# On the limits on judicial control over the arbitration procedure and the arbitration award: comment to the Constitutional Court's ruling of 15 June 2020

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On 15 June 2020, the Constitutional Court issued a judgment confirming an appeal on human rights grounds against a decision of the Madrid High Court of Justice ("Tribunal Superior de Justicia de Madrid"; hereinafter, "Madrid High Court"), in which the Madrid High Court decided to issue a judgment and annul an arbitral award *ex officio*, despite the fact that the parties had reached a settlement agreement before the end of the procedure. The Constitutional Court established that the autonomy of the will of the parties in the arbitration proceedings (and of the courts in this case) prevails over the application of an allegedly violated public order.

**Factual background**

The parties in question were natural persons (landlords and tenants). The landlords were advised by ARRENTA as the property manager. Both parties entered into a real estate lease agreement which included a clause for submission to arbitration to the European Association of Arbitration (AEADE). For the Madrid Court of Justice, it seemed clear that there was a link between AEADE and ARRENTA, because the former had advised the latter in the lease agreement that was finally signed by the parties on 1 June 2014: "*the work of advising AEADE to one of the parties intervening in the arbitration proceedings and the identity of interests between the arbitration court AEADE and the marketing entity of the pre-formulated standard contracts with a submission to arbitration clause (Arrenta) are accredited, so that it is sound, according to the prudent reason, to argue that, in these situations, the objective impartiality and/or the appearance of neutrality of the arbitration court is missing, with the consequent damage to public order by the award made under those conditions and, as we have pointed out, with direct impact on the very validity of the arbitration agreement, consented to by one of the parties with a clear breach of the principle of equality when it comes to giving consent, since it should not be forgotten that the valid will to submit to arbitration is that which assumes that one accepts submission to the decision of an independent and impartial third party and to the administration of the arbitration by an institution that is also independent and impartial*".

Two years after signature, the landlords filed for arbitration alleging non-payment of several monthly payments, and on 20 June 2016, an arbitration award was issued which terminated the contract and ordered the tenants to pay the rent and the amounts due, with their respective interests.

In view of this arbitration ruling, the tenants filed a claim with the Madrid Court of Justice requesting the annulment of the arbitration award due to the lack of reasoning for the award and because the clause of submission to unfair arbitration was considered to be a reference to their alleged condition as consumers.

On 16 December 2016, the Madrid Court of Justice admitted the complaint and set 31 January 2017 as the date for the hearing. During that period, the parties reached an out-of-court settlement, so that they requested the Court to close the proceedings by way of extra-judicial satisfaction. In response to this request, the Madrid Court of Justice decided to continue with

the procedure ex officio, despite the refusal of the parties, which even led to a hearing without the appearance of either party.

The Madrid High Court then issued a ruling[1] in which it declared the arbitration award null and void, on the grounds that it was contrary to public policy (Article 41.1.f) of the Spanish Arbitration Act (LA), on the grounds that the law allows for the ex officio assessment of this issue (Article 41.2 LA), which, in the opinion of the Madrid High Court, prevents the parties from withdrawing from the legal action for annulment. Likewise, the Court understood that the cause for annulment of paragraph a) of article 41.1 LA (that the arbitration agreement does not exist or is not valid) would also be applicable due to the special relationship between AEADE and the lessor.

The parties, by mutual agreement, decided to appeal the decision of the Madrid Court of Justice, for violation of the right to effective judicial protection without defenselessness (art. 24.1 Spanish Constitution) as the interest in the lawsuit had disappeared after reaching a settlement agreement ex article 19 LEC.

**The decision of the Constitutional Court**

In the ruling, the Constitutional Court upholds the appeal filed by the parties and considers that the contested decision is unreasonable, and it effectively violates the right to effective judicial protection without defenselessness.

It confirms that, at the time when the parties request that the proceedings be closed, there is no longer any interest in pursuing the annulment procedure. In the words of the Constitutional Court itself, "*it must be understood that this falls within the scope of the parties' right to dispose ("derecho de disposición") in civil proceedings, as is the case with the process of annulment of the arbitration award, without there being any prohibitive legal rule in this regard*".

Before entering into the specific case for which it upholds the appeal, the Constitutional Court recalls that the action for annulment must be understood as an option for external control offered by the Courts against those awards the validity of which is in question, but its function does not allow a review of the substance of the decision "*since the causes for review provided for in the aforementioned article 45* (sic) *are assessed, and these are limited to the formal guarantees without the judicial body being able to pronounce on the substance of the case, we are faced only with an external o view*"[2].

With regard to the concept and reason for the annulment of public order used by the Madrid High Court, the Constitutional Court explicitly states that "*It is precisely because the concept of public order is unclear that it risks becoming a mere pretext for the Court to re-examine the issues discussed in the arbitration procedure, distorting the institution of arbitration and ultimately infringing the autonomy of the parties' will.* ***The Court cannot, on the pretext of an alleged breach of public order, review the substance of a matter submitted to arbitration and show what is merely a discrepancy with the parties' exercise of their right of withdrawal***"[3].

[1] Madrid High Court of Justice Ruling nº 33/2017 of 4th May 2017, Rec. 63/2016.
[2] Constitutional Court Ruling nº 174/1995 of 23th November 1995, Rec. 2112/1991.
[3] Underlining added.

The Constitutional Court's warning that public order cannot be used as a "catch-all" for the High Courts of Justice to annul arbitration awards ex officio (Article 41.2 LA), but only in cases where any of the fundamental rights recognized in Chapter II, Title I of the Constitution are being violated[4].

The Constitutional Court adds that the decision of the Supreme Court of Madrid is "*contrary to the constitutional canon of reasonableness of judicial decisions*" since it did not even give effect to the will of the parties to withdraw from the case (as they did not even appear to the hearing).

Likewise, it states that "*none of the causes for annulment provided for in Article 41.1 LA can be interpreted in a way that subverts this limitation, **since the ultimate purpose of arbitration, which is none other than to reach a prompt out-of-court solution of a conflict, would inevitably be distorted if the arbitration decision were to be reviewed on the merits**" (ATC 231/1994, July 18, FJ 3). To this must be added - contrary to what has been stated by the judicial body - that it is the doctrine of the Court of Justice of the European Union that "the requirements relating to the effectiveness of the arbitration procedure justify the limited nature of the review of arbitral awards and that the annulment of an award can only be obtained in exceptional cases" (ECJS of 26 October 2008, case C- 168/05, Light Mustard)*".

The Court concludes that "*that solution could be admissible if the request for annulment is based on the fact that the subject matter of the award (in this case, the contract) regulates a matter that was not eligible for arbitration because it affects public policy, but this is not the case, given that the public policy that determines the decision refers to the violation of the right to an impartial arbitrator, a nuance **provided ex officio by the Chamber itself**, since the applicants based their request for annulment on the abusive nature of the clause of submission to arbitration*"[5].

Tu sum up, the Constitutional Court has confirmed the appeal for protection filed by the parties and has expressed that the right to effective judicial protection without defencelessness (Article 24.1 EC) has been violated and, consequently, has declared the nullity of the ruling of the Madrid Court of Justice, bringing the proceedings back to the time of the out-of-court settlement.

**Comment**

For years, the Madrid High Court has been generally criticised in the arbitration sector for the number of awards annulled on the grounds of Article 41.1.f), which the public order motive. This has sometimes led the Court to analyse the merits of the case (the main factor of the complaint), when the activity of judicial control the award, as established in Article 41.1 of the Arbitration Law (and the New York Convention), must be mainly based on a formal analysis.

In this context, the ruling of the Constitutional Court that we are now commenting comes to confirm the appeal for protection of fundamental human rights that both parties jointly, Plaintiff and Defendant,, in a procedure for annulment of an award before the Madrid High Court, had

[4] STC of 18 January 2017, STC of 15 June 2016, STC of 9 February 2016, STC of 19 January 2016: "*It has to be regarded as contrary to public order, any award which violates the fundamental rights and freedoms recognised in Chapter II, Title I of the Constitution, guaranteed by the general provisions of Article 24 thereof, including the obvious arbitrariness referred to in Article 9.3 of the Constitution, and, of course, excluding the possible justice of the award, the shortcomings of the ruling or the more or less appropriate way of resolving the issue...*".

[5] Underlining added.

jointly filed, after being denied by the Madrid High Court a request for termination of the annulment action process for having reached a settlement agreement (out of court, not validated by the Court itself). The Madrid High Court had in fact decided to continue with the proceedings until it reached a judgment annulling the award which was the subject of the dispute.

The Madrid High Court found it necessary to annul the award issued by the arbitration institution managing the arbitration because it belongs to the same group of companies as the real estate company that advised the lessor. This resulted, the Madrid High Court stated, in a lack of impartiality of the arbitration institution and a radical fault in the willingness of the defendants to submit to arbitration managed by that institution[6].

The Constitutional Court has recalled the operative nature of all civil judicial proceedings and thus the (fundamental) right of the parties to agree among themselves on the termination of the proceedings. The Constitutional Court's ruling adds that the concept of public order cannot be used as a justification for judicial control by the Courts, an affirmation that has been valued as forceful by the generality of the operators in the arbitration sector[7], who have perceived it as an endorsement of the autonomy of arbitration in the face of judicial interference, which must be strictly limited to what is established in the Law, that is, to an almost exclusively formal control of the award (ex art. 41.1 of the LA).

As a curiosity, the Madrid High Court itself, in a decision dated November 13, 2014[8], with a similar background, chose to justify the annulment of the award (the parties in that case did not reach a settlement agreement) by way of art. 41.1.a) of the LA, that is, applying *ex officio* (alleging the principle of *iura novit curia*) the annulment motive of lack of agreement in the arbitration clause[9], and not the motive of infringement of public order (art. 41.1.f)).

It should be recalled that the ground for annulment of Article 41.1.a) cannot be assessed ex officio by the Court, as the Court can do with the ground of public order (Article 41.2 LA). In the ruling of 4th May 2017 (which was annulled by the Constitutional Court, as we have mentioned), the Madrid High Court opted to annul the award under the public policy ground, for breach of the principle of equality, but maintained by way of *obiter dictum* that the background led to the conclusion that there was no arbitration clause, repeating the argument that it had already expressed in the aforementioned 2014 ruling with regard to this position. In other words, in the

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[6] As RAMÓN MULLERAT remind us, quoting Lord Heward: *"Justice should not only be done but should manifestly and undoubtedly be seen to be done"* ("Ethical rules for arbitrators", *Anuario de Justicia Alternativa,* Nº 6/2005. Febrero 2005). In the same way, GONZÁLEZ DE COSSÍO, F. "*Independencia, imparcialidad y apariencia de imparcialidad de los árbitros*", Anuario del Departamento de Derecho de la Universidad Iberoamericana, 2002, p. 460: *"Arbitrators must not only act judiciously and impartially but must also appear to do so"*. In the present factual background, there is no perceived effort on the part of the arbitral institution to try to protect its appearance of independence and impartiality.

[7] As an example, the President of CIAM, José Antonio Caínzos, in his article "*Arbitraje: una sentencia muy oportuna del Tribunal Constitucional*", Expansión, July 3, 2020, where he states that "*With this ruling Spain can aspire to be one of the few prestigious countries that have that possibility* [of resolving its disputes in a civilized and efficient manner]".

[8] Madrid High Court of Justice Ruling 63/2014, 13th November 2014.

[9] This conclusion was particularly analysed and criticised in VALLS MARTÍNEZ, C.: "*Comentario a la Sentencia del Tribunal Superior de Justicia de Madrid número 63/2014 de 13 de noviembre*", Diario LA LEY nº 8537, 12th May 2015, in which it was suggested that the Court could have reached the same conclusion if it had alleged a breach of public order, which would have made it unnecessary to resort to a claim for annulment under a motive not put forward by the parties and not applicable *ex officio*, which turns into a *contra legem* acting by the Court.

2017 judgment, with similar precedents, the Court has proceeded with more caution and does not focus the annulment on grounds not raised by the parties and to which it cannot resort *ex officio*.

Notwithstanding the foregoing, the ultimate reflection should be in favour of the practice of arbitration being developed with the utmost respect not only for the independence and impartiality, and other duties that should be required to arbitrators and arbitral institutions, but also for the appearance of such independence and impartiality[10], so that the institution of arbitration gains in prestige and acceptance by its users, individuals and companies.

[This information is not intended to constitute legal advice and is only for information purposes].

[10] MULLERAT, R.: "Arbitration : Back to the future", *A contribution to the International Arbitration Congress, Barcelona 18-20 October 2012*, p. 16: "*My suggestion to improve the* [IBA] *Guidelines* [on Conflicts of Interest in International Arbitration] *making them a stricter set of recommendations is motivated by the need to protect and improve the good reputation of arbitration, which needs to enhance the perfect independence and impartiality of the arbitrator but particularly the appearance of such independence and impartiality not only to the eyes of the parties but to the eyes of the general public or "fair minded lay observers*".