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Spain

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A. Legislation and rules

A.1 Consolidation of Spanish Arbitral Institutions

Spain is characterized by a number of local arbitration institutions, with a particular proliferation in the capital, Madrid. Over the years, there have been various discussions about unifying the different institutions, but no serious efforts to pursue such a project had been made until now. Despite the variety of local arbitral institutions, there is a trend among arbitration users in Spain, towards arbitration in the international sphere rather than on a domestic level. In fact, for various consecutive years, the ICC remains as the most preferred arbitral institution in arbitration agreements involving Spanish parties. In particular, according to the latest ICC statistics, Spain is the fifth country in the world using ICC arbitration, representing 4.4% of the total number of parties in all 2017 fillings.[5]

Madrid now wants to reverse this trend and aspires to become an international benchmark within the field of international arbitration. The proliferation of different arbitral bodies in Spain was regarded as a problem by the relevant stakeholders, which is why the Court of Arbitration of the Madrid Chamber of Commerce (CAM), the Spanish Chamber of Commerce (CEA) and the Civil and Commercial Court of

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[5] ICC Dispute Resolution Bulletin 2018, July 2018, pp. 52-55. Available at https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf

Arbitration (CIMA) have decided to join forces and merge their institutions to create a sole arbitral institution.[6] The three institutions signed a memorandum of understanding to this effect on 18 December 2017.

This fundamental step marks the beginning of a new chapter in international arbitration practice in Spain. This project aims to grant Spain more visibility as an arbitration-friendly forum, able to attract the arbitration proceedings that have historically been held in cities like London or Paris. This unification strategy will enhance the consistency of arbitral proceedings and contribute to an increased specialization. In fact, the prospective arbitral body will be focused on covering a key business niche: Latin America-related disputes.

Additionally, the three signing arbitral institutions have not ruled out unifying with other Spanish arbitral bodies, such as the Arbitral Tribunal of Barcelona, in the near future.

A.2 Recent developments in the field of consumer arbitration

Spain has recently passed "Act 7/2017 of 2 November, on consumer alternative dispute resolution systems for consumer disputes," which transposes Directive 2013/11/EU (Directive on Consumer ADR)[7] into Spanish law. The purpose of this regulation is to enable consumers to settle their disputes with companies established in any member state through ADR entities that comply with the quality requirements set out in the Directive and are accredited by the competent authority, the

[6] "Las cortes de arbitraje de Madrid buscan su unificación," elEconomista.es, 19 December 2017. Available at https://www.eleconomista.es/legislacion/noticias/8818803/12/17/Las-cortes-de-arbitraje-de-Madrid-buscan-su-unificacion.html;Madrid aspira a convertirse en corte de arbitraje internacional de referencia, Diario El País, 18 December 2017. Available at https://elpais.com/economia/2017/12/18/actualidad/1513595815_501145.html

[7] "Directive 2013/11/EU of the European Parliament and the Council of 21 May 2013, on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC" (Directive on consumer ADR)

Spanish Agency for Consumer Affairs, Food Safety and Nutrition (AECOSAN).[8]

The new regulation is supposedly aimed at liberalizing the field of consumer ADR, which has traditionally been entrusted to Consumer Arbitration Committees, to the extent that it will allow for the involvement of other public or private entities, insofar as they request accreditation from the competent authority. This being said, according to article 6.2 of Act 7/2017 of 2 November,[9] whenever ADR entities offer procedures with a binding outcome on the consumer, the referred entities will have to be set up by law or regulation, which clearly hampers private entities' access to the market and thus confines them to mediation or other non-binding ADR proceedings.[10]

B. Cases

B.1 Spanish Constitutional Court annuls article 76(e) of Spain's Insurance Contract Act on insured's right to arbitration in legal expenses insurance.

The Spanish Constitutional Court, in its judgment of 11 January 2018,[11] has declared article 76 e) of Spain's Insurance Contract Act[12] to be null and void, as a result of a question of unconstitutionality

[8] Article 26.1, "Act 7/2017 of 2 November, on consumer alternative dispute resolution systems for consumer disputes"
[9] See article 6.2, "Act 7/2017 of 2 November, on consumer alternative dispute resolution systems for consumer disputes"
[10] FERNÁNDEZ FERNÁNDEZ, María Eugenia. "Recentísimas novedades en materia de arbitraje de consumo tras la Ley 7/2017, de 2 de noviembre, sobre resolución alternativa de conflictos de consume," Revista de arbitraje comercial y de inversiones, Vol. XI, no. 2, 2018: pp. 483-497. Available at https://arbitrajeraci.files.wordpress.com/2018/08/11-02-06.pdf
[11] Tribunal Constitucional, Sentencia núm. 1/2018, de 11 de enero, Cuestión de inconstitucionalidad 2578/2015 [ES:TC:2018:1]
[12] "Ley 50/1980, de 8 de octubre, de Contrato de Seguro" (Insurance Contract Act 50/1980)

promoted by the Superior Court of Justice of Catalonia in October 2015.[13]

In particular, article 76(e) was enacted in compliance with EU Law (Solvency II Directive[14]), which stated that legal expenses insurance contracts should provide the insured party with the right to resort to arbitral proceedings in case of a dispute. However, in doing so, article 76(e) went one step further in favor of the insured party, by stating that, whenever the insured has chosen to submit to arbitration a particular dispute, then the insurer must accept such proceedings, and shall be prevented from submitting the case to jurisdiction.[15] Arbitration is, therefore, an alternative to judicial redress which the insured may choose to pursue without the need for the insurer's prior consent or acquiescence.

The Constitutional Court contends, essentially, that article 76(e) entails a breach of both the fundamental rights to action in court and judicial guarantees (article 24 of Spanish Constitution), and the courts' and tribunals' exclusive jurisdictional power (article 117 of the Spanish Constitution), since it prevents one of the parties from exercising its right to access to the ordinary jurisdiction, thus imposing an alternative and exclusive route, arbitration, that depends on the will of one party on the other.

The Constitutional Court's judgment of 11 January 2018,[16] stresses that the key issue is to resolve whether article 76(e) conforms to domestic constitutional principles, leaving aside any matter relating to

[13] "El TC anula el precepto que establece un arbitraje imperativo para la aseguradora en seguros de defensa jurídica," Noticias Jurídicas, 7 February 2018. Available at http://noticias.juridicas.com/actualidad/jurisprudencia/12699-el-tc-anula-el-precepto-que-establece-un-arbitraje-imperativo-para-la-aseguradora-en-seguros-de-defensa-juridica/

[14] Directive 2009/138/EC of the European Parliament and the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsuranc*e* (Insolvency II)

[15] Article 76 e) Insurance Contract Act

[16] Tribunal Constitucional, Sentencia núm. 1/2018, de 11 de enero, Cuestión de inconstitucionalidad 2578/2015 [ES:TC:2018:1]

EU law. That being said, this decision was controversial amongst members of the tribunal, who expressed views at variance with the judgment on the grounds that arbitration should be equal to judicial redress and mandatory EU law should not be questioned or left aside by domestic Courts.

In sum, it seems clear that this recent judgment of Spanish Constitutional Court will, therefore, mark a turning point in the development of Spanish case law on arbitration clauses and, particularly, regarding asymmetric forum selection clauses, which, until now, were common in international business practice but a foreign element yet to be analyzed by our national Courts.

B.2 Annulment of arbitral awards in Spain on the grounds of insufficient or absent reasoning (arbitrariness)

The ruling of the Superior Court of Justice of Madrid, of 8 January 2018 (reporting judge: Susana Polo García)[17] annulled an arbitral award in equity, rendered by a single arbitrator, on the grounds of public policy.[18]

This approach is fully consistent with the new paradigm for annulment of arbitral awards introduced by the Superior Court of Justice of Madrid in 2015,[19] and also embraced by the judgments of 6 April, 14 April, 23 October and 17 November 2015 as well as the said judgment

[17] Superior Court of Justice of Madrid, 8 January 2018. See http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8303029&links=arbitraje&optimize=20180228&publicinterface=true

[18] The Superior Court of Justice of Madrid provided a thorough but highly contentious reasoning, and arguing that,

> After a thorough review of the award's motivation ... this Tribunal must conclude ... that the award does not provide adequate reasons, since it does not weigh all the evidence presented during the arbitration proceedings ... Thus the award does not address all the issues raised in the arbitration proceedings, it does not weigh evidence in its integrity and it does not provide an adequate reasoning leading to such a critical conclusion.

[19] Repos I Repàs, *S.L. v. BBVA*, Superior Court of Justice of Madrid, 28 January 2015

of 8 January 2018,[20] which has triggered an intense debate among members of the arbitration community in Spain. For the first time, a tribunal annulled an arbitral award on the grounds that its arbitrary reasoning was contrary to public policy in Spain, in the sense that it contravened the citizen's fundamental right to a reasoned judgment, as guaranteed in article 24 of Spanish constitution, as well as to the protection from patent arbitrariness referred to in article 9.3 of the Spanish constitution.[21]

However, this approach has been highly criticized by Spanish arbitral community, since it paves the way for further scrutiny of arbitral awards, thus contributing to the leakage of arbitration proceedings from Spain and, in particular, from Madrid.

This being said, it seems clear that if arbitration aims to be equal to ordinary jurisdiction, thus providing a competitive dispute settlement system and ensuring the parties' right to effective remedy, it would be desirable for arbitral awards to be adequately reasoned (unless the parties have expressly waived that right). Furthermore, a well-founded decision is less exposed to unfounded nullity actions by the aggrieved party and reinforces arbitration as an actual alternative dispute resolution system.

B.3 Violations of public policy

The concept of "public policy" is clearly defined in a number of cases from the Spanish Constitutional Court, as well as other lower courts, which state that it involves a set of principles, general guidance norms and fundamental constitutional rights established in the Spanish legal

[20] *Mobles Passe Avant, S.L. v. BBVA*, Superior Court of Justice of Madrid, 6 April 2015; *Playa Padrón Estepona, S.L. v. Banco Popular Español, S.A.*, Superior Court of Justice of Madrid, 14 April 2015; *Gori Transbur, S.L. v. BBVA, S.A.*, Superior Court of Justice of Madrid, 23 October 2015; *Desarrollo y aplicaciones a nuevas actividades productivas del valle del Nalón, S.L. v. BBVA*, Superior Court of Justice of Madrid 17 November 2015; Superior Court of Justice of Madrid, 8 January 2018

[21] CREMADES ROMÁN, Bernardo M. and CAIRNS, David J.A. "National Report for Spain (2018) in ICC International Handbook on Commercial Arbitration," Kluwer Arbitration: p. 18

system that cannot be derogated by the will of the parties. Therefore, an arbitral award shall be considered violating public policy when it clashes with the rights and fundamental liberties set forth in chapter II, title I of the Spanish Constitution. Two decisions from the Superior Court of Justice in Madrid[22] set aside arbitral awards issued in matters involving breaches of a lease agreement based on violations of the public policy. The first decision involved an award granted in favor of a property owner that sought the eviction of a tenant for failure to pay rent and utilities. The tenant ultimately paid the rent owed to the property owner while the arbitral proceedings were ongoing, which should have led the arbitral tribunal to dismiss the eviction action as per article 22.4 of the Spanish Law of Civil Procedure. The court considered that the option to dismiss an eviction action by paying the rent owed is an imperative rule that must be respected even when the eviction action is heard by an arbitral tribunal. For this reason, the court believed that the proceedings should have ended when the tenant paid the rent owed and, by failing to do so, the arbitral tribunal incurred in a violation of public policy, leading to the award being set aside.

The second decision found that, in an award involving the resolution of a lease agreement and corresponding eviction of the tenant, public order or policy had been violated due to the impartiality and lack of independence of the arbitral institution. The arbitration proceedings were brought forth before the European Arbitration Association, an entity that on numerous occasions had been found to have close ties with certain property owners, such as the plaintiff in this case. The close relationship between the institution and the plaintiff was found by the court to raise reasonable doubts with regard to the institution's neutrality and impartiality and its potential violation of constitutional principles of equality. It was found that the arbitral institution provided counseling to the plaintiff and even provided a template complaint for initiating arbitration proceedings against tenants that

[22] 27/2018, dated 12 June 2018 (ROJ\AC\2018\1302) AND 6/2018, dated 6 February 2018 (ROJ: AC\2018\199)

included a list of potential causes for action based on breaches by the tenant. The principle of equality of arms, applicable to all court proceedings, requires the designation of an impartial, objective and disinterested arbitrator in order to conduct the proceedings in accordance with fundamental constitutional rights of legal protection. These same principles must also apply to arbitration proceedings, given their nature as a "jurisdictional equivalent."

B.4 Irrational assessment of evidence

In decision 15/2018, dated 5 April 2017,[23] issued by the Superior Court of Justice in Madrid, the court set aside an award citing an arbitrary and irrational assessment of evidence due to omitting the assessment of key pieces of evidence without justification. The court insists that an exhaustive analysis of all the evidence submitted is not required but, in this case, it was vital for the majority vote to have analyzed the evidence specifically considered by the dissenting arbitrator for issuing its dissenting vote in the final award. The court believed that the absolute silence on these pieces of evidence without explanation or justification in the award by the majority vote (while analyzed in exhaustive detail by the dissenting arbitrator) implies an appearance of arbitrariness of the award. By failing to even consider these documents, the court determined that the tribunal engaged in an arbitrary and unjustified assessment of the evidence, which also led to a violation of constitutionally mandated and fundamental legal protections. The court noted that it would be a different matter entirely if the arbitral tribunal had, at least, mentioned these documents and provided their reasons for not considering them as key evidence in the case.

B.5 Annulment of the arbitration agreement

The Superior Court of Justice of Madrid, in its decision 48/2017, dated 19 July 2017,[24] set aside an award after concluding that the

[23] ROJ: AC\2018\783
[24] ROJ: AC\2017\1069

arbitration agreement was void. In this particular case, the matter at issue was simultaneously brought before a criminal court due to the forgery of one of the party's signatures in the contracts that contained the applicable arbitration clause. Said court found that the signature had indeed been forged, thus freeing the party from its obligations under the contract. In its decision, the Superior Court notes that the proven forgery was enough to render the arbitration agreement and subsequent award null and void, given that there is no evidence that could sustain his ratification of the arbitration agreement at a later date. The court, however, continued and provided its decision on another argument set forth by the same party. The party had also raised its condition as a consumer as a reason for excluding the validity of the arbitration agreement based on the rule set forth in article 57.4 of the Spanish Law for the Defense of Consumers and Users, which establishes the rights of consumers to not be bound by arbitration agreements before a controversy has arisen. The court notes that the tribunal failed to consider any evidence brought forth by the party that attempted to prove his condition as a consumer, merely relying on a formal or superficial review of the title of the contract to determine his condition as a non-consumer. The court indicates that the failure of the tribunal to consider this evidence accordingly would also justify setting aside the award.

In its decision 64/2017, dated 7 December 2017,[25] the Superior Court of Justice of Madrid found that the arbitration agreement itself was null and void as it was prepared and provided to the plaintiff by the arbitral institution. The court states that this particular arbitration agreement provided an inadmissible advantage to one of the parties as it designated AEADE as the arbitral institution, thereby draining the agreement from its constitutionally required objectivity and, therefore, according to the court, rendering it null and void.

[25] ROJ: AC\2017\1938

B.6 Invalidity of the defendant's acquiescence to setting aside an award

The Superior Court of Justice of Madrid reiterates, in its decision of 5 September 2017 (ROJ: AC\2018\388) that the parties cannot settle the outcome of proceedings in order to set aside an arbitral award. In this specific case, the court was faced with a request to set aside an arbitral award introduced by the plaintiff where the defendant sought to agree to the annulment of the award while also requesting the court to accept the parties' settlement on the issue that the award should be annulled.

The court, in its decision, reiterated a long-standing principle of prohibiting acquiescence in procedures to set aside arbitral awards. The rationale behind this principle is that, once an award is issued, the award is treated as if it were a judgment from a court or tribunal. Therefore, parties will not be able to reach an enforceable agreement or settlement that ignores the decision made by the arbitral tribunal. The court notes that, similarly, a final decision of a court cannot be declared null and void simply because of the parties' wishes (save for in situations foreseen by law). The court further states that once proceedings to set aside an award has begun, it is up to the court, and only the court, to analyze and decide whether the conditions for setting aside the award (which are provided in article 41 of the Spanish Law of Arbitration) are met, regardless of the will of the parties, as anything else would constitute a violation of general interest and public policy.

It should be noted, however, that the President of the Court's Tribunal included a dissenting vote in this decision, citing article 19.1 of the Spanish Code of Civil Procedure ("LEC"), which states, in relevant part, that parties are free to acquiesce to the demands of a complaint except when prohibited by law or when a law establishes limitations based on the principle of "general interest" or in benefit of a third party. The President argues that there is no law that forbids or limits a party's ability to acquiesce to setting aside an arbitral award and that the prohibition of disposing of a cause of action of setting aside an arbitral award is a legal construction that lacks legal support. The

President further argues that the parties are free to dispose of matters related to their private agreements and that setting aside the award would not be in contravention of any legal provisions, violate public policy, nor harm a third party.