J. Almoguera
Abogados

Is the action seeking the vacatur of an arbitral award waivable after having been brought?

Madrid, May 2017

Two recent judgments of the Madrid High Court of Justice (**MHCJ**) have followed the doctrine laid down by this court in previous decisions rendered in 2015 and 2016 on whether the parties are entitled to put an end to an action seeking the annulment of an award initiated by one of them. As in all earlier cases, the President of the MHCJ issued strong dissenting votes.

According to these judgments, the judicial action to set aside a domestic award when a violation of public policy may be at stake cannot be withdrawn pursuant to a settlement between the parties. This view, that is not shared by other Spanish High Courts of Justice, has raised a few eyebrows in the arbitration community.

In the MCHJ's majority view, once one of the parties to an award has brought an annulment action, there arises a public interest in the continuation of the action. Therefore, a subsequent settlement by the parties is not capable to put an end to the proceedings.

In one of these two cases the party challenging the award claimed that the arbitration clause incorporated in a letting agreement was null and void, given that one of the parties was a consumer (the tenant) while the other was a professional (the landlord). In the other case, the party that had brought the action had invoked a violation of the due process principles.

The basis to rule that the setting aside action cannot be settled, once it has been brought by one of the parties, is, according to these judgments, article 41.2 of the Spanish Arbitration Act, according to which the court may raise on its own motion, as grounds to vacate the award, that (i) one of the parties was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present its case, (ii) the arbitrators have decided on matters beyond the scope of the submission to arbitration, or (iii) the award is contrary to public policy.

In the prevailing view of the MHCJ, there is a public interest in "removing from the legal order" those awards that entail a violation of public policy. For this reason, the courts have the duty to *debug* the legal order from those awards.

However, according to the dissenting vote of the President of the MHCJ, (i) there is no legal provision that prohibits or limits the right of the parties to terminate the annulment proceedings, and (ii) no single judgment can be found in the data bases supporting the view of the majority of the MHCJ (the vote mentions as much as 28 judicial precedents from various HCJ -including the MHCJ itself- accepting the waiver of the annulment action after having been brought). The dissenting judge went on saying that the "rigid and dogmatic" stance of his fellow judges does not result in any

benefit whatsoever to the parties, to the administration of justice or to the very institution of arbitration, but rather in an artificial continuation of the vacatur proceedings. This approach is, in the view of the dissenting judge, contrary to the principles of flexibility and lack of formalism that are essential to arbitration.

In our view, the dissenting vote is right, for there does not seem to be any fundamental reason why the parties to a vacatur proceedings against an award should not be able to dispose of the action while they can do so when the decision challenged is a judgment, all the more taking into account that arbitration is a *creature of contract.*

This conclusion does not apply, naturally, when the agreement to terminate the vacatur proceedings has an illegitimate goal or is otherwise contrary to a legal provision specifically aimed at protecting the general interest or third party rights.