The European Arbitration Review 2020

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A Global Arbitration Review Special Report

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Overviews

Country chapters

Welcome to *The European Arbitration Review 2020*, one of *Global Arbitration Review*'s annual, yearbook-style reports.

Global Arbitration Review, for anyone unfamiliar, is the online home for international arbitration specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than our journalistic output is able. *The European Arbitration Review*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from all across Europe.

Across 15 chapters, and 88 pages, this edition provides an invaluable retrospective from 31 authors. All contributors are vetted for their standing and knowledge before being invited to take part. Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

This edition covers Austria, England and Wales, Finland, France, Germany, Italy, The Netherlands, Norway, Poland, Portugal, Russia, Spain, Sweden and Ukraine.

Among the nuggets it contains:

- news of a rule change in the UK that makes it easier to appoint serving judges as arbitrators (and cheaper);
- an update on how arbitration in Italy is being used for 'freedom to operate' rulings, giving entrepreneurs and innovators security that, if they proceed with a particular venture, they would not hit problems with third-party owned IP rights; and
- a Ukrainian perspective on how to enforce awards against Russia by targeting the assets of Gazprom and other – nominally - private companies.

And much, much more. We hope you enjoy the review. If you have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
October 2019

Spain

Mercedes Romero and Daragh Brehony
Pérez-Llorca

The concept of public policy is somewhat vague and nebulous in Spain. Open to narrow and broad interpretations, we have recently seen how public policy may be a potential way of escaping the enforcement of an unfavourable arbitral award and how it may be used in seeking the annulment of the same award. A string of recent decisions from the Superior Court of Madrid (TSJM) annulling a number of arbitration awards on the grounds of public policy, inter alia, has sparked a debate on how thorough a judge's examination of an award should be, and in which circumstances public policy should be used to annul an award. This article provides a brief overview of the public policy exception and its various means of interpretation and application by taking a glance at how these questions are determined in a number of different jurisdictions.

The term 'public policy' appears in a number of international agreements, conventions and domestic arbitration laws. Looking first at the New York Convention, article III provides that:

> [e]*ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.*

The 'rules of procedure' to be relied upon are therefore the rules of procedure of the jurisdiction in which the award is being enforced, making it essentially a local matter to be resolved. Article V of the New York Convention goes on to set out circumstances in which recognition and enforcement of an award may be refused by a local court. These circumstances relate to matters such as the incapacity of one of the parties when entering into the arbitration agreement, improper notice of the commencement of an arbitration or the appointment of an arbitrator, or where the award has been set aside or suspended by a competent authority in the country where the award was made.

Article V.2 then provides that:

> [r]*ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.*

The New York Convention therefore leaves it open to each contracting state to determine what is public policy and in what circumstances article V.2(b) may be invoked.

Public policy is also referred to in the UNCITRAL Model Law, which provides in article 36(1)(b)(ii) that:

> [r]*ecognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only if the court finds that the recognition or enforcement of the award would be contrary to the public policy of this State.*

The UNCITRAL Model Law forms the basis for the arbitration legislation of approximately 111 jurisdictions.[1] This includes the Spanish Arbitration Act, which provides in its article 41(1)(f) that '[a]n award may be set aside only if the applicant argues and proves that the award is in conflict with public policy'.

The Explanatory Memorandum to the UNCITRAL Model Law notes that the meaning of public policy 'is to be understood as serious departures from fundamental notions of procedural justice'. What is and what is not a 'fundamental notion of procedural justice' is thus up to any given domestic court to determine. Public policy could cover a number of issues. For example, in France, article 1520(5) of the Code of Civil Procedure provides that an award may be annulled where it is contrary to 'international public policy'. The Paris Court of Appeal has relied on this provision to set aside an award where there were allegations of money laundering[2] and in a different case where alleged document forgery had taken place.[3]

This matter has received particular attention in Spain because of a number of decisions handed down by the TSJM annulling arbitration awards for failing to comply with Spanish public policy.

On 5 April 2018,[4] the TSJM was faced with deciding on an application to set aside an arbitration award. The underlying facts were that the parties (the owner of a wind farm project and the contractor) had entered into a turnkey contract for development of the project and the principal issue in dispute was whether the parties had included a limitation of liability clause in the contract. The contractor argued that there was a valid limitation of liability clause by way of a number of emails that had been exchanged between the parties prior to the signing of the turnkey contract. The arbitral tribunal, by a majority vote, issued an award in favour of the contractor. The owner then sought annulment of the award on grounds of public policy in accordance with article 41(1)(f) of the Spanish Arbitration Act arguing that the majority had 'irrationally assessed the evidence and the applicable law'. The TSJM sided with the owner in setting aside the award. It held that the arbitral tribunal had failed to provide sufficient reasoning for its decision and had failed to rely on certain crucial evidence and for that reason alone the award could be set aside. Referring to public policy, the court held that 'under certain circumstances, the assessment of the evidence – as explained in the reasoning – may infringe upon due process and therefore infringe public policy'. The lack of sufficient reasoning (in determining the existence of the limitation of liability clause) was therefore deemed to be sufficient to annul the award on grounds of public policy.

The above case is only one of a string of recent decisions issued by the TSJM in which it annulled arbitral awards on public policy grounds. Prior to the above case, the TSJM had annulled several arbitral awards concerning toxic financial products sold to

minor investors, challenging the reasoning of said awards and the conclusions reached therein.[5]

The Spanish Supreme Court has previously stated that public policy:

> *is formed by the legal, public and private, political, moral and economic principles, which are absolutely obligatory for the preservation of social order in a population and in a particular time…* [and that] [e]*ssentially, what must be taken into account today, as forming part of public order, are the fundamental rights contained in the Spanish constitution*.[6]

The Spanish Supreme Court thus views public policy as a matter that goes to the very core of the justice system. However, as we can see from some of the TSJM's recent judgments, the application of the public policy exception is an entirely different matter.

Courts in other jurisdictions have also sought to consider when an absence of reasoning, or insufficient reasoning, is enough to annul an award based on public policy grounds. In Chile, the Santiago Court of Appeals was presented with this precise question when a party to an arbitration sought to challenge the award before local Chilean courts arguing that the award was in breach of public policy for, inter alia, not being a reasoned decision. As regards the reasoning of the award, the court decided that procedural grounds for annulment stemming from domestic procedural law could not be assimilated into the grounds established by the parties. The court said that assimilating public policy with domestic procedural law would be contrary to the autonomy principle and the requirement of minimal court intervention. The court said that it could only act in such circumstances when violations were manifest, apparent or ostensible.[7] Therefore, in this instance a breach of domestic procedural rules could not amount to a breach of public policy.

Turning to the United States, it is clear that courts have adopted a more stringent standard. It has long been established in US federal courts that the public policy provision should be interpreted narrowly and that the public policy defence only applies where enforcement of the award 'would violate the forum state's most basic notions of morality and justice'.[8] It would therefore be difficult to seek to overturn an arbitration award because the court disagrees with the reasoning therein. This is especially the case in the United States, where federal courts are generally known for being arbitration-friendly.

In France, the Paris Court of Appeal held that the public policy exception could only be invoked in circumstances where the enforcement of the award would be contrary to the French legal order or would entail the violation of a fundamental rule of law.[9] Thus, this implies a narrow view of the meaning of public policy involving direct and grave violations of the recognition forum's most fundamental and mandatory public policies and laws.

In South Korea, the Supreme Court provided one of the most clear and succinct definitions of public policy when it comes to assessing the alleged infringement of an arbitral award in this regard:

> *The basic tenet of* [article V(2)(b) of the New York Convention] *is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement of the award is sought from being harmed by such recognition and enforcement. As due regard should be paid to the stability of international commercial order, as well as domestic concerns, this provision should be interpreted narrowly. When foreign legal rules applied in an arbitral award are in violation of mandatory provisions of Korean law, such a violation does not necessarily constitute a reason for refusal. Only when the concrete outcome of recognizing such an award is contrary to the good morality and other social order of Korea, will its recognition and enforcement be refused*.[10]

Therefore, in South Korea an award must go against the good morality and social order of the country to be considered in breach of public policy. It is difficult to imagine that inadequate reasoning would be capable of meeting this requirement. This is what the Supreme Court of Greece has held, stating that the insufficient reasoning of an arbitral award, the erroneous interpretation or application of foreign legal provisions and even the erroneous judgment of the substance of the dispute by the arbitrators do not render the award contrary to international public policy.[11]

Australia has adopted a similarly restrictive view in interpreting public policy under the New York Convention. In *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd*, the Federal Court of Australia allowed enforcement of an arbitral award rendered in Uganda, rejecting arguments that the enforcement was in breach of public policy in accordance with the New York Convention.[12] The court held that it is not 'against public policy for a foreign award to be enforced by this court without examining the correctness of the reasoning or the result reflected in the award'.[13] The court referred to and expressly adopted the narrow view of public policy applied by courts in the United States. The court, also relying on international authority, took the view that erroneous or incorrect legal reasoning or a failure to apply the law correctly is not generally a violation of public policy within the meaning of the New York Convention.[14] In another Australian Federal Court decision, it was stated that the reasoning of an arbitral tribunal must not be examined as if it were a decision from a court, thereby giving significant deference to the arbitral tribunal in this regard.[15]

Scanning the above decisions, it is not difficult to find at least one common thread. National courts consider public policy to be something that touches upon the morality and social justice of the country. It refers to rules of mandatory law and is often intertwined with elements of criminal justice, as can be seen from some of the decisions by French courts. It is more difficult to find a consensus on exactly how public policy should be applied, particularly when it comes to the annulment of arbitral awards. Courts offer differing interpretations on the power that public policy gives them to delve into the merits of an award. Many commentators fear that public policy, improperly applied, may convert an annulment proceeding into a de novo appeal. Thus, while most jurisdictions may consider public policy to be something of the highest social order, determining how it should be interpreted and applied is an entirely different matter on which there does not appear to be any consensus, even within some of the aforementioned jurisdictions.

Notes

1 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.
2 Paris Court of Appeal, 21 February 2017, No. 15/01650.
3 Paris Court of Appeal, 16 January 2018, No. 15/21703.
4 Superior Court of Madrid, 5 April 2018, No. 15/2018.
5 Superior Court of Madrid, 6 April 2015, No. 27/2015; ibid, 14 April 2015, No. 30/2015; ibid, 23 October 2015, No. 74/2015.
6 Spanish Supreme Court, 5 April 1966, RJ 1966/1684.
7 Santiago Court of Appeals, 1 September 2016, No. 2685-2016.
8 *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir.1974).
9 Paris Court of Appeal, 18 November 2004.

10 Supreme Court of South Korea, 14 February 1995, XXI Y.B. Comm. Arb. 612, 615 (1996).
11 Supreme Court of Greece No. 11/2009; Supreme Court of Greece No. 1665/2009.
12 *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131.
13 Ibid, at 126.
14 Ibid, at 133.
15 *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* [2014] FCA 414.

Mercedes Romero
Pérez-Llorca

Mercedes Romero joined Pérez-Llorca in 2006 after practising law for a year and a half at a medium-sized law firm in Madrid. She was made a partner in January 2017. Mercedes holds a post-graduate degree in international commercial arbitration from Queen Mary University, London, and a degree in law from Universidad Carlos III, Madrid.

Mercedes advises clients on international arbitration and litigation in various sectors, such as the financial, construction, engineering, corporate, energy and telecommunications sectors. Mercedes participates in complex judicial and arbitral proceedings, both nationally and internationally, regarding controversies arising from contractual obligations in purchase agreements, distribution agreements, financial transactions, financial lease agreements, joint ventures, turnkey contracts, shareholder agreements and all types of contractual disputes. In addition, Mercedes participates in enforcement proceedings of foreign judgments and awards, as well as other issues relating to international private law.

Mercedes is a professor at Universidad Carlos III de Madrid and Universidad Europea de Madrid. She also participates as a regular speaker in arbitration courses and conferences.

Mercedes writes regularly for various publications, such as for the firm's national and international newsletters, and contributed to the reissue of the Arbitration Code Aranzadi (2009) and the new Arbitration Code published by Thomson Reuters Aranzadi in 2017.

Mercedes Romero is listed by the legal directory *Best Lawyers* for arbitration and mediation.

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Daragh Brehony joined Pérez-Llorca in 2019 after practising law for several years at an arbitration boutique in Madrid. He is admitted as a barrister before the Irish Bar and is also admitted as an attorney at the New York Bar. He obtained his LLM degree from the New York University School of Law and has been developing his career in the field of litigation and arbitration in Spain for the better part of the past five years.

Daragh is a specialisist in commercial and investment treaty arbitration. He has acted both as counsel and as secretary to arbitral tribunals in arbitrations conducted in accordance with the rules of the International Chamber of Commerce, ICSID, ICDR, the Stockholm Chamber of Commerce, the London Court of International Arbitration, FIFA and FIDIC. He has also acted as counsel in federal litigations in the United States.

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Pérez-Llorca is a pre-eminent law firm in Spain. We provide high-end advice to international and domestic clients in connection with the largest and most complex transactions and disputes in Spain or matters with a Spanish component. We pride ourselves on offering unrivalled quality, service and long-term commitment to clients. The majority of our work is cross-border and often involves several jurisdictions. As an independent law firm, we approach multi-jurisdictional work by providing turnkey solutions together with other leading independent firms from Europe, the Americas or Asia. We offer full-service advice on Spanish law and operate from our offices in Madrid, Barcelona, London and New York.

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