New Ruling by the Madrid High Court of Justice: Arbitration and Public Policy

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On 5 April 2018, the Civil and Criminal Chamber of the Madrid High Court of Justice (*Tribunal Superior de Justicia de Madrid, TSJM*) set aside an arbitral award as contrary to public policy, because the challenged award contained "*an unreasonable assessment of the evidence and unreasonable failure to apply applicable rules*".[fn] Competent Court to deal with the challenge of awards of arbitration proceedings with seat in Madrid. The influence of the award is due to the fact that a large part of the arbitrations based in Spain have its seat in Madrid.[/fn]

In this case, the applicable arbitration clause, which provided for arbitration with seat in Madrid[fn] It was a domestic arbitration for more than 10M€ in dispute and with a tribunal of three arbitrators.[/fn] was valid. The parties were duly notified and were able to assert their rights. The arbitrators resolved matters that could be and were submitted to their arbitration. The arbitration clause was respected in terms of the appointment of arbitrators and in the procedure.

Despite all of the above, the Madrid court decided to invoke public policy to annul the award. The approach of the court, as discussed below, is problematic as, if followed, it risks perverting, in Spain, the process of application for annulment of an award.

How did the court end up ruling in such a way? First, the Madrid court permitted itself to get into a discussion of all the disputed matters, procedural and substantive, originally before the tribunal and within these considered the appropriateness and suitability of the legal grounds contained in the award. It also allowed itself to review all findings relating to the tribunal's overall assessment of the evidence. In fact, in the judgment itself (fifth point of law, page 31) the court acknowledges openly, when referring to the authority it considers itself to have, that: "*what it is for this court to do is to check whether the probatory assessment that was made in the arbitral award is not arbitrary because it is deviates markedly from the probatory result or by unjustifiably omitting assessment of evidence that is essential to resolve the matters discussed*".

From this starting point, the Madrid court went on to annul the award because in its view it is relevant that "*in view of a singular deviation from the wording of the provisions of an agreement (…) which appear to be an expression of the parties' intentions, drawn up after a long negotiating process as the award highlights, the content of certain emails and not others is taken as the sole basis to substantiate a transactional intention different to that stated in the agreement, without explaining in any way why no reference is made to the emails that apparently do not support the majority thesis accepted by the arbitral tribunal*".

Faced with this conclusion, one may ask what all this has to do with public policy. It is worth recalling that public policy is a delineated concept which, applied strictly, should be prevented from becoming a catch-all through which the Madrid court, with clearly defined authority for annulment, gives itself the prerogative for review.

The well-known Spanish Supreme Court judgment of 5 April 1966 [RJ 1966/1684] states that public policy is "*the set of legal, public and private, political, economic, moral and even religious principles, which are absolutely obligatory for the preservation of social order in a population and in a particular time*".

More recently, in its judgment of 5 February 2002(54/2002), the Supreme Court expanded on this a little further and updated the concept, to declare that public policy

> "is formed by the legal, public and private, political, moral and economic principles, which are absolutely obligatory for the preservation of social order in a population and in a particular time (Supreme Court judgments of 5 April 1966 and 31 December 1979) and further, an obvious scientific approach finds it to be the principles or directives that inform legal institutions from time to time; a modern position of legal science also indicates that public order is the expression given to the function of general principles of law in the realm of private autonomy, consisting of limiting its development where it violates these principles. Essentially, what must be taken into account today, as forming part of public order, are the fundamental rights contained in the Spanish constitution".

In the reasoning given in the judgment, there is not a single reference to this concept or to the legal principles necessary to preserve the social order that are threatened because the overturned award did not mention "*why no reference is made to the emails that apparently do not support the majority thesis accepted by the arbitral tribunal*". In its fifth point of law (pages 28 to 34 of the judgment), which is the only one in the whole ruling in which annulment of the award is discussed, there is no reasoning which justifies setting aside the award on the basis of public policy.

In view of such absence of thorough legal grounds, this leads to the conclusion that the court's decision is one whose legal basis is difficult to understand. Furthermore, it is not one which is necessarily helpful to Madrid's status as a seat of arbitration as parties, of course, choose arbitration to be free of court interference. For both reasons, it represents an approach which seems hard to justify.