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Contents

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INTRODUCTION

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Cases relating to the UNCITRAL Model Law on Arbitration (MAL)

Case 965: MAL 34[1]

Spain: Valencia Provincial High Court, Section 9
Reporting judge: Purificación Martorell Zulueta
10 October 2006
Published in Spanish
Full text in Aranzadi-Westlaw, 2007/76646
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *challenge to the award; public order principles of the applicable law; suspension of the award*]

A businessman sued a transport company for damage to goods. Following the award, the transport company appealed for the setting aside of the arbitral award made by the Transport Arbitration Board, under which it had been ordered to pay for the damage suffered by the goods in transport.

The Tribunal began by recalling the case law, including article 41 of the Arbitration Act No. 60/2003 (MAL art. 34), which regulates and lists the grounds for setting aside.

It then considered the grounds for setting aside brought by the transport company. The appellant argued that there had been a breach of article 41 (f) of the Arbitration Act No. 60/2003 (MAL art. 34, para. 2 (b) (ii)), claiming that the award was in conflict with public policy, in that it infringed the principle of flexibility that arbitration proceedings should observe and infringed the right to defence, trial and an adversary procedure. It argued that practice and custom had been infringed by the fact that the arbitration proceedings had not been permitted to develop in a flexible way and also that the arbitration tribunal had disallowed a written statement, thus depriving the appellant of its defence. The court held that, in invoking the infringement of public policy, the appellant was really seeking to return to the merits of the case. It therefore reaffirmed that legal doctrine did not allow that and said that, although the concept of public policy was vague, it should be understood as being "the entirety of the principles required for the coexistence of a community, as set out in Title I, chapter II, of the Constitution". The case file showed, moreover, that the arbitral tribunal had adopted a neutral stance and had not infringed the right to defence; so-called flexibility should not, in the Court's view, be used as a pretext for introducing time-barred arguments. Although the Statement of Purposes in the Arbitration Act referred to the flexibility of arbitration proceedings, it was undoubtedly the case, according to the Court, that such flexibility was not intended to be used by either of the parties as a means of ensuring that the arbitration proceedings unfolded in such a way as to suit their own personal convenience.

Lastly, with regard to the argument concerning the lack of reasons given for the award, which would mean that the right of effective judicial protection had been infringed, the Court considered that the award had been duly justified, in line with

[1] Arbitration Act No. 60/2003, 23 December 2003, article 41.

the opinion previously set out by the Constitutional Court with regard to judicial decisions to the effect that the requirement to provide reasons did not mean that the Court was required to provide an exhaustive and detailed judicial argument on every aspect or point of view that the parties might raise on the question under consideration; judicial decisions supported by reasons that demonstrated the essential legal criteria underpinning the decision — the *ratio decidendi* — should be considered sufficient.

Case 966: MAL 34[2]

Spain: Valencia Provincial High Court, Section 9
Reporting judge: Purificación Martorell Zulueta
21 September 2006
Full text in Aranzadi-Westlaw, 2007/132
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *challenge to the award; suitability for arbitration; public policy principles of the applicable law*]

A Spanish cooperative society, which was itself the partner of another cooperative company, applied for the setting aside of an arbitral award that declared invalid an agreement adopted by the defendant company's Annual General Meeting to amend its statutes.

The Court began by recalling the case law, including article 41 of the Arbitration Act No. 60/2003 (MAL art. 34), which regulates and lists the grounds for setting aside an award.

In its consideration of the grounds for setting aside the award, the Court stated, first, with regard to the infringement of the six-month deadline imposed on arbitrators by the Spanish Arbitration Act for deciding a dispute (Arbitration Act No. 60/2003, art. 37, para. 2),[3] that the *dies a quo* (the first day of the period allowed) was the date of submission of the statement of defence, as required by the rule of law, and that the *dies ad quem* (the final day of the period) was when the arbitrator decided the dispute (the words used in the Act are "ought to decide") and not when notification of an arbitral award made under a given decision was issued. In the case in question, the statement of defence had been submitted on 16 August 2005 and the arbitral award was dated 14 February 2006, which meant that it complied with article 37, paragraph 2, even if the notification of the award was issued after the expiry of the time limit.

Secondly, with regard to article 41.1 (e) of the Act (MAL art. 34, para. 2 (b) (i)) and the argument that the dispute was not capable of settlement by arbitration on the grounds that company agreements affecting the structural aspects of a company — in this case, the necessary amendment of the company statutes to comply with the

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[2] Article 41 of the Arbitration Act No. 60/2003 of 23 December 2003.

[3] Article 37.2 states: "Unless otherwise agreed by the parties, the arbitrators ought to decide the dispute within six months from the date of the submission of the statement of defence referred to in Article 29 or from the expiry of the period to submit it. Unless otherwise agreed by the parties, this period of time may be extended by the arbitrators, for a period not exceeding two months, by means of a reasoned decision."

Valencian Cooperatives Law — could not be subjected to arbitration, the Court considered that the appeal actually related not to that but to irregularities in the adoption of the agreement and, in particular, the infringement of the article in the company statutes that stipulated the percentage of votes required for the adoption of an agreement; and that question was entirely arbitrable.

Lastly, with regard to the argument that the award was in conflict with public policy (art. 41, para. 1 (f) of the Arbitration Act No. 60/2003; MAL art. 34, para. 2 (b) (ii)), the Court considered that, behind the claim that public policy had been infringed, there lay an attempt to return to the merits of the case. It therefore reiterated the legal doctrine, which did not permit such a course of action, ruling that although the concept of public policy was vague, it should be understood as being "the entirety of the principles required for the coexistence of a community, as set out in Title I, chapter II of the Constitution".

Case 967: MAL 3; 31 (4)[4]
Spain: Madrid Provincial High Court, Section 19, Case No. 225/2006
Reporting judge: Nicolás Días Méndez
12 September 2006
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *notification; receipt of written notification; arbitral award*]

In this case, the judge recalled the legal doctrine whereby a judge responsible for enforcement of an arbitral award may not consider the validity of the arbitral agreement concerned. The enforcement was, however, set aside on the grounds that notification of the award had not been received. The judge ruled that the intention of sending notification by registered post with acknowledgement of receipt was acceptable only as a back-up measure, where an attempt had previously been made to provide notification in person or by electronic or telematic communications and where, following a reasonable enquiry, the addressee's domicile, habitual place of residence or place of business could not be found. He also ruled that the requirement of proof of receipt referred to in article 5 of the Arbitration Act (MAL art. 3) should be understood to refer also to the award itself. The mere acknowledgement of receipt of a letter was not evidence of its content, since it was not registered and, moreover, it might be delivered to a person who was not the addressee and who had no obligation to ensure that it reached the addressee. This was reinforced by the provision in article 37, paragraph 7, of the Arbitration Act (MAL art. 31, para. 4), which referred to the notification of a copy of the award.

[4] Articles 5 and 37.7, Arbitration Act No. 60/2003 of 23 December 2003.

Case 968: MAL 18, 24, 25 and 34 (2)(a)(ii)[5]

Spain: A Coruña Provincial High Court, Section 6, Case No. 241/2006
Reporting judges: Ángel Pantin Riegada (President), José Ramón Sánchez Herrero and José Gómez Rey
27 June 2006
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *arbitral tribunal; procedural questions; hearing; the taking of evidence; failure by one party to appear; invalidity of the award; substantive law*]

An appeal was lodged against the validity of an arbitral award by the Galician Consumer Institute, on the grounds that one of the parties had lacked a proper defence, since, although it had clearly been given sufficient time to appear, it had, prior to the hearing — specifically, at two days' notice — sent the Institute a letter signed by its lawyer, in which he requested deferral of the hearing on the grounds that he could not attend because he was required to attend a criminal trial on the same day and at the same time.

Having determined that the question was not covered by the Arbitration Act No. 60/2003, the Court decided that it should follow the general principles of the legal system. It referred in particular to article 24, paragraph 1, of the Arbitration Act (MAL art. 18), which states that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case", and article 41, paragraph 1 (b) (MAL art. 34, para. 2 (a) (ii)), which states that an arbitral award may be set aside if it is proved that the party making the application was unable to present his case, grounds that, moreover, may be raised by the court of its own motion (art. 41, para. 2). On the other hand, it noted that, although the arbitrators had the right to decide at the time whether to hold hearings for the presentation of oral argument or the taking of evidence (art. 30, para. 1; MAL art. 24), once they had decided they had to give the parties sufficient advance notice and the parties would then "be able to take part directly or by means of representatives" (art. 30, para. 2) (MAL art. 25). Lastly, the Court referred to article 31, which made no provision for setting the proceedings aside.

In consideration of all these principles put together, the Court considered that the arbitral tribunal ought to have suspended the planned proceedings, since the party requesting the setting aside of the award was entitled to be represented by a lawyer and the lawyer in this case had not been able to be present because he had to attend a criminal trial, which took precedence, although that position was flawed, since the lawyer's presence was not obligatory. The failure to postpone the hearing had placed the party challenging the award in a situation where it had no real defence, in that it was not able to state its case, because the question under consideration was the setting aside of the arbitral award. It was for the arbitral tribunal to decide whether or not to resume the proceedings.

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[5] Articles 24, paragraph 1, 30, paragraph 1, 31 and 41, paragraph 1 (b) of the Arbitration Act No. 60/2003 of 23 December 2003.

Case 969: MAL 3[6]

Spain: Madrid Provincial High Court, Section 21, Case No. 208/2006
Reporting judge: Ramón Belo González
18 April 2006
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *notification; place of business; receipt of written notification*]

In this case, by contrast with other orders issued by the Madrid Provincial High Court that have also appeared as CLOUT abstracts, the Court ruled that it was valid to send a notification of an award by registered post with acknowledgement of receipt, on the assumption that the envelope contained the arbitral award, since no other content was likely. The Court therefore ruled that, although the registered letter was sent only to the third option given in article 5 (a) of the Arbitration Act (final sentence), it should not, for that reason, be considered to have been restricted to that option — in other words, if the addressee's domicile, place of residence or place of business could not be found after a reasonable inquiry is made — but rather efforts should be made to find the other two.

Case 970: MAL 34 (2)(a)(i)

Spain: Madrid Provincial High Court, Section 19, Case No. 335/2005
Reporting judge: Nicolás Díaz Méndez
12 July 2005
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *challenge to the award; petition for a declaration of invalidity; arbitral award; arbitration clause*]

The point at issue was the invalidity of an arbitral award owing to the invalidity of the corresponding arbitration agreement (art. 41, para. 1 (a), of the Arbitration Act No. 60/2003; MAL art. 34, para. 2 (a) (i)). It was argued that the arbitration agreement was invalid because it ran counter to article 9 of the Arbitration Act, which was cited to determine the validity of arbitration agreements included in a standard form agreement under the rules in the specific legislation. The Court thus ruled that the applicable legislation was the Consumer Protection Act, which, in exceptional circumstances, applied to contracts between two contractors, and ruled that the agreement was invalid, since, under the Act, arbitration agreements set out under general conditions of contract were valid only when they related to arbitration administered under a legally established consumer arbitration system.

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[6] Article 5 of the Arbitration Act No. 60/2003 of 23 December 2003.

Case 971: MAL 3 (1)(a)
Spain: Constitutional Court, Case No. 301/2005. Question of constitutionality Case No. 2771/2005
5 July 2005
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *habitual residence; notification; place of business*]

This case concerned a question of constitutionality that had come before the Madrid Provincial High Court (the body responsible for the execution of an arbitral award), namely whether article 5 (a) of the Arbitration Act No. 60/2003 (which corresponds to MAL art. 3, para. 1 (a)) was contrary to articles 9, 14 and 24 of the Spanish Constitution. Specifically, the provision whose constitutionality was in doubt was the final clause of article 5 (a) of the Arbitration Act (the final clause of MAL art. 3, para. 1 (a)).
The Constitutional Court dismissed the constitutional challenge on the grounds, first, that article 5 (a) of the Arbitration Act did not apply, or that it applied only in the absence of agreement between the parties (of MAL art. 3, para. 1) that the contract should specify a domicile to which communications should be sent. The question of constitutionality had arisen because the intention had been to send a notification to one of the addresses indicated in the contract, but that had not been possible, which was why article 5 (a) of the Arbitration Act had been applied by analogy, thus giving rise to the doubt in the Provincial High Court as to whether it was constitutional.

Secondly, the Constitutional Court dismissed the argument that the provision could be considered unconstitutional in that it infringed the principle of equality set out in article 14 of the Spanish Constitution. The argument that had been put forward was that the requirements for notification of a judicial decision were different from those for notification of an arbitral award. However, the Constitutional Court ruled that such a comparison overlooked not only the substantial difference between the two kinds of decision but also the legal effect when an intention to provide notification of a judicial decision was thwarted for reasons not attributable to the administration of justice, which was the corresponding presumption in article 5 (a) of the Arbitration Act.

Thirdly, the Constitutional Court ruled that the Provincial High Court had framed the question in an unreasoned way, since the defendant had resorted to arbitral proceedings and made his claim because he was required to inform the High Court of his change of domicile. It therefore ruled that the Provincial High Court had been incorrect in asking whether the provision was unconstitutional; in doing so, it had neglected its own task of judging and safeguarding procedural rights, since it was its own responsibility to determine whether or not a "reasonable enquiry" to find the addressee's address had been made (see art. 5 (a) of the Arbitration Act). In other words, the High Court was asking the Constitutional Court to pass judgement on the merits of the legal regulations, which were not a matter for the Constitutional Court.

Case 972: MAL 34 (2)(b)(ii)
Spain: Madrid Provincial High Court, Case No. 89/2005
Reporting judge: Amparo Camazón Linacero
9 May 2005
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *arbitral award; challenge to the award; arbitral tribunal; principles of public policy of the applicable law; suspension of the award*]

This case involved the dismissal by the Madrid Provincial High Court of an arbitral award by the same arbitration association, Asociación Europea de Arbitraje de Derecho y Equidad (AEDE), referred to in case No. 381/2005 heard by the Madrid Provincial High Court, Section 14, on 31 March 2005. The High Court held that the award was contrary to public policy on the grounds of the lack of impartiality of the arbitrators. As previously ruled in other judgements by the same Court, the lack of impartiality on the part of the administering arbitration association meant that the arbitration agreement was invalid.

In this judgement, the Court went one step further and ruled that there was a close connection between the arbitrators and the association. The Court came to this conclusion following an extensive consideration of a number of awards that AEDE had been responsible for administering, where it was clear that the same arbitrators were appointed again and again. It thus concluded that the lack of impartiality included the arbitrators themselves and that the award was invalid on those grounds, as being contrary to public policy.

Case 973: MAL 34 (2)(a)(iv)
Spain: Madrid Provincial High Court, Section 14, Case No. 381/2005
Reporting judge: Pablo Queredo Aracil
31 March 2005
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *arbitral award; challenge to the award; arbitration clause; arbitral tribunal; suspension of the award*]

Application was made for an arbitral award to be declared invalid on the grounds that the arbitration clause agreed between two businessmen was invalid (domestic arbitration). Specifically, there had been a failure to observe the formalities and the essential principles set out in the Arbitration Act on the appointment of arbitrators and the conduct of the arbitration proceedings (it may be inferred that the arguments for invalidity in this case were made on the basis of article 41, para. 1 (d) of the Arbitration Act No. 60/2003 and MAL article 34, para. 2 (a) (iv)).

The Court referred to the lack of impartiality on the part of the arbitrators, which it ruled had been evident in the case in question. The same institution (Asociación Europea de Arbitraje de Derecho y Equidad) that administered the arbitration, appointed the arbitrators and executed the award had also drawn up the contracts for firms in the sector (mobile telephones) at the request of those same firms and had done so, moreover, in the form of standard-form contracts, whereby the contracts and the arbitration agreements contained therein were binding on all the parties, without any possibility of their discussing the clause, the contract or the

administering institution. In other words, as the Court said, "the administrating arbitration association adjudicates using its own contracted arbitrators, whom it has groomed itself at the request of its more powerful clients".

Case 974: MAL 34 (2)(a)(i); 34 (2)(a)(iv)
Spain: A Coruña Provincial High Court, Section 4, Case No. 38/2005
27 January 2005
Reporting judge: Carlos Fuentes Candelas
Abstract prepared by María del Pilar Perales Viscasillas, National Correspondent

[**Keywords:** *arbitral tribunal; arbitration clause; challenge to the award; suspension of the award*]

The arbitration related to a collaboration contract agreed in 2001 between two — presumably Spanish — companies. The arbitral award was made in equity in 2004, but an appeal was lodged for its dismissal. It was claimed, first, that under article 41, paragraph 1 (a), of the Arbitration Act No. 60/2003 (corresponding to MAL article 34, para. 2 (a) (i)) the arbitration agreement was invalid, because it had designated as the institution to administer the arbitration "the Court of Arbitration of A Coruña Chamber of Commerce and Industry", whereas in fact the arbitration had been administered by the Galician Arbitration Association. A breach of article 41, paragraph 1 (d), of the Arbitration Act No. 60/2003 (MAL art. 34, para. 2 (a) (iv)) was also claimed. The Court rejected these grounds for invalidating the treaty, ruling that the reference was to the same arbitration institution, in that the latter had legally replaced the former in 1993 and there had been no other arbitral tribunal run by the Chamber of Commerce. The Court therefore found it logical to assume that, when the parties made their agreement in 2001 (that is, eight years after the abolition of the Court of Arbitration mentioned in the arbitration agreement), they were referring to the new institution and not the old court, which had been in existence for only three years before making way for a new organization and a new system.