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Judicial Activism and Spanish Arbitration

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There has been much recent judicial activism in Spain in arbitration matters. Although the grounds for annulment of an arbitral award are limited in Spanish Arbitration Law (Article 41) and reflect the UNCITRAL Model Law standards, the volume of recent annulment decisions and the array of issues considered have been noteworthy.

The most active court has been the Superior Court of Madrid (Tribunal Superior de Justicia de Madrid) which decided no less than 124 annulment applications during 2015 and 2016, resulting in 33 annulments or partial annulments (a 26.6% success rate for applicants, with the qualification that this figure includes all cases, and may be much lower for international cases).

The financial crisis has been a fertile source of annulment applications, and particularly of disputes relating to the sale by banks of complex financial products, compounded in some instances by the practice of multiple appointments of the same arbitrators by major banks.

There has also been a strand of decisions relating to the independence and liability or arbitrators and arbitral institutions. These cases have largely arisen in the annulment context, but the most significant is the recent decision of the Spanish Supreme Court on the professional liability of arbitrators.

Some judgments of the Superior Court of Madrid have subordinated the jurisdiction of arbitral tribunals over the merits of the disputes to the imperatives of fundamental law in the form of the Spanish Constitution and, more controversially, European law. There have been complaints that the Superior Court of Madrid has been reviewing the merits of arbitral awards under the guise of annulment, and some vigorous dissenting opinions confirm the impression of doctrinal friction.

The Spanish concept of public policy has long been identified with the fundamental rights recognized by the Spanish Constitution and in the arbitration context particularly with the procedural and material minimum standards of due process and the right of defence. Spanish public policy also includes imperative norms relating to the freedoms guaranteed by European Community law. However, it is also well established that public policy does not authorize the revision of the justice of the award or the correctness of the decision.

The Superior Court of Justice of Madrid in several annulment decisions has built on the significance of European law to Spanish public policy to develop the concept of "economic public policy" identified with the general principle of contractual good faith in situations of inequality, disproportion or asymmetry between the parties by reason of the complexity of the product or disparate knowledge of the contracting parties. To date nine awards dealing with the sale of financial products have been annulled on the grounds of this new and controversial manifestation of economic public policy. However, the concept of economic public policy has not yet been applied to annul an international arbitral award.

The multiple arbitrations involving financial products have also given rise to annulment applications based on conflicts of interest. In another significant judgment, the Superior Court of Madrid annulled an award where the arbitral institution had failed to disclose its relationship with a multiple user of its services. The applicant alleged that the Tribunal Arbitral de Barcelona (TAB) derived a substantial part of its income from arbitrations over financial products, and the respondent (Caixabank, a major Spanish bank based in Barcelona) was a party to many of these cases. Evidence presented to the court demonstrated that Caixabank had participated in 79 TAB arbitrations between 2011 and 2015 and that these cases amounted to 11.62% of TAB's revenue during this period. The Superior Court of Madrid held that arbitral institutions also have an obligation of independence and impartiality 'with the consequent reasons for abstention, and the duties of disclosure and of information that apply to the arbitrators, mutatis mutandis, are required from the institutions called to administer arbitrations.' The Court noted that an institution needed to 'exercise extreme care in managing the arbitration where a habitual client is involved' (appeal 79/2015; November 4, 2016).

This is not the only recent case where an award has been annulled on the basis of the conflict of interest of the arbitral institution. Many arbitral institutions in Spain operate under the aegis of local Chambers of Commerce. The Superior Court of Justice of Madrid in a judgment issued in November 2014 annulled an award on the basis that the institution administering the arbitration formed part of the Madrid Chamber of Commerce, which also owned 31% of the respondent in the arbitration. The court found that the indirect interest of the arbitral institution in the outcome of the arbitration violated the principle of the equality of the parties which as a matter of public policy could not be waived. The award was annulled on the ground that there was no valid arbitral agreement as the violation of the principle of equality occurred at the very moment of the agreement. The reasoning of the court in this judgment meant that disclosure of the conflict of interest by the arbitral institution would not have saved the award from annulment (judgment 63/2014, November 13, 2014).

Such a level of annulment activity inevitably raises questions of the professional liability of arbitrators and arbitral institutions. In a recent case, the professional liability of arbitrators arose after a successful annulment application in a case where the majority of the arbitral tribunal had deliberated, voted and issued the award without the participation of the third arbitrator. This breach of collegiality was found to constitute an infringement of the right of defence (and therefore public policy) of the party that had appointed the third arbitrator. In subsequent proceedings brought by one of the parties, the arbitrators constituting the majority were found

professionally liable for the amount of their fees paid by that party pursuant to Article 21 of the Arbitration Law (which imposes liability on arbitrators, inter alia, for the damage and losses they cause by reason of recklessness). This liability was recently confirmed by the Spanish Supreme Court in a judgment of February 15, 2017 (Judgment 102/2017).

There are multiple possible interpretations for this judicial activism in arbitration in Spain. Some attribute much to personalities, and a strong division between the current judges in the Superior Court of Madrid. However, the judges are not responsible for the sheer volume of annulment applications that have come before them. There is no doubt that there is a lot of arbitration in Spain. Is there also an arbitral 'bubble'? Is judicial activism a response to problems generated by the volume of new entrants at all levels of a profitable legal market?

Behind the development and use of the concept of 'economic public policy' is an intriguing question of why some arbitral tribunals have adopted an interpretation of the Spanish implementation of the European Directive 2004/39/EC on markets in financial instruments (MiFID) that seems to conflict with the jurisprudence developed in the Spanish courts. Does party autonomy and freedom of contract weigh more heavily with arbitral tribunals, while the courts place more weight on the investor protection objectives of the MiFID Directive? At a time when the legitimacy of international arbitration is already in question in other contexts, some more disquieting questions might be raised. Does international arbitration offer a level playing field for all participants where there are economically powerful repeat players? Are arbitral institutions supervising sufficiently the appointment of arbitrators and the resolution of potential conflicts of interests? Is more transparency and disclosure required from arbitral institutions regarding their own economic interests, their appointment processes, the resolution of challenges to arbitrators, and the identity of arbitrators appointed? Spanish arbitral institutions, of which there are too many, have been slow to adopt the recent initiatives of the LCIA and ICC to address such concerns.
In any event, a high rate of annulment In Spain raises questions that require a response. At its most basic, high annulment rates suggest a desynchronization between the courts and the arbitral community, and arguably qualitative concerns regarding arbitration practice in domestic cases.

The success of arbitration in Spain since the passage of the current UNCITRAL-based Arbitration Law has been truly impressive. There is a vibrant and active arbitration community in Spain. There is no doubt that it will rise to meet this latest challenge, which is indeed a symptom of the success of arbitration.

David JA Cairns is the author of the ICCA Handbook National Report on Spain, recently completely revised and updated and now available.

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This entry was posted on Wednesday, June 14th, 2017 at 12:52 am and is filed under Spain, Uncategorized
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