

# The special nature of tax arbitration courts

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## 1. Introduction

Arbitration in tax matters was introduced into national law by Decree-Law no. 10/2011, of 20<sup>th</sup> January 2011, which approved the Legal Regime of Tax Arbitration (LRTA), as per the legislative authorization granted by Article 124 of Law no. 3-B/2010, of 28<sup>th</sup> April 2010.

The uniqueness and the pioneer spirit of this institute, with no paralleled in any other legal systems of the same family, were widely recognized by national legal literature<sup>1</sup> and were recently reaffirmed in the context of the first referral for a preliminary ruling by a tax arbitration court, both in the

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<sup>1</sup> See, among others, JORGE LOPES DE SOUSA, “*Comentário ao Regime Jurídico da Arbitragem Tributária*”, *Guia da Arbitragem Tributária*, AAVV., Nuno Villa-Lobos e Mónica Brito Vieira (coord.), Almedina, 2013, p. 95; and SÉRGIO VASQUES, “*Os primeiros passos da arbitragem tribu-*

Opinion of Advocate General Szpunar and in the *Ascendi* Judgment<sup>2</sup>. In this judgment, the European Court of Justice (ECJ) recognized for the first time, and without reservation, a voluntary arbitration court as their direct interlocutor, through the preliminary ruling procedure, given its “special nature”.

The question of whether a tax arbitration court is a “court of a Member State” within the meaning of Article 267 of the Treaty on the Functioning of the European Union (TFEU) – which, under an apparent referral to domestic law, would not raise any reservations - must be examined within the framework of EU Law<sup>3</sup>. The abundance of criteria stipulated in Member States’ national legal orders for deeming an entity a “court or tribunal” would easily undermine the uniformity of the interpretation and application of European Union Law. If there had been any questions on this point, they would have been immediately dispelled when, in the *Hagen* Judgment, the ECJ clearly stated that “terms used in Community law must be uniformly interpreted and implemented throughout the Community<sup>4</sup>”. Disregard for the established case law of the ECJ - according to which assessing the jurisdictional nature of a body of a Member State, for the purposes of Article 267 of the TFEU, must be within the scope of European Law - is a potential cause of misunderstandings and precipitation when deciding on the recognition of arbitration courts as national interlocutors of the ECJ.

Indeed, the fact that the national legislature has provided in the preamble of the LRTA that “in those cases where the arbitral court is the court of final appeal for resolving tax disputes, the decision may be referred for a preliminary ruling in compliance with Article 267(§3) of the Treaty on the Functioning of the European Union”, does not entail that such court may directly address the ECJ. This is merely a recognition that tax arbitration courts meet all the requirements established by the ECJ to be qualified as a “court” for the purposes of the TFEU<sup>5</sup>, as we will seek to demonstrate

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*tária*”, CAAD - Arbitragem Tributária n.º 1, AAVV., Nuno Villa-Lobos and Tânia Carvalhais Pereira (coord.), 2014, p. 12.

<sup>2</sup> *Ascendi judgment*, C-377/13, of 12<sup>th</sup> June 2014.

<sup>3</sup> See, among others, the judgements in cases *Dorsch Consult*, C54/96, of 17<sup>th</sup> September 1997; *Syfait and Others*, C53/03, of 31<sup>st</sup> May 2005; *Häupl*, C246/05, of 14<sup>th</sup> June 2007; and *Koller*, C118/09, of 22<sup>nd</sup> December 2010; *Miles and Others*, C196/09, of 14<sup>th</sup> March 2011; and *Belov*, C394/11, of 31<sup>st</sup> January 2013.

<sup>4</sup> See *Hagen Judgment*, C-49/71, of 1<sup>st</sup> February 1972.

<sup>5</sup> In this context, we abstain ourselves from wider considerations on the “legal value” of preambles, a controversial issue in the national constitutional framework and regarding which

in this paper. This intent would not, however, be achieved without taking into consideration the fundamental features of the national legislation that regulates tax arbitration court procedures and the “test” of whether they comply with the elements, requirements or criteria defined by the ECJ to qualify a given body of a Member State as a “court”, for the purposes of resorting to a preliminary ruling procedure.

## 2. The classification as a “court” within the meaning of Article 267 of the TFEU

In the absence of a legal definition, and given the inherent complexity of adopting a “strict definition”, the ECJ has been refining, since the 60s<sup>6</sup>, a number of structural, functional and territorial criteria used to determine, in each case, whether or not the body making the referral for a preliminary ruling should be regarded as a “court” within the meaning of Article 267 of the TFEU. In 1966, in the *Vaassen-Goebbels* judgment, the ECJ first established five structural criteria that were deemed decisive for qualifying a body of a Member State as a “court or tribunal”, namely: (i) statutory origin, (ii) permanence (iii) compliance with the requirement for an *inter partes* procedure (iv) compulsory jurisdiction and (v) application of legal provisions. Called once more to rule on the delimitation of the concept in question, in the *Corbiau* judgment<sup>7</sup>, the ECJ added to the above criteria the following requirements: (vi) independence (vii) territoriality and (viii) a functional requirement that referral for a preliminary rulings arise within the scope of proceedings that necessarily lead to a judicial decision<sup>8</sup>.

The case law of the ECJ regarding the verification, on a case-by-case basis, of the fulfilment of these criteria has, in practice, been too inconsistent and often in contradiction with its own guidelines, which has fos-

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several theses have been defended, ranging from “having the same legal value as norms” to their “total irrelevance”. Among us, an intermediate thesis seems to prevail arguing that preambles are a guide for the interpreter, an important hermeneutic auxiliary without normative value (See JOSÉ JOAQUIM GOMES CANOTILHO AND VITAL MOREIRA, *Constituição da República Portuguesa anotada*, vol. 1, Coimbra Editora 2007, pp.180-181; and “*Guia prático de regras a observar na redação de atos normativos da Assembleia da República (AR)*”, available at [www.parlamento.pt](http://www.parlamento.pt)).

<sup>6</sup> *Vaassen-Göbbels Judgment*, C-61/65, 30<sup>th</sup> June 1966. Colect, 1965-1968, p. 404.

<sup>7</sup> *Corbiau Judgment*, C-24/92, of 30<sup>th</sup> March 1993.

<sup>8</sup> Order given on 18<sup>th</sup> June 1980, *Borker*, C-138/80, Rec., 1980, p. 1975.

tered a certain level of legal uncertainty<sup>9</sup> regarding the use of one of the most important procedural rules of the Treaties, which are the topmost guarantee of the integrity of European law<sup>10</sup>. After a first examination of the case law of the ECJ on the matter under analysis, we can say, with fair certainty, that the court uses these criteria as mere “guidelines”, deciding, in each specific case, on the nature of the body requesting the intervention of the ECJ, and admitting, in certain cases, that some criteria are neglected in favour of other criteria, thus attempting a “graduation” whose grounds are not always properly demonstrated.

In respect to arbitration courts, the ECJ seems to oscillate between the admissibility of preliminary ruling requests - as in *Danfoss*<sup>11</sup> - and its inadmissibility - as in the *Nordsee*<sup>12</sup>, *Eco Swiss*<sup>13</sup> and *Denuit and Cordenier*<sup>14</sup> judgments.

The ECJ has so far issued preliminary rulings requested by a body that, by virtue of an arbitration agreement made between the parties, judged

<sup>9</sup> See FRANCISCO PEREIRA COUTINHO, “Os tribunais arbitrais e o reenvio prejudicial”, *Revista Arbitragem Tributária* n.º 1, 2014, Nuno Villa-Lobos and Tânia Carvalhais Pereira (coord.), pp. 16-17.

<sup>10</sup> On the importance of the preliminary ruling procedure in the European context, cf., among others, CARL OTTO LENZ, “The Role and Mechanism of the Preliminary Ruling Procedure”, *Fordham International Law Journal*, Vol. 18, Issue 2, 1994, Article 2, pp. 389-407; GEORGE TRIDIMAS AND TAKIS TRIDIMAS, “National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure”, *International Review of Law and Economics*, 24, 2004, p. 127; and PAUL CRAIG AND GRÁINNE DE BÚRCA, *EU – Law Text, Cases, and Materials*, 4<sup>th</sup> Ed., Oxford University Press, Oxford, 2008, p. 460.

<sup>11</sup> In this case, the ECJ admitted a formal request to constitute a necessary *ad hoc* arbitration court, having disregarded the permanence criterion.

<sup>12</sup> In the *Nordsee Judgment*, C-102/81, of 23<sup>rd</sup> March 1982, the ECJ was asked whether an arbitration court constituted under an arbitration clause inserted in a private law contract was a “court”, and it deemed itself as lacking jurisdiction to decide on the referral for a preliminary ruling, since the contracting parties had no obligation, either in fact or by law, to submit the dispute to arbitration, and since the German tax authorities were not involved in the choice of the arbitral means of resolution, nor could they be called to intervene in the proceedings before the arbitrator appointed by the parties.

<sup>13</sup> In the *Eco Swiss Judgment*, C-126/97, of 1<sup>st</sup> June 1999, the ECJ decided that, regarding an arbitration clause included in a licensing contract between private parties, “arbitrators (...) are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law”, even if the application of the law of such Member State was specifically established.

<sup>14</sup> *Denuit and Cordenier Judgment*, C-125/04, of 27<sup>th</sup> January 2005.

according to equity, as in the *Commune d'Almelo* judgment<sup>15</sup>; by courts that were not part of the judicial organization of the concerned Member State, as in the *Barr* and *Montrose* judgment<sup>16</sup>; and even by administrative bodies, as in *Mannesmann*<sup>17</sup>, to give just a few examples. Conversely, and in contradiction to the opinion of the respective Advocate General, the ECJ deemed itself as lacking jurisdiction to decide on a referral for a preliminary ruling in the *Syfiat*<sup>18</sup> and *Film Victoria* judgments<sup>19</sup>. In the *Syfiat* judgment, the ECJ was deemed without jurisdiction to decide on a referral for a preliminary ruling by *Epitropi Antagonismou*, the Hellenic competition commission. Such body had been created by law, operated, under Greek law, as an independent authority with exclusive jurisdiction, and its members enjoyed personal and functional independence, being subject only to the law and their conscience in the exercise of their duties. In the *Victoria Film* judgment, the ECJ did not decide on the referral by *Skatterättsnämnden*, a tax law committee deemed by the Advocate General an independent body, created by law, operating with permanence, following an *inter partes* procedure, applying written law, having compulsory jurisdiction and whose decisions are binding on Swedish tax authorities. In paragraph 15 of the respective judgment, the ECJ acknowledged, however, the difficulty of the decision in this case, stating that, “although there are (...) factors which might make it possible to consider that *Skatterättsnämnden* performs a judicial function, in particular the independence which its statutory origin confers on it and the power to deliver binding decisions by applying rules of law, other factors lead to the conclusion that it performs an essentially administrative function”, and then concluded it had no jurisdiction to issue a preliminary ruling. In these two cases, we can add to the uncertainty about the correctness of the decision - not at all

<sup>15</sup> In the *Commune d'Almelo Judgment*, C-393/92, of 27<sup>th</sup> April 1994, the ECJ considered that arbitration courts may resort to equity but are not exempt from applying European Law.

<sup>16</sup> As was the case of the *Deputy High Bailiffs Court* of Douglas (Isle of Man), which is not part of the British judiciary organization. See *Barr e Montrose Judgement*, C-355/89, of 3<sup>rd</sup> July 1991.

<sup>17</sup> *Mannesmann Judgment*, C-44/96, of 15<sup>th</sup> January 1998.

<sup>18</sup> See paragraph 20 of the conclusions of Advocate General Jacobs (28<sup>th</sup> October 2004) in the *Syfia Judgment*, C-53/03. In this case, the ECJ considered itself without jurisdiction since “*Epitropi Antagonismou* is subject to the supervision of the Minister for Development”, not being deemed, for that reason, a court.

<sup>19</sup> See conclusions of Advocate General Fennely (18<sup>th</sup> June 1998) in the *Victoria Film Judgment*. See judgment of the ECJ, C-134/97, of 12<sup>th</sup> November 1998, regarding that same case.

consensual among the various entities involved - their inconsistency when weighing the “qualifying elements of judicial nature<sup>20</sup>”. To achieve such longed-for qualification, the unappealable nature of the arbitral award and the compulsory nature of the arbitral jurisdiction seem paramount, and such criteria seem to point to compulsory arbitration.

Another seemingly preponderant requirement is the existence of a sufficiently strong link between the arbitration court and the respective Member State. As will be shown, the first two requirements apparently deemed preponderant by the ECJ in the *Victoria Film e Syfiat* judgments - the absolute impossibility to appeal an arbitral award and compulsory jurisdiction - are strange to the tax arbitration model adopted by the national legislature, defined as “an alternative form of judicial settlement of disputes in the tax field”.

In light of the above, and until the issue of the *Ascendi* judgment, the recognition of tax arbitration courts as a court for the purposes of a referral for a preliminary ruling was not absolutely certain, although this seemed the most reasonable approach.

As Advocate General Spuznar well evidences in the *Ascendi* judgment conclusions, the uncertainty regarding the qualification of tax arbitration courts as a court or tribunal for the purpose of addressing the ECJ “is connected with the fact that the Tax Arbitration Court does not form part of the basic system of general and administrative courts in Portugal, but rather constitutes an alternative form of judicial settlement of disputes in the tax field, as it is defined by Law no. 3-B/2010. As the very name of the referring body itself indicates, this alternative form of dispute settlement is based on the use of certain arbitration techniques in settling disputes between taxable persons and the tax authority. According to settled case-law of the ECJ (...), courts of arbitration established pursuant to an agreement do not constitute a ‘court of a Member State’ within the meaning of Article 267 TFEU and the Court of Justice does not have jurisdiction to reply to questions which they refer for a preliminary ruling”<sup>21</sup>. And, according to the prevailing position at the ECJ, until then, a voluntary arbitration court was not a court of a Member State, since, in its view, there was

<sup>20</sup> It is also worth mentioning, regarding the weighing of the various criteria, paragraph 31 of the *Dorsch Consult Judgment*, C54/96, of 17<sup>th</sup> September 1997, where the ECJ expressly recognizes that the requirements used to define “court of a Member State” are not absolute.

<sup>21</sup> See paragraph 17 of the conclusions.

“no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator<sup>22</sup>”.

Therefore, as the referred Advocate General well highlights, “the more serious problem concerns the admissibility of request for a preliminary ruling submitted in this case on account of the special nature of the body which is making it”.<sup>23</sup> Reason why the Court must consider the special nature of tax arbitration courts, which distinguishes them from compulsory arbitration courts and from *ad hoc*<sup>24</sup> voluntary arbitration courts, and which, notwithstanding their voluntary nature, led to the decision of the ECJ in the *Ascendi* Judgment, according to which tax arbitration courts are direct interlocutors of the ECJ within the meaning of Article 267 of the TFEU.

### 3. Tax Arbitration Courts as a “court of a Member State”

The unprecedented nature of the recent decision of the ECJ, which ruled on the admissibility of a referral for a preliminary ruling by a Portuguese Tax Arbitration Court, is specifically related to the qualification of a voluntary arbitration court as a “court of a Member State”, notwithstanding its several specificities.

Indeed, we must question the extent of the innovation that emerged from the ECJ decision in the *Ascendi* case and its actual significance in the ever-changing context of European case law. The *Ascendi* judgment is particularly innovative in two fundamental aspects: firstly, the re-weighting of the criterion regarding the nature (*in casu*, voluntary) of the body that requested the preliminary ruling, and, secondly, the non-ranking of the

<sup>22</sup> See *Denuit and Cordenier Judgment*, paragraph 12, and the decision cited in the referred paragraph, confronting it with the *Gabalfria Judgment*, C-110/98 and C-147/98, of 21<sup>st</sup> March 2000.

<sup>23</sup> Paragraph 1.

<sup>24</sup> Defending that there is no point of legal connection between the LRTA and the Portuguese Voluntary Arbitration Law, see MÁRIO ESTEVES DE OLIVEIRA (coord.), *Lei da Arbitragem Voluntária Comentada*, Almedina, 2014, p. 51: “Although tax arbitration is subsumed under the concept of “arbitration”, since it constitutes an alternative means of jurisdictional resolution through a neutral and impartial arbitrator, the truth is that, from a legal perspective, it is not connected to the Voluntary Arbitration Law”.

relative weight of the various criteria used to determine the body's qualification. It is also worth noting that the decision enjoyed a wide legitimacy, being endorsed by all the procedural participants - in fact, the arbitrators of the referring arbitration court, as well as the Applicant, the Portuguese State, the European Commission and the Advocate General, expressed support for the ECJ's jurisdiction to decide on the requests for a preliminary ruling.

As the national legislature certainly foresaw, the consideration of tax arbitration courts as bodies with jurisdiction for the purposes of a referral to the ECJ for a preliminary ruling would be absolutely crucial to effect the national legal solution, regardless of the result of the qualification. By establishing, in the preamble of the LRTA, the admissibility of the referral by tax arbitration courts for a preliminary ruling, the legislature surely intended to demonstrate, using a non-normative element as a vehicle, that tax arbitration courts met, *avant la lettre*, the requirements deemed essential by the ECJ for the purpose of qualifying them as a "court of a Member State", such nature being expressed first of all in Article 2 of the LRTA<sup>25</sup>.

In this context, we must recognize that it was precisely the core aspects of the tax arbitration legal regime that determined the qualification of the tax arbitration court as a court of a Member State, based on the simultaneous and cumulative fulfilment of the demands, criteria or requirements defined by the ECJ in the extensive case law mentioned above.

Let us see:

### **3.1. Statutory origin and application of law**

Arbitration courts are one of the types of courts provided in Article 209 of the Constitution of the Portuguese Republic, which contains no limitation regarding the matters on which arbitration courts may decide, thus leaving a certain margin to the ordinary legislature to define its scope and regime.

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<sup>25</sup> See Article 1 of the LTRA, according to which "this decree-law regulates arbitration as an alternative means of jurisdictional resolution of disputes in tax matters".



Thus, *as per* a legislative authorization<sup>26</sup>, Decree-Law no. 10/2011, of 20<sup>th</sup> January 2011, was approved, and tax arbitration was introduced into the Portuguese legal system.

Arbitration was intended to be an alternative means of jurisdictional resolution of tax disputes, which logically entails the strict application of written law<sup>27</sup>, since resorting to equity is barred<sup>28</sup>.

It should also be noted, in this regard, that in tax law obligations arise *ex lege*, and thus the content of the tax relationship - between taxpayers and the tax authorities - depends exclusively on the interpretation and application of the law. This aspect is particularly highlighted in the conclusions of the advocate general in the *Ascendi* judgment, by distinguishing tax arbitration from what he calls a “*stricto sensu* arbitration”, which “is based on the power (desire) to submit the dispute to a non-State (private) court”<sup>29</sup>. In the above-mentioned *Nordsee* judgment, to which we have already alluded, the ECJ ruled out the possibility of arbitration courts, established by agreement, making referrals for preliminary rulings, since the ECJ considered that their connection to the system of legal remedies was too tenuous. This ruling was later confirmed in the above-mentioned *Eco Swiss* judgment and in the *Denuit and Cordenier* judgment. Indeed, it results from those judgments that only the authorities of the Member States, or the bodies entrusted by such Member States with legal protection, may refer to the ECJ for a preliminary ruling, to the extent that those Member States are responsible for implementing and enforcing European Law in their territory. Thus, as the *stricto sensu* arbitration courts are not authorities of the Member States, nor organizations which undertake, on behalf of the same Member States, missions in the field of legal protection, but rather private institutions, they cannot make a referral to the ECJ for a preliminary ruling.

Conversely, as well evidenced by the advocate general, tax arbitration courts, as defined in the LRTA, do not fit the *stricto sensu* definition of arbitration courts, and this “conclusion is based primarily on the fact that it

<sup>26</sup> Stated in Article 124 of Law no. 3-B/2010, of 28<sup>th</sup> of April 2010.

<sup>27</sup> Contrary to the established in the Voluntary Arbitration Law, which admits, in case of agreement between the parties, the resort to equity (Article 39 (1))

<sup>28</sup> According to Article 2 (2), of the LRTA.

<sup>29</sup> See paragraph 19 of the conclusions.

is not a court set up under the agreement of the parties, but based on the provisions of Portuguese law”.<sup>30</sup>

The jurisdiction of the arbitration courts operating under the Centre for Administrative Arbitration (CAAD) is expressly defined in the LRTA and is legally limited, in the first place, to the matters set out in its Article 2 (1)<sup>31</sup>. Thus, under Article 2 (1) of the LRTA, tax arbitration courts have subject matter jurisdiction to decide on “a) the declaration of the illegality of tax assessments, self-assessments, tax withholdings and payments on account; b) the declaration of the illegality of acts determining the tax base when it does not give rise to the assessment of any tax, of acts determining the tax base and of acts defining property values”.<sup>32</sup>

Indeed, in accordance with the above-mentioned regulatory provisions, it appears that the legislature intended to replicate, in arbitration, the traditional “objectivist model of judicial annulment procedures” in force in Tax Litigation, even though Article 24 of the LRTA, which predicts the effects of the decision, has gone a bit further than what was apparently intended by this model. Favourably to this “objectivist model of judicial annulment procedures”, the arbitration court ruled, in case no. 260/2013-T<sup>33</sup>, that “the Portuguese tax litigation model stems from an objectivist model, being roughly structured as a(n) (tax) “act-by-act” action and, as is

<sup>30</sup> See paragraph 28 of the conclusions.

<sup>31</sup> The subject-matter jurisdiction of arbitration courts is a matter of public order and its analysis precedes that of any other issue (Article 13 of the Code of Procedure in Administrative Courts, applicable *ex vi* Article 29 (1) (c) of the LRTA). The infringement of the jurisdiction rules determines the absolute lack of jurisdiction of the court (Article 16 (1) and (2), of the Code of Procedure in Administrative Courts - applicable, *ex vi* Article 29 (1) (a) and (c) of the LRTA). Regarding the determination of the scope of jurisdiction of arbitration courts, see, among others, the arbitral awards issued in cases no. 5/2011-T, of 26<sup>th</sup> January 2012; no. 48/2012-T, of 6<sup>th</sup> July 2012; and no. 118/2012-T, of 16<sup>th</sup> May 2013. The above-mentioned arbitral awards are available, in the Portuguese language, at the site of the Centre for Administrative Arbitration at [www.caad.org.pt](http://www.caad.org.pt).

<sup>32</sup> The original wording of the statute also established the jurisdiction of arbitration courts to decide on “any factual or legal matters concerning a draft assessment decision whenever the law fails to ensure the right to file the claim referred in the previous paragraph” (subparagraph c)). This rule was repealed by Article 161 of Law no. 64-B/2011, of 30<sup>th</sup> December 2011. On the effects of this revocation, see SÉRGIO VASQUES AND CARLA CASTELO TRINDADE, “O âmbito material da arbitragem tributária”, CJT Zero – Cadernos de Justiça Tributária Zero, Cejur – Centro de Estudos Jurídicos do Minho, pp. 19-32.

<sup>33</sup> To the same effect, cf. the arbitral award issued in case no. 142/2012-T, of 26<sup>th</sup> April 2013.

clear from Article 2 of the LRTA, tax arbitration litigation does not deviate from said model. Thus, and in short, the subject-matter of tax litigation, including arbitration (...), is a tax act whose legality is to be analyzed.<sup>34</sup>

It is worth mentioning that although paragraphs a) and b) of paragraph 1 of Article 2 of the LRTA use the phrase “declaration of the illegality” to define the jurisdiction of the arbitration courts operating under the CAAD, and do not referring to adjudicatory decisions, arbitration courts have been considering that their jurisdiction includes the same powers assigned to tax courts in processes of judicial review. To support this view, they argue that this is the interpretation that best conforms with the spirit of the legislative authorization granted by the government for the approval of the LRTA, and which states, as a prime instruction, that “the tax arbitration process should be an alternative means of jurisdictional resolution of tax disputes and an action for the protection of rights and the legally protected interests of taxpayers”.

The process of judicial review, despite being essentially a process of cancellation of tax acts, admits the sentencing of the Tax and Customs Authority<sup>35</sup> to pay default interest, as can be clearly inferred from Article 43 (1) of the General Tax Law (LGT), which states that default interest shall be payable “when it is determined in an administrative or judicial appeal that there was an error attributable to (the tax) services resulting in the payment of more tax than was legally due”, and from Article 61 (4) of the Code of Administrative and Judicial Tax Procedure<sup>36</sup>, which provides that “if the decision that recognizes the right to default interest is issued by a court, the payment period is counted from the beginning of the term established for its spontaneous execution<sup>37</sup>. “The same applies to the admissibility of the claim for damages for the provision of an undue guar-

<sup>34</sup> Available at [www.caad.org.pt](http://www.caad.org.pt).

<sup>35</sup> Resulting from the merger of the Directorate-General for Taxation, of the Directorate-General for Customs and Excise Duties and of the Directorate-General for IT and Tax and Customs Services Support (Decree-Law no. 118/2011, of 15<sup>th</sup> December 2011).

<sup>36</sup> Wording given by Law no. 55-A/2010, of 31<sup>st</sup> December 2010, which corresponds to paragraph 2 of the original wording.

<sup>37</sup> To the same effect, among others, cases no. 142/2012-T, of 26<sup>th</sup> April 2013; no. 9/2012-T, of 7<sup>th</sup> September 2012; no. 92/2012-T, of 31<sup>st</sup> December 2012; no. 94/2012-T, of 30<sup>th</sup> November 2012; no. 112/2012-T, of 1<sup>st</sup> April 2013; no. 8/2013-T, of 3<sup>rd</sup> July 2013; no. 14/2013-T, of 15<sup>th</sup> October 2013; no. 19/2013-T, of 3<sup>rd</sup> October 2013; and no. 117/2013-T, of 6<sup>th</sup> December 2013.

antee<sup>38</sup>. As decided in arbitration proceedings no. 39/2013-T, “although judicial review is essentially a process of mere annulment (Article 99 and Article 124 of the Code of Administrative and Judicial Tax Procedure), the tax administration may be sentenced to pay default interest and compensation for the provision of an undue guarantee.

In fact, despite the inexistence of an express provision to that effect, it has been unanimously understood, since the entry into force of the 1958-1965 tax reform codes, that, in a judicial review, a claim may be filed for the payment of default interest together with a claim for the annulment or declaration of nullity or inexistence of the act, since it is referred that the right to default interest arises when, in an administrative appeal or in a lawsuit, the administration is persuaded that there was an error of fact attributable to the tax administration.

This scheme was later generalized in the Code of Administrative and Judicial Tax Procedure, which established in Article 24 (1) that “the taxpayer shall be entitled to compensation when, in an administrative appeal or court action, it is determined that there was an error attributable to the tax administration”; then in the General Tax Law, where it is established, in Article 43 (1), that “whenever it is determined in an administrative or judicial appeal that there was an error attributable to the tax administration that resulted in the payment of more tax than was legally due, default interest shall be payable”; and, finally, in the Code of Administrative and Judicial Tax Procedure, which established in Article 61 (2)<sup>39</sup> that, “if the decision that recognizes the right to default interest is issued by a court,

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<sup>38</sup> This judicial orientation had been constantly and unanimously accepted by the Supreme Administrative Court in, among others, decisions no. 1103/09 and 299/10, of 24<sup>th</sup> November 2010. See, also in this regard, decisions of the Supreme Administrative Court no. 09/02, of 9<sup>th</sup> October 2002; no. 01103/09, of 24<sup>th</sup> November 2010; no. 0299/10, of 24<sup>th</sup> November 2010; no. 01032/10, of 13<sup>th</sup> April 2011; no. 0889/10, of 29<sup>th</sup> June 2011; and no. 0216/11, of 22<sup>nd</sup> June 2011. As summarised in decision no. 299/2010, of 24<sup>th</sup> November 2010, of the Supreme Administrative Court “(...) within the scope of the damage claim for a unduly provided guarantee, it results from the established in Article 171 of the Code of Administrative and Judicial Tax Procedure and Articles 53, 100 and 102 of the General Tax Law that, even if such right has not been exercised by means of a claim in administrative tax proceedings or in a tax court action, such claim may still be filed at the time of the execution of a decision cancelling the corresponding assessment”.

<sup>39</sup> Which corresponds to paragraph 4 in the wording given by Law no. 55-A/2010, of 31<sup>st</sup> December 2010.

the payment period is counted from the beginning of the term established for its spontaneous execution.”

The same court further stated that “regarding the claim for the payment of compensation for the provision of an undue guarantee, Article 171 of the Code of Administrative and Judicial Tax Procedure provides that “compensation in the event of an unduly provided bank guarantee or equivalent shall be claimed in the proceedings whose object is the legality of the enforceable debt”, and that “compensation should be claimed in the administrative appeal, judicial review or judicial appeal or, should the event that gave rise to it be supervenient, within 30 days of its occurrence”.

In consequence, it is clear that judicial review encompasses the possibility of an order to pay for an undue guarantee and is even, normally, the adequate procedural means of filing such a claim, which is more than justified for obvious reasons of economy of procedure, since compensation for an undue warranty depends on the award on the legality or illegality of the tax assessment.” Therefore, as the “request for establishing an arbitration court entails discussing the “legality of the enforceable debt” within the arbitration procedure, (...) the arbitration procedure is also the one appropriate to decide on the claim for compensation for an undue guarantee. Indeed, the possibility of a joinder of claims concerning the same tax act is implicitly assumed in Article 3 of the LRTA, when it mentions “the joinder of claims, even if regarding different acts”, which clearly reveals that filing different requests is also possible for the same tax act and that a claim for default interest and a request for the sentencing for undue guarantee are covered by that formula, which means that an interpretation to that effect has, at least, the minimal verbal correspondence required by Article 9 (2) of the Portuguese Civil Code<sup>40</sup>.

Furthermore, the jurisdiction of the arbitration courts operating under the CAAD is also limited by the terms on which the tax administration agreed to be bound to that jurisdiction, i.e. through Ministerial Order no. 112-A/2011, of 22<sup>nd</sup> March 2011. And, as articulated in the arbitration award rendered in case no. 117/2013-T, in light “of this second limitation to the jurisdiction of arbitration courts operating under the CAAD, the

<sup>40</sup> To the same effect, cf., among others, the arbitral awards given in cases no. 10/2012-T, of 5<sup>th</sup> September 2012; no. 77/2012-T, of 27<sup>th</sup> December 2012; no. 1/2013-T, of 14<sup>th</sup> May 2013; no. 36/2013-T, of 9<sup>th</sup> October 2013; no. 44/2013-T, of 25<sup>th</sup> October 2013; no. 66/2013-T, of 4<sup>th</sup> November 2013, and no. 80/2013-T, of 10<sup>th</sup> October 2013.

resolution of the jurisdiction issue depends essentially on the terms of this bindingness, because, even if the situation fits the established in Article 2 of the LRAT, if it is not covered by the terms of bindingness, the dispute is outside the jurisdiction of this Arbitration Court.”

This Ministerial Order essentially delimits in a negative way the extent to which the tax administration is bound to tax arbitration, restricting it, from the outset, to “taxes whose administration is committed to it”. Thus, in view of the established in Article 2 of the Ministerial Order, all tributes other than taxes<sup>41</sup> and all taxes whose administration is not committed to the tax administration<sup>42</sup> are excluded from this bindingness.

In addition to this “implicit” negative definition, Article 2 of the Ministerial Order expressly states that the tax administration is not bound to the jurisdiction of arbitration courts in the case of claims regarding “a) the declaration of the illegality of acts of self-assessment, withholding and payment on account which have not been preceded by recourse to administrative proceedings under Articles 131 to 133 of the Code of Administrative and Judicial Tax Procedure<sup>43</sup>; b) acts determining the tax base and acts determining taxable income, both by indirect methods, including the decision of the review procedure<sup>44</sup>; c) claims relating to customs duties on imports and other indirect taxes on goods subject to import duties<sup>45</sup>; and d) tariff classification, origin and customs value of goods and tariff

<sup>41</sup> See taxes and deductions.

<sup>42</sup> On the concept of “administration of the tax”, see, among others, the arbitral awards issued in cases no. 18/2011-T, of 5<sup>th</sup> July 2012; no. 19/2011-T, of 29<sup>th</sup> March 2012; no. 23/2011-T, of 18<sup>th</sup> June 2012; no. 2/2012-T, of 24<sup>th</sup> April 2012; no. 38/2012-T, of 29<sup>th</sup> June 2012; no. 122/2012-T, of 29<sup>th</sup> May 2013; no. 6/2013-T, of 15<sup>th</sup> May 2013; no. 11/2013-T, of 10<sup>th</sup> September 2013; and no. 200/2013-T, of 6<sup>th</sup> January 2014, from which results that the “administration of taxes regards the assessment and collection of taxes.”

<sup>43</sup> Regarding the referral to Articles 131 to 133 of the Code of Administrative and Judicial Tax Procedure, see, among others, the arbitral awards issued in cases no. 48/2012-T, of 6<sup>th</sup> July 2012; no. 51/2012-T, of 9<sup>th</sup> November 2012; no. 72/2012-T, of 11<sup>th</sup> March 2013; no. 32/2013-T, of 9<sup>th</sup> August 2013; no. 117/2013-T, of 6<sup>th</sup> December 2013; no. 188/2013-T, of 6<sup>th</sup> January 2014; no. 202/2013-T, of 12<sup>th</sup> May 2014; and no. 209/2013-T, of 24<sup>th</sup> February 2014.

<sup>44</sup> See, among others, the arbitral awards issued in cases no. 52/2012-T, of 22<sup>nd</sup> October 2012; and no. 17/2012-T, of 14<sup>th</sup> May 2012 and TÂNIA CARVALHAIS PEREIRA, “*Arbitrabilidade do Regime de Preços de Transferência: breve análise da Decisão Arbitral 76/2012-T*”, *Cadernos Preços de Transferência*, 201, AVV., Almedina, pp.263-288.

<sup>45</sup> See the arbitral awards issued in cases no. 12/2013-T, of 8<sup>th</sup> July 2013; no. 94/2013-T, of 29<sup>th</sup> December 2013.

quotas, or whose resolution depends on a laboratory analysis or steps to be effected by another Member State within the scope of administrative cooperation in customs matters<sup>46</sup>. In addition to a negative delimitation in terms of subject-matter, the Ministerial Order also provides, in Article 3, a negative delimitation in terms of the amount in controversy, excluding disputes whose value exceeds €10,000,000.00.

The legal nature of this bindingness<sup>47</sup> and its conformity with constitutional principles has a theoretical significance that justifies a few brief remarks. As mentioned above, arbitration courts are part of the list of courts established under Article 209 of the Portuguese Constitution, being, therefore, jurisdictional bodies. The constitutional provision leaves, however, the ordinary legislature with a wide margin to regulate its scope and regime. Still in terms of constitutional provisions, Article 165 (1) (i) of the Portuguese Constitution states that “[it is] the exclusive competence of the Parliament to legislate on the following matters, unless an authorization is granted to the Government: (...) i) Creation of taxes and tax system and general system of fees and other financial contributions towards public entities”. According to Article 103 (2) of the Portuguese Constitution, “taxes are created by law, and the incidence, rate, tax benefits and safeguards of taxpayers are thus determined by law.” The possibility of resorting to tax arbitration cannot be understood as a means to protect, both efficiently and effectively, the rights and the legally-protected interests of taxpayers, and, for that reason, such possibility must comply with the constitutional requirements mentioned above.

The LRTA was approved by a governmental decree, pursuant to a legislative authorization granted by the Parliament, which, for this purpose, did not establish the “means or instrument for the binding” of the tax administration to the jurisdiction of tax arbitration courts. Now, since the legislative authorization provided for the establishment of an arbitration mechanism in tax matters, as an alternative to the jurisdiction of tax courts - opting, thus, for a model of voluntary arbitration -, and also since

<sup>46</sup> On the arbitrability of excise duties and customs duties, see MANUEL TEIXEIRA FERNANDES, “A arbitragem nos direitos aduaneiros e nos IEC: um ponto final ou um ponto de passagem”, *Temas de Direito Aduaneiro*, AAVV., Tânia Carvalhais Pereira (coord.), Almedina 2014, pp. 291-304.

<sup>47</sup> Defending that this bindingness is another distinguishing aspect between the Voluntary Arbitration Law and tax arbitration (and also partially administrative arbitration), MÁRIO ESTEVES DE OLIVEIRA (coord.), *Lei da Arbitragem Voluntária Comentada*, Almedina, 2014, p. 55.

it provided for the obligation of the legislature to institute arbitration as a potestative right of taxpayers, without specifying the “instrument” that would guarantee this aim, we must conclude that the practical aspects of such “normative command” were left to the legislature responsible for the LRTA.

Thus, the legislature imposed, on the one hand, the establishment of a model of voluntary arbitration in public law - i.e. which could be freely resorted both State and taxpayers -, but, on the other hand, that would grant a potestative right to the taxpayers. The harmonization of these two legal standards came to be embodied in Article 4 of the LRTA, which expressly provided that “the tax administration being bound to the jurisdiction of the courts constituted in accordance with this statute is dependent on a decision of the members of the Government in charge of finance and justice matters, which shall establish notably the type and maximum amount in controversy of the litigations included.” The reference to a ministerial order, as the act entailing the binding of the tax administration, appears, thus, as the “instrument” that marks the voluntary nature of the binding of the State to tax arbitration.

This binding of the State to the jurisdiction of arbitration courts was modeled on Article 187 (2) of the Code of Procedure in Administrative Courts<sup>48</sup>, in respect of ministries being bound to the jurisdiction of the permanent arbitration centers, entrusted with the resolution of disputes on administrative issues, and had already been replicated in other legal regimes<sup>49</sup>. So, given the similarity of the legislative choices stated in Article 187 (2), of the Code of Procedure in Administrative Courts, and in Article 4 (1) of the LRTA, the transposition to the tax regime of the conclu-

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<sup>48</sup> According to which “the binding of each ministry to the jurisdiction of arbitration centers depends on a joint ministerial order of the Minister of Justice and of the minister in charge of this area, establishing the type of disputes and the maximum amount in controversy, and granting the interested parties the power to resort to such centres to resolve such disputes”.

<sup>49</sup> See Decree-Law no. 207/2009, of 31<sup>st</sup> August; and Decree-Law no. 205/2009, of 31<sup>st</sup> August. The Statute of the University Teaching Career and the Statute of the Polytechnic Education Teaching Career establish the possibility of the respective institutions previously binding themselves to the jurisdiction of arbitration centres if such possibility is established by a regulation to be adopted by each higher education institution, which will establish the type of disputes and the maximum amount in controversy, giving the interested parties the power to resort to these centres for resolving disputes arising from relationships governed by the referred Statutes.



sions of Mário Aroso de Almeida and Carlos Alberto Fernandes Cadilha, concerning the public law arbitration model defined by the national legislature, defending the establishment of a model of institutionalized voluntary arbitration, seems perhaps fit. It may thus be said that also in tax arbitration “we are dealing with an instrument that is freely available to both the State - whose ministries are free, if they wish, to bind themselves, by means of a ministerial order, to the jurisdiction of the permanent arbitration centers in certain types of disputes and within possible limits – and to the others involved in these disputes, who will be free to opt for submitting disputes to established arbitration centers, if and whenever they wish to entrust them with the resolution of such disputes.<sup>50</sup>”

The institution of arbitration as a potestative right of taxpayers does not impair this option for a model of voluntary tax arbitration<sup>51</sup>. In fact, restricting to taxpayers the ability to start the proceedings is not even an innovation within the national judicial system - obviously, for different reasons -, if one considers the French model of executive administration.

The ministerial order is an administrative regulation that complements and executes the legal discipline of a given statute. In this case, and as mentioned above, the legislature itself left the issue of the terms on which the tax administration was bound to the jurisdiction of arbitration courts, as well as the definition of the type and maximum amount in controversy of the disputes that could be subject to such jurisdiction, to a ministerial order. In terms of its dependence on the law, the administrative regulation in question might be described as a complementary or implementing administrative regulation<sup>52</sup> in light of Article 4 of the LRTA, since the

<sup>50</sup> Defending that we are facing an instrument at the free disposal of the State, MÁRIO AROSO DE ALMEIDA AND CARLOS ALBERTO FERNANDES CADILHA, *Comentário ao Código de Processo nos Tribunais Administrativos*, revised, 2<sup>nd</sup> ed., 2007, p. 1024.

<sup>51</sup> To the effect that reciprocity is not a necessary requirement for arbitration clauses, cf. RAÚL VENTURA, “Convenção de Arbitragem”, *Revista da Ordem dos Advogados*, Ano 46, vol. II, September 1986, p. 362 and 363: “legal transactions may, in general, grant rights to only one of the parties. In Law no. 31/86, I find no special provision that entails the attribution to both parties to an arbitration clause of a similar right to constitute an arbitration court (...) if each accepts the preference of the other party, I see no obstacle to such common will”.

<sup>52</sup> On the types of administrative regulations, see DIOGO FREITAS DO AMARAL, *Direito Administrativo*, Vol. III, Lisboa 1989, p. 18: “As the designation itself suggests, the “complementary or implementing regulations” are those that develop or detail the legal regime contained in a statute. To that extent, they complete it, and thus allow its application to actual cases”.

ministerial order developed, deepened and completed the legal discipline of tax arbitration, thus enabling its practical application.

We could perhaps question whether in this case the referral to a ministerial order of the definition of the type and maximum amount in controversy of the disputes covered still complies with the principle of legality provided in Article 103 (2) of the Portuguese Constitution. Now, concerning this issue, we must first recall that the principle of legality is not absolute and, as José Casalta Nabais so accurately puts it: “similarly to what occurs in other areas subject to a qualified legality (as in the case of fundamental rights), the principle of tax legality does not prevent the legislature from “using, in this area, indeterminate concepts or even from granting discretionary powers to the tax authorities, or, due to the interference of other constitutional principles, such as those of practicality, local autonomy or tax equality, from delegating certain aspects of the essential elements of taxes”. The same author further states that the principles of legality and practicality “are the basis of numerous opportunities to grant a margin of free decision to the tax administration, whether by granting real discretionary powers, or through the use of (*stricto sensu*) indeterminate concepts, or even by establishing mixed or copulative provisions<sup>53</sup>. A ministerial order, as an instrument used by the State to bind itself voluntarily, also safeguards equality in arbitration, which would not be the case in the absence of a “regulatory intermediation” through which the pre-bound party has a certain margin concerning subject-matter and the terms on which it is bound. Thus, the will of both parties is relevant to the constitution of tax arbitration courts, though expressed at distinct times and by different means, and thus the establishment of a model of voluntary arbitration fully comes to fruition, notwithstanding the taxpayers’ potestative right to determine whether to resort to arbitration. Thus, the existence of a potestative right attributed to the taxpayer does not impair the equality of the parties, defined as each of them being able to give its opinion on the matters of subjection to the jurisdiction of tax arbitration courts. In a word, taxpayers having an exclusive right to resort to tax arbitration does not equal disregarding the will of the State, and, to that extent, there is a relative balance between the two.

<sup>53</sup> See JOSÉ CASALTA NABAIS, *Direto Fiscal*, 7<sup>th</sup>ed., Almedina, 2013, p. 146-147. See also JOSÉ CASALTA NABAIS, *O dever fundamental de pagar impostos*, Almedina, 2012, p. 378 ff.

All things considered, we believe that providing access to arbitration as a potestative right of individuals is neither incompatible with the voluntary nature of arbitration, nor does it distort it, since this law always requires a prior ministerial order to define the type and the amount in controversy of the covered disputes, such ministerial order being, therefore, an expression of the will of the administration. We would even go as far as saying that the prior binding of the tax administration to the jurisdiction of tax arbitration courts, through a ministerial order, turns out to be the “instrument” that implements the establishing of tax arbitration as a potestative right of taxpayers.

In view of the above, it is clear that the subject matter jurisdiction of tax arbitration courts is not defined by agreement of the parties, but by public regulation provided in the Ministerial Order<sup>54</sup> and in the LRTA, and that tax arbitration was established by law in order to constitute a potestative right of taxpayers.

### 3.2. The compulsory nature of the jurisdiction

The mandatory nature of the jurisdiction, defined in the *Vaasen-Göbbels* judgment as one of the functional criteria for the recognition of a “court of a Member State”, was specially developed in the *Broekmeulen*<sup>55</sup> and *Danfoss*<sup>56</sup> judgments. In both cases, the jurisdiction of arbitration courts was not dependent on the agreement of the parties, and the courts’ decisions were binding and unappealable, which was decisive to recognize those arbitration courts as a “court of a Member State”.

Now, with regard to tax arbitration courts, the compulsory jurisdiction requirement is met, because generally these courts’ decisions are binding and unappealable. Let’s see: under subparagraph h) of Article 124 of the Authorization Act, the legislature should establish, “as a rule, that the arbitral award cannot be appealed”. This “legislative mandate” was trans-

<sup>54</sup> To this effect, JORGE LOPES DE SOUSA, “Comentário ao Regime Jurídico da Arbitragem Tributária”, *Guia da Arbitragem Tributária*, AAVV., Nuno Villa-Lobos and Mónica Brito Vieira (coord.), Almedina 2013, p. 104.

<sup>55</sup> *Broekmeulen Judgment*, C-246/80, of 6<sup>th</sup> October 1981.

<sup>56</sup> *Danfoss Judgment*, C-109/88, of 17<sup>th</sup> October 1989.

posed to Articles 25 to 28 of the LRTA<sup>57</sup>, pursuant to which the arbitration award may only be challenged<sup>58</sup> on the grounds of procedural defects expressly provided in the LRTA, and, regarding the merits, the appeal is limited to exceptional cases of violation of constitutional norms or to the opposition, as to the same fundamental point of law, with a judgment of the Central Administrative Court - North and South - or of the Supreme Administrative Court.

Under the general principle of the unappealability of arbitral awards, the Central Administrative Court-South has made a “literal interpretation” of the grounds for a challenge by deciding, repeatedly, that “the only legally admissible grounds to appeal a decision of an arbitration court to the Central Administrative Courts is the possibility to challenge such decision, enshrined in Article 27, on grounds that relate to the procedural defects explicitly listed in Article 28 (1) “, even if the list of defects under Article 125 of the Code of Administrative and Judicial Procedure<sup>59</sup> is not exhausted.

The Central Administrative Court-South went even further in terms of defining the grounds for challenging the arbitration award in its judgment in Case no. 06952/13, of 30<sup>th</sup> January 2014, distinguishing them from instances of mere errors of judgment. Thus, according to the jurisprudence of the Central Administrative Court-South, the poor characterization of the factual background, the deficient legal framing of the facts or the improper discovery, interpretation and application of facts and rules, are not grounds for challenging the tax arbitration award, but mere errors of judgment.

Also in what concerns the grounds for challenging decisions, the Central Administrative Court-South considered that the examination of the requirements for the appointment and recusal of the arbitrators does not fall within the scope of Article 28 of the LRTA and does not, therefore,

<sup>57</sup> Specifically: “a) lack of specification of the factual and legal grounds that justify the decision; b) opposition between the grounds and the decision; c) decision on undue matters or lack of decision on necessary matters; d) breach of the *audi alteram partem* and equality of arms principles, based on the definition of such principles in Article 16 of the LRTA”.

<sup>58</sup> Which corresponds, substantially, to an appeal.

<sup>59</sup> See judgment no. 05203/11, of 19<sup>th</sup> February 2013, of the Central Administrative Court-South. To the same effect, see judgments of the Central Administrative Court-South no. 06121/12, of 18<sup>th</sup> June 2013; no. 05922/12, of 21<sup>st</sup> May 2013; and no. 06952/13, of 30<sup>th</sup> January 2014.

constitute sufficient grounds for challenging an arbitral award. In this case, the Ethics Committee of the Centre for Administrative Arbitration would be competent for examining the requirements for the appointment and recusal of the arbitrators, and such competence should be exercised within the statutory time limits set out in the LRTA<sup>60</sup>.

All things considered, and according to the interpretation that the Central Administrative Court-South expressed in various decisions, in particular the judgment of 30<sup>th</sup> January 2014 mentioned above, the challenge to the arbitral award acts as a true “cassation appeal”, which determines the jurisdiction of the Central Administrative Court-South to overturn the arbitration award and its lack of jurisdiction to issue a decision on the merits. Thus, in case of annulment, the case should be remanded to the tax arbitration court that first delivered the judgment, which, for this specific purpose, reacquires jurisdiction to remedy the defect that led to the challenge. It should be noted that, as of the date of submission of this article, the Central Administrative Court-South has not remanded any cases to tax arbitration courts for remedying defects that led to the annulment of an award, which means, logically, that no arbitral award has yet been challenged, which would be, in any case, a normal procedural occurrence.

It should also be noted that in a purely domestic level, assigning a cassation effect to the challenge of the arbitral award raises the question of determining the scope of the referral under paragraph 2 of Article 27 of the LRTA. According to the provision above, the “regime of the appeal defined in the Code of Procedure in Administrative Courts is applicable, with the necessary adjustments, to the challenge to the arbitral award”, provided in Article 149. And according with paragraph 1 of such Article 149, “even if overturns the decision, the appellate court shall still decide on the merits, deciding the law and the facts”. If so, what is the scope of the referral of the LRTA to Article 149 of the Code of Procedure in Administrative Courts? Notwithstanding the apparent breadth of the referral, the Central Administrative Court-South has understood that it must be interpreted restrictively.

This understanding was established in a judgment of 27<sup>th</sup> February 2014, in which the Central Administrative Court-South expressly stated that the possibility of the system of appeals of administrative litigation

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<sup>60</sup> Judgment no. 05926/12, of 12<sup>th</sup> March 2012, of the Central Administrative Court-South.

being fully applicable to challenges to arbitral awards in tax matters would clearly frustrate one of purposes for which the LRTA was enacted, namely “to render the resolution of disputes between the tax administration and taxpayers speedier”, and would collide with the “unappealable nature of the arbitral award (...) as a general rule”. The same judgment qualifies the LRTA as a special law in relation to the procedural law of administrative litigation. Thus, in obedience to the principle *lex specialis derogat lex generali*, reflected in Article 7 (3), of the Portuguese Civil Code, the regime governing the challenge to decisions of arbitration courts in tax matters should prevail over the general regime of appeals under the Code of Procedure in Administrative Courts and the Code of Administrative and Judicial Tax Procedure. This qualification of the LRTA as a special law has considerable consequences, not only regarding the appeal mechanism<sup>61</sup>, but also regarding applicable time limits<sup>62</sup> and the rules on the joinder of claims and on the joinder of parties, which, despite their practical interest, are beyond the ambit of this paper.

Another pertinent question, and completely unprecedented in the national legal system, concerns the relationship between a challenge and an appeal of an arbitral award. Contrary to the appeal of decisions of administrative and tax courts, the Central Administrative Court lacks jurisdiction to decide on the merits of arbitral awards. And if the defeated party believes the decision should be annulled on the grounds of one of the defects contained in Article 28 of the LRTA, but such decision also contains substantial defects, must such party simultaneously lodge a chal-

<sup>61</sup> See JORGE LOPES DE SOUSA, “Comentário ao Regime Jurídico da Arbitragem Tributária”, *Guia da Arbitragem Tributária*, AAVV., Nuno Villa-Lobos and Mónica Brito Vieira (coord.), Almedina 2013, p. 227.

<sup>62</sup> On time limits in tax arbitration, SERENA CABRITA NETO, “A Articulação dos Prazos de Impugnação do LRTA, do CPPT e do Código do IRS”, Newsletter CAAD, February 2013, available at [www.caad.org.pt](http://www.caad.org.pt), defended that the “special rule established in the Personal Income Tax Code concerning the moment from which the time limit for a challenge in personal income tax matters is reckoned (...) prevails over the general rule established in Article 102 of the Code of Administrative and Judicial Tax Procedure, even in cases where arbitration is resorted to”. With all due respect, we do not agree with this position, since it is our understanding that Article 10 of the LRTA provides a self-contained regime on time limits and, as a special and subsequent legal rule, it must prevail over a procedural rule, even if (wrongfully) included in a statute. To the same effect, see CARLA CASTELO TRINDADE, “Os Prazos na Arbitragem Tributária”, *Revista Arbitragem Tributária* n.º 2, 2015.

lenge and an appeal? How do these two remedies relate to each other? Clearly, the issue is the timing for the lodging of each, because the time limits for challenging and appealing an arbitration award are not coincident. In fact, a challenge to an arbitration award must be submitted within 15 days<sup>63</sup> and the appeal for the uniformization of a court decision has a time limit of 30 days<sup>64</sup> from the date of notification of the decision<sup>65</sup>. Although this question was not specifically raised in this case, the Central Administrative Court-South adopted a position on the issue, on its judgment of 30<sup>th</sup> January 2014, arguing that the structure of the challenge to the tax arbitral award, as it is provided in the LRTA, requires the Central Administrative Court to overturn the decision and remand the case to the arbitration court, in order to remedy the defect, and only the subsequent decision may then be appealed to the Constitutional Court<sup>66</sup> and to the Supreme Administrative Court. This understanding of the Central Administrative Court - South confronts us with yet another question: what if the Supreme Administrative Court - South does not overturn the decision? What is the time limit to appeal to the Supreme Administrative Court? Is there a “renewal” of the appeal period? What are the legal grounds? In the absence of legislative clarification, the “jurisprudence of caution” determines, in our view, that the party filing the challenge to the arbitral award and the appeal to the arbitral award within the time limits specified in the LRTA, which implies the simultaneous running of the two proceedings, with the challenge having logical priority – since such challenge focuses on formal defects. The challenging party/ appellant may, however, request from the Supreme Administrative Court that suspensive effect be granted to the appealed arbitral award until the decision on the challenge to the arbitral award is issued.

The jurisprudence of the Central Administrative Court South reinforces, in practice, the unappealable nature of the arbitral award, supporting the argument that, as a rule, tax arbitration courts are courts of

<sup>63</sup> See Article 27 (1), of the LRTA.

<sup>64</sup> See Article 152 (1) of the Code of Procedure in Administrative Courts.

<sup>65</sup> And not from the *res judicata* (Article 25 (3) of the LRTA).

<sup>66</sup> This question is not especially problematic in terms of the relationship between the appeal to the Constitutional Court and other appeals, because the appeal to the Constitutional Court interrupts the time limit for filing an appeal with the Supreme Administrative Court, which may be filed only after the interruption has ceased (Article 75 of Law no. 28/82).

final appeal for resolving tax disputes<sup>67</sup>. And, as clearly results from the above-mentioned Article 267 of the TFEU, “where any such question is raised in a case pending before a court of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court”. Thus, more than being just a possibility, tax arbitration courts may even be legally obliged to refer a case to the ECJ for a preliminary ruling.

Concerning the proof of enforceability of arbitral awards on tax matters, it is sufficient to invoke the established in Article 24 (1) of the LRTA, which establishes that “the arbitral award on the merits of the claim which cannot be appealed or challenged is binding on the tax administration from the end of the term foreseen for the appeal or challenge, and the tax administration, on the exact terms of the arbitral award in favour of the taxpayer and until the end of the time limit established for the spontaneous execution of tax court decisions, shall, alternatively or cumulatively, depending on the case: a) Perform the tax act that is legally due in replacement of the act that is object of the arbitral award; b) Reinstate the situation that would exist if the tax act that is object of the arbitral award had been performed, by adopting the acts and operations necessary for such purpose; c) Review the tax acts that have an impact or depend on the tax acts that constitute the object of the arbitral award, notably due to being part of the same fiscal relationship, even if they correspond to separate periodical obligations, by amending or replacing them, on the whole or in part; d) Pay the tax amounts in compliance with the arbitral award or abstain from paying such amounts”. It should also be mentioned that the same article states that, “without prejudice to the remaining effects foreseen in the Code of Administrative and Judicial Tax Procedure, the arbitral award on the merits of the claim that may not be appealed or challenged precludes the right to, on the same grounds, file a complaint, challenge, request a reassessment or promote the *ex officio* reassessment, or request an arbitral award on the acts that constitute the object of such requests or on subsequent assessments” (paragraph 2), and that “the arbitral award precludes the right of the tax administration to perform a new act regarding

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<sup>67</sup> Limiting the possibility of appealing an arbitral award is based on the legislative intention to provide celerity to the resolution of disputes between the tax administration and taxpayers, and relies on the fact that tax arbitration courts are always composed of arbitrators with at least 10 years of proven professional experience in the field of tax law (Article 7 (3) of the LRTA).



the same taxpayer and tax period, save in those cases where it is grounded on new facts different from the ones that motivated the arbitral award” (paragraph 4).

Thus, in view of the legal regime established in the LRTA, the advocate general concludes in the *Ascendi* Judgment that “rejection of the possibility of courts of arbitration hearing tax cases from referring questions for a preliminary ruling would seriously deprive the Court of influence over Portuguese court rulings on tax issues and thus in a field that is largely harmonised in EU law and has a direct effect on the law and the obligations of individuals”<sup>68</sup>.

### 3.3. The permanence criterion

Tax arbitration courts are also able to fulfill the permanence criterion, since they operate, as stated in Article 4 of the LRTA, under a permanent institution - the Centre for Administrative Arbitration (CAAD)<sup>69</sup> – created by Ministerial Order no. 5097/2009, of the Junior Minister of Justice, published in the Official Journal, series II, of 12<sup>th</sup> February 2009. In this regard, it should be recalled that, notwithstanding the fact that arbitration courts operate under the auspices of the CAAD, the judicial function is exercised by each of the arbitration courts individually, the CAAD being entrusted with mere administrative and secretarial competences. The fulfillment of the permanence requirement is not impaired by the fact that the composition of each tax arbitration court is different, since the method of appointment of arbitrators and the rules applicable are regulated by law and by the regulations of the CAAD itself.

The institutional model of the CAAD was cautiously and carefully designed, which explains the relatively long gestation period between its

<sup>68</sup> Paragraph 51.

<sup>69</sup> About the origin, nature and purpose of the Centre for Administrative Arbitration, see NUNO VILLA-LOBOS, “*Nota Introdutória. CAAD, Um Primeiro Balanço*”, *Mais Justiça Administrativa e Fiscal. Arbitragem*, AAVV., Wolters Kluwer/Coimbra Editora, November 2010; JOÃO TIAGO SILVEIRA, “*O Potencial do CAAD para a Resolução de Conflitos Administrativos*”, *Newsletter Arbitragem Administrativa e Fiscal*, no. 1, 2013, available at [www.caad.org.pt](http://www.caad.org.pt); and DOMINGOS SOARES FARINHO, “*Algumas Notas Sobre o Modelo Institucional do Centro de Arbitragem Administrativa (CAAD)*”, *Mais Justiça Administrativa e Fiscal. Arbitragem*, AAVV, Wolters Kluwer/Coimbra Editora, November 2010, available at [www.caad.org.pt](http://www.caad.org.pt).

legal consecration in Article 187 of the Code of Procedure in Administrative Courts, providing for the establishment of arbitration centers in administrative matters, and its practical implementation, which occurred only in early 2009, with the opening of the CAAD. Also quite prolonged, *mutatis mutandis*, was the gap of 9 months between the date of creation of the CAAD and the first ministry to bind itself to the jurisdiction of the centre a ministry that was, symbolically, the Ministry of Justice.

The institutional model that was finally adopted, ensuring legal, financial and operational autonomy, a flexible internal organization and the guarantees of impartiality, offers an innovative solution on two institutional levels. On a first level, it establishes a body that ensures the organic participation of the State in the CAAD - the Council of Representatives<sup>70</sup>, composed by the Directorate-General for Justice Policy of the Ministry of Justice. On a second level, the Statute of the Centre establishes a body responsible for ensuring compliance with the guarantees of independence and impartiality of arbitrators, and for their appointment and dismissal – the Ethics Committee of the Centre for Administrative Arbitration, whose chairman is appointed by the Superior Council of the Administrative and Tax Courts from among the judges of the superior courts.

The Ethics Committee of the Centre for Administrative Arbitration had as its first mission to adopt a Code of Ethics whose standards, in the words of Manuel Fernando dos Santos Serra, “complement and specify the ethical standards listed in the statute authorizing tax arbitration, establishing, together with the latter, the ethical framework for the proper conduct of arbitrators and the bases of trust in arbitration”. The referred author then concludes that “the tax arbitration regime and the Code of Ethics itself defined a demanding and restrictive system of recusals, firmly anchored in the independence and impartiality requirements to be observed in the appointment of arbitrators, whether chairmen or regular arbitrators”<sup>71</sup>.

Arbitrators appointed by the Ethics Committee of the Center for Administrative Arbitration are included in a list issued by the CAAD, in

<sup>70</sup> In particular, concerning the powers of the Council of Representatives, cf. DOMINGOS SOARES FARINHO, *ob. cit.*, pp. 40-41.

<sup>71</sup> See MANUEL FERNANDO DOS SANTOS SERRA, “*Arbitragem Tributária: os primeiros passos*”, *Guia da Arbitragem Tributária*, AAVV., Nuno Villa-Lobos and Mónica Brito Vieira (coord.), Almedina, 2013, pp. 58-59.

accordance with the law and the respective Code of Ethics<sup>72</sup>. According to the provisions of the LRTA, it is possible for an individual who is not included in the CAAD's list of arbitrators to be appointed as an arbitrator, if appointed by the parties. The appointment of an arbitrator by the Applicant always entails the constitution of a panel of arbitrators<sup>73</sup>, regardless of the amount in controversy.

In any case, regardless of whether or not an arbitrator is appointed by the parties from the CAAD's list of arbitrators, all arbitrators are subject to the recusal laid down in Article 8 and to the obligations laid down in Article 9 of the LRTA. The appointment of an arbitrator nominated by the Applicant seems to be discouraged by the LRTA, which provides, in this case, that the Applicant will bear, at the time of the request for the constitution of an arbitration court and in its entirety, the costs of the proceedings, regardless of the decision (Article 12 (3) of the LRTA), which is not the case when the arbitrator is appointed by the Ethics Committee of the Center for Administrative Arbitration<sup>74</sup>. This "disincentive" to the nomination of an arbitrator by the parties has had clear practical consequences since in only 23 of the 1162 requests for the constitution of an arbitration court addressed to the CAAD until the date of this paper, did the Applicant choose to nominate an arbitrator.

The relevance of the "institutional peculiarity" of the CAAD would be later expressly recognized in the LRTA itself in the preamble: "it is the only arbitration center operating under the aegis of the High Council of the Administrative and Fiscal Courts, and the latter has, in fact, the authority to appoint the chairman of the Ethics Committee of the Center for Administrative Arbitration". It should also be emphasized that the work of the Ethics Committee was one of the aspects highlighted in the *Ascendi* judgment for the purposes of assessing the fulfillment of the independ-

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<sup>72</sup> Available at the site of the Center for Administrative Arbitration, at [www.caad.org.pt](http://www.caad.org.pt).

<sup>73</sup> The situation in which an arbitrator is appointed by the Applicant, the other by the Respondent and the two arbitrators appointed by the parties appoint a third arbitrator to assume the functions of chairman.

<sup>74</sup> In accordance with paragraph 2 of Article 12 of the LRTA, "In the cases where the taxpayer does not appoint an arbitrator, foreseen in paragraph 1 and in subparagraph a) of paragraph 2 of Article 6, the taxpayer shall pay, on the date on which the request for the constitution of the arbitration court is sent, the initial arbitration fee, and the amount and the possible sharing between the parties of the costs directly resulting from the arbitration proceedings shall be determined in the arbitral award issued by the arbitration court".

ence requirement. The ECJ has been particularly sensitive to institutional aspects, even sometimes assigning public legitimacy to private associations due to the State's intervention in the appointment of their members, as in the *Broekmeulen*<sup>75</sup> judgment, where a referral for a preliminary ruling by the Committee for General Medicine was being assessed. We cannot fail to see in this case a parallel with the CAAD.

In light of the above, and as was so well put in the Opinion of the Advocate General in the *Ascendi* judgment, “the Tax Arbitration Court is not an ad hoc court, merely an element of the dispute settlement system which, although its activities manifest themselves in the form of ephemeral court compositions which cease to exist at the end of the case which they were called on to determine, are, as a whole, permanent in nature<sup>76</sup>”. From the perspective of the ECJ, the legal framework for the operation of tax arbitration also conveys the idea of permanence in the sense that each tax arbitration court integrates a broader legal reality - the system of jurisdictional resolution of tax disputes. This conceptual distinction does not render irrelevant the discussion on the institutional form adopted for the operation of arbitration courts, and their importance is increased when the arbitration is on public law matters.

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<sup>75</sup> *Broekmeulen Judgment*, C-246/80, of 6<sup>th</sup> October 1981.

<sup>76</sup> Paragraph 37.

### 3.4. Territoriality

The territoriality requirement or criterion was delimited by the ECJ in the *Corbiau*<sup>77</sup> judgment. In this decision, the ECJ held that only entities located in one of the EU Member States should be considered direct interlocutors of the ECJ. Territoriality appears as a new criterion in addition to those defined decades before in the *Vaasen-Göbbels* judgment. This requirement is also fully met in respect of tax arbitration, and such requirement is also, in this regard, connected to the permanence requirement analyzed above, under whose aegis tax arbitration courts operate, as analyzed in the previous paragraph. Now, according to paragraph 2 of Article 4 of the LRTA, “the arbitration courts shall function at the Centre for Administrative Arbitration”, which, under Article 1, paragraph 2 of the respective Statutes<sup>78</sup>, is based in Lisbon, and thus in the territory of a Member State.

A seemingly innocuous aspect, such as determining the location where the tax arbitration takes place, has several legal consequences not immediately obvious, such as determining the court with jurisdiction to decide on challenges to arbitration awards. As mentioned in the previous paragraph, in accordance with the established in paragraph 1 of Article 27 of the LRTA, “the arbitral award may be overturned by the Central Administrative Court”, although it is not established whether such challenge should be filed before the Central Administrative Court-South or before the Central Administrative Court-North. In the absence of an express provision delimiting territorial jurisdiction, Article 29 (1)(c) of the LRTA establishes the subsidiary application of Article 181 (1) of the Code of Procedure in Administrative Courts, and the latter refers to Article 59 of the Voluntary Arbitration Law, which determines that territorial jurisdiction to hear a challenge to an arbitration award belongs to the court in whose district the place of arbitration is located. Since tax arbitration always takes place in the CAAD, the jurisdiction belongs to the Central Administrative Court-South<sup>79</sup>. It should be noted that the territorial jurisdiction of arbitration courts is the whole national territory.

<sup>77</sup> *Corbiau Judgment*, C-24/92, of 30<sup>th</sup> March 1993.

<sup>78</sup> Available at the site of the Centre for Administrative Arbitration, [www.caad.org.pt](http://www.caad.org.pt).

<sup>79</sup> To the same effect JORGE LOPES DE SOUSA, “Comentário ao Regime Jurídico da Arbitragem Tributária”, *Guia da Arbitragem Tributária*, AAVV., Nuno Villa-Lobos and Mónica Brito Vieira (coord.), Almedina 2013, pp. 58-59.

### 3.5. Compliance with the *inter partes* procedure requirement

The requirement of an *inter partes* procedure, deemed since 1966 as one of the key criteria for the qualification as a “court of a Member State” by the ECJ, was somewhat mitigated in the *De Coster, Dorsch Consult* and *Gabalfrisa* judgments mentioned above. However, there is no doubt that tax arbitration courts meet such requirement, as is clear from Article 124 (4) (c) of the Legislative Authorization Act, which required the “establishing of the principles and rules of the tax arbitration procedure, in accordance with the inquisitorial, *audi alteram partem* and equality of the parties principles, and with an exemption from essential procedural requirements, in accordance with the principle of autonomy of arbitrators when conducting proceedings.” This command has been clarified by Article 16 of the LRTA, which expressly establishes the *audi alteram partem* principle in the tax arbitration procedure. This principle is guaranteed by granting the parties the right to comment on any matters of fact or points of law raised in the proceedings. It should be noted, furthermore, that the importance of guaranteeing compliance with the *audi alteram partem* principle determines that violation of this principle is one of the grounds for challenging an arbitration award, as provided in Article 28 (d) of the LRTA.

### 3.6. Independence

The fulfilling of the independence requirement by tax arbitration courts was analyzed and expressly recognized in the *Ascendi* judgment, based on two lines of reasoning. On the one hand, and as a rule, arbitrators are appointed by the Ethics Committee of the Centre for Administrative Arbitration from CAAD’s list of arbitrators, and, in the other hand, these arbitrators are subject to the independence and impartiality principles. According to the ECJ, the observance of these aspects is what makes the court a third party in relation to the parties in conflict. And, according to the conclusions of the advocate general in the same case<sup>80</sup>, the independence requirement should be assessed in light of an external and an internal aspect, the first concerning the “independence of the body and its members from persons and institutions who are third parties to the dis-

<sup>80</sup> Conclusions of the Advocate General, paragraph 44.

pute – the executive and high-level bodies etc. The external aspect concerns the impartiality of the members of the body in relation to the parties to the dispute and the absence of any interest on their part in the specific adjudication”. Additionally, “courts of arbitration in tax cases do not form part of the tax authority or other institutions of executive authority. They are an element of judicial authority and operate under the CAAD, which provide their administrative/technical services”.

In the *Ascendi* judgment, the ECJ recognized the special requirement of the LRTA regarding the technical quality of arbitrators and ethical aspects, establishing especially tight selection requirements<sup>81</sup> (Article 7 of the LRTA) and a vast range of recusal (Article 8 of the LRTA) and duties of arbitrators (Article 9 of the LRTA), which were later extended, developed and detailed in the Code of Ethics and in the Rules on Selection and appointment of arbitrators of the CAAD<sup>82</sup>. Under Article 7 of the LRTA, “arbitrators are chosen from among people of proven technical ability, moral character and sense of public interest” (§1) and “must be jurists with at least 10 years’ proven professional experience in tax law, notably as a public servant, magistrate, lawyer, consultant, legal consultant, in higher education teaching or research, in the tax administration or in relevant scientific work in the area” (paragraph 2) or “in matters requiring a specialized knowledge of other areas, a person with a degree in Economics or Management may be appointed as arbitrator, though not as a chairman” (paragraph 3).

The requirements of the LRTA in terms of the arbitrators’ training and experience allow the overcoming of an objection of principle from the ECJ regarding the admission of referrals for a preliminary ruling made by persons without adequate qualifications for the purpose, which would foster the exponential growth of referrals either potentially useless or unsubstantiated from a legal point of view, to the detriment to the effectiveness of the court itself. With regard to tax arbitration courts, any referral must always be made by jurists with at least “10 years of proven professional experience in the area of tax law”, which is not synonymous with 10 years of professional experience. The law is clear concerning the requirement of specific professional experience in the area of tax law. It should also be

<sup>81</sup> Regarding the requirements concerning arbitrators, Article 9 (1) of the Voluntary Arbitration Law merely states that “arbitrators must be individuals and have full legal capacity”.

<sup>82</sup> Available at the site of the Centre for Administrative Arbitration, at [www.caad.org.pt](http://www.caad.org.pt).

highlighted that the explicit mandatory public disclosure of arbitration awards<sup>83</sup>, which is neither required, nor a standard practice, in other forms of public law arbitration, much less in private law arbitration, not only grants an added legitimacy to tax arbitration awards, but also constitutes an additional requirement in terms of grounding the award<sup>84</sup>.

With regard to the recusal of arbitrators, the LRTA was specially demanding, establishing, in Article 8, that “the cases of recusal for acting as an arbitrator are those listed in paragraph 1 of Article 44 of the Administrative Procedure Code, with the necessary amendments, as well as when in the two previous years before its appointment as arbitrator: a) the appointed person has been an officer, employee or agent of the tax administration, a member of the corporate bodies, worker, attorney, auditor or consultant of the taxpayer who is a party to the proceedings, of an entity in a control relationship with the referred taxpayer, as defined in the Companies Code, or of a person or entity with an interest in the success of the claim; b) The appointed person has been a worker, collaborator, member, associate or partner of any entity that has provided auditing, consulting or legal services or legal counsel to the taxpayer” (paragraph 1).

Paragraph 2 states that “the person appointed as arbitrator must decline the appointment in any circumstance that may reasonably entail a suspicion concerning its impartiality and independence”. Paragraph 3 of Article 8 of the LRTA grants the Ethics Committee of the CAAD the power “to dismiss the arbitrator or arbitrators in case of breach of the requirements foreseen in the previous paragraphs”.

Arbitrators in tax matters “are subject to the principles of impartiality and independence, as well as to the duty of tax secrecy on the same terms as those imposed on directors, employees and agents of the tax administration” (Article 9 (1) of the LRTA). It is also worth noting that “the supervening impossibility of performance of the obligation for a reason attributable to the arbitrator entails the latter’s replacement in accordance with the rules applicable to the appointment of the replaced arbitrator indicating replaced or, having heard the remaining arbitrators and in the

<sup>83</sup> See Article 16 (g) of the LRTA.

<sup>84</sup> On the advantages of publicly disclosing arbitration awards, see JOÃO TABORDA DA GAMA, “*Decisões arbitrais públicas (finalmente) públicas*”, Newsletter CAAD, February 2013, available at [www.caad.pt](http://www.caad.pt).



absence of opposition from the parties, the alteration of the composition of the court” (Article 9 (2) of the LRTA).

The organic model of the CAAD is still the top insurer of independence in the functioning of arbitration courts, both in an external and in an internal level, which in the opinion of the President of the Ethics Committee of the Centre for Administrative Arbitration means that “entrusting tax arbitration to an institutionalized body, to work in close connection to the Superior Council of the Administrative and Fiscal Courts, reflects an healthy concern with ensuring that such an activity will be carried out under strong public control, that of the judiciary, so that, now that fears or suspicions of a discretionary “privatization” of justice have been overcome, a general climate of confidence in the integrity of this arbitration system is guaranteed”.<sup>85</sup>

### 3.7. Judicial nature of the decision

The judicial nature of the arbitration award is fully demonstrated in the preceding paragraphs, but it also expressly results from the provisions of Article 1 of the LRTA, which establishes arbitration as an alternative means of jurisdictional resolution of disputes in tax matters, and of Article 24, which establishes the effects of the arbitral award, which we will refrain from repeating for reasons of economy.

### 3.8. Sufficiently strong link to the State

In the *Nordsee*<sup>86</sup> judgment, and more recently in the *Eco Swiss* and in the *Denuit and Cordenier* judgments, the ECJ ruled out the possibility of arbitration courts, established by agreement of the parties, referring cases for a preliminary ruling to the ECJ, since their connection with the system of legal remedies was too tenuous. As mentioned above, it results from the ECJ’s case law that only the authorities of Member States, or the bodies with a mission in the field of legal protection assigned by the State, may

<sup>85</sup> See MANUEL FERNANDO DOS SANTOS SERRA, “Conselho Deontológico do CAAD”, *Revista Arbitragem Tributária*, no. 1, 2014, Nuno Villa-Lobos and Tânia Carvalhais Pereira (coord.), p. 8.

<sup>86</sup> *Nordsee Judgment*, C-102/81, of 23<sup>rd</sup> March 1982.

refer cases for a preliminary ruling to the ECJ, because only in such cases are Member States responsible and accountable for the implementation of and compliance with EU law in their territory, through an action against a Member State for failure to fulfill obligations.

Thus, if the authorities of the Member States have not been involved in choosing arbitration as a means of dispute resolution, and cannot be called on to intervene automatically in the proceedings, there won't be a "sufficiently strong" link to the State for the qualification of that referring entity as a "court of a Member State"<sup>87</sup>. Indeed, the answer seems to be in the correlation between the legitimacy to make a referral for a preliminary ruling and the possibility of holding a Member State liable for breaching EU law. If arbitration courts cannot be held liable for a breach of EU law, they cannot be considered as "a court or tribunal" able to refer cases for a preliminary ruling. The absence of a "sufficiently strong" link between the referring court and the Member State seems therefore to exclude both the possibility of an action against a Member State for failure to fulfill obligations and a damage claim against the State for breach of EU law.

In tax arbitration, as it has been designed, there is no doubt that there is a "sufficiently strong" link between the arbitration court and the State, because, due to the very nature of the fiscal relationship, the State is always and by definition a party to it. It should also be noted that the State, *in casu* the tax administration, was bound to tax arbitration through a Ministerial Order, which defines the terms and the maximum amount in controversy of the disputes covered, and that the same State is legally obliged to implement the final arbitration awards.

#### 4. Conclusions

The analysis of the legal framework of tax arbitration reveals with particular clarity the special nature of this singular institute, which shares characteristics with the general system of public law arbitration, while having

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<sup>87</sup> In the same vein, see *Guy Denuit Judgment*, in which the ECJ considered that it lacked jurisdiction to issue a preliminary ruling requested by a Belgian Arbitration Court voluntarily chosen by the parties to resolve legal disputes regarding consumer disputes concerning travels (*Collège d'arbitrage de la Commission de Litiges Voyages*), since it deemed that the parties were under no obligation, either legally or in practice, to submit their disputes to arbitration, in addition to the Belgian public authorities not being involved in choosing arbitration as a means of dispute resolution (Judgment, C-125/04, of 27<sup>th</sup> January 2005, §16).

great similarities with the regime of judicial challenge established in the procedural rules of tax codes and other tax rules. We should recall, in fact, that the Voluntary Arbitration Law is not included in the list of Article 29 of the LRTA, which establishes subsidiary legal rules applicable to cases not covered therein.

Arbitration courts are judicial bodies established by law, with compulsory jurisdiction over the entire national territory, which apply exclusively written law, being expressly barred from resorting to equity. The issuing of an arbitration award complies with the requirement for an *inter partes* procedure and the equality of the parties principle, and such award is immediately enforceable after becoming unappealable. The special legal and regulatory requirements in terms of the selection, appointment and ethical conduct of arbitrators, together with the mandatory public disclosure of arbitral awards, are also distinctive features of this regime. The very nature of the legal tax relationship also determines the existence of a sufficiently strong link of the arbitration proceedings to the State. Finally, before the constitution of the arbitration court, the highest person in charge of the tax administration department may “revoke, ratify, reform or convert the tax act whose illegality has been raised, and perform, when necessary, a replacement tax act” within 30 days of the notification of the request for the establishment of an arbitration court<sup>88</sup>. And, after that period, “the tax administration may no longer perform a new tax act regarding the same taxpayer, tax and fiscal period, except if based on new facts<sup>89</sup>”.

In light of the foregoing, the special nature of tax arbitration courts, expressly recognized in the opinion of the advocate general and in the judgment of *Ascendi* case, precludes the straightforward transposition of the argumentative structure that determined the admission of the referral for a preliminary ruling submitted by these courts to other arbitration courts, whether public law arbitration courts or, even less, where private arbitration courts are concerned.

<sup>88</sup> See Article 13 (1) of the LRTA.

<sup>89</sup> See Article 13 (1) of the LRTA. On the interpretation of Article 13 (1) of the LRTA, see the arbitral award issued in case no. 276/2013-T, of 27<sup>th</sup> May 2014.