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ANALYSIS

Litigation and Arbitration

Public policy considerations in the recognition of foreign arbitral awards settling consumer disputes

An *exequatur* court may examine, of its own motion, the validity of an award in accordance with consumer protection laws.

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1. In the case in which the Catalonia High Court of Justice (Civil and Criminal Division) issued Order no. 18/2026 of 23 March (app. 12/2025), an application had been lodged for the recognition of two awards in which the following circumstances applied:

   a) the respondent in the arbitration was a consumer;

   b) the arbitration agreement was included in the standard terms and conditions of the contract entered into with the consumer prior to the dispute arising;

   c) the contract provided for submission to arbitration other than consumer arbitration, and the clause in the contract containing it was not individually negotiated;

   d) the respondent consumer remained in default throughout the proceedings for the recognition of the foreign award in Spain.

   It is clear that the contractual clause containing the arbitration agreement contravenes basic consumer protection rules set out in Royal Legislative Decree 1/2007, of 16 November, approving the recast version of the Consumer and User Protection Act and other supplementary rules (which are mandatory and form part of the core of Spanish domestic public policy [*ordre publique*]). This is, in fact, an unfair clause (Art. 90(1)) and, therefore, void ab initio (Art. 83(1)); in any case, since it was signed before the dispute arose, it is not binding on the consumer (Art. 57(4)).

   "For these purposes", Article 83(1) of the aforementioned recast text states, "the judge, after hearing the parties, shall declare the unfair terms included in the contract invalid…"; this also applies to the judge hearing the *exequatur* (recognition) proceedings, given that the general legal doctrine regarding the review of such terms in consumer proceedings — to which I have already referred in previous papers — is applicable. According to this doctrine — as recalled in Constitutional Court Judgment no. 23/2026 of 11 March — the judge is required to review the unfairness of contractual clauses if he or she has not done so previously. In accordance with the legal doctrine of the Court of Justice of the European Union, "Directive 93/13/EEC requires the national court to assess the potential unfairness of a contractual clause when it has the necessary factual and legal elements to do so, provided that the clause in question has not been previously examined in a duly reasoned judicial decision having the effect of res judicata; such an examination must be conducted in a manner that allows the consumer to raise an objection in accordance with the provisions of the law, which does not exempt the court from its obligation to review the matter of its own motion. To this end, the timing or procedural channel used to raise this issue before the court is irrelevant, provided that the enforcement proceedings are still pending".

   This Constitutional Court judgment goes on to state that, since its Judgment no. 31/2019, the Court has reiterated that the failure to review the unfairness of clauses (in the case it ruled on, regarding a mortgage loan agreement), when all the conditions of Directive 93/13/EEC apply, harms the debtor-consumer's right to effective judicial protection, "insofar as it entails

disregarding the interpretation of a provision of Union law established by the Court of Justice of the European Union, which is binding on domestic courts by virtue of the principle of primacy." It is incumbent upon the Constitutional Court "to ensure compliance with the principle of primacy of Union law when [...] there is an authentic interpretation provided by the Court of Justice of the European Union itself", such that the disregard or omission of a provision of European Union law, as interpreted by the Court of Justice, may constitute "an unreasonable and arbitrary selection of a rule applicable to the proceedings," which "may give rise to a violation of the right to effective judicial protection" (Constitutional Court Judgment no. 232/2015, 5th point of law).

Ultimately, when — pursuant to the aforementioned doctrine — the consumer can no longer challenge the unfair nature of a contractual clause in proceedings that have already concluded, nor can the judge assess it on his or her own motion, the Judgment of the Court of Justice of the European Union (Grand Chamber) of 17 May 2022, *Ibercaja Banco*, Case C-600/19, held that "the consumer must, in accordance with Article 6(1) and Article 7(1) of Directive 93/13, read in the light of the principle of effectiveness, be able to rely, in separate subsequent proceedings, on the unfairness of the terms of the mortgage loan agreement" (§ 58); and, to that effect, added that the purpose of such subsequent proceedings is to obtain "compensation, under that directive, for the financial consequences resulting from the application of unfair terms" (§ 59).

2. The order of the Catalonia High Court of Justice here analysed applies this doctrine by holding that the review may extend to the substantive invalidity of the arbitration agreement (which serves as the basis for the award) because it conflicts with mandatory domestic rules — as well as those of the European Union — on consumer protection; and, consequently, that the concept of public policy, which may be invoked as a ground for objecting to the *exequatur* or which may be assessed by the court of its own motion in accordance with the applicable New York Convention (Art. V(2)(b)), encompasses both procedural and substantive public policy. The order, therefore, goes beyond a purely external examination, under which the court adjudicating on the validity of an award for the purposes of its recognition — as well as the court hearing an action for declaration of invalidity — should limit itself to a formal examination of the reasoning in the award (see, in this regard, Constitutional Court Judgment no. 146/2024 of 2 December), and must also examine the sufficiency and legal correctness of that reasoning in accordance with the mandatory rules on consumer protection.

The High Court of Justice cites, in support of its ruling, decisions handed down by other courts in similar cases and undoubtedly relies on the clarity and relevance of the rules protecting consumer rights — both under European Union law and domestic law — which form part of public policy in both spheres and make it clear, without the need for any interpretation, that the arbitration agreement in this case is invalid. Certainly, the legal doctrine it applies entails a limit on the enforceability of awards in international arbitration; and it may be understood that this doctrine goes beyond the restrictive interpretation of public policy as a ground for objecting

to the recognition of an award used in previous rulings, which limited it to procedural public policy. However, it follows the path laid out by Union case law, in which the preservation of public policy is a constant. As the Advocate General stated in his Opinion in Case C-802/24 (*NV Reibel v. JSC VO Stankoimport*), "from the point at which an arbitration mechanism is to be implemented in the European Union, in particular in the context of disputes related to the pursuit of an economic activity within its territory, such implementation must necessarily ensure the compatibility of that mechanism with the structural principles of the EU judicial architecture as well as effective compliance with EU public policy [...]. Within that framework, the path of arbitration therefore cannot be chosen by a person wishing to 'discard the principles and provisions of primary or secondary EU law which are essential to the legal order established by the Treaties or are of fundamental importance for the accomplishment of the tasks entrusted to the European Union', as those principles and provisions form part of EU public policy [...]. Such judicial review, drawing on considerations of public policy, is therefore fundamental to preserving the characteristics of the EU legal order at the same time as addressing the specific nature of arbitration [...]. EU public policy therefore operates, as such, as a limit on the free will of parties: observance of such policy is mandatory for individuals".