

Award set aside on public policy grounds for arbitrators' failure to consider relevant evidence (Madrid High Court of Justice)

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In *Engasa Eólica SA v Vestas Eólica SAU* (Judgment No.15/2018), the Madrid High Court of Justice set aside an award for being contrary to public policy, under Article 41.1(f) of the Spanish Arbitration Act.

[Facts](#)

[Decision](#)

[Comment](#)

[Case](#)

Speedread

In a decision dated 5 April 2018, but only recently published, the Madrid High Court of Justice set aside an award issued by the majority of an arbitral tribunal constituted under the rules of the Spanish Civil and Commercial Arbitration Court, for violation of public policy.

The court unanimously held that the arbitral tribunal arbitrarily issued an award having irrationally assessed the evidence. In particular, the tribunal had failed to examine all of the documentary evidence and excluded evidence that could have been crucial to revealing the true intention of the parties when signing an Engineering, Procurement and Construction (EPC) agreement and, therefore, to the outcome of the dispute.

The judgment demonstrates that arbitrators should be mindful of the core principles enshrined in Article 24 of the Spanish constitution. Although the decision has received criticism from some quarters, in the authors' view, the arbitrators failed to draft an enforceable award and the court took the correct approach to uphold its duty to protect due process rights. The arbitral tribunal should have examined all the documentary evidence provided by the parties, at least to mention that, in its view, those documents did not sufficiently prove that the parties intended to sign a real turnkey agreement. Had the majority done so, the court would not have concluded that the award was arbitrary and would have upheld the majority's decision.

The case also suggests that arbitral rules that provide for the award to be reviewed before being finalised are wise and may avoid decisions that do not satisfy minimum legal requirements. (*Engasa Eólica SA v Vestas Eólica SAU (Judgment No.15/2018), 5 April 2018.*)

Background

Article 41.1(f) of the Spanish Arbitration Act provides that an award may be set aside only if the applicant alleges and furnishes proof, among other things, that the award is in conflict with public policy.

Article 24.1 of the Spanish constitution enshrines the right to effective judicial protection (due process). In particular, it establishes that "every person has the right to obtain the effective protection of judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended".

Accordingly, the right to a reasoned decision and to the assessment of all evidence forms part of the parties' due process.

Facts

The underlying arbitration concerned a dispute surrounding an Engineering, Procurement and Construction agreement (*EPC contract*) between Engasa Eólica SA (Engasa), a Spanish wind energy producer and Vestas Eólica SAU (Vestas), a Danish-owned company that offers wind project planning, construction and operation.

In February 2006, Engasa and Vestas entered into an EPC contract and two operation and maintenance agreements, whereby Vestas would carry out the execution (and subsequent maintenance) of Xiabre's wind farm under EPC turnkey conditions.

For this purpose, Vestas entered into a civil execution agreement with Isolux Ingenieria SL (Isolux) in March 2006, whereby Isolux, as a subcontractor, would construct the foundations of Xiabre's wind farm.

Engasa initiated an arbitration against Vestas, alleging that the foundations were defective. Among other things, it requested Vestas to rebuild the Xiabre's wind farm or, alternatively, to pay EUR3.2 million for the reconstruction.

In establishing the real intention of the parties, the majority of the arbitral tribunal found that:

- The documentary evidence the parties provided suggested that the parties' intention was to release Vestas from any liability arising from the subcontracted works that Isolux carried out. In essence, the award considered that the EPC agreement was "virtual" and not "real".
- In this regard, the majority of the arbitrators considered that Vestas agreed to sign an EPC agreement, provided Engasa waived the right to claim any amounts derived from the subcontracted work.
- Engasa also agreed to pay Isolux separately from Vestas.

Therefore, in October 2016, the majority of arbitrators issued an award dismissing all of Engasa's claims, concluding that, notwithstanding the EPC contract, Engasa agreed to exonerate Vestas from any liabilities resulting from Isolux's works.

However, the award was not unanimous. The dissenting arbitrator considered that Vestas, as a turnkey contractor, assumed full liability for the construction and maintenance of the Xiabre's wind farm (being also responsible for the work carried out by its subcontractor, Isolux) and, consequently, that the EPC agreement was "real" and not "virtual".

Remarkably, the dissenting arbitrator highlighted that there was clear documentary evidence in the arbitration proving that Engasa did not agree to release Vestas from its liability. On the contrary, based on such documentary evidence that the majority had not considered, the dissenting arbitrator reached an opposite result. Apparently, none of the documents attributing liability to Vestas were analysed in the majority's award.

Decision

The Madrid High Court of Justice upheld the annulment action and set aside the award.

In its decision, the court examined Engasa's first argument for set aside, consisting of an alleged irrational assessment of the evidence for having considered that Vestas was not liable even though the parties had expressly entered into an EPC agreement.

The court unanimously agreed that the majority of the tribunal had not examined all available evidence and actually excluded some documentary evidence that could have been crucial to establish what was the real intention of the parties when signing the EPC agreement.

In particular, the court affirmed that the majority of arbitrators had not assessed any of the communications discussed in the dissenting opinion, even though they required some consideration. The court stated that, to determine the true intentions of the parties when signing the EPC agreement, the arbitral tribunal should have reviewed all the documentary evidence, not just some of it, even if only the purpose of deeming it irrelevant.

Therefore, the failure to make any mention of those communications without any justification or explanation made the court conclude that the award had been arbitrarily issued. Otherwise, it was not possible to understand why the arbitral tribunal did not take into consideration such evidence.

In addition, the court noted that the evidence that was not examined in the award was closely related to one of the main issues in the proceedings, namely the legal nature of the EPC agreement and the attribution of the parties' liability.

Notably, the court did not suggest that the majority decision was wrong, just that lacking any reference to such relevant evidence was tantamount to arbitrariness and contrary to public policy.

Comment

In its decision, the Madrid High Court of Justice expressly recognises that it is not entitled to review whether the dissenting opinion is better grounded than the majority's opinion or to revise the arbitrators' conclusion about the real intention of the parties.

However, it considers that the court has a duty to verify if the arbitral tribunal has taken into account all the evidence in making its award or if it unreasonably omitted to consider essential evidence in its determination of the dispute. If this happens, due process rights are affected and there is a violation of procedural public policy.

The court's decision has received criticism from some quarters. However, the authors consider that the judgment is correct and that the arbitrators should be mindful of the core principles enshrined in Article 24 of the Spanish Constitution. The arbitral tribunal should have examined all the documentary evidence provided by the parties, at least, to mention that, in its view, those documents did not sufficiently prove that the parties intended to sign a real EPC agreement. Had the majority mentioned them, the Madrid High Court of Justice would never have concluded that the award was arbitrarily issued and the majority decision would have been upheld. Unlike some other commentators, in the authors' view the award was set aside because of the arbitrators' failure to draft an enforceable award, rather than because the court took the wrong approach to its duties as a protector of due process rights.

The case also suggests that arbitration rules providing for awards to be reviewed before being finalised are wise and may avoid decisions that do not satisfy minimum legal requirements.

Furthermore, the Madrid High Court of Justice has rendered a subsequent similar decision on 12 April 2018 and practitioners should be aware of the current tension between arbitrators and the High Court of Madrid. In the authors' view, both arbitrators and the court should be mindful of their respective roles and carry out their respective duties in a rigorous and professional manner.

Case

Engasa Eólica SA v Vestas Eólica SAU (Judgment No. 15/2018) (15 April 2018).

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