ONE MORE TIME: THE SPANISH CONSTITUTIONAL COURT AND THE STAY OF ARBITRATIONS PENDING CRIMINAL PROCEEDINGS

The Spanish Constitutional Court has issued a new judgment which reinforces Spain's status as an arbitration-friendly jurisdiction but raises queries as to the interactions between arbitration and criminal matters.

Key issues

- The Constitutional Court has reiterated the limited scope for the scrutiny of arbitral awards by the courts in annulment proceedings
- The substantive criteria set out in the Spanish Civil Procedure Act to decide on whether to stay civil proceedings pending criminal proceedings (i.e. the so-called *prejudicialidad penal* doctrine) are "transferable" to arbitrations
- The Constitutional Court has found that the prejudicialidad penal is an issue of ordinary legality and not procedural public policy
- Certain issues on the relationship between arbitration proceedings and the criminal jurisdiction are left unresolved. In particular, the tension between the duty to inform the Public Prosecutor's Office of criminal offences and the confidentiality of arbitration proceedings
- The individual concurring vote proposes an approach to the *prejudicialidad penal* doctrine, for the purposes of ensuring that arbitral awards respect public policy, which is closer to the French Supreme Court's doctrine on this matter

The Madrid High Court of Justice's ("**TSJM**") Judgment of 4 October 2019 – which was confirmed by the subsequent TSJM Ruling of 27 July 2020 handed down in a motion for dismissal – annulled an arbitral award on the basis that the arbitral tribunal had not stayed the proceedings in circumstances where, according to the TSJM, it should have done so and waited for a decision to be rendered in a related criminal proceeding (i.e. the TSJM found that the arbitral tribunal should have applied the Spanish procedural doctrine of "*prejudicialidad penal*").[1]

The Spanish Constitutional Court's ("**TC**") Judgment of 4 April 2022 has annulled the referred TSJM decisions, stating once again that courts cannot rely on an extensive concept of public policy to replace the reasoning of arbitral tribunals with their own (in the instant case, this applied to the TSJM's disagreement with the arbitral tribunal's decision not to stay the arbitration on the basis of the *prejudicialidad penal* doctrine).

The TC Judgment makes further assertions on the interaction between criminal and arbitration proceedings, dispelling some doubts but raisings others which may be addressed in a coming TC Judgment. It remains to be seen whether such doubts will be solved in line with the French Court of Cassation's recent doctrine on the matter.

THE LIMITED SCOPE OF THE SCRUTINY OF AWARDS

The TC has established in a series of recent Judgments (*see* here and here) that the Courts' scrutiny of arbitral awards in annulment proceedings has a limited scope which does not warrant a review of the merits of the case. In essence, the TC finds that a court's assessment of an award's potential breach of public policy "*cannot amount to a new analysis of the issue submitted to arbitration, replacing the role of the arbitrator in resolving the dispute*".[2]

This doctrine has been confirmed by the TC's Judgement of 4 April 2022, which states that "*the possible judicial scrutiny of an award and its compliance*

---

1 The Spanish "*prejudicialidad penal*" doctrine is akin to the French doctrine of "*le criminel tient le civil en l'état*", which is similarly provided for in English law in the English Civil Procedural Rules, Practice Direction 23A, ¶¶11.A.1 to 11.A.4 (*see* here). However, note should be taken that there are differences between all such doctrines.

2 *See* TC Judgment No. 17/2021

with public policy cannot result in courts replacing arbitral tribunals in their role of applying the law". In this regard, the TC affirms that Courts hearing proceedings for the annulment of awards should only confirm that due process was adhered to and that the rights to and principles of defence, equality, a bilateral and adversarial contest and evidence were respected.

The TC also confirms, quoting previous TC Judgments, that an award's reasoning will respect those rights and principles from a public policy perspective as long as it is not unreasonable or arbitrary, it is not based on "*non-existent premises*" and it does not contain "*failures of logic of such a magnitude that the conclusions reached cannot be considered to be based on any of the reasons invoked*".[3]

THE *PREJUDICIALIDAD PENAL* AND ARBITRATION

The TC Judgment of 4 April 2022 further makes two significant clarifications regarding the application of the *prejudicialidad penal* in arbitration proceedings:

- First, the TC confirms that the *prejudicialidad penal* is a matter of "*strictly ordinary legality*" and not of procedural public policy;[4] and
- Second, the TC finds that the criteria set out in article 40 of the Spanish Civil Procedure Act to determine when it is appropriate to stay proceedings due to *prejudicialidad penal*[5] are "*perfectly transferable to arbitration proceedings*".

What follows from the above is that, according to the TC, it is the arbitral tribunal who must assess whether the arbitration proceedings should be stayed on the basis of the *prejudicialidad penal* doctrine. A Court hearing a subsequent application to annul the resulting award will only be able to conduct a limited scrutiny of the arbitrator's decision and will not be able to review the accuracy of the arbitral decision on the merits. Only a public policy breach, which may involve the limited assessment of whether the reasoning of the award complies with public policy, would warrant a review of the arbitral decision. This is not the case in the appeal which the TC ruled on.

NEW QUESTIONS FOR A LATER JUDGMENT?

The TC's Judgment of 4 April 2022 dispels major doubts regarding the nature of the *prejudicialidad penal* and its impact on arbitral proceedings. However, it fails to answer other questions:

- Is an arbitrator obliged to stay arbitration proceedings if the requirements for the *prejudicialidad penal* are met? Or is the stay of the proceedings an option but not an obligation, as submitted by part of the foreign doctrine?
- In the event that there are no pending criminal proceedings but a fact which appears to constitute an offence emerges in the course of the proceedings, should the arbitrator inform the Public Prosecutor's Office? Would this duty take precedence over the arbitrator's duty of confidentiality envisaged in article 24.2 of the Spanish Arbitration Act?

---

3 *See* TC Judgment No. 65/2021.

4 This is a statement that the TC Judgment seems to have incorporated as a result of the criticisms set out in the individual concurring vote from senior judge Mr Juan Antonio Xiol Ríos.

5 These criteria are (i) demonstration of the existence of a criminal case which is investigating some/any of the facts on which the pleas of the parties in the civil case are based; and (ii) that the decision of the criminal court on the facts on which the criminal case is based could have a decisive impact on the resolution of the civil case.

The separate concurring vote from senior judge Mr Juan Antonio Xiol Ríos to the TC Judgment of 4 April 2022 disagrees with the majority on some points and puts forward a position that could reply to some of these questions as, instead of considering that the *prejudicialidad penal* is merely an issue of ordinary legality, he asserts that "*what really constitutes the concept of public policy in the case at hand is the effectiveness of the criminal jurisdiction and its decisions*, […] *and only to the extent that the requirements for the seriousness and manifest nature of the infringement which deprives the criminal jurisdiction of its effectiveness are met, together with that of not replacing the assessment of the arbitrator (something that the Judgment applies correctly), can we speak of a public policy infringement, as I see it*".

This, in turn, seems to dissent with the TC's asserted transferability of article 40 of the Spanish Civil Procedure Act to the arbitral proceedings, such that not staying arbitration proceedings in cases where there are *indicia* of criminality would not amount to a breach of public policy provided that the resulting award does not contain statements or orders that are incompatible with the criminal justice system. That is, the award would only be null if its statements or orders deprive "*the criminal jurisdiction of its effectiveness*", and not where the award solely failed to apply the *prejudicialidad penal*.

This approach seems akin to the one adopted by the French Court of Cassation in its recent Judgment of 23 March 2022. In that decision, the Court confirmed a Judgment which had annulled an arbitral award on the basis that the recognition or enforcement of such award would be contrary to public policy as it would benefit or remunerate a party for its involvement in a conduct of money laundering. In that case, the French courts did not refer to a mandatory stay of arbitrations pending criminal proceedings, but rather only verified that the final award did not contain declarations or orders that were materially contrary to public policy.

On this point, the French Court of Cassation also clarified in it is reasoning that the lower instance Court "*did not perform a new examination or a review of the merits of the award*" instead it just "*made a different assessment of the facts exclusively as regarded the compatibility of the recognition or enforcement of the award with international public policy*".[6]

At the time, it was reported that the Spanish TC had given leave to proceed to two appeals for constitutional protection against two TSJM Judgments addressing similar facts, where two arbitral awards had been annulled due to the non-suspension of the corresponding arbitrations on the basis of the *prejudicialidad penal*.[7] The TC Judgment of 4 April 2022 resolves one of these two appeals. We will have to wait for a new Judgment to confirm whether the Constitutional Court addresses the unresolved issues identified above.

6 *See* the Judgment of 23 March 2022 from the French Court of Cassation in the *Belokon* case.

7 *See* news article entitled "*FCC lleva Acuamed al Constitucional por no pagar un laudo multimillonario*" published in Expansión on 26 March 2021.

CONTACTS

Fernando Irurzun
Partner

T +34 91 590 4120
E fernando.irurzun
@cliffordchance.com

Ignacio Díaz
Partner

T +34 91 590 9441
E ignacio.diaz
@cliffordchance.com

Fernando Giménez-Alvear
Counsel

T +34 91 590 4175
E fernando.
gimenez-alvear
@cliffordchance.com

Eduardo Hernández
Lawyer

T +34 91 590 9494
E eduardo.hernandez
@cliffordchance.com

Borja Pérez-Puente
Lawyer

T +34 91 590 4145
E borja.perez-puente
@cliffordchance.com

Laura García-Valdecasas
Lawyer

T +34 91 590 7562
E laura.garcia-
valdecasas
@cliffordchance.com

Elias Soria
Lawyer

T +34 91 590 7524
E elias.soria
@cliffordchance.com

Víctor Lana
Lawyer

T +34 91 590 9453
E victor.lana
@cliffordchance.com

Anabel Ganado
Lawyer

T +34 91 590 7513
E anabel.ganado
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, Paseo de la Castellana 110, 28046 Madrid, Spain