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Arbitrating disputes with international organisations and some access to justice issues

August Reinisch*

I. INTRODUCTION

International organisations are infrequently parties to legal disputes. At least that is what one can often hear from organisations themselves. Indeed, compared to the vast practice of dispute settlement mechanisms available and resorted to in cases of disputes between states and also between states and private parties, the occurrence of disputes involving international organisations seems to be a rather rare event.

At the outset, it is important to highlight a rough distinction between two main types of disputes involving international organisations: international disputes, i.e. disputes between an international organisation and another subject of international law (mostly states, possibly also other international organisations) to be settled under international law as applicable law, on the one hand, and disputes of a private law character involving international organisations and natural or legal persons to be resolved other than under international law, mostly under a specific domestic law or principles agreed upon by the disputing parties, on the other hand.

Particularly, the first type of disputes will often be preferably settled in non-adjudicatory ways. If international organisations and their member states disagree, if there is for instance an issue of compliance with a constituent treaty or a host country agreement, political settlement through negotiations seems to be the preferred method of dispute settlement.

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It is more likely that the second type of disputes, those with private parties, may require adjudicatory resolution. The most frequent type of disputes will be those arising from situations where private parties are providing goods or services to international organisations, either as staff members or as contractors. The former normally have access to administrative tribunals, a form of specialised labour courts on the international level, and the latter will usually be able to resort to arbitration.

That dispute settlement involving international organisations remains a rare occurrence (with the exception of the routine procedures before an organisation's administrative tribunals) may also stem from the fact that dispute settlement mechanisms are often not available. International courts or tribunals are rarely open to international organisations as litigants because their jurisdiction is regularly limited to disputes between the members of organisations and does not extend to the organisations themselves. That their jurisdiction would cover disputes between international organisations and private parties is even more exceptional.

In addition, national courts are normally not available dispute settlement fora because international organisations regularly enjoy jurisdictional immunity. Such immunity is, of course, no legal obstacle for international organisations to access domestic courts as claimants. In fact, most constituent instruments or privileges and immunities instruments expressly provide for the power of international organisations to institute legal proceedings before national courts. However, here the reluctance of international organisations to resort to judicial forms of dispute settlement seems to explain best why disputes are rarely brought before domestic courts by international organisations.

The fact that their immunity prevents private parties from suing international organisations before domestic courts is increasingly seen as an access to justice issue both as a matter of national constitutional law and as a human rights issue, in particular in countries bound by the European Convention on Human Rights ('ECHR').[1] The European Court of Human Rights ('ECtHR') considers that the immunity of international organisations requires states to ensure that an alternative method of dispute settlement is available to private parties in order to not infringe upon their right to a fair trial,[2] which includes access to justice.[3] In fact, arbitration may constitute an alternative method of dispute settlement. But arbitration also raises access to justice issues, which are at the core of the present inquiry.

1 European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 221.

2 Article 6(1) ECHR ('In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law').

3 See for Article 6 ECHR *Golder v United Kingdom* App no 4451/70 (ECHR, 21 February 1975, Series A no. 18), para 36; *Waite and Kennedy v Germany* App no 26083/94 (ECHR, 18 February 1999), para 50.

II. INTERNATIONAL ARBITRATION

Disputes between an international organisation and other subjects of international law that are settled by arbitration appear to be extremely rare. According to Michael Wood, who in 2016 suggested that the International Law Commission deal with the topic of the settlement of international disputes to which international organisations are parties, only four such arbitrations were publicly known in 2016.[4] Caution in assessing the frequency of arbitrations is warranted because of the generally prevailing confidentiality of arbitration proceedings. There may indeed be more than the few publicly known arbitrations, but it appears that overall there are really only few arbitrations between international organisations and other subjects of international law.

One can only speculate about the reasons why arbitration is in fact rarely resorted to since it is quite common that, in particular, headquarters agreements provide that disputes that may arise between an international organisation and its host country be resolved by this mechanism.[5] Less frequent are such clauses in multilateral privileges and immunities agreements.[6]

4 See Michael Wood, 'Annex: The Settlement of International Disputes to which International Organizations are Parties' A/71/10, para 20, mentioning *Tax regime governing pensions paid to retired UNESCO officials residing in France (France – UNESCO)*, UNRIAA, vol. XXV, pp. 231–66; *European Molecular Biology Laboratory (EMBL) v Federal Republic of Germany*, ILR, vol. 105, pp. 1–74; *District Municipality of La Punta (Peru) v United Nations Office for Project Services (UNOPS)* (PCA Case No. 2014-38) (https://pcacases.com/web/view/109) (terminated without an Award); *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v The European Union)* (PCA Case No. 2013-30) (https://pcacases.com/web/view/25) (brought under Part XV of the United Nations Convention on the Law of the Sea and concluded without an award).

5 See eg, Article VIII Sec. 21 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, Lake Success, 26 June 1947, 11 UNTS 12 ('(a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.'); Article 29 para 1 Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory, Paris, 2 July 1954, 357 UNTS 3 ('Any dispute between the Organization and the Government of the French Republic concerning the interpretation or application of this Agreement, or any supplementary agreement, if it is not settled by negotiation or any other appropriate method agreed to by the parties, shall be submitted for final decision to an arbitration tribunal composed of three members; one shall be appointed by the Director-General of the Organization, another by the Minister of Foreign Affairs of the Government of the French Republic and the third chosen by these two. If the two arbitrators cannot agree on the choice of the third, the appointment shall be made by the President of the International Court of Justice.').

6 But see Article 32 Agreement on the Privileges and Immunities of the International Criminal Court, New York, 9 September 2002, 2271 UNTS 3 ('1. All differences arising out of the interpretation or application of the present Agreement between two or more States Parties or between the Court and a State Party shall be settled by consultation, negotiation or other agreed mode of settlement. 2. If the difference is not settled in accordance with paragraph 1 of this article within three months following a written

Two of the arbitrations referred to in Michael Wood's report are examples of this type of dispute: the arbitration between France and UNESCO[7] concerning the taxation of pensions paid to retired UNESCO officials and the European Molecular Biology Laboratory arbitration against Germany,[8] which also concerned taxation, fall into this category. Both the arbitration between the United Nations Office for Project Services (UNOPS) and a Peruvian municipality[9] and the *Atlanto-Scandian Herring Arbitration*[10] between Denmark and the EU concluded without an award and without much of a trace of information to assess their nature and potential importance.

Among the few other arbitrations involving international organisations was the *UNESCO (Constitution) Case*.[11] The UNESCO Constitution provides for arbitration, next to seeking an advisory opinion from the International Court of Justice ('ICJ'), as one of the options of dispute settlement in case of interpretation issues.[12] On this basis a tribunal was set up to determine the possibility of re-electing members of the Executive Board who were no longer members of their national delegations, a question that was determined in the negative.

In addition, even more political disputes have been close to being brought before an arbitration panel. As is evident from the ICJ's Advisory Opinion in the *PLO Observer Mission Case*,[13] the controversy over the forced closure of the PLO's Observer Mission to the UN in New York was considered to be a dispute that was 'not settled by negotiation or other agreed mode of settlement' pursuant to section 21(a) of the UN-US headquarters agreement,[14] which triggered the host state's obligation to 'enter into arbitration'.[15] This was ultimately avoided by a US

request by one of the parties to the difference, it shall, at the request of either party, be referred to an arbitral tribunal according to the procedure set forth in paragraphs 3 to 6 of this article. […].').

7 *Tax regime governing pensions paid to retired UNESCO officials residing in France (France – UNESCO)*, UNRIAA, vol. XXV, pp. 231–66.

8 *European Molecular Biology Laboratory (EMBL) v Federal Republic of Germany*, ILR, vol. 105, pp. 1–74.

9 *District Municipality of La Punta (Peru) v United Nations Office for Project Services (UNOPS)* (PCA Case No. 2014-38) (https://pcacases.com/web/view/109) (terminated without an Award).

10 *Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v The European Union)* (PCA Case No. 2013-30) (https://pcacases.com/web/view/25), Termination Order of 23 September 2014.

11 *UNESCO (Constitution) Case*, Special Arbitral Tribunal, Award of 19 September 1949, Annual Digest of Public International Law Cases No. 113, p. 331.

12 Article XIV(2) UNESCO Constitution ('Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its Rules of Procedure.').

13 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12.

14 UN-US Headquarters Agreement (n 5) Article VIII Sec. 21(a).

15 *ibid* [35] ('[T]he United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of 26 June 1947, is under an obligation, in accordance within section 21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the United Nations.').

court decision holding that US law did not require the closure of the observer mission.[16]

It is indeed often said that international organisations prefer to settle disputes by negotiation[17] and that appears to be also the case in regard to headquarters or seat issues.

An alternative dispute settlement possibility exists in requesting a 'binding' advisory opinion from the ICJ pursuant to the General Convention.[18] Well known examples are the *Mazilu*[19] and the *Cumaraswamy* cases,[20] both involving UN experts on mission and the status they enjoyed under the General Convention. Such opinions (once obtained) often considerably enhance the (negotiating) position of organisations resorting to such mechanism.

On the whole, though, arbitration does not seem to have played a major role in settling international disputes involving international organisations. The 1996 Optional Rules for Arbitration Involving International Organizations and States,[21] consolidated into the 2012 Permanent Court of Arbitration ('PCA') Arbitration Rules,[22] do not appear to have led to many arbitrations. Though the 1996 Optional Rules were applicable in two parallel arbitrations administered by the PCA, in *International Management Group v. European Union*[23] and *International Management Group v. European Union*.[24] However, the PCA homepage merely reveals that they concerned contractual disputes between two international organisations without additional information on the two proceedings.

16 *United States v Palestine Liberation Organization and ors*, [1988] ILDC 1838 [1988] 695 F Supp 1456 (SDNY 1988).

17 Miguel de Serpa Soares, 'Responsibility of International Organizations', in 7 *Courses of the Summer School on Public International Law* (Moscow 2022) 125 ('[…] most disputes between the United Nations and its Member States are settled through diplomatic channels.').

18 See the procedure envisaged in Article VIII Sec. 30 Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946, 1 UNTS 15 ('All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'). Similarly, Article IX Sec. 32 Convention on the Privileges and Immunities of the Specialized Agencies, New York, 21 November 1947, 33 UNTS 261.

19 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 177.

20 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62.

21 Permanent Court of Arbitration's Optional Rules for Arbitration Involving International Organizations and States (1996).

22 PCA Arbitration Rules (2012).

23 *International Management Group v European Union, represented by the European Commission* (PCA Case No. 2017-03) (https://pca-cpa.org/en/cases/157/) (proceedings initiated in January 2017).

24 *International Management Group v European Union, represented by the European Commission* (PCA Case No. 2017-04) (https://pca-cpa.org/en/cases/158/) (proceedings initiated in January 2017).

III. ARBITRATION BETWEEN INTERNATIONAL ORGANISATIONS AND PRIVATE PARTIES

Arbitration is more common in disputes involving international organisations with private parties, mostly contractors, be it individual persons or companies. Arbitration is apparently quite routinely provided for in commercial contracts.[25] It is also considered necessary as a result of the immunity from jurisdiction regularly enjoyed by international organisations.[26]

Different from the immunity of states which, in most jurisdictions, is a restricted one applying only to governmental or *jure imperii* acts and not to commercial transactions,[27] the jurisdictional immunity of international organisations is usually conceived of as a 'functional' one, largely considered to imply an absolute immunity from legal process.[28] This means that even routine commercial transactions with private parties are exempt from the jurisdiction of domestic courts. Thus, contracts between international organisations and private parties often provide for arbitration as an option for dispute settlement. However, most of these arbitrations are confidential and therefore knowledge about recourse to arbitration is limited. Also, academic work on the topic does not reveal many cases.[29]

Nevertheless, a number of commercial arbitrations involving international organisations conducted under International Chamber of Commerce ('ICC')[30] or

25 Relations between States and international organisations (second part of the topic) (agenda item 9) Document A/CN.4/L.383 and Add. 1–3. Practice of the United Nations, the specialised agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: supplementary study prepared by the Secretariat, Yearbook of the International Law Commission 1985 Volume II, Part One, Addendum One 156 (the UN, replying in a questionnaire of the IDI that '[t]he contracts in question generally contain provisions designating arbitration as the manner in which any disputes are to be resolved.').

26 Report of the Secretary-General, 'Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946' (1995) UN Doc A/C.5/49/65.

27 Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP, 2015) 403–7; Alexander Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 105–6; Xiadong Yang, *State Immunity in International Law* (CUP 2012) 460.

28 See August Reinisch, 'Privileges and Immunities' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 132–55; Chanaka Wickremasinghe, 'International Organizations or Institutions, Immunities before National Courts' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* Vol. vi (OUP 2012) 10–18.

29 Panayotis Glavinis, *Les Litiges Relatifs aux Contrats Passés entre Organisations Internationales et Personnes Privies* (Travaux et recherches Panthéon-Assas, Paris II 1990); Stephanie Bellier, *Le Recours à L'arbitrage par les Organisations Internationals* (Editions L'Harmattan 2011); Stian Øby Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (CUP 2020); Rishi Gulati, *Access to Justice and International Organisations* (CUP 2022).

30 See eg, *Office de Secours et de travaux de Nations Unies (UNRWA) v The General Trading and Transport Company* (1958) International Chamber of Commerce Award (Award rendered by Arbitrator H Batiffol); partly reprinted in: Yearbook of the International Law Commission 1967 Volume II 208; *Balakhany*

United Nations Commission on International Trade Law ('UNCITRAL') arbitration rules,[31] sometimes administered by the PCA,[32] are in the public domain.

Occasionally, arbitrations between international organisations and individuals occur which concern employment disputes. This results from the fact that most international organisations settle such disputes through their internal justice system, in the form of administrative redress mechanisms or of administrative tribunals, to which staff members can turn if they have a dispute with their employer organisation.[33] A few arbitrations have become known in cases where private parties did not have access to an internal justice system, but rendered services to organisations.[34]

Another category of arbitrations between international organisations and private parties arises from *ad hoc* agreements to arbitrate disputes concerning tortious wrongs. An example is the arbitration in *Starways Limited v. United Nations*,[35] involving

(Chad) Limited v Food and Agriculture Organization of the United Nations (1972) International Chamber of Commerce Award of the Arbitrator, 1972 United Nations Juridical Yearbook 206; *A (organisation internationale) v B (société)* (1972) International Chamber of Commerce Case no 2091, Award (R. Lehmann, Sole Arbitrator), *Revue de l'arbitrage* (1975), 252–67; *Westland Helicopters Ltd. and Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*, International Chamber of Commerce Case no 3879/AS, Court of Arbitration, Interim Award Regarding Jurisdiction of 5 March 1984, 23 ILM (1984) 1071–89, 62 JDI (1985), 232–46; 8 June 1982, 5 March 1984, 25 July 1985; 80 ILR (1989), 595–622; *Food and Agriculture Organization of the United Nations v BEVAC Company* (1986) International Chamber of Commerce Case no 5003/JJA Arbitral 1986 United Nations Juridical Yearbook 347; *EUTELSAT (The European Telecommunications Satellite Organization) v Alcatel Space*, ICC Arbitral Award No. 10216/AC/DB, Unpublished Arbitral Award, 26 February 2001, discussed in: Alexis Mourre, 'Arbitration in Space Courts' (2005) 21(1) *Arbitration International* 37, 41–45.

31 *Equipe '90 v The Food and Agricultural Organization of the United Nations*, Ad hoc arbitration under UNCITRAL Rules, Award 4 December 2001, summarised in CCLM 73/2 – FAO Committee on Constitutional and Legal Matters, Seventy-third Session, Rome, 3–4 June 2002 (http://www.fao.org/3/y6612e/y6612e.htm); *Granuco S.A.L. v The Food and Agricultural Organization of the United Nations* (PCA Case No. AA286) Award of 30 April 2009; summarised in detail in FAO, COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS, Eighty-eighth Session Rome, 23–25 September 2009, CCLM 88/6, http://www.fao.org/tempref/docrep/fao/meeting/017/k5709e.pdf.

32 See eg, *Dr. Horst Reineccius (Germany), First Eagle SoGen Funds, Inc. (USA) and others v Bank for International Settlements (Switzerland)* (PCA Case No. 2000-03) Partial Award of 22 November 2002 and Final Award of 19 September 2003; *Polis Fondi Immobiliari Di Banche Popolare SGR.p.A. v International Fund for Agricultural Development (IFAD)* (PCA Case No. 45863) Award of 17 December 2010.

33 See CF Amerasinghe, *The Law of the International Civil Service* (OUP 1994); Anna Riddell, 'Administrative Boards, Commissions and Tribunals in International Organizations' in Anne Peters (ed), *The Max Planck Encyclopedia of Public International Law* (Online Version, OUP 2021); Elias Olufemi and Melissa Thomas, 'Administrative Tribunals of International Organizations' in Chiara Giorgetti (ed), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff 2012) 159–88; George Politakis, 'Administrative Tribunal: International Labour Organization (ILO)' in Anne Peters (ed), *The Max Planck Encyclopedia of Public International Law* (Online Version, OUP 2021).

34 *D v Energy Community* (PCA Case no 2016-03) (https://pca-cpa.org/en/cases/137/); *Mr. Mohamed Ismail Reygal (Somalia) v The United Nations High Commissioner for Refugees (UNHCR)* (PCA Case no 2016-28) (https://pca-cpa.org/en/cases/138/) Award of 27 March 2017; *A v UN Organisation* (PCA Case no 2019-04) (https://pca-cpa.org/en/cases/201/) Final Award issued on 5 December 2019.

35 *Starways Limited v United Nations*, 24 September 1969 (Bachrach, Sole Arbitrator), 44 ILR (1972), 433–37, case note by R H Harpignies, 'Settlement of Disputes of a Private Law Character to which the United

a compensation claim for damage sustained during the Congolese civil war and allegedly caused by UN forces. Such cases of *ad hoc* arbitration are rare or at least knowledge about them is limited. Again, it seems that the preferred method of dispute settlement is negotiation, as is also evident from the lump sum settlement agreement concluded between Belgium and the UN in regard to Belgian nationals suffering harm during the Congo mission.[36]

It appears, however, that tort claims are of special importance for the same reason as so-called commercial disputes. In both situations, the international organisation immunities prevent the third-party settlement of disputes alleging the accountability or responsibility of organisations. Typical access to justice issues arise in particular in this latter form of private arbitration involving international organisations and individuals and legal persons. A number of them will be discussed in the following sections.

IV. ACCESS TO JUSTICE ISSUES

Access to justice is not only considered to be an inherent element of the fair trial obligations under Article 14 of the International Covenant on Civil and Political Rights[37] and Article 6 of the ECHR,[38] it is also an element of the rule of law. On the universal level, this is reflected in the 2012 Rule of Law Declaration of the UN General Assembly which calls for '[…] an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice […]',[39] as well as for affordable 'access to justice'.[40]

The underlying policy argument that there is a need to provide recourse against international organisations was recognised already early on. For instance, in the

Nations is a Party—a Case in Point—The Arbitral Award of 24.9.1969, In Re Starways Ltd. v the United Nations' (1971) 7 *Revue Belge de Droit International* 451–68.

36 United States Secretary-General, 'Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals' (20 February 1965) (1965) UNJYB 39, 535 UNTS 191. The same approach was also adopted in regard to other nationals. See 564 UNTS 193 (Switzerland); 565 UNTS 3 (Greece); 585 UNTS 147 (Luxembourg); 588 UNTS 197 (Italy); 535 UNTS 197 (Belgium).

37 Article 14(1) International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (1976) ('In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'); Human Rights Committee, 'General Comment No. 13: equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)' (13 April 1984) para 3 ('[…] equality before the courts, including equal access to courts.').

38 See above (n 2).

39 United Nations General Assembly, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels,' (30 November 2012) UN Doc A/RES/67/1 para 12.

40 *ibid* para 14 ('We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.').

Effect of Awards Advisory Opinion, the ICJ found in regard to staff disputes that, in light of the organisation's immunity from suit before national courts, it would '[…] hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals […] that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.'[41]

In light of human rights jurisprudence and a modern understanding of the rule of law demands, it became clear that it is not only the availability of some form of judicial or arbitral remedy that is required, but also that such alternative forms of redress must be of a quality offering at least comparable guarantees of a fair trial as those demanded under human rights instruments. In particular, the *Waite and Kennedy* logic of requiring 'reasonable alternative means' to justify immunity before national courts[42] and the similar logic of the privileges and immunities instruments of the UN and its specialised agencies, calling for appropriate modes of dispute settlements,[43] point in this direction.

This implies that where arbitration is the alternative remedy to satisfy the right of access to justice, such arbitration has to be not only available in the first place, but must also satisfy certain demands. A few of them will be discussed non-exhaustively below.

A. The Availability of Arbitration

The first crucial question that arises is whether arbitration is actually available in order to raise claims against international organisations or to enable international organisations to bring claims against private parties. This in first line depends upon the existence of an arbitration agreement.

As already mentioned, arbitration clauses appear to be standard practice in contracts such as procurement or rental agreements and the like.[44] That means that in commercial relations of international organisations access to dispute settlement is usually not an issue since arbitration will often be available to third private parties claiming that their rights have been impaired by acts of international organisations and vice versa. What is problematic are cases of tort claims where no pre-existing contractual relationship exists. In such situations, private parties depend upon the willingness of

41 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 57.

42 See below (n 50).

43 See below (n 47).

44 United Nations Procurement Division 'General Conditions of Contract: Contracts for the Provision of Goods', para 16.2 <https://www.un.org/Depts/ptd/about-us/conditions-contract> (accessed 29 March 2023); see also Stéphanie Bellier, 'À Propos de la Clause Arbitrale dans le Règlement des Différends de L'organisation Internationale' (2009) 55 *Annuaire Francais de Droit Internationale* 445–68; August Reinisch, 'Contracts between International Organizations and Private Law Persons' in Anne Peters (ed), *The Max Planck Encyclopedia of Public International Law* (Online Version, Oxford University Press 2021) para 15; Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (Kluwer Law International, 2013) 166–70.

international organisations to agree on arbitration *ex post*, i.e. after the occurrence of the harmful events.

That this often meets reluctance is evident in a number of situations. International organisations may try to avoid third-party adjudication in general, not only in the form of arbitration, but also by submitting to a court or waiving their immunity, because of the financial implications of damages claims. Often they prefer negotiation or other forms of dispute settlement without independent third-party adjudication.[45]

This appears to be not only a question of the willingness of organisations. It is also legally difficult to envisage how organisations could *ex ante* agree to arbitrate their potential 'tort' disputes with third parties, simply because the potential claimants will be unknown before the occurrence of the harmful event. The commitments contained in privileges and immunities instruments to provide for the settlement of disputes of a private law character[46] have not been interpreted as a unilateral offer to arbitrate comparable to what we find in investment arbitration.[47] Thus, the availability of arbitration depending upon the willingness of both parties to consent to it, implies that this form of dispute settlement is not secured for all disputes.

This has been increasingly recognised as an access to justice problem. With the seminal *Waite and Kennedy* case,[48] the ECtHR found that the jurisdictional immunity enjoyed by international organisations could impair the right of access to justice of claimants unless they 'had available to them reasonable alternative means to protect

45 Miguel de Serpa Soares, 'Responsibility of International Organizations', in 7 *Courses of the Summer School on Public International Law* (Moscow 2022) 140. See also the *Haiti Cholera* litigation in the US where the UN vigorously defended its immunity from jurisdiction before US courts and declined to agree on arbitration or other third party adjudication. *Georges v United Nations*, 834 F 3d 88 (2nd Cir. 2016); Report by the Secretary-General, 'A new approach to Cholera in Haiti' (25 November 2016) UN Doc A/71/620: this new approach to tackling Cholera consists of two tracks, namely eliminating Cholera from Haiti and providing material assistance and support to those communities most impacted by the outbreak. UN Secretary-General Ban Ki-moon also apologised to the Haitian people see, UN Press Release, 'Secretary-General Apologizes for United Nations Role in Haiti Cholera Epidemic, Urges International Funding of New Response to Disease' (1 December 2016) UN Doc SG/SM/18323-GA/11862. However, the Haiti Cholera Response Multi-Partner Trust Fund (see https://mptf.undp.org/fund/clh00) does not provide for individual compensation.

46 See eg, Article VIII Section 29 Convention, on the Privileges and Immunities of the United Nations, New York, 13 February 1946, 1 UNTS 15 ('The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; […].'); Article IX Section 31 Convention on the Privileges and Immunities of the Specialized Agencies, New York, 21 November 1947, 33 UNTS 261.

47 In investment law, clauses in treaties such as bilateral investment agreements, whereby Contracting Parties agree to arbitrate future disputes with investors from other Contracting Parties, are routinely considered to be advance consent to arbitration that can be accepted by private investors through instituting arbitration. See Stephan W Schill, Loretta Malintoppi, August Reinisch, Christoph H Schreuer and Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention* (CUP 2021) 362. This has been aptly described as 'arbitration without privity'. See Jan Paulsson, 'Arbitration without Privity' (1995) 10 *ICSID Review – FILJ* 232. Of course, the wording of such treaty clauses is usually more explicit in giving advance consent. However, the situation would appear to be comparable.

48 *Waite and Kennedy v Germany* App no 26083/94 (ECHR, 18 February 1999).

effectively their rights under the Convention'.[49] Such reasonable alternative means could be administrative tribunals or arbitration. What is important to note is that, while the ECtHR was reluctant to conclude that the non-availability of reasonable alternative means was a violation of the access to justice guarantee,[50] a number of national courts did so, denying jurisdictional immunity to international organisations where they did not offer alternative dispute settlement at all,[51] or in some cases even where the alternative offered was not regarded reasonable to effectively protect the rights of litigants.[52] Recently, the Austrian Constitutional Court declared the immunity accorded to OPEC in its headquarters agreement unconstitutional because individual staff members did not have access to reasonable alternative means of redress.[53]

Nevertheless, in a number of jurisdictions the non-availability of alternative redress does not lead to a loss of jurisdictional immunity, as was clearly stated by the appellate court in the US *Haiti Cholera* litigation.[54]

That arbitration may be an adequate alternative dispute settlement method was expressly endorsed by the highest Swiss court. In *Consortium X. v. Swiss Federal Government (Conseil federal)*,[55] the Federal Court, relying on *Waite and Kennedy*, held that

49 *ibid* para 68.

50 *Stichting Mothers of Srebrenica et al. v The Netherlands* App no 65542/12 (ECHR, 11 June 2013 Decision on Admissibility) para 164 (denying that '[…] in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court.'); see also the Dutch supreme court decision in *Stichting Mothers of Srebrenica and ors v Netherlands and United Nations*, Final appeal judgment, LJN: BW1999, ILDC 1760 (NL 2012), 13th April 2012, Netherlands; Supreme Court [HR].

51 *Alberto Drago v International Plant Genetic Resources Institute (IPGRI)*, Court of Cassation, all civil sections, 19 February 2007, No. 3718, ILDC 827 (IT 2007); *Banque africaine de développement v M.A. Degboe*, Cour de Cassation, Chambre sociale, 25 January 2005, 04-41012, 132 Journal du droit international (2005), 1142. See also *Paola Pistelli v European University Institute*, Italian Court of Cassation, all civil sections, 28 October 2005, no. 20995, Guida al diritto 40 (3/2006), ILDC 297 (IT 2005), finding that the right of access to court was not violated by an organization's immunity because there was an alternative judicial remedy in the form of an internal staff disputes commission; *Energies nouvelles et environnement v Agence spatiale européenne*, Civ. Bruxelles (4e ch.), 1 decembre 2005, Journal des tribunaux (2006), 171, where ESA's immunity from suit was upheld because the claimant had 'reasonable' alternative means available in the specific case.

52 *Siedler v Western European Union*, Brussels Labour Court of Appeal (4th chamber), 17 September 2003, Journal des Tribunaux (2004), 617, ILDC 53 (BE 2003), at paras 62 et seq. ('[…] the limitation on the access to the normal courts by virtue of the jurisdictional immunity of the [Western European Union] [was] incompatible with Article 6(1) ECHR.'); affirmed in *Union de l'Europe occidentale v Siedler (S.M.)*, Case No. S.04.0129.F, 21 December 2009, Cour de cassation (3ème Chambre) 20.

53 *OPEC Immunity case*, Austrian Constitutional Court [VfGH] SV 1/2021-23, 29 September 2022.

54 *Georges v United Nations*, 834 F 3d 88 (2nd Cir. 2016) 94-95 (finding that the availability of appropriate modes of settlement of disputes of a private law character is not a condition precedent to jurisdictional immunity). See also *Stichting Mothers of Srebrenica and ors v Netherlands and United Nations*, Final appeal judgment, LJN: BW1999, ILDC 1760 (NL 2012), 13th April 2012, Netherlands; Supreme Court [HR], holding that the UN's immunity was not dependent upon the existence of effective alternative means of securing redress.

55 *Consortium X. v Swiss Federal Government (Conseil federal)*, Swiss Federal Supreme Court, 1st Civil Law Chamber, 2 July 2004, partly published as BGE 130 I 312, International Law in Domestic Courts (ILDC) 344 (CH 2004).

arbitral proceedings foreseen in the general contract clauses of CERN pursuant to its obligation 'to make provision for appropriate methods of settlement of disputes arising out of contracts and other disputes in private law to which the organization is a party'[56] satisfied the right to a fair trial guaranteed in Article 6 of the ECHR.

B. The Affordability of Arbitration

An often important and practical access to justice-issue is whether arbitration is an affordable mechanism. Commercial arbitration is often 'advertised' as a cost efficient alternative to adjudication.[57] Much has been written about the cost implication of arbitration and it appears that no general answers are available when it comes to assessing the costs involved.

In practice, the costs of arbitration depend on various factors. In cases of substantive amounts in dispute, arbitration fees – whether they are calculated as a percentage of the amount in dispute or pursuant to standard rates on the basis of the work performed by arbitrators[58] – are usually affordable. It is also well-known though that it is less the costs of tribunals and/or arbitral institutions administering arbitrations that determine the overall costs of arbitration. Rather, the larger share of costs are created by party representation. In commercial arbitration, estimates range between 80 and 90% of the overall costs.[59] The same is true for investment arbitration.[60] As is known from the current debate about the reform of investor-state dispute settlement in UNCITRAL, there is no mechanism to control these costs incurred by the parties themselves.[61]

56 Art. 24(a) Headquarters Agreement between CERN and Switzerland, Agreement between the Swiss Federal Council and the European Nuclear Organization in Switzerland of 11 June 1955, 249 UNTS 405.

57 Gary Born, *International Commercial Arbitration* (Wolters Kluwer 2014) 86; Marianne Stegner, 'Costs in Arbitration' (2012) 2 *YB on Int'l Arb* 85

58 Under the ICC rules, the costs of the arbitration are calculated according to the amount in dispute see, Appendix III, Article 3 of the 2021 Arbitration Rules. The 2020 LCIA rules in Annex II prescribe a fixed registration fee and the expenses of the arbitral tribunal are calculated according to hourly rates. For the allocation of costs generally see, John Walton and David Williams, 'Costs and Access to International Arbitration' (2014) 80 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 432.

59 Michael O´Reilly, 'Provisions on Costs and Appeals: An Assessment from an International Perspective' (2010) 76 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 705, 706. The ICC Commission in its 2015 report gives an average of 83% of total costs incurred by Party Costs, 15% by Arbitrator fees and 2% of ICC administrative expenses, see Commission on Arbitration and ADR, Decisions on costs in International Arbitration (ICC Dispute Resolution Bulletin Issue 2, 2015) 3.

60 Susan Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (OUP 2019) 184–87; David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012) OECD Working Papers on International Investment 3/2012, 19 <https://www.oecd-ilibrary.org/finance-and-investment/investor-state-dispute-settlement_5k46b1r85j6f-en> accessed 3 April 2023.

61 David Rivkin and Samantha Rowe, 'The Role of the Tribunal in Controlling Arbitral Costs' (2015) 81 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 115, 117; August Reinisch, 'UNCITRAL Reform Process on ISDS: Comment from Arbitrator's Perspective' in Stephan Hobe and Julian Scheu (eds), *Evolution, Evaluation and Future Developments in International Investment Law: Proceedings of the 10 Year Anniversary Conference of the International Investment Law*

The issue of costs can be problematic when employment disputes are settled by arbitration. This may occur where persons are not entitled to access the internal justice system of an international organisation because they are not staff members or otherwise fall within the scope of such mechanisms. For want of an otherwise available forum they often have to proceed to arbitration according to their contract terms. Where private individuals claiming salary or compensation for services rendered in comparatively small amounts the arbitral fees and the costs of representation may be disproportionate to the amount in dispute.[62]

This involves a serious access to justice problem. It has fed into the debate of opening administrative tribunals beyond the strict confines of staff members and also allowing persons rendering services to international organisations under contracts to access them.[63] This would permit non-staff to access a far less expensive avenue of litigating their claims.

C. Transparency

Whether and to what extent the lack of transparency is a problem is a more difficult question. As mentioned in outlining the available information about arbitration involving international organisations, the confidentiality surrounding this form of dispute settlement results in very limited general knowledge about how common and widespread arbitration is actually used as a tool to settle disputes with international organisations. It is even more difficult to determine whether confidentiality of arbitral proceedings and final awards poses an accountability or access to justice problem.

Transparency is often demanded in situations where disputes involve not only private parties, but also broader public interests. This is best illustrated by the discussion about increased transparency in investment arbitration where the subject-matter of disputes is usually not limited to commercial considerations, but rather extends to reviewing public policy decisions by states. In addition, the outcomes of investment arbitration often have budgetary implications justifying that the public has a right to know why the state may eventually have to pay considerable compensation to individual investors.[64]

Centre Cologne (Nomos 2021) 177; See also United Nations Commission on International Trade Law, 'Draft Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-sixth Session', A/CN.9/964 (6 November 2018).

62 See Gulati, *Access to Justice and International Organisations*, supra (n 31) 121 et seq.

63 Jan Wouters and Jed Odermatt, 'Assessing the Legality of Decisions' in Jacob Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook on International Organizations* (OUP 2016) 1025; August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 *Global Governance* 131; Nico Schrijver, 'Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations' in Niels Blokker and Nico Schrijver (eds), *Immunity of International Organizations* (Brill 2015) 338.

64 Joachim Delaney and Daniel Barstow Magraw Jr, 'Procedural Transparency' in Peter T Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 721,761; Dominik Horodyski, 'Democratic Deficit of Investment Arbitration in the View of Rules

Where, as a result of arbitration, damages are awarded against an international organisation one might consider that its member states could have a legitimate interest in learning about the actual financial implications of such arbitrations. However, given that there will usually be budgetary appropriations within international organisations, member states regularly learn about financial liabilities arising from awards. It appears though that often the actual reasons for such liability, i.e. the substance of arbitral awards, are not communicated. When focusing on the interests of private parties one might think that the widespread confidentiality of arbitrations with international organisations may prevent private parties of considering the availability of this form of dispute settlement and their chances of success. Both considerations would mean that the lack of transparency implies a rule of law problem.

Again though, the answer probably has to be more nuanced. That arbitration is available in general and may be inserted in contracts with international organisations falls upon counsel to advise private parties when contracting with international organisations. Similarly, in case of damages claims arising from extra-contractual liability/tort claims the knowledge about this form of dispute settlement should be available.

The lack of, or rather the scarcity of publicly available awards implies, however, that private parties, as well as international organisations, are not in a position to assess how disputes are actually resolved. This, in turn, means that they are often not sufficiently knowledgeable about their respective chances of success. In this sense, the lack of transparency implies a practical problem for parties contemplating this form of dispute settlement. Therefore, transparency should be encouraged.

D. Enforceability

From an access to justice point of view or a broader accountability perspective the outcome of any form of dispute settlement must be effective in the sense that it is complied with or that, if necessary, it can be enforced. Little is known about the actual practice of enforcing arbitral awards involving international organisations. It appears that most of them are complied with by organisations and/or private parties without recourse to enforcement measures. However, since the availability of an effective enforcement system often contributes to 'voluntary' compliance, it seems justified to analyse the options for enforcing awards involving international organisations.

While, in general, the higher likelihood of enforcement of arbitral awards – in comparison to domestic court judgments – is considered to be a major 'selling point' in favour of arbitration, enforceability is more precarious in case of arbitral awards involving international organisations. For arbitration the enforcement regime under the

on Transparency and Mauritius Convention on Transparency' (2016) 13 *US-China Law Review* 160, 168–69; Alessandra Asteriti and Christian J Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 787, 791–92.

New York Convention[65] guarantees that arbitral awards are recognised and enforced in the domestic courts of the Convention's 170+ Contracting Parties.[66] However, the immunity of states and their assets from execution measures remains a last obstacle to enforcement and may render actual enforcement impossible in practice. Pursuant to customary international law rules, state property serving non-commercial, i.e. governmental purposes, is regarded to be exempt from enforcement measures.[67]

The enforcement of awards rendered against international organisations will be even less realistic because of the broader immunity from enforcement measures regularly enjoyed by international organisations. Privileges and immunities instruments, whether in the form of constituent treaties, multilateral privileges and immunities agreements or bilateral headquarters/seat agreements or even domestic legislation, regularly provide that in addition to international organisations' immunity from jurisdiction, their assets enjoy a blanket immunity from enforcement measures. In the case of the UN, the General Convention speaks of the organisation and its 'property and assets' being exempt from every form of legal process,[68] which is understood to include full enforcement immunity.[69] While such enforcement immunity is probably subject to waiver,[70] it seems that in practice most international organisations do not waive their immunity from enforcement measures.[71]

With international organisations generally possessing unlimited immunity from enforcement measures, the lack of non-voluntary enforcements of arbitral awards rendered against them raises serious access/accountability issues. To some extent, this

65 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 38.

66 See <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>.

67 See Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP, 2015) 518–21; August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17 *EJIL* 803, 821. See also Article 19 United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the UN General Assembly on December 2, 2004, UN, GAOR, 59th Session, Supp. No. 22 (A/59/22), 44 ILM 803 (2005), exempting from immunity 'property […] specifically in use or intended for use by the State for other than government non-commercial purposes.'

68 See eg, Article II Sec. 2 General Convention, supra note 20 ('The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.')

69 August Reinisch, 'Immunity of Property, Funds and Assets (Article II Section 2 General Convention)' in August Reinisch (ed), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies. A Commentary* (OUP 2016) 63–98, at 86.

70 In the case of the UN, the provision in the general Convention that '[i]t is, however, understood that no waiver of immunity shall extend to any measure of execution' has given rise to a debate about the waivability of the organisation's immunity from enforcement measures. See August Reinisch, 'Immunity of Property, Funds and Assets (Article II Section 2 General Convention)' in August Reinisch (ed), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies. A Commentary* (OUP 2016) 63–98, at 97.

71 Gian Luca Burci, 'Immunity of Property, Funds and Assets (Article III Section 4 Specialized Agencies Convention)' in August Reinisch (ed), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies. A Commentary* (OUP 2016) 99–122, at 120.

seems to be overcome by other mechanisms ensuring the effectiveness of awards such as reputational losses for non-compliant parties. Again though this is connected to the problem of confidentiality of awards. Where the existence of arbitration proceedings as well as their outcomes remain confidential, non-compliance with awards will usually not become public knowledge. Thus, reputational loss stemming from the public 'shame' of being perceived as non-compliant with the duty to honour an arbitral award will not be triggered.

V. CONCLUSIONS

Although arbitration seems to be a form of alternative dispute settlement not very frequently resorted to in cases of disputes involving international organisations, it remains an important alternative, in particular, for private litigants to ensure that their right of access to justice is guarded. This requires more than the mere availability of arbitration in the first place. It also implies that arbitration must be an affordable method of dispute settlement, ensuring basic fair trial demands. Further, transparency and the effective enforcement of outcomes will enhance the rule of law-conformity of arbitration as an option for settling disputes to which international organisations are parties.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).