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THE CONSTITUTIONAL REVIEW OF FOREIGN ARBITRAL AWARDS

SUMMARY: 1. Introduction. – 2. The incompatibility between the mechanism of direct constitutional complaint and Art. V of the New York Convention. The necessary deference towards international arbitration. – 3. Constitutional norms as a vector of legitimacy: the necessity of extending the rule of law over acts of international arbitral tribunals. – 4. Public policy as a tool for ensuring the respect of constitutional norms in international arbitration. – 5. Conclusions.

1. It is very common, in modern literature, talking about a process of "constitutionalization" of the law. This notion refers to the increasing influence that domestic constitutions or supreme courts' *dicta* exert on one or several branches of the law, especially through the recognition of fundamental rights[1]. Some authors affirm that public international law equally shows such an evolution, in that, in the exercise of public authority, States are increasingly constrained by international norms aimed at safeguarding fundamental rights of individuals[2]. Regardless of the acceptance of the concept of constitutionalization of international law (which is not the subject of the present paper), however, the need to grant respect for human rights also has repercussions at the so-called "transnational level", i.e. the one concerning the relationships among

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[1] MOLFESSIS, *L'irrigation du droit par les décisions du Conseil constitutionnel*, *Pouvoirs*, 2003, p. 89 ff.

[2] ROSENFELD, *Modern Constitutionalism as Interplay Between Identity and Diversity*, in *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Rosenfeld ed.), Durham, 1994, p. 3 ff.; SPIRO, *Treaties, International Law, and Constitutional Rights*, *Stanford Law Review*, 2002-2003, p. 2022. For a criticism to such a "myth" of constitutionalization see IOVANE, *The Italian Constitutional Court Judgment No. 238 and the Myth of the 'Constitutionalization' of International Law*, *Journal of Int. Criminal Justice*, 2016, p. 595 ff.

private individuals (or entities) of different nationalities, which are regulated by private international law; this is a subject which has been studied and analyzed by Angelo Davì and on which we would like to attract, once again, his attention[3]. In this regard, it is possible to say that – within the broader spectrum of private international law – the respect of fundamental rights, both substantive and procedural, is affecting also international commercial arbitration[4]. This phenomenon is of extreme relevance considering the current expansion of the number of international disputes solved through international arbitration[5], which has become a veritable alternative to court litigation in commercial as well as in investment disputes.

It is not by chance, indeed, that the more international commercial arbitration is characterized by the respect for fundamental procedural (and substantive) guarantees, the more the judicial review of arbitral awards implemented by state courts is characterized by deference towards arbitral decisions (which are increasingly considered as a perfect surrogate of domestic judgments). This deference is illustrated, first of all, by the restrictive grounds provided by Art. V of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards to refuse such recognition and/or enforcement (as well as the limited grounds laid down by national laws to set aside arbitral awards), and secondly, by the so-called *favor arbitrati*, which is an attitude expressly assumed by national courts which do not interfere with arbitral proceedings unless this is strictly necessary[6].

Recently, however, the well-established idea of minimal interference of judges with the arbitration process seems to be questioned by some Constitutional Courts, which – in countries where a mechanism of individual constitutional recourse is allowed – have recently set aside international arbitral awards[7] at the enforcement stage on the basis of an in-

[3] DAVÌ, *Diritto internazionale privato e diritti umani*, in *La tutela dei diritti umani e il diritto internazionale* (Di Stefano and Sapienza eds), Napoli, pp. 209-216.

[4] CARELLA, *Arbitrato commerciale internazionale e Convenzione europea dei diritti dell'uomo*, in *La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato* (Carella ed.), Torino, 2009, 53 ff.; ZARRA, *Rinuncia preventiva all'impugnazione dei lodi arbitrali internazionali e compatibilità con l'art. 6 della Convenzione europea dei diritti dell'uomo*, *Rivista dell'arbitrato*, 2016, p. 302 ff.

[5] BORN, *International Commercial Arbitration*, London, The Hague, 2009, p. 97.

[6] ZARRA, *Il principio del favor arbitrati e le convenzioni arbitrali patologiche nei contratti commerciali internazionali*, *Rivista dell'arbitrato*, 2014, p. 138 ff.

[7] In this regard we refer to awards that cannot be considered as purely domestic,

fringement of fundamental constitutional rights. This constitutional review of arbitral awards has been seen by some practitioners as creating a new avenue for challenging arbitral awards, thereby threatening the principle of their finality, which is the core of the New York Convention and is essential to the attractiveness of arbitration[8]. This practice has been generally criticized because it turns protectionism (i.e. the attitude that national courts should assume towards international arbitration in accordance to the idea of *favor arbitrati*) into interventionism, therefore putting into question the reliability of international arbitration. Indeed, "[t]here is a fine borderline between helpful assistance of the courts and abuse of the available judicial remedies within arbitration. If crossed, the entire purpose of opting for such an institution is undermined and its essentialness is jeopardized"[9].

This phenomenon comes in parallel with two other evolutions concerning the perception of international arbitration, which share the questioning of the legitimacy of the decisions of international arbitral tribunals. The first concerns an alleged broader legitimacy crisis which arbitration is facing, in particular in the field of international investment law, resulting from the feeling that arbitral tribunals could only grant protection to foreign private investors to the detriment of the national public interest (and also, sometimes, the fundamental rights of citizens)[10]. The second, which mainly regards common law jurisdictions, is the charge moved towards international commercial arbitration to allegedly run against the development of the common law, considering that arbitral awards are usually confidential and, hence, cannot form a body of precedents which may be used by future adjudicators[11]. The

due to the existence of a foreign element either in the parties or in the subject matter of the dispute. See, in this regard, art. I of the New York Convention 1958.

[8] Arbitration is, in fact, popular because it is perceived as a neutral and speedy mechanism of dispute settlement in which adjudicators are chosen on the basis of their competence in the specific subject. See LEW, MISTELIS, KRÖLL, *Comparative International Commercial Arbitration*, London, The Hague, 2003, p. 1 ff.

[9] MURIEL-BEDOYA, *Constitutional Review of Arbitral Awards: Between Protectionism and Interventionism*, *www.kluwerarbitrationblog.com*, 2015. *Contra* see BECERRA, *The constitutional review of international commercial arbitral awards in Latin America and the challenges for legal certainty. Insights from Colombian jurisdiction*, *Revista Tribuna Int.*, 2014, p. 11 ff.

[10] FRANCK, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, *Fordham Law Review*, 2005, p. 1521 ff.

[11] Lord THOMAS OF CWMGIEDD, *Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration*, *The Bailii Lecture 2016*, in

three phenomena, therefore, could be jointly considered as a general recalcitrance against (or political refusal of) international arbitration[12].

This is, however, not the case: this paper is not the place to address all these criticisms, which have been already dismantled elsewhere[13]. It will only focus on the aspect concerning the possibility for national constitutional courts to review the validity of arbitral awards at the enforcement stage, in order to show the inopportunity of the recourse to this remedy. We will, first of all, analyze and criticize the case law concerning the constitutional review of international arbitral awards. While, however, we believe that direct recourse to constitutional courts is not the proper avenue for challenging arbitral awards, we strongly believe that arbitration is not immune from the necessity of granting the protection of fundamental rights. For this reason, we will try to demonstrate that public policy can be used as a valuable tool in order to ensure the respect and application of fundamental rights in international arbitration.

2. The creation of a mechanism of direct (i.e. individual) constitutional complaint is considered, in certain legal systems, a key procedural remedy in the defense of individual fundamental rights, and as such is a symbol of the constitutionalization of legal orders. Indeed, several systems, mainly located in Latin America and Europe, have promoted the protection of fundamental constitutional rights through the creation of

https:// www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf, 2016, p. 2 ff.; FRENCH, *Arbitration and Public Policy*, *2016 Goff Lecture*, *Asia Pacific Law Review*, 2016, p. 3; BATHURST, *The importance of developing convergent commercial law systems, procedurally and substantively*, *15th Conference of Chief Justices of Asia and the Pacific*, in http://www.supremecourt.justice.nsw.gov.au, 2013, p. 11 ff.

[12] Indeed, as noted by MURIEL-BEDOYA, op. cit., the fine boundary between politics and law ought to be considered at all times. Looking at the bigger picture, there are several events that are not isolated from each other, nor from the issues previously exposed. *E.g.*, the actions taken by Ecuador, such as the termination of several BITs, the denouncement of the Washington Convention, the creation of a special commission for the audit of BITs and the investment arbitral system (CAITISA), jointly with the practice of reviewing the constitutionality of arbitral awards, may be considered as a political way of displacing international arbitration in that Country.

[13] ZARRA, *The New Investor-State Dispute Settlement Mechanisms Proposed by the EU and the Geneva Centre for International Dispute Settlement. A Step forward or a Hasty Reform?*, *Studi sull'integrazione europea*, 2018, p. 389 ff.; ID., *Arbitrato internazionale e ordine pubblico*, *Il giusto processo civile*, 2018, p. 539 ff.

an individual constitutional complaint mechanism. Beyond local particularisms, these procedural remedies known as writ of *amparo*, *recurso de queja*, *accion de tutela*, or *mandato de segurança*, grant individuals with "the right to a direct recourse to uphold constitutional rights against the omission or acts of the executive, the legislative, the judiciary"[14]. A clear example of this practice is provided by the 2008 Constitution of Ecuador, which sets forth the *Extraordinary Action Protection* mechanism, allowing a person to challenge judgments or final decisions within which there have been violations of constitutional rights (following the exhaustion of other remedies).

Although controversial from a theoretical perspective (considering that it is not provided in the law), in some legal orders certain lawyers – "seek[ing] to reshape the *status quo* or the benefit of their own position"[15] – proposed the constitutional complaint against international arbitral awards when their enforcement is sought pursuant to Art. III of the New York Convention 1958. In some countries this possibility has in fact been accepted[16]. Indeed, the expansive attitude assumed by certain national courts in reviewing arbitral awards "made it extremely attractive to private litigants to try identifying purported constitutional violations in their ordinary claims, as a way to take advantage of the enhanced constitutional proceedings available and prevail in their cases.

[14] DE JESUS, *The Impact of Constitutional Law on International Commercial Arbitration in Venezuela*, *Journal of Int. Arbitration*, 2007, p. 71. As noted by DE ALBA URIBE, *An Unusual Motion Against Arbitration Awards in Latin America*, http://kluwerarbitartionblog.com/blog/2013/06/27/an-unusual-motion-against-arbitration-awards-in-latin-america/, 2013, "the rationale behind the writ of amparo is twofold: (…) it seeks to protect the *cit*izens in the successful exercise of their constitutional rights and secondly, to guard the provisions of the Constitution ensuring their effectiveness when they are violated".

[15] GOMEZ, *The "Amparization" of the Justice System in Latin America and International Arbitration*, www.kluwerarbitrationblog.com/blog/2013/11/01/the-amparisation - of-the-justice-system-in-latin-america-and-international-arbitration, 2013.

[16] This is, e.g., the case of Ecuador. See Constitutional Court Judgment No. 123-13-SEP-CC, issued on December 19 2013; an Extraordinary Action Proceeding is also already present in international investment arbitration proceedings, where provisional measures proceedings were asked to be suspended by Constitutional Court judgment No. 028-14-SEP-CC. The controversy was PCA case No. 2012-10: *Merck Sharpe & Dohme Corporation v. The Republic of Ecuador*, in www.italaw.com/cases/1603. Both cases are mentioned in MURIEL-BEDOYA, op. cit. See also – for an analysis of the institution in Chilean law with regard to domestic arbitrations – TUCK, *The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas*, *Law and Business Review of the Americas*, 2008, p. 585.

This phenomenon, which has led to an abusive filing of extraordinary writs of amparo in several countries of [South America], has become known as 'amparization' of the justice system"[17].

While we could, to a certain extent, accept that the system of *amparo* is used for reviewing *domestic* awards[18], this remedy, in any case, shall not be used when the enforcement of *international* arbitral awards is sought in accordance with the New York Convention 1958. Indeed, in this last case, it would give birth to a new avenue for reviewing arbitral awards at the enforcement stage, which apparently is incompatible with Art. V of the same Convention – that, as showed by the use of the word "only"[19], sets forth a limited number of grounds for refusing recognition and enforcement – as well as with the perceived qualities of international arbitration as an autonomous system of dispute settlement[20] and with the *favor arbitrati* attitude[21]. The practice of constitutional recourses against arbitral awards, indeed, has been defined as a "pernicious practice that taints and confuses the role of the courts and

[17] GOMEZ, op. cit. In Europe this possibility has been generally excluded by countries which have mechanisms of direct constitutional complaint. See GYARFAS, *Constitutional Scrutiny of Arbitral Awards: Odd Precedents in Central Europe*, *Journal of International Arbitration*, 2012, p. 400 ff. A notable exception is, however, Croatia, where in 2004 the Constitutional Court admitted the possibility to review arbitral awards if other local remedies have been exhausted. See Constitutional Court of the Croatian Republic, Decision of 27 October 2004, U-III-669/2003.

[18] This would be, indeed, a legitimate sovereign choice of a State.

[19] "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, *only* if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […]" (emphasis added).

[20] This does not mean that arbitration is unrelated to domestic courts, but simply that it – in principle – should be able to proceed autonomously without any domestic undue interference. See ZARRA, *L'esecuzione dei lodi arbitrali annullati presso lo Stato della sede e la Convenzione di New York: verso un'uniformità di vedute?*, *Rivista dell'arbitrato*, 2015, p. 574 ff.

[21] Some critics exist also at the domestic level. In Ecuador, for example, it has been argued that the Extraordinary Action of Protection (mentioned above) is not applicable to arbitral awards nor to any decision issued by an arbitral tribunal due to the following reasons: (i) the Constitution does not consider this specific scenario; (ii) the alternative nature of arbitration; (iii) the nature of the subject matter of the arbitration; and (iv) because the Constitutional Assembly, which enacted the 2008 Constitution, did not establish the application of the EAP against arbitral awards. See NEIRA, *La Constitución de 2008 y el arbitraje bajo la ley ecuatoriana: análisis de dos problemas que surgen antes que del texto constitucional, de su equivocada aplicación*, *Revista Ecuatoriana de Arbitraje*, 2011, p. 34 ff.

the rightful application of well-established arbitral principles. […] The general perception is that parties are increasingly relying on *amparo* petitions to delay the course of arbitral proceedings, to interfere with the process, to coerce unfavorable arbitrators, and to evade the recognition and enforcement of arbitral awards"[22].

As already said, arbitration has become "the ordinary and normal method of settling disputes of international trade"[23], and is henceforth considered as a veritable alternative to courts. As a result, the judicial review of arbitral awards by state courts is characterized by a noticeable deference to arbitral decisions[24]. This deference is enshrined in the restrictive grounds provided by Art. V of the New York Convention 1958 for the refusal of recognition and enforcement of arbitral awards[25]. This minimal judicial interference is equally illustrated by the limited grounds laid down by national laws for the annulment of arbitral awards, which often imitate the wording of the Art. 34 of the UNCITRAL Model Law (which, in turn, is based on Art. V of the New York Convention of 1958)[26]. This well-entrenched practice of judicial deference to arbitral decisions is questioned by the increasing use of individual constitutional complaints in the field of international arbitration. The acceptance of this practice in some countries is *de facto* creating a "new constitutional venue" for reviewing arbitral awards[27].

In particular, it has been rightly pointed out by some commentators that the recourse to an *amparo* to obtain the annulment of a foreign award before the Supreme Court of the country where enforcement is sought is contrary to Art. V(1)(e) of the New York Convention 1958[28], which implies, as well-known, that the only court which is competent to

[22] GOMEZ, op. cit.

[23] LALIVE, *Transnational (or Truly International) Public Policy and International Arbitration*, in *Comparative Arbitration Practice and Public Policy in Arbitration* (P. Sanders ed.), London/The Hague, 1987, p. 293.

[24] SANTACROCE, *The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?*, *Arbitration Int.*, 2015, p. 297.

[25]Article V of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

[26] Article 34 of the UN*CIT*RAL Model Law of 1985 on International Commercial Arbitration.

[27] DE ALBA URIBE, op. cit.

[28] Recognition and enforcement may be refuse, according to this rule, if: "*(e).* [t]he award has not yet become binding on the parties, or 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*" (emphasis added).

set aside a foreign award is the court of the country in which, or under the law of which, that award was made[29].

An illustration of this misuse of constitutional complaint may be found in a case before the Superior Court of Caracas, which annulled an award issued by an arbitral tribunal in Miami constituted under the auspices of the International Centre for Dispute Resolution of the American Arbitration Association[30]. The Superior Court overturned the award because it thought that the arbitrators did not apply rules of Venezuelan public policy while deciding the dispute. Specifically, the parties had entered into a contract for the transfer of shares of a corporation engaged in the insurance and financial intermediation activities. The relevant rules of Venezuelan law require that any modification in the ownership of the shares of such type of corporations has to count with the previous authorization of the insurance and banking authorities. According to the Superior Court, such mandate was circumvented by the arbitral tribunal. Therefore, the Court granted the annulment of the award through a writ of *amparo*, notwithstanding this was not provided in the New York Convention 1958 and the Inter-American Convention on International Commercial Arbitration ("Panama Convention").

Similarly, in *Municipality of Turbo v. Arbitral Tribunal*[31] the Municipality of Turbo (Colombia) invoked *amparo* against an arbitral award alleging that the arbitral tribunal had violated its constitutional due

[29] DE ALBA URIBE, op. cit.

[30] The description of the facts has been assumed by DE ALBA URIBE, op. cit. A similar precedent can be found in Venezuelan Supreme Court of Justice, Constitutional Chamber, Decision of 19 November 2004, No. 2635, *Consorcio Barr, S.A. v. Four Seasons*.

[31] Constitutional Court of Colombia, Decision of 9 June 2011, No. T-466/1, *Municipality of Turbo v. Arbitral Tribunal*. This decision came as a surprise, considering that in Constitutional Court of Colombia, Decision of 14 March, 2007, No. SU-174/07, *Departamento del Valle del Cauca v. Arbitral Tribunal*, it was affirmed that amparo could be used to annul arbitral awards to protect fundamental constitutional rights of the requesting party. Nonetheless, the court did try to impose some limitations on when a party could use amparo to annul an award. First, courts may not review the merits of the arbitral award in amparo proceedings. Second, the arbitral award must directly damage or threaten fundamental rights of the requesting party for amparo to be available. Third, the requesting party must have exhausted all other legal actions available to challenge arbitral awards (i.e. annulment proceedings) before invoking amparo. Fourth, amparo is only available where the arbitral tribunal's decision is patently arbitrary or the product of *voie de fait*. The approach endorsed by Colombian Courts is, therefore, still shrouded in ambiguity.

process rights. The requesting party claimed that the arbitral award was the product of *voie de fait* because the tribunal failed to consider legal rules applicable to the dispute (*via de hecho por defecto sustantivo*) and had assessed some evidence in a patently arbitrary manner (*via de hecho por defecto fictico*). The Constitutional Court of Colombia considered that the arbitral tribunal had breached the requesting party's due process rights, having supported its decision on the isolated assessment of documentary evidence that other evidence in the record showed was not reliable. The court considered that such error in the assessment of evidence was material to the outcome of the case, and thus the requesting party's due process rights were affected. Therefore the court issued a decision revoking the arbitral award[32].

The possible recourse to constitutional complaints against arbitral proceedings or decisions has been also confirmed in Peru, but in this country it was significantly restricted. The reference applies to a case decided by the Peruvian Constitutional Court, *Sociedad Minera de Responsabilidad Ltda. Maria Julia*, where it was determined that the general rule is that *amparo* proceedings are not available to challenge arbitral awards[33]. The court reasoned that annulment proceedings against arbitral awards under Peruvian legislation were a true procedural option so that, technically speaking, they may substitute *amparo* in cases where the defense of constitutional rights is sought against arbitral awards. The only exceptional cases in which, according to the Court, *amparo* is admissible are: 1) the direct and explicit violation of a precedent of the Constitutional Court by an arbitral tribunal; 2) the non-application of a norm which complies with the constitution (according to an already issued opinion by the Constitutional Court) but is perceived as unconstitutional by the arbitral tribunal; 3) a third party to the

[32] The description of the facts has been assumed by BURNETT, *Recent Developments in Key Latin American Jurisdictions to Attract International Commercial Arbitration*, *American University Business Law Review*, 2015, p. 400 ff.

[33] Peruvian Constitutional Court, Decision of 21 September 2011, Case No. 00142-201 1-OA/TC,*Sociedad Minera de Responsabilidad Ltda. Maria Julia*, para. 17. As noted by DE ALBA URIBE, op. cit., "for its part, in September 2011, the Constitutional Court of Peru decided to strengthen arbitration proceedings in the country, so it decided that the writ of amparo was not an admissible remedy against arbitration awards. In that judgment, the Constitutional Court ruled that the motion to set aside the award fulfils a role equivalent to the writ of amparo in the protection of fundamental rights in relation to arbitration. Therefore, it is the motion to set aside an award the appropriate remedy to challenge arbitral awards". See also BURNETT, op. cit., p. 400 ff.

arbitration agreement initiates *amparo* proceedings against an arbitral award that directly impinges on its constitutional rights.

It is finally worth mentioning the *Corporación Todosabor* case, decided in 2006 by the Venezuelan Supreme Court[34]. Corporación Todosabor, CA, the Venezuelan franchisee of Haagen Dazs Shoppe Company, Inc., was condemned to damages by an arbitral tribunal sitting in Miami under the rules of the American Arbitration Association for a breach of contract. Corporación Todosabor, CA filed a writ of *amparo* before the Venezuelan Supreme Court in order to obtain the suspension of the effects of this foreign award, the nullity of the award, as well as an order commanding the Venezuelan courts to refrain from enforcing it[35]. It alleged, *inter alia*, that the weight given by the tribunal to allegations and testimonies against it, without pondering their veracity, reflected an abuse of rights and an arbitrariness contravening its fundamental rights to effective judicial protection, due process, defense and equality provided in Articles 26, 49 and 51 of the Venezuelan Constitution. The Supreme Court did not exclude the possibility of an *amparo* against an arbitral award, but dismissed the constitutional complaint on grounds which do not regard this paper. Significantly, however, a strong dissenting opinion was issued by the President of the Constitutional Chamber, Luisa Estella Morales Lamuno. This dissenting opinion underscores that the duty of the Constitutional Court, which consists in defending the Constitution, must be construed in accordance with the substantive and procedural provisions of the Constitution, the law, and the ratified international treaties. The opinion expressly refers to the New York Convention and the Panama Convention[36]. Besides, the recourse to a constitutional complaint to obtain an order enjoining

[34] Venezuelan Supreme Court of Justice, Constitutional Chamber, Decision of 14 February 2006, No. 174/06, *Corporación Todosabor, CA v. Haagen Dazs Internacional Shoppe Company, Inc.*, in www.newyorkconvention.org/11165/web/files/document/1/7/17197.pdf.

[35] DE JESUS, op. cit., p. 75.

[36] *Corporación Todosabor, CA v. Haagen Dazs Internacional Shoppe Company, Inc.*, cit.: "la potestad y el deber otorgado por la Constitución de la República Bolivariana de Venezuela a esta Sala Constitucional y a todos los Tribunales de la República, de defenderla y velar por su recto cumplimiento aún frente a decisiones arbítrales dictadas en foros internacionales; pero ello, claro está de conformidad con las disposiciones sustantivas y adjetivas contenidas en dicha Carta Magna, los Códigos y Leyes Venezolanas y, por supuesto, en los Tratados Internacionales válidamente suscritos aprobados y ratificados por la República".

courts to refuse any recognition or enforcement to a foreign arbitral award could potentially broaden the grounds for such a refusal, thereby contravening Articles III and V of the New York Convention[37]. This confirms that the constitutional review of arbitral awards undoubtedly contravenes the international conventions that govern (the annulment and) the recognition and enforcement of arbitral awards.

As already said, *amparo* against foreign arbitral awards is an unacceptable solution also insofar as it is incompatible with the perceived qualities of international arbitration. More in detail, as explained by Gary Born, the choice of international arbitration rests on its perception as a "neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions"[38]. The constitutional review does not only hamper the international enforcement of arbitral awards but is incompatible with all the perceived qualities of the arbitral process[39]. First, the constitutional review seriously questions the deference given to arbitral decisions by State courts, and is likely to disrupt the equilibrium between fairness and finality, which characterizes arbitration[40]. As a consequence, the constitutional review equally unravels the idea of arbitration as involving a speedy process for the final resolution of a dispute. Given the general length of proceedings before constitutional courts, these constitutional complaints have already incurred substantial delays and uncertainty in the course of arbitral proceedings. The mechanism may even be used as part of a delaying strategy by one party. Besides, the constitutional review undermines the idea of neutrality of arbitration. This neutrality vanishes when constitutional courts, whose impartiality and independence are sometimes questioned by the citizens themselves, are associated with the arbitral proceedings[41]. Finally, this constitutional remedy has the effect to divert disputes from specialized arbitrators to constitutional judges[42] which do not necessarily have a thorough knowledge of

[37] Venezuelan Supreme Court of Justice, Constitutional Chamber, 6 December 2005, *Nokia de Venezuela, CA v. Digicel, SA*, Decision No. 3610, Dissenting opinion of Luisa Estella Morales Lamuno.

[38] BORN, op. cit., p. 70.

[39] MURIEL-BEDOYA, op. cit.

[40] GOMEZ, op. cit.

[41] CHOUDHRY, BASS, *Constitutional Courts after the Arab Spring: Appointment mechanisms and relative judicial independence*, 2014, in www.ssrn.com, pp. 17, 31, 52.

[42] DE JESUS, op. cit., p. 78.

the parties' preoccupations or the systemic implications of their decisions over an economic sector [43].

The constitutional complaint mechanism qualifies therefore as an at least inopportune means for obtaining the suspension of enforcement of arbitral awards. This could rise to a "constitutional torpedo", i.e. a way of prorogating *sine die* the enforcement of arbitral awards[44].

It is therefore essential to promote judicial self-restraint in order to continue fostering the development of international commercial arbitration[45]. However, this does not mean that arbitration shall not be subject to constitutional guarantees. As we will see in the rest of the work, indeed, arbitration is today a system of dispute resolution that may to a certain extent be equalized to State justice. As a consequence, while constitutional review does not work as a means to ensuring the respect of fundamental principles and values in arbitral proceedings, it is necessary to look for other means for the parties to obtain the respect of constitutional procedural guarantees by arbitral tribunals.

3. Several authors, both in the United States of America and in Europe, correctly support the application of constitutional procedural guarantees in the arbitral process. This approach rests on the idea that, in contemporary legal orders, arbitral tribunals are devolved a parcel of public authority and, as such, are inevitably subject to the rule of law[46]. "[A]rbitration must not be seen as a mechanism alienated from the Constitution, nor as an instrument to evade fundamental rights or principles. (…) [T]he balance between party autonomy and reviewability must be sensible, otherwise an uncertain legal and judicial environment

[43] *Ibid.*

[44] MURIEL-BEDOYA, op. cit. The concept of "torpedo" has been borrowed from scholarship pertaining to EU private international law, where the concept of "Italian torpedo" was used in order to describe the practice to start proceedings before Italian courts (notoriously very lengthy) even in lack of jurisdiction in order to take advantage of the *lis pendens* mechanism set forth in EU Regulation 44/2001 and get the advantage of the long time that will pass until Italian courts declare not to have jurisdiction. Fortunately, the problem has been overcome with the entry into force of EU Regulation 1215/2012 which replaced art. 44/2001. See, on this matter, PANIGHETTI, *Has London Outmanoeuvred the Italian Torpedo*, *Yearbook of Arbitration and Mediation*, 2013, p. 277 ff.

[45] GOMEZ, op. cit.

[46] MONTT, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, Oxford, 2009, p. 310.

might prevail. (…) [T]he remedies for violations of constitutional rights or due process do not reside on an absolute constitutional control, but on the correct application and understanding of the Constitution and the institutions recognized by it"[47].

It is sometimes argued that constitutional norms do not, in principle, regulate private behavior, but the conduct of public institutions only[48]. This is, however, not true anymore because, on the one hand, the separation between the public and private spheres is not always clear-cut[49], and, on the other hand, because the direct applicability of constitutional principles (both substantive and procedural) is today very common in international adjudication and arbitration[50]. It is interesting, however, to verify the legal basis supporting the applicability of fundamental rights (which, usually, reflect constitutional norms) in arbitration. We will mainly take into account the U.S. and the Italian systems as case studies.

In the U.S., the so-called "state action doctrine" fosters the idea that, notwithstanding the seemingly private nature of arbitration, tribunals may nevertheless work as a *medium* of public authority or state action, and should therefore be subject to constitutional requirements. This doctrine was developed by the U.S. Supreme Court's case law and relies on two alternative conditions[51]. The state action can be identified when the state (i) is substantially involved with a private behavior and encourages it, or (ii) a private institution fulfills a traditional and exclusive public function upon delegation by the State[52].

It seems useful to recall the rationale on which the applicability of

[47] MURIEL-BEDOYA, op. cit.

[48] RUTLEDGE, *Arbitration and the Constitution*, Cambridge, 2013, p. 1. Similarly see D'AMICO, *Principi costituzionali e clausole generali: problemi (e limiti) nella loro applicazione nel diritto privato (in particolare nei rapporti contrattuali)*, in *Principi e clausole generali nell'evoluzione dell'ordinamento giuridico* (D'Amico ed.), Milano, 2017, p. 66 ff.

[49] ALLEN, *Remembering* Shelley v. Kraemer*: of Public and Private Worlds*, *Washington University Law Quarterly*, 1989, p. 725.

[50] PERLINGIERI, *I princípi giuridici tra pregiudizi, diffidenza e conservatorismo*, *Annali SISDIC*, 2017, p. 2.

[51] *See* US Supreme Court, 3 March 1999, *Am. Mfrs. Mut. Ins. Co v. Sullivan*, 526 U.S. 40, 52 (1999); US Supreme Court, 2 June 1991, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991); US Supreme Court, 15 May 1978, *Flagg Bros. v. Brooks,* 436 U.S. 149, 157 (1978); US Supreme Court, 22 December 1974, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974).

[52] COLE, *Arbitration and State Action*, *Brigham Young University Law Review*, 2005, p. 7.

this doctrine to arbitration may be based, taking into account that "[i]f arbitration does constitute state action, various consequences might follow. Procedural due process rules could apply to arbitrations"[53]. In this regard, it is to be noted that due to the fact that States have an interest in the correct resolution of disputes (which always have public repercussions) they, on the one hand, delegate their judicial function to arbitrators (in the cases where the parties so decide) and encourage the recourse to arbitration but, on the other hand, maintain the final control over proceedings[54]. This seems sufficient in order to say that, generally speaking, in countries with business-oriented economies, States encourage arbitration and delegate (within certain limits) the public function of doing justice to arbitrators. The applicability of "state action" in arbitration is, indeed, fostered by several authors[55] and can find, *mutatis mutandis*, application in other legal systems. As to Italy, as noted by Pietro Perlingieri, whenever we are in presence of a judicial activity (including arbitration proceedings seated in Italy), due process of law as set forth by the Constitution must be respected; indeed, it is actually the respect of the procedural guarantees which qualifies a decision-making process as judicial[56]. This means that even if arbitrators carry out a form of private jurisdiction, they nevertheless exercise a function which has an intrinsic public nature and is (and shall be) characterized by the respect of public/constitutional guarantees. A confirmation of the above can also be found in the approach assumed by the Italian Constitutional Court, which accepted the possibility that arbitrators may refer to it constitutionality issues as if arbitral tribunals are State judges.

However, surprisingly enough, some authors still believe that arbitral tribunals are very far from State justice. First of all, these authors answer the question whether arbitral tribunals satisfy the "public function" test – according to which, for the applicability of the state action doctrine, it shall be demonstrated that the State has delegated to arbitrators a function which is in its exclusive competence – in the negative. According to Peter B. Rutledge, the proponents of the applicability of the "state action test" to arbitration fail to prove any delegation of this

[53] RUTLEDGE, op. cit., p. 131.

[54] *Ibid*., p. 14.

[55] REUBEN, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, *U.C.L.A. Law Review*, 1999-2000, p. 998.

[56] PERLINGIERI, *Arbitrato e Costituzione*, Napoli, 2001, pp. 11-12, 30-31.

judicial power to arbitrators[57], since "the state does not delegate its *entire* dispute resolution function to arbitrators", but retains arguably the essential elements of the function of binding resolution of disputes, namely the powers of judicial review, recognition, and enforcement of arbitral awards[58]. This idea is, however, flawed: it is undoubted that the final resolution of disputes is an attribution of the State and that arbitration exists because of the allowance by States[59].

Secondly, the critics argue for the unworkability of the "significant encouragement" test[60], according to which "[…] state action exists when the government becomes excessively entangled with private behaviour and encourages or causes the unconstitutional behavior"[61]. Various authors, among which Sternlight, stress that the courts' pro-arbitration stance, favouring arbitrability, as well as a narrow interpretation of the grounds of annulment of an arbitral award, satisfies the "encouragement test"[62]. Rutledge, on the contrary[63], benefiting from the vagueness of the "encouragement" criterion, points at the impossibility to assert without any doubt that such a bias – were it proved – would amount to a "significant encouragement" of the private party. This opinion, however, is not convincing and is, indeed, contradicted by States' practice. The recent development of arbitration in Italy, where it is today admitted (*i*) that proceedings (pending before tribunals of first instance or courts of appeal) can move from State justice to arbitration without the need to be started again and with the transfer of the assumed evidence from the former to the latter (so-called *translatio iudicii*)[64] and (*ii*) that arbitrators can refer constitutionality matters direct-

[57] REUBEN, op. cit., p. 998.

[58] RUTLEDGE, op. cit., p. 134.

[59] PARK, *The* Lex Loci Arbitri *and International Commercial Arbitration*, *Int. and Comparative Law Quarterly*, 1983, p. 26, where it is affirmed that in the lack of a State's willingness, arbitral awards would be binding commitments, free from any municipal law, which just appear.

[60] This second prong of the state action doctrine originates in US Supreme Court, 3 May 1948, *Shelley v. Kramer*, 334 U.S. 1 (1948).

[61] COLE, op. cit., p. 7.

[62] STERNLIGHT, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, *Tulane Law Review*, 1997, pp. 44-47.

[63] RUTLEDGE, op. cit., p. 140.

[64] See Italian law No 162/2014, on which see DEL ROSSO, *Note in tema di* translatio iudicii *tra arbitrato e processo*, *Il giusto processo civile*, p. 545 ff.

ly to the Constitutional court[65], can be cited as an example of the strong effort which public authorities make in order to stimulate the recourse to arbitration (by rendering it, as far as possible and within the limits of the State's supervision, an autonomous method of dispute resolution).

In support of the proposed approach, it is possible to mention, e.g., that, after some prior hesitations[66], the Croatian Constitutional Court expressly qualified arbitral awards as acts of a "body vested with public authorities"[67]. The Court apparently relied on the idea, developed earlier by a local judge, that an arbitral award, as an enforceable document, is conferred a public authority[68]. A subsequent judgment confirmed the application of this reasoning in the field of international arbitration[69].

The public nature of the authority exercised by arbitral tribunals may also be deduced from the effect of *res judicata* and enforceability of its decision. Indeed, an entity whose decisions have a binding effect on its recipients upon delegation by States is necessarily exercising a public authority derived from the State[70].

4. The constitutional complaint mechanism against an arbitral award is not the only available means for the parties to obtain the respect of fundamental rights. It appears with evidence that public policy grounds necessarily overlap with the most important constitutional guarantees, and, therefore, parties may invoke such constitutional guarantees by invoking public policy both when they challenge the award before the courts of the seat of arbitration and when they oppose to the recognition and enforcement of arbitral awards.

According to Art. V(2)(b) of the New York Convention of 1958 (which is mirrored by the vast majority of domestic arbitration

[65] See art. 819-*bis* of Italian Code of civil procedure.

[66] U-III-410/1995, Constitutional Court of the Croatian Republic, Nov. 17, 1999 (Official Gazette 130/99)

[67] U-III-488/1996, Constitutional Court of the Croatian Republic, Nov. 17, 1999 (unpublished in the Official Gazette).

[68] VLAHOV, *Scrutiny of Arbitral Awards by Constitutional Court*, Doctoral Thesis, CEU Budapest College, in http://www.etd.ceu.hu/2008/vlahov_dina.pdf, 2008, p. 26.

[69] Constitutional Court of the Croatian Republic, 27 October 2004, U-III-669/2003 (Official Gazette 157/2004).

[70] Suffice it to mention art. 824-bis of the Italian Code of Civil Procedure, where it is stipulated that arbitral awards shall have res judicata effect between the parties as if they are domestic decisions.

laws, including Article 34(2)(b) of the UNCITRAL Model Law) State courts may refuse to recognize or enforce (and therefore national courts at the seat may annul) an international arbitral award on grounds concerning international public policy. This notion of international public policy is part of the broader concept of domestic public policy and is composed of the *fundamental* principles of a domestic legal system, the respect of which shall be granted also in cases with a transnational element; therefore all those principles which may apply to domestic cases but are not to be considered as the principles which identify the legal system are excluded from the definition of international public policy[71].

It is evident that such an open-ended notion of public policy inevitably (at least partially) overlaps with constitutional fundamental guarantees. An example of the practice of denying enforcement of arbitral awards for the violation of constitutional principles composing the international public policy of a certain domestic legal system is the *Matuzalem* case, recently decided by Swiss courts[72]. An arbitral award issued by the CAS (Arbitral Court for Sport) condemned the football player Francelino Matuzalem to reimburse 6.8 millions of Euro to the Ukrainian team Shakhtar Donetsk for having unlawfully breached his contract with such team. Moreover, the player was condemned at the interdiction from football fields until he actually paid that amount. Such a condemnation could actually consist in a perpetual deprivation of the fundamental right of the player – recognized by Swiss Constitution and part of Swiss public policy – to self-determine himself through the possibility of carry out his job. Such a deprivation was also not proportional to the damage occurred, considering that no advantage was obtained by Shakhtar Donetsk by Matuzalem's interdiction (the team's interest consisting in the monetary reimbursement). For this reason, the enforcement of the award was refused due to its contrariety to Swiss public policy.

From the above we understand that, in order to comply with their obligation to issue an enforceable award, arbitrators must respect notions of substantive public policy of the domestic legal systems which are reasonably relevant to the case (e.g. the State where the seat of arbitration is located or those where it is likely that the award will be enforced) and which inevitably overlap with constitutional fundamental guarantees of such systems.

[71] ZARRA, *Arbitrato internazionale*, cit., pp. 544-550.

[72] Swiss Tribunal Fédéral, 27 March 2012, *Francelino da Silva Matuzalem v. Fédération Internationale de Football Association – FIFA*, case 4A_558/20111.

This consideration equally applies to the procedural aspects of international arbitration. Indeed, as to the conduction of arbitration proceedings, it is today well-established that the guarantees encapsulated in Art. 6 of the European Convention of Human Rights (which is mirrored by several European Constitutions and substantially coincides with all those constitutional rules which establish the principle of due process) apply in international arbitration. This imposes the neutrality, independence and impartiality of adjudicators and the principle *audi alteram partem*; these standards are also recognized by domestic laws regulating arbitration, such as S. 33 of the English Arbitration Act 1996[73] or Art. 35(2)(a)(ii) of the UNCITRAL Model Law. Several cases demonstrate that, should arbitrators not respect procedural guarantees, their awards will be annulled. These cases regard, e.g., the lack of a proper notice concerning the pendency of arbitration proceedings[74], the impossibility for both parties to have a say on some factual or legal circumstances on which Tribunals then based their choice[75] and several others[76]. A special mention regards the necessity to motivate arbitral awards: while in the English system it is often said that arbitral awards shall not be motivated, this conclusion does not apply – in our opinion – to the Italian system, due to the very clear provision of Art. 111 of the Italian Constitution. An unmotivated decision would be, therefore, contrary to Italian public policy[77].

In conclusion, and in light of the above considerations, there is no reason to (i) exclude that constitutional guarantees find a place in international arbitration as part of the relevant concepts of international public policy; and, consequently, to (ii) set forth any additional mechanism of individual direct constitutional complaint against arbitral awards.

[73] Such a rule is completed by S. 68, which sets forth the duty for national courts to annul arbitral awards which derive from procedures that are not based on the principle of due process of law.

[74] District Court for the Southern District of Florida, 18 February 1982, *Corporación Salvadorena de Calzado S.A. v. Injection Footwear Corp.,* 533 F. Supp. 290.

[75] England and Wales Court of Appeal, 21 February 2006, *Kanoria v. Guinness*, [2006] EWCA Civ 222; England and Wales Court of Appeal, *Interbulk Limited v. Aiden Shipping Co Limited (The 'Vimeira')*, [1984] 2 Lloyd's Rep 66.

[76] ZARRA, *Arbitrato internazionale*, cit., pp. 559-561.

[77] PERLINGIERI, *Profili applicativi della ragionevolezza in diritto civile*, Napoli, 2015, p. 56 ff.

5. This paper started by examining the practice – today well-known in South America – of starting direct constitutional claims against arbitral awards, often abusing of the system of justice of the countries involved. In this regard, we have demonstrated that a constitutional challenge is an inappropriate remedy against unsatisfactory arbitral awards. Indeed, if applied at the enforcement stage, this remedy runs against Art. V of the New York Convention 1958, which sets forth a limited number of reasons to oppose the enforcement of arbitral awards. Moreover, this approach also runs against the well-established practice according to which the judicial interference with international arbitration proceedings should be minimal.

This does not mean however, that constitutional safeguards do not bind arbitration: there is, indeed, a substantive overlap of this remedy with the traditional public policy challenge. The recourse to international public policy, i.e. to the fundamental principles which identify a domestic legal order, is the proper way for challenging arbitral awards which run against such principles. On the other hand, given the duty that arbitrators have to issue an award which is enforceable, they are indirectly forced to respect public policies of all the domestic systems which are reasonably intertwined with the dispute at hand. The respect of constitutional guarantees is therefore ensured both during arbitral proceedings and at the subsequent stages of challenge, recognition and enforcement.

As a general conclusion, in order to solve the problem related to the abuses of the possibility to challenge arbitral awards, the education of domestic judges to mechanisms of dispute settlement different from State justice is essential: "[a]s national judges become more familiar and knowledgeable with international arbitration and related institutions and principles, they will be in better position to identify these tactics that negatively affect the good development of international arbitration and the much needed constitutional protection of fundamental rights"[78]. Indeed, as an author has underlined, "judicial review is necessary as long it truly contributes to judicial harmony; thus, proper control is vital for a healthy adjudicative system. The excessive and helpless intervention by the courts is negative, as it undermines arbitration's principles and benefits. The consequence of the denaturalization of a dispute settlement mechanism such as arbitration through an invasive

[78] GOMEZ, op. cit.

system might result in reluctance towards this institution and in the unattractiveness of the legal framework that embraces it, which in turn could eventually be avoided for its lack of certitude. Accordingly, the courts should condemn the abusive conduct against arbitration's nature and render judgments that provide judicial certainty"[79].

[79] MURIEL-BEDOYA, op. cit.