The Parties' Discretion to Terminate the Proceedings for the Annulment of an Arbitral Award: Recent Developments in Court Rulings

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On 4 April 2017, the Madrid High Court of Justice ("TSJM"), the court in Spain that handles appeals for the annulment of awards, issued two decisions – Case numbers 43/2016 and 63/2016 – in which it confirms the doctrine already advanced by means of a previous judgment rendered by the same court (see Judgment of the TSJM dated 28 February 2017 [JUR 2017/ 89938]). In brief, according to these three decisions, once the parties file an appeal for the annulment of an arbitral award for any of the reasons described in article 41.2 of the Spanish Arbitration Act (the "Arbitration Act", Law 60/2003 dated 23 December 2003), they cannot waive or withdraw the appeal filed.

> Art. 41:
> 1. The award may be annulled only if the party requesting the annulment claims and proves:
> B) That he has not been duly notified of the appointment of an arbitrator or of arbitration proceedings or has not been able, for any other reason, to assert his rights.
> E) That the arbitrators have resolved on matters not subject to arbitration.
> F) That the award is contrary to public order.
> 2. The motives contained in paragraphs b), e) and f) of the previous section may be appraised by the court hearing the action for annulment ex officio or at the request of the public prosecutor in relation to the interests legally defended.

In both annulment proceedings (Case numbers 43/2016 and 63/2016), the parties requested termination because an out-of-court settlement had been reached during the pendency. In the first case, the request was based on article 19.2 of the Spanish Civil Procedural Law, Law 1/2000 dated 7 January 2000 ("LEC") (transaction), while in the second it was based on Article 22.1 LEC (extra-procedural satisfaction).

The arguments given by the Court to reject the parties' request to termite the proceeding for the annulment of an arbitral award could be summarized as follows: it concluded that the transaction, waiver or withdrawal (as putting into practice the principle that the parties set the scope of the case

and the judge is limited by the relief sought) in proceedings for the annulment of an arbitral award that deals with a matter not subject to parties decision making ("*indisponible*"), cannot be accepted by the Court when the appeal is based on any of the reasons that the court could assess *ex officio* (i.e. those established in Article 41.2 Arbitration Act, and sections b), e) and f) of Article 41.1 referred to above).

Therefore, for the TSJM, only appeals for the annulment of an arbitral award based on the other grounds of Article 41.1 could be subject to the parties' discretion (i.e. transaction, waiver, withdrawal, etc).

> Art. 41:
> 1. The award may be annulled only if the party requesting the annulment claims and proves:
> A) That the arbitration agreement does not exist or is not valid.
> C) That the arbitrators have resolved on matters not subject to their decision.
> D) That the designation of the arbitrators or the arbitration procedure has not respected the agreement between the parties, unless such agreement is contrary to an imperative regulation of this Law, or, in the absence of such agreement, that have not been adjusted to this law.

To support its decisions, the TSJM considered that, once an appeal for the annulment of an arbitral award has been filed based on the grounds referred to (Article 41.2 Arbitration Act, sections b), e) and f) of Article 41.1) the parties cannot decide on it, thus depriving the court of undeniable jurisdiction. The reason is that there are general interests that deserve protection, such as the preservation of public order and, in particular, the need for the arbitration procedure to be carried out in accordance with the most basic requirements of hearing and contradiction. General interests that, according to the TSJM, the court has a legally imposed duty to safeguard *ex officio*.[fn]To support its grounds, TSJM refers to previous judgements dated 17 September 2015 [PROV 2015, 242025]. 23 October 2015 [JUR 2015, 301853] and 2 November 2016 [AC 2016, 1939].[/fn]

The TSJM itself recognizes that this assessment clearly emphasizes judicial control over arbitration, although in this case the justification would lie in the fact that the *ex officio* examination proceeds on those grounds that go beyond the simple will of the parties and their decision-making powers. Thus, the TSJM recalls that the annulment of an arbitral award can only be agreed by the competent Court, and not by means of a transaction by the parties.

The rulings were subject to a dissenting vote by one of the judges, who considers that the principle that the parties limit the scope of the case and that the judge is limited by the relief sought, cannot be restricted except by legislation.

According to this dissenting opinion, the protection of general interests is guaranteed in any case through the mechanisms for rejection of the transaction established in section 2 of article 19 LEC, since the Court must analyse whether the transaction reached by the parties is illegal. This judge understands that to deny the parties the possibility to waive, withdraw or compromise in proceedings for the annulment of an award infringes the legal provisions of article 19 LEC, and could cause damage to any of the parties if a judgment was finally rendered contrary to what was agreed in good faith in the transaction. Finally, the dissenting opinion concludes by listing other negative consequences which, in this judge's view, this ruling entails for: the parties, which do not obtain satisfaction for their interests; the Administration of Justice, which is forced to artificially enlarge the procedure without any effect; and for arbitration, by introducing a further obstacle in exercising action

for the annulment of the award.

There are many other negative effects that could be raised. Nevertheless, we could not agree more with this dissenting opinion.