EU law and commercial arbitration: a rights-based reading

Nicolaj Kuplewatzky*

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Abstract

This article argues that the EU law approach to commercial arbitration is predicated on a balancing of the rights and principles that define the EU legal order. It explains that, in the EU legal context, commercial arbitration, which is respected by virtue of Art. 16 CFR, must be balanced against the structural principles protected by Art. 19 TEU and the principle of effective judicial protection enshrined in Art. 47 CFR. The article proposes interpreting the European Court of Justice's case-law on commercial arbitration, including the recent judgment in *Royal Football Club Seraing*, in this context. However, it concludes that the judicial architecture of Art. 19 TEU cannot be "balanced away" and that any limitation of Art. 47 CFR must be "strictly necessary". This balancing exercise explains why the European Court of Justice interprets the concept of EU public policy broadly and why that court is willing to review arbitral awards with limited intensity. Beyond the existing case-law, the article proposes that a balancing of rights and principles in the EU legal context neces-

* Référendaire in the Chambers of Advocate General Ćapeta at the Court of Justice of the European Union (Luxembourg). The views expressed herein are mine alone. Email: nicolaj.kuplewatzky@curia.europa.eu.

sitates control by an EU law court. It follows from this that the seat of arbitration for EU law disputes must always be placed within the European Union.

Keywords: EU Law, Commercial Arbitration, Fundamental Rights, EU Public Policy, *Royal Football Club Seraing*, Seat of Arbitration

A. Introduction

In principle, EU law recognises the need for deference to commercial arbitration. As part of the freedom to conduct a business, Art. 16 CFR of Fundamental Rights of the European Union (CFR) safeguards the freedom of contract. This guarantees the consensual basis for entering into arbitral agreements and for handing certain disputes over to an extra-judicial resolution mechanism. [1] However, EU law does not consider absolute the freedom to conduct a business, and therefore the freedom of contract. It accordingly mandates a balancing act between competing rights, principles, and freedoms. In the case of arbitration, these competing elements arise, on the one hand, from Art. 19 of the Treaty on European Union (TEU), which lays down the judicial architecture of the Treaties, and, on the other hand, from Art. 47 CFR, which reflects the right to effective judicial protection (see Section B). It is with these competing elements in mind that this article proposes to read the current line of EU case-law on arbitration. Viewed through that prism, it is suggested that the limited scope and intensity of review deemed acceptable by the Court in its judgments in *Nordsee*, *Eco Swiss*, and most recently *Royal Football Club Seraing*, is not rooted in a "special" position for arbitration within the EU legal architecture. Instead, commercial arbitration must be viewed as a permissible limitation of the principle of effective judicial protection, reflected in Art. 47 CFR (Section C). However, as shall be explained, it is difficult to speak of a "true" limitation of that right. First, the limited intensity of judicial review to certain elements of law, recognised in *Royal Football Club Seraing*, appears at least inspired by the competence of the European Court of Justice ("the Court") in appeals from the General Court. The Court's case-law moreover shows that this competence on appeal is not as limited as it appears (Section D). Second, the Court's guidance on the principles and objectives constituting "EU public policy" may be read as covering, in fact, *all* of EU law (Section E). Finally, it will be argued that since all of the Court's case-law presupposes some access to a national court of a Member State capable of acting within the system established by the Treaties, there can be no permissible commercial arbitration of an EU law dispute unless the seat of the arbitration is situated in the European Union and benefits from access to a court placed within the system of Art. 19 TEU (Section F).

1 See notably *Carbonneau*, Vanderbilt Journal of Transnational Law 2003/4, pp. 1192–93, in which he explains that, from the US perspective, "freedom of contract (…) is at the very core of how the law regulates arbitration." See also, more generally, from the EU perspective, *Basedow*, European Review of Private Law 2008/6, pp. 903 et seq.

B. The judicial architecture of the EU Treaties

It may be useful to start with the judicial architecture of the Treaties. Under the first subparagraph of Art. 19 para. 1 TEU, the Court ensures that "in the interpretation and application of the EU Treaties the law is observed". It exercises those powers in respect of disputes which come within the scope of the EU Treaties, among which fall all economic activities that are carried out within the territory of the EU Treaties.[2]

The European Union operates a multi-level system of judicial protection. This system is characterised by the vertical allocation of power. Although situated at the apex of the judicial architecture established by Art. 19 TEU, the Court exercises its powers and tasks alongside those of the courts of the Member States. This is the first facet that is provided for in the second subparagraph of Art. 19 para. 1 TEU. After all, it is those courts that are the recipients of most EU law disputes. Furthermore, given that EU law forms part of national law,[3] all of these courts are "EU law courts" ("*les juges de droit commun du droit de l'Union*"), and so have the possibility (and, where relevant, the obligation) of entering into a dialogue with the Court on the basis of Art. 267 of the Treaty on the Functioning of the European Union (TFEU), the "keystone of the [EU] judicial system".[4]

In view of the judicial architecture of Art. 19 TEU, it is the collective mission of the national courts (as EU law courts) and the Court to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law.[5] The rights set out in the Charter form part of those rules. At the same time, these rights constitute a source of "primary EU law", given that they form part of the foundational values on which the European Union as a whole

2 See, to that effect, ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 42 (finding that a link to EU law is inter alia reflected in the provisions on the fundamental freedoms, including the freedom of establishment and the free movement of capital). See also, as regards the protection afforded by the latter right in cases of (indirect) expropriation, ECJ, joined cases C-52/16 and C-113/16, *SEGRO and Horváth,* ECLI:EU:C:2018:157, para. 129 (relating to the EU law compatible nature of legislation bringing about the extinction of rights of usufruct acquired by contract over agricultural land).

3 See ECJ, case C-741/19, *Republic of Moldova*, ECLI:EU:C:2021:655, para. 33 and ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 41.

4 See ECJ, case C-741/19, *Republic of Moldova*, ECLI:EU:C:2021:655, para. 46. Under that procedure, EU "national courts are provided the most extensive power, or even the obligation, to make a reference to the [Court] if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of the provisions of EU law and requiring a decision by them". See Opinion 1/09 of the ECJ, *Agreement creating a Unified Patent Litigation System*, ECLI:EU:C:2011:123, para. 83.

5 See, ex multis, ECJ, case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, ECLI:EU:C:2018:586, para. 50 and the case-law cited.

is built.[6] However, EU law currently does not harmonise the types of remedies that must be available to subjects seeking to enforce their EU law rights. Therefore, it is the responsibility of the Member States to make available to their EU law courts "sufficient remedies to ensure effective legal protection" in the fields covered by EU law. This is the second facet that is provided for by the second subparagraph of Art. 19 para. 1 TEU.

As will be clear to the reader, in that judicial system, competences and responsibilities are distributed in a way that establishes a pre-determined balance of power. Maintaining that balance is "essential for the preservation of the Community character of the law established by the Treaties, [which] aims to ensure that, in all circumstances, that law has the same effect in all Member States".[7] This is why, in its *Nordsee* judgment, the Court highlighted that, by virtue of that structure and the resulting requirement for uniformity, "parties to a contract are not (…) free to create exceptions to it."[8]

C. Openness to arbitration through the prism of fundamental rights

I. Commercial arbitration and the Charter

One of the fundamental rights protected by the Charter, and thereby by the judicial structure of Art. 19 TEU, is the freedom to conduct a business. Today, this freedom is reflected in Art. 16 CFR.[9] The freedom of contract forms part of that right and is one of the earliest fundamental rights recognised in the Court's case-law.[10]

Scholarship has termed the EU law approach to the freedom of contract as reflecting a form of "regulated autonomy".[11] By virtue of the freedom of contract, the Court has found that parties are generally able, for example, to freely choose who

6 See, in that respect, Art. 2 TEU, which inter alia lays down that "the Union is founded on the values of respect for (…) the rule of law and (…) human rights". See also Opinion of AG Ćapeta, case C-769/22, *Commission v Hungary (Values of the European Union)*, ECLI:EU:C:2025:408, para. 155, in which the Advocate General explains that phrasing as reflecting "the choice of the founders of the European Union as to the type of society that the Member States have pledged to create together within the framework of the European Union."

7 See Opinion 1/09 of the ECJ, *Agreement creating a Unified Patent Litigation System*, ECLI:EU:C:2011:123, para. 83.

8 See ECJ, 102/81, *Nordsee*, ECLI:EU:C:1982:107, para. 14.

9 First recognised in ECJ, case 4/73, *Nold v Commission*, ECLI:EU:C:1974:51, paras. 13 and 14.

10 See ECJ, case 151/78, *Sukkerfabriken Nykøbing*, ECLI:EU:C:1979:4, para. 20.

11 See *Weatherill*, European Review of Contract Law, 2014/1, p. 180 (explaining that "the Court's case law is better understood as embracing "regulated autonomy" as the character of EU law – an autonomy bounded by pursuit of the objectives of the EU in opening up markets and subjecting them to regulatory intervention").

to do business with,[12] how to price their service or good,[13] and how to assert one's interests in the contractual process.[14] EU law therefore also protects the possibility to consent to resolve disputes arising from a contract. That is what the Court in the *Achmea* line of case-law famously described as "the freely expressed wishes of the parties".[15] It is through that expression that the Court sought to distinguish commercial arbitration from investor-State arbitration; that includes disputes as to the scope of an arbitral tribunal's own competence.

No enforceable contract can exist without freely-given consent.[16] Much like the Member States cannot "consent" to circumvent the system of Art. 19 TEU and their obligation under Art. 344 TFEU (as *PL Holdings* explains),[17] EU law subjects cannot consent (whether freely or not) to irreversibly remove their EU law disputes from the system of Art. 19 para. 1 TEU. [18] As described above, the constitutional framework of the EU Treaties necessitates that there remains open the possibility of a compatibility review of an EU law dispute before an EU law court. This is the essence of Art. 47 CFR (which, as described, in turn reflects Art. 2 and 19 TEU).

12 See, to that effect, ECJ, joined cases C-90/90 and C-91/90, *Neu and Others*, ECLI:EU:C:1991:303, para. 13, as cited in case C-283/11, *Sky Österreich*, ECLI:EU:C:2013:28, para. 43.

13 See, to that effect, ECJ, case C-437/04, *Commission v Belgium*, ECLI:EU:C:2007:178, para. 51 and case C-213/10, *F-Tex*, ECLI:EU:C:2012:215, para. 45, as cited in ECJ, C-283/11, *Sky Österreich*, ECLI:EU:C:2013:28, para. 43.

14 See, to that effect, ECJ, case C-426/11, *Alemo-Herron and Others*, ECLI:EU:C:2013:521, para. 33.

15 See ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 55; case C-741/19, *Republic of Moldova*, ECLI:EU:C:2021:655, para. 62; and case C-638/19 P, *Commission v European Food and Others*, ECLI:EU:C:2022:50, para. 144 (distinguishing standing offers to arbitrate under international agreements signed by the Member States from the type of consent "which would have been given in commercial arbitration proceedings, [given that the former] does not originate in a specific agreement reflecting the freely expressed wishes of the parties concerned, but derives from a treaty concluded between two States in the context of which they have, generally and in advance, agreed to exclude from the jurisdiction of their own courts disputes which may concern the interpretation or application of EU law in favour of arbitration proceedings").

16 Advocate General Ćapeta alluded to the importance of that element of consent in her Opinion in *Royal Football Club Seraing*. See Opinion of AG Ćapeta, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:24, paras.s 71 et seq.

17 See ECJ, case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875, paras. 50 and 51 (in which the Court explains "'the validity of the legal basis of an arbitration body's jurisdiction, in the light of Articles 267 and 344 TFEU, cannot depend on the conduct of the parties to the dispute concerned' because that 'would have the effect of maintaining the effects of the commitment – which was entered into by that Member State in breach of EU law and is, therefore, invalid – to accept the jurisdiction of the arbitration body before which the matter was brought").

18 The same applies naturally to a situation where, say, the contract at issue was entered into freely, but where the dispute resolution clause contained therein was, in practice, imposed on the signatory. Such as is the case in the context of sport arbitration, see, to that effect, ECJ, case C-124/21 P, *International Skating Union v Commission*, ECLI:EU:C:2023:1012, paras. 193, 195, and 225. See also, similarly, ECtHR, nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, paras. 109 to 115.

That essence, mandated by the EU judicial structure, cannot be undermined (or "consented away") through an exercise of other fundamental rights and freedoms.[19] It is for that reason that, where such access is precluded by an agreement to arbitrate or other contractual clauses, EU law does not accept that there was a proper "meeting of the minds".[20] Accordingly, the freedom of contract, respected through Art. 16 CFR, does not apply to the resulting arbitration. It follows that the effects of any arbitral award resulting from such contracts – much like those resulting from an intra-EU investment arbitration agreement – similarly *cannot* be recognised in the European Union. [21] Therefore, when speaking of commercial arbitration, EU law presumes arbitration compatible with the judicial structure of the Treaties. As will be explained later, that is the baseline for any discussion on EU law and arbitration and the first qualifier to the Court's statement in *Royal Football Club Seraing* that the EU legal order "does not preclude, in principle, individuals who are subject to that legal order (…) from submitting disputes that may arise between them (…) to an arbitration mechanism."[22]

The second qualifier to that statement arises from Art. 16 CFR. That provision states that "the freedom to conduct a business in accordance with Union law and national laws and practices is recognised." As that wording evidences, the freedom to conduct a business, and therefore the freedom of contract, is not absolute.[23] That provision merely "recognises" the freedom to conduct a business.[24] That means that it may be subject to a broad range of interventions with a view to limiting the exer-

19 See, to that effect, ECJ, case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, paras. 32 to 37 and ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 75 and the case-law cited.

20 Compare, in that regard, the specific observations in ECJ, case 102/81, *Nordsee*, ECLI:EU:C:1982:107, para. 11, that "the first important point to note is that when the contract was entered into in 1973 the parties were free to leave their disputes to be resolved by the ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract. From the facts of the case, it appears that the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration."

21 See, by analogy, ECJ, case C-333/19, *Romatsa and Others*, ECLI:EU:C:2022:749, paras. 42 to 44 and the operative part of that order) and, more generally, BGH, I ZB 43/22. See also Opinion of AG Čapeta, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:24, para. 118 and fn. 68 on the enforceability under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of an award rendered pursuant to a non-consensual contract. In its judgment, the Court did not address that aspect and limited itself instead to observing that its interpretation of the concept of "public policy" is compatible with the scope of the concept, as reflected in Art. V para. 2 lit. b of the New York Convention. See, to that effect, ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 116.

22 ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 78.

23 See, ex multis, ECJ, case C 283/11, *Sky Österreich*, ECLI:EU:C:2013:28, paras. 46 and 47 case C-254/23, *INTERZERO Trajnostne rešitve za svet brez odpadkov and Others*, ECLI:EU:C:2025:569, para. 141 and the case-law cited (finding, in relation to Art. 16 CFR, that the freedom contained therein "may be subject to a broad range of interventions on the part of public authorities").

24 The wording of Art. 16 CFR speaks of the freedom of contract being "recognised". It does not start with the wording "everyone has the right", which is found in other provisions of Title II of the CFR.

cise of that activity in the public interest.[25] As the Court in *Sky Österreich* highlighted, "that circumstance is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented."[26] In practice, that has the effect that, when balancing the freedom reflected in Art. 16 CFR against other rights and freedoms protected by EU law, as is required by the principle of proportionality, the interferences with and the limitations of the freedom to conduct a business may be greater than for "stronger" fundamental rights.[27] The reason for this is simple: in a democratic society, certain rules and principles must be capable of being restricted more than others in pursuance of a justified objective, with the freedom to conduct a business not constituting the type of foundational legal rule which cannot be undermined at will.[28]

The principle of effective judicial protection is one of those types of foundational legal rules of EU law. It is referred to in the second subparagraph of Art. 19 para. 1 TEU as a concrete expression of the value of the rule of law, laid down in Art. 2 TEU.[29] It therefore informs the EU's judicial architecture as a whole.[30] It is also reaffirmed by Art. 47 CFR,[31] which explains that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective

25 See ECJ, case C 283/11, *Sky Österreich*, ECLI:EU:C:2013:28, para 46. See also, more recently, case C-254/23, *INTERZERO Trajnostne rešitve za svet brez odpadkov and Others*, ECLI:EU:C:2025:569, para. 141 and the case-law cited.

26 ECJ, case C 283/11, *Sky Österreich*, ECLI:EU:C:2013:28, para. 47. See also, more recently, case C-254/23, *INTERZERO Trajnostne rešitve za svet brez odpadkov and Others*, ECLI:EU:C:2025:569, para. 141 and the case-law cited.

27 Compare, in that regard, Art. 7 CFR, which guarantees everyone the right to respect for his or her private and family life, home and communications, and Art. 8 para. 1 thereof, which confers on everyone the right to the protection of personal data concerning him or her. Limitations on those fundamental rights are only permissible insofar as is "strictly" necessary. See, for example, ECJ, joined cases C-293/12 and C-594/12, *Digital Rights Ireland and Others*, ECLI:EU:C:2014:238, paras. 48 and 52.

28 Compare, in that respect, ECJ, case C-623/17, *Privacy International*, ECLI:EU:C:2020:790, para. 62, in which the Court explains that "the right to freedom of expression, (…) guaranteed in Article 11 of the Charter, constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded".

29 See, ex multis, ECJ, case C-824/18, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, ECLI:EU:C:2021:153, para. 108 and the case-law cited. It is for that reason that the Court has taken the position that "the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law." See ECJ, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para. 219 and the case-law cited.

30 See, ex multis, ECJ, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others*, ECLI:EU:C:2021:393, para. 190 and the case-law cited (explaining that "the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States").

31 See, ex multis, ECJ, case C-824/18, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, ECLI:EU:C:2021:153, para. 110 and the case-law cited.

remedy".[32] While also not an absolute right protected by the Charter,[33] the Court has confirmed that any interference with the right to effective judicial protection, as reflected in Art. 47 CFR, must be limited to what is "strictly necessary".[34] *Strict* judicial review requires one thing in particular: an *intensive* review of the justification for a limitation to that right.[35] That means that by its very nature Art. 47 CFR significantly reduces the amount of discretion that an EU law court may grant to a stated objective, if that has the effect of limiting the principle of effective judicial protection.[36]

Both of these elements, the judicial architecture established by Art. 19 TEU and the reduced scope of limitation of Art. 47 CFR, define the Court's approach to commercial arbitration.

II. Reading the case-law as a balance of fundamental rights

Consider the examples of *West Tankers*[37] and *Gazprom*.[38] These cases concerned anti-suit and anti-anti-suit injunctions in favour of commercial arbitration proceedings. In its judgments, the Court resolved the questions put before it by reference to

32 See the Explanations to the Charter on Art. 47, which state that "in Union law the protection is more extensive [than under Article 13 ECHR] since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (…)." As those explanations also lay down, that protection goes beyond the protection afforded by Art. 13 ECHR.

33 See, for example, ECJ, case C-687/23, *Banco Santander (Résolution bancaire Banco Popular III)*, ECLI:EU:C:2025:687, para. 67 and the case-law cited (explaining that the right to judicial protection enshrined in Art. 47 CFR "is not absolute and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union"). See also, for an acceptable limitation of Art. 47 CFR in a case involving commercial arbitration, ECJ, case C-40/08, *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, paras. 43, 44 and 48, which involved a two-month time-limit to bring proceedings against an arbitral award.

34 See, for example, ECJ, case C-185/23, *protectus*, ECLI:EU:C:2024:657, para. 86 and the case-law cited. To that effect also ECJ, case C-292/23, *European Public Prosecutor's Office (Judicial review of procedural acts)*, ECLI:EU:C:2025:255, para. 74.

35 See, by comparison with US law, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), fn. 4, in which the judgment explains that "there may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendment, which are deemed equally specific when held to be embraced within the Fourteenth".

36 See also, by analogy, as regards Art. 6 ECHR, ECtHR, no. 10934/21, *Semenya v. Switzerland*, judgment of 10 July 2025, para. 217 (demanding a "particularly rigorous examination" of an alleged breach of fundamental rights, albeit only in the case of "compulsory arbitration").

37 See ECJ, case C-185/07, *Allianz and Generali Assicurazioni Generali*, ECLI:EU:C:2009:69.

38 See ECJ, case C-536/13, *Gazprom*, ECLI:EU:C:2015:316.

the Brussels I Regulation[39].[40] Essentially, it found that regulation not applicable because it excluded arbitration from its scope. It considered that proceedings for the recognition and enforcement of arbitral awards would be covered by national and international law, rather than by that regulation.[41] However, underlying the Court's reasoning is the logic of balancing the competing fundamental rights at play. Thus, in both cases, the Court essentially considered that a mechanism, such as that inherent in anti- and anti-anti-suit injunctions, which would strip a court of its jurisdiction in favour of giving effect to the findings of a commercial arbitration tribunal, would call into question the trust, which, by virtue of their membership in the European Union, the Member States share in each other's systems and in the common judicial architecture under Art. 19 TEU as a whole.[42] The consequence would be simple: favouring the consent-based mechanism of resolving EU law disputes outside the judicial architecture of Art. 19 TEU, to the exclusion of the judicial structure foreseen in the Treaties, would bar the opposing party "from access to the court before which it brought proceedings (…) and would therefore be deprived of a form of judicial protection to which it is entitled."[43]

Expressed in terms of rights: when balancing contractual rights and the right to effective judicial protection, the latter must be given preference if the effect of the former is to deny the exercise of the latter. This is particularly apparent when reading the Brussels I Regulation itself as a possible limitation of the principle of effective judicial protection. In its judgment in *London Steam-Ship Owners' Mutual Insurance Association*, the logic of which builds on *West Tankers* and *Gazprom*, the Court explained that, for an arbitral award to be recognised as a "judgment" under that regulation, the implementation of that system of recognition and enforcement

39 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

40 See ECJ, case C-185/07, *Allianz and Generali Assicurazioni Generali*, ECLI:EU:C:2009:69, paras. 23 et seq. and case C-536/13, *Gazprom*, ECLI:EU:C:2015:316, paras. 31 et seq.

41 See, to that effect, ECJ, case C-536/13, *Gazprom*, ECLI:EU:C:2015:316, para. 41.

42 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 L 12, 16.1.2001, p. 1).

43 See ECJ, case C-185/07, *Allianz and Generali Assicurazioni Generali*, ECLI:EU:C:2009:69, para. 31. In full, the Court explains that "if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled." See also ECJ, case C-536/13, *Gazprom*, ECLI:EU:C:2015:316, paras. 38 and 39 (explaining that "an arbitral tribunal's prohibition of a party from bringing certain claims before a court of a Member State cannot deny that party the judicial protection" and that consequently "neither that arbitral award nor the decision by which, as the case may be, the court of a Member State recognises it are capable of affecting the mutual trust between the courts of the various Member States upon which Regulation No 44/2001 is based").

must *itself* comply with Art. 47 CFR.[44] Therefore, the Court reasons, "an arbitral award can, by means of a judgment entered in the terms of that award, produce effects in the context of [the Brussels Regulation] only if this does not infringe the right to an effective remedy".[45]

Contrast the above with the *Nordsee*[46] and *Eco Swiss*[47] line of case-law. At issue there was the intensity of review to be carried out by national courts when faced with a commercial arbitral award that is alleged to violate EU law. That question, too, arose against the background of contractual arbitration. In fact, it is in the context of qualifying the circumstances before it that we find, for the first time, the Court employing the language of "consent". Thus, in *Nordsee*, the Court underlined the voluntary nature of this means of dispute settlement, highlighting that: "the first important point to note is that when the contract was entered into in 1973 the parties were free to leave their disputes to be resolved by the ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract. From the facts of the case, it appears that the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration."[48] Similarly, in *Eco Swiss*, the Court referred to "arbitration resorted to by agreement".[49] Both national systems at issue, the German and Dutch systems respectively, granted deference (albeit short of full *res judicata* status) to such awards rendered by means of that process of dispute resolution. This shifted the burden of proof involved. At the same time, neither system recognised awards issued through that process as equivalent to final judgments issued by their national courts.[50] Both systems, in fact, limited their review to "public policy" grounds by virtue of Art. 5 of the New York Convention.[51] That consequently entailed that, by virtue of national law, *the intensity of review* of those arbitral awards would depend on the type of argument raised before the competent national courts. This explains the reference in both *Nordsee* and *Eco Swiss* to the fact that a review of the arbitration award before the national courts "may be more or less extensive depending on the circumstances".[52]

44 See, to that effect, ECJ, case C-700/20, *London Steam-Ship Owners' Mutual Insurance Association*, ECLI:EU:C:2022:488, para. 58 and the case-law cited.

45 See ECJ, case C-700/20, *London Steam-Ship Owners' Mutual Insurance Association*, ECLI:EU:C:2022:488, para. 58.

46 ECJ, case 102/81, *Nordsee*, ECLI:EU:C:1982:107.

47 ECJ, case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269.

48 ECJ, case 102/81, *Nordsee*, ECLI:EU:C:1982:107, para. 11.

49 ECJ, case 102/81, *Nordsee*, ECLI:EU:C:1982:107, para. 31.

50 See, for example, ECJ, case 102/81, *Nordsee*, ECLI:EU:C:1982:107, para. 13, which explains that "the link between the arbitration procedure in this instance and the organization of legal remedies through the courts in the Member State in question is not sufficiently close for the arbitrator to be considered as a 'court or tribunal of a Member State' within the meaning of Article [267 TFEU]".

51 See ECJ, case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 38. See also, to that effect, Opinion of AG Reischl, case 102/81, *Nordsee*, ECLI:EU:C:1982:31, p. 1120.

52 See ECJ, case 102/81, *Nordsee*, ECLI:EU:C:1982:107, para. 14 and case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 32.

These elements of fact are important for our rights-based reading of *Nordsee* and *Eco Swiss*. Viewed from the angle of Art. 16 and 47 CFR, the mere grant of some procedural or substantive recognition to the findings made in contract-based awards, reflecting recognition of the freedom expressed in Art. 16 CFR, naturally constitutes a *limitation* of the right, reflected now in Art. 47 CFR, to call upon the national EU law courts to carry out the tasks attributed to them under the second paragraph of Art. 19 para. 1 TEU. "Public policy" review – and the potentially more limited intensity of review that may result from it – is therefore simply another expression for a *permissible limitation* of the right to effective judicial protection.

From that perspective, it is readily apparent why the *West Tankers* and *Gazprom* line of case-law diverge so significantly from that of *Nordsee* and *Eco Swiss*: the former cases concerned instances of impermissible restrictions to the right to effective judicial review *not* because – in the black-box that is proportionality "*stricto sensu*", namely balancing the interests at stake – one right "came out on top". It is rather that the former line of cases concerned instances where the action before the national court would have the effect of *completely excluding a possibility of a review* against EU law. That is to say, one of the elements going to the core of Art. 47 CFR, and therefore to the judicial structure laid down in Art. 19 TEU. As has long been settled, that type of restriction has the effect of depriving an individual of the possibility of asserting, by means of the judicial process, the rights that EU law grants them.[53] For that reason, such a limitation is not compatible with EU law.

However, in the *Nordsee* and *Eco Swiss* line of case-law, the limitation in question *left untouched* the possibility of seeking judicial redress through access to the competent courts. Therefore, an EU law judge faced with an action for annulment against the awards in question could have ensured the satisfaction of EU law rights where necessary. The mere grant of deference to certain findings made in those awards, similar to those of a lower-instance court's judgment, was therefore deemed unproblematic for the purposes of the principle of effective judicial protection.

Against this background, two statements from *Nordsee* and *Eco Swiss* take on new meaning. First, the well-known statement from *Eco Swiss* that "it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope".[54] In the context of our rights-based analysis, this statement can be interpreted as an explanation of *why* the EU law judge should accept a limitation of the principle of effective judicial protection, resulting from the freedom of contract, and grant deference to the arbitral award before it. Likewise, *Nordsee*'s often-repeated words that "Community law must be observed in its entirety throughout the territory of all the Member States [and that] parties to a contract are not, there-

53 See, for example, ECJ, case 222/84, *Johnston*, ECLI:EU:C:1986:206, para. 20 (in which an administrative certificate was treated, under national law, as "conclusive evidence" of equal treatment, such that "allows the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the directive. Such a provision is therefore contrary to the principle of effective judicial control laid down in Article 6 of the directive").

54 ECJ, case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 35.

fore, free to create exceptions to it".[55] Interpreted as an expression of the limits to the right to an effective remedy, this statement indicates that a complete exclusion from the judicial process before an EU law court is incompatible with the Treaties due to structural and systemic reasons of the judicial architecture of the European Union—now reflected in Art. 19 TEU.

D. Placing Royal Football Club Seraing

I. A rights-based reading

The judgment in *Football Club Seraing* builds on the above framework by more clearly spelling out what balancing the rights and principles between Art. 19 TEU, Art. 16 and 47 CFR entails. Stripped of its sporting (and therefore also political) context, the case concerned a Belgian procedural law provision that (i) granted an arbitral award rendered by an arbitration institution based outside the European Union the authority of *res judicata* between the parties to the dispute, even where said award had not been reviewed by an EU law judge for its conformity with EU law, and (ii) conferred on that award probative value vis-à-vis third parties, as a consequence of the *res judicata* effect of that award.[56]

Sometimes misunderstood as relating to "forced" arbitration only,[57] the factual matrix of *Football Club Seraing* features *two* limitations to the possibility to review an arbitral award falling within those rules before a Belgian EU law court. According to the referring court, these rules would have the effect of requiring it to find inadmissible an action against that award, in the same way as it would do with a final judgment issued by a Belgian court.

These elements are reminiscent of *West Tankers* and *Gazprom*. As discussed, both cases concerned national measures having the consequence of removing from the jurisdiction of the EU law courts an action that has as its purpose a compatibility assessment of EU law rights with an arbitral award rendered outside the structure of Art. 19 TEU. The same type of consequence is apparent from the description of the

55 ECJ, case 102/81, *Nordsee*, ECLI:EU:C:1982:107, para. 14.

56 See, to that effect, ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 68.

57 In fact, the part of the judgment in *Royal Football Club Seraing* that relates to the applicable standard of judicial review lays down the general EU law approach to *commercial* (and thus consensual) arbitration, entirely detached from the factual context underlying that judgment (and thus a situation of "forced" arbitration). That distinguishes the Court's approach from that taken by the ECtHR in *Semenya v. Switzerland*, which appears to lay down two different judicial review standards: a "light-touch" approach for consensual arbitration and a "particularly rigorous" examination for forced arbitration; see ECtHR, no. 10934/21, *Semenya v. Switzerland*, judgment of 10 July 2025, paras. 197 and 237, on the one hand, and paras. 217 and 218, on the other hand. See also Opinion of AG Ćapeta, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:24, paras. 112, 113, 118 and 119 (explaining that "mandatory" arbitration does not justify limited judicial review; also suggesting such types of arbitration do not fall within the scope of the New York Convention).

national law at issue in *Royal Football Club Seraing*. However, unlike *West Tankers* and *Gazprom*, on the one hand, and *Nordsee* and *Eco Swiss*, on the other hand, in *Royal Football Club Seraing*, the Court highlights the structural and rights-based consequences that upholding the Belgian procedural rules would entail for the judicial architecture of the European Union. The first substantive paragraph of the judgment in *Royal Football Club Seraing* already substantiates this point. Therein, the Court explains that, in a union based on the rule of law, "the right to effective judicial protection is of cardinal importance, as a guarantee that all the rights which individuals derive from EU law will be protected."[58] The Court then turns to the obligations for Member States that arise from that principle: that the full effectiveness of that *right*, reflected also in Art. 47 CFR, depends on the *remedies* that those Member States put in place, in observance of their obligations arising from the second paragraph of Art. 19 TEU.[59] In other words, an inseparable relationship, in which too great a limitation of either side would lead to the ineffectiveness of the other. From that relationship emerges the baseline established by Art. 19 TEU and Art. 47 CFR: that, first, there exists access to an EU law court embedded in the judicial structure of the Treaties (i.e. the existence of an EU court system) and, second, that, "*in principle*", "those courts or tribunals must have the power to consider *all the issues of fact and of law* that are relevant for resolving that case (i.e. the power of that EU court system)."[60]

II. Permissible limitations of Art. 47 CFR

It is at this point that one may consider the shadow of a rights-based balancing assessment reappearing.

As an expression of the essence of the rule of law, the *existence* of effective judicial review designed to ensure compliance with EU law, as required by Art. 19 TEU, cannot be limited.[61] The freedom of contract – or any other fundamental right for that matter – cannot take away from Art. 19 TEU that which is mandated by the Treaties. For a system of commercial arbitration to be compatible with EU law, it must provide access to the structure of Art. 19 TEU. Only if this is provided does EU law not "preclude (…) individuals (…) from submitting disputes that may arise

58 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 69.

59 See, to that effect, ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, paras. 70 and 72 to 73.

60 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, paras. 74 and 75. See also para. 82 of that judgment, where the Court expresses those two conditions in the following words: "[O]nce the arbitration mechanism established or designated by (…) an agreement is to be implemented in all or part of the territory of the European Union, in the context of disputes relating to the pursuit of an economic activity in that territory, that mechanism must be designed and implemented in such a way as to ensure, first, its compatibility with the principles underlying the judicial architecture of the European Union and, second, effective compliance with EU public policy.".

61 See, to that effect, ECJ, case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, paras. 32 to 37 and the case-law cited.

between them in the context of [the] pursuit [of an economic activity] to an arbitration mechanism."[62] The manner in which that "way back" into the Art. 19 TEU structure is governed is left to the national systems of the Member States. It is clear from *Royal Football Club Seraing* that the only limits that EU law sets in that regard are that there must exist some type of mechanism to ensure that "the awards made by [an arbitral] body (…) be amenable to judicial review such as to guarantee the effective judicial protection to which the individuals concerned are entitled, pursuant to Article 47 of the Charter, and which the Member States are required to ensure in the fields covered by EU law, in accordance with the second subparagraph of Article 19(1) TEU."[63]

Those reflections link to our earlier observations on *West Tankers* and *Gazprom* that there cannot exist a "one-way street" to exit the EU judicial system for EU law disputes. To preserve the *structure* of that system, there must be some way of "re-entering" it – or, as the Court terms it, an "*indirect*" way of ensuring fundamental rights protection.[64] A number of possibilities in that regard immediately come to mind: resorting to a "*juge d'appui*" firmly established in the judicial architecture of Art. 19 TEU (as *Nordsee* evidences)[65] or establishing an appeal mechanism to an EU law court (as is the case, for example, with appeals from specialised agencies of the European Union to the General Court),[66] including, if necessary, the provision of a "non-traditional" remedy of ensuring the compatibility with that system through *ex ante* or *ex post* measures of protection (such as is the case in Germany, under § 1032 of the German civil rules of procedure, which allows parties to challenge the arbitrability of certain disputes, including those in the investor-State are-

62 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 78.

63 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 83. The same idea is later repeated in para. 85 as follows: "it must, in any event, remain possible for the individuals concerned by such awards to obtain a review, by a court or tribunal meeting all the requirements arising from Article 267 TFEU, as to whether such awards are consistent with the principles and provisions which form part of EU public policy and which are relevant to the dispute concerned."

64 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 76.

65 See also *Fernández Rozas*, Collected Courses of the Hague Academy of International Law 2001, p. 130. The juge d'appui may be the judge designated by the procedural law of the State where the tribunal has its seat, but may also be a judge resulting from a specially-composed system to ensure "public order" review.

66 See, for example, Art. 72 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ L 154, 16.6.2017, p. 1) (laying down that actions against decisions of the Boards of Appeal may be brought to the General Court, and that such actions may entail a review on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TFEU, infringement of that regulation or of any rule of law relating to their application or misuse of power). See also the procedure laid down in Title IV of the Rules of Procedure of the General Court (OJ L 105, 23.4.2015, p. 1).

na).[67] In other words, that every EU law dispute, irrespective of its "departure" or "destination", must be capable of "stopping in Luxembourg".[68]

Conversely, the *way* in which judicial review of such awards may be achieved, "may legitimately be limited in nature".[69] Since that element links to the scope of Art. 47 CFR (and therefore not the general structure of Art. 19 TEU), there exists a possibility of balancing that right against other fundamental rights. This exercise may occur through a limitation of both *scope* and *intensity* of judicial review.

1. The intensity of judicial review

With regard to the *intensity of judicial review*, *Royal Football Club Seraing* notes that "in principle"[70] Art. 47 CFR requires that judicial review covers elements of law *and fact* to be effective. This should be uncontested, given that the baseline for effective judicial protection must be that an EU law court is capable of "leaving no stone unturned". However, at the same time, the Court acknowledges that, in the case of commercial arbitration, findings of fact – "as established and assessed by the arbitration body" – need not be reviewed by the EU law courts.[71] That conclusion is a recognition of the possibility that the freedom of contract, as expressed through consensual arbitration, may limit an EU law court's finding of *fact.* This is nothing new: as discussed above, already in *Nordsee* and *Eco-Swiss*, the Court found it is compatible with the principle of effective judicial protection that national law grants some sort of preliminary status, such as through *res judicata*, to an arbitral award. Accepting findings of fact as falling within that scope is therefore an expression of a permissible limitation, by the freedom of contract of the principle of effective judicial protection.

As regards elements of *law*, however, the Court is less lenient. It explains that "effective" judicial review mandates that an EU law court's intensity of review relates to "an *interpretation or application of the principles or provisions which form part of EU public policy* and which confer rights or freedoms on individuals, be able to review the interpretation of those principles or provisions, the *legal consequences* attached to that interpretation as regards their application to the case at hand, and

67 See, in that regard, generally, *Kuplewatzky*, ZEuS 2024/3 and *Maxian Rusche*, IPRax, 2021/6.

68 To borrow the words of AG Ćapeta in joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others and Commission v KS and KD*, ECLI:EU:C:2023:901, para. 150.

69 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 84 (explaining that, subject to the existence of a system of review embedded in the Treaties, and of a way of ensuring an effective review of awards, judicial review may be limited in nature).

70 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 75.

71 See, to that effect, ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, paras. 86 and 101.

the *legal classification* which was given, in the light of that interpretation, *to the facts* as established and assessed by the arbitration body".[72]

Why is that the case? In the context of the judicial structure of Art. 19 para. 1 TEU, the uniform interpretation of EU legal concepts serves not only the parties to the arbitration agreement but also the public interest as a whole. The effectiveness of that system, and the distribution of powers within it, cannot be guaranteed by a mere "light touch" review of the interpretation or application of the law. That is particularly so for questions of the protection of fundamental rights, in relation to which it is the EU courts' role in a democratic society to protect that society's subjects against unjustified limitations. In the absence of a legislative framework to that effect, balancing the rights inherent to that protection can generally only occur on a case-by-case basis.[73] This explains the need for the possibility to review the protection of such rights for each case going to arbitration. It is also why the Court's language in *Royal Football Club Seraing* regarding the intensity of judicial review of the interpretation and application of the law differs from that concerning the review of elements of fact.

It would appear that that language is inspired by the Court's own jurisdiction in appeal matters from the General Court.[74] In such instances, the Court's jurisdiction is "limited to points of law".[75] As is settled case-law, that jurisdictional limitation does not prevent the Court from hearing grounds of appeal relating to the "*interpretation or application of European Union law*",[76] the "*legal consequences*" attached to that exercise,[77] and the "*legal characterisation*" of facts and the "*legal conclusions* which the General Court has drawn from them".[78] Given the similarity of the language used by the Court in relation to its own jurisdiction on appeal and that ascribed to EU law courts when conducting a public policy review of an

72 See, to that effect, ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, paras. 86 and 101. Emphasis added.

73 See, by analogy, as regards the possibility for such a "pre-balancing" of fundamental rights by the legislator, Opinion of AG Čapeta in case C-115/22, *NADA and Others*, ECLI:EU:C:2023:676, para. 139. Needless to the validity of such a balancing assessment could always be challenged before the EU courts.

74 That is, for all areas except the areas of law listed in Art. 58a of the Statute of the Court of Justice (OJ C 202, 7.6.2016, p. 210) for which permission must first be requested that an appeal is allowed to proceed, given that certain decisions of a number of EU agencies are already subject to a double review by the relevant Board of Appeal and by the General Court.

75 See Art. 51 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ L 319, 25.11.1988, p. 1) and Art. 58 of the Statute of the Court of Justice (OJ C 202, 7.6.2016, p 210).

76 See, ex multis, ECJ, case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 47 and the case-law cited (explaining that "provided that the appellant challenges the interpretation or application of European Union law by the General Court, the points of law examined at first instance may be argued again in the course of an appeal").

77 See, ex multis, ECJ, case C-122/16 P, *British Airways v Commission*, ECLI:EU:C:2017:861, para. 52.

78 See, ex multis, ECJ, case C-337/15 P, *Ombudsman v Staelen*, ECLI:EU:C:2017:256, para. 53 and the case-law cited.

arbitral award, it would seem only logical for the latter to take inspiration from the Court's case law. This could be particularly helpful for those instances where it is unclear whether a particular argument "on appeal" (that is, where a challenge to an arbitral award is made before an EU law court) falls within the scope of an EU law court's jurisdictional powers of review. This also means that, in reality, said limitation (to the extent that it can be called that) to an EU law court's intensity of review does not close the door to an obvious error in the finding of fact. If guidance is taken from the Court's case-law, review of the findings of fact underlying an arbitral award would still be open to arguments asserting, for example, that the arbitral tribunal failed in its duty to act diligently in its assessment of the facts; that said tribunal distorted those facts; that it did not obtain evidence lawfully; that it failed to respect the legal principles and rules relating to the burden of proof; or that did not take the right legal criteria as the basis for its appraisal of the facts and evidence.[79]

At this point, the reader may question how the above directions on the applicable intensity of review relate to the existing case-law on "public policy" rendered in the context of the Brussels I Regulation. Recall, for example, the judgment in *Real Madrid Club de Fútbol*, where the Court held that the concept of "public policy" is limited to "manifest breaches" of certain EU fundamental rights, such as Art. 11 CFR.[80] Naturally, it could be argued that that line of case-law would require only "manifest" breaches of fundamental rights to be capable of review before an EU law court.[81]

That, however, would be an incorrect understanding of the "manifest" breaches standard applicable in the realm of the Brussels I Regulation. It appears clear that

79 See *Lenaerts*, *Gutman*, *Nowak*, p. 646 and the case-law cited. See also, ex multis, ECJ, case C-403/04 P and C-405/04 P, *Sumitomo Metal Industries and Nippon Steel v Commission*, ECLI:EU:C:2007:52, para. 39 and the case-law cited (explaining that "the jurisdiction of the Court of Justice to review the findings of fact by the Court of First Instance therefore extends, inter alia, to the substantive inaccuracy of those findings as apparent from the documents in the file, the distortion of the evidence, the legal characterisation of that evidence and the question whether the rules relating to the burden of proof and the taking of evidence have been observed").

80 See ECJ, case C-633/22, *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:843, para. 39 and the case-law cited (explaining that "the fact that the manifest error in question concerns a rule of EU law, and not a rule of national law of the Member State in which enforcement is sought, does not alter the conditions for reliance upon the public policy clause for the purpose of Article 34(1) of [the Brussels I Regulation], irrespective of whether it is a substantive or procedural legal rule. In accordance with settled case-law, it is for the national court to ensure with equal diligence the protection of rights established in national law and rights conferred by EU law. Consequently, the public policy clause would apply only where the recognition or enforcement of the judgment concerned in the Member State in which enforcement is sought would result in the manifest breach of a rule of law regarded as essential in the EU legal order or of a right recognised as being fundamental within that legal order and therefore in the legal order of that Member State").

81 In his analysis of the "minimalist" approach to public policy, *Penades Fons* argues that that is the position shared by the French, Austrian, Danish, German, Italian, Spanish and Swedish approaches to arbitration. See *Penades Fons*, CMLR 2010/4, pp. 1081 et seq.

the *Real Madrid Club de Fútbol* line of case-law relates to the free movement of judgments *rendered within the system of Art. 19 TEU* on the basis of the Brussels I Regulation. That regulation precisely has as its objective the free circulation of *judgments* on the basis of mutual trust in the common legal system established by the Treaties.[82] In those cases, the principle of mutual trust permits greater limitation of Art. 47 CFR given that, in principle, review by one EU law court *has already occurred* and a second review should only be permissible in exceptional circumstances.[83] So as to respect that general idea of deference to judgments of other "Article 19 TEU courts", the "manifest" violations standard therefore is intended to minimise review to ensure the effectiveness of the framework established by the Brussels I Regulation.

However, the principle of mutual trust does not apply outside the Art. 19 TEU architecture, and so cannot be extended to arbitral tribunals.[84] That means that a review for public policy violations by an EU law court of an arbitral award rendered outside the Art. 19 TEU structure is *not* subject to the same standard as a judgment falling within the scope of the Brussels I Regulation. Precisely because mutual trust does not apply, an EU law court must carry out a strict necessity analysis of any possible limitations to Art. 47 CFR. That is also why there is no deference to a prior review for "public policy" control (such as was the case with the Swiss Federal Supreme Court in *Royal Football Club Seraing*). In fact, it is precisely because of the lack of mutual trust towards systems of dispute resolution outside the scope of the judicial framework of Art. 19 TEU that the Brussels I Regulation excludes from its scope of application the free circulation of commercial arbitral awards rendered outside that system.[85]

82 See recital 26 of the Brussels I Regulation, which explains that "[m]utual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure".

83 See ECJ, case C-633/22, *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:843, para. 42 and the case-law cited) (explaining that "it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law").

84 See, to that effect, Opinion 1/17 of the ECJ, *EU-Canada CET Agreement*, ECLI:EU:C:2019:341, para. 129 (explaining that the "principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State").

85 See recital 12 of the Brussels I Regulation (explaining, inter alia, that "this Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law") and Art. 1 para. 2 lit. d thereof.

Accordingly, it would be wrong to infer any guidance from *Real Madrid Club de Fútbol* and other case-law relating to the Brussels I Regulation as regards the *seriousness* of a breach of an element of EU public policy. To ensure that the essential character of system established by the Treaties remains unaltered, *any* violation of a fundamental right, irrespective of its severity, must be sufficient to trigger the review competence of an EU law court.[86] The converse would imply that EU law would be willing to tolerate certain restrictions of its foundational principles over others. However, this is difficult to reconcile with the risk-based approach that the Court takes to challenges to the foundational principles that establish the EU legal order.[87] To use the language of Advocate General Wathelet in *Genentech*: "no system can accept infringements of its most fundamental rules making up its public policy, irrespective of whether or not those infringements are flagrant or obvious."[88] Accordingly, there is no place for a "crève aux yeux" standard for EU public policy violations.

2. The scope of judicial review

Regarding the *scope of judicial review*, the Court's guidance from *Royal Football Club Seraing* appears straightforward: we already know since *Nordsee* and *Eco Swiss* that it is permissible to limit the Court's review to elements of EU "public policy". As discussed above, this limitation is a legitimate interference by the freedom of contract, as recognised in Art. 16 CFR, with the right to effective judicial protection, as protected in Art. 47 thereof. The judgment in *Royal Football Club Seraing* recalls and confirms the possibility of this limitation given that "consistency with that public policy constitutes an essential complement to the structured network of principles, rules and mutually interdependent legal relations binding the

86 The converse would furthermore mean that the Court would have to enter, on a case-by-case basis, into an assessment of the complexity of the case before it and the EU public policy violation at issue. As both AG Wathelet in his Opinion in case C-567/14, *Genentech*, ECLI:EU:C:2016:177, para. 64 and the Bundesgerichtshof (German Federal Court of Justice) in BGH, KZB 75/21, para. 17, explained, particularly in cases where "manifest" violations of EU public policy are difficult to establish, that would result in making it excessively difficult, if not impossible, for an EU law subject to exercise the rights conferred on them by EU law.

87 See, by analogy, Opinion 1/00 of the ECJ, *Agreement on the establishment of a European Common Aviation Area*, ECLI:EU:C:2002:231, paras. 6 and 12; case C-118/07, *Commission v Finland*, ECLI:EU:C:2009:715, para. 33; and case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875, para. 46 (all highlighting that the mere existence of a risk to the alteration of the foundational structure of the EU legal order is sufficient for a finding of incompatibility).

88 See Opinion of AG Wathelet in case C-567/14, *Genentech*, ECLI:EU:C:2016:177, para. 67. See also BGH, KZB 75/21, para. 15, in which the Bundesgerichtshof explains that "[k]eine Rechtsordnung kann es hinnehmen, dass Verstöße gegen ihre grundlegendsten Normen durch ihre eigenen Gerichte bestätigt werden, unabhängig davon, ob diese Verstöße offenkundig oder offensichtlich sind oder nicht" ("no legal order can accept that violations of its most fundamental norms are confirmed by its own courts, regardless of whether these violations are manifest or obvious or not").

European Union and the Member States and binding the Member States to each other".[89] Appearances, however, can be deceiving: after all, what *precisely* is "EU public policy"?

E. "EU public policy": all of EU law

An understanding of the scope of EU "public policy" is important from two perspectives. First, if review of an arbitral award may be limited to "the principles and provisions which form part of public policy",[90] it may be useful to know what precisely need *not* be reviewed by the competent EU law court faced with a challenge to an arbitral award. Second, in *Royal Football Club Seraing*, the Court finds that its interpretation of the concept of "public policy" is in line with the New York Convention.[91] Although the European Union is not a member of that convention, for the purposes of ensuring its uniform application across the Member States, particularly insofar as it relates to a possible derogation from EU law under Art. 351 TFEU, the Court may interpret that instrument.[92] In effect, therefore, the Court is able to harmonise the meaning of concepts used in that convention, such as that of the concept of "public policy", as referred to in Art. V para. 2 lit. b of the New York Convention,[93] *across* the national legal orders of the Member States. With its interpretation of that convention, the Court therefore creates an EU-specific interpretation of that concept for the purposes of the EU legal order, and thereby among the

89 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 87.

90 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 85. See also, to that effect, ECJ, case C-124/21 P, *International Skating Union v Commission*, ECLI:EU:C:2023:1012, para. 193 (referring to "fundamental provisions that are a matter of EU public policy").

91 See, to that effect, ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, paras. 116 and 117 (explaining that the New York Convention "also provides for judicial review of arbitral awards as regards consistency with public policy" and that the obligation, under that convention, to recognise the existence and authority of foreign arbitral awards "goes hand in hand with the obligation, for such a State, to ensure that the persons concerned have the possibility of obtaining from the national court or tribunal having jurisdiction, either at those persons' request or of the court's or tribunal's own motion, a review of those awards for consistency with that State's public policy").

92 See, as regards the Court's incidental jurisdiction for international agreements to which the European Union is not a party, ECJ, case C-216/01, *Budějovický Budvar*, ECLI:EU:C:2003:618, paras. 134 and 143 and, by analogy, case 130/73, *Vandeweghe and Others*, ECLI:EU:C:1973:131, paras. 2 and 3. See also, in the realm of arbitration, ECJ, case C-516/22, *Commission v United Kingdom (Judgment of the Supreme Court)*, ECLI:EU:C:2024:231, paras. 64 et seq (as regards the Court's interpretation of the ICSID Convention, to which the European Union is not a party).

93 That provision reads as follows: "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (…) (b) The recognition or enforcement of the award would be contrary to the public policy of that country.".

Member States, without, however, altering the meaning of that concept for relations with third States.[94]

So, what precisely is "EU public policy"?

Under EU law, the scope of that concept has not been defined. A number of pointers from the case-law on the scope of the public policy exception in the Brussels I Regulation allow us to infer that violations of EU fundamental rights[95] – characteristic of a society based on the rule of law – [96] as well as certain substantive and procedural "safeguards" fall within that concept.[97] We also know from *Nordsee*, *Eco Swiss* and *International Skating Union* that that concept entails at least the effectiveness of Art. 101 and 102 TFEU.[98] Those cases had already suggested that EU law would take an approach to public policy that would cover entire fields of primary and secondary law,[99] as opposed to individual provisions or even broader contours, such as "state's most basic notions of morality and justice".[100] The judgment in *Royal Football Club Seraing* follows that trend of "categorisation" and adds to the existing list of fields subject to review by the EU law judge all those "principles and provisions of primary and secondary EU law which are essential to the legal order established by the Treaties or are of fundamental importance for the accomplish-

94 See, by analogy, as regards the ICSID Convention, ECJ, case C-516/22, *Commission v United Kingdom (Judgment of the Supreme Court)*, ECLI:EU:C:2024:231, para. 68 (explaining that because the ICSID Convention is an "international agreement is capable of falling within the scope of the first paragraph of Article 351 TFEU, which is a provision of EU law in respect of which the Court has exclusive jurisdiction to give a definitive interpretation").

95 See, to that effect, ECJ, case C-633/22, *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:843, para. 67 (explaining that "a manifest breach of Article 11 of the Charter comes within public policy in the Member State in which enforcement is sought and therefore constitutes the ground for refusal laid down in [the Brussels I Regulation]" and case C-7/98, *Krombach*, ECLI:EU:C:2000:164, para. 40 (explaining that "recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the [ECHR] itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin").

96 See, by analogy, ECtHR, no. 10934/21, *Semenya v. Switzerland*, judgment of 10 July 2025, para 236 (characterising the protection of fundamental rights as "an essential element of public policy").

97 See, to that effect, ECJ, case C-681/13, *Diageo Brands*, ECLI:EU:C:2015:471, paras. 46 et seq.

98 See ECJ, case 102/81, *Nordsee*, ECLI:EU:C:1982:107, para. 37, case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, paras. 36 and 37, and case C-124/21 P, *International Skating Union v Commission*, ECLI:EU:C:2023:1012, paras. 192 and 193.

99 See, in that regard, *Bermann*, Arbitration International 2012/3, p. 418 (who observes that the *Eco Swiss*, *Mostaza Claro* and *Asturcom* case-law appears to move "whole fields of EU law (…) *en bloc* within the domain of public policy").

100 As is the approach taken by the United States courts; see, for example, *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (1974). See likewise the approach taken by the UK House of Lords in *Egerton v. Brownlow* [1853] 4 HLC 1, [1843 to 1860] All ER Rep 970, at p. 995, describing "public policy" as "that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good".

ment of the tasks entrusted to the European Union".[101] As the Court then, in essence, explains, this includes the four freedoms, given that "they form part of the foundations of the internal market comprising an area without internal frontiers".[102]

Much may be inferred from those directions. The reference to "principles and provisions (…) essential to the legal order established by the Treaties" arguably harks back to *Achmea*, where the Court explained that the "structured network of principles" which the EU legal order establishes, is characterised inter alia "by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves."[103] Although, strictly speaking, not necessary for the purpose of defining the scope of EU public policy, *Royal Football Club Seraing* takes up that direct effect characterisation when it explains the common denominator behind Art. 101 and 102 TFEU, Art. 45, 56 and 63 TFEU, Art. 47 CFR, and Art. 19 para. 1 TEU.[104] However, direct effect is, in itself, devoid of substance and so requires always *some* link to a substantive element of EU primary or secondary law. As such, "direct effect" does not provide for a closed category of EU law provisions that could constitute EU public policy. But if direct effect is essential to the EU public order, then so must be, at least, the principles of primacy, conform interpretation, State liability for violation of EU law, and the requirements of equivalence and effectiveness of domestic enforcement of EU law. Structurally, they all shape the judicial architecture of the European Union and so define the scope of Art. 19 TEU. However, those concepts, too, are not "substantively whole"; they all require some sort of hook to primary or secondary EU law. Given the vast (and ever-expanding) body of EU law, it is essentially impossible to determine with certainty which provisions could hold EU public policy status through a link with one or more of the structural principles highlighted above.[105]

Moreover, by suggesting that EU public policy should cover all provisions of primary and secondary law that are "of fundamental importance for the accomplishment of the tasks entrusted to the European Union",[106] it could be argued that the Court addresses all of those provisions of EU law through which the

101 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 87. See also, to that effect, ECJ, case C-681/13, *Diageo Brands*, ECLI:EU:C:2015:471, para. 48; case C-590/21, *Charles Taylor Adjusting*, ECLI:EU:C:2023:633, para. 36 and the case law cited; and case C-633/22, *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:843, paras. 38 and 39.

102 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 89.

103 ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para 33.

104 Compare ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 88, as regards Art. 101 and 102 TFEU, para. 89, as regards Art. 45, 56 and 63 TFEU, para. 119, as regards Art. 47 CFR, and para. 120, as regards Art. 19 para. 1 TEU.

105 (Former AG) *Bobek* has even argued that every provision of a directive should hold (horizontal) direct effect. See *Bobek*, International Journal of Comparative Labour Law and Industrial Relations 2023/2.

106 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 87. See also, to that effect, ECJ, case C-681/13, *Diageo Brands*, ECLI:EU:C:2015:471, para. 48; case C-590/21, *Charles Taylor Adjusting*, ECLI:EU:C:2023:633, para. 36 and the case law cited; and case C-633/22, *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:843, paras. 38 and 39.

EU legislature seeks to put in place measures for the pursuit of the *objectives* laid down in the Treaties. That conclusion may be read from the reference to *Mostaza Claro*, expressly cited (albeit "to that effect") in the very paragraph of *Royal Football Club Seraing* that defines those "principles and provisions" that fall within the scope of EU public policy. In *Mostaza Claro*, the Court found that the Unfair Contract Terms Directive[107] constituted an element of EU public policy, given that it seeks "to strengthen consumer protection" and thus a measure "essential to the accomplishment of the tasks entrusted to the Community".[108] This conclusion was, in turn, justified in *Asturcom* on the basis "that [the Unfair Contract Terms Directive] *as a whole* constitutes, in accordance with Article 3(1)(t) EC [laying down the objective that the Community is to contribute to the strengthening of consumer protection], a measure which is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the Community."[109]

Mostaza Claro and *Asturcom* evidence that – even prior to *Royal Football Club Seraing* – there was guidance from the Court that all measures of EU secondary law that pursue one of the objectives of EU integration constitute EU public policy. Again, that conclusion is the only logical contention if we approach commercial arbitration from the perspective of the limitations of the freedom of contract, as respected in Art. 16 CFR. Indeed, the converse would mean that parties could disapply, through contract, certain pillars of EU integration. However, the consequence of that approach means also that, unless we are to distinguish between "higher" objectives of EU integration and those less worthy of protection under the banner of EU public policy, *all* other measures put in place in pursuance of an EU objective should be treated as EU public policy. [110] For example, consider fisheries regulation, which is adopted in view of the *objectives* of the common agricultural policy, as set out in Art. 39 para. 1 TFEU. Measures adopted for this purpose enable the Euro-

107 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p 29).

108 See ECJ, case C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675, para. 37. According to the Court, that interpretation was "necessary for ensuring that the consumer enjoys effective protection, in view of the real risk that he is unaware of his rights or encounters difficulties in enforcing them" (see para 28 of said judgment). Similar directions also derive from ECJ, case C-40/08, *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, para. 52 (explaining that "in view of the nature and importance of the public interest underlying the protection which [the Unfair Contract Terms Directive] confers on consumers, Article 6 [thereof] must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy".

109 See ECJ, case C-40/08, *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, para 51.

110 Therefore moving away from the doctrinally-straightforward idea voiced by Advocate General Wathelet that "EU public policy" entails all those "principles that form part of the very foundations of the [EU] legal order" to the point that "their breach (…) cannot be tolerated (…) because such a breach would be unacceptable from the viewpoint of a free and democratic State governed by the rule of law". The Advocate General thus characterised such rules as "so fundamental to the [EU] legal order that [they] cannot be subject to any derogation whatsoever in the context of the case at issue". See para. 182 of the Opinion of AG Wathelet, case C-536/13, *Gazprom*, ECLI:EU:C:2014:2414.

pean Union to achieve one of the objectives assigned to it by the Member States. As one of the objectives of EU integration – a common agricultural policy – under the qualifiers discussed above, such measures constitute EU public policy. However, under that logic, one would elevate "micro" policies to the "macro" level that is EU public policy status: the rules on safety goggles and hard hats? Pursuant to the above logic, these would constitute public policy given that they constitute an implementation of the objectives of Art. 151 TFEU to encourage improvements in the safety and health of workers, and thus uniform harmonisation of certain safety rules at work.[111] The list could go on: data protection rules? EU public policy because they constitute an implementation of Art. 16 TFEU and reflect a right protected in Art. 8 CFR. Restrictive measures? Naturally included in that scope, given that they implement "decisions which (…) define the approach of the Union to a particular matter of a geographical or thematic nature", as per Art. 29 TEU, and so are intended to protect the essential interests of the Union's security, in line with Art. 21 TEU.[112]

Finally, a point of reflection: if, as *Royal Football Club Seraing* recognises that Art. 47 CFR is "EU public policy", but, at the same time, grants an EU law subject an "effective remedy" to bring a case before an EU law court, does that not entail that that provision is capable of "importing" any rule of EU law, irrespective of its structural importance to the legal order as a whole, in an action against an arbitral award? This is because, if an EU law subject were not capable of bringing certain violations of EU law to court (that is, if certain rules of EU law were not capable of constituting "EU public policy"), those individuals could arguably not exercise their right to an *effective* remedy.[113] There is recent case-law, rendered in Grand Chamber formation, that suggests that the "core" of Art. 47 CFR covers the availability of such an *effective* remedy. Naturally, this core cannot be balanced away by

111 See ECJ, case C-392/21, *Inspectoratul General pentru Imigrări (Acquisition of spectacles by a worker)*, ECLI:EU:C:2022:1020, para. 32 and the case-law cited.

112 See, to that effect, ECJ, case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, paras. 115 and 150. The public policy nature of EU restrictive measures is also pending as ECJ, case C-802/24 *Reibel*.

113 See ECJ, case C-362/14, *Schrems*, ECLI:EU:C:2015:650, para. 95 and the case-law cited (explaining that "legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. *The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law*"). Emphasis added.

an exercise of Art. 16 CFR.[114] From this perspective, Art. 47 CFR could be considered as the *only* EU public policy element truly warranting recognition as "EU public policy". Therefore, regardless of the actual scope of the concept of "EU public policy", recognising Art. 47 CFR as forming part of that concept has, it is asserted, the effect that *all* of EU law must form part of the rules that an EU law court must review of its own motion.

F. The missing element: the need for an EU seat

What is the consequence to be drawn from the above assessment? Any balancing of rights and principles presupposes a way of *controlling* that balancing exercise. That is because a significant interference with Art. 47 CFR may have an effect on the arbitrability of an EU law dispute. Likewise, if that provision is interpreted as capable of "importing" substantive EU law, and therefore EU public policy, an interference with that right automatically arises as soon as an EU law dispute is assigned to arbitration. In those circumstances, the principle of effectiveness would require that there must be a way of seeking review of that exercise before an EU law court embedded in the structure of Art. 267 TFEU.[115]

Nordsee and *Eco Swiss* do not address that aspect since those cases involved disputes in which the arbitration at issue was located in a Member State. Hence, for those cases, there already existed a possibility to seek annulment of the award at issue before an EU law court — as is evidenced by the very fact that those actions formed the subject of a preliminary reference. While *Royal Football Club Seraing* and *International Skating Union* allude to the challenge of *controlling* the balancing of rights inherent in any recourse to commercial arbitration, those judgments did not need to draw the necessary consequences.[116]

114 See, by analogy, ECJ, case C-715/20, *X (Lack of reasons for termination)*, ECLI:EU:C:2024:139, para. 79 (finding a violation of Art. 47 CFR on the basis of a rule of Polish law that did not require a statement of reasons for the termination of certain types of employment contracts, and therefore finding that "the difference in treatment introduced by the applicable national law (…) undermines the fundamental right to an effective remedy enshrined in Article 47 of the Charter, since a fixed-term worker is deprived of the possibility, which is however available to a permanent worker, of assessing beforehand whether he or she should bring legal proceedings against the decision terminating his or her employment contract and, where appropriate, to bring an action challenging in a precise manner the reasons for such a termination").

115 See, to that effect, ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, paras. 108, 111, and 121.

116 See, to that effect, ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 100 (explaining that "in the absence of (…) an indirect review or if that review is not effective, (…) there would be no legal remedy making it possible to ensure effective judicial protection for the individuals concerned") and ECJ, case C-124/21 P, *International Skating Union v Commission*, ECLI:EU:C:2023:1012, para. 194 (explaining that "in the absence of (…) judicial review, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law").

However, what happens when the seat of the arbitral tribunal called upon to resolve an EU law dispute is placed outside of the European Union? What if legal theory presupposes no fixed seat (as is the age-old mantra for ICSID arbitration)? In such cases, as the factual background to *Royal Football Club Seraing* evidences, a national court may consider itself incompetent to review the award at issue.[117] Parties are generally free to locate their seat of arbitration where they wish. That is to say, they are capable of deciding, formally speaking, where the arbitral award will be made. In the absence of such a choice, arbitral tribunals are given broad discretion to do so.[118] However, the choice of seat directly impacts the possibility of parties to access EU public policy review, and therefore also access to the preliminary ruling procedure under Art. 267 TFEU.[119] That is because the choice of the seat of arbitration has consequences on the national courts responsible for the law applicable to public policy review (such as through an action for annulment) of any ensuing arbitral award.[120] That possibility of choosing a non-Member State seat for an EU law dispute consequently opens up a systemic risk of circumvention of the rights and principles protected under EU public policy.[121] The existence of such a risk has the potential of undermining the balancing of EU law rights and principles, and therefore the effectiveness of EU law.[122] The Court has already on many occasions explained that the mere existence of such a risk *in itself* leads to a situation incompatible with the judicial structure of the Treaties.[123]

One way in which national courts have addressed this issue is to require an *ex ante* compatibility assessment with EU law of a dispute from a court or tribunal

117 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 49 (highlighting that the cour d'appel de Bruxelles (Court of Appeal, Brussels) found that the grounds of appeal before it were inadmissible in so far as they were directed against FIFA given the *res judicata* effect of the CAS award before it).

118 See, for example, Art. 18 para. 1 of the UNCITRAL Arbitration Rules 2021 and Art. 25 para. 1 of the SCC Rules of Arbitration (2023).

119 *Girsberger* and *Voser* refer to the seat of the arbitration as the "legal home binding the arbitration to a national arbitration law" and thus as the law determining the relationship between the national courts at issue and the arbitral tribunal. The choice of seat therefore has an effect on various elements linked to the powers of the arbitral tribunal, such as anti-suit injunctions. See *Girsberger*, *Voser*, paras. 596 et seq.

120 See *Born*, p. 40. See also Art. V para. 1 lit. e of the New York Convention, which lays down that an arbitral may be refused recognition and enforcement inter alia where the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.".

121 See, for example, recital 24 of Council Regulation (EU) 2025/1494 of 18 July 2025 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L, 2025/1494, 19.7.2025), which alludes to the possibility that arbitral awards constituting a breach of EU public policy are enforced in third State courts.

122 Coming to the same conclusion, see *Boddin*, European Papers 2025/3, p. 679.

123 See, to that effect, the case-law cited *supra* at note 86 and, likewise, ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 56 and ECJ, case C-741/19, *Republic of Moldova*, ECLI:EU:C:2021:655, paras. 59 and 60.

placed within the Art. 19 TEU structure.[124] *Royal Football Club Seraing* hints in this direction by, in effect, requiring Belgian law to contain the possibility for interim measures in favour of full judicial review of EU public policy matters.[125] However, said *ex ante* solution to the arbitrability of an EU law dispute presupposes clarity over which law applies to the arbitration agreement, where the tribunal's seat is placed, and a court with jurisdiction willing to take up the task of determining the *ex ante* arbitrability of the case before it. For a cross-border dispute involving a complex assessments of law and fact[126] or multiple tangibles[127] *ex ante* control by an EU law court is, at best, unlikely to ensure effective protection. Moreover, *ex ante* control cannot ensure that the arbitral tribunal also follows the relevant interpretation provided by the competent EU law court. *Ex ante* control is therefore inherently incapable of removing the above-described risk to the coherence of the EU legal order. That, in turn, would have the effect of rendering all EU law disputes non-arbitrable, given that there would be no way of ensuring the effectiveness of potential elements of EU law arising in such a dispute. The consequence: a negation of the freedom of contract, as recognised by Art. 16 CFR.

The question therefore arises whether the rights-balanced reading discussed in this article mandates that an EU law dispute's seat of arbitration must always be placed *within* the EU legal order. In that way, there would always be a national EU law court competent to assist the tribunal, be that through the status of a *juge d'appui* or as "reviewing" court, and thus capable of ensuring the correct

124 See § 1032 of the German rules of civil procedure. That provision lays down that a German court may determine the admissibility (or lack thereof) of arbitral proceedings at the request of a party and is aimed at enhancing the efficiency of arbitrations and promotes legal certainty at a very early stage of arbitral proceedings.

125 See ECJ, case C-600/23, *Royal Football Club Seraing*, ECLI:EU:C:2025:617, para. 105 and the case-law cited (referring to the need for a "power to grant interim measures which ensure the full effectiveness of the judgment to be given on the substance of the case").

126 See, by analogy, AG Wathelet, case C-567/14, *Genentech*, ECLI:EU:C:2016:177, para. 65, in which he explains that a limited review of arbitral awards would entail that "it would cover only 'the most obvious infringements [of Article 101 TFEU], such as price-fixing or market-sharing agreements'. Restrictions by effect would therefore completely evade review by the courts hearing actions for annulment, since a finding that such restrictions exist would require more than a token examination of the substance of the arbitral award, which the French courts are unable to do."

127 Take, by way of example, the factual parameters of the famous United States Supreme Court judgment in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), in which that court was faced with a Swiss arbitration agreement in a dispute between parties from Puerto Rico and Japan which raised issues of US antitrust law. In fn. 19 of that judgment, the United States Supreme Court famously found that if it transpired at the post-award (enforcement) stage that the arbitration agreement and the choice-of-law clause therein "operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy".

balancing of the EU rights and principles at play in an EU law dispute.[128] In that way, it would also be excluded that there could occur enforcement in a third State (under a much different interpretation of the concept of "public policy"), without the possibility of ensuring judicial review compatible with the requirements of the Treaties.[129] The converse would indeed mean that party autonomy could override the foundational principles of EU law, including fundamental rights protection, without there being a possibility to hold accountable a Member State for any ensuing EU law violations.[130] In view of that risk, the consequence of the above discussion appears simple: non-EU seats in arbitration agreements for EU law disputes are inherently incompatible with the Treaties.

G. Conclusion

This article argues that the EU law approach to commercial arbitration involves balancing the rights and principles of the EU legal order. It concludes that commercial arbitration is a creature of the freedom of contract, respected by Art. 16 CFR, which, in the EU legal context, always needs to be balanced against the right to effective judicial protection, as enshrined in Art. 47 CFR (and thus the structural principles protected by Art. 19 TEU). However, given that the judicial architecture of Art. 19 TEU cannot be balanced away and given that any limitation of the principle of effective judicial protection, enshrined in Art. 47 CFR, must be "strictly necessary", the freedom of contract in the EU legal order has certain limits. Two of those limits are reflected in the judgment in *Royal Football Club Seraing*: a (somewhat) limited intensity of judicial review and a (not really) limited scope of review in the form of the concept of "EU public policy". The challenge to the current sys-

128 That element is also supported by the respect accorded by foreign courts in arbitration-friendly jurisdictions to annulment proceedings at the seat of arbitration. See, for a recent example, US District Court for the District of Columbia in *Mercuria Energy Group Limited v Republic of Poland*, Case No. 1:23-cv-03572 (TNM), judgment of 8 September 2025).

129 See, to that effect, ECJ, case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875, para. 47 (explaining that "to allow a Member State, which is a party to a dispute which may concern the application and interpretation of EU law, to submit that dispute to an arbitral body with the same characteristics as the body referred to in an invalid arbitration clause contained in an international agreement (…), by concluding an ad hoc arbitration agreement with the same content as that clause, would in fact entail a circumvention of the obligations arising for that Member State under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU, as interpreted in the judgment of 6 March 2018, *Achmea* (C-284/16, ECLI:EU:C:2018:158)").

130 See, to that effect, Opinion 1/09 of the ECJ, *Agreement creating a Unified Patent Litigation System*, ECLI:EU:C:2011:123, paras. 86 to 88 (explaining, as regards the proposed unified patent court, that, to be compatible with EU law, the Member States must make good damage caused as a result of breaches thereof by their national courts, and even hold them financially liable and that "it is clear that if a decision of the PC were to be in breach of [EU law], that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member States").

tem of commercial arbitration of EU law disputes is the element of control: so long as parties are able to freely choose their seat of arbitration, and therefore the courts responsible for ensuring public policy review, the current system holds the inherent risk of circumvention of the balancing of EU law rights and principles. That risk is incompatible with the balancing exercise required in the commercial arbitration context. Given that risk, this article concludes that the rights and principles of the EU legal order mandate a seat of arbitration for EU law disputes within the European Union.

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