

SPAIN

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MEMORANDUM

To Eduardo Silva-Romero
IBA Arbitration Committee

From Virginia Allan
Victor Bonnin Reynes

Our ref /PERS_KH-ALLANV MD:4203159.1

Date 15 October 2014

Subject **Spanish courts' concept of public policy within the meaning of article V(2)(b) of the NY Convention – preliminary findings**

1. SCOPE OF THE RESEARCH

Pursuant to the instructions agreed with the IBA Arbitration Committee (“**the Committee**”), we have attempted to catalogue general definitions and list particular situations provided by Spanish domestic courts when examining matters of public policy for the purposes of recognition and enforcement of a foreign arbitral award in Spain, with a view to assisting in devising a consensus definition for adoption by the Committee.

The window of research covers decisions rendered on applications for *exequatur* of foreign awards in the years 1990 to 2014. We used 1990 as a cut-off date, given the relative newness of contemporary Spanish legislation on arbitration.¹ Using available databases, this timeframe of reference yielded us 16 judicial decisions.

1.1 Possible sources of additional decisions

We should note that we did not include any cases seeking annulment or set aside of awards rendered in Spain, pursuant to the local legislation’s analogue to Art. V(2)(b).² We would be happy to expand our research to include such cases – or at least those that relate to international arbitral awards rendered in Spain – should the Committee deem it desirable.

We should also note the paucity of reported decisions from 2004 to 2011. During this time period, jurisdiction over applications for *exequatur* was attributed to the courts of first instance.³ Previously, the Spanish Supreme Court (SSC) had had jurisdiction over *exequatur* requests.⁴ In May 2011, the SAA was

¹ The current Spanish Law, Law 60/2003 of 23 December, on arbitration (the Spanish Arbitration Act or SAA), entered into effect on 27 March 2004. Its predecessor was Law 36/1988 of 5 December, with entry into effect on 7 December 1988. The Spanish Constitution, providing the basis for most if not all of the procedural public policy violations alleged by parties in the context of arbitral proceedings, dates from 1978.

² See Articles 41.1(f) and 41.2, SAA (violation of public policy as grounds for set aside of an award, either as alleged by a party or established *ex officio* by the court).

³ See Article 8 SAA.

⁴ See Article 57, Law 36/1988.

amended, and jurisdiction was attributed instead to the Superior Courts of each Autonomous Community (TSJs for their initials in Spanish).⁵

While decisions rendered by the Supreme Court and the TSJs are published, decisions rendered by the courts of first instance are usually not found in the public domain. If the Committee deems it desirable, we could seek to locate among practitioners in Spain personal copies of decisions rendered between 2004 and 2011 by courts of first instance.

Finally, we intend to expand our research to include any reported cases in Equatorial Guinea. We will aim to inform you prior to 22 October whether we have additional cases to report.

2. GENERAL REMARKS ON THE CONCEPT OF PUBLIC POLICY

For the purposes of recognition of foreign arbitral awards pursuant to the New York Convention, public policy is principally understood by Spanish courts as a minimum level of respect for imperative international law norms, both substantive and procedural, while taking into account the values inherent to the Spanish Constitution.

Since the entry into force of the 1978 Constitution, the fundamental rights and the public freedoms constitutionally guaranteed are those that inform the concept of public policy (“*orden público*”). This basic interpretation of public policy is in accordance with international conventions on fundamental rights and on transnational public policy, which also need to be taken into account during judicial control of an international arbitral award.

Nevertheless, one cannot say that the concept of public policy in the context of recognition of international arbitral awards is a purely international concept, although Spanish courts frequently cite the international nature of the award (as well as party autonomy in agreeing to submit disputes to arbitration) as a reason to construe public policy restrictively in this context.

Spanish courts repeatedly state that public policy for the purposes of judicial control of arbitral awards must be construed narrowly.

Courts also frequently recognise that judicial control of a foreign arbitral award is to be exercised from a point of view where respect is given to – and there is sincere recognition of – the autonomy of the parties in international arbitration, to the extent that such autonomy is not detrimental to the fundamental principles of the legal system(s) of the parties involved in particular, or to the international community in general.

2.1 Substantive public policy

Unfortunately, there are not many decisions that deal with the concept of public policy from a substantive point of view.

The 19 April 2012 decision of the TSJ of the Basque Country is of note because, while it rejected the argument of the Spanish party resisting enforcement, that the award violated public policy by infringing Spanish and European antitrust laws, this was because the court found that antitrust law had not been infringed. It bears noting, however, that the TSJ considered a possible infringement of antitrust law to be within the notion of public policy.

The 5 May 1998 Spanish Supreme Court decision deals with the interplay between insolvency and the ability to conduct arbitral proceedings which is also considered to be a matter of public policy.

⁵ “*Tribunales superiores de justicia*”: see Article 8 SAA, as amended by Law 11/2011, of 20 May 2011 affecting arbitration.

2.2 Procedural public policy

As previously mentioned, most *exequatur* decisions analyse matters of procedural public policy.

Spanish courts have consistently held that the recognition and enforcement of foreign awards is subject to compliance with internal public policy, which includes a constitutional component in line with the principles set forth in article 24 of the Spanish Constitution.⁶

Spanish courts have considered *lis pendens* in domestic courts to be a matter of procedural public policy. Indeed, several decisions have denied recognition where a pending proceeding before the Spanish courts could result in incompatible decisions.⁷ Not all decisions agree on whether a triple identity of parties, cause of action and relief sought is necessary: one decision of the SCC considered that the risk of conflicting decisions was sufficient to render the award unenforceable, where the effects of the two decisions could not reasonably co-exist.⁸

Most often, the party resisting enforcement claims procedural wrongdoings that allegedly have affected its “*derecho de defensa*” or its legitimate right to exercise the defence of its interests. Generally speaking, if there is an effective breach of the right to a proper defence, this will constitute a valid ground for refusal to recognise the award. Nevertheless, in practice the vast majority of such claims fail, usually due to the consensual nature of arbitration and to a party’s having taken cognizance in the course of the proceedings of the aspects it finds objectionable at the enforcement stage.

3. CHART LISTING DECISIONS

Attached is our chart of the decisions analysed.⁹ We have attempted to list, under the “Circumstances” and “Allegations” columns, specific situations that have given rise to public policy objections in the context of the enforcement of foreign arbitral awards in Spain.

We will be happy to elaborate on this research as the Committee may see fit.

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⁶ Article 24 of the Constitution enshrines as fundamental the rights to access of the courts, to a legitimate exercise of one’s defence (article 24.1), and it offers certain procedural guarantees that essentially secure the rights to a fair trial and to notice and opportunity to be heard (article 24.2).

⁷ Spanish Supreme Court, 20 June 2000; Spanish Supreme Court, 1 December 1998; Spanish Supreme Court 19 January 1999.

⁸ Spanish Supreme Court, 20 June 2000.

⁹ We are grateful for the assistance of the following in compiling the research: José Luis Terrón, Javier Fernández, Pablo Torres, David Ingle and Juan Aznar.

Successful challenges based on PP grounds

Date	Tribunal	Procedural / Substantive	Circumstances	Allegations	Reasons given by court
1 December 1998	Supreme Court	Procedural	Pending dispute between the parties before the Spanish Courts with the same scope as arbitral proceedings.	<p>The party resisting enforcement alleges that the existence of a dispute before the Spanish Courts with the same scope as the award intended to be enforced prevents such enforcement.</p> <p>The enforcement would entail a breach of international public policy.</p>	<p>Enforcement denied.</p> <p>The existence of on-going proceedings is an obstacle that makes the recognition of the award impossible.</p> <p>For an award to be enforced it is necessary for it to be compatible with previous judgements issued or enforced in Spain that resolve matters relative to the same parties and the same circumstances. The Spanish proceedings must be prior to the foreign arbitration.</p>
19 January 1999	Supreme Court	Procedural	Pending administrative proceeding between both parties with the same scope as arbitral proceedings (maritime salvation).	<p>The party resisting enforcement alleges that the existence of a pending administrative proceeding before the Spanish Courts with the same scope as the award intended to be enforced prevents such enforcement.</p> <p>The enforcement would entail a breach of international public policy.</p>	<p>Enforcement denied.</p> <p>The existence of on-going proceedings is an obstacle that makes the recognition of the award impossible.</p> <p>For an award to be enforced it is necessary for it to be compatible with previous judgements issued or enforced in Spain that resolve matters relative to the same parties and the same circumstances. The Spanish proceedings must have been initiated prior to the arbitral proceedings..</p>

				Public order because there was a pending process in Spain that could result in a contradictory decision	
16 November 1999	Supreme Court	Procedural	Respondent was notified the arbitration proceedings at an address that it no longer used. Respondent not aware it was being notified. The Claimant, aware of this, did not give an alternative address.	<p>The party resisting enforcement alleges that the existence of pending proceedings does not allow the recognition of the award.</p> <p>In addition, it alleges an abuse of process because through the first proceeding it brought against it the claimant knew that the respondent was not being notified in the correct address, and thus, a notification at the same address in the arbitration would fail.</p> <p>The above result in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>Enforcement denied.</p> <p>The concept of public policy is linked to the principles of the Spanish Constitution, i.e. fundamental rights and public freedoms. In particular, procedural public policy is contained in Article 24.</p> <p>The Court understands that as the prior Spanish proceedings have concluded and they are no obstacle for the enforcement of the foreign award. Thus, this objection is denied.</p> <p>With regards to the abuse of process, the Court understands it is relevant that the claimant requested the respondent be notified at the same address as the previous Spanish proceedings without stating the problems that arose in those proceedings regarding notices and without providing an alternative address. Through these actions, the claimant knowingly violated the respondent's right of defence.</p>

Failed challenges based on PP grounds

Date	Tribunal	Procedural / Substantive	Circumstances	Allegations	Reasons given by court
27 January 1998	Supreme Court	Procedural	Party resisting enforcement denied access to a second instance.	<p>The party resisting enforcement alleged that its right to a defence was undermined as it was not informed about the arbitral proceedings, and could not present allegations.</p> <p>Further, the tribunal did not admit the claim it filed in second instance.</p> <p>The above result in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>Award confirmed.</p> <p>The Court understands that the party resisting enforcement was aware of the proceedings, as it made allegations relative to the incompetence of the arbitral tribunal.</p> <p>In addition, claimants have no constitutional right to an appeal. The right to appeal is established in the applicable procedural laws and the lack of such right is not relevant from a constitutional or public policy perspective. In this case, no right to an appeal existed.</p>
28 November 2000	Supreme Court	Procedural	All the notices that were carried out during the arbitration proceedings were in English.	The opposing party alleges that the fact that the notices were in English prevented it from being aware of their content, thus	<p>Award confirmed.</p> <p>The concept of public policy is linked to Article 24 of the Spanish Constitution, i.e.</p>

				<p>undermining its defence.</p> <p>In addition, its defence was undermined as the arbitrator was not the judge predetermined by the law in accordance with Article 24 of the Spanish Constitution.</p> <p>The above result in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>and Article 6 of the ECHR.</p> <p>Party autonomy when agreeing to arbitration has to be considered, thus, the opposition grounded on the breach of the constitutional provision setting out the right to a judge predetermined by the law cannot succeed.</p> <p>It cannot be sustained that the use of the English language impeded to know the existence of the arbitral proceedings, appear in the proceedings and present a defence, as English is the language usually used in international transactions.</p> <p>The opposing party did not request the arbitrator for translation of the documents nor manifested any difficulties in understanding the language.</p>
8 February 2000	Supreme Court	Procedural	All notifications during the arbitral proceedings were in English, the language of the arbitration. Submission in Spanish not admitted by the Arbitral Tribunal.	<p>The opposing party alleges that the fact that the notices were in English prevented it from being aware of their content, thus undermining its defence. It also alleged that the failure to admit its Spanish-language submission meant it was not considered as a party to the arbitration.</p> <p>The above result in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>Award confirmed.</p> <p>The concept of public policy is linked to the principles of the Spanish Constitution, i.e. fundamental rights and public freedoms. In particular, procedural public policy is contained in Article 24.</p> <p>The Court found inconsistencies in the facts presented by the opposing party, as it was notified the initiation of the arbitration proceedings by a Spanish Court and in Spanish. Other notices were also proven to have been translated.</p>

					Further, the non-admission of the submission in Spanish, and therefore the lack of consideration as party to the arbitration, did not infringe any of the agreed procedural rules of the arbitration, thus, it cannot be understood to be irregular. In addition, the tribunal requested the translation of the submission twice without the opposing party raising any objections. It was thus not considered party as a result of its passive attitude and inaction rather than as a result of the actual language of the submission.
1 February 2000	Supreme Court	Procedural	Award orders the payment of a sum of money.	<p>The party resisting enforcement alleges that the award is not supported by any evidence.</p> <p>The above result in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>Award confirmed.</p> <p>The notion of public order in its international sense has derived to a constitutional content that is fundamentally identified with the constitutional principles, rights and guarantees.</p> <p>The exequatur cannot be used to allege a disagreement with the appreciation of the evidence. This cannot be done under the alleged notion of public policy nor under the homologation nature of the exequatur proceedings.</p>
12 March 2002	Supreme Court	Procedural	Award rendered <i>in absentia</i> of the party resisting enforcement.	Party resisting enforcement alleges a breach of due process and procedural public policy as the award was made in default and lacked motivation.	<p>Award confirmed.</p> <p>The Court does not appreciate that the right of defence of the party resisting enforcement has been undermined.</p>

				<p>The above results in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>Such party has been proven to have intervened and to have made allegations in the arbitration proceedings.</p> <p>The award is understood to be sufficiently motivated.</p> <p>Summary decision. The court provides little reasoning.</p>
7 October 2003	Supreme Court	Procedural	<p>The notices of the arbitral proceedings were carried out in Chinese.</p>	<p>The party resisting enforcement alleged a breach of due process and that its right of defence had been undermined as a result of:</p> <ol style="list-style-type: none"> 1. It was not notified of the initiation of the arbitral proceedings; 2. It was not notified of the designation of the arbitrator; 3. Evidentiary procedures were not carried out relative to the circumstances that support; 4. The award is not a final decision; and 5. The notices of the of the arbitration proceedings were carried out in Chinese, a language it did not comprehend. <p>The above results in a breach of</p>	<p>Award confirmed.</p> <p>The Court finds that the party resisting enforcement:</p> <ol style="list-style-type: none"> 1. Was notified of the arbitral proceedings and of the designation of the arbitrator; 2. That it was duly represented by two lawyers in the proceedings; 3. That the relevant evidential procedures were carried out sufficiently and appropriately; 4. That the resisting party understood Chinese and used this language in the recurring commercial relationships with Chinese companies. <p>Thus, the Court rejects all of the allegations.</p>

				the principles of due process, the Spanish Constitution (art. 24) and public policy.	
14 October 2003	Supreme Court	Procedural	<p>Pending proceedings in Spain, filed after the initiation of the arbitration.</p> <p>Notices solely in English.</p>	<p>The party resisting enforcement alleges that the existence of pending proceedings in Spain does not allow the recognition of the award.</p> <p>Further, as it was not duly notified of the initiation of the arbitral proceedings and they were solely in English its right of defence was undermined.</p> <p>The above result in a breach of the principles of due process and the Spanish Constitution (art. 24).</p>	<p>Award confirmed.</p> <p>The enforcement of an award when there are pending proceedings shall <u>only</u> determine the breach of international public policy when there is a risk that the potential decision of the pending proceedings may be inconsistent with the award.</p> <p>In this case the local proceedings were initiated after the arbitral proceedings and are relative to alleged breaches of fundamental rights within the arbitral proceedings.</p> <p>The Court finds that there is no risk that both decisions may be inconsistent with one another.</p> <p>The Court finds that the allegations relative to an undermining of the right of defence are unproven and insufficiently grounded.</p>
25 May 2004	Supreme Court	Procedural	<p>Pending proceedings in Spain, filed after exequatur.</p>	<p>The party resisting enforcement alleges that the existence of pending proceedings in Spain does not allow the recognition of the award.</p> <p>The above result in a breach of public policy.</p>	<p>Award confirmed.</p> <p>The enforcement of an award when there are pending proceedings shall <u>only</u> determine the breach of international public policy when there is a risk that the potential decision of the pending proceedings may be inconsistent with the award.</p>

					The Court finds that the local proceedings have been initiated, with the potential fraudulent purpose of preventing the enforcement of the award, after the <i>exequatur</i> intended to enforce the award. Thus, no risk exists of inconsistent decisions.
15 March 2012	High Court of Justice of Cataluña (Section 1)	Procedural	Notices of the arbitration proceedings carried out by fax.	<p>The party resisting enforcement alleges that the designation of the arbitrators and the initiation of the arbitral proceedings were not duly notified to it, as it should have been notified personally or by certified mail.</p> <p>The above undermined its defence resulting in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>Award confirmed.</p> <p>The Court finds that the party resisting enforcement has not evidenced the breach of any mandatory formalities in relation to the notification of the designation of arbitrators according to English law.</p> <p>In addition, this party did not object to the designation of the arbitrators and did not inform the tribunal at that point in time of the alleged irregularities concerning the above notification.</p>
29 March 2012	High Court of Justice of Cataluña (Section 1)	Procedural	Notices of the arbitration proceedings carried out by fax.	<p>The party resisting enforcement alleges that the initiation of the arbitral proceedings was not duly notified to it, as it should have been notified personally or by certified mail.</p> <p>The above undermined its defence resulting in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>Award confirmed.</p> <p>The Court finds that the party resisting enforcement has not evidenced the breach of any mandatory formalities in relation to the notification of the designation of arbitrators according to English law.</p> <p>In addition, this party did not object to the designation of the arbitrators and did not inform the tribunal at that point in time of the alleged irregularities concerning the above notification.</p>

<p>19 April 2012</p>	<p>High Court of Justice of the Basque Country (Section 1)</p>	<p>Substantive</p>	<p>Arbitral tribunal construes contract not subject to arbitration to rule on a matter relative to a contract subject to arbitration.</p>	<p>Firstly, EUS claims that the award decides on issues which are outside of the scope of the arbitration clause (in particular, it interprets an agreement not subject to arbitration). Thus, the award is incongruent.</p> <p>Secondly, EUS claims that the award breaches essential Spanish provisions regarding contractual liability and the construction of contracts and thus breaches public policy. In particular, EUS alleges that non competence clauses must mandatorily be construed restrictively under Spanish Law.</p> <p>Thirdly, EUS claims that the award breaches Spanish and EU antitrust regulations. The breach resides in the fact that the clause which restricted competition was not duly notified to the Spanish Tribunal of Defence of Competition.</p> <p>The above entails a breach of legislation that is key to public policy (antitrust) and a breach of the principles of due process and the Spanish Constitution (art. 24).</p>	<p>Award confirmed.</p> <p>Firstly, the Court does not understand that by interpreting an agreement not subject to arbitration it has breached the arbitration clause, which stated that the controversies that may arise out of another agreement would be subject to arbitration. The interpretation and construction of the agreement not subject to arbitration was required in order to decide upon the controversy that arose in relation to the agreement that was subject to arbitration.</p> <p>Secondly, the court understands that the arbitrators are entitled to analyse evidence in accordance with the <i>lex arbitri</i> and that this is in line with the appropriate procedural and substantive provisions of Spanish Law. The fact that the award does not quote the appropriate provisions of the Spanish Civil Code regarding the construction of contracts should not be understood to mean that it has not taken them into due consideration. In conclusion, the award reflects the will of the parties, contained in their agreement, appropriately.</p> <p>Further, the Court understands that international public policy cannot be confused with internal public policy and that the Spanish provisions of contractual liability and the construction of contracts are not to be included within the scope of international public policy.</p>
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					<p>The award is sufficiently grounded. It is grounded on legal arguments that enable the court to appreciate that the award is based on a reasonable construction and application of current regulations.</p> <p>It is not arbitrary or against public policy, i.e. antitrust regulations.</p>
30 May 2012	High Court of Justice of Cataluña (Section 1)	Procedural	Arbitral Tribunal awarded 50% of the damages requested (award of EUR 250,000 where EUR 500,000 requested).	<p>The opposing party alleges that the award is incongruous as the enforcing party requested in the arbitration proceedings a different amount than the one awarded, not including the possibility of an alternative award. By ordering it to pay a lower and therefore different amount to the one requested, the award is incongruent.</p> <p>Such incongruence results in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>Award confirmed.</p> <p>The award is not understood to be incongruent.</p> <p>As the Supreme Court Judgement of 3 June 2005 states: “<i>not every variation to the object of the claim should be understood to be incongruent when it is minimum and does not affect the legal debate between the parties</i>”.</p> <p>As the variation to the object of the claim made by the arbitrators is minimal and consists only in lowering the amount of the award the Court does not esteem it to be incongruent.</p>
15 May 2014	High Court of Justice of Cataluña (Section 1)	Procedural	Sole arbitrator exercised his discretion in apportioning costs. Both parties were given the opportunity to make allegations.	<p>The party opposing enforcement claims that its arguments were not taken into due consideration within the arbitral proceedings.</p> <p>As the sole arbitrator decided on the costs of the proceedings and their proportion in a capricious</p>	<p>Award confirmed.</p> <p>The concept of public policy is linked to the principles of the Spanish Constitution, i.e. fundamental rights and public freedoms. Public policy grounds should be construed restrictively.</p>

				<p>manner, such decision affected the ability of the opposing party to defend itself.</p> <p>The above result in a breach of the principles of due process, the Spanish Constitution (art. 24) and public policy.</p>	<p>Grounds relative to breach of mere provisions of procedural law cannot be invoked to oppose the enforcement of an award as infringement of public policy. When analysing possible violations of public policy, the court shall only analyse whether the principles of due process and actual contradiction between both parties are respected.</p> <p>Upon analysing the award it is made clear to the court that the arbitrator has duly considered the arguments made by both parties and that the resisting party's allegations are false.</p>
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