# Kluwer Arbitration Blog

## Public Policy Under Scrutiny by Spanish Courts: Pro-arbitration Approach Confirmed

Cecilia Tilve (Herbert Smith Freehills LLP) · Monday, March 25th, 2024 · Herbert Smith Freehills

Spanish regional High Courts of Justice (*Tribunales Superiores de Justicia*) have heard applications to annul awards since the 2011 amendment to the Spanish Arbitration Law ("SAL"). The most active among the seventeen regional courts has been the High Court of Justice of Madrid ("TSJM"), in charge of hearing annulment proceedings of Madrid-seated arbitral awards. According to official statistics, between 2021 and 2022 the TSJM heard almost 40% of all annulment actions decided by Spanish Courts.

In a series of decisions issued in the late 2010s, the TSJM upheld a fair number of annulment applications on the ground of public policy. The high annulment rates gave rise to concerns within the Spanish arbitration community that feared that public policy arguments were being used by the TSJM as a pretext to review the merits of the case, as voiced in previous posts.

Much has changed since then, however. Between 2020 and 2022, the Spanish Constitutional Court ("SCC") rendered several decisions on the issue of public policy that have reversed this annulment trend adopted by the TSJM.

As discussed in this post, this positive development has reinforced the already-existing perception of Spain as a pro-arbitration jurisdiction. Certainly, it has reassured arbitration users that the public policy grounds for annulment of an award before Spanish courts can only be relied on in exceptional cases.

### The Annulment Regime Under Spanish law

The SAL is modelled on the UNCITRAL Model Law, including with regard to the grounds for annulment of an arbitral award. Indeed, a party willing to bring an annulment action before a regional High Court of Justice must allege and prove one of the six grounds for annulment provided under article 41 of the SAL, which essentially mirror those set out in Article 34 of the Model Law, including the award being contrary to public policy.

The relevant High Court of Justice will decide on the annulment request after an exchange of written pleadings between the parties and if requested by the parties, following an oral hearing. The decision issued by the High Court of Justice is final and binding.

The only course of action available to call into question the decision of the High Court of Justice is to file an appeal for constitutional protection (*recurso de amparo*) before the SCC. The object of this process is the protection against breaches of the rights and freedoms enshrined in Articles 14 to 29 and 30.2 of the Spanish Constitution originated by provisions, legal acts, omissions or simple actions of public bodies, including national courts.

**The Spanish Constitutional Court Decisions**

As noted in past blog entries (here and here), the TSJM's tendency to annul awards on the basis of public policy arguments was seen as a challenge by the Spanish arbitration community and gave rise to doctrinal debates. In this context, the admission by the SCC of several *amparos* relating to arbitral awards that had been annulled on public policy grounds was welcomed by the community, who was eagerly awaiting the decisions of the SCC on the merits.

On 15 June 2020, the SCC issued the first of its decisions (STC 46/2020) concerning the issue. In short, the SCC granted the requested protection in a case where the TSJM had annulled an award despite the parties having reached an out-of-court agreement and jointly requested that the annulment proceedings be dismissed by the TSJM. Instead of dismissing the case, the TSJM decided that it must proceed without the parties, on the basis that the award could be contrary to public policy (as it eventually upheld).

When addressing the TSJM's approach to public policy, the SCC stated that:

> "*the broadening of the concept of 'public policy' that is performed by the contested resolutions leads to carrying out a substantive review of the crux of the dispute by the judicial body, which belongs in essence only to the arbitrators, thereby exceeding the scope of the annulment proceeding and disregarding the power of disposition or the justice requested from the parties to the process*".

Further, the SCC explained that:

> "*precisely because the concept of public policy is unclear, the risk of it becoming a mere pretext for the court to re-examine the issues debated in the arbitration proceedings is multiplied, denaturalising the arbitration institution and ultimately violating the autonomy of the will of the parties. The judicial body cannot, with the excuse of an alleged violation of public order, review the merits of a matter submitted to arbitration and show what is a mere discrepancy with the exercise of the parties' right of withdrawal.*"

On this basis, the SCC concluded that the TSJM's annulment decision was unreasonable and infringed the parties' constitutional right to effective judicial protection enshrined in Article 24 of the Spanish Constitution.

This decision was followed by others issued in 2021 (STC 17/2021 and STC 65/2021) and 2022

(STC 50/2022 and STC 79/2022). Essentially, the SCC reiterated that regional High Courts of Justice generally must not reopen the merits or substance of a dispute, and that cases that meet the public policy threshold are highly exceptional.

In particular, the SCC clarified that the provision in Article 37.4 of SAL that the award must always be reasoned does not mean that the arbitral tribunal must decide on all the arguments presented by the parties, nor that it must indicate the evidence on which it has relied to make its decision on the facts. Instead, to determine if the duty in Article 37.4 SAL has been complied with, it is sufficient to verify that the award contains reasons, even if they are considered incorrect by the relevant High Court of Justice.

**How the SCC Doctrine Translates Into Practice: A Glance at Recent TSJM's Decisions**

According to the available official records, in 2023, the TSJM decided on 33 annulment proceedings. This figure shows a significant decrease in comparison with the number of annulment actions decided by the TSJM in 2021 (77) and 2022 (44). One can reasonably assume that this downward trend may be largely due to parties being discouraged from requesting the annulment of awards in light of the SCC's restrictive approach to public policy as a ground for annulment.

Nevertheless, out of these 33 annulment proceedings, the vast majority (30 annulment requests) were based (though not always exclusively) on public policy grounds under Article 41.1.f of the SAL.

A substantial majority of the TSJM's decisions issued in said annulment proceedings invoked the SCC doctrine described above to dismiss the requests for annulment based on public policy grounds. In particular, the TSJM has recurrently dismissed in its decisions, the applicants' argument that the challenged awards lacked reasoning (as an example in relation to an international arbitration award, see STSJM 32/2023 dated 26 September 2023).

There have been, however, very limited exceptions to the general rule of dismissing the annulment requests based on public policy grounds. Out of the 30 annulment requests based on public policy grounds, only four were upheld by the TSJM. Among them, the most noteworthy decision is the STSJM 38/2023 dated 19 October 2023 by which the TSJM upheld the partial annulment of an award rendered in an international arbitration context.

In that case, the annulment claim only referred to the dismissal of the loss of profit claim by the award. According to the applicant, the fact that the award decided on the loss of profit claim without mentioning either the four expert reports filed by the parties on the issue, or the related evidence given during one day of hearing would amount to an arbitrary, unwarranted and illogical evidentiary and legal motivation. The majority of the TSJM tribunal upheld this argument, concluding that, even considering the SCC doctrine, the absence of any reference to the evidence submitted represented a "radical lack of reasoning adversely affecting procedural public policy".

Remarkably, this conclusion was not shared by all the members of the TSJM tribunal in charge of the case. Indeed, the President of the relevant section of the TSJM issued a dissenting opinion based on the SCC doctrine. In essence, the dissenting opinion explained that even if the award:

> "*does not explicitly descended to a particular analysis of the specific expert evidence which, according to the applicant, covers its claims, it cannot be maintained that a resolution such as that which put an end to the arbitration proceedings should be declared null and void for lack or absence of reasoning*."

As such, the door for filing an *amparo* is open.

**Conclusion**

The progressive decrease in the number of annulment requests filed before the TSJM and the exceptionality with which they are upheld acknowledge the positive effect of the recent SCC doctrine according to which public policy can only be invoked as a ground for annulment of arbitral awards in highly exceptional cases. The pro-arbitration approach shown by Spanish courts should serve to reassure international arbitration users when choosing a Spanish seat.

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