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# EUROPEAN ARBITRATION REVIEW 2022

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# European Arbitration Review 2022

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# Preface

Welcome to *The European Arbitration Review 2022*, one of Global Arbitration Review's annual, yearbook-style reports.

Global Arbitration Review, for anyone unfamiliar, is the online home for international arbitration specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, GAR delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner), covid allowing, and provides our readers with innovative tools and know-how products such as UCIA and the GAR Arbitrator Research Tool.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than the exigencies of journalism allow. *The European Arbitration Review*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from across Europe.

This edition, across 12 chapters, and 200-odd pages, is part invaluable retrospective and part primer on the characteristics of different seats. There's also a little crystal-ball gazing thrown in for good measure. All contributors are vetted for their standing and knowledge before being invited to take part. Together, they capture and interpret the most substantial recent events, fully supported with footnotes and statistics.

This edition covers Austria, Belgium, Finland, Germany, Italy, Portugal, Russia, Spain, Switzerland and Ukraine; and has overviews on construction disputes in the era of covid, and on the potential for using relative valuation methods (ie, multiples) in investment treaty arbitration.

As ever, close reading yields many gems. Among the pearls this reader left with:

- there's evidence of a growing appetite for fast and temporary decisions in the world of construction arbitration;

- civil lawyers are more resistant to sole arbitrators (according to an ICC Commission report);
- arbitration in Belgium is not automatically confidential, but you can avail yourself of an appeal to another arbitral tribunal (if you want, though not many currently do);
- Belgium is also becoming something of an epicentre for enforcement of awards – owing to the presence of multilateral agencies that hold state-related funds;
- the Arbitration Institute of Finland recently recorded a record caseload (101 new matters in 2020);
- Germany's arbitration bar is busy discussing whether dissenting opinions lead to set aside (following obiter remarks from a regional court on the matter);
- Russia's highest court looks set to rule on the question of anti-suit injunctions issued under the new sanctions-blocking statute, despite a series of lower court rulings declining to stop an SCC tribunal from proceeding; and
- authority to represent Russian in front of foreign tribunals now resides with the Prosecutor General's Office, not the Ministry of Justice, following, it would appear, extensive lobbying by the Prosecutor General's Office.

In addition, there are two tremendous summaries that I have filed for future reference. One covers all the latest in the Spanish solar cases; the other Switzerland's new arbitration law. The latter includes a fabulously useful chart showing how the numbering of all the key articles has changed.

And much much more. We hope you enjoy the review. I commend all of our authors for their work. It's a particularly strong edition this time out. If you have any suggestions for future editions, or would like to take part, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

**David Samuels**
Publisher, Global Arbitration Review
October 2021

# Part 2

## Country chapters

# Spain

**Álvaro López de Argumedo, Gabriel Bottini, André del Solar Garzón and Julia de Castro Velasco**
Uría Menéndez Abogados, S.L.P.

## IN SUMMARY

This article outlines Spain's position as an international arbitration hub by exploring its legislative framework and arbitral institutions. It then analyses the Spanish renewables investment arbitration saga, deciphering its origin and exploring new developments in 2021. Finally, it looks at how the courts are interpreting and applying the concept of public policy as a ground for the annulment of arbitral awards in light of recent decisions of the Spanish Constitutional Court.

## DISCUSSION POINTS

- Spain as a hub for international arbitration: legislative framework, institutions, involvement in investment arbitral proceedings and recently consolidated 'pro-arbitration' constitutional case law
- Spanish renewables saga: origin and developments in 2021
- *Antin v Spain, Achmea*, compliance with EU law and the Commission's investigation
- End of the debate on annulling arbitral awards on public policy grounds
- Spanish Constitutional Court and the obligation to provide reasoning in arbitral awards
- Madrid International Arbitration Centre and its position in the international arbitration field

## REFERENCED IN THIS ARTICLE

- *Antin v Spain*
- *Achmea*
- Spanish Constitutional Court, Decision No. 46/2020 of 15 June
- Spanish Constitutional Court, Recourse No. 3956/2018 of 15 February 2021
- Spanish Constitutional Court, Decision No. 55/2021 of 15 March
- Spanish Constitutional Court, Decision No. 65/2021 of 15 March

## Introduction: arbitration in Spain

From its legislative framework to its institutions, right through to its involvement in investment arbitral proceedings and its recently consolidated 'pro-arbitration' case law, Spain and arbitration go hand in hand.

At the heart of its legislative framework is the 2003 Spanish Arbitration Act (the Arbitration Act), drafted in line with the UNCITRAL Model Law. It applies to all Spanish-seated national and international arbitrations.

Spain has ratified the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) without reservations or declarations. The New York Convention hence applies to the enforcement of arbitral awards handed down in non-member countries. Spain is also a party to the Geneva Convention of 1961 on International Commercial Arbitration and to several bilateral treaties that contain provisions on the recognition and enforcement of foreign arbitral awards (eg, treaties with Switzerland, France, Italy, Brazil, Mexico and China).

In the investment arbitration field, Spain is well known for its numerous arbitral proceedings under the Energy Charter Treaty (ECT) regarding the country's legislative reforms in the renewable energy sector. Spain is also currently party to over 70 bilateral investment treaties (BITs) and to many multilateral treaties, including the ECT and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).[1]

The Spanish Constitutional Court has very recently reiterated the importance of arbitration as a dispute resolution method and has clearly defined the scope of judicial review of arbitration awards. The Spanish arbitration community has welcomed this move as it reinforces the role of arbitration in Spain, making it a much more attractive seat for international arbitration.

Spain also has prominent institutions for the administration and promotion of arbitration. The Madrid International Arbitration Centre (MIAC), active since January 2020, aims to become a leading international arbitral institution. It is the result of combining the three well-known Spanish institutions located in Madrid: the Madrid Court of Arbitration, the Civil and Commercial Court of Arbitration and the Spanish Court of Arbitration. The MIAC is empowered to administer two types of international arbitrations: (1) those arising from arbitration agreements that designate the

1 With regard to the BITs Spain is currently a party to, it signed an agreement with all other European Union (EU) member states on 5 May 2020 for the termination of all intra-EU BITs. When this treaty comes into force, Spain will be a party to over 60 BITs.

MIAC as the administrative court; and (2) those arising from arbitration agreements that designate any of the arbitral institutions from which the MIAC was formed (and which continue to administer domestic arbitrations).

## Arbitral proceedings: the Spanish renewables saga and post-Achmea arbitration

Investment arbitrations against Spain in the renewable sector have significantly increased in recent years. This is because investments in the renewable energy sector grew significantly in the early and mid-2000s as many countries offered initiatives and financial support to promote the development of alternative energy sources over continued use of fossil fuels. These countries, particularly those in the EU (including Spain) enacted schemes such as feed-in-tariffs (FITs) and other special rates to promote long-term investment in a sector that often requires large initial capital investments.

However, particularly when faced with the 2008–2009 global financial crisis, many European countries (including Spain) were forced to scale back or completely set aside their original incentive frameworks, often as a result of their obligations under EU law. These regulatory changes and their effects on foreign investment resulted in numerous legal disputes, including investor–state arbitrations. These claims were mainly based on the ECT, which provides an international legal framework for energy cooperation, particularly in Europe. They have largely focused on alleged violations of the fair and equitable treatment standard (FET) or of the provision on expropriation.

Spain enacted laws subsidising new investments in solar energy, wind energy and waste incineration. The Spanish Renewable Energy Promotion Plan, originally implemented in 2000 and revised in 2005, provided for grants, loans, tax incentives and loan guarantees. This incentive framework attracted billions of euros of investment in renewable energy assets from foreign investors.

Between 2008 and 2014, the Spanish government substantially reduced or eliminated these incentives to address a significant 'tariff deficit' – according to the Spanish government, the difference between the regulated tariffs set by the government and paid by consumers and the real costs associated with said tariffs – as the revenue from state-subsidised prices failed to cover costs.[2]

2 See Igor V Timofeyev, Joseph R Profaizer and Adam J Weiss, 'Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty', *The Guide to Energy Arbitrations*, fourth edition, *Global Arbitration Review*, November 2020.

As a result of these regulatory changes and the financial effects on their investments, numerous investors have brought arbitration claims against Spain. By August 2021, investors had brought a total of 49 arbitration claims against Spain. More than 30 have been filed at ICSID while others are being heard by tribunals constituted under the rules of the United Nations Commission on International Trade Law (UNCITRAL) or the Stockholm Chamber of Commerce (SCC).[3]

Until the end of 2020, although Spain has prevailed in some ECT renewable energy arbitrations,[4] most of the awards have favoured the claimants,[5] which Spain has subsequently sought to have annulled.[6] It is worth noting that the Spanish government

3 The latest ICSID case was registered on 3 August 2021: *Spanish Solar 1 Limited and Spanish Solar 2 Limited v Kingdom of Spain* (ICSID Case No. ARB/21/39).

4 *Stadtwerke München GmbH, RWE Innogy GmbH, et al. v Spain* (ICSID Case No. ARB/15/1), award dated 2 December 2019: the tribunal, in a divided decision, rejected claims by investors in several concentrated solar power plants on the basis that Spain did not breach the claimants' legitimate expectations by amending its FITs in 2013; *Isolux Infrastructure Netherlands B.V. v Spain* (SCC Case No. 153/2013), award dated 17 July 2016: the tribunal found that there was no violation of the FET standard as the foreign investor, who began investing after the 2010 reforms, could not have had legitimate expectations that further reforms would not take place; and *Charanne and Construction Investments, et al. v Spain* (SCC Case No. 062/2012), award dated 21 January 2016: the tribunal, in a divided award, dismissed the investors' claims on the merits, finding that Spain's actions (ie, modifying its renewable energy investment regime enacted in 2010) did not constitute an indirect expropriation or deprive investors of FET.

5 See, for example, *Cavalum SGPS, S.A. v Spain* (ICSID Case No. ARB/15/34), decision on jurisdiction, liability and directions on quantum dated 31 August 2020: the tribunal ruled in favour of a Portuguese investor by finding that Spain's renewable energy subsidy reforms violated the claimant's legitimate expectations of a reasonable return; *PV Investors v Spain* (PCA Case No. 2012-14), final award dated 28 February 2020: the tribunal found that although the claimants had no legitimate expectations that an immutable regulatory framework would protect their investments, the investors did have legitimate expectations to receive a reasonable return on their investment and awarded the claimants €90 million; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Spain* (ICSID Case No. ARB/13/30), decision on responsibility dated 30 November 2018: a divided tribunal rendered an award in relation to Spain's change of its 2013 regulatory regime finding that Spain had not acted discriminatorily in enacting its policy amendments, but had breached its stability obligation under the ECT's FET requirement and, thus, awarded the claimant investors €59.6 million; and *Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.à r.l. v Spain* (ICSID Case No. ARB/13/36), award dated 27 June 2017: the tribunal rendered a unanimous award finding that Spain had failed to accord FET to the investors and awarded them €128 million.

6 As at August 2021, only three decisions have been rendered in annulment proceedings (two were discontinued and 13 are pending): *PV Investors v Spain* (PCA Case No. 2012-14), judgment of 23 February 2021, which upholds the award; *Antin Infrastructure Services Luxembourg S.a.r.l.*

has recently enacted legislation to encourage those investors who brought arbitrations against Spain to settle their claims, in exchange for certain incentives. We describe this development below.

We now address some of the main decisions and most notable events in this regard in 2021.[7]

## Spain's new renewable energy incentives and claimants' waiver of rights

In January 2021, the annulment proceedings in *Stadtwerke Munchen, RWE and others v. Spain* (ICSID Case No. ARB/15/1) were discontinued as the claimants reportedly waived their rights to pursue arbitration claims or collect damages in relation to the 2013/2014 modification of Spain's renewables incentives regime, in order to benefit from the Spanish Royal Decree-Law of 22 November 2019 (RDL 17/2019).

RDL 17/2019 provided that renewable energy producers who had been entitled to certain incentives before the regulatory changes of 2013/2014 would be paid a return of 7.398 per cent until 2031, but only if they pledged not to pursue arbitral claims, to withdraw from ongoing arbitrations, or to waive their rights to collect damages under existing arbitral awards.

The early-2021 discontinuance of the *Stadtwerke* case follows previous cases that were also discontinued in late 2020 for the same reasons. In *Masdar v Spain*,[8] the case was discontinued in November 2020 as the Dutch investor waived its right to collect €64.5 million in damages owed under a 2018 award, in order to benefit from the incentives offered by Spain under RDL 17/2019. The investors in *RREEF v Spain*

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*and Antin Energia Termosolar B.V. v Spain* (ICSID Case No. ARB/13/31), judgment of 30 July 2021, which upholds the award; and *Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.à r.l. v Spain* (ICSID Case No. ARB/13/36), judgment of 11 June 2020, which annuls the award as the ad hoc committee found fault with the arbitrator's undisclosed relationship with claimants' damages experts.

7 Other decisions or events of note include: (1) on 19 April 2021, ICSID registered Spain's annulment petition and issued a provisional stay of enforcement regarding the award rendered in *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Spain* (ICSID Case No. ARB/14/34); (2) on 22 June 2021, the ICSID tribunal in *Sun-Flower Olmeda GmbH & Co KG and Others v Spain* (ICSID case No. ARB/16/17) rendered an award ordering Spain to pay the claimants €47.3 million in compensation for breaching the ECT; (3) on 3 August 2021, ICSID registered a new claim filed by the investors in *Spanish Solar 1 Limited, Spanish Solar 2 v Spain* (ICSID Case No. ARB/21/39); and (4) on 17 August 2021, the ICSID tribunal in *STEAG GmbH v Spain* (ICSID Case No. ARB/15/4) rendered an award ordering Spain to pay the investor €27.7 million for breaching the ECT.

8 *Masdar Solar and Wind Cooperatief U.A. v Spain* (ICSID Case No. ARB/14/19).

and some of the investors in *PV Investors v Spain* have also reportedly waived their rights to pursue arbitration claims or collect damages in order to benefit from incentives offered by Spain under RDL 17/2019.[9]

## New decisions in the Spanish renewables saga

On 25 January 2021, in *BayWa v Spain*[10] the ICSID tribunal issued a quantum award addressing damages associated with the 'claw-back' component of Spain's new renewable energy regime, having issued a previous majority ruling dismissing claims for broader violations of the ECT.[11] The tribunal awarded €22 million in damages.

On 23 February 2021, the Swiss Federal Supreme Court upheld the UNCITRAL award rendered in *PV Investors v Spain*.[12] Spain alleged that the arbitral tribunal violated its right to be heard and procedural public policy and denied it justice by refusing to reconsider its partial award on jurisdiction over intra-EU disputes in light of the ruling of the European Court of Justice (ECJ) in *Achmea*, which found that the investor–state arbitration clause in an intra-EU bilateral investment treaty was incompatible with EU law.[13]

The Swiss Federal Supreme Court dismissed Spain's arguments on procedural grounds and also considered that the tribunal had duly provided reasoning for its dismissal of the request to reconsider its jurisdictional decision and therefore could not be accused of violating Spain's right to be heard or causing a denial of justice. The court hence avoided deciding whether *Achmea* should be considered as a new fact that the tribunal had to address.

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9 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Spain* (ICSID Case No. ARB/13/30); and *PV Investors v Spain* (PCA Case No. 2012-14).

10 *BayWa Renewable Energy & BayWa R.E. Asset Holding v Spain* (ICSID Case No. ARB/15/16).

11 Spain's 2013 regulatory framework contained a 'claw-back' provision that took into account pre-2013 earnings that exceeded 7.398 per cent of pre-tax return on investment to calculate post-2013 incentives. As a result, the claimants were ineligible for investment incentives under the new regime as they had achieved a return exceeding such percentage in previous years. The tribunal noted that the compensation amount should comprise a scenario in which the new regulatory framework would have been adopted without the claw-back provision.

12 *PV Investors v Spain* (PCA Case No. 2012-14).

13 *Slovak Republic v Achmea B.V.* (ECJ Case C-284/16), Judgment, 6 March 2018.

On 8 March 2021, the ICSID tribunal in *InfraRed v Spain* dismissed Spain's revision application of the award for a manifest lack of legal merit.[14] Spain claimed that the tribunal had come to its conclusions on installed capacity based solely on the previous *Eiser v Spain* award,[15] which was later annulled by an ad hoc committee on the basis of an arbitrator's failure to disclose a long-standing professional relationship with one of the claimant's expert witnesses. However, the tribunal considered that it was clear that it had determined the installed capacity issue on two grounds – the inscriptions on the nameplates of the concentrated solar power plants and the Spanish competition regulator's own conclusions about installed capacity; and a 'purposive and textual interpretation' of the state's subsidies regime – that were separate from the *Eiser v Spain* award, which led to the same conclusion: that Spain had violated the FET standard of the ECT.

Also on 8 March 2021, the SCC tribunal in *FREIF Eurowind Holdings v Spain* rendered an award dismissing a €135 million ECT claim brought by a subsidiary of the US investment fund Blackrock.[16] The tribunal affirmed its jurisdiction over most of the claims raised but ruled that Spain had not violated the ECT or international law in relation to the claimant's windfarm investments. Particularly, the tribunal held that Spain had complied with the ECT's FET clause by acting transparently and in good faith and that the investor's impression that any changes to the renewables framework would be minor was not reasonable, meaning it had no legitimate expectations. The tribunal also awarded Spain all its legal fees.

On 17 March 2021, in *Eurus v Spain* the ICSID tribunal rendered an award largely dismissing a €258 million ECT claim brought by a subsidiary of Japan's Toyota Group.[17] The majority ruling held that the investor could not have formed a legitimate expectation that Spain's renewables regime would remain unchanged. However, the tribunal was unanimous in determining that Spain's retroactive 'claw-back' of profits had breached the ECT's stability guarantee, and so it ordered the parties to reach an agreement on the impact of those measures.[18]

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14 *InfraRed Environmental GP Ltd. and Others v Spain* (ICSID Case No. ARB/14/12). Spain has lodged a separate bid to annul the award, which is pending before an ad hoc committee.

15 *Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.à r.l. v Spain* (ICSID Case No. ARB/13/36), award dated 27 June 2017.

16 *FREIF Eurowind Holdings v Spain* (SCC Case No. 2017/060).

17 *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v Spain* (ICSID Case No. ARB/16/4).

18 On the 'claw-back' provision, see footnote 11.

As the above shows, Spain has been significantly targeted in many investment arbitrations. The results of those arbitrations vary significantly, although in most cases Spain has been ordered to pay considerable amounts to the claimants.

## *Antin v Spain*, *Achmea* and compliance with EU law

After the ECJ rendered its *Achmea* decision – in which it found that the investor–state arbitration clause in the Netherlands–Slovakia BIT was incompatible with EU law as it impaired the ECJ's exclusive jurisdiction to interpret EU law and thereby undermined the EU's principle of autonomy and as such was incompatible with EU law – Spain has tried unsuccessfully to invoke an intra-EU jurisdictional objection at every opportunity when faced with renewable energy claims from EU investors. In fact, the annulment committee in *Antin v Spain*[19] dismissed Spain's argument that the tribunal had manifestly exceeded its powers in assuming jurisdiction over the intra-EU dispute as it noted that 56 other tribunals had dismissed Spain's intra-EU argument, while Spain had failed to produce a favourable decision.[20]

Although Spain has not been successful in its intra-EU jurisdictional objections, *Antin v Spain* has recently opened up a new avenue to review the compliance of arbitral awards with EU law in the wake of *Achmea*.[21] On 19 July 2021, a few days before the annulment decision in *Antin v Spain* was handed down, the European Commission announced that it had 'opened an in-depth investigation in order to assess whether

19 *Antin Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Termosolar B.V. v Spain* (ICSID Case No. ARB/13/31).

20 On 30 July 2021, the ad hoc committee in *Antin v Spain* rendered a decision dismissing Spain's annulment application of the 2018 award ordering Spain to pay €101 million in compensation for breaching the ECT. In its decision, the committee rejected Spain's contentions that the arbitral tribunal had manifestly exceeded its powers, seriously departed from a fundamental rule of procedure, or failed to duly reason its award. The ad hoc committee also rejected Spain's attempt to rely on the intra-EU nature of the dispute, and on *Achmea* to support its annulment request.

21 Another very recent case which may have similar implications as *Achmea* particularly in relation to the ECT is *Moldova v Komstroy*, where the ECJ found that a dispute between a member state and an investor of another member state concerning an investment made by the latter in the first member state may not be subject to arbitration proceedings under article 26(2)(c) ECT (Judgment of the Court (Grand Chamber), Case C-741/19, *Republic of Moldova v Komstroy, a company successor in law to the company Energoalians*, ECLI:EU:C:2021:655, 2 September 2021).

an arbitration award, to be paid by Spain in favour of Antin as compensation for the forgone support following the modification of a renewable electricity support measure, is in line with EU rules on state aid.'[22]

In the *Antin v Spain* award, the arbitral tribunal ordered Spain to compensate the investor for losses resulting from the modifications of the 2007 renewable energy sources support scheme, which was not notified to the European Commission for approval under state aid rules. The Commission's preliminary view is that the *Antin v Spain* award constitutes state aid as it grants the investor an advantage equivalent to those provided for by the non-notified 2007 scheme. In particular, the Commission has expressed concerns about the following:

- Whether the award complies with the principles of mutual trust and the autonomy of EU law. The award is based on the investor–state provisions of the ECT and the EJC ruled in *Achmea* that investor–state arbitration, when applied in an intra-EU context, undermines the system of legal remedies established in the EU treaties, thereby posing a threat to the autonomy of EU law and the principle of mutual trust between member states.
- Whether the award could lead to discrimination among investors based on nationality and on their access to international arbitration, as Spanish investors are precluded from bringing an action before an investment arbitration tribunal resulting from the modifications to the 2007 scheme.
- Whether the award complies with the Commission's 2008 Guidelines on State Aid for Environmental Protection and the 2014 Guidelines on State Aid for Environmental Protection and Energy.

The Commission's investigation is reminiscent of its 2015 decision that a €178 million ICSID award in favour of the Micula brothers against Romania violated EU state aid rules.[23] The EU General Court annulled the Commission's decision in the *Micula* case in 2019 and the Commission has appealed that decision with the support of the ECJ advocate general, who has advised that the court should uphold the appeal, stating that the General Court was wrong to conclude that the Commission had exceeded its powers.[24]

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22 European Commission, 'State aid: Commission opens in-depth investigation into arbitration award in favour of Antin to be paid by Spain', press release dated 19 July 2021.

23 *Ioan Micula, Viorel Micula and Others v Romania* (ICSID Case No. ARB/14/29).

24 Cosmo Sanderson, 'Solar award triggers EU state aid probe', *Global Arbitration Review* dated 19 July 2021.

With regard to the *Antin v Spain* award and the future of the Spanish renewables saga, it remains too soon to anticipate where the European Commission's investigation may lead and what impact it may have on past and future awards. This is still an unwritten chapter in the story of the recent confrontation between intra-EU arbitrations and EU law.

## Case law: consolidation of Constitutional Court case law on arbitration and recognition and enforcement of foreign arbitral awards in Spain

The annulment of arbitral awards on public policy grounds has been a much-debated subject among the Spanish legal community.[25] Spain's high courts of justice are responsible for hearing set-aside actions in this respect. In particular, the High Court of Justice of Madrid (TSJM) has annulled arbitral awards in the past few years for failing to comply with Spanish public policy.

Although Spain is known to be a pro-arbitration jurisdiction, the TSJM's application and interpretation of the concept of public policy has been controversial. The TSJM has heard almost 40 per cent of all set-aside actions filed with Spain's high courts of justice from 2018 to 2020.[26] According to the latest statistics published by the Consortium of Spanish Bar Associations,[27] Spain's high courts of justice heard a total of 38 set-aside actions in 2018 and granted eight of them. The TSJM annulled the highest number of awards (six out of eight)[28] and public policy violation was the

25 Article V.2(b) of the New York Convention and article 34(2)(b)(ii) of the UNCITRAL Model Law recognise the public policy exception. The New York Convention allows each contracting state to define and apply the public policy term and the UNCITRAL Model Law refers to the policy of the country of enforcement. Spain is a contracting state of the New York Convention and its arbitral legislation is inspired by the UNCITRAL Model Law, and thus article 41(1)(f) of the Arbitration Act provides that an award may be set aside if the applicant can prove that it is contrary to public policy.

26 Statistics published by Spain's highest judicial authority – General Council of the Judiciary (*Consejo General del Poder Judicial*) (see online https://www6.poderjudicial.es/PXWeb2021v1/pxweb/es/03.-Tribunales%20Superiores%20de%20Justicia/-/OCTSJ001.px/table/tableViewLayout1/).

27 El arbitraje comercial en España, Consejo General de la Abogacía Española, 2019 (see online: https://www.abogacia.es/wp-content/uploads/2019/07/Estudio-El-arbitraje-en-Espana-publicado.pdf).

28 Judgment of the High Court of Justice of Madrid dated 24 May 2018 (ECLI:ES:TSJM:2018:2724); Judgment of the High Court of Justice of Madrid dated 26 July 2018 (ECLI:ES:TSJM:2018:10643); Judgment of the High Court of Justice of Madrid dated 14 November 2018 (ECLI:ES:TSJM:2018:11440); Judgment of the High Court of Justice of Madrid dated 8 January 2018 (ECLI: ES:TSJM:2018:46); Judgment of the High Court of Justice of Madrid dated 5 April

most common ground for annulment (five out of eight).[29] This has given rise to much debate on the extent to which judges should examine arbitral awards, specifically in relation to protecting the general interest and avoiding public policy violations. But the Constitutional Court seems to have finally settled the debate with its recent rulings. The TSJM has changed its approach to follow the Constitutional Court's precedent and is on the whole applying more restrictive criteria to set-aside actions based on grounds such as public policy.

## The Constitutional Court's first landmark decision

On 15 June 2020, the Constitutional Court decided on the TSJM's annulment of an arbitral award on public policy grounds.[30] The Constitutional Court's decision was the first to deal with this matter specifically and it overturned the TSJM's ruling of 4 May 2017.[31] In this case, the lessor of a commercial property lease agreement initiated arbitration proceedings for the lessee's alleged failure to pay the rent. The award upheld the claim and terminated the contract.

The lessee brought annulment proceedings before the TSJM, but the parties reached a settlement agreement before trial and jointly requested the court to dismiss the case. The TSJM rejected this petition because it considered that there was a 'general interest in assessing whether [the award] was contrary to public policy'. The TSJM annulled the award on public policy grounds and the parties successfully appealed the decision before the Constitutional Court.

The prevailing conclusion from the Constitutional Court's decision is that arbitration is based on the will of the parties (article 10 of the Spanish Constitution) and therefore the judiciary must intervene accordingly. If the parties agree to discontinue the case, there is no general interest concerning public policy that entitles the TSJM

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2018 (ECLI: ES:TSJM:2018:3635); and Judgment of the High Court of Justice of Madrid dated 6 February 2018 (ECLI: ES:TSJM:2018:914).

29 Judgment of the High Court of Justice of Madrid dated 8 January 2018 (ECLI: ES:TSJM:2018:46); Judgment of the High Court of Justice of Madrid dated 5 April 2018 (ECLI: ES:TSJM:2018:3635); Judgment of the High Court of Justice of Asturias dated 3 April 2018 (ECLI:ES:TSJAS:2018:1170); Judgment of the High Court of Justice of Asturias dated 12 April 2018 (ECLI:ES:TSJAS:2018:1171); and Judgment of the High Court of Justice of Madrid dated 6 February 2018 (ECLI: ES:TSJM:2018:914).

30 Decision of the Spanish Constitutional Court, dated 15 June 2020 (ECLI:ES:TC:2020:46).

31 Judgment of the High Court of Justice of Madrid, dated 4 May 2017 (ES:TSJM:2017:4765).

to refuse the parties' petition. Therefore, according to the Constitutional Court, the TSJM's decision violated the parties' right to effective protection, was contrary to public policy and was thus overturned.

The Constitutional Court has subsequently heard several cases within a relatively short period on the annulment of arbitral awards on public policy grounds. This year alone, the Constitutional Court has overturned three other TSJM rulings annulling arbitral awards on public policy grounds. In essence, the Constitutional Court has held that the lower-court decisions violated the parties' right to effective judicial protection.

## Other Constitutional Court decisions on the matter

The first of the rulings handed down this year concerns a long-running family conflict regarding the inheritance of a well-known Spanish businessperson, the Marquis of Paul.[32] The dispute arose between the Marquis' second wife and their two daughters and his son. They all sought the controlling stake of the family company called Mazacruz worth more than €600 million.

Mazacruz's articles of association establish that disputes are to be settled by a sole arbitrator in equity. In this case, the award ordered the company's dissolution according to each party's ownership stake. This was particularly unfavourable for the son, who did not own the majority of the company, and so he brought annulment proceedings before the TSJM.

The TJSM stated that arbitrators must provide reasoning for their awards even if they are handed down in equity. It found that the award in question had not been properly reasoned as it did not examine and assess all the evidence provided in the arbitration proceedings.[33] On 8 January 2018, the TSJM annulled the award for being contrary to public policy, as (1) it did not cover all of the issues raised in the arbitration, (2) the arbitrator did not fully assess the evidence provided, and (3) the award was not sufficiently reasoned to justify a major decision such as dissolving the company.

The Constitutional Court revoked the TSJM's judgment on the grounds that courts deciding on set-aside actions cannot examine the merits of the award to determine whether it is right or wrong. In other words, public policy is not a tool for

32 Decision of the Spanish Constitutional Court, dated 15 February 2021, Recourse No. 3956-2018.

33 Judgment of the High Court of Justice of Madrid, dated 8 January 2018 ECLI:ES:TSJM:2018:46).

reviewing the substance of the award. In this regard, the Constitutional Court also defined the concept of public policy, which it specified must always be interpreted restrictively:

> *The term 'material public policy' means the set of public, private, political, moral and economic legal principles which are absolutely obligatory for the preservation of social order in a society and at a given time. From a procedural point of view, public policy is made up of a set of necessary formalities and principles of our procedural legal system. Only arbitration proceedings in conflict with one or more of these principles can be said to be null and void for not complying with public policy.*[34]

The Constitutional Court distinguished between the obligation to provide reasoning for arbitral awards and court decisions. The former is based on the will of the parties (article 10 of the Spanish Constitution and article 37 of the Arbitral Act) and falls outside the scope of public policy, while the latter is based on the right to effective judicial protection (article 24.1 of the Spanish Constitution) and falls within the scope of public policy. Thus, they are not subject to the same criteria. Only if an award is unreasonable or arbitrary or contains material and prejudicial errors of law can it be deemed as insufficiently reasoned. This also applies, albeit less stringently, to awards rendered in equity. The Constitutional Court stated that awards must set out the grounds on which their decisions are based but need not be convincing or sufficient in the opinion of the court deciding the annulment proceedings.

Finally, with regard to the TSJM and the arbitrator not reaching the same conclusions from the evidence provided, the Constitutional Court considered that this was because there was a difference of opinions. This does not amount to a breach of the arbitrator's obligation to provide reasoning for the award or to an arbitrary decision. The Constitutional Court held that the TSJM's decision was unreasonable and violated the parties' right to effective legal protection and ordered a retrial commencing from the moment the irregularity was committed.

The Constitutional Court confirmed its approach in two other judgments, both handed down on 15 March 2021.[35] In one, the Constitutional Court overturned the TSJM's decision dated 13 December 2018,[36] which partially annulled an arbitral award

34 Decision of the Spanish Constitutional Court, dated 15 June 2020 (ECLI:ES:TC:2020:46).

35 Decision of the Spanish Constitutional Court, dated 15 March 2021 (ECLI:ES:TC:2021:55).

36 Judgment of the High Court of Justice of Madrid, dated 13 December 2018.

in the context of arbitration proceedings administered by the International Chamber of Commerce. The parties had jointly requested the TSJM to dismiss the annulment proceedings before the scheduled trial date. However, the TSJM rejected the petition and eventually decided to annul the award for being arbitrary and in conflict with public policy.

In the other judgment, the Constitutional Court overturned the TSJM's decision dated 1 October 2019 partially annulling an arbitral award decided in equity.[37] The TSJM partially set aside the award because it found that its reasoning was inconsistent and arbitrary and therefore contrary to public policy. The Constitutional Court based both decisions on respecting the will of the parties and on the specific reasoning threshold for arbitral awards, which differs from that of court decisions and falls outside the scope of public policy.

## The TSJM's decisions after the Constitutional Court's case law

For now, as mentioned, the TSJM seems to have adapted its approach and has been following the Constitutional Court's view. On 21 May 2021, the TSJM ruled on the *Mazacruz* case and corrected its previous decision, rejecting the annulment action.[38] In subsequent decisions in other set-aside actions, the TSJM has rejected challenges to arbitral awards also based on the Constitutional Court's recent doctrine.[39]

The Constitutional Court's decisions will also apply to the recognition and enforcement of arbitral awards. Violating public policy is one of the main grounds alleged to oppose the recognition and enforcement of foreign awards in Spain. Unless

37 Decision of the Spanish Constitutional Court, dated 15 March 2021 (ECLI:ES:TC:2021:65).

38 Judgment of the High Court of Justice of Madrid, dated 21 May 2021, Decision No. 31/2021 (ECLI:ES:TSJM:2021:4399).

39 In particular, the High Court of Madrid has recognised how important the parties' will is in three judgments dated 15 December 2020 and 19 January 2021 (ECLI:ES:TSJM:2020:14629, ECLI:ES:TSJM:2021:141 and ECLI:ES:TSJM:2021:142). The cases concerned a mobile phone sales agreement between a department store and several consumers. Due to a technical error, the department store's website temporarily offered a mobile phone at a very low price (less than half of its market value). Several consumers bought the phone online at the reduced price and when the department store refused to deliver the phones, some of them resorted to arbitration. The awards ruled in favour of the consumers. The department store disagreed with the awards and brought annulment proceedings before the High Court of Justice of Madrid. Unusually, during the arbitration proceedings the consumers in the three annulment proceedings (as defendants) agreed with the department store's annulment request and the High Court of Justice of Madrid annulled all three awards. On this occasion, the High Court of Justice of Madrid allowed the parties to decide whether to both enforce the award and end the annulment proceedings.

there is a very significant ground impeding recognition and enforcement, the Spanish courts tend to favour recognition when they interpret the grounds for its denial. The burden of proof hence lies with the opposing party.[40]

In summary, the fact that the Constitutional Court has set a high bar for judicial intervention in the review of substantive elements of awards will presumably aid Spanish lower courts in applying the concept of public policy. This is a very positive step and reassures arbitration practitioners that future judicial review in both annulment and recognition and enforcement proceedings of arbitral awards will be limited and proportionate.

## Arbitral institutions: the Madrid International Arbitration Centre and Spain as a seat for international arbitration

The Spanish arbitration community continues to grow and work towards consolidating Madrid as a prominent seat for international arbitration. As mentioned, the three main Spanish institutions located in Madrid have come together to form the MIAC, which aims to become the leading Spanish arbitration institution at the international level.

Since January 2020, the MIAC has established itself as one of the most important arbitration institutions in Spain and has signed important cooperation agreements with renowned arbitration institutions, such as the Permanent Court of Arbitration.

The MIAC's and Constitutional Court's decisions significantly improve arbitration in Spain and show that this dispute resolution mechanism is on the rise in the country. Spain welcomes both domestic and international arbitrations and is committed to leading the way as a reliable and preferred seat for arbitration. Spain is meeting those targets at present, as confirmed by the GAR Awards 2021, where Spain was chosen as the 'jurisdiction that has made the greatest progress' in the field of international arbitration.

40 Álvaro López de Argumedo Piñeiro and Patricia Roger: 'Recognition and enforcement of foreign arbitral awards' '*Interpretation and application of the New York Convention in Spain*' Cham, Switzerland, Springer International Publishing, 2017, pages 855–885.

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Álvaro also advises on civil and commercial matters, especially in contract, real estate and construction law. Additionally, he has extensive experience in distribution and agency contracts, representing both domestic and international clients, particularly in the automotive sector. Additionally, he is an arbitrator in various arbitration courts and centres.

Álvaro is currently member of the London Court of International Arbitration and Vice-President of the Steering Committee of the UIA Arbitration Commission. Furthermore, Álvaro is a member of the Spanish Arbitration Club (Club Español de Arbitraje), and sits on both the board of directors and the Mediation Committee. He also is a CEDR accredited mediator and Academic Coordinator of the FIDE Mediation Club. Álvaro was an officer of the IBA Arbitration Committee and has acted as Chair of the Arbitration Guidelines and Rules Subcommittee and Co-Chair of the IBA Task Force for the revision of the IBA Rules on the Taking of Evidence in International Arbitration.

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He is a member of the ICSID Panel of Arbitrators designated by the President of the ICSID Administrative Council and of the group of experts in investment policy convened by the World Economic Forum. He was chosen by the OECD as one of only three experts to participate in the Special Session of Legal Experts of the Investment Committee in Paris, France (8 October 2009).

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Uría Menéndez is a top-tier law firm with more than 70 years of experience. We currently have 12 offices and operate in the main financial centres of Europe and the Americas. We advise on Spanish, Portuguese and EU law in business-related matters and assist our clients in their international transactions through our network of offices and our close links with prestigious law firms around the world.

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