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Arbitration and the EU Legal Order: Has Greece Gone Further Than the CJEU?

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Session 2: Tension with the EU Acquis

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The CJEU Case Law in Three Sentences

***Achmea* (2018).** Intra-EU BIT arbitration clauses are incompatible with Arts. 267 and 344 TFEU - arbitral tribunals cannot refer to the CJEU, so the autonomy of EU law cannot be guaranteed.

***Komstroy* (2021).** Same result for ECT-based arbitration between intra-EU parties.

***PL Holdings* (2021).** National courts have a *positive duty* to set awards aside.

What the CJEU Did Not Cover

Commercial arbitration. The Court's reasoning targets treaty mechanisms by which states by treaty withdraw disputes from their own judicial systems.

Safe working conclusion.

- The case law does not reach contract-based commercial arbitration.

- The issue of concession agreements was left open.

In 2022, the Greek Council of State ("GCoS")* Went Further

*Greece's Supreme Administrative Court

Two 2022 judgments (GCoS 246, 251/2022) - Background

Contract. Athens Airport Development Agreement ("**ADA**"), Art. 44.3 → LCIA arbitration, seat London, Greek law.

Award. LCIA No. 101735 (2013) - VAT assessments imposed on the Athens International Airport ("**AIA**") by Greek tax authorities held unlawful under the ADA.

Challenge on lower court judgments. Athens Administrative Court of Appeal had given the award binding effect; Greece appealed to the Council of State.

What the GCoS Said and Did

EU law may be at stake. Disputes under the ADA *may* concern the interpretation/application of EU law (VAT directives).

No preliminary reference possible. An LCIA tribunal is not part of the Hellenic Republic's judicial system; it cannot refer under Art. 267 TFEU.

Conclusion. The arbitration clause in a public investment agreement of the Greek State is incompatible with Arts. 267 and 344 TFEU; awards issued under it are rendered *in excess of the lawful limits of jurisdiction* and **do not bind the administrative courts**.

What the GCoS Did Not Do

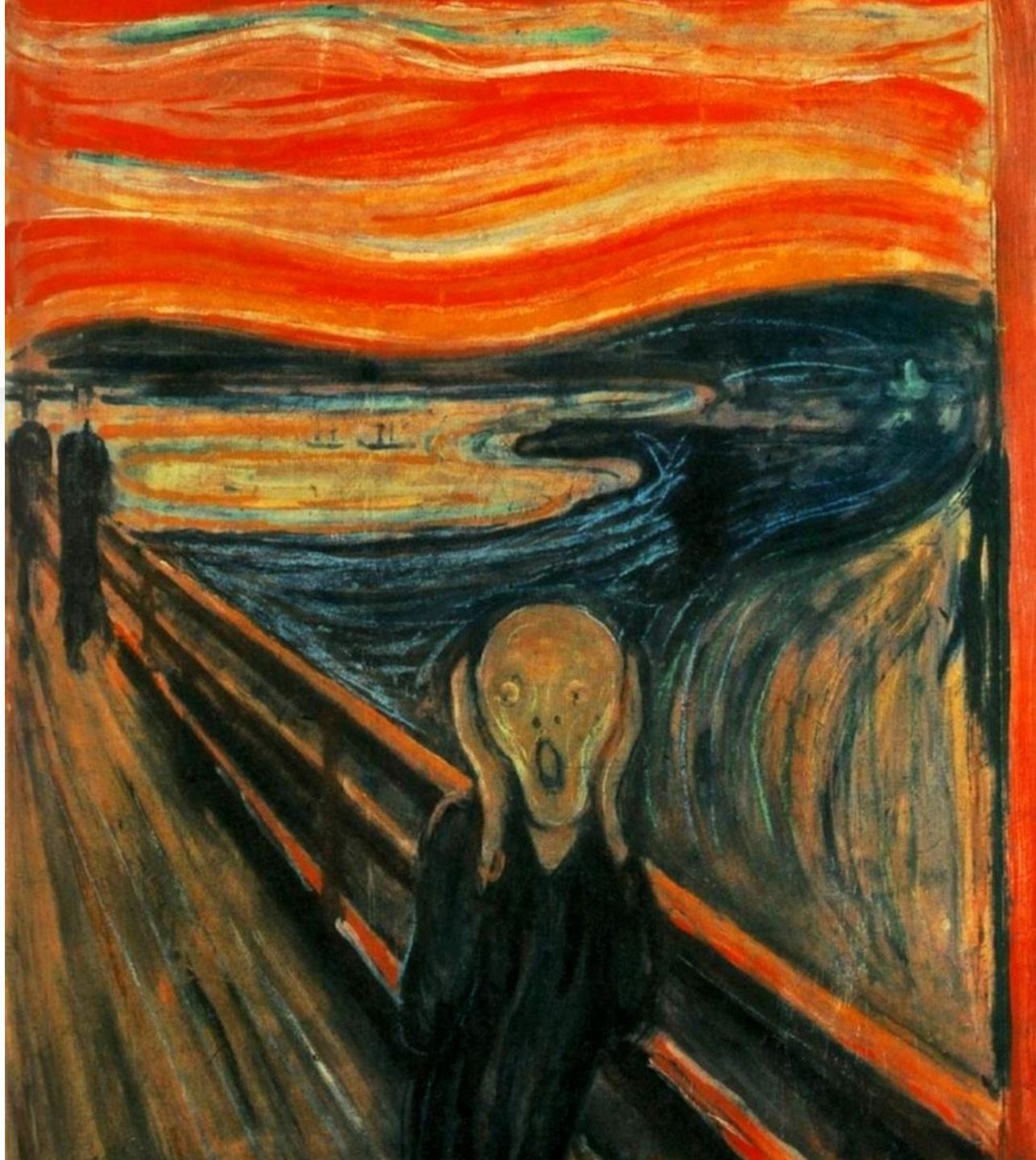
It did not vacate the award.

Set-aside jurisdiction belongs exclusively to **civil courts** - the GCoS has no power to annul an arbitral award.

The award formally remains on the books; the Council of State simply declared it non-binding as against the administrative courts.

Settled Case Law?

Subsequent judgments (GCoS 601/2023, 1220/2024) treat GCoS 246, 251/2022 as **settled doctrine**.



Where This Lands in Practice – Chilling Effect

The trigger is "*may concern the interpretation and/or application of EU law*" - there is no concession agreement today that clearly falls outside this.

EU law is an integral part of any member state's law and permeates every dimension of public contract performance: procurement, VAT, state aid, competition, environment, fundamental freedoms.

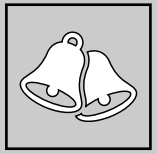
State lawyers' current posture. Resistance to (standard) arbitration clauses in new concession agreements.

Any dispute touching EU law is at risk.

Three (2+1) Reasons Not to Panic

(1) The GCoS cannot vacate - and the civil courts have not. The Council of State has no set-aside jurisdiction. Every LCIA, ICC and ad hoc award issued under these agreements formally remains valid. The civil courts - the only courts that can annul - have not adopted the GCoS reasoning and show no sign of doing so.

(2) An LCIA Tribunal just dismissed the same argument. In AIA v. Greece (LCIA Case No. 225730, Award 2 March 2026, Eduardo Silva Romero presiding), Greece ran the *Achmea*/GCoS 246, 251/2022 argument squarely. The Tribunal - unanimously - rejected it: the *Achmea* line applies to investment arbitration; it does not reach commercial arbitration under a concession agreement. The award is reported in GAR (April 2026).



(3) The GCoS itself went a different way - without mentioning 246, 251/2022. GCoS 1915/2023 (Section B', 1 November 2023): Greek State v. Hellenic Petroleum, domestic concession, contractual three-member tribunal. The court upheld the binding force of the arbitral award on the administrative courts and annulled the lower court's judgment for improperly reviewing the merits - precisely the opposite of 246/2022. No reference to *Achmea*, *PL Holdings*, or Arts. 267/344 TFEU. The case had no obvious EU law dimension.

Thank you

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