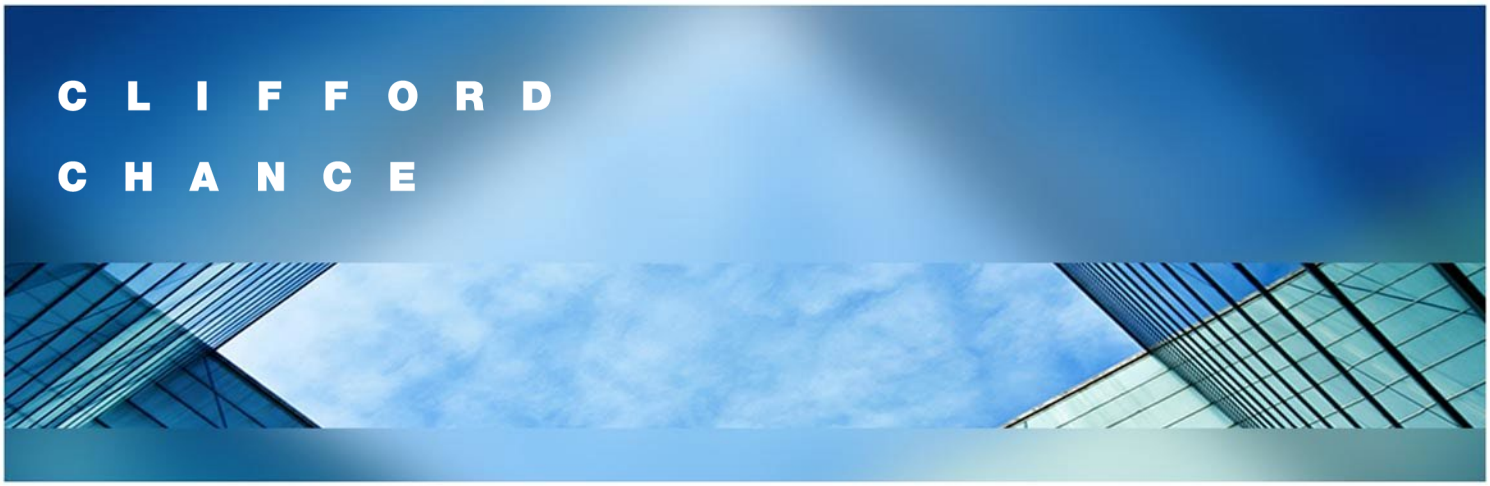

THE CONSTITUTIONAL COURT SUPPORTS FREEDOM OF CHOICE AS CONSUBSTANTIAL TO ARBITRATION AND REJECTS THE NOTION OF PUBLIC POLICY CHAMPIONED BY THE MADRID HIGH COURT

On 15 June 2020, the First Chamber of the Constitutional Court handed down a judgment (the "**Judgment**") declaring the nullity of several decisions by the Civil and Criminal Chamber of the Madrid High Court ("**Madrid High Court**") which rejected the possibility for the parties to have access to an action for annulment of an arbitral award. The Constitutional Court rejected the concept of public policy championed by the Madrid High Court in various decisions and expressly warned of the risks derived from an extensive application of the same.

Key issues

- It rejects the widening of the concept of public policy in an effort to review the merits of the case.
- It warns that the lack of definition of public policy cannot be a pretext for perverting the institution of arbitration in which the minimal intervention of jurisdictional bodies and the freedom of choice of the parties is consubstantial.
- The option for the parties to have an annulment procedure is expressly recognised.
- It is stressed that an action for annulment is limited to a strictly formal review of the award without going into the merits.

EXTENSIVE APPLICATION OF THE CONCEPT OF PUBLIC POLICY BY THE MADRID HIGH COURT

For some years now, the Madrid High Court has been interpreting the concept of public policy contained in the grounds for annulment envisaged in article 41.1.f) of the Arbitration Act expansively[1].

This expansive interpretation had led the Madrid High Court, in the words of the court itself, to examine "*the reasoning, in general, and the assessment of evidence, in particular, contained in the Award, that could violate article 24.1 of the Spanish Constitution*", issuing decisions that revised the merits of the case in a manner akin to the extraordinary appeals envisaged in the civil jurisdiction or that rejected the option for the parties to have access to an annulment process[2].

The stance of the Madrid High Court, alien to the principles generally followed in international arbitration, had generated much uncertainty among the users of arbitration as to the advisability of using Madrid as a seat of arbitration.

1 The Spanish Arbitration Act (*Ley 60/2003, de 23 de diciembre, de Arbitraje*).
2 See Madrid High Court Judgments no. 27/2018, of 12 June (AC 2018\1302), no. 1/2018, of 8 January (AC 2018\102), no. 62/2016, of 11 October (AC 2016\1747), no. 13/2015, of 28 January (JUR 2015\79489) and no. 30/2015, of 14 April (JUR 2015\136198).

THE CONSTITUTIONAL COURT DECISION

In the Judgment, the Constitutional Court overturns several decisions issued by the Madrid High Court, essentially finding that they contained "*an extensive and unjustified interpretation of the concept of public policy contained in art. 41.2.f) of the Arbitration Act*".

In the case in question, the extensive interpretation had deprived the parties of the possibility of exercising their right to a process for the annulment of the award, when there was no legal rule prohibiting it.

The Judgment contains the doctrine of the Constitutional Court on public policy that the Madrid High Court had already been using[3], but it warned that the lack of definition of the concept of public policy cannot be used as an excuse to review the merits of the award, because the parties freely decided to submit the decision on the matter to the judgement of the arbitrators:

> *"It is precisely because the concept of public policy is unclear that the risk of it being used purely as a pretext for courts to re-examine the issues debated during the arbitral procedure is multiplied, perverting the institution of arbitration and ultimately violating the parties' freedom of choice. The court cannot, with the excuse of a supposed violation of public policy, revise the merits of a case submitted to arbitration and illustrate what is a mere discrepancy with the exercise of the parties' right of withdrawal".*

The Constitutional Court expressly recognises in the Judgment that the extensive application of the concept of public policy by the Madrid High Court in the cancelled decisions is seeking a review of the merits of the case (i) that goes beyond the scope of the annulment procedure (ii) that belongs exclusively to the arbitrators and (iii) that circumvents the principle of petitioned redress or party disposition:

> *"The widening of the concept of "public policy" contained in the challenged decisions in order to carry out a review of the merits of the case by the court, something that is within the exclusive purview of the arbitrators, goes beyond the scope of the action for annulment and disregards the principle of party disposition or petitioned redress of the parties to the proceedings".*

In this way, and although confined to the scenario of the freedom to withdraw the action for annulment submitted by mutual agreement of the parties, the Constitutional Court stressed, after citing doctrine from the Court of Justice of the European Union[4] and the judgment of its own Plenary Session no. 1/2018, of 11 January (RTC 2018\1), that the annulment procedures must be limited to external oversight of the validity of the award without reviewing the merits of the decision reached by the arbitrators.

Thus, the Constitutional Court's decision supports a restrictive interpretation of the concept of public policy that, in principle, would not allow Spanish courts to perform extensive interpretation based on violations of the obligation to provide reasons pursuant to article 24.1 of the Spanish Constitution.

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3 "material public policy is understood to mean the collection of public, private, political, moral and economic legal principles that are absolutely obligatory for the conservation of society in a particular people and time (…) from a procedural standpoint, public policy is a collection of formalities and principles necessary in our system of legal procedure (…) the fundamental rights and freedoms guaranteed by the Constitution, as well as other essential principles that the legislator cannot modify for constitutional reasons or due to the application of internally accepted principles".

4 Judgment of the Court of Justice of the European Communities dated 26 October 2008 (C-168/05, Mostaza Claro).

CONCLUSIONS

The Judgment of the Constitutional Court is, without doubt, very good news for arbitration in Spain and, in particular, for Madrid as a seat of arbitration, because:

- it stresses the importance of the action for annulment being limited to an examination of the formal validity of the award, without the court being able to carry out a review of the merits of the case, which is the exclusive responsibility of the arbitrators;
- it expressly warns of the risk derived from the lack of definition of public policy and concludes that it cannot be used as a pretext to pervert the institution of arbitration and undermine the parties' freedom of choice; and
- it places article 10 of the Spanish Constitution, freedom of choice, at the centre of arbitration, rather than the right to effective judicial production pursuant to article 24 of the Spanish Constitution, as the arbitration community had been advocating.

In this way, despite referring to a specific scenario of the right of disposition of the action for annulment and the fact that the resolution of the appeal for constitutional protection filed against the decisions handed down by the Madrid High Court in annulment proceedings no. 52/2017 which led to the annulment of an award issued in equity due to infringement of the obligation to provide reasoning in relation to the assessment of the evidence taken in the arbitration is pending, the Judgment should help to lessen the uncertainty derived from the extensive application of the concept of public policy by the Madrid High Court.

However, the practical scope of the Judgment will depend on how it is perceived by the Madrid High Court.

CONTACTS

Ignacio Díaz
Partner

T +34 91 590 9441
E Ignacio.Diaz
@cliffordchance.com

Laura García-Valdecasas
Lawyer

T +34 91 590 7562
E Laura.GarciaValdecasas
@cliffordchance.com