> accessed 3 May 2020.

³⁵ Consolidated version of the Treaty on European Union [2012] OJ C326/1.

³⁶ Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003, Oxford) 180.

³⁷ Art. 3(5) and 21(1) TEU. Besides, this political will is very well illustrated by Art. 6(2) TEU, which, taking into account the findings of the CJEU in Opinion 2/94, contains the necessary competence for the EU to accede to the European Convention on Human Rights.

³⁸ de Witte (n 9) 34; Szilágyi (n 31) 705.

³⁹ Opinion 2/13 (n 6) para 246; Opinion 1/17 (n 1) para 111.

⁴⁰ C-181/73 R. & V. *Haegeman v Belgian State* [1974] ECR 449.

⁴¹ de Witte (n 9) 34–35; Jan Wouters, Jed Odermatt, Thomas Ramopoulos, 'Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law' in Marise Cremona, Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014, Oxford–Portland, 249–280) 253.

agreement, ‘from the coming into force thereof, form an integral part of Community law’.⁴² In other words, the international agreements form part of the EU legal order and, therefore, the CJEU’s monopoly to interpret EU law extends to the provisions of the international agreements as well. Consequently, there is a clash between the exclusive jurisdiction of the CJEU to interpret and apply EU law and the jurisdiction of the other extra-EU dispute settlement mechanisms, which are, evidently, also entitled to interpret and apply the provisions of the international agreements.

In such a situation, when it comes to conferring jurisdiction on an external court or tribunal through an international agreement, the CJEU applies its own conflict rules in order to safeguard its prerogatives.⁴³ This means that the CJEU sees no problem as long as the court or tribunal interprets and applies solely the provisions of the international agreement. Hence, an international agreement providing for the establishment of a court or tribunal responsible for the interpretation of its own provisions is not, in principle, incompatible with EU law.⁴⁴ However, the cornerstone of the CJEU’s approach is that the decisions of the extra-EU courts or tribunals cannot result in *spillover effects* on the construction and the essential elements of the EU legal order, including the CJEU’s exclusive competence to interpret and apply EU law.⁴⁵ If, notwithstanding the above, this is the case, the autonomy of the EU legal order is jeopardised and, therefore, the envisaged dispute settlement mechanism is not compatible with EU law.

In the CJEU’s case-law, the concept of the autonomy of the EU legal order has gained even greater importance over time, and it became a constitutional principle that has been interpreted by the CJEU, particularly in recent years, in a rather expansive way.⁴⁶ Therefore, in the following sub-sections, the CJEU’s opinions on the different extra-EU mechanisms will be discussed in more detail, by describing how the principle of autonomy has been advanced prior to Opinion 1/17.

2 The Fund Tribunal Under Opinion 1/76

The first opinion in which the CJEU examined the compatibility of an international dispute settlement mechanism with Community law was Opinion 1/76.⁴⁷ This Opinion relates to the draft international agreement establishing a European laying-up fund for inland waterway vessels amongst the Community, six Member States and Switzerland in order to compensate shippers using the Rhine and Moselle basins that withdraw their vessels at times of

⁴² *Haegeman* case, para 5.

⁴³ *de Witte* (n 9) 35.

⁴⁴ Opinion 1/91 (n 5) para 40; Opinion 1/09 (n 6) para 74; Opinion 2/13 (n 6) para 182.

⁴⁵ Steffen Hindelang, ‘Repellent Forces: The CJEU and Investor-State Dispute Settlement’ (2015) 53 (1) *Archiv des Völkerrechts* 68–89, 73.

⁴⁶ Christian Riffel, ‘The CETA Opinion of the European Court of Justice and its Implications – Not that Selfish After All’ (2019) 22 (3) *Journal of International Economic Law* 503–521, 505.

⁴⁷ Opinion 1/76 of the Court of 26 April 1977 [1977] OJ C107/4 (Opinion 1/76).

overcapacity.⁴⁸ The agreement set up the Fund Tribunal which was entrusted with the task of ruling on the lawfulness of the decisions of the Fund organs and was also empowered to give preliminary rulings on the validity and interpretation of the Fund organs' decisions, as well as on the interpretation of the agreement itself.⁴⁹ The composition of the Fund Tribunal was also notable because six judges out of the seven were simultaneously members of the CJEU.

Although the CJEU marginally dealt with the potential conflict of jurisdiction between the Fund Tribunal and the CJEU, this issue has not yet been elaborated on in this Opinion. Since the *Haegeman* decision, it has been well known that an international agreement concluded by the Community could be considered an act of one of the Community's institutions and, therefore, the CJEU had the competence to give preliminary rulings on the interpretation of the agreement. Nevertheless, based on the agreement in question, it was not clear whether the jurisdiction of the CJEU would be replaced by that of the Fund Tribunal to give a preliminary ruling or whether the two jurisdictions would work in parallel.⁵⁰ The CJEU has not made a firm conclusion on the competing competences but only stated that 'no one can rule out a priori the possibility that the legal organs in question might arrive at divergent interpretations with consequential effect on legal certainty'⁵¹.

Although the possible conflict of jurisdiction of the Fund Tribunal with the jurisdiction of the CJEU was not entirely resolved in this Opinion, the finding of the CJEU implies that parallel jurisdictions should not be allowed, because it can give rise to *diverging interpretations* on the same matters. As such, this Opinion paved the way for more extensive reasoning on conflict of jurisdiction in the later opinions of the CJEU.

Besides the above, what the CJEU considered essential from the perspective of compatibility of the envisaged dispute settlement mechanism was the composition of the Fund Tribunal. With regard to the fact that the two adjudicatory bodies consisted of the same members, the CJEU held that the judges were not in a position to 'give a completely impartial ruling on contentious questions'⁵² because the same legal questions might come before the CJEU after being brought before the Tribunal or vice versa. Broadly speaking, this means that, from an EU law perspective, no personal link is welcome between the CJEU and another international court or tribunal.

Although in Opinion 1/76 the CJEU has not yet expressly referred to the protection of the autonomy of the Community legal order to qualify an international mechanism of dispute settlement as incompatible with Community law, this Opinion is of great importance because it can be regarded as a precursor to the subsequent opinions in which the CJEU has elaborated on the external dimension of autonomy in respect of other extra-EU dispute settlement mechanisms.

⁴⁸ de Witte (n 9) 35.

⁴⁹ Opinion 1/76 (n 47) para 17.

⁵⁰ Barbara Brandtner, 'The "Drama" of the EEA – Comments on Opinions 1/91 and 1/92' (1992) 3 (2) European Journal of International Law 300–328, 312.

⁵¹ *Ibid*, para 20.

⁵² *Ibid*, para 22.

3 The EEA Court Under Opinion 1/91

Opinion 1/91 concerned the compatibility of the envisaged European Economic Area (EEA) Court, which was intended to be set up under the agreement on the creation of the EEA amongst the Community, its Member States and the countries of the European Free Trade Association (EFTA). This Opinion is of high importance because it spells out, for the first time, in detail what the autonomy of the Community legal order shall mean from an external relations law perspective and, thus, the CJEU usually relies on the conclusions laid down in this Opinion in its subsequent case-law.

The objective of the agreement was to establish a homogeneous EEA by extending the existing and future Community internal market rules covering the free movement of goods, persons, services and capital, and competition to the entire territory of the EEA.⁵³ This means in practice that the majority of internal market rules were taken over in the agreement with identically worded provisions. The agreement provided for the establishment of the EEA Court composed of eight judges, including five members of the CJEU.

As a preliminary remark, the CJEU made clear at the beginning of the Opinion that even if the provisions of the agreement were textually identical to the corresponding provisions of Community law, this did not mean that they should necessarily be interpreted identically. On the contrary, the CJEU made a distinction between the Treaties which had ‘established a new legal order for the benefit of which the States have limited their sovereign rights’⁵⁴ and the EEA agreement which had created ‘rights and obligations as between the Contracting Parties’ and provided for ‘no transfer of sovereign rights to the intergovernmental institutions.’⁵⁵ Consequently, the CJEU concluded that the contradictions between the objectives and context of the agreement and those of Community law did not secure the aim of homogeneity of the law throughout the EEA.⁵⁶

After these considerations, the CJEU held that the proposed judicial system may undermine the autonomy of the Community legal order for several reasons.

First of all, the EEA agreement qualified as a mixed agreement, meaning that some of the topics covered by the agreement belonged to the shared competence of the Community and the Member States.⁵⁷ This means that when the EEA Court settled disputes between the ‘Contracting Parties’, the Court first had to interpret the expression ‘Contracting Party’ in order to determine whether the Community and the Member States, or the Community, or the Member States were covered by the case before the Court. This implied that the Court had to necessarily rule on the respective competences of the Community and the Member

⁵³ Opinion 1/91 (n 5) para 4.

⁵⁴ *Ibid.*, para 21.

⁵⁵ *Ibid.*, para 20.

⁵⁶ *Ibid.*, paras 28–29.

⁵⁷ Marco Bronckers, ‘The Relationship of the EC Courts with Other International Tribunals: Non-committal, Respectful or Submissive?’ (2007) 44 *Common Market Law Review* 601–627, 606.

States.⁵⁸ This task of the Court, however, was contrary to the *allocation of responsibilities* set forth in the Treaties and, thus, the autonomy of the Community legal order, because this task was exclusively assigned to the CJEU under the Treaties.⁵⁹ In other words, the CJEU considered the allocation of responsibilities laid down in the Treaties an essential element of Community law, the alteration of which adversely affected the autonomy of the Community legal order. In addition, the CJEU noted that the exclusive jurisdiction of the CJEU was also confirmed in Article 219 of the EEC Treaty (currently Article 344 TFEU) as regards disputes concerning the interpretation and application of the EEC Treaty between Member States.

The second argument of the CJEU concerned the interpretative power of the EEA Court over the provisions of the EEA agreement, which were strongly identical to the internal market rules of the EEC Treaty. Based on the *Haegeman* doctrine, the decisions of the EEA Court on the interpretation of the provisions of the EEA agreement were regarded as part of Community law and, thus, binding on the Community institutions, including the CJEU.⁶⁰ In connection with this, the CJEU laid down its general statement on the compatibility of an extra-EU dispute settlement mechanism with Community law, which has been repeated in several subsequent opinions:

An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.⁶¹

Nevertheless, in Opinion 1/91, the CJEU has placed great emphasis on the fact that the EEA agreement took over the Community internal market rules that were the very core provisions of Community law. Although the EEA agreement's main objective was to ensure uniform application and homogeneity of the law throughout the entire EEA, the EEA Court had a duty to interpret the provisions of the agreement in the light of the CJEU's case-law given only prior to the date of signature of the agreement but not after that date.⁶² This means that it was not guaranteed under the EEA agreement that the interpretation of the EEA rules would be identical to that of the Community internal market rules. In other words, the EEA Court would have been in a position to interpret not only the provisions of the agreement itself but also the corresponding rules of Community law, which constituted fundamental provisions of the Community legal order and, thus, their interpretation belonged to the exclusive competence of the CJEU.

⁵⁸ Opinion 1/91 (n 5) paras 33–34.

⁵⁹ Ibid, para 35; Henry G. Schermers, 'Opinion 1/91 of the Court of Justice, 14 December 1991; Opinion 1/92 of the Court of Justice, 10 April 1992' (1992) 29 (5) *Common Market Law Review* 991–1009, 996; Bronckers (n 57) 606.

⁶⁰ Opinion 1/91 (n 5) para 39.

⁶¹ Ibid, para 40.

⁶² Ibid, paras 43–44.

Consequently, an international court can be considered compatible with EU law as long as its decisions concern only the interpretation and application of the respective international agreement and do not produce any *'spillover effects'* affecting the fundamental provisions of the EU legal order.⁶³

Third, the CJEU went on to say that 'the organic links between the EEA Court and the Court of Justice by providing that judges from the Court of Justice are to sit on the EEA Court'⁶⁴ would not eliminate the problem. On the contrary, there was a fear that the fact that the same judges should 'apply and interpret the same provisions but using different approaches, methods, and concepts in order to take account of the nature of each treaty and of its particular objectives'⁶⁵ would even accentuate the problem because the judges would not be able to decide impartially on questions that have already come up before the EEA Court.⁶⁶

Fourth, the CJEU examined the possibility of the EFTA States to authorise their courts or tribunals to refer questions to the CJEU for a *preliminary ruling*. Although the CJEU concluded that, in principle, there was nothing in the EEC Treaty which would prevent an international agreement from conferring jurisdiction on the CJEU to interpret the provisions of the agreement, it was not acceptable that the answers given by the CJEU were purely advisory and without any binding effects on the courts and tribunals in the EFTA States.⁶⁷ The CJEU found that this system, which was capable of having an adverse impact on legal certainty, would have undermined the proper operation of the preliminary ruling procedure within the Community and was, therefore, contrary to the autonomy of the Community legal order.

As a result of Opinion 1/91, the EEA agreement was amended in order to address all the concerns raised by the CJEU. The new version of the agreement has abandoned the idea of the EEA Court and set up a separate court created only for the EFTA States. Since the EFTA Court did not hear cases between the Contracting Parties but its jurisdiction was restricted only to the EFTA States and had 'no personal or functional links with the Court of Justice',⁶⁸ the CJEU was not bound by the interpretations given by the EFTA Court. Consequently, this new system was able to preserve the autonomy of the EU legal order and, therefore, was approved in Opinion 1/92.

4 The European and Community Patents Court Under Opinion 1/09

The concept of the autonomy of the EU legal order has been further interpreted by the CJEU in Opinion 1/09 and a new aspect has been added to the existing case-law of the CJEU on autonomy, namely the importance of the role that the national courts and tribunals of the Member States play in the correct application and uniform interpretation of EU law.

⁶³ Hindelang (n 31) 190; Szilágyi (n 31) 711.

⁶⁴ *Ibid.*, para 47.

⁶⁵ *Ibid.*, para 51.

⁶⁶ *Ibid.*, para 52; Schermers (n 59) 998.

⁶⁷ Opinion 1/91, (n 5) paras 59, 61.

⁶⁸ Opinion 1/92 of the Court of 10 April 1992 [1992] ECR I-2821, paras 13, 19.

In this Opinion, the CJEU assessed the compatibility of a European-wide patent court system, the European and Community Patents Court with EU law. The origins of the Opinion can be traced back to the European Patent Convention, which provides for a unitary procedure for European patents to be granted by the European Patent Office, located in Munich. The Convention was signed in 1973 and covered a number of European countries, including all the Member States of the EU. Although the patents granted under the Convention have a Europe-wide validity, the Convention did not provide for an international dispute settlement mechanism.⁶⁹ Additionally, the EU has attempted to build up a truly harmonised EU patent system, relying on the already existing and well-functioning regime under the Convention.

In order to ensure the appropriate application and enforcement of this bifurcated regime, the Council drew up a draft international agreement on the establishment of a two-tier European and Community Patents Court (Patents Court) amongst the Member States, the EU and third countries which were parties to the Convention. The Patents Court was given exclusive jurisdiction to hear actions related to European and Community Patents, which necessarily involved the interpretation and application of EU law as well.⁷⁰ With regard to this, the Court of First Instance was entitled, while the Court of Appeal was obliged to refer a question to the CJEU for a preliminary ruling if a question of interpretation of EU law arises. Learning from Opinion 1/91, the decision of the CJEU on the interpretation of EU law was binding on the Patents Court.

With regard to the fact that the national courts of the contracting States, including those of the Member States, retained jurisdiction only to the extent that was not subject to the exclusive jurisdiction of the Patents Court, the main legal question that arose in Opinion 1/09 was whether the Member States were allowed to outsource the jurisdiction of their national courts to an international judicial regime that was ‘outside the institutional and judicial framework of the EU’.⁷¹

The CJEU based its main line of argument on Article 19(1) TEU and Article 267 TFEU to find the Patents Court incompatible with EU law. According to Article 19(1) TEU, the CJEU and the courts and tribunals of the Member States are the guardians of the European legal order and make sure that ‘in the interpretation and application of the Treaties the law is observed’.⁷² In other words, the judicial system of the EU, consisting of the CJEU and the domestic courts of the Member States, is a ‘complete system of legal remedies and procedures’⁷³ where the national courts, with the assistance of the CJEU, secure the uniform interpretation of EU law in each Member State.

⁶⁹ de Witte (n 9) 42.

⁷⁰ Ibid; Opinion 1/09 (n 6) paras 7, 73.

⁷¹ Opinion 1/09 (n 6) para 71; Allan Rosas, ‘The National Judge as EU Judge: Opinion 1/09’ in Pascal Cardonnel, Allan Rosas, Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012, Oxford, 105–121) 112.

⁷² Opinion 1/09 (n 6) paras 66, 69.

⁷³ Ibid, para 70.

However, the envisaged Patents Court would have altered this essential character of the powers laid down in the Treaties that is indispensable to the preservation of the very nature of EU law.⁷⁴ More precisely, under this new dispute settlement system, the Patents Court would have taken the place of national courts and tribunals in the field of its exclusive jurisdiction and would have been called upon to interpret and apply not only the provisions of the agreement in question but also EU patent law and other related instruments of EU law.⁷⁵ This implies that the Patents Court would have deprived the national courts of the power to submit questions for a preliminary ruling, which can be considered essential for the preservation of the autonomy of the EU legal order.

In addition, if the Patents Court had misinterpreted or misapplied EU law, no redress would have been available, given that the Patents Court lays outside the institutional and judicial framework of the EU.⁷⁶ In other words, in the event of a breach of EU law, neither the *infringement proceedings* set forth in Articles 258 to 260 TFEU nor the *Köbler*⁷⁷ liability action could have been used to correct the mistake.

In Opinion 1/09, the CJEU concentrated on the essential role that the national courts play in the correct application and uniform interpretation of EU law, as well as the preliminary ruling procedure. The CJEU made it clear that these elements of the EU constitutional order are indispensable; they belong to the very core elements of EU law and, therefore, an extra-EU dispute settlement mechanism that intends to alter these keystones of the EU legal order cannot be compatible with EU law.

5 Compatibility of the EU Accession to the European Convention on Human Rights with EU Law Under Opinion 2/13

Opinion 2/13 is one of the most controversial of the CJEU's opinions where the protection of the autonomy of the EU legal order has been used to conclude that recourse to an international court was not compatible with EU law. This Opinion was already the second one in which the CJEU dealt with the compatibility of the EU accession to the European Convention on Human Rights (ECHR). In Opinion 2/94, the CJEU already examined this question and concluded that the Community had 'no competence to accede to the Convention' and the accession 'could be brought about only by way of Treaty amendment'.⁷⁸ With regard to this, the Lisbon Treaty introduced Article 6(2) TEU, which expressly empowered the EU to accede to the Convention.

Upon the entry into force of the Lisbon Treaty, the negotiations started between the EU and the Council of Europe in relation to an accession agreement in order to agree on all the

⁷⁴ Ibid, paras 85, 89.

⁷⁵ Ibid, para 79.

⁷⁶ Ibid, paras 86–88; Nikolaos Lavranos, 'Designing an International Investor-to-State Arbitration System After Opinion 1/09' in Bungenberg, Herrmann, *Common Commercial Policy after Lisbon* (n 31) 214.

⁷⁷ Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, paras 31, 33, 36.

⁷⁸ Opinion 2/94 of the Court of 28 March 1996 [1996] ECR I-1759, paras 34–36.

provisions which were considered necessary for the EU's accession to the Convention. During the drafting process, special attention was paid to the instruments ensuring the preservation of the autonomy of the EU legal order. Thus, two institutional innovations, i.e. the co-respondent mechanism and the prior involvement procedure, were also introduced in order to make sure that the accession complied with the requirements laid down in the previous opinions of the CJEU.

Nevertheless, despite all efforts, the CJEU was not convinced that the draft accession agreement would preserve the autonomy of the EU legal order and, therefore, concluded that the accession agreement was not compatible with EU law.⁷⁹ Although the CJEU based its conclusion on seven grounds, for the purposes of the present paper three of them will be discussed in more detail.

First, the draft accession agreement introduced the *co-respondent mechanism* in order to address the CJEU's concern raised in Opinion 1/91 in relation to the division of powers between the EU and its Member States. This procedure allowed both the EU and the Member States to become parties to a procedure initiated before the European Court of Human Rights (ECtHR) if applications were not correctly addressed to the Member States and/or the EU.⁸⁰ Even if the purpose of the co-respondent procedure was to prevent the ECtHR from assessing the rules of EU law governing the competences between the EU and its Member States, the CJEU concluded that the design of the co-respondent mechanism was still able to adversely affect the autonomy of the EU legal order. According to the CJEU, the ECtHR still would have had the possibility to indirectly assess EU law on the division of powers because the ECtHR itself would have decided on a request to intervene as co-respondent in a case.⁸¹

Second, the *procedure for the prior involvement of the CJEU* was the other institutional innovation of the draft accession agreement. This procedure sought to permit the CJEU to first rule on a question of EU law, thereby producing a binding decision on the ECtHR in a procedure pending before the Strasbourg Court. Thus, the main purpose of this newly introduced procedure was to ensure that 'the competences of the EU and the powers of its institutions, notably the Court of Justice', are preserved.⁸²

However, the CJEU took the position that the prior involvement procedure foreseen in the accession agreement was not able to achieve this purpose. First, it was not guaranteed that the competent EU institutions could assess whether the CJEU had already given a ruling on the question at issue before the ECtHR but, instead of this, the ECtHR itself was allowed

⁷⁹ Although Opinion 2/13 had postponed the EU accession to the ECHR, the negotiations on this topic between the EU and the Council of Europe have recently restarted and an *ad hoc* group, composed of representatives of the 47 Member States of the Council of Europe and a representative of the EU, has been set up in order to find solutions to all the legal issues raised by the CJEU in Opinion 2/13. For more details, see <<https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights>> accessed 3 May 2020.

⁸⁰ Opinion 2/13 (n 6) paras 215–216.

⁸¹ *Ibid*, paras 222–225.

⁸² *Ibid*, paras 236–238.

to rule on this question. The CJEU interpreted this feature as conferring jurisdiction on the ECtHR to interpret the case-law of the CJEU.⁸³ Second, based on the wording of the draft accession agreement, the CJEU drew the conclusion that the scope of the prior involvement procedure was limited, ‘in the case of secondary law, solely to questions of validity’ but it did not include the interpretation of secondary law.⁸⁴

Third, the CJEU examined the relationship between the *preliminary ruling procedure* set forth in Article 267 TFEU and the *advisory opinion mechanism* established by Protocol 16. Confirming that the dialogue set up between the CJEU and the national courts and tribunals of the Member States pursuant to Article 267 TFEU is the keystone of the EU judicial system,⁸⁵ the CJEU held that by failing to make any provision on the relationship between these two procedures, there was a risk that, by way of the prior involvement procedure, the preliminary ruling procedure might be circumvented. Consequently, the effectiveness of the preliminary reference procedure and, thus, the autonomy of the EU legal order were adversely affected.⁸⁶

Although in this regard the CJEU intended to reinforce Opinion 1/09, it is important to keep in mind that the main justification of the prior involvement procedure was to enable the CJEU to rule on EU law when the procedure under Article 267 had not been triggered.⁸⁷ This means that the preliminary ruling procedure would not have been circumvented by way of the prior involvement procedure but the CJEU would instead have been provided with the possibility to determine the correct interpretation and application of EU law.

After Opinion 2/13, the CJEU was heavily criticised as being overly formalistic and protective of its own jurisdiction *vis-à-vis* other international courts and tribunals, stating that the CJEU has been ‘building up Luxembourg into an excessively armored constitutional fortress’⁸⁸. With regard to the fact that the requirements to preserve the autonomy of the EU legal order has gained, over time, an ever broader interpretation in the opinions of the CJEU, the compatibility of the new ISDS mechanism envisaged in the CETA with EU law was highly questionable. However, the CJEU seems to have revisited its previous hostile attitude towards the external dispute settlement mechanisms and found, in Opinion 1/17, the ICS to be compatible with the autonomy of the EU legal order.

⁸³ Ibid, paras 239–241; Stephan W. Schill, ‘Editorial: Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements?’ (2015) 16 (3) *The Journal of World Investment & Trade* 379–388, 382.

⁸⁴ Opinion 2/13 (n 6) paras 242–247.

⁸⁵ Ibid, paras 176, 198.

⁸⁶ Ibid, para 199.

⁸⁷ Contartese (n 8) 1656.

⁸⁸ Schill (n 83) 379.

IV The Compatibility of the Investment Court System with the Autonomy of the EU Legal Order

Although Opinion 1/17 concerns the compatibility of the new ISDS mechanism envisaged in the CETA with EU law, the conclusions of the CJEU will also most probably be applicable to future international agreements providing for a dispute settlement mechanism.⁸⁹ Thus, since the investor-State dispute resolution provisions set forth in the other new generation bilateral agreements, such as the EU – Singapore and EU – Vietnam Investment Protection Agreements, are highly similar, the conclusions made in Opinion 1/17 are equally applicable to the dispute resolution regime envisaged in these agreements.

The CJEU assessed the compatibility of the new system with the autonomy of the EU legal order from two perspectives. While in the first part of its examination, the CJEU concentrated on the question as to whether the CETA confers on the envisaged tribunals any power to interpret and apply EU law as well as to rule on the division of powers, in the second part, the potential effects of an award rendered by the ICS on the EU constitutional framework were considered.⁹⁰ Accordingly, we follow the CJEU's reasoning and start with the first aspect of the CJEU's examination.

1 No Jurisdiction to Interpret and Apply EU Law

What was essential to the CJEU in determining as to whether the CETA Tribunal would be empowered to interpret and apply EU law other than the provisions of the CETA was the governing law provision set forth in Article 8.31 of the CETA. Article 8.31.1 of the CETA states that

[w]hen rendering its decision, the Tribunal established under this Section *shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law* applicable between the Parties.⁹¹

Additionally, Article 8.31.2 of the CETA goes on to say that the 'Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party'.

This means that the CETA Tribunal has no jurisdiction to interpret and apply the domestic law of the disputing Party, including EU law, and the legality of a measure cannot be reviewed under domestic and/or EU law. Instead of this, the Tribunal's power of interpretation and application is restricted to the provisions of the CETA and the other rules and

⁸⁹ Marc Bungenberg, Catharine Titi, 'CETA Opinion – Setting Conditions for the Future of ISDS' (5 June 2019) EJIL: *Talk!* <<https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-ids/>> accessed 3 May 2020; Riffel (n 46) 507.

⁹⁰ Opinion 1/17 (n 1) para 119.

⁹¹ Emphasis added.

principles of international law. This is how the Commission sought to preserve the CJEU's interpretative monopoly over EU law: the ICS, unlike the European and Community Patents Court, does not apply domestic law.

However, when the CETA Tribunal has to render a decision on an infringement of the provisions of the CETA that was committed by a Member State or the EU, it is difficult to imagine how it is possible without applying and interpreting domestic and/or EU law.⁹² In response to this concern, Article 8.31.2 of the CETA gives the answer, according to which

[f]or greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the *domestic law* of the disputing Party as a *matter of fact*. In doing so, the Tribunal *shall follow the prevailing interpretation* given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal *shall not be binding* upon the courts or the authorities of that Party.⁹³

Consequently, the CETA Tribunal, when it is called upon to examine the compliance with the CETA of a measure adopted by a Member State or the EU, the Tribunal should consider domestic and/or EU law as a matter of fact, which 'cannot be classified as equivalent to an interpretation'⁹⁴ of domestic law by the Tribunal.

What is somewhat surprising in relation to Opinion 1/17, compared to the previous opinions of the CJEU, is that the CJEU has accepted this innovative move brought by the Commission and concluded that domestic law being taken into account as a matter of fact suffices to preserve the autonomy of the EU legal order.⁹⁵

This approach, however, raises the question as to what the CETA Tribunal is supposed to do during the consideration of domestic law as a factual matter. Pursuant to the second sentence of Article 8.31.2 of the CETA, the Tribunal shall follow the prevailing interpretation of domestic law given by the courts or authorities of the disputing Party. However, at this point, two further questions may be asked: what happens if there is no prevailing interpretation, or if there is one but the CETA Tribunal does not follow it?

As regards the first question, the CETA has a big deficiency that was not addressed in Opinion 1/17. The drafters of the CETA did not see any need for a similar mechanism to the preliminary ruling or the prior involvement procedure because they intended to solve the question of autonomy of the EU legal order by excluding domestic and/or EU law from the applicable law.⁹⁶ Nevertheless, an investor-State dispute under the CETA is likely to

⁹² Daniele Gallo, Fernanda G. Nicola, 'The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication' (2016) 39 (5) *Fordham International Law Journal* 1081–1152, 1125–1126 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2454&context=ilj>> accessed 3 May 2020.

⁹³ Emphasis added.

⁹⁴ Opinion 1/17 (n 1) para 131.

⁹⁵ *Ibid.*, para 131; Francisco de Abreu Duarte, 'Autonomy and Opinion 1/17 – a matter of coherence?' (31 May 2019) *European Law Blog* <<https://europeanlawblog.eu/2019/05/31/autonomy-and-opinion-1-17-a-matter-of-coherence/>> accessed 3 May 2020.

⁹⁶ Gallo, Nicola (n 92) 1132.

involve the interpretation of domestic and/or EU law. This means that if EU law is not clear enough and a determinative interpretation given by the CJEU is not yet available, the CJEU cannot be requested to give a preliminary ruling on the proper interpretation of EU law.⁹⁷

This was accepted by the CJEU in Opinion 1/17, even if it was not in line with its previous jurisprudence. Although, in Opinions 1/09 and 2/13, the CJEU considered the preliminary ruling procedure the keystone of the EU judicial system, which

has the object of securing uniform interpretation of EU law [...], thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties⁹⁸

in Opinion 1/17 the CJEU has departed from its long-standing characterisation of the preliminary ruling procedure and only stated that it was

consistent that the CETA makes no provision for the prior involvement of the Court that would permit or oblige that Tribunal or Appellate Tribunal to make a reference for a preliminary ruling to the Court.⁹⁹

Consequently, in Opinion 1/17, the CJEU has not put too much emphasis on the proper operation of the preliminary ruling procedure, even though it is considered, based on its previous opinions, an essential element of the EU constitutional framework that is necessary for the preservation of the autonomy of the EU legal order.

As regards the second question, even if there exists a prevailing interpretation of domestic law, there is no guarantee that the Tribunal will follow that interpretation correctly. In this case, it is the task of the Appellate Tribunal under Article 8.28.2(b) of the CETA to remedy the mistake that occurred in the first instance procedure. Pursuant to this provision, the

Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on [...] (b) *manifest errors in the appreciation of the facts*, including *the appreciation of relevant domestic law*.¹⁰⁰

Although this two-tier mechanism intends to ensure that the well-established case-law of the CJEU will be respected by the CETA Tribunals, it cannot be excluded that EU law and the corresponding jurisprudence, as a matter of fact, will be taken into account wrongly, even by the Appellate Tribunal. Whereas, in Opinion 1/09, this problem appeared in the CJEU's argumentation and served as a reason to find the European and Community Patents Court incompatible with EU law, in Opinion 1/17 this concern was not even addressed. The problem, however, exists, given the fact that 'the envisaged ISDS mechanism stands outside the EU judicial system'¹⁰¹. This means that even if an award were to be in breach of EU law, the

⁹⁷ Riffel (n 46) 516.

⁹⁸ Opinion 2/13 (n 6) para 176.

⁹⁹ Opinion 1/17 (n 1) para 134.

¹⁰⁰ Emphasis added.

¹⁰¹ Opinion 1/17 (n 1) para 113; de Abreu Duarte (n 95).

misinterpretation of EU law by the CETA Tribunals could not be sanctioned by way of a financial liability claim or infringement proceedings. Nevertheless, the CJEU, contrary to Opinion 1/09, has not extended the scope of its examination to this question, given its understanding that the CETA Tribunals have no jurisdiction to apply EU law.

The only response that can be given to this concern on the basis of the third sentence of Article 8.31.2 of the CETA is that the *interpretative spillover effects* on domestic and/or EU law are precluded. In other words, this provision is aimed at making sure that any meaning given to the domestic and/or EU law by the CETA Tribunals will not be binding on the EU and its Member States.¹⁰² Although that is true that, based on this provision, the decisions of the Tribunals will not have any binding effects on the EU and its institutions, the basic problem has not been resolved. In the specific case, the interpretation of EU law as a fact will be binding on the disputing Parties, even if it is contrary to the prevailing jurisprudence of the CJEU.

The last aspect of Opinion 1/17 that demonstrates a further contradiction with the previous opinions of the CJEU is set forth in paragraph 133 of the Opinion which states that

[w]hile Article 8.28.2(b) of the CETA adds that the Appellate Tribunal may also identify ‘manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law’, it is nonetheless clear from the preceding provisions that *it was in no way the intention of the Parties to confer on the Appellate Tribunal jurisdiction to interpret domestic law*.¹⁰³

This means that while in Opinion 2/13, despite the firm intention of the parties, the CJEU rejected the accession of the EU to the ECHR, in Opinion 1/17, the intention of the parties played the main role in the argumentation of the CJEU to justify that the Appellate Tribunal would have no jurisdiction to interpret EU law.¹⁰⁴ Consequently, this is, again, a new element of the CJEU’s argumentation that has never appeared before in its jurisprudence on autonomy.

To summarise, when the CJEU found the new ISDS mechanism compatible with the autonomy of the EU legal order, its line of argument was based on the premise that the CETA Tribunals would have no jurisdiction to interpret and apply EU law. However, as demonstrated above, the potential interpretation of EU law cannot be ruled out under the CETA, even if EU law should be taken into account only as a matter of fact.¹⁰⁵ Consequently, if the CJEU had followed its rigid case-law on autonomy, the envisaged ICS could not have been qualified as being compatible with EU law. Nevertheless, in Opinion 1/17, the CJEU has reinterpreted the requirements necessary for the preservation of the autonomy of the EU legal order and, thus, saved the Commission’s project to fundamentally reform the field of ISDS mechanisms.

¹⁰² Riffel (n 46) 517; de Abreu Duarte (n 95).

¹⁰³ Emphasis added.

¹⁰⁴ de Abreu Duarte (n 95).

¹⁰⁵ Carlo Favaretto, ‘Beyond Selfishness: The Court of Justice in Opinion 1/17 on CETA’ (2019) *Diritti Comparati* <<http://www.diritticomparati.it/beyond-selfishness-court-justice-opinion-1-17-ceta/>> accessed 3 May 2020.

2 No Jurisdiction to Rule on the Division of Powers

The question of who is entitled to determine the proper respondent in a specific dispute in the case of mixed agreements has been a constantly recurring topic in the case-law of the CJEU on autonomy from the early 1990s. Considering the fact that the CETA is a mixed agreement, the CJEU also touched upon this question in paragraph 132 of Opinion 1/17.

The legal provision that the CJEU relied on during its examination was Article 8.21 of the CETA which expressly confers on the EU the power to determine ‘whether the dispute is, in the light of the rules on the division of powers between the Union and its Member States, to be brought against [the] Member State or against the Union’¹⁰⁶. Consequently, it is not the CETA Tribunal but solely the EU who can decide on the proper respondent in each case and this decision of the EU is binding on the Tribunal. Since this is exactly what the previous opinions, such as Opinion 1/91 and Opinion 2/13 required, it is not surprising that the CJEU reaffirmed the compatibility of this system with EU law. Thus, in this respect, Opinion 1/17 is consistent with the previous jurisprudence on autonomy.

3 The Level of Protection of the Public Interest

Finally, in the second part of its examination, the CJEU addressed the question as to whether the awards of the Tribunal had ‘the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework’¹⁰⁷. In other words, the question concerned the right to regulate, namely whether the parties had the right under the CETA to regulate within their territories to achieve legitimate policy objectives, *inter alia*, the protection of public order, public safety or the protection of public morals.

This question added a further, *substantive aspect* to the concept of autonomy because, in the previous opinions, the CJEU usually examined the preservation of the autonomy of the EU legal order from a jurisdictional/procedural perspective and did not extend the scope of its review to substantive issues.¹⁰⁸

Based on several substantive provisions of the CETA,¹⁰⁹ the CJEU concluded that the CETA standards of protection, similarly to the EU investment treaty practice, respected state sovereignty because the power of the CETA Tribunals did not ‘call into question the level of protection of public interest determined by the Union following a democratic process’ but rather allowed ‘the Union to operate autonomously within its unique constitutional framework’¹¹⁰. Consequently, the CJEU reached the conclusion that the investment Chapter of the CETA did not adversely affect the autonomy of the EU legal order.

¹⁰⁶ Opinion 1/17 (n 1) para 132.

¹⁰⁷ *Ibid*, para 119.

¹⁰⁸ Panos Koutrakos, ‘More on Autonomy – Opinion 1/17 (CETA)’ (2019) (3) *European law review* <<https://dialnet.unirioja.es/servlet/articulo?codigo=6976614>> accessed 3 May 2020; Riffel (n 46) 519.

¹⁰⁹ See, for example, Articles 8.9 – 8.10 of the CETA, Annex 8-A to the CETA.

¹¹⁰ Opinion 1/17 (n 1) paras 150, 156; Bungenberg, Titi (n 89).

V Conclusions

Although the autonomy of the EU legal order is not mentioned in the EU Treaties, in the jurisprudence of the CJEU this concept has become a constitutional principle that has been used to safeguard the essential elements of EU law from interference flowing from both national and international legal orders. While it is self-evident that the CJEU sought to protect the very foundations of the EU constitutional framework from any external influences and, to this end, relied on the principle of autonomy in its argumentation, over the past years, the CJEU has taken a quite restrictive approach when it came to the participation of the EU and its Member States in an international dispute settlement mechanism. Hence, it was questionable whether the new ISDS mechanism proposed in the CETA would be able to reach the high threshold which had been set up by the CJEU in a series of opinions.¹¹¹

However, the CJEU, in Opinion 1/17, reconsidered its previous jurisprudence on autonomy and, with a new line of argument, placed the EU back into the path of international dispute settlement.¹¹² With regard to the obvious turnaround, right after the CJEU had delivered Opinion 1/17, several authors wondered why the CJEU had departed from its previous decisions and held that the ICS did not adversely affect the autonomy of the EU legal system.¹¹³

In our view, it must be accepted that the CJEU is not only a legal but also a political institution which is pursuing its political programme. In other words, the CJEU made a clear political decision in Opinion 1/17, namely that the protection of the investors' individual rights should take precedence over autonomy.¹¹⁴ This political consideration clearly appears in the Opinion of Advocate General Bot, who highlighted that

[i]n order to rule on the compatibility of the dispute settlement mechanism provided for in Section F of Chapter 8 of the CETA with EU primary law, it is [...] necessary to *broaden the perspective* and to *take account of the need to protect EU investors* when they invest in third States.¹¹⁵

Consequently, with Opinion 1/17, the CJEU wanted to ensure that there would be a neutral and independent forum from the domestic courts and tribunals of the host State where the EU investors may enforce their rights arising from the CETA.

Although the purpose that the CJEU wished to achieve is welcome, one must conclude that, after Opinion 1/17, the concept of autonomy no longer has a uniform interpretation but

¹¹¹ See, for example, Giséle Uwera, 'Investor-State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle?' (2016) 15 (1) *The Law and Practice of International Courts and Tribunals* 102–151, 150–151; Szilágyi (n 31) 723–739; Contartese (n 8) 1671.

¹¹² Bungenberg, Titi (n 89).

¹¹³ See, for example, de Abreu Duarte (n 95); Favaretto (n 105).

¹¹⁴ Riffel (n 46) 520.

¹¹⁵ Opinion 1/17 – Request for an opinion by the Kingdom of Belgium, Opinion of Advocate General Bot delivered on 29 January 2019, ECLI:EU:C:2019:72, para 89, emphasis added.

it must be interpreted differently depending on the actual context surrounding it.¹¹⁶ This means that autonomy has remained ‘partially nebulous’ even after Opinion 1/17 and its exact meaning can be determined only on a case-by-case basis.

¹¹⁶ de Abreu Duarte (n 95); Koutrakos (n 108).

Challenges of Third Party Funding to Arbitral Autonomy: A Discussion of Possible Solutions in the Chinese Context

Arbitration is an autonomous mechanism for solving disputes, which flows above the domestic procedural rules for litigation. In today's world, the amendments to the domestic arbitration legislation have been directed at minimising the court's intervention in order to uphold arbitral autonomy. Yet this process has been greatly complicated in recent years by the increasing use of Third Party Funding (TPF). Modern international arbitration is interspersed with TPF – a legal investment arrangement under which the funder is obliged to pay the cost of arbitration in exchange for a part of the final recovery. TPF has not only increased the court's willingness to impose and supervise arbitrations but it has also created a larger desire for the party to bring TPF-related issues arising from the arbitration procedure to court. It has been observed that arbitral proceedings that are fuelled by TPF attract more judicial supervision than those that are not. This paper will first explain the challenges posed by TPF to arbitration and then address the uncertainty of what the future might hold for arbitral autonomy as TPF becomes more widespread. This question is asked and answered in China, where recently TPF and its impact have provoked fierce debate. This paper presents and analyses the possible solutions of the issues associated with TPF before concluding that it is possible for China to promote the use of TPF in arbitration without causing harm to arbitral autonomy.

I Introduction

TPF has been recently discussed more frequently in the legal sphere. In narrow terms, TPF is a funding arrangement under which the funder is obliged to pay part of or the whole cost of arbitration in exchange for a share in the final proceeds. The use of TPF in arbitration is increasing with the rise of the costs of arbitration and the growth of trade, which in turn leads to the need for arbitration. Traditionally, funding arranged by the parties does not concern the

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court or tribunal in the Chinese context.¹ Only after TPF has evolved into a widely used financing tool and has even become a built-in feature of arbitration did regulators and practitioners start contemplating the potential impact of TPF on the arbitration procedure.

The interaction between TPF and arbitral autonomy contains multiple layers. On the one side, TPF is likely to influence arbitration in both positive and negative ways. Arbitral autonomy not only asks whether the parties have the opportunity to settle their disputes in a consensual manner but also whether they have sufficient resources to do that. For this reason, TPF has the potential to contribute to the autonomy of the parties to arbitration. Nonetheless, TPF is commercially motivated and largely unregulated in most jurisdictions at the moment, which increases the willingness of the court to impose more supervision, as well as the desire of the parties to bring TPF-related issues to the court's attention. These factors undoubtedly constitute a challenge to arbitral autonomy. On the other side, arbitration, as an autonomous procedure, allows TPF to carve out a distinctive place for itself. It is therefore almost inevitable that TPF for arbitration is addressed separately from TPF for litigation.

It is hard to deny that more attention should be paid to the integrity and fairness of the arbitration procedure in cases where there are third party funders. The follow-up question would be whether this is doomed to lead to arbitral autonomy shrinking. If the answer is affirmative, are there any steps that could be taken to mitigate the negative effects of TPF and thereby keep the level of court intervention moderate? As an answer to the above questions, this paper looks closely at the regulation of TPF for arbitration in China. The author believes that the solutions of the problems caused by or connected to TPF should be addressed by both domestic and international rules, despite that the former being more relevant than the latter. Although arbitration may encompass international elements, arbitral proceedings are inevitably shaped in one way or another by domestic regulations. In particular, TPF-related issues are often categorised as procedural ones, which should be subject to the law of the seat of arbitration. Globally, there is an obvious lack of uniformity and an array of conflicting laws in the area of the regulation of TPF.² As such, it makes more sense for now to discuss TPF according to the domestic law of a specific jurisdiction.

This paper first highlights the connotations and the significance of arbitral autonomy. It then moves on to examine the effects of TPF on the funded arbitration proceedings and the autonomy of arbitration. On this basis, the paper has singled out certain steps that could be taken by the Chinese regulators in the future in order to promote the use of TPF in arbitration without triggering too many judicial concerns. These efforts usher the following points of

¹ The situation may be different in other jurisdictions, especially those with common law traditions. For instance, TPF was historically prohibited by the law of maintenance and champerty in England. See: The Law Commission, 'Proposals for reform of the law relating to maintenance and champerty: Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965' (1966) 4–5. Criminal and civil liability for maintenance and champerty was not abolished by English law until the 1960s when the legislators realized that the retention of the maintenance and champerty prohibition might be inconsistent with the developments in the practice of litigation. See: *ibid.*, 5; Criminal Law Act 1967, section 14.

² Victoria Sahani, 'Harmonizing third-party funding regulation' (2015) 36 *Cardozo Law Review* 861.

view: first, the effects of TPF on arbitration do not necessarily lead to the shrinking of arbitral autonomy. Second, the regulatory framework of arbitration needs to be reformed so that it will be able to cope with TPF and eliminate the concerns of the national courts regarding arbitration procedures when TPF is involved.

II The Significance of Arbitral Autonomy

To litigate is a right and not an obligation and therefore the aggrieved parties may decide not to contest in court but to arbitrate their disputes. To acquire the required efficiency of arbitration, a certain degree of autonomy of the procedure must be guaranteed. In addition, arbitral autonomy is arguably a natural implication of the strong commitment in arbitration law and in other civil legislation to the ideal of personal autonomy.³

Arbitral autonomy as a legal term has many connotations. It is sometimes used to suggest the separability of the arbitration agreement from the main contract. Other times, it is referred to as the underpinning principle of the distinctive rules of how the proceedings are conducted or the choice of applicable laws.⁴ It is worth noticing that the autonomy thesis does not point in the direction of completely excluding court intervention.⁵ The state delegates jurisdictional power to the arbitral tribunal in order to issue a final and binding decision to settle civil disputes. Such delegation comes as a type of trade-off in the form of standards of quality that are applicable to arbitration.⁶ Judicial supervision and assistance are considered as inevitable in order to achieve this quality.

Arbitral autonomy is the cornerstone on which arbitration rests and has a significant impact on the conduct and the regulation of TPF for arbitration and vice versa. To better understand the interaction between the two, a revision of some key attributes of arbitral autonomy is needed. The first one treats the parties to arbitration as equals. Any factors that can force the parties into settlement or unjustly deprive them of their procedural rights should be deterred or eliminated. TPF contributes to the efforts by putting the parties on an equal footing. If both parties enter into the arbitration process without much fear of the financial burdens, it falls into the category of what arbitral autonomy implies.

The second attribute of arbitral autonomy provides TPF with more room for development. Compared to litigation, arbitration views TPF with less suspicion. After common law gave up

³ Hiro N. Aragaki, 'Does rigorously enforcing arbitration agreements promote autonomy' (2016) 91 (4) *Indiana Law Journal* 1145.

⁴ Aragaki argued that autonomy can be broadly construed as the freedom to design a process tailored to the parties' needs... See *ibid*, 1147.

⁵ Davis Mavunduse, 'Party autonomy in international commercial arbitration: a look at freedom, delimitation and judicialisation' (2019) 25 (2) *International Trade Law & Regulation* 95.

⁶ Matti Kurkela, Santtu Turunen, and Conflict Management Institute, *Due process in international commercial arbitration* (2nd edn, Oxford University Press 2010) 1–2.

its historical hostility towards maintenance and champerty,⁷ the issue of how to fund legal claims in arbitration was free from procedural coercion in both common law and civil law jurisdictions.⁸ It is common sense that arbitration fundamentally differs from litigation, as some public policies borne in mind by national courts can be ignored in arbitration, leading to a distinctive approach in dealing with the impact of TPF on arbitration.⁹

There is no lack of cases illustrating that it would not be artificial to distinguish arbitration from litigation in the context of non-party funding in the light of arbitral autonomy. In *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 1 HKC 179,¹⁰ Kaplan J said that

it is not appropriate to extend the doctrine (the champerty doctrine, which can prevent the use of TPF in dispute resolution) from public justice to a private consensual system, that is, arbitration, especially when faced with the diminution of the role of the court in relation to arbitration and the introduction of the UNCITRAL Model Law, which gave supremacy to the doctrine of full party autonomy.¹¹

In order to implement arbitral autonomy, the English court upheld the tribunal's decision that the costs of TPF were recoverable as part of the costs of arbitration in *Essar v Norscot* [2016] EWHC 2361 (Comm).¹² In the funding agreement, the successful party Norscot agreed to pay the funder Woodsford a fee of 300 percent of the funding, or 35 percent of the recovery, which turned out to be around £2 million.¹³ In contrast, recoverable success fees for TPF are unheard of in English court proceedings. The English court has taken the view that the costs of TPF for litigation are a price that can be expected to be paid by the funded party for the funding service.¹⁴ This is in line with the English legislators' dismay over the recovery of the success fees of conditional fees agreements and the premiums for after-the-event insurance.¹⁵ *Essar v Norscot* serves as a useful reminder of the importance of arbitral autonomy. Meanwhile, it

⁷ In medieval England, maintenance was defined as 'the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognized by the law as justifying his interference'. Champerty was 'a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give to the maintainer a share in the subject-matter or proceeds thereof, if the action succeeds'. See: The Law Commission (n 1) 3.

⁸ Olga Owczarek and Marie Stoyanov, 'Third-Party Funding in International Arbitration: Is it Time for Some Soft Rules?' (2015) 2 (1) BCDR International Arbitration Review 174–175.

⁹ Jern-Fei Ng, 'The role of the doctrines of champerty and maintenance in arbitration' (2016) 75 (2) Arbitration 210.

¹⁰ *Cannonway Consultants Limited v Kenworth Engineering Ltd*, [1995] 1 HKC 179.

¹¹ *Ibid*.

¹² Jeffrey Sullivan, 'Essar v Norscot: Are The Costs Associated With Third Party Funding Recoverable?' (2018) 15 (4) Transnational Dispute Management; Duarte Henriques, 'The Essar v. Norscot Case: A Final Argument for the 'Full-Disclosure-Wingers' of TPF in International Arbitration' in Kluwer Arbitration Blog (2016); *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm).

¹³ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm), para 5.

¹⁴ *Arkin v Borchard and others*, [2005] EWCA Civ 655.

¹⁵ Alex Allan, 'Recoverability as costs of cfa success fees and ate premiums: Plevin v Paragon Personal Finance Ltd' (2017) 36 (4) Civil Justice Quarterly 401.

demonstrates the English court's willingness to promote arbitration as an autonomous procedure, flowing above the domestic procedural rules for court proceedings. This case also indicates that it is undeniable that TPF has a significant impact on the interests of the parties and can therefore increase the desire of the parties to seek court scrutiny on arbitration.

The existing Chinese law gives no regard to the interaction between arbitration and TPF, but it acknowledges the importance of arbitral autonomy. In the 1994 Arbitration Law of the People's Republic of China, which is currently effective for all arbitration cases seated in Mainland China,¹⁶ the autonomy theory is recognised as one of the main characteristics of arbitration. It is devoted to limiting to a minimum the domestic elements and national courts' intervention in arbitration.¹⁷ Accordingly, the parties can decide on key issues of arbitration, such as the arbitration institution, the arbitrator, the place of the hearings and so on. In addition, an arbitration agreement shall remain valid and enforceable when the main contract has been revoked or has not yet come into force.¹⁸ Although the Chinese arbitration law does not explicitly state non-interference of the national court in arbitration, it provides in article 8 that the arbitral proceedings should be conducted independently from any intervention by administrative or governmental institutions, social organisations or individuals.¹⁹ On choice of law issues, party autonomy also has an important role to play. The law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations has confirmed that the parties may agree upon the applicable law of the arbitration agreement.²⁰ Before this statute entered into force, similar rule can be found in a judicial interpretation issued by the Supreme People's Court (SPC).²¹

Looking at the recent developments, legal reforms in China continue to strive for the elimination of court intervention and try to safeguard the autonomy of arbitration. In 2017, a new judicial interpretation was issued by the SPC to further reduce the chance of arbitrary and intrusive decisions on the validity of arbitral awards by lower courts.²² As a result of this change, the gap between foreign and domestic arbitral awards in the process of judicial review has been narrowed. The pre-reporting system, which used to be applied to foreign and foreign-related arbitral awards, is currently applicable to negative decisions on the validity of the arbitral awards in all arbitral proceedings.²³ In other words, whenever the courts make the

¹⁶ Mainland China, also known as the Chinese Mainland, is the geographical area of the People's Republic of China, excluding Hong Kong, Macau and Taiwan.

¹⁷ Yifei Lin, *Judicial Review of Arbitration: Law and Practice in China* (Kluwer Law International 2018) 4.

¹⁸ Giovanni Pisacane, Lea Murphy, Calvin Zhang, *Arbitration in China: Rules & Perspectives* (Springer 2016), 11.

¹⁹ *Arbitration Law of People's Republic of China*, article 8.

²⁰ *Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations*, article 18.

²¹ *Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China (2008 Adjustment PKULAW Version)*, article 16. This judicial interpretation provides in article 16 that 'the examination of the effectiveness of an agreement for arbitration which involves foreign interests shall be governed by the law agreed upon between the parties concerned...'

²² *The Provisions of the Supreme People's Court on Report for Approval of the Arbitration Cases that are Subject to Judicial Review*.

²³ *Ibid*, article 2.

decision to reject the recognition of arbitral awards, it needs to be reported and reviewed by a higher court so that the autonomy of arbitration can be better protected from local protectionism and other unjust actions.²⁴

The above findings nevertheless have to be understood in light of the Chinese legislators' view that arbitration derives its legitimacy from both the parties' consent and the law, and therefore the conduct of arbitral proceedings and the enforcement of arbitral awards must be subject to judicial supervision.²⁵ Indeed, arbitration cannot be a 'blackout' that hurts the weaker or third party or the public interest.²⁶ No one can be forced into arbitration and therefore the court has to be involved when the existence of an arbitration agreement is in question. In the final stage, the court has to review the arbitral award and hear the views of the party against whom enforcement of the award is sought. This imposes limits on arbitral autonomy.

III TPF and Its Impact on Funded Arbitral Proceedings

As mentioned earlier, TPF is, by nature, an investment that can help the parties shift the financial risks of pursuing the case to external third party funders.²⁷ In law and in academic discussions, it is usually isolated from leading, insurance, claim assignment, legal aid and other funding options.²⁸ In many jurisdictions, TPF for arbitration is not only promoted but even glorified, so that the arbitration industry can better adapt to the increase in the scale and complexity of arbitration cases, which leads to a rise of the costs of arbitration. In the meantime, regulators in these jurisdictions acknowledge that TPF poses threats, not only to the integrity of the arbitral proceedings but also to the independence of legal practitioners. China is not insulated from these threats. The desire for a proper regulatory framework for TPF has already been demonstrated by the introduction of new provisions to arbitration guidelines and rules in order to reflect the potential negative impact of TPF.²⁹

Chinese law does not raise the question of the legality of TPF. In academic discussions, however, views are divided on whether arbitral autonomy implies the involvement of TPF

²⁴ Ibid.

²⁵ Lin (n 17) 13.

²⁶ L. Ali Khan, 'Arbitral autonomy' (2013) 74 (1) *Louisiana Law Review* 1; 韦伟强, '《仲裁法》的修改和完善——从一起仲裁执行异议之诉案件所进行的实证分析' (2018) (253) *社会法学家*.

²⁷ Nick Rowles-Davies, *Third Party Litigation Funding* (Oxford University Press, 2014) 4; Catherine Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 182–185; *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98G; 'Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration' (2018) 50.

²⁸ Duarte Henriques, 'Third-Party Funding: A Protected Investment?' (2017) (30) *Spain Arbitration Review*.

²⁹ Singapore International Arbitration Centre, 'Investment arbitration rules of the Singapore International Arbitration Centre' (2017); *International Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission*; Beijing Arbitration Commission, 'Public Consultation on Draft BAC Investment Arbitration Rules' <<http://www.bjac.org.cn/english/news/view?id=3370>> accessed 3 May 2020.

without mutual consent. One view is that the party's right to shape the proceedings hints at the discretionary use of TPF. The other view is that TPF is an arrangement between one of the parties of the dispute and an external funder, and therefore, does not fall within the contractual agreement of the parties. Following this line of thinking, the presence of TPF is already a challenge to arbitral autonomy. Nevertheless, neither of the above views negates the fact that TPF has the potential to facilitate access to arbitration and it should be treated as an experiment that is worth taking, if not an integral part of arbitration.

The existence of TPF is not yet a reason for the Chinese court to step in and review the impact of the funding arrangement on arbitration cases. Disputes between parties may end up in the state court when serious procedural issues associated with TPF lead to suspicion of the integrity of the arbitral procedure. In other words, TPF does not create new escape routes to litigation. It actually increases the use of these routes for issues governed by the law of the seat of arbitration that may require a higher level of scrutiny. To further elaborate, it is useful to look again at the case of *Essar v Norscot* before the English High Court. In this case, an ICC tribunal decided that the costs of TPF incurred by the successful party constituted part of the costs of arbitration and are therefore recoverable. The losing party brought the tribunal's decision to the English court, which is the court of the seat of arbitration, with the claim that the tribunal had no power to order recoverable success fees of TPF.³⁰ With TPF in the picture, the parties clearly have less confidence in the self-regulating character of arbitration. In that case, TPF-related issues are likely to spark further proceedings, on not only on the scope of the power of the tribunal but also on the scope of the costs of arbitration.

In investment arbitration, TPF could be more intricate, given that the state's right to arbitrate is limited.³¹ Normally, international investment arbitration treaties only apply to 'qualified investors'. The question could be whether investors who are pursuing claims that will mostly benefit external funders are still 'qualified'.³² Compared to commercial arbitration, the parties in investment arbitration are more likely to challenge the arbitration proceedings and the final award when there is TPF involved. In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.*, for instance, the respondent sought annulment of the arbitral award on the grounds that the tribunal ignored a fundamental rule of procedure by allowing a third party funder, Burford Capital, together with King & Spalding, to be the principal beneficiary of the proceeds of the final award.³³ To ensure the finality of the results of arbitration, which is implied by the principle of arbitral autonomy, the post-investment arbitration remedies have to be limited and exclusive of direct court intervention. However, TPF is still likely to increase the use of such remedies, which threatens the autonomy of the original

³⁰ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm), para 6.

³¹ Angelynn Meya, 'Chapter 10. Third-Party Funding in International Investment Arbitration The Elephant in the Room' in *Third-Party Funding in International Arbitration (ICC Dossier)* (2013) 122.

³² *Ibid.*

³³ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic (ICSID Case No. ARB/09/1) Decision on Argentina's Application for Annulment.*

tribunal.³⁴ It is worth noting that post-arbitration remedies are not the only danger to the autonomy of arbitration in the context of TPF. In some cases, the tribunal decides on the request for security for the costs considering the participation of third party funders.³⁵ Such security is likely to put a halt on the party's actions to bring up the claims,³⁶ which contradicts the autonomy thesis.

It is clear that TPF's lack of transparency deters problem-solving. In the absence of a disclosure obligation, an unjust situation is created if the opponent of the funded party shoulders the obligation to investigate whether and how a third party funder is involved in the case and how the funding arrangement impacts the arbitration procedure. If conflicts of interest and other abuses of arbitral proceedings associated with TPF are found after the delivery of the final award, the losing party that is likely to challenge the validity of the award in setting aside or enforcement proceedings. As such, the related arbitral proceedings might become a waste of time and money for everyone.

IV A Case for Mandatory but Targeted Regulatory Measures for TPF for Arbitration in the Chinese Context

In international arbitration, the tribunal hopes that TPF leaves the procedure unaffected; however, it is constantly facing the situation where the parties have disputes on the legality and impact of the TPF arrangement. It is not impossible that the Chinese court is needed by the parties in order to help resolve the TPF-related issues. Although the law does not object to the right of the party to make such requests, future legal reforms should be geared to eliminating the number of those requests, so that arbitral autonomy can be upheld. To do that, this section first presents empirical findings from China regarding the concerns of arbitration practitioners over TPF, then it brings forward a dual track approach to the regulation of TPF in the belief that if certain precautions are taken, the use of TPF for arbitration does not necessarily weaken arbitral autonomy.

³⁴ Gary J. Shaw, 'Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit' (2016) (advance access) *Arbitration international* 120.

³⁵ Umika Sharma, 'Third Party Funding in Investment Arbitration: Time to Change Double Standards Employed for Awarding Security for Costs?' in *Kluwer Arbitration Blog* (2018).

³⁶ *Ibid.* In investment arbitration, the tension between access to arbitration and the party's right to ask for security for defending an expansive and prolonged case is outstanding. As Sharma has noted, 'on one side is the respondent State which seeks security for defending a claim with the taxpayers' resources'. On the other side, 'there is the claimant who might become financially incapable of accessing justice if it is asked to put up security for costs.'

1 Empirical Findings: Arbitration Practitioners' Concerns About TPF

The Chinese TPF market has not been well described in the English literature. The Report of the ICCA-Queen Mary Task Force on TPF in International Arbitration is believed to be the first attempt to narrate the Chinese TPF industry, although the findings are rather preliminary.³⁷ Beyond that, what we have is no more than a few papers dealing with TPF on the theoretical level. In the Chinese literature, TPF is also a relatively underexplored area. In order to fill the information gap, the author conducted empirical research on the Chinese TPF market from October 2017 to December 2017 in Shenzhen, China, with the assistance of DS Legal Capital and some local institutions and authorities. In the process, two questionnaires were sent as part of the survey research. The first one received 175 responses from lawyers (63), arbitrators (12), in-house counsels (23), judges or judge assistants (16), governmental officers (12), arbitration institutions (18) and others (31). The second one specifically targeted in-house counsels with companies that have subscribed to the membership of the Legal Executive Board. There were 18 responses. The following are the findings from this empirical research.

a) The legality of TPF

Chinese law contains no prohibition of non-party funding for dispute resolution. At the moment, arbitration seems to be more prepared for TPF than litigation. Even though Chinese arbitration law does not directly deal with TPF-related issues, it does not prevent institutions from adopting rules with regard to the use of TPF. The China Economic and Trade Arbitration Commission (CIETAC) and Beijing Arbitration Commission (BAC), for instance, have adopted safeguards against the risks of TPF in their investment arbitration rules.

Notwithstanding the lack of statutory prohibition of the involvement of third party funders, it could be interfered from the regulation of lawyer funding and contingency fees that external funding is not preferable in some areas of law. The 2006 Measures for the Administration of Lawyers' Fees have outlawed contingency fees from the following cases:

- (1) cases of marriage or inheritance; (2) cases of asking for social insurance or minimum living costs; (3) cases of asking for child support or for alimony, pensions for the disabled or for the family of the deceased or welfare payments, or compensation for work-related injuries; or (4) cases of asking for payments for labour remunerations, etc.; (5) criminal cases, administrative cases, cases of state compensation and cases of collective litigation.³⁸

³⁷ 'Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration.' The findings about China do not touch on the specific legal issues associated with TPF. This report only points out that third party funders have emerged in China. And as a response to this change, some Chinese arbitration institutions have issued guidelines to define and to regulate TPF for arbitration.

³⁸ 国家发展改革委 (State Development & Reform Commission) and 司法部 (Ministry of Justice), '律师服务收费管理办法 (Measures on Payment of Litigation Fees)' (2006), articles 12 and 13.

The rationale underlying the above is presumably that the nature of these cases is not compatible with the commercial incentives of non-party funders. Hence, it is reasonable to ask whether the permission of TPF will be reversed in the above cases. The author tends to believe that, in arbitration that is focused on commercial cases, there is no reason to brush aside TPF. Both common law and civil law jurisdictions have shown that the involvement of TPF for arbitration does not go beyond the administrative capacity of arbitration if proper safeguards are put in place.

b) The qualification of third party funders

The Chinese third party funders approached by the author portray themselves as investment companies focusing on funding legal claims in both litigation and arbitration. They offer not only funding but also case and budget management, case strategy design and other related services. To expand their business, Chinese funders are cooperating with insurance companies and law firms. Parties can integrate legal insurance, TPF and contingency fees in the same proceedings. TPF is conceived by practitioners and regulators as an investment, separate from other funding options such as loans and lawyer funding. With substantial financial stakes in the funded case, the funder normally seeks to investigate the case beforehand and to monitor the funded proceedings closely. Its investigation is likely to cover the nature, legal merits and value of the claims, as well as the financial status of the opposing party and maybe the whole investment portfolio. The decision on whether to fund a specific legal claim requires both legal and non-legal considerations. During the procedure, the funder is likely to engage in the funded case to such an extent that it would become the one in charge of the proceedings.

Despite that, imposing statutory qualification requirements on third party funders is not necessarily favoured by domestic laws. Exceptions however exist. In Singapore, for instance, the Civil Law (Third-Party Funding) Regulations 2017 have provided that third party funders must (1) give the principal business funding for the costs incurred during the dispute; (2) have capital of not less than \$5 million or the equivalent amount in foreign currency in managed assets. Failure to comply with either of the above requirements will be subject to legal liabilities. That is, the rights of the funder under the TPF contract that is affected by or connected with the disqualification or non-compliance may not be enforceable by action or other legal proceedings.³⁹

In jurisdictions where the above statutory rules are absent, it is left to the court or to the tribunal to decide whether the funders are in good shape or have engaged properly in the funded proceedings in light of the general procedural rules. In the *Excalibur* case, the English court found that funders encouraged and maintained claims that were extremely weak and were conducted in an aggressive way.⁴⁰ The court in the first instance ordered the plaintiff (the

³⁹ *Civil Law Act of Singapore (Chapter 43)*, section 5B(4).

⁴⁰ *Excalibur Ventures LLC v. Texas Keystone Inc & Ors*, [2016] EWCA Civ 1144; The Association of Litigation Funders, 'Statement from the Association of Litigation Funders of England and Wales regarding the Court of Appeal Judgment in *Excalibur*' <<http://associationoflitigationfunders.com/wp-content/uploads/2016/11/ALF-Excalibur-Press-Release-181116-.pdf>> accessed 3 May 2020.

losing party) and its funders to pay the defendants' costs on an indemnity basis for the following reasons: (1) Excalibur is 'nothing more than a brass plate' that had advanced and aggressively pursued serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time; (2) Excalibur's claims could not have been pursued without third party funders and failed on every material issue; (3) The plaintiff's claims imposed an enormous drain on judicial resources; (4) The funders behind Excalibur would recover up to seven times their funding if they won the case. Arbitration is also exposed to the above risks. However, the tribunal would hardly issue cost orders directly against third party funders. Noticeably, the self-regulation of third party funders supervised by the Association of Litigation Funders (ALF), which provides the standards for the qualification and for the behaviour of the funders in England and Wales, plays a role in reducing abuses associated with the disqualification of third party funders.⁴¹ However, this self-regulation only applies to those that have subscribed to ALF membership.

In China, there are currently no requirements for eligibility or any punitive norms for third party funders. In the empirical research, some of the respondents were arbitrators who think that they are entitled to play a role in regulating third party funders. However, this has not become a widely accepted idea. Some arbitrators believe that, by doing so, they risk going beyond their mandate.

c) Lack of transparency of funding arrangements

Lack of transparency regarding TPF arrangements distances the Chinese arbitration law from international standards. A series of recent developments in the arbitration community have set the trend towards mandatory disclosure of TPF,⁴² although it is still debatable who should bear the obligation of disclosure. Widely recognised, the increasing involvement of third party funders in arbitration justifies mandatory disclosure of the funding arrangement. In the 2015 Queen Mary Arbitration Survey, the disclosure issue was singled out by the results. The report reads 'a point made in a number of interviews was that regulation should mainly focus on disclosure rather than on the creation of a prescriptive, substantive regime.'⁴³ In the empirical research conducted by the author, among 14 responses from arbitration institutions, half of them indicate that the disclosure of TPF is a necessity. The funded party's disclosure obligation is favoured by all of the respondents from the arbitration institutions.

In some Asian arbitration centres, the disclosure of TPF has already become part of the statutory law. In Singapore, the disclosure obligation is imposed on legal practitioners in order to guarantee compliance.⁴⁴ Hong Kong followed suit but had chosen to force this obligation

⁴¹ The Association of Litigation Funders, 'Code of Conduct for Litigation Funders' (2018).

⁴² Marius Nicolae Iliescu, 'A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact' in *Kluwer Arbitration Blog* (2016).

⁴³ Queen Mary University of London; and White & Case LLP, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration'.

⁴⁴ *Legal Profession (Professional Conduct) Rules 2015*.

on the funded party. Both agree that limited disclosure, with only the existence of the funding arrangement and the identity of the funder, would be enough to satisfy the regulatory purposes. In the absence of proper disclosure, the parties in China are exposed to many of the risks of TPF. The most alarming one could be that the involvement of TPF affects the independence of the arbitral tribunal and, by necessary implication, the integrity of the arbitral award.⁴⁵

d) Conflicts of interest

The risk of conflicts of interest in cases with TPF is real. This has led to the modification of the IBA Guidelines on Conflicts of Interest in International Arbitration (hereafter referred to as 'IBA Guidelines'). According to them, 'third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party'⁴⁶.

In China, conflicts of interest might arise not only from the funder's relationship with the tribunal but also with the lawyers. As noted before, funders often have business connections with law firms, which puts lawyers at risk of a conflict of interests and therefore threatens the integrity of the legal profession. This view, however, may be exaggerated, considering that the problem of conflict of interests in the legal profession is hardly new and arguably cannot be seen in black and white. In reality, lawyers operate a business and always have their own financial interests at heart when working on a case, with or without the involvement of TPF. Despite that, it is undeniable that TPF amplifies the financial incentives of lawyers and third party funders, to the extent that the funded party may no longer be the main beneficiary of the funded legal proceedings. Arguably, the regulation of the legal profession should reflect on TPF in order to guarantee that (1) the line between third party funders and the funded parties' lawyers is not blurred; and (2) if the interest of the funded party and that of the funder collide, lawyers must prioritise the former over the latter.

e) Confidentiality of arbitration

In the surveys conducted by the author, respondents were concerned about potential breaches of confidentiality of arbitration. Users of commercial arbitration appreciate the confidentiality of arbitration,⁴⁷ as it prevents case materials being shared with outsiders.⁴⁸ However, confidentiality of arbitration does not have a statutory basis in every jurisdiction. In fact, it is not a well-established principle in either domestic or international laws.⁴⁹ Chinese law allows

⁴⁵ William Stone, 'Third Party Funding in International Arbitration: A Case for Mandatory Disclosure?' (2015) 17 (2) *Asian Dispute Review* 66.

⁴⁶ International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration' (2014) Explanation to General Standard 6.

⁴⁷ Elza Reymond-Eniaeva, *Towards a Uniform Approach to Confidentiality of International Commercial Arbitration* (Springer, 2019), 1.

⁴⁸ *Ibid.*, 1.

⁴⁹ 辛柏春, '国际商事仲裁保密性问题探析' (2016) 30 (2) *当代法学* 120-121.

for arbitration proceedings to be conducted in private,⁵⁰ but this is not equivalent to confidentiality in arbitration. Despite that, arbitration institutions often provide confidentiality obligations. Discussing details with third party funders appears to be outright incompatible with these obligations according to some scholars.⁵¹ In the author's view, the impact of TPF on the confidentiality of arbitration can be linked to the qualification of third party funders. In order to maintain an appropriate level of confidentiality, the tribunal needs the participation and cooperation of the funders. They must be required to have mechanisms that can prevent case materials from being shared with or misused by parties who have no legal connection to the case.

f) The impact of TPF on the costs of arbitration

At the moment it is unknown whether TPF contributes to the disproportionate costs of arbitration. In international commercial arbitration practices, it is likely that the success fee in TPF is categorised as part of the 'costs of arbitration', leading to a large financial exposure for the opponent of the funded party. Therefore, on the micro level, it can be argued that TPF affects the parties' liabilities for costs. This explains the increasing concern over whether the recoverable success fees in TPF need to be capped or even suspended from arbitration. There is also a question whether the tribunal is empowered to issue cost orders against the funders if they can directly affect the parties' procedural liabilities.

Similar to litigation, there are two approaches to cost allocation in arbitration. The first one is the 'loser pays' rule and the other one is the American model, that parties bear their own costs.⁵² When the first approach is applied, the costs of TPF are likely to equal the costs of the opponent who might not know of the existence of TPF until then. This could undermine the attractiveness of arbitration, since the financial risk of losing the case becomes unpredictable. Apart from that, TPF gives rise to more concerns about undue proceedings. Parties and their lawyers who pay nothing when they lose under the terms of their TPF agreement tend to be optimistic about the case and are likely to initiate unnecessary pleadings. In this sense, TPF increases the costs of arbitration, regardless of the cost allocation rule being applied.

Under the TPF agreement, funded parties normally pay several times over the original investment or a certain percentage of the final award in the event of success. The amount of the costs of TPF could be exploitative. The situation is worsened if the funded party's lawyers have business connections with the funder that can affect their independence. In some jurisdictions, the risk of exploitative TPF success fees has triggered broad academic discussions in certain areas of law, such as class action. Dutch law, for instance, empowers the court to investigate TPF for collective redress proceedings. Legislators there believe that

⁵⁰ Arbitration Law of People's Republic of China, article 40. This provision states that 'arbitration shall be conducted in camera. If the parties agree to public arbitration, the arbitration may be public unless state secrets are involved.'

⁵¹ Jonas von Goeler, 'Show Me Your Case and I'll Show You the Money – How to Balance Conflicts Between Third-Party Funding and Confidentiality in Arbitration Proceedings' in Kluwer Arbitration Blog (2016).

⁵² Micha Bühler, 'Awarding Costs in International Commercial Arbitration: an Overview' (2004) 22 (2) ASA Bulletin 250–251.

exploitative success fees constitute a violation of the interests of the parties and pose a threat to the integrity of the legal proceedings. In the context of arbitration, there is no scrutiny over the funding arrangement. Chinese law does not deal with the amount of the success fee of TPF for arbitration and neither do the arbitration rules. This seems to be an oversight, since the law does not allow priority to be given by third party funders to the generation of financial profits.

The costs of arbitration have been noticeably, rising in the recent years, which can be for a variety of reasons.⁵³ These costs can be broadly categorised into two groups, procedural costs and parties' costs. The increases in the parties' costs, which are the main contributor to the rise of the overall costs of arbitration, are linked to lawyers' fees and therefore can hardly be controlled by state authorities. In fact, it is debatable whether those authorities have the obligation to make arbitration affordable and lower the price for TPF for arbitration. Having this in mind, the paper argues that, although regulators should keep an eye on the impact of TPF on costs of arbitration, such an impact should not necessarily be regulated by statute.

2 A Dual Track Approach to the Regulation of TPF for Arbitration in China

Despite substantive efforts having been made to impose regulations for the minimum standards for practicing TPF, harmonisation is still lacking. The proliferation and sophistication of TPF-related issues require Chinese legislators to investigate the scattered and divergent regulatory measures beyond the Chinese borders in order to come up with solutions. This section first identifies some international trends in regulating TPF, and then makes proposals for this process in China. Finally, it points to the unsolved issues that might be the subject of future research.

a) The regulation of TPF beyond Chinese borders

Looking beyond the Chinese borders, there are three trends that can be observed in the area of regulating TPF. The first concerns the disclosure of the TPF agreement in arbitration. We have seen both soft rules and hard laws being introduced to ensure sufficient disclosure.⁵⁴ The primary purpose of it is to ensure that TPF does not create conflicts that could compromise the integrity of the whole arbitration procedure. Disclosure also serves the purpose of maintaining a certain level of predictability of arbitration. It informs the other party of what they are getting into at the preliminary stage, which meets the requirements of procedural justice. Arguably, it is unjust for one of the parties to investigate the funding arrangement made by the opponent with an external party, especially when such an arrangement is likely to give rise to conflicts of interest.

⁵³ Christoph Stippl and Gunnar Pickl, 'Chapter II: The Arbitrator and the Arbitration Procedure – Limiting Costs in Arbitration' in *Austrian Arbitration Yearbook 2009*, 213.

⁵⁴ For instance, section 98U of the Arbitration Ordinance Cap. 609 has imposed a disclosure obligation on the funded party.

The second trend is to set up qualification requirements for the funders. In England, such requirements are contained in the ALF code of conduct. Singapore provides similar requirements for the funders in international arbitration. Failure to comply will directly give rise to legal consequences,⁵⁵ meaning that the rights of the funder under or arising out of the TPF contract affected by or connected with the disqualification or non-compliance are not enforceable by action or any other legal proceedings.⁵⁶ Hong Kong has a code of practice applicable to all third party funders. Section 2.5 of the code states that a third party funder must (a) ensure that it will be capable of paying all debts when they become due and payable; and (b) cover all of its aggregate funding liabilities under all of its funding agreements in less than 36 months.

The third trend is regulating TPF in order to manage conflicts of interest. IBA Guidelines, which were modified in 2014, reinforce this trend. General Standard 7 of these Guidelines requires the parties to disclose the relationship with an arbitrator in order to reduce the risk of a challenge of an arbitrator's impartiality or independence because of information learnt subsequently. This requirement extends to third party funders that have a direct economic interest in the final award. In some jurisdictions, domestic regulation has a similar effect. The Hong Kong code of practice for third party funders, for instance, requires a funder to maintain effective procedures for managing conflicts of interest. Section 2.6 states the details in this regard:

the third party funder has effective procedures for managing a conflict of interest that may arise if it can show through documentation that (1) the third party funder has conducted a review of its business operations that relate to the funding agreement to identify and assess potential conflicting interests; (2) the third party funder: (a) has written procedures for identifying and managing conflicts of interest; and (b) has implemented the procedures; (3) the written procedures are reviewed in intervals no greater than 12 months; (4) the written processes include procedures about the following: (a) monitoring the third party funder's operations to identify and assess potential conflicting interests; (b) disclosing conflicts of interest to the funded parties; (c) managing situations in which interests may conflict; (d) protecting the interests of funded parties and potential funded parties; (e) dealing with situations in which a lawyer acts for both the third party funder and a funded party or potential funded party; (f) dealing with a situation in which there is a pre-existing relation between a third party funder, a lawyer and a funded party (or potential funded party)...⁵⁷

b) A proposed regulatory framework: mandatory but limited regulatory measures

Regarding the measures that have to be adopted to ensure the quality of arbitration and to prevent parties from bringing arbitration-related issues to the court, the above three trends should be considered in future Chinese legal reforms, since they represent the efforts to adapt

⁵⁵ *Civil Law (Third-Party Funding) Regulations 2017*, section 4.

⁵⁶ *Ibid.*

⁵⁷ Secretary for Justice of HKSAR, 'Hong Kong Code of Practice for Third Party Funding in Arbitration' (2019) section 2.7.

to the increasing use of TPF. Bearing these trends in mind and taking into consideration the conditions in China, the following regulatory approach is proposed: an adoption of both hard and soft rules with awareness that the regulatory approach ought to be moderate, since TPF has positive effects on arbitration and is currently in its preliminary stage of development. In the author's view, most of the issues related to TPF should be subject to soft rules, which are more flexible and compatible with international standards. However, for issues directly affecting the integrity of arbitration and that of the legal profession, mandatory rules are required. The recommended approach has contemplated the concerns of TPF that have been discussed in section 4.1 of this paper. This approach can be specified as follows.

First of all, TPF for arbitration needs to be regulated separately from TPF for litigation. The key features of the funded procedure play an essential role in shaping the rules for TPF. China has civil law traditions without legal doctrines preventing the use of non-party funding with commercial motives, but the regulators are required to consider the scope for the practice of TPF. As stated earlier, the nature of the case is not compatible with non-party funders' commercial incentives in some litigation cases. It therefore can be reasonably expected that TPF is subject to more legislative restrictions in litigation than in arbitration.

Second, it is suggested that legislators consider imposing mandatory qualification requirements for third party funders. Beyond the Chinese borders, there is no consensus on who should be allowed to fund arbitration, despite the obvious trend of setting up some standards of capital adequacy and the behaviour of the funders. At this moment, it is crucial to define the line between legal practitioners and third party funders. Chinese law does not prevent partners of local law firms from becoming the founder or the shareholder of third party funders. Some firms have even signed cooperative agreements with third party funders and, as a result, they are obliged to send clients to each other. With the absence of requirements for the quality and the business model of third party funders, it is likely that parties would object to the funding agreements based on procedural irregularities.

The author also argues that Chinese regulators should consider integrating TPF disclosure into mandatory rules. On the one hand, an appropriate level of transparency of external funding agreements is at the core of managing conflicts of interests. On the other hand, disclosure of TPF is needed to protect the opposing party. Arbitration guarantees a certain level of predictiveness as to the amount of recoverable costs.⁵⁸ To achieve that, arbitration rules normally allow parties to shape the cost rules. However, TPF could have a significant impact on the costs of arbitration. As previously discussed, *Essar v Norscot* demonstrates the possibility of recoverable success fees in TPF.⁵⁹ Even though the theory in the *Essar* case will not be applied, there are many ways through which TPF could increase the costs of arbitration. For instance, TPF might be related to the issue of security for costs. It is reasonable to ask whether the funded party is assumed unable to pay the costs of arbitration and therefore

⁵⁸ Michael O'Reilly, 'Rethinking costs in commercial arbitration' (2003) 69 (2) *Arbitration* 125.

⁵⁹ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm).

should not be allowed to proceed without posting a proper guarantee.⁶⁰ In the above scenarios, if TPF is not subject to disclosure, the parties to arbitration are likely to be shocked by the costs incurred by or connected to TPF.

Based on the disclosed information, the tribunal is able to investigate the impact of TPF on arbitration proceedings. From this point forward, legislators can rely on soft laws to deal with conflicts of interest, excessive success fees, and many other issues that are deemed important. The value of soft laws in the context of TPF can be justified by the fact that Chinese practitioners and regulators still lack an adequate understanding of the risks of TPF. Moreover, soft laws are an expression of the non-domestic nature of commercial arbitration and can enable China to be included in the process of unifying the rules on the international front. They may also be used to educate inexperienced practitioners regarding the possible impact of TPF. Very often, soft laws only become applicable if the parties agree on them, which is in line with the autonomy thesis underlying arbitration.

V Conclusion

TPF constitutes a challenge to arbitral autonomy. However, this does not mean that arbitral autonomy is inevitably discounted in cases where TPF is involved. This paper acknowledges the principle of arbitral autonomy as one of the pillars of arbitration,⁶¹ which expresses the idea that the arbitral process is partially, instead of completely, isolated from national courts.⁶² As an implication of the above principle, the parties are free to enter into funding agreements with third party funders or other financiers for business reasons. However, the way that the funder is involved has an effect on the wider interests of justice and therefore should be checked by the tribunal and probably the court. Arguably, the tribunal is best-suited to supervise TPF for arbitration, though there are exceptional circumstances where there is a good reason for the court to step in.

In cases with TPF for arbitration, national courts may continue to be benevolent supporters of arbitration rather than hostile interferers, with the precondition that arbitration has the ability to deliver justice. In the Chinese context, preventing the use of TPF from going beyond the administrative capacity of arbitration calls for a hybrid regulatory approach, combining both mandatory and voluntary rules. The focus of mandatory rules should be on the disclosure of TPF, with the understanding that such disclosure can help shorten the list of things that can go very wrong and subsequently reduce the possibility of the court's intervention. Other than that, some mandatory requirements for the governance, structure, and behaviours of the funders are necessary. In particular, the blurred line between third party funders and lawyers should be singled out, since it compromises not only the quality of the arbitration

⁶⁰ Duarte Henriques, 'Arbitrating disputes "in" third-party funding' (2019) 85 (2) *Arbitration* 169.

⁶¹ N. H. Andrews, *Andrews on Civil Processes: Arbitration and Mediation* (Intersentia 2013) 94.

⁶² *Ibid.*

procedure but also that of the legal profession. On top of mandatory rules, the use of arbitration rules and various international instruments with regard to the negative effects of TPF should be encouraged. The parties are advised to contemplate TPF and its potential impact by the time they enter into an arbitration agreement. They may exclude TPF by mutual consent. If third party funders are involved, they may need to investigate the arbitration rules regarding cost allocation and other related factors to see how TPF could affect the independence of the tribunal, the quality of the legal advice as well as adverse costs liabilities.

Articles

Africa–EU Trade Relations: Concise Legal Background to the West Africa – EU Economic Partnership Agreement

I Introduction

There are three main types of European Union (EU) trade agreements: (i) Customs Unions; (ii) Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements (FTA), and Economic Partnership Agreements (EPA); and (iii) Partnership and Cooperation Agreements.¹ An EPA is a development-focused, asymmetrical trade agreement to increase trade, investment, and development support for developing countries through the gradual trade liberalisation of EPA contracting parties with the expectation that economic benefits would accrue, and *ceteris paribus*, so would the welfare of the less developed party.² The prospect of losing any currently enjoyed preferential treatment would encourage (or discourage) the preferentially treated party to transition to a new agreement depending on the new terms and conditions. Achieving a mutually acceptable EPA is the purpose of negotiations. Once ratified and entered into force, an EPA is a legally binding agreement, which can be enforced through appropriate measures in cases of non-compliance.³

The EU and the African, Caribbean and Pacific group of states (ACP) have a longstanding history of trade relations. The EU has sought to enhance these trade relations through regional EPAs. Only two regional EPAs – the South African Development Community (SADC) – EU EPA and the Caribbean Forum (CARIFORUM) – EU EPA – have come into force after long negotiations spanning over a decade. The EPAs are viewed by some ACP States as having unfair terms and potentially ill-fated impacts. As this article will show, the terms of the EPAs are more unilateral than neutral, which could lead to State-to-State disputes in the international arena, and public-private disputes in the domestic courts, from an early stage of implementation.

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¹ EU Directorate General (DG) for Trade: <<http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>> accessed 01 June 2019.

² European Parliament Think Tank: <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2018\)625102](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2018)625102)> accessed 01 June 2019.

³ For example, art. 74 of the West Africa – European Union EPA.

II Background to Africa–EU Trade Relations

Africa–EU trade policy and principles are most notably enshrined in the *ACP–EU Partnership Agreement*,⁴ (hereafter Cotonou Agreement – CA), which can be traced back to the Treaty of Rome of 1957.⁵ Even as the treaty aimed to establish a common market among the then six members⁶ of the European Community (EC), the treaty also made special provisions for the interests of the non-European colonies and so-called ‘overseas dependencies’ of four⁷ EC Members. It created an ‘association’ to promote the economic and social development of these countries and territories, and to establish close economic relations between them and the EC. These countries and territories were referred to as ‘associated states’:

This Association shall in the first place permit the furthering of the interests and prosperity of the inhabitants of these countries and territories in such a manner as to lead them to the economic, social, and cultural development to which they aspire.⁸

The above-quoted legal provision ushered in the setting for the special treatment towards these non-European states (and thus, the special relationship between both groups). This article of the Rome Treaty is arguably a cornerstone of the subsequent association conventions formed between the non-European associated states, which in effect became third country states after their respective independence. The provision was concerned with the socio-economic interests, wellbeing, and prosperity of these states. This altruistic undertone essentially lent credence to the preferential constructs that followed in the later association conventions.

The (first) Yaoundé Convention (YC I) signed on 20 July 1963,⁹ aimed to prolong this association, and hence is also known as the Association Convention. It had similar objectives as the Rome Treaty. It sought to promote the economic exchanges between the signatory parties, their economic independence and relations, and thus the development of global trade.¹⁰ The YC was renewed for the years 1969–1975.

The first Lomé Convention (LC) 1975–79, signed between the nine European Economic Community (EEC) Members and 46 ACP States, and subsequently renewed versions, were even more favourable to ACP States because they abolished the reciprocity requirement under

⁴ *Partnership Agreement Between The Members Of The African, Caribbean And Pacific Group Of States Of The One Part, And The European Community And Its Member States Of The Other Part, Signed In Cotonou On 23 June 2000*. Revised In Luxembourg On 25 June 2005. Revised in Ouagadougou on 22 June 2010, And Multiannual Financial Framework 201420, (hereafter Cotonou Agreement – CA).

⁵ *Treaty establishing the European Economic Community* (EEC Treaty, hereafter Rome Treaty) Signed in: Rome (Italy) 25 March 1957. (Entry into force: 1 January 1958).

⁶ Belgium, France, Germany, Italy, Luxembourg, the Netherlands.

⁷ France, Belgium, the Netherlands, and Italy.

⁸ Rome Treaty, art. 131.

⁹ *The First Yaoundé Convention* (1963–1969) – OJ 093, 11/06/1964 P. 1431, signed on 20 July 1963, end of validity: 31/05/1969 (hereafter YC I); Expiry in 1969 with a renewable term of five years.

¹⁰ YC I, art 1.

the YCs. The LCs allowed duty free access for ACP exports into the EEC market. Lomé I was succeeded by Lomé II, III, and IV, which entered into force in 1980, 1985, and 1990 respectively. Since 1975, no reciprocal tariff reductions were required from the ACP party, except to grant most-favoured-nation (MFN) status to the EEC party, and even then, the preferential treatment obligation towards the EEC was not substantial. As confirmed by the World Bank (WB): ‘in practice, MFN rates are the highest (most restrictive) that World Trade Organisation (WTO) members charge one another.’¹¹ Moreover, complementary support schemes for the ACP party were included, like the Stabilisation of export earnings (STABEX) from selected primary products scheme under Lomé I provided grants and loans, while the support to the mining industry (SYSMIN) scheme under Lomé II granted financial compensation to the ACP party for currency fluctuations that impacted these sectors. These preferences are captured in the footnotes.¹²

The fourth Lomé Convention expired in August 2000 and ushered in the *ACP–EU Partnership Agreement* which reversed the non-reciprocal treatment and is the legal basis for the current ACP–EU EPAs.

The EU has exclusive competence on the customs union including over the common customs tariff between EU Member States (MS) and their import/export relations with third countries.¹³ In addition, the EU has exclusive competence over common commercial policy.¹⁴ The EU can enter into international agreements with third countries that would be binding on EU MS, involving reciprocal rights and obligations, and must be concluded by the Council and consented to by the European Parliament.¹⁵

¹¹ See <https://wits.worldbank.org/wits/wits/witshelp/content/data_retrieval/p/intro/c2.types_of_tariffs.htm> accessed 10 May 2019.

¹² Article 240 Lomé II:

1. In order to avoid increases in the debt of ACP States, finance under this Convention, apart from bank loans and risk capital, is provided in the form of grants. Specifically, the following measures and actions will be taken: (a) for projects with high rates of return, and in particular for Sysmin financing, a two-stage procedure will be followed whereby ACP States will receive grants and will on-lend the funds at appropriate market terms and conditions, with suitable arrangements for deposit of interest and repayment, less an agreed service charge, in a counterpart fund account, managed according to normal procedures as agreed for this type of finance generated from Community assistance;

(b) Stabex transfers will be granted without any obligation for the beneficiary ACP States to reconstitute the resources of the system. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A21991A0817%2801%29>> accessed 10 May 2019.

¹³ *Treaty on the Functioning of the European Union* (hereafter TFEU), art 28.

¹⁴ TFEU, art 207.

¹⁵ TFEU, art 216–218.

The CA, is a treaty between the ACP group of states,¹⁶ and the EU and its Member States¹⁷. It was signed in Cotonou on 23 June 2000 for a duration of 20 years, with an expiry due on 29 February 2020. Negotiations for a renewed agreement have been underway since 28 September 2018 but have not yet been concluded nor ratified.¹⁸ It was established to expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.¹⁹ This mandate is the responsibility of the Council of Ministers as the highest-level body in the CA institutional framework. The Council comprises, on the one hand, the members of the Council of the EU and members of the European Commission, and on the other hand, a member of the government of each ACP State.²⁰ It is supported by a diplomatic corps, the so-called Committee of Ambassadors, consisting on the one hand, of the permanent representative of each Member State to the EU and a representative of the Commission and, on the other, the head of mission of each ACP State to the EU.²¹ As a treaty, the CA is bound by international law,²² and so are the EPAs.

As an oversight mechanism, the Joint Parliamentary Assembly (JPA) is composed of equal numbers of EU and ACP representatives. The members of the JPA are, on the one hand, members of the European Parliament and, on the other, members of parliament or, failing this, representatives designated by the parliament of each ACP State.²³

The ACP–EC Development Finance Cooperation Committee, referred to as ‘the ACP–EC Committee’, is comprised by parity of representatives of ACP States and the EU, or their authorised representatives.²⁴ The Committee is responsible for the achievement of the objectives and principles of the development finance cooperation commitment enshrined under Articles 55–56. (Objectives and Principles), Part 4 of the CA:

¹⁶ *The Georgetown Convention* signed in July 1975 in Georgetown, Guyana, founded the ‘ACP Group’.

¹⁷ Approved on behalf of the Union by Council Decision 2003/159/EC of 19 December 2002 2003/159/EC: Council Decision of 19 December 2002 concerning the conclusion of the Partnership Agreement between the African, Caribbean, and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

¹⁸ According to the legislative train schedule, transitional provisions have been agreed in case the new post-Cotonou agreement is not concluded by the end of February 2020. On 28 September 2019, chief negotiators endorsed the text on the future agreement’s economic priorities, <<http://www.europarl.europa.eu/legislative-train/theme-europe-as-a-stronger-global-actor/file-towards-post-cotonou>> accessed 11 February 2020.

¹⁹ CA, art 1.

²⁰ CA, Part 2, art 15.

²¹ CA Part 2, art 16.

²² *Vienna Convention on the Law of Treaties*, signed on 23 May 1969, entered into force on 27 January 1980, art 2(1)(a).

²³ CA Part 2, art 17.

²⁴ CA TITLE IV Procedures and Management Systems, art 83 (3).

ARTICLE 55 Objectives

The objectives of development finance cooperation shall be, through the provision of *adequate financial resources* and *appropriate technical assistance*, to support and promote the efforts of ACP States to *achieve the objectives* set out in this Agreement on the basis of *mutual interest and in a spirit of interdependence*.²⁵

ARTICLE 56 Principles

1. Development finance cooperation shall be implemented on the basis of and *be consistent with* the development objectives, strategies and priorities *established by the ACP States*, at national, regional and intra-ACP levels. Their respective geographical, social, and cultural characteristics, as well as their specific potential, shall be taken into account. Guided by the internationally agreed aid effectiveness agenda, cooperation shall be based on *ownership*, alignment, donor coordination and harmonisation, *managing for development results and mutual accountability*.²⁶

The Joint ACP–EC Ministerial Trade Committee is composed of representatives of the ACP States and of the EU.²⁷ It is tasked with monitoring trade-related issues that can impact the ACP States. More specifically, the Committee is mandated to monitor the negotiations and implementation of EPAs,²⁸ and acts as the main forum for consultations on trade measures and disputes between the parties.²⁹ It can be argued that the Trade Committee is tasked with protecting the interests of the ACP party. In Declaration I of the revised CA, the Trade Committee is specifically to monitor the impact of the reciprocal market access requirements on the ACP party in the event that ‘additional support could be necessary’:

To that end, they agree to examine all necessary measures in order to maintain the competitive position of the ACP States in the EU market [...]. The objective will be to enable ACP States to exploit their existing and potential comparative advantage in the EU market.³⁰

Although these committees meet at least once annually, they have the duty to provide periodic reports and recommendations to the Council of Ministers on ways to improve the trade arrangements. At the 16th meeting (latest meeting at the time of writing this article) of the Joint ACP–EU Ministerial Trade Committee held in Brussels on 26 October 2018, the state of the EPAs was discussed.³¹ The issues raised were familiar themes about a lack of real market access by the ACP States due to the EU’s restrictive policies and practices and a lack of genuine ACP–EU dialogue on crucial issues. Both the ACP and EU sides agreed that the solutions

²⁵ Article 55 Objectives, Author’s emphasis.

²⁶ Article 56, Author’s emphasis.

²⁷ CA Title II, art 38.

²⁸ CA art 38 (2).

²⁹ CA art 38A (4).

³⁰ CA, DECLARATION I Joint declaration on support for market access in the ACP–EC partnership. Ouagadougou, 22 June 2010 (OJ L 287, 4.11.2010).

³¹ Draft minutes of the 16th meeting of the Joint ACP–EU Ministerial Trade Committee Date: 26 October 2018 <<https://data.consilium.europa.eu/doc/document/ST-2101-2019-INIT/en/pdf>> accessed 11 February 2020.

include extending the technical and financial assistance for capacity building to facilitate ACP exports' compliance with EU regulations, a flexible approach in order to create a level playing field, and the need to ensure that genuine, and adequate ACP–EU consultations are made.

III State of Play of the EPAs

On a global level, the EU has had preferential trading arrangements with developing countries in the framework of its Generalised Scheme of Preferences (GSP) since 1971. This is a legal exception to the non-discriminatory MFN provision accepted by WTO members. Given that the GSP is unilaterally offered by the EU, it is also subject to the EU's discretion in terms of approval, rejection, modification, or withdrawal.³² The GSP conforms to the WTO Agreement based on the 'enabling clause' enshrined in the General Agreement on Tariffs and Trade (GATT) 1979, which allows for differential and more favourable treatment to developing countries.³³ The GSP consists of three different tariff preferences: a general arrangement (Standard GSP); a special incentive arrangement for sustainable development and good governance (GSP+); and a special arrangement for the least-developed countries [Everything But Arms (EBA)].³⁴ The Standard GSP is automatically available to any developing country of low middle-income status unless the country is already benefitting from a special trade arrangement with the EU that grants similar rates of preferences. The Standard GSP is valid until December 2023. The EU's EBA scheme initiated in 2001 has since granted duty and quota free access to most commodity exports from Least Developed Countries (LDCs). Just over half of the (40 out of the 78) ACP States are classified as LDCs. 13 out of the 16 West African countries are LDCs. Nigeria and Ghana are non-LDCs.

By their nature, the ACP trade preferences granted by the EU are a violation of Article 1 of the WTO Agreement and Article 1 of the GATT 1994, which cover the MFN principle and non-discriminatory treatment. The ACP–EU trade preferences are based on traditional trade ties from their colonial past.³⁵ They are incompatible with the WTO Agreements because they offered non-reciprocal trade preferences, as outlined in the preceding chapter of this article. The underlying principle is that WTO members must afford each other the same treatments. To this end, a temporary derogation waiver was granted to the EU and ACP

³² Stephen R. Hurt, 'Cooperation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention' (2003) 24 (1) *Third World Quarterly* 168.

³³ Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the 'Enabling Clause'), adopted under the *General Agreement on Tariffs and Trade* (GATT) in 1979, (L/4903).

³⁴ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008.

³⁵ Lomé Convention, Agriculture and Trade Relations between the EU and the ACP Countries in 1975–2000 Kalle Laaksonen, Petri Mäki-Fränti and Meri Virolainen (Pellervo Economic Research Institute, Finland) Working Paper 2006/20, 43.

to adapt their trade arrangements accordingly.³⁶ The EU's Market Access Regulation 1528/2007³⁷ was a bridging solution for the ACP countries that had negotiated EPAs but not yet signed and ratified them.³⁸ The WTO waiver of preferential tariff treatment for products originating in ACP States lasted until 31 December 2007.³⁹ Any interested parties and the WTO General Council are to be notified and consulted on any changes to the preferential treatment as set out in the CA.⁴⁰ The interim EPAs, restricted to trade in goods, signed and in force between 29 ACP States and the EU, have replaced the preferential arrangements, and thus negated the need for a further WTO waiver after its expiry in 2007.

The CA enshrines the broad commitments, common principles and values between the ACP and EU. It is a legally binding agreement drafted in a normative tone. As its economic and trade cooperation strategy, the CA envisages the gradual⁴¹ introduction of new trading arrangements (that is, EPAs) between ACP and EU that would pursue its objectives and principles and be in conformity with the WTO rules.⁴² These EPAs are free trade agreements (FTA) with a strong development cooperation dimension.

1 Regional EPAs

The ACP–EU EPA negotiations commenced on 27 September 2002. The ACP–EU EPA is divided into seven (7) regional-level EPAs: Central Africa, Eastern and Southern Africa (ESA), East African Community (EAC), Southern African Development Community (SADC), West Africa (WA), Caribbean (CARIFORUM), and Pacific.

The Pacific–EU EPA⁴³ is currently held between Fiji, Papua New Guinea, and the EU. Solomon Islands and Samoa are seeking accession to it, and thus an accession procedure is underway.⁴⁴

³⁶ Doha WTO Ministerial 2001: The ACP–EC Partnership Agreement, WT/MIN (01)/15, Decision of 14 November 2001. See also INTA Committee, 'Economic Partnership Agreement with the East African Community' European Parliamentary Research Service, April 2018, 3.

³⁷ Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements, ELI: <http://data.europa.eu/eli/reg/2007/1528/2013-07-01>.

³⁸ Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP) Final Report, July 2018, 44.

³⁹ Understanding in Respect to Waivers of Obligations under the General Agreement on Tariffs and Trade 1994.

⁴⁰ Doha WTO Ministerial 2001: The ACP–EC Partnership Agreement, WT/MIN (01)/15, Decision of 14 November 2001.

⁴¹ CA art 36 (3).

⁴² CA art 36.

⁴³ Council Decision of 13 July 2009 on the signature and provisional application of the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part (2009/729/EC).

⁴⁴ See <http://ec.europa.eu/trade/policy/countries-and-regions/regions/pacific/> accessed 10 May 2019.

The CARIFORUM–EU EPA⁴⁵ was signed by 14 Caribbean States in October 2008, and two months later, in December 2008, the EPA entered provisional application. Haiti signed the EPA in December 2009 but has not yet ratified it.⁴⁶ The implementation of all provisions of the EPA is sluggish on both sides. The CF States are hesitant to contest any EU irregularities and the trading difficulties caused by visa issues. The EU has not fully provided the wide-ranging development cooperation as envisaged in the EPA. This springs from delay in concluding financial agreements and disbursements.⁴⁷

Since May 2012, the ESA–EU EPA⁴⁸ has been provisionally applied. There are 11 countries in the regional grouping: Comoros, Djibouti, Eritrea, Ethiopia, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia, and Zimbabwe. Comoros was the last to sign the EPA in 2017. They are all WTO members or observers, except Eritrea.⁴⁹

The EAC–EU EPA⁵⁰ has been ratified by Kenya (the only non-LDC country of the EAC bloc), whereas the remaining five countries Burundi, Rwanda (signed but not ratified), Tanzania, Uganda, and South Sudan⁵¹ have not, despite the negotiations concluded in October 2014. It is noteworthy that the EAC is renowned for being one of the most integrated regional economic blocs in the African Union owing to its active customs union and common market, and commitment to establishing a monetary union by 2023. Yet, it has not adopted a common position on the EPA.⁵²

The Central Africa–EU EPA⁵³ covers eight countries in the Central Africa region, but so far, only Cameroon has signed and ratified the EPA in 2009 and 2014 respectively. The interim EPA is under provisional application between the EU and Cameroon.⁵⁴

⁴⁵ *Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part*, signed on 15 October 2008. (Under provisional application since December 2008). (Hereafter CARIFORUM–EU EPA)

⁴⁶ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/caribbean/>> accessed 10 May 2019.

⁴⁷ EUROPEAID/129783/C/SER/multi Lot 1: Studies and Technical assistance in all sectors 2013/325520 Monitoring the Implementation & Results of the CARIFORUM–EU EPA, Final Report – Executive Summary, September 2014.

⁴⁸ *Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part* OJ L111 24.4.2012. Signed in August 2009. (Interim EPA with Madagascar, Mauritius, Seychelles and Zimbabwe since May 2012). (Hereafter ESA–EU EPA)

⁴⁹ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/esa/>> accessed 10 May 2019.

⁵⁰ *Economic Partnership Agreement Between The East African Community Partner States, Of The One Part, And The European Union And Its Member States Of The Other Part*. Signed in September 2016. (Not yet in force). (Hereafter EAC–EU EPA).

⁵¹ South Sudan, which joined the EAC in 2016, was not part of the EPA negotiations, can accede to the EPA once it comes into force.

⁵² See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/>> accessed 10 May 2019.

⁵³ *Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part*, OJ L 57, 28.2.2009. Signed in January 2009. (Not yet in force, only Interim EPA with Cameroon entered into force in August 2014). (Hereafter Central Africa – EU EPA).

⁵⁴ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-africa/>> accessed 10 May 2019.

The WA–EU EPA⁵⁵ negotiations were closed on 6 February 2014. Four months later, the text was initialled on 30 June 2014 between 16 WA States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the EU and its Member States, of the other part. By December 2014, all EU Member States and 13 WA States signed the EPA, except Nigeria, Mauritania and The Gambia.⁵⁶ The EU–WA regional EPA can only move to ratification stage, however, when all 16 WA countries have signed it. In the course of the occasioned impasse, bilateral agreements interim EPAs – iEPA (also called ‘stepping stone’ EPAs) were signed. Between the EU and Ivory Coast, the iEPA was signed on 26 November 2008, and ratified by the Ivorian National Assembly on 12 August 2016. With Ghana, the iEPA was signed on 28 July 2016, and ratified by the Ghanaian Parliament on 3 August 2016.

The SADC–EU EPA⁵⁷ was signed in June 2016 and became fully operational from February 2018. It is the first regional EPA in Africa to move beyond provisional application and enter into force. There are six SADC States involved in this EPA: Botswana, Lesotho, Mozambique, Namibia, Swaziland (‘BLMNS States’), and South Africa.⁵⁸ Angola is the only SADC State not yet a party to the EPA, but has the opportunity to accede.⁵⁹

The EU is SADC’s largest trading partner, with South Africa accounting for the largest part of EU imports to and EU exports from the region.⁶⁰ Consequently, the most significant state in the SADC bloc is South Africa, which already has a separate bilateral trade agreement with the EU since 2000 called the *Trade, Development and Cooperation Agreement* (TDCA) between the EU and South Africa. South Africa will gain access to new markets thanks to the EPA, but unlike the other SADC States, will not enjoy full duty-free access in the EU. The EPA extensively covers the EU Schedule of staging categories for the elimination of customs duties.

2 West Africa–European Union EPA

This article has chosen to examine the WA–EU EPA. This is due to the significance of the relations of both groupings. WA is the EU’s largest trading partner in Sub-Saharan Africa, and the EU is WA’s biggest trading partner on a global level. The WA–EU EPA negotiations

⁵⁵ *Economic partnership agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the European Union and its Member States, of the other part*. Signed in December 2014 (not yet entered into force, only interim EPA with Ivory Coast in force since September 2016, and interim EPA with Ghana in force since December 2016) (hereafter WA–EU EPA).

⁵⁶ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/west-africa/>> accessed 10 May 2019.

⁵⁷ *Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part*, signed on 10 June 2016 (Entry into force February 2018) (hereafter SADC–EU EPA).

⁵⁸ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>> accessed 10 May 2019.

⁵⁹ SADC–EU EPA, art 119 (3).

⁶⁰ See <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>> accessed 10 May 2019.

began on 4 August 2004, and although concluded for now, they are not yet final until the WA–EU EPA reaches full and comprehensive EPA status. This would mean going beyond the trade in goods arrangement, to cover other outstanding trade matters. The current version of the WA–EU EPA text contains a *rendez-vous* clause⁶¹ to advance negotiations, and a revision clause⁶² to modify the provisions. Considering the wide scope of open issues, the challenges of negotiating are not yet over and will remain the prime concern of the Contracting States:

(a) services; (b) intellectual property and innovation, including traditional knowledge and genetic resources; (c) current payments and capital movements; (d) protection of personal data; (e) investment; (f) competition; (g) consumer protection; (h) sustainable development; and (i) public contracts.⁶³

The EPA adoption procedure is in line with international law.⁶⁴ First, the EPA is signed by the parties, it is approved/ratified by the parliaments/national assembly of both parties, and finally, it enters into force on an agreed date. The regional WA–EU EPA is not under provisional application. There are however two bilateral interim EPAs currently under provisional application as of 3 September 2016 (Ivory Coast) and 15 December 2016 (Ghana) respectively. These stepping stone agreements ‘establish an initial framework for an EPA’⁶⁵, while ‘waiting for the conclusion of a global EPA between WA and the EU’⁶⁶. The Gambia and Mauritania signed the EU–WA EPA in 2018,⁶⁷ whereas Nigeria remains the only WA State that has still not signed the EPA. The WA–EU EPA will only enter the ratification and implementation stage once Nigeria also signs it. Currently, 29 ACP countries are implementing EPAs with the EU, which are only restricted to trade in goods. In the WA region, only two countries (Ghana and Ivory Coast) are currently implementing interim EPAs.⁶⁸

Studies have analysed and predicted the past, present, and future trade flows under each ACP–EU trade regime.⁶⁹ The LCs ended in unrealised hopes of increased diversified trade

⁶¹ WA–EU EPA, art 106.

⁶² WA–EU EPA, art 111.

⁶³ WA–EU EPA, art 106 (2).

⁶⁴ Part II Conclusion and Entry into Force of Treaties, art 6–18, *Vienna Convention on the Law of Treaties*, 1969.

⁶⁵ *Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part*. Signed in December 2014. (Entry into force December 2016) (hereafter Ghana–EU Stepping Stone Agreement), art 1.

⁶⁶ Preamble of the Ghana–EU Stepping Stone Agreement.

⁶⁷ Overview of Economic Partnership Agreements, Updated March 2019: <http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf> accessed 15 May 2019.

⁶⁸ The provisions in force cover Trade Regime for Goods; Custom Duties and Non-Tariff Measures; Trade Defence Measures; Customs and Trade Facilitation; Technical Barriers to Trade and Sanitary and Phytosanitary Measures; Services, Investment and Trade Related Rules; Dispute Avoidance and Settlement; Mutual Administrative Assistance In Customs Matters.

⁶⁹ Joanna Moss, John Ravenhill, ‘Trade Developments during the First Lomé Convention’ (1982) 10 (10) *World Development*. Pergamon; Lomé Convention, Agriculture and Trade Relations between the EU and the ACP Countries in 1975–2000 Kalle Laaksonen, Petri Mäki-Fränti and Meri Virolainen (Pellervo Economic Research

and market shares between the two blocs.⁷⁰ An interesting finding is that the statistically significant increases in EEC shares of ACP total imports all occurred in relationships where, prior to the LCs, there had been no special economic ties between the ACP sub-grouping and the relevant EEC MS.⁷¹ The impact of the EPA on the economies of WA is forecasted to be small and uneven across the States. For the benefit of establishing the reason for the current impasse with the WA–EU EPA, a little digression from the hitherto legal analysis towards an economic analysis is required at this juncture of the article. Bouët et al. have undertaken an intricate economic impact analysis of the WA region. Their macroeconomic simulation models have shown that there will be marginal but positive impacts on Burkina Faso and Côte d’Ivoire and negative impacts on Benin, Ghana, Nigeria, Senegal, and Togo.⁷² The study opines that the reduction in trade barriers in the EPA is not substantial enough to create a significant growth and development impact on the WA States.⁷³ This is all the more so given the limited development support offered in the EPA. The overall increase in export in value would be limited for the WA States compared to the growth of EU imports in value terms.⁷⁴

The main difference in the forecasted impact of the EPA across WA is based on if a State is an LDC or non-LDC.⁷⁵ The WA LDCs would benefit less from the EPA liberalization scheme because their access to the EU market will not be much more improved than under the EBA regime.⁷⁶ On the other hand, the WA non-LDCs will gain greater access to the EU market than under the GSP regime.⁷⁷ For both WA LDCs and non-LDCs, the gradual opening up of their markets to the EU will result in loss of public revenue for the WA governments.⁷⁸ This is because the share of EU imports in the total imports of the WA economies is significant.⁷⁹ In addition, the customs duties on EU imports are an important portion of WA States public revenue. Therefore, the WA governments would seek alternative means to compensate the loss, most probably through increased domestic taxes that will burden the local households.⁸⁰

Institute, Finland) Working Paper 06/20; The European Union–West Africa Economic Partnership Agreement: Small Impact and New Questions. Antoine Bouët, David Laborde, Fousseini Traoré, Markets, Trade and Institutions Division, International Food Policy Research Institute (IFPRI), IFPRI Discussion Paper 01612 February 2017.

⁷⁰ Moss, Ravenhill (n 69) 834.

⁷¹ *Ibid.*, p. 850.

⁷² Bouët et al. (n 69) vii.

⁷³ Bouët et al. (n 69) 40.

⁷⁴ *Ibid.*, 19.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Salif Koné, Economic Partnership Agreement between West Africa and the European Union in the Context of the World Trade Organization (WTO) and the Regional Integration Process, (2010) 25 (1, March) *Journal of Economic Integration* 104–128.

⁸⁰ Bouët et al. (n 69) 93.

Even with the increase in trade effected by the EPA – also known as trade creation, the additional taxation will negate the welfare and GDP of the WA States.⁸¹ Paradoxically, even though the gradual influx of duty-free EU imports would reduce the trade balance of the WA LDCs, the competitiveness would rise due to a devaluation of their currencies and a deflation in local prices.⁸² The concomitant effect of the EPA, as with other FTAs, is the trade diversion to be expected as the WA and EU switch their supply chain from non-party States to EPA contracting party States.⁸³ Herein lies the potential source of future disputes – non-party States against EPA party States. Seeing their EU and Africa market shares gradually decline, China, India, Russia, and the US would defend their interests in courts, tribunals, and/or WTO.

Overall, the studies found that the preferential trading agreements granted to the ACP States have benefitted the EEC/EU instead. The impact on the ACP economy has been negligible – very different from the aspirations expressed in the Conventions. This puts into question the underlying rationale of the ‘aid for trade’-type agreements as a development cooperation strategy, which has not proven feasible. As succinctly put by Laaksonen et al., ‘Preferential margins cannot compensate for a lack of basic competitiveness in ACP economies’⁸⁴. This means that the existential imbalance cannot simply be attenuated by introducing greater preferential provisions for the weaker party in the EPAs. On the other hand, the issue may be rather (seen from a different legal angle) about how the legal provisions in the EPAs are interpreted and applied so that their effect is de facto (really) preferential to the weaker party. This notwithstanding, the formulation of development support provisions enshrined in the EPA could be further enhanced so that the weaker party can take real advantage of the free market envisaged in the EPA. The solution does not lie in the elimination of tariffs. The application of Non-Tariff Measures (NTMs) and other technical barriers to Trade (TBT) of both parties at the domestic level should be closely examined to understand the extent to which they contribute to the deficiencies in trade relations, and block the objectives of the EPAs.

IV Nigeria and the WA–EU EPA

There are studies that forecast the winners and losers among the WA States from the impact of the EPA.⁸⁵ More specifically, Grumiller et al. have calculated that tariff revenue losses for ECOWAS countries (including Nigeria) will be more than USD 600 million per annum

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ ‘Lomé Convention, Agriculture and Trade Relations between the EU and the ACP Countries in 1975–2000’ Kalle Laaksonen, Petri Mäki-Fränti and Meri Virolainen (Pellervo Economic Research Institute, Finland) Working Paper 2006/20, 10.

⁸⁵ *Etude d’Impact de l’offre d’accès aux Marchés sur les Pays de l’Afrique de l’Ouest dans le Cadre de l’Accord de Partenariat Economique, Etude Réalisé Par Le Consortium Pour La Recherche Economique Et Sociale (CRES)*

between years 5 to 10 of the implementation period of the tariff reduction schedules proposed in the WA–EU EPA, and they estimate the figure to increase to USD 1.7 billion per annum at the end of the implementation period.⁸⁶ The competition from EU imports would result in a deterioration in trade balance, and a decline in demand for locally-made products or those from the sub-region. Nigeria's GDP would shrink due to the reduction in export revenue.⁸⁷ However, some studies quantify Nigeria's potential losses as relatively marginal taking into account the royalties in oil and gas sales.⁸⁸ Moreover, the EPA is not devoid of potential benefits if seen in the wider context of national bargaining power and competitiveness trade-offs. In response to Nigeria's dumping fears on the EPA, Fasan, a Nigerian trade lawyer⁸⁹ makes a thought-provoking remark: 'China is flooding Africa with cheap exports without guaranteeing access to its market, unlike the EU'⁹⁰.

The refusal by the continent's largest economy and population to sign a trade agreement that purportedly offers a lot of benefits for the signatory nation is significant and calls for some consideration. The publicly stated reason is unequivocally protectionist: 'Presently, our industries cannot compete with the more efficient and highly technologically driven industries in Europe. We have to protect our industries and our youths'⁹¹.

Where is the flow of trade concentrated at the global level? That is, where are the most active trade relations for Nigeria at the global level? It is worth closely analysing the trade agreements of the largest trading partners of strategic significance to the EU and Nigeria if they are to enhance their trade relations.

Juillet 2011, Copyright 2011 par Friedrich-Ebert-Stiftung / Enda Tiers Monde; Mary Farrell, 'A Triumph of Realism over Idealism? Cooperation between the European Union and Africa' (2005) 27 (3) *Journal of European Integration* 263–283; Kelechi C. Nnamdi, Kingsley C. Iheakaram K., Impact of Economic Partnership Agreements (EPA) on African Economy: A legal perspective <<https://pdfs.semanticscholar.org/c82e/7f75b400c01836743c64aeb1151559a1deff.pdf>> accessed 02 June 2019.

⁸⁶ Jan Grumiller, Werner Raza, Cornelia Staritz, Bernhard Tröster, Rudi von Arnim, 'The economic and social effects of the Economic Partnership Agreements on selected African countries' Vienna, July 2018, XII: <https://www.oefse.at/fileadmin/content/Downloads/Publikationen/Studien/7_EPA_Study.pdf> accessed 02 June 2019.

⁸⁷ *Étude CRES* (n 85) 40.

⁸⁸ Farrell (n 85).

⁸⁹ Olu Fasan is a trade lawyer and political economist. Visiting Fellow at London School of Economics and Political Science (LSE). He also advises on state aid issues, working closely with the European Commission.

⁹⁰ EU–Africa trade relations: Why Africa needs the economic partnership agreements. 26 Mar 2018. <<https://www.theigc.org/blog/eu-africa-trade-relations-africa-needs-economic-partnership-agreements/>> accessed 01 June 2019. The global trade statistics of Nigeria reveals that 'fuels' is the largest export (42,701,824.93 USD – a 96.03% product share according to World Bank 2017 statistics) product group (followed by raw materials) at the global level, and the second largest product group imported into Nigeria (after consumer goods, which is the most imported product group at a value of 13,608,644.36 USD – a 41.79% product share – according to World Bank 2017 statistics). The constant ranking of these three product groups (fuels, raw materials, and consumer goods) as Nigeria's top three globally traded commodities is symbolic of the lack of a diversified economy in Nigeria.

⁹¹ Why Nigeria is Reluctant to Sign EPA with EU – President Buhari, April 2018. <<http://saharareporters.com/2018/04/05/why-nigeria-reluctant-sign-epa-eu-president-buhari>> accessed 02 June 2019.

Having regard to the top 10 countries on which Nigeria depends for its imports, there are six EU Member States – all of which belong to the ‘old’ Member States that were parties to the YCs and LCs. China, the US, and India rank as Nigeria’s first, fourth, and fifth largest import partners respectively, while Belgium, the Netherlands, Germany, the UK, France, and Italy rank as second, third, sixth, seventh, eighth, and ninth largest import partners respectively. Of these EU Member States, Nigeria enjoys the greatest trade surplus with France,⁹² followed by the Netherlands,⁹³ and Italy. However, Nigeria has a trade deficit with its largest EU trade partner (Belgium)⁹⁴ as well as with Germany, and the UK. Having a trade deficit with three (or two, if we do not count the UK) out of its six largest EU partners means that it is crucial for it to maintain its import tax revenues.

With respect to Nigeria’s exports, there are fewer EU Member States in the list of top destinations: only three (Spain, the Netherlands, and France) if the UK is excluded. The EPA would enable the free access to *all* EU Member States and could present an opportunity for new/increased trade relations with (newer) EU Member States.

If we look closely at the trade flow specifically between EU and Nigeria,⁹⁵ we note that there is a constant trade deficit on the EU’s side, as EU exports to Nigeria remain relatively low. Over the last ten years (2008–2018), the EU (mainly Spain, The Netherlands, and France) has consistently imported from Nigeria at a value of not less than 10,416 million euro (the lowest figure, which occurred in the year 2009), with the highest figure being 33,045 million euro in 2012. On the other hand, the most ‘lucrative’ trading for the EU (mainly, Belgium, The Netherlands, and Germany) with Nigeria within that same 10-year period was at a value of 12,922 million euro in 2011.⁹⁶

This asymmetrical trade is aptly summed up in the latest (year 2018) rankings whereby Nigeria holds 19th position among all EU trade partners in terms of imports to the EU, but holds 29th position as a destination for EU exports. The most traded commodity between both partners remains Mineral Products, which takes the lion’s share in imports (95.7% total share) as well as in exports (55.3% total share)⁹⁷.

⁹² 2,279,119.07 USD Thousands according to World Bank 2017 statistics.

⁹³ 889,581.10 USD Thousands according to World Bank 2017 statistics.

⁹⁴ At -3,900,962.82 USD Thousands according to World Bank 2017 statistics.

⁹⁵ See <https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_nigeria_en.pdf> accessed 06 June 2019.

⁹⁶ EU trade flows and balance with Nigeria, 2008–2018 Source: European Union, Trade in goods with Nigeria. Statistical Regime 4: Total trade including inward and outward processing, DG Trade, 03–06–2019.

⁹⁷ EU trade with Nigeria in 2018 for top 5 products as harmonized system (HS) sections, Source: European Union, Trade in goods with Nigeria. Statistical Regime 4: Total trade including inward and outward processing, DG Trade, 03–06–2019.

Table 1: EU overall trade with Nigeria in 2018

| Key Figures | | | | | | |
|----------------------------|-----------|-----------|---------|---------|-------------|---------|
| Indicator | Unit | Period | Imports | Exports | Total trade | Balance |
| Last year | Mio euros | 2018 | 22,546 | 11,942 | 34,488 | -10,604 |
| Rank as EU partner | | 2018 | 19 | 29 | 27 | |
| Share in EU trade | % | 2018 | 1.1 | 0.6 | 0.9 | |
| Annual growth rate | % | 2017–2018 | 48.7 | 18.4 | | |
| Annual average growth rate | % | 2014–2018 | -5.4 | 0.8 | | |

Source: European Union, Trade in goods with Nigeria. Statistical Regime 4: total trade including inward and outward processing, DG Trade, 03. 06. 2019

Without Nigeria's signature, the WA–EU EPA cannot proceed to ratification stage, nor to provisional application. As a side note, Nigerian President was elected in July 2018 as the new chairman of ECOWAS for a 12-month tenure, in what was supposedly an unexpected appointment. Speculations arose as to the underlying motive(s) for his new ECOWAS mandate.⁹⁸ The Nigerian presidential elections took place in February 2019, and the incumbent has been re-elected. It remains to be seen if he will succumb to the pressure to ratify the WA–EU EPA, and thus bring the regional EPA into force. Nigeria would opt rather to trade under the GSP+ scheme, but the EU's rejection of Nigeria's application, some authors claim, is based on political reasons since Nigeria fulfils the GSP+ criteria.⁹⁹

It is noteworthy that the latest amendment to the CA made in 2010 has included a provision that could be used by the EU party to circumvent this WA–EU EPA standstill caused by Nigeria's refusal to sign. The amendment states that once ACP States have concluded an EPA, those ACP States, which are not Parties to the EPA, can seek accession at any time.¹⁰⁰ This potentially means that the EU and the 15 WA States signatories to the WA–EU EPA could proceed to implementing the WA–EU EPA while leaving open the possibility for Nigeria to accede to it at any time. The WA–EU EPA does not reflect this CA amendment in its own provisions. The only provision on accession relates to new EU Member States (Article 112), but does not mention the accession of ACP States to the WA–EU EPA. This could be an omission, deliberate or otherwise, but certainly not an oversight.¹⁰¹ As the expiration of the

⁹⁸ See for example <<https://www.vanguardngr.com/2018/08/now-that-buhari-is-ecowas-chairman/>> accessed 02 June 2019.

⁹⁹ Nnamdi, Iheakaram (n 85) 13.

¹⁰⁰ CA, art 37 (7).

¹⁰¹ The SADC–EU EPA allows for an interested third state or organisation, as well as Angola, to join the SADC–EU EPA upon request, art 119.

GSP draws nearer, and without an alternative preferential arrangement secured, the EU and Nigeria may feel an ever more pressing need to further (re)negotiate the terms of the WA–EU EPA, or an interim Nigeria–EU EPA, which specifically address the concerns of Nigeria. As earlier stated, the EU has been experiencing a constant trade deficit with Nigeria as EU exports to Nigeria remain relatively low, so it would be in the EU’s interests to reach a better deal. As for Nigeria, it would be looking to maintain the preferential treatment it has been enjoying with the EU so it cannot afford to transit to less favourable trading terms.

On the other hand, the EU might be contemplating a special arrangement with Nigeria as a means of overcoming the current impasse; if so, this intention has not yet been publicised. Such a scenario is only legally possible if the EPA allows for the formulation of reservations (i.e. to form special arrangements), which would most likely have to be coupled with the requirement for its consent by all Contracting States.¹⁰² A special arrangement would be reminiscent of the Lagos Treaty (signed in 1966 and expired in 1969). The Lagos Treaty aimed, in a similar vein, to grant Nigeria duty-free access to the EU market with the exception of four products, while Nigeria was to reciprocally grant free access to EU imports.¹⁰³ The Lagos Treaty never came into force due to civil war and poor relations with France. This is an example of how politics and other factors could disrupt the implementation of any trade arrangements, special or otherwise. It remains to be seen what the fate of the WA–EU EPA will be.

1 Institutional Structure of the WA–EU EPA

The institutional framework is established to oversee the implementation and monitoring of the EPA. Four joint bodies make up the institutional structure of the WA–EU EPA. At the apex is the Joint Council of the WA–EU EPA, which supervises the implementation of the EPA and has the power to take decisions by consensus of both parties, which are binding and to be applied by any measure necessary in accordance with parties’ domestic legal systems.¹⁰⁴ The Joint Council shall be composed, on the one hand, of Members of the Council of the EU and Members of the European Commission and, on the other hand, of Members of the Ministerial Monitoring Committee of the WA–EU EPA and the Presidents of the ECOWAS and UEMOA Commissions. It reports to the Council of Ministers periodically.

For the EPA to operate, it requires the establishment of an implementation committee whose role encompasses a wide range of functions. The committee is essentially the executive arm of the highest body under the EPA framework – the Joint Council, whose decisions are binding on the parties.

Underneath the Joint Council is the Joint Implementation Committee of the EPA, comprising senior officials or their representatives duly appointed by the Parties,¹⁰⁵ which

¹⁰² Vienna Convention, art 20.

¹⁰³ Richard Bailey, *The European Connection: Implications of EEC Membership* (Pergamon Press 1983) 162.

¹⁰⁴ WA–EU EPA, art 94 (2).

¹⁰⁵ WA–EU EPA, art 95.

essentially conduct the functions delegated to it by the Joint Council. It even has the competence to take actions to resolve trade-related disputes about the interpretation and application of the EPA.¹⁰⁶ The Joint Implementation Committee adopts the rules of procedure for Dispute Settlement and the Code of Conduct of Arbitrators and Mediators.¹⁰⁷

The Joint West Africa – European Union Parliamentary Committee shall provide a framework for consultation and dialogue between Members of the European Parliament and Members of the Parliaments of ECOWAS and the UEMOA.¹⁰⁸

The Joint West Africa – European Union Consultative Committee is tasked with promoting dialogue and consultations between the social and economic partners of the WA and EU with a focus on economic, social, and environmental aspects of the trade relations. Its composition is determined by the Joint Council.¹⁰⁹

2 Special and Differential Treatment (SDT)

a) SDT for West Africa

The SDT principle is predicated on the development constraints of the WA States, and is reminiscent of the special provisions in the Rome Treaty. The Doha Declaration confirms that SDT is an ‘integral part of WTO Agreements’¹¹⁰. On the practical level, it commits to reviewing ‘all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational’¹¹¹.

It should be pointed out that the SDT is nevertheless subject to the principle of proportionality – a fundamental general principle in EU law. Proportionality and necessity are a joint recurring theme in the WA–EU EPA. All instances where a measure or action can be taken to suspend a preferential treatment are qualified by the condition of doing so to the extent necessary. As examples, in temporary suspensions for lack of administrative cooperation,¹¹² trade defence measures,¹¹³ adjustments to customs,¹¹⁴ anti-dumping and countervailing measures¹¹⁵.

As the second and third largest exporters to WA (and to Nigeria), China, and the US would be the most concerned about the impacts the EPA would have on their export revenue and trade relationship. If competing products from the EU can be more cheaply purchased

¹⁰⁶ WA–EU EPA, art. 95 (3)(a)(iii).

¹⁰⁷ WA–EU EPA, art. 77.

¹⁰⁸ WA–EU EPA, art. 96.

¹⁰⁹ WA–EU EPA, art. 97.

¹¹⁰ Doha WTO Ministerial 2001: *Ministerial Declaration*, WT/MIN (01)/DEC/1, 20 November 2001, Art. 44.

¹¹¹ *Ibid.*

¹¹² WA–EU EPA, art. 17(4)(c).

¹¹³ WA–EU EPA, art. 19(2).

¹¹⁴ WA–EU EPA, art. 12(3).

¹¹⁵ WA–EU EPA, art. 20(4).

(imported) by the WA bloc, then importing the same products (especially in the product groups of fuels and consumer goods) from the US and China would be less attractive. On the other hand, this competitive advantage of the EU as exporter for Nigeria is destined to last for a temporary period until the end of the liberalization period, approximately until end of the year 2035. When substantially all trade becomes duty- and quota-free, the WTO preferential waiver expires, and the MFN obligation is fully enforced, an equal level playing field will be established. Alas, the essence of bilateral trade agreements is to define the most suitable terms for both parties to suit their strategic interests. China, the US, Russia, India, and all other trade partners with a significant role in the WA economy will review their trade agreements in their efforts to consolidate market shares in WA.

b) Balance of trade between WA and the EU

The EU is party to trade agreements with 69 countries, which account for 40% of global Gross Domestic Product (GDP).¹¹⁶ The WA–EU EPA would supersede any bilateral-level EPAs like the Stepping Stone Agreements.¹¹⁷ Moreover, countries acceding to the EU will automatically accede to these EPAs.¹¹⁸ The EU trades majorly with China, the US, Russia, and Switzerland in terms of imports and exports. There are no African countries in its top ten trading partners of the EU.¹¹⁹

Conversely, for WA, the EU consistently ranks as its largest trade partner on the global level.¹²⁰ If we zoom in to consider the EU’s trade with Africa on Member State level, the latest data shows that bilateral trading with the majority of the EU Member States remains relatively low. Spain, France, and Portugal, not least because of their close geographical proximity to Africa, purchase the largest amount of African imports.¹²¹

3 A Side Note on the Impact of BREXIT

The UK, as the former colonial power to over 15 African countries, has maintained strong and active relations with Sub-Saharan Africa. The UK’s share of bilateral trade with Africa has declined significantly compared to that of other EU Member States. The UK experienced a trade in goods deficit with Africa. Currently available statistics show that France, Germany, Spain and Italy were the largest exporters and importers of goods to Africa in 2017.¹²²

¹¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2019, Delivering what we promised and preparing for the future. COM/2018/800 final.

¹¹⁷ Ghana–EU Stepping Stone Agreement, art 75, para 8.

¹¹⁸ Ghana–EU Stepping Stone Agreement, art 77 para 2, ibid

¹¹⁹ Total Goods: Top trading partners 2018. Source: Eurostat 2018 Comext Statistical regime 4.

¹²⁰ West Africa’s top 10 trading partners in goods, 2018 latest figures, Source: IMF 2018.

¹²¹ Import of goods from Africa by EU Member State, 2017. Source: Eurostat, 2018. Comext data code DS-018995.

¹²² Trade in goods balance with Africa by Member State, 2017, Africa–EU. Source: Eurostat 2018. Comext data code DS-018995.

When the UK leaves the EU, the free trade conditions under the Africa–EU EPA will not apply to the trade in goods (and in development cooperation) between Africa and the UK. Until the UK leaves the EU, it is obliged to ‘continue to ratify third country agreements with the EU’¹²³. The practical relevance of this ratification however seems to be akin to rubberstamping so as not to disrupt the EU’s trade arrangements. The UK has signed a trade continuity agreement (‘continuity deal’) with the ESA region in January 2019. It is said to replicate the effects of the existing ESA–EU EPA.¹²⁴ However, after Brexit, without special trade agreements formed between the UK and other African regions, the default MFN treatment would apply. For certain countries like Tanzania, the UK’s leaving the EU is a disincentive to ratify the EPA.¹²⁵ To take Ghana as an example from WA, the author retrieved the latest statistics about its largest trade partners in terms of their share in total imports and exports to Ghana.

There are only two EU countries in Ghana’s targeted exports – the Netherlands is fifth, while the UK is tenth. However, Ghana’s trade relationship is very different with these two countries. It exports much more than it imports from the Netherlands, that is, it enjoys a trade surplus with the Netherlands, but faces a trade deficit with the UK because it imports huge quantities similar to the level of imports from the US and China. In other words, it appears that Brexit would not be detrimental to Ghana because the latter can maintain its import duties on the large amounts of UK imports it receives. On the other hand, the iEPA would potentially gradually increase Ghana’s export levels to the Netherlands, and to other EU Member States, to fill any occurring gaps.

V Conclusions

West Africa is a strategic trade and investment region for the EU in Africa. Although Cameroon, Ivory Coast, Ghana, and Nigeria have all advanced to lower-middle-income status,¹²⁶ they face significant drawbacks foremost of which are weak institutional structures and poor infrastructure. The Standard GSP is currently still applicable for Nigeria, but no longer for Cameroon, Ivory Coast, and Ghana since the end of 2018.¹²⁷ From the economic perspective, the WA–EU EPA is to be seen through the classical lens of ‘buyer beware, and

¹²³ See <<https://www.gov.uk/government/publications/impact-assessment-for-the-eu-ghana-economic-partnership-agreement>> accessed 03 June 2019.

¹²⁴ See <<https://www.gov.uk/government/collections/esa-uk-economic-partnership-agreement-epa-2>> accessed 03 June 2019.

¹²⁵ Clara Brandi, Hulse Merran, Keijzer Niels, ‘What Next for the Economic Partnership Agreements? Thoughts on Deepening the EU–Africa Trade Partnership’ Briefing Paper 9/2017, Bonn: German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE) 2.

¹²⁶ See <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519>> accessed 02 June 2019.

¹²⁷ Regulation 978/2012: as from two years after the date of application of a preferential market access arrangement, art 5(2)(b).

seller scrutinize'. Nigeria has insufficient incentives to abandon the current agreement. Indeed, common (commercial) sense dictates that WA would prioritize the country where its exports are most readily accepted and at the cheapest possible rate in return for the highest possible revenue. If it is free to export to all EU countries but due to non-tariff barriers its exports cannot penetrate the EU market, or if the amount paid for its exports is low, then there is no real benefit to WA. In other words, before entering into a trade agreement of an indefinite duration,¹²⁸ it is crucial to weigh the costs and benefits it offers to the Contracting States.

The EPA allows contracting parties to adjust the customs duties on one or more EU imported goods to accord with their sectoral policies.¹²⁹ However, the adjustment can only be *decided upon* by the WA party if the Joint Council agrees to it. Further, the same article appears to permit the enforcement of the adjustments *after* the Joint Council has taken a decision on it. This provision is seemingly too restrictive contrary to the concept of SDT. The special development needs, provided they are evidenced by empirical reports from the WA State, should be a sufficient justification to warrant the adjustment of duty levels. It should not have to be dependent on the agreement and decision of the Joint Council that may be unduly prolonged, or may never materialise, due to objections from the EU party. In fact, a converse argument could be that the proportionality should also be applied to the extent of evidence required to satisfy the need for justification. Commercially and politically sensitive information, which could be contained in the justification presented, could harm national interests of the WA party. Such information, unless they are brought in the context of the dispute settlement mechanism, are excluded under the confidentiality clause, from the otherwise due obligation on parties.

In order to enhance the capacity of the WA States to meet their obligations and enforce their rights under the EPA, the EU could make specific commitments to provide them substantial support through financial, technical, and legal resources. This would signal a real partnership that resonates with the stated development finance objectives of the CA, that is, support on the basis of mutual interest and in a spirit of interdependence.¹³⁰ All the reports reviewed for this article conclude that the major contemporary concern is the rise of anti-globalization policies. The US is becoming increasingly protectionist and disrupting of multilateral trade arrangements. The EU is keen on demonstrating its continuous support for trade liberalization through its EPAs. However, as has been discussed in this article, the developing countries want to determine the terms of their socioeconomic development and integration into the global economy. In this tripolar trading environment where the US, China, and the EU dominate, it is clear that the EU fiercely seeks to enhance its strategic economic interests in regions where it is lagging. The EU's global trade footprint mainly covers China, the US, Russia, and Switzerland in terms of imports and exports. Although, the African States are eager to transition into emerging markets status, ultimately, the most favourable trade

¹²⁸ WA–EU EPA, art 109.

¹²⁹ WA–EU EPA, art 12.

¹³⁰ CA, art 55.

deal for them will trump all other considerations. The protracted negotiations of the still unaccomplished regional EPAs between most of the African regions have affected Africa–EU trade relations. The author supports the view that further negotiations are necessary to address the existing WA–EU EPA's shortcomings outlined. The concerns of the African partners can be alleviated if the EU party allows for a greater level of flexibility in its acceptance of African exports. This can be done by adjusting its relevant trade regulations, standards, and policies.

Pressure to revise EU non-tariff barriers will continue to rise with the growing European importing trend. However, in order not to engage in a 'race to the bottom,' the EU party should consider boosting the capacities of the African party through technology transfer and enhanced capacity building programmes. As the nature of EU exports shift towards services, it is imperative that the gamut of the Africa–EUEPAs should encompass trade in services, investments, and provisions on intellectual property and technology. In a price-sensitive EU market, the very low labour costs obtainable in Africa serve as a competitive advantage for the African side compared to their international and European counterparts. However, in this modern global trade environment, their aspiration is to achieve fair trading terms and to boost their competitiveness. The global and EU markets will continuously change as new challenges arise on the global stage, as well as with the prospect of further enlargement of the EU. There is no doubt that the Africa–EU regional EPAs will benefit the EU side. Within the EU itself, there are Member States which are net 'winners' and net 'losers' of the current Africa–EU trade regime. As already highlighted, Belgium and Germany are the largest exporters holding the biggest trade surplus in terms of trade with Nigeria, for example. However, countries like France, Spain, and the Netherlands (which have trade deficits with Nigeria, for example) could stand to gain a greater market share in African markets with the duty free access that would occur if more of the African regional EPAs enter into force. As EU MSs who have longstanding bilateral trade relations and well-established operations with Africa, they have an advantage over their EU MS counterparts who do not. However, the fierce economic diplomacy and internationalisation of EU trade values that could give all EU MSs the opportunity to gain (greater) access to third countries' markets and resources cannot be effective unless it addresses the concerns of the African party.

This article aimed to analyse Africa–EU trade relations from a particular regional perspective. It focused on the West African region as a trading bloc given its high trade flux with the EU trading bloc. The article concisely established the legal background underlying the WA–EU EPA, which has emerged as arguably the most contentious amongst all other ACP–EU trade agreements.

The article began by tracing the legal history of the WA–EU EPA in order to identify its position within the overarching framework of Africa–EU trade arrangements. Then the discussion progressed into mapping the state of play of all the ACP–EU EPAs. The focus turned to the WA region to consider key EPA concerns of Ghana and its hegemon neighbour Nigeria. The article then examined the legal concept of special and differential treatment and whether it is captured in the WA–EU EPA. Flowing from that, it analysed more closely the

development objectives that gives the EPA its *raison d'être*. The final chapter recalled the main points of the study in the wider global economy context of which the EPA is a part.

This article builds on existing research and information. It is hoped that the article could contribute to a better understanding of the enduring challenges towards consolidating a real trade rapport, and thereby shape the future of Africa–EU trade.

The Rise and Fall of Daylight Saving Time: The Uncertainties of Internal Market Harmonisation

In 2018, the European Commission came out with a proposal to discontinue daylight saving time EU-wide. The Commission argued that the reason for this proposal was the apparent demand on the part of citizens, the European Parliament, and some Member States to abolish the bi-annual clock change. In order to abolish the biannual clock change – currently required and regulated by a 2000 Directive – a new legal act has to be adopted amending or repealing the current one. This new legal act needs to be adopted under Article 114 TFEU, which requires that the act concerned has as object the establishment and functioning of the internal market. Does switching from time-change to a permanent winter or summer time really contribute to this objective, bearing in mind that a changed system might cause even more fragmentation in the internal market? Is it possible, under EU law and by virtue of the relevant case-law of the Court of Justice of the European Union, to switch to a probably less beneficial system under Article 114 TFEU? This paper aims to address this issue presenting the reasons and objectives of the new proposal and the related case law.

I Introduction

Currently, seasonal changes of time are regulated in the European Union by Directive 2000/84/EC.¹ This Directive provides that clocks have to be changed by one hour in advance every last Sunday of March and set back every last Sunday of October. The historical roots of Daylight Saving Time (DST) stretch back to Benjamin Franklin, who wrote an essay in which he suggested that Parisians could economise candle usage by getting people out of bed earlier.² Although Benjamin Franklin was only joking, the story of summer-time arrangements in Europe became real and started during the First World War, when Germany and France

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¹ Directive 2000/84/EC of the European Parliament and of the Council of 19 January 2001 on summer-time arrangements OJ L 31, 2.2.2001.

² Steve P. Calandrillo, Dustin E. Buehler, 'Time Well Spent: An Economic Analysis of Daylight Saving Time Legislation' (2008) 43 (1) Wake Forest L. Rev. 45.

introduced daylight saving time in order to conserve coal.³ However, modern DST only appeared in the 1970s. EU legislation targeted summer time arrangements for the first time in 1980; since then, seasonal changes of time have been harmonised at European level.

In recent years there has been a trend to discontinue seasonal changes of time, China and Iceland ended this system in 1991, Russia and Belarus in 2011, and Turkey in 2016.⁴ The European Union seems to follow this trend; first the European Parliament asked the Commission to conduct an assessment of the Directive and, if necessary, come up with a proposal for its revision.⁵ In December 2018, the Commission presented its proposal for a ‘Directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC’⁶. This new proposal’s objective is to abolish time switch, and give the possibility to every Member State to choose whether they apply summer or winter time as a permanent time. In order to abolish biannual clock changes, new legislation has to be adopted. The new legislation – as the current one - needs to be adopted under Article 114 TFEU, which enables EU legislation to harmonise altering national legislations, by adopting a legal act which has the establishment and functioning of the internal market as its object.⁷ Although currently there are no diverging national legislations, since Directive 2000/84/EC is already regulating this field, Article 114 TFEU would still be the appropriate legal basis to amend it. The legislative procedure is still in process under Article 294 TFEU; the European Parliament has already adopted its position at first reading⁸ and has communicated it to the Council.⁹

Although the economic impacts of creating a well-functioning single market without barriers have pushed Member States in the direction of giving more and more competences to the EU,¹⁰ the EU has no power to enact general regulations on the internal market.¹¹ The measures adopted under Article 114 TFEU have to improve the conditions for the establishment and functioning of the internal market.¹² From time to time, Member States and

³ Commission, ‘Proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC’ COM(2018) 639 final 1.

⁴ Ibid.

⁵ European Parliament, 2017/2968(RSP) European Parliament resolution of 8 February 2018 on time change arrangements.

⁶ Commission, ‘Proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC’ COM(2018) 639 final.

⁷ László Blutman, *Az Európai Unió joga a gyakorlatban* (HVG-ORAC 2013, Budapest) 278.

⁸ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)].

⁹ See <[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/0332\(COD\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/0332(COD))> accessed 4 February 2020.

¹⁰ Somssich Réka, ‘Jogszabályok közelítése’ in Osztovits András (ed), *Az Európai Unióról és az Európai Unió Működéséről szóló Szerződések magyarázata II.* (CompLex 2011, Budapest) 2160–2161; Isidora Maletić, *The Law and Policy of Harmonisation in Europe’s Internal* (Edward Elgar 2013, Cheltenham UK) 1–7.

¹¹ Case C-376/98 *Germany v Parliament and Council* (ECLI:EU:C:2000:544) 83.

¹² Ibid.

private entities question whether this harmonising competence is well used by the EU.¹³ In these cases, the stakes are high, Member States do not want the EU to exceed its competences; they aim to maintain their sovereignty,¹⁴ and meanwhile private entities are interested in who the lawmaker is because that determines the content of the adopted provision, especially if the measure in question would have an impact on their financial status and business activity.

II The Use of Article 114 TFEU as a Legal Basis in General and in the Specific Case

Article 114 TFEU states that

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.¹⁵

The Court of Justice of the European Union (CJEU) developed a case-law on the interpretation of the scope of Article 114 TFEU.¹⁶ This case-law provides different insights on the application of Article 114 TFEU.¹⁷

First, it is necessary that a legal act based on Article 114 TFEU actually contributes to eliminating obstacles to the free movement of goods, the freedom to provide services, and to remove distortions of competition.¹⁸ A measure adopted on the basis of Article 114 TFEU must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.¹⁹ If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 114 TFEU as a legal basis, a judicial review of compliance with the proper legal basis might be rendered

¹³ Case C-376/98 *Germany v Parliament and Council*; Case C-58/08 *Vodafone and Others* (ECLI:EU:C:2010:321); Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* (ECLI:EU:C:2002:741); Case C-151/17 *Swedish Match* (ECLI:EU:C:2018:938); Case C-358/14 *Poland v Parliament and Council* (ECLI:EU:C:2016:323); Case C-434/02 *Arnold André* (ECLI:EU:C:2004:800); Case C-477/14 *Pillbox 38* (ECLI:EU:C:2016:324); Case C-547/14 *Philip Morris Brands and Others* (ECLI:EU:C:2016:325).

¹⁴ Florian Sander, 'Subsidiarity Infringements Before the European Court of Justice: Futile Interference with Politics or A Substantial Step Towards EU Federalism?' (2006) 12 (2) *Colum. J. Eur. L.* 517.

¹⁵ Article 114 TFEU.

¹⁶ Damian Chalmers, *Gareth Davies and Giorgio Monti, European Union Law: Cases and Materials* (Cambridge University Press 2010, New York) 95.

¹⁷ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016, Oxford) 558–559; Stephen Weatherill, *The International Market as a Legal Concept* (Oxford University Press 2017, Oxford) 167–175.

¹⁸ Case C-376/98 *Germany v Parliament and Council* para 95.

¹⁹ *Ibid.*, 84.

nugatory.²⁰ The Court would then be prevented from discharging the function entrusted to it, of ensuring that the law is observed in the interpretation and application of the Treaty.²¹ Advocate General Poiares Maduro held that further objectives pursued by legislation do not have to be limited to market integration, even if the latter is necessary to justify the exercise of EU competence.²² This means that a difference has to be made between the content and the reasons for the legislation.²³

According to the above conditions, the Commission, in its proposal on the abolishing of time adjustment, held that the objective of the proposal is to ensure the proper functioning of the internal market, Article 114 TFEU is therefore the adequate legal basis.

The Commission has examined available evidence, which points to the importance of having harmonised Union rules in this area to ensure the proper functioning of the internal market and avoid, inter alia, disruptions to the scheduling of transport operations and the functioning of information and communication systems, higher costs to cross-border trade, or lower productivity for goods and services. Evidence is not conclusive as to whether the benefits of summer-time arrangements outweigh the inconveniences linked to a biannual change of time.²⁴

The European Parliament relied on these conclusions of the Commission with one difference; the European Parliament's amendment proposed to remove the last sentence on the inconclusive benefits of ending DST.²⁵ The Commission stated that the benefits of the abolition are not conclusive because the evaluations found counterbalancing effects of DST. Energy savings generally became marginal thanks to technological evolution; however, the amount of energy saving vary from Member State to Member State, due to different geological locations. The impact of time change on health is also controversial: while clock change can cause harm to the human body, summer-time arrangements can generate positive effects linked to more outdoor leisure activities. These effects counterbalance each other, thus overall health impacts remain inconclusive. Although some studies found that sleep deprivation, caused by clock change, can increase the number of road traffic accidents, the Commission concluded that it is generally difficult to attribute the direct effect of summer-time arrangements on accident rates as compared to other factors. In the sector of agriculture, there have been concerns about the disruption of the biorhythm of animals caused by clock change. The Commission found that those concerns appear to progressively disappear due to the deployment of new equipment, artificial lighting and automated technologies.²⁶

²⁰ Ibid.

²¹ Ibid.

²² Opinion of Advocate General Poiares Maduro in case C-58/08 *Vodafone and Others* para 11.

²³ Ibid, 8.

²⁴ Commission (n 6) 9.

²⁵ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)] [Am. 3].

²⁶ Commission (n 6) 3–5.

Overall, on one hand, having a harmonised system is crucial; on the other hand, there is no evidence that the abolition of the biannual time change would be profitable. Since a harmonised system is already guaranteed by the current DST system, why would the abolition effectively contribute to the functioning of the internal market? For these reasons, the new proposal seems to be a political decision rather than a measure purely based on internal market considerations. That notwithstanding, it should still be justified under Article 114 TFEU.

As a result of ending clock changes, each Member State will be required to choose its own standard time and whether it will change its standard time to coincide with its current summer-time on a permanent basis.²⁷ It can, however, not be excluded that these standard time choices might lead to a more fragmented internal market than it is with the existing legislation. The European Economic and Social Committee issued its Opinion on the Proposal, and in it the Committee expressed concern about this risk of fragmentation.

The risk is that if there is not unanimous time alignment by all countries, ensuring the same level of harmonised implementation as at present, the costs arising from different times between countries would have a serious impact on the internal market (fragmentation), generating more problems than benefits. The Commission recognises this problem in its impact assessment and the Committee considers necessary to achieve a wider consensus in advance, before the official presentation of the Commission proposal.²⁸

One can assume that, if the risk of fragmentation is real, it can undermine the main goal set by Article 114 TFEU, namely to pursue a better functioning of the internal market. Since a measure adopted on the basis of Article 114 of TFEU must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market, repealing seasonal time changes in the proposed scheme might not pass this test.

Second, where an act based on Article 114 TFEU has already removed any obstacle to trade in the area that it harmonises, the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or development of knowledge having regard to its task of safeguarding the general interests recognised by the Treaty. In that respect, the Court held that, by using the expression ‘measures for the approximation’ in Article 114 TFEU, the authors of the Treaty intended to confer on the EU legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result.²⁹ Advocate General Poiares Maduro held in its Opinion in the *Vodafone and Others* case that it would be absurd and undemocratic if the EU legislature were unable to revisit earlier political choices taken in the context of legislation passed on the basis of Article 114 TFEU in order to reflect changes in

²⁷ Ibid, 2.

²⁸ Opinion of the European Economic and Social Committee on Discontinuing seasonal changes of time, TEN/685-EESC-2018.

²⁹ Case C-58/08 *Vodafone and Others* para 34 and 35; C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* para 77–80.

public opinion and advances in knowledge or to address unforeseen negative consequences of harmonising measures.³⁰

The field of seasonal time changes is already covered by EU legislation; thus the EU legislator cannot be deprived of its right to address legislative amendment. As the proposed Directive might cause more obstacles to the internal market than the current legislation, the Proposal might mean a step back from the level of harmonisation already achieved. Such an obstacle would be the fragmentation of the internal market, which could cause higher prices and problems in transportation and communication.³¹

It is unclear whether such a step back would be possible under Article 114 TFEU. The question is whether the amendment should ensure a higher degree of harmonisation compared to the current level, or compared to a non-harmonised situation on the market. The United Kingdom House of Lords, in its reasoned opinion, stated that ‘the existing Directive 2000/84/EC already ensures harmonization of time across the Union and the Commission does not demonstrate how the proposal would enhance this.’ The Opinion also reported that the Government of the United Kingdom therefore concluded that the proposal could not be justified on the grounds of harmonisation alone and that ‘strong evidence’ was not provided for other benefits to the Union, Member States or citizens.³²

However, if such a step back would be possible, the amendment could still not be based on arbitrary considerations. The amendment has to reflect changes in public opinion and advances in knowledge or to address unforeseen negative consequences of harmonising measures.³³

Changes in public opinion were measured by the Commission and, as a result, both the Commission and the Parliament found the support of EU citizens relevant as a reason for the proposal. The Commission launched a public consultation on stopping summer-time, and this online survey has become the most successful survey of all time, by receiving 4.6 million valid replies.³⁴ Although this number seems to be quite high, it only represents 1% of the EU’s population. In addition, these kinds of consultations are not statistically representative. Most of the answers (70%) came from one Member State (Germany), and an additional 14.6% from France and Austria. The outcome of the public consultation was that 84% of citizens voted against the biannual time switch.

³⁰ Opinion of Advocate General Poiras Maduro in case C-58/08 *Vodafone and Others* 11.

³¹ Opinion of the European Economic and Social Committee on Discontinuing seasonal changes of time, TEN/685-EESC-2018.

³² Reasoned opinion of the United Kingdom House of Lords on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)].

³³ Opinion of Advocate General Poiras Maduro in case C-58/08 *Vodafone and Others* 11; C-374/05 *Gintec* (ECLI:EU:C:2007:654) 29; Case C. 491/01 *British American Tobacco (Investments) and Imperial Tobacco* 80.

³⁴ Commission Staff Working Document: Public Consultation on EU Summertime Arrangements, Report of Results [Swd (2018) 406 Final] <https://ec.europa.eu/info/consultations/2018-summertime-arrangements_en> accessed 4 February 2020.

Only in Greece and Cyprus, a small majority of citizens prefer keeping the current system (56% and 53% respectively). Conversely, more than 90 % of citizens' replies from Finland (95%), Poland (95%), Spain (93%), Lithuania (91%), and Hungary (90%) were in favour of abolishing the current arrangement. The main reason highlighted by all respondents in favour was human health (43%), followed by lack of energy-saving (20%), while for those in favour of keeping the current arrangements, the main reason highlighted is leisure activities in the evening (42%). The question was asked that, if the biannual time switch were to be abolished, would respondents favour permanent summertime or permanent standard (winter) time. Answers show that the overall preferred option was permanent summertime. 2,529,000 of all respondents (56%) would prefer permanent summertime and 1,648,000 of respondents (36%) would be in favour of permanent standard (winter) time, if the biannual time switch were to be abolished. 377,000 respondents (8%) had no opinion on this matter.³⁵

Even Jean-Claude Juncker (President of the Commission at the time) in his speech ('State of the Union 2018') in front of the European Parliament mentioned time switch:

Clock-changing must stop. Member States should themselves decide whether their citizens live in summer or winter time. It is a question of subsidiarity. I expect the Parliament and Council will share this view. We are out of time.³⁶

However, some voices have questioned the importance and the reliability of the outcome of the Commission's consultation. Not only the survey's methodology is problematic but also the fact that most of the answers arrived from one Member State makes the results unbalanced. According to the European Economic and Social Committee's Opinion, the Commission did not take the facts that a large majority of participants were from a single country, and that the proposal was rejected in certain Member States into adequate account.³⁷ The Danish Parliament and the United Kingdom House of Commons also shared this view in their opinions.³⁸ Altogether, it can be concluded that changes in public opinion are not fully proved, thus remain uncertain.

Advances in knowledge or to address unforeseen negative consequences of harmonising measures can also underpin the adoption of new legislation. Several studies have been carried out over the years to examine different fields and the Commission's conclusion was that it cannot be decided whether a biannual clock change or a permanent time system is more

³⁵ Commission Staff Working Document (n 34).

³⁶ Annual State of the EU address by President Juncker at the European Parliament: State of the Union 2018, <https://ec.europa.eu/commission/priorities/state-union-speeches/state-union-2018_en> accessed 4 February 2020.

³⁷ Opinion of the European Economic and Social Committee on Discontinuing seasonal changes of time, TEN/685-EESC-2018.

³⁸ Reasoned opinion of the United Kingdom House of Commons on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)]; Reasoned opinion of the Danish Parliament on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)].

convenient.³⁹ Energy savings are marginal; the effects of time switch on human health are inconclusive, and the negative impacts of time switch on the agricultural sector might disappear with automated technologies. As referred to before, it is surprising that, while the Commission proposed the abolition of the biannual clock change, it states that this measure will probably not be beneficial.

Third, as the internal market is one of the areas of shared competence, the principles of subsidiarity and proportionality shall apply.⁴⁰ The limits of Union competences are governed by the principle of conferral. Under it, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein; competences not conferred upon the Union in the Treaties remain with the Member States.⁴¹ In the case of shared competences, the use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.⁴² The Protocol (No 2) on the application of the principles of subsidiarity and proportionality states, in paragraphs 6 and 7, that the EU is to legislate only to the extent necessary and that EU measures should leave as much scope for national decision as possible, consistent however with securing the aim of the measure and observing the requirements of the Treaty.⁴³

The Commission saw the respect of the principle of subsidiarity in ending DST in the Union by leaving the decision to each Member State as to its standard time, and in particular as to whether it will change its standard time to coincide with its current summer-time on a permanent basis, or whether it will apply the standard time that corresponds with its current ‘winter-time’ on a permanent basis.⁴⁴ The Amendments voted by the European Parliament confined Member States’ margin of discretion by establishing a coordinating mechanism, which would consist of one representative of each Member States and one representative of the Commission. This coordinating mechanism would help to ensure a harmonised and coordinated approach to time arrangements throughout the Union. Therefore, the coordination mechanism should discuss and assess the potential impact of any envisaged decision on a Member State’s standard times on the functioning of the internal market, in order to avoid significant disruptions.⁴⁵ The Parliament sees the fulfilment of the requirement of subsidiarity

³⁹ Ibid.

⁴⁰ Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* 179.

⁴¹ Article 5 TFEU

⁴² Ibid.

⁴³ Case C-58/08 *Vodafone and Others* para 73; Case C-151/17 *Swedish Match* para 64–76.

⁴⁴ Commission (n 6) 2.

⁴⁵ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)] [Am. 2], [Am. 22] – [Am. 26].

by the single fact that the objectives of this Directive as regards harmonised time arrangements cannot be adequately achieved by the Member States but can be better achieved at Union level instead.

In its Opinion, the European Economic and Social Committee reports that the Commission hopes that all the countries will, without exception, adopt the same summer and winter time in order to retain the current harmonisation and avoid fragmentation of the internal market.⁴⁶ This opinion of the Committee highlighted the contradiction between the satisfaction of the requirement of subsidiarity and the risk of fragmentation. These considerations might have led the Parliament in the direction of establishing the coordination mechanism and to redefine compliance with the principle of subsidiarity.

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.⁴⁷ With regard to judicial review of compliance with those conditions, the Court has accepted that, in the exercise of the powers conferred on it, the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. As such, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate, having regard to the objective which the competent institution is seeking to pursue.⁴⁸ The Parliament, in its legislative resolution, stated that the planned Directive does not go beyond what is necessary to achieve the Directive's objectives. For this reason, the Parliament found the planned Proposal to comply with the principles of subsidiarity and proportionality.

In conclusion, the Proposal's compliance with Article 114 TFEU can be questioned from different perspectives. The most important argument against the compliance is the risk of fragmentation of the internal market. This risk might undermine the essential goal of Article 114 TFEU. In that regard, it is noteworthy that even the Commission seems to be hesitant with regard to the benefits of the Proposal. The main reason for the Proposal identified by the Commission was the support by the European citizens. This argument might be weakened by the fact that the above support was explicitly given by 1% of the EU's population. The Danish Parliament, the House of Common, and the House of Lords shared the same concerns in their opinion on the compliance with the principles of subsidiarity and proportionality.

⁴⁶ Opinion of the European Economic and Social Committee on Discontinuing seasonal changes of time, TEN/685-EESC-2018.

⁴⁷ Article 5 TFEU.

⁴⁸ Case C-58/08 *Vodafone and Others* para 52.

III Health Concerns

By virtue of Article 114 (3), legal acts adopted under Article 114 TFEU must envisage a high level of health protection. Time switch has been criticised for its potential harmful effects on human health. Even in the Commission's public consultation, 42% voted for the abolition, because of health concerns. Sticking to the facts, the Commission came to a conclusion that there is no scientific proof of overall health impacts being harmful. Although time switch can interfere with the human biological clock and cause sleep deprivation, these negative effects seems to be balanced by the positive effects of the outdoor activities possible thanks to long summer nights.⁴⁹

Despite the conclusion of the Commission, the European Parliament saw the seasonal time change as an existing health risk. The Parliament, in its legislative resolution, added to the proposal the following findings:

The biorhythm of the human body is affected by any changes of time, which might have an adverse impact on human health. Recent scientific evidence clearly suggests a link between changes of time and cardiovascular diseases, inflammatory immune diseases or hypertension, linked to the disturbance of the circadian cycle. Certain groups, such as children and older people, are particularly vulnerable. Therefore, in order to protect public health, it is appropriate to put an end to seasonal changes of time.⁵⁰

From the perspective of Article 114, this is an important added consideration, because the Court held that the EU legislature cannot be prevented from relying on Article 114 TFEU on the grounds that public health protection is a decisive factor in the choices to be made. Types of measures available under this legal basis, and the discretion of the Union legislature as regards the most appropriate method of harmonisation justify the adequacy of Article 114 as a legal basis.⁵¹

The Court, in the *Swedish Match* judgment,⁵² held that the EU legislature must take account of the precautionary principle, according to which, where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because the results of studies conducted are inconclusive, but the likelihood of real harm

⁴⁹ Commission (n 6) 4.

⁵⁰ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)] (4a) [Am. 7].

⁵¹ Anatole Abaquesne de Parfourus, "Breaking Through the Foul and Ugly Mists of Vapours" – Regulation of Alternative Tobacco and Related Products by the New Tpd and Exercise of Eu Competence' (2018) 19 (6) German L.J. 1291; Case C-380/03 – *Németország kontra Parlament és Tanács* (ECLI:EU:C:2006:772); Case C-151/17 *Swedish Match*; Case C-434/02 *Arnold André*.

⁵² Case C-151/17 *Swedish Match*.

to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.⁵³ Thus, even though discontinuing seasonal time changes might cause more fragmentation to the internal market, the high level of health protection requirement hand in hand with the precautionary principle might make the new Directive fit under Article 114 TFEU.

IV Conclusions

The first and most fundamental requirement of Article 114 TFEU is that a legal act based on it must contribute to eliminating obstacles to the free movement of goods, and to the freedom to provide services. Although a coordinating mechanism is planned to be established, the new Directive risks the fragmentation of the internal market. This could lead to higher costs and disruptions to the market and so the functioning of the internal market could become worse. At present, no case-law by the Court is available on whether such ‘step back’ legislation would be possible under Article 114 TFEU. The question is whether such an amendment should ensure a higher degree of harmonisation compared to the current level or compared to a non-harmonised situation on the market.

It is quite surprising why the Commission proposed such a directive while itself stating that the benefits of the abolition of biannual clock change remain inconclusive. In conclusion, the Proposal is likely to be more a political decision, than a measure aiming to improve the functioning of the internal market. The European Parliament, with its Amendments to the Proposal, pushed the proposal to seem more compliant with Article 114 TFEU. The Parliament deleted the passage stating that the abolition’s benefits are inconclusive, added health protecting provisions, and provisions establishing a coordinating mechanism. Stephen Weatherill found that the case-law of the Court created a ‘drafting guide’ for the EU legislator, who only has to apply the formulas given by the Court in order to fit in the scope of Article 114 TFEU.⁵⁴ Observing the Parliament’s amendments, this theory seems to give a fair view. The Parliament not only introduced a mechanism which might counterbalance the risk of fragmentation, but also added health protecting objectives to the Directive. In the case-law of the Court, health protection with the precautionary principle became a strong bulwark of the EU’s wide discretion in determining the adopted measures. Thus, adding health-protecting goals to the Proposal might ensure EU’s wide discretion for determining the content of the legislation. Conclusively, stating that health protection is envisaged by the Proposal might justify such a ‘step back’ directive.

The concerns of the Danish Parliament, the House of Commons and the House of Lords seem to be well-founded: the benefits of abolition are not substantiated; the Europeans

⁵³ Ibid, 34.

⁵⁴ Stephen Weatherill, “The Limits of Legislative Harmonization Ten Years After Tobacco Advertising: How the Court’s Case Law Has Become A “Drafting Guide” (2011) 12 (3) German L. J. 827.

citizens' support, measured by the Commission's survey, does not seem to be representative; and the principle of subsidiarity and the risk of fragmentation are in conflict. However, these concerns could only be answered by the Court and currently it is uncertain whether it will ever have the opportunity to adjudicate on the validity of the new Directive, if adopted.

At the time of writing this article, the EU is awaiting Council's first reading position, and, if the Council adopts the Proposal, Directive 2000/84/EC will be repealed with effect from 1 April 2021.⁵⁵

⁵⁵ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)] [Am. 32].

Boris Praštalo*

Expanded Judicial Review in International Commercial Arbitration: Which Jurisdictions Offer the Optimal Approach from the Private Parties' Perspective?

The article at hand delves into the topic of 'expanded judicial review' in international commercial arbitration. The phrase 'expanded judicial review' refers to the situation when the parties in their arbitration agreement stipulate that, in addition to the available statutory grounds (which are generally extremely narrow), the court should set aside an arbitral award for the arbitral tribunal's misapplication of law and/or errors of fact. Several years ago, the question of whether the contractual stipulations calling for an expanded judicial review ought to be honoured was fervently debated both by the courts (especially in the United States) and the scholarly community. Eventually, at least in the international context, the approach perceiving the statutory grounds for setting aside an arbitral award as being exhaustive seems to have won the battle. After exploring the topic of 'expanded judicial review' from the private parties' perspective (and by employing the law and economics analysis), this article reaches the conclusion that is in discord with the current situation on the ground; i.e., it is the jurisdictions that would have the narrow grounds for setting aside as the default solution, but would allow the parties to expand them freely that would offer the optimal approach from the private parties' perspective. At least among the jurisdictions that are considered to be major arbitration hubs, these are nowhere to be found. While acknowledging the reasons in favour of disallowing expanded judicial reviews, this article suggests that the strong dominance of such an approach should be reduced by at least having one or two major arbitration jurisdictions to enable the parties to exercise an expanded judicial review.

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I Introduction

When an arbitral award is rendered, the losing party may decide to embark on a tantalising journey to have the award set aside. More often than not, this effort will remain a Sisyphean one. The mainstream approach, at least in the international context, has been to limit the grounds on which the arbitral awards may be set aside to a great degree. A quintessential illustration of this approach can be found in the UNCITRAL Model Law on International Commercial Arbitration (Model Law), where setting aside is only permitted on grounds that encompass the validity of the arbitration agreement, due process violations, exceeding of powers on the part of the arbitral tribunal, and procedural defects.¹ In addition, the Model Law lists two more grounds, by stating that the award may be set aside on the basis that the matter arbitrated was not arbitrable by law, and when the rendered award stands in contradiction with public policy.²

Up until now, 83 states and 116 jurisdictions have adopted the Model Law.³ Therefore, no particular justification is necessary as to why the Model Law's approach to setting aside an arbitral award is designated as *mainstream*. However, this also necessarily implies the existence of other approaches. These other approaches are mostly in line with the idea underlying the Model Law; i.e. that the enumerated grounds for challenging an arbitral award ought to be narrow, in a sense that they (generally) do not empower courts to review matters of law and fact. There may be variations in scope and wording, but the gist remains the same. For example, in the United States, the Federal Arbitration Act (FAA) was enacted in 1925; i.e. 60 years before the Model Law was adopted. While it also puts forth narrow grounds for setting aside an arbitral award, they are certainly not a mirror image of those grounds found in the Model Law.⁴ And while in Finland one can ask that the award be annulled because it was not made in writing, or because it is so vague or incomplete that it is impossible to

¹ *UNCITRAL Model Law on International Commercial Arbitration* (United Nations 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 20 June 2018. Article 34 of the Model Law puts forth the grounds on which the arbitral award may be set aside, and it treats these grounds as exclusive. In other words, once the award is rendered, it is only on these narrow grounds that the party seeking to set aside the award may rely.

² *Ibid.*

³ 'Status – UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006' (UNCITRAL, 2008) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 26 May 2020.

⁴ Federal Arbitration Act 1925 (US). The FAA uses different terminology than the Model Law. Instead of setting aside, the FAA talks about vacating an award. The FAA grounds for vacating the arbitral award can be found in 9 U.S. Code § 10:

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
- (1) where the award was procured by corruption, fraud, or undue means;
 - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
 - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or

determine how the arbitral tribunal reached its conclusions, these grounds, although somewhat broader in scope compared to the mainstream approach of the Model Law, are still considered as being narrow enough, as they do not call for the review of facts and law.⁵ However, some jurisdictions envision in their respective arbitration laws a more intrusive judicial review, an example being the English Arbitration Act of 1996 (EAA). A losing party under the EAA might succeed in appealing the arbitral award to the court on points of law, but not on factual points.⁶

In recent years, the issue of whether the grounds for setting aside an arbitral award are exhaustive and final or whether they can be varied contractually by the parties has been entertained both by the courts and scholarly community.⁷ In seeking to alter the setting aside grounds through their arbitral agreement, the parties may head in one of the two general directions. On the one hand, they may seek to further limit the judicial review of the prospective arbitral award.⁸ On the other, they may wish to do the opposite; i.e. to expand the scope of judicial review, and try to enable the courts to review the factual and/or legal aspects of the award as well.⁹ While both of these directions have proven to be quite divisive, the latter seems to be of a more controversial nature,¹⁰ and the article at hand is an attempt to make a contribution to the still on-going debate.

Most of the scholarly discussion thus far has focused on whether that the grounds for setting aside (in the US and in several other jurisdictions) are mandatory and exhaustive, and are therefore not subject to variation through contract, or whether the law permits the

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

⁵ Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficiency System of Judicial Review' (2011) 28 (6) *J. Int'l Arb.* 596.

⁶ Sec. 69 of the 1996 English Arbitration Act provides as follows:

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

⁷ *LaPine Technology v Kyocera* 130 F.3d 884 (1997); *Kyocera v Prudential-Bache Trade Services, Inc.* 341 F.3d 987 (2003); *Hall Street Associates, L.L.C. v Mattel, Inc.* 552 U.S. 576 (2008); J. Keaton Grubbs, Justin R. Blount and Kyle C. Post, 'Arbitration Agreements, Expanded Judicial Review, and Preemption—Hall Street Associates and NAFTA Traders, Inc. – A National Debate with International Implications' (2014) 24 (Spring) *Southern Law Journal* 8.

⁸ Tibor Várady, 'On the Option of a Contractual Extension of Judicial Review of Arbitral Awards or: What Is Actually Pro-Arbitration?' (2006) 56 *Collected Papers of Zagreb Law Faculty* 460.

⁹ *Ibid.*, 461.

¹⁰ *Ibid.*, 460. Further limitation of the grounds for setting aside an arbitral award through the exercise of party autonomy is more widely accepted than the attempts that try to do the reverse; i.e. expand the scope of judicial review that is available under law.

exercise of party autonomy, and therefore their expansion when the parties so agree.¹¹ The scholars have also fervently debated whether endorsing the expanded judicial review is more pro-arbitration, or whether it is actually vice versa, i.e. whether strictly limiting the scope of judicial review, without the possibility of invoking party autonomy, is more pro-arbitration.¹² Reasons for and against tend to be given from the viewpoint of the international arbitration regime as a whole. In other words, the scholars have sought to test whether allowing the expanded judicial review of arbitral awards would somehow have an adverse impact on international arbitration, or whether it would allow the parties even more freedom to tailor their dispute-resolution process as they see fit.¹³

This article will take a somewhat different approach to the topic of expanded judicial review. It will not construe the texts of various national arbitration laws so as to argue which camp got it right, the one that argues that there is nothing in the respective text to prevent the parties from asking a heightened judicial review, or the one which sees that same text as being a nail in the coffin for the parties' aspirations to have a court take a closer look at the award. By the same token, the article at hand will not engage itself in the discussion as to whether favouring or disfavouring expanded judicial review is more pro-arbitration. Instead, it will strive to determine which approach would be the optimal solution from the viewpoint of the parties to the arbitration agreement. To this end, the primary endeavour in this article is twofold:

¹¹ Ibid, 474. It is generally accepted that Model Law does not allow the parties to contract for the expanded judicial review. Margaret Moses, 'Can Parties Tell Court What to Do? Expanded Judicial Review of Arbitral Awards' (2003) 52 U. Kan. L. Rev. 465. In her discussion on the possibility to contractually expand the grounds for vacating the arbitral award under the FAA, Moses concludes that the '[l]egal and policy reasons on the whole seem stronger for permitting rather than refusing expanded judicial review if the parties want it'. Sarah Rudolph Cole, 'Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards' (2007) 8 (1) Nev. LJ 214. On the state of the debate before the US Supreme Court decision in *Hall Street Associates, L.L.C. v Mattel, Inc.*: 'The raging debate about whether section 10 [of the FAA] contains mandatory or default rules [...]' John J. Barceló III, 'Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective' in Yehuda Elkana, Nenad Dimitrijević, Peter Hay, Lajos Vékás, *Resolving International Conflicts – Liber Amicorum Tibor Várady* (Central European University Press 2009), 17. Barceló cites Franke as arguing that in Sweden '[t]he Act does not provide for any appeal on the merits to the courts. However, there [are] no restrictions for parties to make an arrangement to such effect, although this happens very rarely, if, indeed ever.'

¹² Várady (n 8) 455. After summarising both sides of the argument, Várady concludes that 'the basic problem is with the contractual provision itself. Party agreements on expanded judicial review of arbitral awards are ill-advised. Pro-arbitration is the omission of this clause.' Moses (n 11) 434. Moses notes as follows: Commentators and courts which oppose expanded judicial review of arbitral awards assert that the FAA does not permit expanded judicial review. They further claim that expanded review would obliterate the distinction between arbitration and litigation, thereby destroying the great advantage of arbitration, which is to provide a speedy and efficient process for completing the '[a]djudication of disputes in a single instance[']'. Tom Ginsburg, 'The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration' [2010] The University of Chicago Law Review 1023. Ginsburg notes as follows:

By preventing courts from policing arbitral interpretations of law, *Hall Street* may end up reducing the number of cases sent to arbitration and, perversely, shifting contract disputes to the courts, precisely because there is no alternative way for parties to ensure that arbitrators do follow the law. The *Hall Street* logic may end up sacrificing judicial economy in an attempt to preserve it, and hurting arbitration in the name of helping it.

¹³ Ibid.

- (1) first, to categorise the jurisdictions based on the grounds that they have for setting aside an arbitral award, and based on the degree to which they allow the parties to expand the scope of judicial review; and
- (2) to test which category of jurisdictions provides the most optimal approach from the viewpoint of the private parties who decide to settle their dispute through arbitration.

A conclusion put forth in this article is that the category of jurisdictions that have narrow grounds for setting aside an arbitral award, but allow the parties to freely expand the scope of judicial review, offers the optimal solution from the private parties' perspective. The article at hand reaches this outcome by employing the law and economics analysis; i.e. it supposes that the parties entering into arbitration agreements have traits equivalent to that of a *homo economicus*. When faced with different options, and when they are in possession of sufficient information, the parties will make a choice that best suits their interests.

The article is divided into three sections. Section one explains why parties may decide to expand the scope of judicial review of their prospective arbitral award. Section two categorises jurisdictions based on two criteria: (1) the broadness (or narrowness) they take in relation to the issue of setting aside an arbitral award, and (2) their position on expanded judicial review. On this basis, the article then proceeds to group the jurisdictions into one of the following categories: (1) jurisdictions with narrow grounds for setting aside an arbitral award that bar the parties from contractual expansion of judicial review, (2) jurisdictions with narrow grounds for setting aside an arbitral award that allow the parties to contractually expand the scope of judicial review, (3) jurisdictions with narrow grounds for setting aside an arbitral award in which expanded judicial review is possible only when the arbitration clause is drafted in a specific way, and (4) jurisdictions which already envision in their arbitration laws a review that is broader in scope, as compared to the mainstream approach. Section three then provides an analysis that seeks to determine which of the enumerated jurisdictions offers the optimal solution from the viewpoint of the parties. Last but not least, the article provides concluding remarks.

II Why Do Parties Resort to Expanded Judicial Review?

What is it that drives some parties to provide in their arbitration agreement for a heightened judicial review of their prospective arbitral award? Why do they attempt to sacrifice the holy grail of arbitration, which is the easy enforceability and finality of arbitration awards? The answers to these questions primarily lie in what some parties see as the claustrophobic nature of arbitration as a dispute-resolution mechanism. As noted earlier, the vast majority of jurisdictions (at least in the domain of international arbitration) only envision very narrow grounds on which the arbitral award may be set aside. This usually means that the court, if there is an attempt to challenge the award, will generally be barred from extending its scrutiny over the matters of law and fact. Therefore, a danger exists that an arbitral tribunal might render an award that is flawed in its application of law and/or determination of fact, and the

losing party will be confined to such an award and unable to have another adjudicator take a (detailed) second look at it.¹⁴

Arbitrators are, after all, only human, and thus are not immune to making mistakes. On the one hand, occasional inadvertent mistakes could hardly be a justification for the parties to resort to expanded judicial review. This is so because the parties can themselves minimise the room for mistakes by appointing renowned specialists with the relevant skills to serve as arbitrators. On the other hand, what the parties could potentially find problematic is the (more than occasional) methodical manner in which the arbitrators do not seek to resolve disputes strictly in accordance with the applicable legal norms.¹⁵ Instead, what quite often happens is that arbitrators gravitate towards the middle ground.¹⁶ If a strict application of the law might lead to a winner-takes-all result, the arbitrators will tend to engage themselves in interpretative gymnastics in order to avoid ‘humiliating’ the losing party, and will thus render a so-called compromise award.¹⁷ Why would they do that? An explanation has been put forth that arbitrators strive to avoid the winner-takes-all approach because it is not in accord with the prospect of their future appointments.¹⁸ Namely, if they get a reputation for handing out awards that are severely one-sided, this could make the parties reluctant to appoint them once the dispute arises.¹⁹ *Ex ante*, some parties might be worried about this trend, and hence might be inclined to stipulate in their arbitration agreement that the courts will have the power to scrutinise the prospective award for errors of law and/or fact:

Parties negotiating a complicated international transaction with elaborate terms and a specific choice of law clause will understandably want these contract terms and legal rules applied strictly to resolve any disputes.²⁰

It is important to note, however, that an arbitration clause providing for an expanded judicial review has the potential of causing numerous difficulties. Namely, such an arbitration clause might bring into question its own viability,²¹ because if the parties insert such a clause in their contract, and the jurisdiction which they chose to serve as the seat of their arbitral proceedings is opposed to the expanded judicial review, the arbitral clause might not be honoured.²² In the alternative, the problematic part of the arbitral clause might be severed, but difficulties may then be encountered at the enforcement stage.²³ For instance, if the court

¹⁴ Mark D. Wasco, ‘When Less Is More: The International Split Over Expanded Judicial Review in Arbitration’ (2009) 62 (2) Rutgers L. Rev. 614.

¹⁵ Barceló III (n 11) 7.

¹⁶ *Ibid.*, 8.

¹⁷ *Ibid.*

¹⁸ *Ibid.*; Richard A. Posner, ‘Judicial Behavior and Performance an Economic Approach’ (2004) 32 (4) Fla. St. UL Rev. 1261.

¹⁹ *Ibid.*

²⁰ Barceló III (n 11) 8.

²¹ Várady (n 8) 465.

²² *Ibid.*

²³ *Ibid.*

at the arbitral *situs* does indeed sever the portion of the agreement that envisions the expanded judicial review then, at the enforcement stage, there is a possibility that the enforcement of the award might actually be denied in accordance with Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention):²⁴

The composition of [...] the arbitral procedure was not in accordance with the agreement of the parties [...]

As a matter of fact, it is the enforcement part that is the most problematic aspect of the expanded judicial review, even when, at the arbitral *situs*, the agreements calling for the heightened judicial scrutiny are recognised and enforced.²⁵ If neither party seeks the court at the *situs* to set aside the arbitral award, on the ground that the arbitral tribunal erred in the application of law and/or determination of fact, then one can naturally expect that the enforcement in the international setting will proceed smoothly. However, if the court at the *situs* does end up reviewing the facts and/or application of law, there is a genuine possibility that the enforcement stage will be fraught with problems. Namely, the court at the *situs* may correct the award, and then the question arises of whether the corrected award is still an award, or if it is now a court judgement.²⁶ This is a major issue, as the New York Convention only enables the enforcement of arbitral awards, and not court decisions. In the alternative, the court at the *situs* might remand the case to the arbitral tribunal for reconsideration.²⁷ When this occurs, the culmination is the so-called two-awards problem.²⁸ This is because, at the enforcement stage, it is not certain that the second award will be enforced. That is, there are jurisdictions (an example being France) that might actually proceed with the enforcement of the first award despite the fact that the court at the *situs* required the arbitral tribunal to produce another one.²⁹ However, it is important to note that, in spite of all these potential difficulties that might arise with an arbitration clause calling for an expanded judicial review, some parties were still willing to take their chances and have inserted such a clause in their contract.³⁰

²⁴ Ibid, 470.

²⁵ Barceló III (n 11) 5.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid, 6.

²⁹ Ibid, 5.

³⁰ As evidenced by the cases that ended up before the courts. See (n 7).

III **Quadrumvirate of Possible Approaches**

Four groups of jurisdictions can be identified, based on how they approach the parties' attempts to expand, by contract, the statutory grounds for review of arbitral awards:

- (1) Jurisdictions with narrow grounds for setting aside an arbitral award that bar the parties from contractual expansion of judicial review,
- (2) Jurisdictions with narrow grounds for setting aside an arbitral award that allow the parties to contractually expand the scope of judicial review,
- (3) Jurisdictions with narrow grounds for setting aside an arbitral award in which expanded judicial review is possible only when the arbitration clause is drafted in a specific way, and
- (4) Jurisdictions that already envision, in their arbitration laws, a review that is broader in scope as compared to the mainstream approach.

1 **Jurisdictions with Narrow Grounds for Setting Aside an Arbitral Award That Bar the Parties from Contractual Expansion of Judicial Review**

An example of a jurisdiction that both has narrow grounds for setting aside an arbitral award and disallows their expansion through contract is, unsurprisingly, France.³¹ It has to be noted first, however, that France, in this regard, has diametrically opposed approaches to domestic arbitration as compared to the one that is international.³² For the former, the parties will be able to provide for a heightened judicial scrutiny of the prospective award, while a categorical 'no' awaits if such a course of action is undertaken in relation to the latter.³³ Another example would be the Model Law, the text of which is also perceived as barring the parties from expanding the grounds on which the court at the arbitral *situs* may set aside an arbitral award.³⁴

2 **Jurisdictions with Narrow Grounds for Setting Aside an Arbitral Award That Allow the Parties to Contractually Expand the Scope of Judicial Review**

As for the jurisdiction that has narrow grounds for setting aside an arbitral award but at the same time allows the parties to contract freely for a heightened judicial scrutiny, the author has not managed to locate an example of such practice, at least not in jurisdictions that are considered to be major hubs for international arbitration. One could, however, divide this category of jurisdictions into two subcategories, and then Italy would qualify. The sub-

³¹ Laurence Franc, 'Contractual Modification of Judicial Review of Arbitral Awards: The French Position' (1999) 10 (2) *Am. Rev. Int'l Arb.* 215.

³² Barceló III (n 11) 16.

³³ *Ibid.*

³⁴ Várady (n 8) 474.

categorisation would be as follows: 1) jurisdictions that allow expansion to encompass matters only of law or fact, and 2) jurisdictions that allow expansion to encompass both matters of law and fact. Italy would fall under the former subcategory, as Article 829 of the Italian Code of Civil Procedure provides that the award may be challenged before the court for violations of the rules of law when parties agree so in their arbitration agreement.³⁵ The Italian Code of Civil Procedure, however, does not contain the same provision regarding factual matters.

The United States had the potential of falling within the latter subcategory. Namely, in the United States, there was a sharp division between the federal courts on whether the grounds for the review of arbitral awards contained in § 10 of the FAA were exclusive, or whether the parties could expand them contractually.³⁶ This state of affairs was present until the US Supreme Court took up the issue in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, deciding that the grounds for vacating (setting aside) an arbitral award under the FAA were indeed exclusive, thus barring the parties from heightening them through the exercise of party autonomy.³⁷ However, the fact that three Supreme Court Justices dissented³⁸ and that several federal courts³⁹ and some scholars⁴⁰ have advocated the opposite stance is an indication, in and of itself, that a situation in which the parties can contractually expand the grounds for review of arbitral awards is not unimaginable, at least not under the FAA. Moreover, commentators in several other jurisdictions have also argued that the arbitration laws in place there do not prevent the parties from contracting for a more intrusive judicial review.⁴¹ While these views have not been transposed into practice, the fact that they are not followed today is no guarantee they will not be heeded in the future. Hence, we will make an assumption that there are two jurisdictions which allows the parties to expand the scope of judicial review of arbitral awards freely – State X and State Y. The existence of such jurisdictions is necessary to carry out the present analysis.

³⁵ Italian Code of Civil Procedure (IT). Article 829 in its relevant part provides as follows: *L'impugnazione per violazione delle regole di diritto relative al merito della controversia è ammessa se espressamente disposta dalle parti o dalla legge.*

³⁶ Moses (n 11) 433.

³⁷ *Hall Street Associates* (n 7).

³⁸ 'Hall Street Associates, L.L.C. v. Mattel, Inc.' (Oyez, 2008) <<https://www.oyez.org/cases/2007/06-989>> accessed 21 June 2018.

³⁹ Moses (n 11) 433.

⁴⁰ Ibid, 465; David K. Kessler, 'Why Arbitrate: The Questionable Quest for Efficiency in Arbitration after Hall Street Associates' (2009) 8 Florida State University Business Review 77.

⁴¹ Barceló III (n 11) 17.

3 Jurisdictions with Narrow Grounds for Setting Aside an Arbitral Award in Which Expanded Judicial Review is Possible Only When the Arbitration Clause is Drafted in a Specific Way

It has to be noted that jurisdictions do exist where the expanded judicial review is available to the parties, but only if they are very creative when drafting their arbitral clause. In other words, putting forth the following arbitral clause will not allow for a heightened judicial review to take place in those jurisdictions (while in State X it would):

In addition to the grounds for setting aside listed in the Arbitration Act, the court shall also annul the award if it finds errors of law or fact.

Examples of such jurisdictions are the United States and Switzerland. In the United States, the Supreme Court only determined that the expanded judicial review was not allowed under the FAA.⁴² Consequently, if any arbitration laws at the state level allow for it, the parties will be free to pursue it.⁴³ And, as it happens, the expansion of statutory grounds for setting aside an arbitral award is allowed in (at least) three states, New Jersey, California and Texas.⁴⁴ In New Jersey, its arbitration law explicitly provides the parties with the ability to expand the scope of judicial review:

[N]othing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record.⁴⁵

In California, the Arbitration Act is not as explicit as the one in New Jersey, but the California Supreme Court in *Cable Connection, Inc. v DIRECTV, Inc.* read it as allowing the parties to contract for the expanded judicial review so long as this is done expressly.⁴⁶ Therefore, if the parties wish to have a heightened judicial scrutiny of an arbitral award in the United States, they would have to (1) specifically place the seat of their arbitration in either New Jersey or California and (2) explicitly provide that the governing arbitration law shall be the state arbitration act (of either New Jersey or California).⁴⁷ Only then will their arbitral clause calling for an expanded judicial review be honoured by the courts. Another option would be to place the seat of arbitration in Texas, bearing in mind the fact that, in 2011 '[i]n *NAFTA Traders*,

⁴² Ibid, 11, 15.

⁴³ Ibid, 11.

⁴⁴ Ibid; Grubbs, Blount and Post (n 7) 1.

⁴⁵ New Jersey Statutes Annotated 2A:23B-4 (US).

⁴⁶ Barceló III (n 11) 11. While in *Cable Connection, Inc. v DIRECTV, Inc.* the dispute was between two US parties, Barceló notes that

[...] nothing in California or New Jersey law would prevent parties to an international transaction from placing the seat in either state [footnote omitted] and explicitly choosing that state's arbitration act as the *lex arbitri*. If the parties also expressly opt for expanded judicial review and litigate the set-aside action in state court, presumably the expanded review clause would be honored. *DIRECTV* so holds.

⁴⁷ Ibid, 15.

Inc. v Quinn [footnote omitted] the Texas Supreme Court held that the Texas Arbitration Act does not preclude the parties from supplementing judicial review by contract.⁴⁸

And as for Switzerland, the parties will be able to enjoy the heightened judicial review (the seat of arbitration, naturally, has to be in Switzerland), provided that they explicitly exclude the application of the Swiss Private International Law Act and, in lieu of it, choose the Inter-cantonal Arbitration Convention (better known as the Concordat) which provides the following ground for annulment in its Article 36⁴⁹:

f. [T]he award is arbitrary in that it was based on findings which were manifestly contrary to the facts appearing in the file, or in that it constitutes a clear violation of law or equity.⁵⁰

4 Jurisdictions That by Default Envision in Their Arbitration Laws a Review Broader in Scope as Compared to the Mainstream Approach

In some jurisdictions, the heightened judicial scrutiny (as compared to the mainstream approach) will be called for by the arbitration law itself. The best-known example of this approach can be found in England, since the EAA envisions a judicial review of an arbitral award on points of law.⁵¹ However, the path to obtaining a judicial review of this kind in England is quite strenuous. For the parties to invoke Article 69 of the EAA, which actually makes the review for errors of law possible, several cumbersome criteria must be met. First, the arbitrators must have erred in applying the law of England and Wales, or that of Northern Ireland (hence, the parties cannot ask the court to react to errors in the application of, for instance, German law).⁵² Second, judicial review on points of law is not available as of right, but a leave of appeal must be sought, for which specific conditions must then be satisfied.⁵³ Moreover, the parties must first exhaust any possible recourses available to them within the realm of their arbitral process (e.g. correction of the award).⁵⁴ Therefore, while in theory England is a jurisdiction that automatically enables a judicial review that is broader in scope as compared to the mainstream approach, in practice the parties might find it extremely difficult to obtain it.⁵⁵

Another example of a jurisdiction that, in contrast to the mainstream approach, envisions a broader judicial review of arbitral awards is Ethiopia.⁵⁶ Namely, Article 351 of the Civil

⁴⁸ Grubbs, Blount and Post (n 7) 1.

⁴⁹ *Ibid.*

⁵⁰ *International Arbitration Convention 1969* (CH).

⁵¹ English Arbitration Act, sec. 69.

⁵² Abedian (n 5) 596.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 597.

⁵⁵ *Ibid.*

⁵⁶ Hailegabriel G. Feyissa, 'The Role of Ethiopian Courts in Commercial Arbitration' (2010) 4 (2) *Mizan Law Review* 325.

Procedure Code makes it possible for the parties to challenge the award on the ground that it is ‘inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact.’⁵⁷ Interestingly enough, when the seat of their arbitration is in Ethiopia, the parties can also contractually further expand the scope of judicial review of their prospective arbitral award.⁵⁸

IV Which Category of Jurisdictions is Optimal from the Private Parties’ Perspective?

An attempt will be made here to pinpoint the category of jurisdictions (see Section 2) that offers the optimal solution from the private parties’ perspective to the issue of expanded judicial review. The underlying foundation of the analysis at hand will be the premise that the parties to the international arbitration agreement are rational parties who, when in possession of sufficient information, will seek to further their interests in the optimal way.⁵⁹ Moreover, an assumption will be made that the major consideration for the parties with access to sufficient information when choosing an arbitral seat is the possibility to have an expanded judicial review within that jurisdiction. These parties may seek it, or may be entirely against it. As for the parties with insufficient information who, for whatever reason, include in their arbitration agreement a stipulation calling for an expanded judicial review, the present analysis *vis-à-vis* them will determine the optimal category of jurisdictions based on the extent to which that particular category enables the arbitral process to render a final and easily enforceable arbitral award. This is because these considerations are widely known as the underlying advantages of arbitration, and even parties with insufficient knowledge regarding the issues surrounding the expanded judicial review must be aware of them.

1 Preferred Category for the Parties with Sufficient Information

Let us assume that Party A and Party B have sufficient information. They are completely aware of the problems that arise when an arbitration clause calls for the expanded judicial review. In spite of that, these parties value the advantages of the expanded judicial review (e.g. strict and court-like application of legal rules)⁶⁰ over the advantages that are present (e.g. simple and straightforward enforceability of an arbitration award)⁶¹ when no such review is

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Alessio M. Paces and Louis T. Visscher, ‘Methodology of Law and Economics’ in Bart van Klief, Sanne Taekema, *Law and Method: Interdisciplinary Research into Law* (Mohr Siebeck 2011) 85–107.

⁶⁰ Barceló III (n 10) 8.

⁶¹ Edna Sussman and John Wilkinson, ‘Benefits of Arbitration for Commercial Disputes’ <https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5_authcheckdam.pdf> accessed 31 July 2018.

envisioned. It follows that these parties will seek to place the seat of their arbitration in one of the jurisdictions that allows them to contract for the post-arbitration judicial input on factual and/or legal matters of the dispute. They can either opt for the jurisdiction that allows them to expand the scope of judicial review freely, or for the jurisdiction in which they must be creative with their arbitration clause in order to have things their way. As the latter seems to involve more uncertainty and potentially a more complicated process for drafting the arbitration clause, the natural tendency of the parties will be to opt for the former. There is also a possibility for Party A and Party B to place the seat of their arbitration in a jurisdiction that envisages, in its law, additional and broader grounds for reviewing the arbitral award, provided that these correspond to what they are seeking. However, the alignment of this kind will not always be present and, if these additional and broader grounds cannot be varied contractually by the parties themselves, this leads to the conclusion that, from the private parties' perspective, jurisdictions that have narrow grounds on which the arbitral award may be scrutinised as a starting point, but allow for contractual expansion of the judicial review, are the most efficient ones. They are the ones that allow the highest level of freedom for the parties to regulate their arbitration process in the way they see fit.

Let us now assume that Party A and Party B are averse towards the expanded judicial review, and they value more highly the advantages that come to fruition with limited judicial scrutiny. More precisely, these parties place emphasis on finality and simple enforceability of the arbitration award. Consequently, they will tend to stay away from the expanded judicial review, and the majority of jurisdictions are at their disposal to satisfy this need of theirs. These parties will have their preferences met if they simply do not call for the expanded judicial review in their arbitration clause. In the alternative, in jurisdictions that provide for a more intrusive court scrutiny by operation of law, these parties will have their needs met by contractually excluding a more invasive judicial review, provided that this is allowed by law. As only this category of jurisdictions requires the parties to dedicate their time and efforts to ensure a limited judicial review, it is the only one that is inefficient from the parties' perspective. All other jurisdictions stand on an equal footing in enabling Party A and Party B to achieve the optimal solution for themselves; i.e. not to allow the courts to review their arbitral award for errors of law and/or fact.

The parties described in the previous two paragraphs are those who are in possession of sufficient information to bring an informed decision. They would, obviously, prefer the approach of those jurisdictions that allow the parties to expand the scope of judicial review contractually to be the default approach. This is so because these jurisdictions allow them a higher level of autonomy that they can then use to their advantage and achieve the optimal result for themselves. Does the preference of the parties with sufficient information for jurisdictions that allow them to expand the scope of judicial review contractually render these jurisdictions as the ones that are more efficient from the parties' perspective? For these parties, the answer is yes. To answer this question at the general level, one has to determine first which approach would be best suited for the parties that do not have sufficient information at their disposal.

2 Preferred Category for the Parties Who Lack Sufficient Information

The point of departure of this analysis has to be identifying the basic catalyst for the parties to enter into an arbitration agreement in the first place. The answer to this question most probably lies in the general traits of arbitration that are widely known. Therefore, one has to assume that even parties who do not have access to sufficient information on issues surrounding the expanded judicial review, and are thus unable to make an informed decision on whether to opt for it or not, must be in the know about the basic characteristics of arbitration, i.e. a speedy resolution of the dispute that is (usually) more economical than litigation, finality of the award, and easy enforceability.⁶² One aspect of arbitration, that the arbitrators tend to be predisposed to make a compromise award instead of upholding the strict rule of law, is not touted as one of the general traits of arbitration, and is not widely known. Hence, the parties with insufficient information as regards the expanded judicial review are likely either not to be in the know about this aspect of arbitration, and are more likely to have opted for arbitration due to its highly-familiar general traits.

Let us assume that Party A and Party B, without possessing sufficient information, still decide, for whatever reason, to include in their agreement an arbitration clause calling for the expanded judicial review. If they place the seat of arbitration (without any particular consideration, as they do not have access to sufficient information) in the jurisdiction that bars the parties from contractually expanding the limits of judicial review (and that at the same time has narrow grounds for setting aside an arbitral award), their arbitration clause will most probably be declared either invalid or the court will sever the problematic part of the arbitration agreement. In the event of the former, there is a clear conflict between the finding that the clause is invalid and the parties' mutual intent that was based on the available (although not sufficient) information. In other words, the parties wanted to utilise arbitration due to its general characteristics, but were unable to do so (i.e. no final award that is easily enforceable was rendered). In the case of the latter, the eventual award might be refused enforcement in accordance with the NY Convention.⁶³ This result is again evidently in conflict with the parties' mutual understanding at the time of concluding the arbitration agreement.

Now, let us assume the same situation from the previous paragraph, but with one important difference; this time around the parties (without any particular consideration, as they do not have access to sufficient information), who have placed the *situs* of their arbitration in the jurisdiction that allows them to expand the scope of judicial review contractually (and at the same time provides for narrow grounds for setting aside an arbitral award). If so, when the court confirms the award in the expanded review process, the chances are high that the award will be enforced, and this is in line with the parties' original intent (i.e. to get a final award that

⁶² Ibid.

⁶³ Barceló III (n 11) 5.

is easily enforceable). However, if the court finds errors of law and/or fact then the situation becomes more complicated (i.e. two awards problem, judgement correcting the award, etc.).⁶⁴ Nevertheless, these controversies are at least somewhat less problematic because, when they are present, the chances are still there that the arbitral award will be enforced. In the two awards scenario, some jurisdictions might allow the enforcement of the first award, some might prefer the second award, but the possibility of enforcement still remains open.⁶⁵ And the same holds true when a court issues a judgement correcting the award; enforcement remains a possibility. Contrast this with the situation described in the previous paragraph; when the parties call for expanded judicial review and place the seat of their arbitration in a jurisdiction that does not allow such an expansion through the contractual mode, there is every possibility that the entire arbitration clause will be deemed invalid.⁶⁶ In this scenario, no award is rendered, and hence there is nothing to be enforced. Out of two evils, it is only natural to choose the lesser one.

Therefore, when the parties opt for an arbitration clause calling for the expanded judicial review, and without possessing sufficient information on the matter, it seems that a better choice for them is to place the seat of their arbitration in the jurisdiction that freely allows them to do so (and that at the same time has narrow grounds for setting aside an arbitral award). This is so because the final result that is attained in this jurisdiction is more in line with the information that the parties have and with their intent that was present at the time the arbitration agreement was entered into.

In the case of a jurisdiction that requires specific drafting of the arbitration clause calling for an expanded judicial review, it would be impossible to argue that the approach nourished by this category of jurisdictions would be more efficient from the perspective of the parties who do not have access to sufficient information. This is so because of the complexities involved in drafting an arbitral clause. It would be unrealistic to expect the parties with insufficient information regarding the expanded judicial review to possess the knowledge and skills needed to draft an arbitral clause in a specific way so that it would be enforced. As these difficulties are not present in the jurisdictions that allow the parties to expand the scope of judicial review freely, one has no choice but to conclude that this latter category of jurisdictions is superior from the efficiency perspective.

Naturally, Party A and Party B, without possessing sufficient information regarding the expanded scope of judicial review, might also end up in a jurisdiction that already envisions in its arbitration law a scrutiny that is substantially broader compared to the mainstream approach. However, even for this category of jurisdictions, it would be quite arduous to contend that it trumps the other categories. It is highly unlikely that Party A and Party B will seek to place the seat of their arbitration in one of the jurisdictions with broad grounds for

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Várady (n 8) 465.

setting aside an arbitral award, because these actually correspond to their needs, because if they operated in this way then Party A and Party B could not be characterised as parties with insufficient information, but only with its sufficiency regarding the possibility to expand the scope of judicial review through a contract. What parties who lack sufficient information might do is to simply, for whatever reason, seek to expand the scope of judicial review contractually, irrespective of the fact that their arbitration seat already enables a judicial review that is substantially broader when compared to the mainstream approach. However, if Party A and Party B call for expanded judicial review encompassing both factual and legal matters while the seat of their arbitration only envisions one of the two, they might then encounter similar problems to those faced by the parties who place the *situs* of their arbitration in a jurisdiction that does not allow the parties to expand the scope of judicial review contractually (and at the same time has narrow grounds for setting aside). That is, if the jurisdiction chosen by Party A and Party B does not allow for further expansion of the grounds for setting aside, the risk exists that the problematic part will be severed or that the validity of the arbitration clause will come into question. The implications of this state of affairs have been discussed above. However, if the expansion of the judicial review by Party A and Party B entirely corresponds to the setting aside grounds already enshrined in the arbitration law, or if the said jurisdiction allows further expansion through contractual means, then the result might be the same as when the *situs* is placed in a jurisdiction that has narrow grounds for setting aside, but allows the parties to broaden them freely by contractual means. Nevertheless, this small niche is not sufficient to upstage the category of jurisdictions that have as a starting point the narrow grounds for setting aside the arbitral award, but at the same time allow the parties to contract freely for a heightened judicial scrutiny. For it is this category, as shown by the present analysis, that is the only one that achieves to be the intersection area for the parties in possession of sufficient information and for those parties who are not.

V Conclusion

The analysis above has shown that, from the perspective of private parties, the most efficient solution is offered by jurisdictions that put forward narrow grounds for setting aside an arbitral award, but at the same time allow the parties to expand them freely on a contractual basis so as to encompass matters of law and fact. There is a discord between this conclusion and the situation on the ground, namely the overwhelmingly pervasive approach among the jurisdictions that are traditionally seen as major hubs for international arbitration (e.g. France, US, Switzerland, Sweden) has been to take a rigid stance on the matter by supporting the position that the grounds for setting aside are not subject to party autonomy. Hence, in relation to the expanded judicial review, it is the paternalistic approach that prevails. This is not without merit, as policy considerations support this state of affairs. It is difficult to dispute that, at least in the international setting, it is advisable for the parties to stay away from the expanded judicial review, because it has the potential to muddle up the key stages of arbitration,

i.e. from the recognition and enforcement of the arbitral clause to the recognition and enforcement of the arbitral award itself.⁶⁷

In spite of the policy considerations, the article at hand concluded that the optimal approach, from the private parties' point of view, is actually offered by those jurisdictions that enable the parties to expand the narrow grounds for setting aside an arbitral award freely. As the author has not managed to locate one single jurisdiction among those that are considered to be important hubs for international arbitration that allows a judicial review to encompass matters of fact and law, an assumption was made in the present article that two such jurisdictions exist – State X and State Y. This fiction was necessary in order to carry out the analysis from the law and economics perspective.

However, it is not the aim of this author to advocate in the article at hand that the approach nourished by State X and State Y ought to be adopted uniformly across all jurisdictions. The difficulties surrounding the expanded judicial review speak against this position, even though, from the perspective of private parties, the possibility of such an expansion would be welcomed. Nevertheless, at the same time, it must be noted that, for other categories of jurisdictions, the author did not need to make assumptions and reach for fictions. The examples of all of the following jurisdictions could be pinpointed on the ground: (1) jurisdictions with narrow grounds for setting aside an arbitral award that bar the parties from contractual expansion of judicial review; (2) jurisdictions with narrow grounds for setting aside an arbitral award in which expanded judicial review is possible only when the arbitration clause is drafted in a specific way; and (3) jurisdictions that already envision in their arbitration laws a review that is broader in scope compared to the mainstream approach. The conclusion that the jurisdictions that allow the parties to expand the narrow grounds for setting aside an arbitral award are the most efficient from the private parties' perspective serves to lament the total dominance of the paternalistic approach. While barring the parties from freely expanding the scope of judicial review might be justified on policy grounds, there still exist strong arguments in favour of allowing it. Therefore, it is the opinion of this author that it would be advisable to have at least one or two jurisdictions that are considered as major hubs for international arbitration change their approach and allow the parties to ask for a heightened judicial scrutiny of their prospective arbitral award with no strings attached. In such a scenario, the parties who want expanded judicial review and are sufficiently informed about its pros and cons will have a jurisdiction where their needs will be met. For parties who do not wish such judicial input, this jurisdiction will still remain a viable option as their preferences will be satisfied if they simply do not call for an expanded judicial review in their contract. And last but not least, parties who are not in possession of sufficient information regarding the expanded judicial review, but for whatever reason opt for it in their arbitration agreement, might even have a better chance of getting an enforceable award than if they placed the *situs* of their arbitration elsewhere. All this serves as a solid justification for the reduction of the indisputable dominance of the approach that bars the parties from expanding the narrow grounds for setting aside an arbitral award.

⁶⁷ Várady (n 12) 465.

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