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Spain: Trends and Developments

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Trends and Developments

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Spain has steadily risen to prominence on the international arbitration stage, aiming to distinguish itself as the go-to jurisdiction for Spanish-speaking arbitrations. The pivotal change can be traced back to the post-2020 constitutional doctrine that delineated the scope of judicial oversight over arbitral awards. This doctrine has unquestionably strengthened its standing within the global arbitration arena.

Past decisions, particularly by the Madrid High Court of Justice, in 2015 and 2016, created ripples of discontent within the arbitration community. These rulings, viewed by many as overly intrusive, exerted an unwarranted degree of control over arbitral awards by the Spanish judiciary. Such rulings not only cast shadows of doubt over Spain's arbitration system but also eroded trust in its institutions. In response, numerous economic stakeholders, seeking greater assurance, either turned back to the traditional judicial system or explored alternative international arbitration venues.

However, these concerns have largely been resolved by the latest rulings of the Constitutional Court (*Tribunal Constitucional* or TC), the highest guarantor of fundamental rights in Spain, the most important of which are STC 46/20, of 15 June 2020, STC 17/21, of 15 February 2021, SSTC 55/21 and 65/21, of 15 March 2021, STC 79/22, of 27 July 2022, and STC 50/22, of 4 April 2022. All of these rulings establish that court reviews of arbitral awards for potential contradictions with public order should not involve a reevaluation of the core issues under arbitration, thereby sidelining the arbitrator's role in resolving the dispute. Instead, the rulings should be limited to assessing the legality of the arbitration agreement, the arbitrability of the matter and the procedural regularity of the arbitration proceedings.

Recent Rulings of the Constitutional Court in Arbitration Matters

Ruling STC 46/20 of 15 June 2020

The Constitutional Court, in ruling STC 46/20 of 15 June 2020, took decisive steps to dispel lingering uncertainties surrounding arbitration in Spain, setting a precedent that further rulings would echo. This pivotal ruling restored Spain's reputation as a trusted and appealing venue for arbitration. Central to this ruling was a case wherein the High Court of Justice of Madrid (*Tribunal Superior de Justicia de Madrid* or TSJ Madrid) denied parties the ability to proceed with annulment due to a potential breach of public order. Notably, as the annulment pro-

ceedings were underway, the parties reached a settlement agreement to resolve the dispute and subsequently requested the termination of the proceedings as they were no longer relevant. However, TSJ Madrid, invoking potential public order implications, not only insisted that the case proceed but also declared the award null and voice and proceeded to judge the merits of the case.

Faced with this situation, the Constitutional Court emphasised three fundamental principles concerning arbitration that appeared to have been disregarded by the TSJ Madrid:

- Arbitration rests upon the valid autonomy of the parties' will, where they willingly and voluntarily waive their right to seek effective judicial protection at a certain point, opting instead to be bound by the decision of a third party outside the traditional court system to resolve their dispute.
- The arbitration award can only be challenged on formal grounds (Articles 40 et seq. of the Law on Arbitration 60/2003 of 23 December 2003 (hereinafter "LA"), thus excluding a judicial review of the merits.
- As regards an arbitral award being potentially contrary to public order, established as a cause for annulment in Article 41.1 f) LA, as well as a cause for refusal of recognition of foreign awards in Article V (2)(b) of the 1958 New York Convention, ratified by Spain, the Constitutional Court has specified that public order includes the fundamental rights and freedoms guaranteed by the Constitution, as well as other essential principles that remain non-negotiable due to constitutional requirements or the application of internationally accepted principles.

Furthermore, the Constitutional Court emphasised the well-established legal principle of differentiating between two types of public order:

- material public order, which comprises public, private, political, moral and economic legal principles, which are deemed indispensable for safeguarding societal equilibrium for any specific community and time; and
- procedural public order, comprising the collection of formalities and essential principles within our procedural legal system necessary for its proper functioning.

Aware of the ambiguity of the term, the Constitutional Court expressly rejected that it could be used as "a mere pretext for the judicial body to re-examine the matters debated in the arbitration proceedings, undermining the arbitration institution and ultimately violating the autonomy of the will of the parties".

Ultimately, the Constitutional Court determined that the TSJ Madrid's decision had violated the plaintiffs' right to effective judicial protection. This conclusion arose from the litigants being prevented from withdrawing from the proceedings, due to a distorted interpretation of the notion of public order as a cause for annulment of the arbitration award. Its importance also lies in the fact that it was a unanimous judgment of the six judges who made up the first chamber of the Constitutional Court, each of whom specialises in distinct branches of law. This led to the judgment being applauded by the national and international arbitration community as it was considered a clear reflection of a common consensus on arbitration in Spain, which, moreover, once again placed the parties at the epicentre of the arbitration ecosystem and reminded the courts of the existing limits on the jurisdictional control of awards.

In subsequent years, a series of landmark judgments were issued, each building upon the foundation laid by the aforementioned ruling. These subsequent decisions further contributed to delineating and refining the foundations of the arbitration system.

Ruling STC 17/21 of 15 February 2021

This judgment also garnered significant attention. It not only revisited the questions of the earlier ruling but also probed the obligation to provide clear reasoning for the awards. Key determinations from this judgment are outlined below.

An annulment action based on the violation of public procedural order focuses on analysing procedural errors during arbitration, referring to compliance with fundamental guarantees, such as, for example, the right of defence, equality, bilaterality, contradiction and evidence, or when the award lacks clear reasoning, is inconsistent, violates mandatory legal norms or violates a prior final decision. In other words, annulment can only concern errors in proceeding.

Such a constricted view of annulment implies that courts cannot overstep their boundaries to assume the arbitrator's role in interpreting the law. Nor is the court a second instance reviewing the facts and law applied in the award, or a mechanism for controlling the correct application of case law. Consequently, if the arbitral decision cannot be described as arbitrary, illogical, absurd or irrational, it cannot be declared null and void on the basis of the notion of public order.

The ruling clarifies that when in previous decisions it has defined arbitration as having "judicial equivalence", this means that both judicial and arbitral avenues yield definitive resolutions to disputes, both bearing the finality of res judicata. Nonetheless, this does not imply an absolute congruence between court judgments and arbitral awards from a constitutional perspective.

Regarding the obligation to provide a rationale (or statement of reasons), its essence diverges in judicial verdicts and arbitral awards. For the former, this obligation springs from the inherent right to effective judicial protection enshrined in Article 24 of the Spanish Constitution (*Constitución Española* or CE). In contrast, for arbitral awards, this requirement stems solely from the statutory framework (Article 37.4 LA). As such, it is clear that the legislature could potentially waive this obligation for arbitral decisions if deemed necessary.

However, this does not detract from the fact that similar criteria must be applied when assessing the reasoning of both types of decisions. Consequently, the Constitutional Court affirms that only an award that is unreasonable, arbitrary or evidently flawed can be faulted for a breach of reasoning under Article 37.4 LA, but not Article 24 CE.

However, in this assessment, it should be borne in mind that the legal regulation only requires the award to contain a statement of the grounds on which the decision is based, but not that the reasoning must be convincing or sufficient, or that it must necessarily extend to certain points. The legal provision does not imply that an arbitrator should analyse in the award all the evidence and arguments of the parties, but only that the decision's rationale be stated, irrespective of its correctness in the eyes of the adjudicating judge.

In the context of arbitration in equity, the requirement for a detailed rationale is less stringent. However, it remains crucial for the award to artic-

ulate the underlying justifications (not necessarily of a legal nature), to provide insight into the arbitrator's choice between the opposing positions of the litigants. Even a concise explanation is deemed necessary to understand the basis for the decision. The ruling underscores the sole discretion of the arbitral tribunal to choose the decision that it considers to be fairest and most equitable, taking into account all the circumstances of the case, even if such a solution is incompatible with the one that would result from the application of the rules of substantive law.

Ruling STC 65/21 of 15 March 2021

The ruling clarifies that those who freely, expressly and voluntarily submit to arbitration as the method of resolving their dispute opt out of the safeguards enshrined in Article 24 CE – ie, the rules governing judicial proceedings, and opt instead for the rules laid down in the Arbitration Act.

It adds that the statement of reasons for arbitral awards has no impact on public order. Indeed, since arbitration is based on the autonomy of the will and the freedom of individuals (Articles 1 and 10 CE), the duty to state reasons for the award does not form part of the public order required in Article 24 CE for judicial decisions. Instead, it adheres to a distinct criterion aligned with Article 10 CE. The primary responsibility for defining this criterion lies with the parties engaged in the arbitration. Just as they decide on the arbitration rules, the number of arbitrators, the nature of the arbitration, and evidentiary guidelines, they should also reach a consensus on the necessity and scope of reasoning in the award, as outlined in Article 37.4 LA.

This means that courts are limited to verifying the existence of a statement of reasons in an arbitration award, and cannot examine its suitability, sufficiency or adequacy. Unless the parties explicitly agree on specific requirements or content for the statement, its adequacy, scope, or sufficiency cannot be deduced from the will of the parties (Article 10 CE).

Ruling STC 79/22 of 27 June 2022

In this recent ruling, the Constitutional Court clarified that when it mentions that annulment should be limited to errors in proceeding, it essentially means the judiciary cannot engage in discussions regarding the evidence presented during the arbitration process, its evidentiary value, or its credibility. Similarly, the choice of the applicable legal rule, its interpretation, and the alignment of established facts with it, exclusively lie with the arbitration panel appointed by the parties. This authority stems from the parties' autonomy of will, thus barring regular court interventions.

Consequently, the Constitutional Court has established a robust defence of arbitration, safeguarding the legal certainty parties expect and simultaneously curbing undue judicial interference in arbitration decisions. This stance undeniably bolsters Spain's attractiveness as a reliable arbitration hub. These decisions convey a clear message to business entities: they can have confidence in the arbitration process, with annulment being a rare outcome, reserved for instances where mandatory rules or procedural guarantees are breached.

Recent judgments in annulment actions have incorporated the latest constitutional doctrine.

A reasonable amount of time has passed since the first of the Constitutional Court's rulings referred to above, and we are now in a position to analyse the impact that the previous case law

has had on the various applications for annulment that have been processed since then.

Enough time has passed since the initial Constitutional Court ruling, enabling us to gauge its influence on subsequent annulment applications. It is clear that this doctrine has firmly rooted itself in our legal system, offering reassurance to the arbitration community. This solid foundation promotes arbitration in Spain as a trusted dispute resolution mechanism.

For instance, the TSJ Madrid, which had previously deviated the most from the Arbitration Law's correct application, has recently issued judgments that clearly align with the constitutional doctrine. Such a shift positions Madrid competitively with leading hubs like Paris, London, and Singapore.

After the Constitutional Court's last ruling, STC 79/22 of 27 June 2022, which overturned the TSJ Madrid decision and sent it back for review, the TSJ Madrid, in its judgment 22/2023 of 18 May 2022, acknowledged that its role was limited to ascertaining the existence of a statement of reasons in the award. Given that the Constitutional Court determined the arbitration tribunal had validly reasoned why criminal preliminary ruling conditions were not met, and saw this as neither irrational nor arbitrary, the TSJ Madrid eventually declined the annulment request, though one judge dissented.

With regard to the assessment of evidence, the TSJ Madrid was unequivocal in its judgment 38/2021 of 8 June 2021. Drawing on recent Constitutional Court rulings, it held that within the context of an arbitration award annulment, the court should not be expected to undertake a specific evaluation of the evidence. When errors in evidence assessment are invoked, a thorough, detailed critique of the arbitration's evidentiary evaluation is essential. This critique should spotlight any blatant arbitrariness in the arbitrator's reasoning. For a judicial review, the claimant must demonstrate a clear logical inconsistency or an overly subjective interpretation of the evidence, which would warrant the desired annulment on account of being wholly indefensible.

In its judgments 32/20 of 15 December 2020, 1/2021 of 19 January 2021, and 5/22 of 3 March 2022, the TSJ Madrid acknowledged a shift in its doctrine as a result of the latest constitutional case law. It had earlier maintained that parties were denied the judicial procedure for arbitral award annulments, implying they had no authority to accept the annulment claim. This was rooted in the understanding that an award's annulment, like a judgment's, required the court to verify the presence of valid annulment grounds. However, based on ruling STC 46/20, the TSJ Madrid revised its doctrine, acknowledging the parties' agency in the annulment procedure and affirming the defendant's unobstructed right to accept the claim.

Beyond the Community of Madrid, other high courts across Spain have fully endorsed the aforementioned constitutional criterion and consistently reference it in their judgments. Some example rulings are Basque Country STJ 4/23 of 25 April 2023, STJ of Catalonia 23/23 of 17 April 2023, or STJ of Valencia 14/2021 of 29 November 2021.

Conclusion

Spain has successfully addressed certain inconsistencies within the judicial system, and now possesses a jurisprudential doctrine on arbitration that reinforces and advocates limited judicial intervention in arbitral proceedings. As a result,

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Spain is poised to become a more popular hub for both domestic and international arbitration.

In addition to the doctrine explored in this article, Spain has an Arbitration Law, inspired by the UNCITRAL Model Law, which is therefore highly competitive with other international arbitral hubs. The presence of reputable arbitration courts guarantees the appointment of specialised and impartial arbitrators, as well as the correct handling of proceedings. Further, Spain has been actively fostering ties with Latin American countries to promote Spanish-language arbitration. With these developments, it is anticipated that Spain will emerge as a prominent player in the field of arbitration in the coming years.

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