

STATE LIABILITY AND THE ENFORCEMENT OF ARBITRAL AWARDS INFRINGING EU LAW, A ZERO-SUM GAME AFTER TOMÁŠOVÁ?

RESPONSABILIDAD DEL ESTADO POR INEJECUCIÓN DE LAUDOS ARBITRALES QUE VIOLAN EL DERECHO DE LA UE, ¿UN JUEGO DE SUMA CERO TRAS TOMÁŠOVÁ?

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Abstract: The CJEU doctrine regarding to commercial arbitration addresses several aspects of the complex relationships between arbitration and EU Law. Nonetheless, since there is no established regulatory standard, the national court's review of the conformity of arbitration awards with the EU legal order is conducted according to different criteria.

As national courts are faced with obligations of varying degrees, there is the risk of detaching themselves from the obligation to protect this legal order, with a corresponding impact on the creation of situations that could give rise to State liability for infringements of EU Law.

Although in its judgment in the Tomášová case the CJEU recognizes very restrictive grounds for the liability of a Member State in such circumstances, this does not exclude that such liability could be incurred under less restrictive circumstances either on the basis of internal law or international law.

Keywords: arbitration, award, public policy

Resumen: La doctrina del TJUE sobre el arbitraje comercial aborda varios aspectos de las complejas relaciones entre el arbitraje y la legislación de la UE. No obstante, dado que no existe una norma reglamentaria establecida, la revisión del tribunal nacional de la conformidad de los laudos arbitrales con el ordenamiento jurídico de la UE se lleva a cabo de acuerdo con diferentes criterios.

Dado que los tribunales nacionales se enfrentan a obligaciones de diverso grado, existe el riesgo de desvincularse de la obligación de proteger este ordenamiento jurídico, con el consiguiente impacto en la creación de situaciones que podrían dar lugar a la responsabilidad del Estado por infracciones del Derecho de la UE.

Aunque en su sentencia en el asunto Tomášová, el TJUE reconoce motivos muy restrictivos para la responsabilidad de un Estado miembro en tales circunstancias, esto no excluye que dicha responsabilidad pueda incurrirse en circunstancias menos restrictivas, ya sea sobre la base del derecho interno o del derecho internacional.

Palabras clave: arbitraje, laudo, orden público.

Summary: I. Introduction. II. The supervision of arbitral awards by the jurisdictional bodies of the Member States. 1. Legal background. 2. The lack of definition of the criteria for the supervision of arbitral awards. III. Tomášová, the national judge at a cross roads of legal uncertainty. 1. Legal background. The Tomášová case and the determination of the standards of public policy of the EU. IV. Final Remarks.

I. Introduction

1. This article analyzes the complex legal scenario where the courts of Member States of the EU have to deal with the review, recognition or enforcement of arbitration awards that infringe EU Law and which under certain circumstances could trigger the individual's right to compensation by application of the principle of State liability owing to an infringement of this legal order. The main arguments of this article are settled in sections III and IV. Section III deals with the national courts' role in reviewing arbitration awards. The practice to date in the areas of competition law and consumer protection highlights the national court's duty to review a disputed award by assessing its consistency with the EU Law. Generally, these are complex situations where the national judge does not have clear supranational criteria and the determination of the existence of serious breach of EU Law depends on the standard of review implemented at the internal level.

2. In this circumstances it is difficult to discern when could be attributable to an internal jurisdictional body the liability for applying awards that breach EU Law. Moreover, and according to the case law of the CJEU, the emergency of liability must be interpreted restrictively.

3. This issue and a key decision on the matter adopted by the Court, the Tomášová judgment, which underlies the features of the CJEU doctrine, are focusing in section IV.

II. The supervision of arbitral awards by the jurisdictional bodies of the Member States

4. The review of international awards by the jurisdictions of the Member States of the EU is subject to various legal uncertainties. Moreover, a confluence between international legality and EU Law may question in some cases the supervision of an international award applying the principles and rules of the law of the Union.

1. Legal Background

5. The courts of the Member States may legally review an arbitration award and decide, as appropriate, on its validity or invalidity in accordance with EU law. However, the exercise of that authority is based on two different sources that pursue different objectives, one of a supranational nature and another of an international nature. In practice this may lead to contradictory legal situations.

6. On the one hand, CJEU case law has established that, as national judges of EU Law, such courts are empowered to facilitate the resolution of proceedings of arbitral tribunals constituted under arbitration agreements based on the free consent of the parties¹, and to clarify inquiries as to the applicable law, as well as to review the arbitration award if it were subject to appeal or opposition, or another national procedure, including an appeal concerning exequatur. In any of these situations, the national court may also refer questions to the CJEU for preliminary ruling to ensure that EU law is fully respected, since the CJEU doctrine has repeatedly denied this power to arbitral tribunals.²

¹ According to a settled case law of the CJEU, arbitral tribunals are strictly defined as those constituted by a voluntary act of the parties, as expressed in a clause or agreement that attributes dispute resolution jurisdiction to a private body; see the Opinion of Advocate General Szpunar in the Ascendi case, C-377/13 [2014], EU:C:2014:246, points 19, 21, and 24. See also M. SZPUNAR: "Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU", in F. FERRARI (ed.): *The impact of EU Law on International Commercial Arbitration*, Chapter 3, (Juris Publishing LLC, 2017), 85, 123-124.

² See, e.g., the Nordsee case, 102/81 [1982], EU:C:1982:107, [10-13]; the Eco Swiss case, C-126/97 [1999], EU:C:1999:269, [34]; the Denuit et Cordenier case, C-125/04 [2005], EU:C:2005:69, [13]; and the Gazprom case, C-536/13 [2015], UE:C:2015:316, [36]. The CJEU emphasizes that it does not suffice if an arbitral tribunal renders decisions pursuant to the law, if its award has the authority of *res judicata* between the parties, or that it may constitute an enforceable instrument if it is granted an exequatur. For them to be deemed courts of a Member State, it is also necessary that their jurisdiction be mandatory for the parties, that their jurisdictional authority emanate directly from a public act and not from an act of the par-

7. Thus, it should be underlined that within their scope of ordinary jurisdictional authority national courts must always ensure that EU Law is respected throughout the territory of the Member States, a duty which is essential when dealing with the review of arbitration awards because arbitrators, who are members of these tribunals, are not bound by this same duty as they are not part of the public institutions³;

The safeguarding of the right of judicial protection ensures that claimants that question the validity of an arbitration agreement access to national courts. On the other hand, international agreements on arbitration binding on the Member States set forth specific provisions in this respect, empowering the national courts to examine the existence and effects of an arbitration clause and, as appropriate, determine whether the dispute should be resolved by means of said channel⁴. Accordingly, international law allows the national court to act with significant autonomy since the court with jurisdiction may refuse to recognize and enforce the award at issue upon carrying out a review of its validity in accordance with its national law, which would not require it to refer the question for a preliminary ruling to the CJEU⁵.

2. The lack of definition of the criteria for the supervision of arbitral awards

8. Since there is no clear regulatory standard established at a supranational level, the national courts' review of the compliance of arbitration awards is conducted according to different standards in view of the public policy of the European Union precisely as defined by the CJEU⁶.

9. The notion of public policy in the EU's legal order,⁷ includes the provisions and principles that constitute its legal foundation.⁸ Only in limited cases has the CJEU classified a provision or principle of EU law as a matter of public policy. For example, fundamental rights,⁹ and those Treaty provisions and deriving laws governing the EU's essential objectives, such as the functioning of the internal market,¹⁰ or the area of freedom, security and justice¹¹.

ties' free will, and that there be a sufficiently proximate link between the legal order of the Member State and the arbitration proceeding. The CJEU established in the *Nordsee* case that the national courts should refer a question for preliminary ruling in this situation, at [14-15].

The CJEU has underlined this position in regard to arbitral tribunals provided by agreements on international investments concluded between the Member States of the EU in case C-281/16, *Achmea* [2018], EU:C:2018:158, at [45-49].

Nevertheless, it is settled case law of the Court to recognize this power in respect of arbitral tribunals governed by public law; See, e.g., the *Vaassen Göbbels* case, 61/65 [1966], EU:C:1966:39 [1.A]; the *Handels-og KfiD* case, 109/88 [1989], EU:C:1989:383, [7-9]; the CJEU's Order in *Merck Canada*, C-555/13 [2014], EU:C:2014:92, [15-25]; and the *Ascendi* case, above n. 1 at [24-34]. See also the case C-26/16 *Santogal* [2017]; EU:C:2017:453, regarding to a Tax Arbitration Tribunal (Centre for Administration) in Portugal.

³ In this regard, see the *Broekmeulen* case, 246/80 (1981), EU:C:1981:218, [16-17].

⁴ See, the *Marc Rich* case, C-190/89 [1991] EU:C:1991:319 at [18]. Also, for example, the CJEU expressly referred to the obligation deriving from article II (3) of the New York Convention in the *West Tankers* case, C-185/07 [2009] EU:C:2009:69.

⁵ This possibility is based on letter a) of article V (2) of the New York Convention, on which Advocate General Wathelet relied in his opinion on the *Gazprom* case, EU:C:2014:2414, points 142-143. It should be also underlined that the simultaneous existence of multiple sources of law on the basis of which the national court may decide a case is likely to create situations of legal uncertainty; See *S. HINDELAND*, 'Repellent Forces: The CJEU and Investor. State Dispute Settlement', 53 *Archiv des Völkerrechts* (2015), 68-69. Even if only in exceptional cases; See, *M. ILLMER*: "The Arbitration Interface with the Brussels I Recast: Past, Present and Future", in *F. FERRARI* (ed.), *The Impact of EU Law on International Commercial Arbitration*, cit. above n. 1, Chapter 2, 31, 60-62.

⁶ See *C. LIEBSCHER*: "European Public Policy. A Black Box?" (2000), *Journal of International Arbitration*, 17 (3), 73, 80-81.

⁷ See, *G. KARYDIS*: "L'ordre public dans l'ordre juridique Communautaire: un concept à contenu variable" [Public Order in the Community's Legal Order: A Concept with Variable Content], (2002), *RTD Eur*, 38 (1), 1, 12-14.

⁸ See the *Kadi* case, C-415/05P (2008), EU:C:2008:461 at [304].

⁹ See, *inter alia*, the *Trade Agency* case, C-619/10 (2012), EU:C:2012:531 at [52]; also, the *Krombach* case, C-7/98 (2000), EU:C:2000:164 at [38-39].

¹⁰ The text of article 101 TFEU as of the *Eco Swiss* case, above n. 2 at [36].

¹¹ The principle of mutual recognition of the decisions of the courts of another Member State by the court responsible for recognizing or enforcing them; see, among others, the *Openbaar Ministerie/A.* case, C-463/15 PPU (2015), EU:C:2015:364 at [23-31]; and the *P/Q* case, C-455/15 PPU (2015), EU:C:2015:763 at [53]. Similarly, the notion of public policy refers to those provisions that protect legal assets dependent on the implementation of European policies provided for in the Treaties to achieve the Union's objectives; some of the aforementioned provisions may be found in the field of consumer protection policy. See, *inter*

Nevertheless, as AG Wathelet pointed out in this Opinion on case *Gazpom*, the Court has not determined the criteria against which a provision of EU Law may be considered “essential”¹².

10. It must be also underlined that when the courts of the Member States exercise authority to review the validity of an arbitration award in the light of EU public policy, they are bound to ensure the principle of the effectiveness and the useful effect of the relevant provisions¹³.

11. Thus, the national court may therefore choose to conduct a minimalist review of the validity of the award, foregoing any examination of the arbitrators’ interpretation or application of the relevant rules under EU Law,¹⁴ or a maximalist type of review¹⁵.

12. CJEU case law on competition law is not very useful for providing Member State courts with rules by which they must review the validity of a disputed award.¹⁶

13. Initially, the *Eco Swiss* case gave the national courts broad discretion to rule on the compliance of awards with EU law, including respect for public policy¹⁷.

14. Similarly, in his Opinion in *Genentech*, Advocate General Wathelet defended the authority of the internal courts to conduct a maximalist review of the disputed award. Referring in particular to possible breaches of public policy provisions of competition law, he justified such review without the need for a fragrant or manifest breach of such rules, since in his view those provisions always establish mandatory rules whose violation must necessarily be reviewed by the national courts.¹⁸ The CJEU de-

alia, the *Mostaza Claro* case, C-168/05 (2006), EU:C:2006:675 at [37]; the *Martin* case, C-227/08 (2009), EU:C:2009:792 at [28]; and cases ac. *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13, and C-487/13 (2015), EU:C:2015:21, at [30].

¹² See EU:C:2014:2414, Points 173-175.

¹³ See the *Van der Weerd* case, C-222/05 (2007), EU:C:2007:318 at [35-41].

¹⁴ See, *inter alia*, L. RADICATI DI BROZOLO: “When, why and How Must Arbitrators Apply Overriding Mandatory Provisions?. The Problems and a Proposal” in F. Ferrari (ed.): *The Impact of EU Law on International Commercial Arbitration*, cit., Chapter 11, 351, 380-382. See also, L. RADICATI DI BROZOLO: “Court Review of Competition Law Awards in Setting Aside and Enforcements Proceedings,” in G. BLANKE and P. LANDOLT (eds.): *EU and US Antitrust Arbitration*, above cit. fn. 5, Chapter 22, 755, paras 22-051-064.

¹⁵ See *inter alia*, P. MAYER: “The Second Look Doctrine: The European Perspective,” (2010), *American Review of International Arbitration*, 21 (1), 201.

¹⁶ See, e.g., G. BLANKE: “The ‘Minimalist’ and ‘Maximalist’ Approach to Review Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last?” in D. BRAY and H. BRAY (eds.): *Post Hearing Issues in International Arbitration*, (Juris Publishing 2013), 169, 185.

¹⁷ See the *Eco Swiss* case, above n. 2, at [32]. Moreover according to the Opinion of Advocate General Saggio courts must be allowed to conduct an ‘effective’ review of the award, EU:C:1999:97, Point 32. See also the doctrinal analyses of: A. MOURRE: “Les rapports de l’arbitrage et du droit communautaire après l’arrêt *Eco Swiss* de la Cour de Justice des Communautés Européennes” [Reports on arbitration and Community law after the *Eco Swiss* judgment of the Court of Justice of the European Communities], *Gazette du Palais*, III, Doct. 2000, 127, 131-132; S. PRECHAL and N. SHELKOPLYAS: “National Procedures, Public Policy and EC Law. From *Van Schijndel* to *Eco Swiss* and Beyond,” (2004), *Eur. Rev. of Private Law*, 5, 589; and, L. RADICATI DI BROZOLO: “Arbitrato, diritto della concorrenza, diritto comunitario e regole di procedura nazionali” [Arbitration, Competition Law, Community Law and National Rules of Procedure], (1999), *Riv. Dell’arbitrato*, 4, 665.

¹⁸ However, Advocate General Szpunar stated in his Opinion in *Diageo Brands* that when deciding to deny recognition of an arbitration award, the public policy standard applied by the Court of Justice is less strict than if it were a court decision, which would suggest that any error of law by an Arbitral Tribunal that applies or misinterprets EU law could constitute a ground for annulment of the award; EU:C:2015:137; Point 54; The CJEU did not rule on this question in its Judgment; the *Diageo Brands* case, C-681/13 (2015), EU:C:2015:471, at [48-52]. Moreover according to the Opinion of Advocate General Saggio courts must be allowed to conduct an ‘effective’ review of the award, EU:C:1999:97, Point 32. See also the doctrinal analyses of: A. MOURRE: “Les rapports de l’arbitrage et du droit communautaire après l’arrêt *Eco Swiss* de la Cour de Justice des Communautés Européennes” [Reports on arbitration and Community law after the *Eco Swiss* judgment of the Court of Justice of the European Communities], *Gazette du Palais*, III, Doct. 2000, 127, 131-132; S. PRECHAL and N. SHELKOPLYAS: “National Procedures, Public Policy and EC Law. From *Van Schijndel* to *Eco Swiss* and Beyond,” (2004), *Eur. Rev. of Private Law*, 5, 589; and, L. RADICATI DI BROZOLO: “Arbitrato, diritto della concorrenza, diritto comunitario e regole di procedura nazionali” [Arbitration, Competition Law, Community Law and National Rules of Procedure], (1999), *Riv. Dell’arbitrato*, 4, 665.

¹⁸ EU:C:2016:177, Points 58-67.

clined to rule on this question in its judgment,¹⁹ thereby maintaining the legal uncertainty regarding the necessary consolidation of the aforementioned standard of review.²⁰

15. CJEU case law also recognizes the authority of national courts to review the validity of awards in relation to certain regulatory provisions on consumer protection that are of public policy,²¹ even if the reason for contesting the award were not invoked in the arbitration proceedings but in the subsequent application to the national court.²² However, CJEU case law in this area does not provide any clear rules for determining the standard of review by which the national courts can review awards.²³

Moreover, CJEU doctrine sets forth the general obligation of the national court to review disputed arbitration awards for compliance with the public policy of the EU, but subject to the existence of national procedural rules which provide therefor (principle of equivalence)²⁴, and also, in certain circumstances, to that court's having the necessary facts and law to do so²⁵.

16. Accordingly, CJEU case law sets out two necessary conditions for the national court adjudicating enforcement proceedings regarding a final arbitral award to be able to review the validity of any disputed clause: that it has access to the necessary legal and factual elements, and that it is obliged to conduct such *ex officio* review in accordance with national procedural rules.²⁶

17. In these circumstances, national courts are faced with obligations of varying degrees, with a corresponding impact on the creation of situations that could give rise to State liability for infringements of EU law:

- a) When national courts review an award in the context of annulment proceedings they are obliged to decide on the content of the disputed clauses, whether acting *ex officio* or at the request of a party²⁷.
- b) In award enforcement proceedings in which both of the above-mentioned conditions are satisfied, they are also obliged to conduct a review of the legality of the disputed clauses²⁸.

¹⁹ See the Genentech case, C-567/14 (2016), EU:C:2016:526 at [35-43].

²⁰ Thus, for example, within the scope of competition law, breach of a mandatory provision which does provide for exceptions would not have the same consequences as another which may be subject to authorization by the relevant authority applying the rule of reason. Accordingly, an arbitral award would be subject to review by the national court or tribunal in the event that it was adopted in breach of a mandatory provision, but review in the latter case would not be warranted; see, L. RADICATI DI BROZOLO: "Court Review of Competition Law Awards...", above n. 16, 788, 789.

²¹ See, *inter alia*, the Mostaza Claro case, above n. 13 at [38-39]; and the Asturcom Telecomunicaciones case, C-40/08 (2009), EU:C:2009:615, at [51-56].

²² In this regard, Advocate General Tizzano in his Opinion on the Mostaza Claro case maintains that the public policy protection here does not clearly derive from the disputed provisions on consumer protection but from the obligation to protect the applicant's rights of defense, EU:C:2006:265, Points 50-62.

²³ One author maintains that this "Standard" could be inferred on the basis of *Asturcom* and, more specifically, from paragraph 53 of that judgment, which states, *inter alia*, that the national court or tribunal shall conduct review of the award "... where it has available to it the legal and factual elements necessary for that task." Consequently, such review must be conducted in accordance with the established practice of the case law and/or the national rules of the Member State of the court or tribunal; see P. SMITH, "Comments" on A. DICKINSON: "Unfair arbitration clause before the ECJ," *Conflicts of Laws.net – News and Views in Private International Law*, 2 November 2009.

²⁴ See, e.g., the Eco Swiss case, cit. at [37]. See N. BLACKBAY, C. PARTADISES, A. REDFERN, M. HUNTER: *Redfern and Hunter on International Commercial Arbitration*, 5th edition, (Oxford UP, 2009), 3, 135. According to these scholars, the Eco Swiss case provides an incentive for the arbitration tribunals to raise and apply issues of EU competition Law themselves if they are concerned about the enforceability of their awards in the EU.

²⁵ See, e.g., the Order of the Court of Justice in the Pohotovost s.r.o. case, C-76/10 (2010), EU:C:2010:685, at [50-54].

²⁶ See, e.g., the Pohotovost s.r.o. case, C-470/12 (2014), EU:C:2014:101 at [42]. In the Opinion of Advocate General Wahl, the national court's obligation of review, provided the conditions laid down in the CJEU case law have been fulfilled, must be satisfied irrespective of the nature of the dispute or the stage of the proceedings at which it acts; see his Opinion in Pohotovost s.r.o., EU:C:2013:844, Point 54.

²⁷ See V. TRSTENJAK AND E. BEYSEN: "European Consumer Protection Law: Curia Semper Davit Remedium?," (2011), *CML Rev.*, 48 (1), 95, 123, 124.

²⁸ F. DELLA NEGRA: "The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kusionová", (2015) *CML Rev.* 52 (4) 1009, 1031.

- c) In award enforcement proceedings in which one of the above-mentioned conditions is not satisfied, national courts would not be obliged to conduct such a review.

It could then be the case that a national court merely reviews the formal compliance of the award and orders its enforcement, but does not review the consistency of its content with the public policy of the EU, acting pursuant to national rules.²⁹

However, even in cases where the national court reviews the validity of an award in the light of EU Law, the absence of supranational rules to set the standard of review allows it to act with broad discretion. Thus, arbitration awards with clauses that breach EU law could be authorized for enforcement provided the national court reviewing the award does not find them to cause any manifest or sufficient damage.

18. This situation does not benefit legal certainty, nor does it contribute to the implementation of the principle of uniform application of EU law across the territories of Member States. It also undermines the mandatory character inherent to the public policy provisions, the safeguarding of which directly lies with the courts of the Member States.

19. This is a situation similar to that which has generated a line of US Supreme Court case law regarding the Federal Arbitration Act, which gives precedence to procedural issues and to the autonomy of the will to enter into a disputed arbitration agreement versus the protection of substantive consumer rights.³⁰

III. Tomášová, the national judge at a crossroads of legal uncertainty

20. The CJEU's recognition of the principle of state liability for infringement of EU law functionally complements the principles of primacy and direct effect³¹ and is enshrined as a general principle of EU law³² requiring specific protection in the Member States, in accordance with the principles of equivalence and effectiveness³³.

²⁹ This situation is somewhat contradictory in the light of CJEU case law on mortgage loans in the Sánchez Morcillo case, in which it found proper the adoption of precautionary measures (suspension of the enforcement proceedings) by the national court that heard the declaratory action concerning the abusive nature of a contractual clause whose non-compliance triggered the enforcement proceedings before another court, without there being an authorizing national regulatory provision; C-169/14 (2014), EU:C:2014:2099, at [42-52] or similarly, FinnMadrid EFC, C-49/14 (2016), EU:C:2016: 98, at [45-47] [52-55]; and Advocate General Szpunar's Opinion on the case, in which he justifies the extraordinary prevalence of the principle of effectiveness of public interest provisions to empower the enforcement court to conduct a review of an unfair contract clause, where national procedural rules had not provided for such *ex officio* review at any previous procedural stage, EU:C:2015:746, Points 62-77.

³⁰ See, *Direct TV v. Imburgia*, 136 S. Ct. 463 (2015), at [470]- [47]. See also, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) at [2309]- [2310]; and *Green Tree Financial Corp Alabama and Tree Financial Corp. v. Larketta Randolph*, 531, U.S. 79 (2000), at [90]. Among the specialized analyses that criticize this line of case law, see: J.M. Glover: "Disappearing Claims and the Erosion of Substantive Law," (2015), 124, *Yale Law Journal*, 3052, 3071; J. Resnik: "Diffusing Disputes: the Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights," (2015), 124, *Yale Law Journal*, 2804, 2810; I.S. Szalai: "Direct TV, Inc. V. Imburgia: How the Supreme Court Used a Jedi Mind Trick to Turn Arbitration Law Upside Down," (2016), 32, *Ohio State Journal on Dispute Resolutions*, 1, 3.

³¹ *Francovich and Bonifaci* (C-6/90, C-9/90) [1991] EU:C:1991:424 at [31-34]. See also: R. Malcolm: "Beyond Francovich," 56, 1, *Modern Law Review*, 55, (1993), 55-57, 60-62, and 72; J. Steiner: "From Direct Effect to Francovich: 'Member State Liability and Direct Effect: What's the Difference After All?' Shifting Means of Enforcement of Community Law," *E. L. Rev.*, 18, 1, (1993), 3, 21-22; S. Prechal: *European Business Law Review*, 17, 2, (2006), 299, 303-306 and 315; A. Ward: "More than an 'Infant Disease.' Individual Rights, EC Directives and the Case for Uniform Remedies," in J. Prissen and A. Eschrauwen (eds.): *Direct Effect. Rethinking a Classic of EC Legal Doctrine*, (Europa Law Publishing, 2002), 45, 64-66, and 73-74; among others. CJEU doctrine on the principle of state liability initially focused on matters concerning the transposition of Directives, *Wagner Miret* (C-334/92) [1993], EU:C:1993:945, [22], *Faccini Dori* (C-91/92), [1994], EU:C:1994:292, [27]; and, *El Corte Inglés/Blázquez Rivero*, (C-192/94), [1996], EU:C:1996:88 [22].

³² See *Francovich and Bonifaci*, above n. 33 at [30-37].

³³ See *Francovich and Bonifaci*, above n. 33 [42-43]; *Danske Slagterier* (C-445/06) [2009] EU:C:2009:178 [31]; *Transportes Urbanos* (C-118/08) [2010] EU:C:2010:39 [46-48]; *Ferreira da Silva e Brito and others* (C-160/14) [2015] EU:C:2015:565 [50]; etc.

1. Legal background

21. An extensive CJEU case law has progressively extended the principle's scope of application to the point of attributing infringements of EU law to any public authority of the Member State irrespective of its nature³⁴ or territorial location.³⁵

22. As above said, the national courts' role in reviewing arbitration awards, and the discretionary use of the standard of review to decide on their validity, could engender situations that afford that an individual invoke the principle of State liability for malfunctions in the Justice System. Nevertheless, according to the case law of the CJEU, the emergency of liability in these circumstances shall be recognized in exceptional cases. In the *Köbler* case,³⁶ the recognition of the possibility of compensation for damage caused to individuals by the malfunctioning of the justice system was subject to the fulfillment of certain requirements that were specifically defined to fit the judicial function: that the breach in question is due to a decision of a court or tribunal of last resort, and that such breach is sufficiently serious and manifest³⁷.

23. On the other hand, the CJEU has set forth narrow criteria for determining the liability of a national court for breach of EU law, namely that the national court must take account of all the factors which characterize the situation put before it, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution, and noncompliance by the court in question with its obligation to make a reference for a preliminary ruling.³⁸

³⁴ In the first cases cited above, at n. 33, the applicants alleged state liability for failure to transpose directives, even though the failure to act was the fault of the legislature. The CJEU judgments in *Brasserie du Pêcheur and Factortame III* (C-46/93 and C/48/93) [1996], EC:C:1996:79 [32-36] expressly provide for the possibility of attributing damages to the malfunctioning of a national legislature. Within the doctrine analyzing the impact of this Judgment, see P. CRAIG: "Once More Unto the Breach: The Community, the State and Damages Liability," *LQ Rev.*, 113 (1997), 67; E. DEARDS: "Brasserie du Pêcheur: Snatching Defeat from the Jaws of Victory?" *EL Rev.*, 22 (1997), 620; W. VAN GERVEN: "Bridging the Unbridgeable: Community and National Tort Law after *Francovich* and *Brasserie*"; *Int'l and CLQ*, 45, (1996), 507.

Based on the judgment in *Köbler* (C-224/01) [2003] EU:C:2003:513 [33-36], private individuals have been able to obtain redress before national courts for damages caused by the infringement of their rights under EU law due to decisions of a last resort court. Within the doctrine analyzing the impact of this Judgment, see N.W. BARBER AND H. SCOTT: "State Liability under *Francovich* for Decisions of National Courts," *L Q Rev.*, 120 (2004) 403; B. MARTEN: "State Liability for Judicial Wrongs and Community Law: The Case of *Gerhard Köbler v. Austria*," *EL Rev.*, 29, (2004), 243; C. D. CLASSEN: "Annotation to *Köbler*," *CML Rev.*, 41, (2004), 813; P. WATTEL: "*Köbler*, *CILFIT* and *Wethgrove*: We Can't Go on Meeting Like This," *CML Rev.*, 41 (2004), 177.

³⁵ Thus, for example, in the Judgment in *Klaus Konle* (C-302/97) [1999] EU:C:1999:271 [61-62], the Court established the duty of the State to make reparation for damage caused to individuals irrespective of the authority responsible for the breach of EU law, including within a decentralized internal system of competences of a federal nature. Liability may also be claimed independently of the type of administrative body to which a sufficiently serious breach of EU law is attributed, see, e.g., the judgment in *Larsy* (C-118/00) [2001], EU:C:2001:368 [35]. Within the doctrine analyzing the impact of this case law, see: A. GEORGIOU: "The Allocation of Responsibility in State Liability. Actions for Breach of Community Law: A Modern Gordian Knot?" *EL Rev.* 26 (2001), 139, id.: "Not as Unproblematic as You Might Think: The Establishment of Causation in Governmental Liability Actions," *EL Rev.*, 27 (2002), 663; A. LENGAUER: "Case C-302/97, *Klaus Konle v. Republic of Austria*," *CML Rev.*, 37 (2000), 181; T. TRIDIMAS: "Liability for Breach of Community Law Growing Up and Mellowing Down?" *CML Rev.*, 38 (2001) 310.

³⁶ Above n. 36.

³⁷ See, *Köbler* above n. 36 [59]. Regarding the notion of a court of last resort, although each national system has its own peculiarities which generally require examination on a case-by-case basis, the CJEU has established the possibility that such courts are not exclusively those which are supreme in each Member State, but rather any one whose decisions on national law are not subject to further judicial remedy. See, e.g., the Judgment in *Biuro podróży Partner* (C-119/15) [2016], EU:C:2016:987, at [48-54]; see also, *Târçia* (C-69/14) [2015], EU:C:2015:662, at [40]. The CJEU has pointed out in this regard that a court whose decisions are subject to judicial remedy may not be deemed a court of last resort when the appeal brought against a decision of that court has not been examined on the basis of the withdrawal of the appellant; see *Aquino*, C-3/16 [2017], EU:C:2017:209, at [38].

³⁸ The CJEU expressly affirms that such liability may only be claimed in the exceptional case where the court of last resort has manifestly infringed the applicable law, see *Köbler* above n. 36 [53-55]. It should be noted here that the CJEU itself has recognized that although a supreme court must bear in mind in its assessment that a case is pending in which a lower court has referred a question for a preliminary ruling, that fact alone does not preclude the supreme court from concluding that the case before it involves an "acte clair." Accordingly, it is not required to make a reference to the Court of Justice on the same que-

Similarly, State liability might be sought where the breach results from an assessment of facts and evidence, especially if this assessment leads to a “manifest infringement of applicable law” as regards the burden of proof, the value of the evidence or the admissibility thereof, or the legal characterization of the facts³⁹.

This case law entails an extension of possible scenarios in which a national court might commit a “manifest” breach of EU law⁴⁰.

2. The Tomášová case and the determination of the standards of public policy of the EU

24. The *Tomášová* case,⁴¹ is a key decision on the matter. The applicant, a low-income pensioner, entered into a consumer credit agreement with Pohotovost in 2007, which included an arbitration clause conferring exclusive arbitral jurisdiction for the resolution of contractual disputes. Moreover, the contract set the penalty interest rate at 91.25% per annum and did not specify the applicable annual percentage rate. When the applicant failed to repay the loan and make interest payments, Pohotovost initiated the arbitration proceedings in which the applicant was ordered to repay the sums owed, plus penalty interest and arbitration costs.

25. In October 2008, Pohotovost filed applications to enforce the arbitration awards before the District Court of Prešov (Slovakia), which were granted in December 2008, though the proceedings were still pending at the time the CJEU received the request for preliminary ruling.

26. In July 2010, Ms. Tomášová brought an action against the Ministry of Justice of the Slovak Republic for compensation for damage arising from the Prešov District Court’s infringement of EU law, for its having granted enforcement of the arbitration awards that were based on an unfair arbitration clause. That petition was dismissed in October 2010 by the Prešov District Court itself on the grounds that the applicant had not exhausted the relevant remedies, since the enforcement proceedings in question were still pending, and that there could not be a question of damage.

27. Ms. Tomášová appealed against this decision and obtained a favorable decision from the Prešov Regional Court, which sent the case back to the same District Court. In those circumstances, the Court decided to stay the proceedings and refer a number of questions to the Court of Justice for a preliminary ruling.⁴²

It is my understanding that the five questions submitted by the national court differ in their relevance to the central elements of the CJEU’s doctrine on the subject at hand: the conduct attributable to the court, the procedural stage at which such conduct may be attributable, the degree of diligence required of the parties concerned to create a link between the damage caused and the liability of the national court, and the means of redress appropriate for those purposes.

28. However, the most controversial issue concerns the requirements for the national court to review the validity of arbitration awards on the basis of the public policy of the European Union, since this CJEU doctrine is responsible for deepening the divergences between international law and EU law.

stion, nor is it required to wait until an answer to that question submitted by the lower court has been given. See the Judgment in joined cases X and Van Dijk (C-72/14 and C-197/14) [2015], EU:C:2015:564, at [60-63]. Similarly, a court of last resort may abstain from submitting a question for preliminary ruling if it rejects an appeal on grounds of inadmissibility proper to the procedure of that court, provided respect with the principles equivalence and effectiveness. See Aquino above n. 39 at [56]. But these situations, apart from generating the undesirable circumstance of contradictory decisions issued by national courts, could also create the risk of a serious breach of EU law if the national court interprets one of its rules in a “manifestly erroneous” manner, especially without regard for CJEU case law or if it interprets its national law in violation of EU law. See Ferreira da Silva e Brito and others above n. 35 [57-60].

³⁹ See the Judgment in *Traghetti del Mediterraneo* (C-173/03) [2006], EU:C:2006:391, at [37-45].

⁴⁰ See B. Beutler: “State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?” *CML Rev.*, 46, 3 (2009), 773, 789.

⁴¹ *Milena Tomášová* (C-168/15) [2016], EU:C:2016:602.

⁴² See *Tomášová* above n. 43 [5-14].

29. In its reply to the referring court, the CJEU jointly addresses the first three questions, and finds that it must elucidate if and in what circumstances an infringement of EU law arising from a court decision given in proceedings to grant an application for recovery of sums under an unfair contractual clause constitutes an infringement “sufficiently serious” for the Member State concerned to incur liability; and, if the facts that the enforcement procedure had not been closed, that the respondent had shown absolute inactivity, and that all national legal remedies had not been exhausted, would have a bearing in that respect.⁴³

30. Having enumerated the above-mentioned factors that may be considered when determining whether there is a “sufficiently serious breach,” it holds that one necessarily occurs when the court in question adopts its decision with a clear disregard of the CJEU’s case law in the field,⁴⁴ thereby more clearly defining an essential limit for the pursuit of compensation claims by interested parties, which is generally in line with the requirements of national judicial practices⁴⁵.

31. In line with its previous case law, the CJEU in this case reiterated that the national court’s obligation to protect consumer interests derives from the nature of the public interest conferred on the relevant provisions in this field of law, including *ex officio* review of the unfairness of contractual clauses that give rise to a disputed arbitration award in the context of an enforcement proceedings, provided that it must conduct an *ex officio* review of whether such clauses are contrary to national public policy rules in accordance with the national procedural rules.⁴⁶

However, based on the Court’s position subsequently taken in this judgment, the failure or refusal to forego a review of the unfair clauses, by any national court adjudicating a matter in the context of the circumstances of the case, would not constitute a breach that would oblige a Member State to compensate for damage caused, since State liability would only be incurred if this were a decision rendered by a court of last resort.⁴⁷

32. The Court, nevertheless avoided ruling on the other questions submitted by the referring court in finding that they were not relevant to the case at hand, since the facts to which they related occurred prior to the relevant CJEU case law in this field.⁴⁸ This position has been subject to some doctrinal criticism on the ground that, regardless of the passive position maintained by the applicant, the Court should have ruled on the national court’s review of the possible unfairness of the contractual clause of the requested loan, which had required the applicant to submit to arbitration⁴⁹.

In sum, the CJEU recognizes very restrictive grounds for the liability of a Member State in such circumstances, although this does not exclude that such liability could be incurred under less restrictive circumstances on the basis of national law⁵⁰.

⁴³ See Tomášová cit. [16-17].

⁴⁴ See Tomášová cit. [24-26].

⁴⁵ See Z. VARGA: “In Search of a ‘Manifest Infringement of the Applicable Law’ in the Terms Set Out in Köbler,” *Review of European Administrative Law*, 9, 2, (2016), 5, 39-40. As this same author had already shown in another study, from 2003 to 2016 35 lawsuits were brought that invoked Köbler within the judiciaries of the 28 EU Member States. And although 13 national judiciaries regularly apply this case law, the biggest obstacle to attributions of liability is the identification of a national court decision qualifying a “manifest infringement” of EU law; see: “Why is the Köbler Principle Not Applied in Practice?” *Maastricht Journal*, 23 (2016), 984, 988, 992, 1006-1008.

⁴⁶ See, Tomášová cit. [27-32].

⁴⁷ See, Tomášová cit. [36]. In this regard, Advocate General Wahl also set forth, in his Opinion in the Tomášová case, understanding that the effectiveness of the provisions of EU law is ensured provided that the court of last resort revokes the decision adopted in breach of the obligation to review the contractual clauses in question for unfairness, EU:C:2016:260, Points 43-45 and 47-48.

⁴⁸ See Tomášová cit. [33-34].

⁴⁹ See A. Van Duin: “Océano meets Francovich (part II): CJEU judgment on State Liability and unfair terms,” *Recent Developments in European Consumer Law*, Thursday, 28.7.2016. However, *Asturcom, cit.*, had already established the national court’s obligation, when adjudicating a petition related to enforcement proceedings of an arbitration award, to examine the unfairness of an arbitration clause in a contract with a consumer, [59].

⁵⁰ Where the national law of a Member State provides that a lower court incurs liability for breach of the rules of applicable national law, the application of the principle of equivalence implies that it also incurs liability for breaches of EU law; see the Opinion of Advocate General Wahl in Tomášová, above n. 49, Point 32.

33. Lastly, the Court jointly addresses the questions of national remedies for the satisfactory reparation for damage caused to the applicants for the infringements of EU law in this case. In line with its cautious position with regard to the rules for attributing the damage to the court of the Member State concerned, it refers laconically to its case law on the matter, setting forth that although reparation of the damage must be made pursuant to national law, it must nevertheless comply with the principles of equivalence and effectiveness⁵¹.

34. *Tomášová* confirms the CJEU's restrictive requirements for an individual to invoke State liability for infringements of EU law caused by a court that must decide on the validity of an arbitration award.

In reality, the Court seeks to reconcile, to the extent possible, the principle of Member State procedural autonomy with the national courts' duty to implement the public policy provisions of EU law on consumer protection.

35. Through its subtle use of smoke and mirrors, it focuses on the resolution of the case in the Pannon judgment, absolving the national court there from liability since it could not have been said to have been in "manifest disregard" in the light of the contentious facts prior to that judgment. However, what the *Tomášová* case does, is to confirm *Asturcom* and *Pohotovost* in order to delimit the functional attributions of arbitration as a means of safeguarding the rights granted to consumers under EU law, when the dispute refers to the enforcement of an award. In this regard, there is a transcendental displacement regarding the possible attribution of liability for claims that these rights are not protected, because should this occur, the individual would run the serious risk of not being able to enforce due reparation at the national level since the arbitral tribunals are not judiciary bodies of the State.

36. Thus, this doctrine does not contribute to dispelling the current degree of legal uncertainty to which we have already referred, but enables two legal scenarios with a direct impact on the parties concerned: a) where the national law of the Member State concerned does not provide the basis for its courts to review, annul, or render inapplicable, where appropriate, an arbitration award based on a contractual clause in breach of EU public policy; (b) where the national law of the Member State concerned provides for such a possibility.

37. The first scenario, which does not provide for the possibility of invoking State liability, and consequently for the ability of the person concerned to obtain the corresponding compensation, is clearly detached from paragraph 32 of the *Tomášová* judgment. The Court here, by confirming *Asturcom* and *Pohotovost* case-law, conditions the national court's duty of protection on compliance with the principle of equivalence, stating that where it adjudicates a petition for enforcement of a final arbitration award (and) has the necessary factual and legal elements before it, it is obliged to conduct an *ex officio* review of the unfairness of the contractual terms which serve as the basis for the loan recognized in that award in the light of the provisions of Directive 93/13 provided further that it be required to consider *ex officio* whether those clauses comply with national rules of public policy under the national procedural rules in the context of a similar enforcement procedure⁵².

⁵¹ The Court reiterates that national requirements for the compensation of damages caused by a breach of EU law may not be less favorable than those applicable to similar domestic claims, nor may they be articulated in such a way as to render it impossible or prohibitively difficult to obtain compensation in practice; see *Tomášová*, cit. [38]. That position, which respects the principle of procedural autonomy of the Member State concerned, allows the applicant to obtain compensation either by damages suit or by recovery of the sums unduly charged when taking out the credit, and does not rule on other national issues which were referred to the Court, for example, whether the action seeking the recovery of those sums, as a legal remedy, has priority over the damages action. The fourth question submitted by the Prešov District Court concerned whether the amount claimed by the applicant corresponded to the damage caused by the Member State and whether that damage would be offset by the sum charged as unjust enrichment, while the fifth question refers to the aforementioned possibility of a procedural priority between the action for damages and the recovery of sums unduly paid; see *Tomášová*, cit. [15].

⁵² This clearly consolidated doctrine of the Court attenuates the impact of the application of the principle of effectiveness of EU law, the useful effect of which is to protect Member State courts, thereby rendering relative the very value of the principle of primacy by subjecting it to two conditions: first, because the case law of *Eco Swiss*, cited above, where the safeguarding of the EU public policy (in this case the current Article 101 TFEU) referred to a provision with direct vertical and horizontal effect,

38. As has already been pointed out, in the event that national law does not allow the national court to conduct such a review, the principle of State liability for breach of EU law would be rendered ineffective, since there would be no liability event to underlie the interested party's compensation claim⁵³.

39. This CJEU doctrine reflects an implicit trust in the proper functioning of the arbitral tribunals as guarantors of the rights at stake, including those arising from EU Law,⁵⁴ establishing certain limits in relation to the functions of the Member State courts, who must exercise a degree of self-restraint when examining a disputed award and deciding whether to conduct *ex officio* review, since they would not have before them the factual and legal elements necessary to conduct such review, given the specific characteristics under which the arbitration proceedings are conducted.⁵⁵

However, *Asturcom* provides for the possibility of bringing a liability suit against a national court that refrains from exercising discretionary review of a clause for its compliance with national public policy, despite having the ability to do so. In these circumstances the effectiveness of the relevant provisions of EU Law would require it to conduct *ex officio* review.⁵⁶

40. As above remarked, there is another legal scenario if a Member State's national law were to provide for the national court's review of an unfair contract clause for compliance on grounds of public policy. Within this context a number of situations could arise as well: first, the national court's mandatory and inescapable obligation to conduct *ex officio* review; second, the possibility that the court would refrain from carrying out the abovementioned review for objective reasons linked to the development of the procedure through which the disputed arbitration award was adopted; and, third, that it would refrain from conducting the review on grounds relating to the conduct of the respondent in the arbitration proceedings at issue.

41. The first situation would involve national courts whose decisions are not subject to appeal at the national level, who hear a request for the enforcement of a final arbitration award, and who have all the necessary factual and legal elements before them to conduct the aforementioned compliance review.

42. Those courts may nevertheless refrain from conducting review if they are required to act in the context of certain jurisdictional procedures, such as those for award enforcement, which by their streamlined nature only allow for their occasional intervention, making it very difficult for them to assess all the relevant factual and legal elements⁵⁷.

43. Third, it may also be the case that a national court of last resort adjudicating the enforcement of an award decides not to conduct review for validity in view of the fact that the respondent has maintained a passive position, in not exercising the procedural rights that correspond thereto⁵⁸.

gave rise to obligations that must be respected both by the public authorities and private individuals; however, the relevant consumer protection provisions may not be invoked and applied at the national level with the same guarantees as those relating to competition law, since they lack horizontal direct effect and, in the absence of the transposition of the Directive, are not binding on individuals, whether it is those who enter into an arbitration agreement to resolve disputes, or the arbitrators themselves, who are not deemed public officials and are therefore under no duty to regard and apply them.

⁵³ This is in line with AG Wahl's position in developing his opinion in this case above n. 49, Points 67-68, and dispels certain authors' fears about the use of the Principle of State Liability as a Trojan horse that undermines the procedural autonomy of the Member States. See J.S. DELICOSTOPOULOS: "Towards European Procedural Primacy in European Legal Systems," *Eur. L. J.*, 9, 5, (2003), 599, 612-613; C. KAKOURIS: "Do the Member States Possess Judicial Procedural Autonomy?" *CML Rev.*, 34, (1997), 1389, 1411-1412; among others.

⁵⁴ See, the Opinion of AG Wahl in *Tomášová*, cit., Points 73-74 and 77-78. See also the Opinion of AG Wathelet in case C-284/16, *Achmea*, EU:C:2017:699, at Point 134.

⁵⁵ On the contrary, that event would not materialize if the disputed enforcement order based on which the national court must investigate the existence of clauses contrary to EU law were not issued by an arbitral tribunal but simply by a public notary. In this case, there would be no presumption that the contents of the disputed act were reviewed by a specialized body capable of deciding whether it complies with EU law; e.g., a notarial act.

⁵⁶ Above cit. n. 23, at [54].

⁵⁷ See the Opinion of Advocate General Wahl in *Tomášová*, cit. Point 67 and note 36.

⁵⁸ CJEU Judgment in *ERSTE Bank Hungary* (C-32/14) [2015], EU:C:2015:637, at [62]; CJEU Judgment in *Danske Slagterier*, above, n. 35, at [69]; among others.

44. In the latter two cases, the abstention of the aforementioned national courts could be justified based on the circumstances of each case, and there would be no grounds for claiming State liability for breach of EU law.

IV. Final Remarks

45. National courts may exercise an advisory role on the interpretation and scope of European law to arbitrators who are before disputes, including the exercise of authority to refer a question for a preliminary ruling to the CJEU, as well as to exercise authority to review, recognize, and enforce an arbitration award.

46. When dealing with the review of the validity of an award, out of the need to protect EU public policy, national courts are required the highest degree of diligence, although they have a wide margin of discretion to determine the existence of possible breaches of said provisions, depending on the standard of review that they would apply in any given case in the absence of a determining supranational principle.

47. Nonetheless, the *Tomášová* case adds some degree of uncertainty since, as noted above, the CJEU's ambiguity and lack of clarity in its replies to the questions submitted by the national court could lead to two circumstances in which a court duty-bound to conduct the abovementioned review would abstain therefrom: whether for objective reasons tied to the nature of the national judicial procedure, or on grounds relating to the conduct of the respondent in the arbitration proceedings at issue. In both cases, there would be no solid grounds for claiming State liability for breach of EU law.

In putting off the creation of the necessary supranational rules in this field, the CJEU is effectively tolerating the existence of legal loopholes that cannot be filled by the national regimes of the Member States and the acts of their courts. This remedy is inadequate because of the dispersed and contradictory character of all these regimes and decisions. In addition, it harms the coherence of the EU legal system and the maximum effectiveness of its principles and rules, to the serious detriment of individuals. The case law of *Asturcom*, *Pohotovost*, and *Tomášová* has established a great deal of legal uncertainty, and it seems to follow that the CJEU is indefinitely postponing the solutions sought by the courts of the Member States.