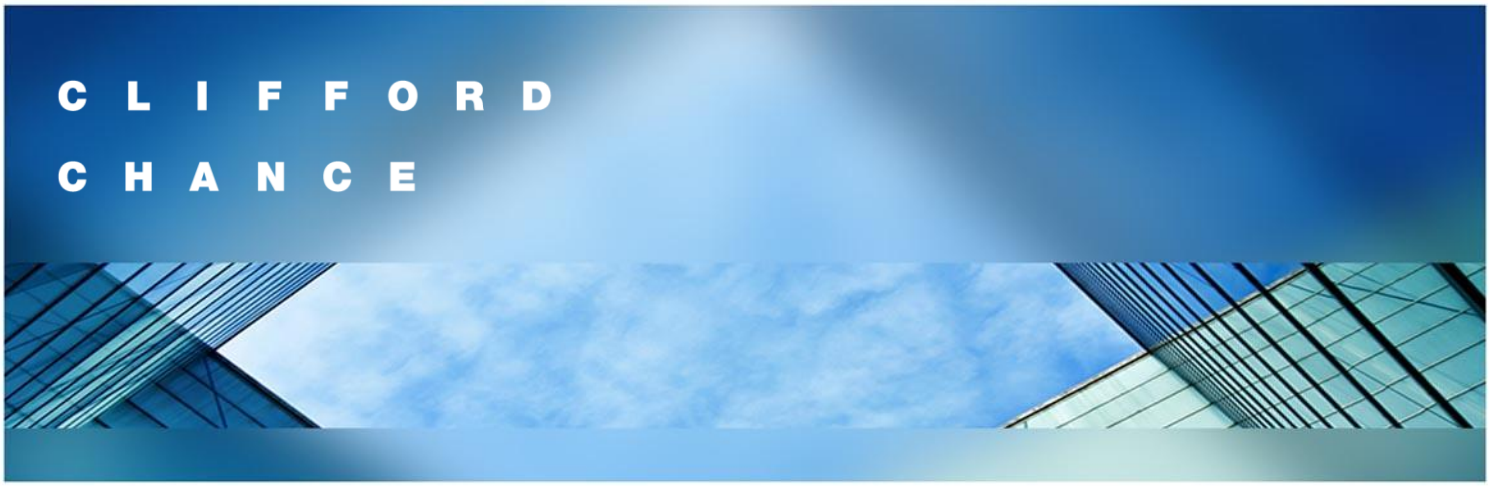

THE SPANISH CONSTITUTIONAL COURT ONCE AGAIN DELIMITS THE NOTION OF PUBLIC POLICY IN ORDER TO PREVENT A REVISION OF THE ASSESSMENT OF EVIDENCE IN ANNULMENT PROCEEDINGS

On 15 February 2021 the First Chamber of the Spanish Constitutional Court issued a unanimous judgment (the "**Judgment**"), long awaited by the arbitration community in Spain, delimiting the courts' interpretation of the notion of public policy, in particular in relation to Art. 24 of the Spanish Constitution ("**CE**").

The Judgment resolves appeal no. 3956/2018 lodged against the ruling of 22 May 2018 and judgment 1/2018, of 8 January of that same year, handed down by the Civil and Criminal Chamber of the Madrid High Court of Justice ("**Madrid HCJ**") that had annulled an arbitration-in-equity (*ex aequo et bono*) award handed down on 6 April 2017 and rectified on 25 May of that same year, finding that it was contrary to public policy due to a lack of reasoning and incorrect assessment of evidence.

Citing judgment no. 46/2020, of 15 June of the Constitutional Court ("**STC 46/2020**") which we analysed previously[1], the Judgment reiterates that the review involved in award annulment proceedings is "*very limited and does not permit a review of the merits of the case decided by the arbitrator, nor should it be considered a second instance*" and dispels any doubt regarding the impossibility of restoring to the contrariness to public policy as a mechanism in order for the courts of law to substitute arbitration tribunals in their function of resolving disputes.

Constitutional Court Judgment of 15 February 2021

- The limited nature of annulment proceedings is reiterated, and in particular when the concept of public policy is at stake.
- It stresses that arbitration is based on the parties' free will.
- It specifies that the configuration of arbitration as a "jurisdictional equivalent" refers exclusively to the *res judicata* effect provided by both judicial and arbitral decisions and does not permit to apply the standards of ordinary and extraordinary appeals before the courts to the resolution of annulment proceedings.
- The duty of arbitral decisions to state reasons is a purely legal configuration and is not derived from the right to effective judicial protection pursuant to Article 24 of the Constitution.
- Arbitral decisions will fall foul of the duty to state reasons set out in Article 37.4 of the Arbitration Act when they are unreasonable, arbitrary or entail a blatant error.

[1] See The Constitutional Court supports freedom of choice as consubstantial to arbitration and rejects the notion of public policy championed by the Madrid High Court.

CLARIFICATION ON THE CONFIGURATION OF ARBITRATION AS A "JURISDICTIONAL EQUIVALENT" AND THE STANDARD OF REASONING APPLICABLE TO ARBITRAL DECISIONS

The Judgment analyses the difference between the standard of reasoning that applies to judicial and arbitral decisions. The Constitutional Court concludes that, even though the criteria for verifying whether a judicial or arbitral decision is sufficiently reasoned are "*similar*", the duty to state reasons is not of the same kind.

For judicial decisions, the reasoning is inherent in the right to effective judicial protection enshrined in Article 24 CE. In the case of arbitral decisions, the duty to state reasons is "*a requirement of exclusively legal configuration*" which derives from Article 37.4 of the Arbitration Act (*Ley 60/2003, de 23 de diciembre, de Arbitraje*, "**LA**").

In light of the above, the Constitutional Court took advantage of the Judgment to clarity that the configuration of arbitration as a "*jurisdictional equivalent*" refers to the *res judicata* effect that is created in both types of proceedings.

As it did in STC 46/2020, the Constitutional Court opts to stress the role, in arbitration, of the free will of the parties.

THE CONSTITUTIONAL COURT'S DECISION

The Judgment annuls the judgment of the Civil and Criminal Chamber of the High Court of Justice of Madrid dated 8 January 2018 (the "**2018 Madrid HCJ Judgment**") and the ruling of 22 May 2018 on the basis that "*the possible judicial control of the award and its acceptance of public policy cannot lead to the consequence whereby the judicial body replaces the arbitral tribunal in its duty to apply the law*".

The 2018 Madrid HCJ Judgment annulled an award handed down in equity (*ex aequo et bono*) on the basis of a statutory arbitration agreement (the "**Award**"), in application of Article 41.1 f) LA, on the understanding that it violated public policy, due to insufficient reasoning and its arbitrary nature that infringed upon the right to effective court protection enshrined in Article 24 CE. The arbitrary nature and lack of reasoning led, according to the Madrid HCJ, to the Award "*failing to respond to all of the issues raised in the arbitration, failing to fully assess the evidence, and failing to contain sufficient reasoning so as to be able to reach a conclusion*".

The Constitutional Court rejects the reasons set out by the Madrid HCJ and clarifies that the duty to state reasons in court decisions and awards does not stem from the same origin: the first case deals with a canon of constitutional law, because the duty to state reasons in court decisions is a requirement "*inherent in the right to effective court protection*", whereas the duty to reason awards is based on Article 37.4 LA and is a matter of ordinary legality.

The Constitutional Court clarifies that an award would be insufficiently reasoned when it is "*unreasonable, arbitrary or entails a blatant error*" and seems to conclude that the canon of reasoning awards and decisions is similar, regardless of its origin. This formula, which is questionable from the perspective of comparative law and considering the anchoring of arbitration on the free will of the parties, is qualified when the Constitutional Court establishes that it is not necessary for the award to reply in detail to all aspects underlying the dispute, nor that the reasoning be correct in the view of the court analysing the action for annulment.

The Constitutional Court concludes that the Madrid HCJ overstepped its own powers when it annulled the Award on the basis of its insufficient reasoning, because it used the premise of the violation of public policy to undertake an evaluation of the merits of the case resolved by the Award

and to make an assessment of the evidence different from that done in the Award. The Constitutional Court establishes that such actions undermine the action of annulment, which was not used to protect the party seeking annulment from actual defencelessness, but rather led the Madrid HCJ to impose an opinion that dissents with the legal assessment of the facts made by the arbitrator.

The foregoing, in addition to the delimitation of the nature of the "*jurisdictional equivalent*" applied to arbitration proceedings in Spain, entails a major step forward in constitutional legal doctrine on arbitration and adds greater certainty in relation to future interpretations expected from our courts.

CONCLUSIONS

The Judgment, which follows in the same vein as STC 46/2020, dispels any doubts on aspects that could affect Spain's reliability as an arbitration venue, as it comprises a series of principles that the Civil and Criminal Chambers of the High Courts of Justice will have to uphold from now on:

- It endorses the basis for arbitration as being the free will of the parties (Article 10 CE);
- it clarifies and qualifies that the expression "jurisdictional equivalent" applies only in relation to the effect of *res judicata* created by both judicial and arbitral decisions; and
- it specifies that although a defect of reasoning would exist, in violation of Article 37.4 LA when the award is "*unreasonable, arbitrary or entails a blatant error*", the annulment proceedings cannot serve as an instrument with which the courts can carry out a review of the merits of the case.

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