Resumen: Este artículo analiza las implicaciones de una serie de anulaciones de laudos arbitrales por infracción del orden público en arbitrajes de suelo (o per nascentis financierorum) en Madrid. Comienza explicando el concepto jurisprudencial español de orden público, el cuyo precedente del derecho a la tutela judicial efectiva recogido en la Constitución Española y de los principios fundamentales de Derecho Europeo. Examina también los requisitos de la Directiva relativa a los mercados de instrumentos financieros (MiFID) y su implementación en la legislación española, y aborda el rezago jurídico de las sentencias de anulación más importantes dictadas por el Tribunal Superior de Justicia de Madrid. El Tribunal Superior de Justicia de Madrid ha anulado laudos arbitrales en base a una nulidad arbitraria y a una nueva doctrina sobre orden público "económico". Hay laudos que han sido anulados por cuestiones de fondo encubiertos, y también ha habido otras decisiones judiciales que han demostrado una desconfianza por parte del sistema judicial en el arbitraje en el contexto de los suelos. El artículo sugiere que la ausencia de la información entre los bancos y las inversores, cuestiones que regula la Directiva MiFID, ha sido acompañada por una asimetría procesal en la resolución de conflictos, generada por el uso por parte de los bancos de contratos de adhesión con cláusulas arbitrarias. El resultado ha sido que los tribunales judiciales han impugnado la legitimidad del arbitraje en el contexto de los suelos. El artículo concluye estableciendo que cuando se produce una desacertada entre las resoluciones de los tribunales judiciales y las de los tribunales arbitrales en disputas que son idénticas desde un punto de vista jurídico, como ha ocurrido en este caso con los suelos, la legitimidad del arbitraje se pone inevitablemente en duda.

A. Introduction:

We have become accustomed to criticism of investment arbitration. It is pejoratively portrayed as a privileged private forum for multinational; as an impediment to the regulatory power of states; as undemocratic and an infringement of national sovereignty. Investment arbitration stands accused of favouring investors over States, and certain States have withdrawn from their commitments to investor-State arbitration. The European Union has proposed an investment court staffed with national judges for investor-State dispute resolution. The European commission, in a statement on a proposed EU trade agreement with Japan, stated that: "For the EU-JSDS [Investor State Dispute Settlement] is dead." 2

International commercial arbitration has not been subject to similar sustained or trenchant criticism, but nor has it been exempt from controversy. In England a speech by the Lord Chief Justice in 2016 suggested that the success of international arbitration was having some negative effects on the development of the common law, and that it was time to look again at the balance between the courts and arbitration. 3 In France, the high profile and politically controversial Tatoli case saw the Cour de Cassation confirm the annulment of a substantial award for having been procured through the 'fraudulent collaboration' between a party, his counsel and

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3 Lord Thomas LCJ Developing commercial law through the courts: re-evaluating the relationship between the courts and arbitration, The Bailiffs Lecture 2016, 9 March 2016, available at:
one of the arbitrators. Both these examples draw attention to the role of judicial supervision of arbitration.

It is impossible to identify an optimal level of judicial supervision of commercial arbitration. Arbitral practitioners are quick to praise local courts when they refuse to interfere in the arbitral process or to annul an award, and to draw the inevitable conclusion that judicial restraint indicates that a jurisdiction is a safe choice for an international seat. Judicial restraint is equated with jurisdictional impunity and security for the purposes of international arbitration. There is however a fallacy in this popular logic: judicial restraint may simply reflect judicial indifferenc e or ineffectiveness. The evaluation of judicial restraint or activism requires first an assessment of the quality and sophistication of the legislation and case law of the jurisdiction.

It also requires an assessment of the quality of the local arbitrators and arbitral awards. A lower incidence of judicial intervention might be expected in a mature arbitral jurisdiction, with established and experienced arbitrators, than in a jurisdiction where arbitration is a novelty and experience is limited and uneven. Evaluating local arbitral standards is subjective, and complicated by questions of confidentiality and professional courtesy.

Another possibility is that judicial activity might reflect novel developments or simply turbulent and uncertain times, rather than issues peculiar to international commercial arbitration. In recent years commercial arbitration has entered new fields such as corporate and testamentary arbitrations, class actions and new jurisdictional extensions, and innovation is always likely to generate applications for judicial clarifications.

Form as well as substance is also important in assessing judicial activism in arbitration. It is important for annulment judgments to be securely reasoned, temperate in tone, and minimal in their interventions. The relationship between the arbitral and judicial functions must be mutually supportive, and based on shared values. If comity is lost, arbitral credibility and legitimacy will suffer.

The purpose of this paper is to review and interpret recent annulment decisions on public policy grounds in swaps arbitrations in Spain. This analysis requires a preliminary explanation of the identification in Spain of public policy with "fundamental" legal rules, which may be derived either from the Spanish Constitution or European law. It also requires an introduction to the EU Markets in Financial Instruments Directive 2004/39/EC ("MiFID Directive") and its implementing legislation in Spain.


8 Art. 422 Arbitration Act.


8 Law 14/2003, of 30 June, on Regulation of the Competence of Spanish Courts in International Commercial Arbitration.

nely, a decision that terminates their dispute with all the effects of res judicata. It is a commonplace that consent is the basis of the jurisdiction of an arbitral tribunal; in Spanish law it is also the indispensable foundation of the constitutional legitimacy of the exercise of that jurisdiction.

The Constitutional Court has reconciled arbitration with the exclusive jurisdiction of the ordinary courts on the basis that arbitration is an exercise of personal autonomy which itself has constitutional recognition as Article 1.1 of the Spanish Constitution defines Spain as a democratic state of law, and identifies freedom as a superior value of the legal system. In the exercise of their freedom, the parties cannot submit a dispute to arbitration without any violation of their constitutional right to effective judicial protection.11

Nevertheless, the jurisdictional implications of arbitration require that the constitutional rights of the parties of recourse to the courts and to due process be guaranteed. Therefore, the award must be subject to the supervisory jurisdiction of the courts through the action of annulment. Further, the arbitrators must at all times respect the right of defence, as defined in Spanish constitutional law, and if they do not then the parties have a right of recourse to the ordinary courts. This right of recourse is exercised through the action of annulling, and so a breach of the right of defence guaranteed by Article 24.1 of the Spanish Constitution will result in the annulment of the award.

The constitutional guarantee of the right of defence means that provisions of the Arbitration Act that deal with due process have not only an immediate procedural significance as the arbitration progresses, but also a supervening constitutional significance that might manifest itself in annulment proceedings. This applies, for example, to Article 24.2 of the Arbitration Act that requires the arbitrators to treat the parties with equality and allow them a sufficient opportunity to present their cases. The scope of this obligation is defined by Spanish constitutional law. Similarly, the requirement in Article 37.4 of the Arbitration Act that an award be reasoned, imports into arbitral practice the ample constitutional jurisprudence relating to the adequacy of reasons. In both cases, a violation of the requirements of constitutional law is challenged through the action of annulment.

The reasoning requirement means that an award must state sufficient facts and reasons to demonstrate the grounds of the decision, and must be based on legal rules. Reasons alone are not sufficient; the reasons must have legal context and not be arbitrary.12 An arbitral award may be annulled for breach of the public policy when there are no reasons, or the reasoning is capricious, a mere appearance, or expresses an irrational or absurd deductive process. Although examination for arbitrability should not involve reconsideration of the merits, the premises and reasoning of an award have on recent occasions been examined in extensive detail.13

Article 41 of the Arbitration Act provides for the grounds of annulment, following in general terms the annulment scheme of the UNCITRAL Model Law. However, there is not always a comfortable correlation between these grounds of annulment and the Spanish concept of the right of defence or due process, with the result of an over-reliance in Spain on the public policy ground of annulment. In effect, any award found to infringe the right of defence guaranteed by Article 24.1 of the Spanish Constitution is ipso facto contrary to Spanish public policy and will be annulled.

C. Public Policy and ‘Fundamental’ Rules of European Law:

The public policy ground for annulment not only has to accommodate the requirements of Spanish constitutional law; Spanish public policy must also recognize certain fundamental legal rules of European law.14

The starting point for discussion of European law and the public policy of Member States is the well-known decision of the Court of Justice of the European Union in Eco Swiss China Timed Ltd v Banetton International NV (“Eco Swiss”). The Court held that Article 85(1) of the EC Treaty prohibiting anti-competitive agreements “constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market”. If follows, the Court went on, “that where indirect restrictive rules of practice are required to grant an applicant the consequences of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.”15 It also stated for good

Spanish Constitutional do not guarantee the justice of the decision or the legal correctness of the proceeding or interpretation carried out by the judicial organs, in a right to correctness does not exist now they ensure the satisfaction of the claim of any party to the proceeding, what they do ensure in any case is the right to have the case decided and recognized in the proceeding established for this purpose, in compliance with the constitutional guarantees that allow the right of defense, and to conclude the proceeding with a decision based on law, which may be favorable or adverse to the claim made...Article 34 of the Constitution imposes on the judicial organs the obligation to issue decisions based on law, and this requirement cannot be considered fulfilled by the mere issuance of a declaration of will in one sense or another, but must be the consequence of a rational exercise of the legislation and not the result of arbitrariness. It is not enough, therefore, to obtain a reasoned decision, but, in addition, it must have legal content and not be arbitrary. A judicial decision can be termed arbitrary either, although there is a formal line of argument, this is not an expression of the administration of justice, but rather a simple appearance because it is the result of mere judicial will or expresses an irrational or absurd deductive process...” Cj. Article 218 of the Spanish Civil Procedure Act, which defines the legal requirements of judgments in the Spanish civil courts.

10 Judgment 15/1987 of the Constitutional Court.
11 Judgment 176/1996 of the Constitutional Court fundamento Juridico 3, referring to the function of arbitration as causa mutua hateriones de arreglo de controversias que se fundamentan en la consensión de la voluntad de los sujetos privados; lo que constitucionalmente le vincula con la libertad como valor superior del ordenamiento juridico (art. 1. C.C.). De manera que no cabe entender que, por el hecho de someter voluntariamente controversias litigiosas al arbitraje de un tercero, quede nievados y perjudica el derecho a la tutela judicial efectiva que la Constitución reconoce a todos.
12 In its judgment 265/2015 of 14 December 2015 the Spanish Constitutional Court describes the duty to give reasons in the following terms (author's translation): case citations omitted: “It is necessary to remember that even though the rights and guarantees provided in art. 24 of the
13 See, for example, Dyza Credit Legal, S.A. v. Banco Sabadell S.A Superior Court of Justice of Madrid, 16 March 2010, Transportes Para Fletes C.A v. Banco Bilbao Vizcaya Argentaria S.A. Superior Court of Justice of Madrid, 3 November 2015.

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measure that "the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention."16

The reasoning is straightforward: an arbitral award that contravenes a fundamental provision of EU law should be annulled on public policy grounds by the courts of the Member States. This simple statement of principle conceals many thorny issues: do all violations of a fundamental provision require annulment and, if not, what is the standard to distinguish annulable from acceptable violations of competition law? Was it necessary for the parties to raise the competition law issue in the arbitration in order to justify annulment? Should arbitral tribunals raise competition law issues sua sponte in arbitral proceedings? Many of these issues have been addressed by the courts of the Member States since 2000.17

However, the greatest uncertainty arising from Eco Swiss was what other provisions of EU law are so fundamental that their non-compliance requires the annulment of arbitral awards on public policy grounds? Two references from Spanish courts arising from arbitration clauses in telecommunications contracts made clear that EU Directive 93/13 on unfair terms in consumer contracts was of such a mandatory character. In Elsa María Montaza Claró v Centre Móvil Millennium SL ("Montaza Claró")18 the First Chamber of the Court identified the 'mandatory' and 'essential' nature of this EU consumer protection legislation:19

"36. The importance of consumer protection has in particular led the Community legislature to lay down, in Article 6(1) of the Directive, that unfair terms used in contracts concluded with a consumer by a seller or supplier 'shall ... not be binding on the consumer'. This is a mandatory provision which, taking into account the particular position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.

37. Moreover, as the aim of the Directive is to strengthen consumer protection, it constitutes ... a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory (see, by analogy, concerning Article 81 EC, Eco Swiss, paragraph 361)."

Given the importance of consumer protection, a court seised of an action for annulment of an arbitral award "must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the con-

16 Ibid, paragraphs 36, 37 and 39.
18 Judgment of the Court (First Chamber) of 26 October 2006; ECLI:EU:C:2006:675.
19 Montaza Claró, paragraphs 36 and 37.
The Spanish implementation of the MiFID Directive included amendments to securities legislation (specifically amendments to the Ley de Mercado de Valores ("LMV")) and a new Royal Decree 217/2008 in relation to investment service providers.\(^{26}\) Art. 79bis.1 of the LMV required investment service providers to classify their clients into two classes: professional clients and retail clients. It defined professional clients, and Art. 79bis.4 deemed all clients to be retail clients except for investment professionals.

Art. 79bis of the LMV defined the information obligations of investment service providers. Investment information was required to be fair, clear and not misleading. It was also required to include sufficient information to enable the client to understand the nature and risks of the investment service and of the specific type of financial instrument that was being offered so as to enable the client to take investment decisions on an informed basis.\(^{27}\)

Art. 79bis distinguished between investment advice and other services (which included execution-only services). Art. 79bis also identified the information financial service providers were required to obtain from their clients, which was elaborated by regulation in Royal Decree 217/2008. Articles 72-74 of Royal Decree 217/2008, following the MiFID Implementation Directive, distinguished between the suitability and appropriateness risk assessment required by financial service providers:

(i) The suitability assessment (evaluación de la idoneidad), applicable to investment advisory services, required the financial institution to obtain sufficient information to ensure their recommendations met the investment objectives of the client, and that the client could assume the risks of the investment;

(ii) The less demanding appropriateness assessment (evaluación de la conveniencia), applicable to other services, required the financial institution to ensure that the client had the knowledge and experience necessary to understand the risks of the product.

The financial crisis generated a significant volume of disputes relating to the misselling of financial products offered by Spanish financial institutions to retail investors, including swaps. One study provides figures for the number of judgments and success rates for retail clients on appeal from decisions at first instance in swaps cases.\(^{28}\)

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26 Ley 24/1998 de 28 de julio, del Mercado de Valores; Real Decreto 217/2008, de 15 de febrero, sobre el régimen jurídico de las empresas de servicios de inversión y de las demás entidades que prestan servicios de inversión. This securities legislation has now been consolidated see Real Decreto Legislación 6/2015, of 23 de octubre, por el que se aprueba el texto refundido de la Ley del Mercado de Valores.

27 Art. 79bis.2 and .3 LMV (cf. Art. 19.2 and 19.3 MiFID Directive).

28 See table 2.1 'Comparativa de conclusiones sobre swaps in AAPP 2012-2015', Inxsas Legal y Tributario SLP Observatorio de la Jurisprudencia de productos financieros complejos, Año 2015 page 18 (figures derived from the Watslaw database of Spanish judgments for the Academias Provinciales, where cases go on appeal after a decision at first instance); available at: http://www.jussexlegal.com/observatorio-de-la-jurisprudencia-de-productos-financieros-complejos-2015.

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(i) In 2013, there were 900 appeal judgments involving swaps, with a success rate for retail clients of 70.55%.

(ii) In 2014 there were 1,057 appeal judgments involving swaps, with a success rate for retail clients of 74.17%.

(iii) In 2015 there were 733 appeal judgments involving swaps, with a success rate for retail clients of 82.5%.

These figures are dominated by a reduced group of leading banks, with Banco Santander, Spain largest bank, comprising 38.07% of a sample of 415 judgments. Spain's second and third largest banks, Banco Bilbao Vizcaya ("BBVA"), and Caixabank, made up no more than approximately 7% each of the sample.\(^{29}\) These figures are supported by the study of judges with each of the largest institutions, with the study qualifying these figures by noting that both BBVA and Caixabank rely on arbitration clauses in the majority of their contracts.\(^{30}\)

In the important judgment in Marbes e Tògi S.L. v Caja d’Estalvis del Penedès ("Togi")\(^{30}\) of January 20, 2014 the Spanish Supreme Court considered the legal consequences of a bank’s failure to perform the suitability assessment, or to properly inform the client of the risks of a commodities swap contract. The Supreme Court noted the importance of the information obligation, reasoned that the information required by Art. 79bis LMV was indispensable in order for a retail investor to validly consent to the contract, so that the client that entered into the contract without knowledge of the risks of the swap's risks was acting under a fundamental mistake, and that the swaps contract was accordingly void.\(^{31}\) These cases followed numerous other judgments applying these principles to the facts of particular swaps contracts.

As noted above, two of Spain’s leading banks included arbitration clauses in most of their swaps contracts, usually in the standard form Framework Agreement on Financial Transactions (Contrato Marco de Operaciones Financieras o CMOF).\(^{32}\) The volume of disputes meant that there were multiple arbitrations raising similar issues, administered by a reduced group of institutions, and where the banks often appointed the same arbitrators in multiple cases. Arbitral tribunals, like the courts in similar cases, had to deal with the submission that the financial institution had not performed the appropriate assessment, or had properly informed clients of the risks associated with swaps products.

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26 Ibid., page 9.


30 The Court referred to the complexity of financial products, the "information asymmetry" at the time of contracting, and the need to protect the investor; relating the MiFID duty to provide information to the duty of contractual good faith in Spanish and European law: Togi, paragraph 6.

31 Togi, paragraphs 10-12. The Supreme Court also noted that although the omission of the suitability assessment did not of itself mean that a client lacked knowledge of the risks of a swaps contract, it did create a presumption of a lack of sufficient knowledge (paragraph 14).

32 On these framework agreements see Piñar Perale, Vícarriales Arbitraje financiero: ¿Sonvalido o arbitrable? Spain Arbitration Review, 24/2015 pages 9-24; The Asociación Española de Bancos ("AEB") has a model framework agreement, based on the model of the International Swaps and Derivatives Association. Annex 1 to this model, entitled optional clauses, has model jurisdiction clauses, including model arbitration clauses. The model framework agreement and Annex 1 are available on the website of the AEB at: https://www.aebanc.es/es/Documentssectorial/ContratosMarcoOperacionesFinancieras.pdf.
The awards in these arbitrations found their way before the Spanish courts in annulment proceedings. Jurisdiction over annulment applications rests with the regional Superior Courts (Tribunales Superiores de Justicia). The most active court has been the Superior Court of Madrid, where the rates of annulment have been high, and they have found the courts often unsettled for the arbitral community. Between January 1, 2012 and December 31, 2016 BBVA was the respondent in thirteen annulment proceedings arising from swaps arbitrations. Eight of the thirteen awards in these proceedings were annulled, an annulment rate of 61.54%.

E. ‘Arbitrariness‘ and ‘Economic’ Public Policy in Swaps Arbitrations:

The reasoning of the Superior Court of Madrid in the swaps cases is well illustrated by the leading judgment in Repos v Repsol, S.L. v BBVA (“Repos”)34. It is important to consider the facts and reasoning in this annulment decision in some detail, as it demonstrates an approach repeated in subsequent annulment decisions, and provides an excellent platform to identify the disturbing issues raised by this line of annulment cases.

The Claimant in Repos requested the nullity of a CMOF or framework contract and an associated interest rate swaps contract. The arbitral tribunal rejected this claim and found for BBVA. The claimant sought the annulment of the award on public policy grounds, alleging that BBVA had not complied with its obligations under the LMEV, and related norms.35

The judgment in the Superior Court of Madrid enables the identification of certain key factual findings and legal conclusions made by the arbitral tribunal:

(i) The Claimant approached BBVA to unify various credits with the bank, and also asked for a product that would avoid variations in the interest rate payable by the Claimant. BBVA responded by offering an interest rate swap, indicating that this product was ideal for stabilising the financial costs of the firm;36

(ii) The interest rate swap was not a product of particular complexity;37

(iii) The Award found that BBVA applied the test of appropriateness (conveniencia) and was not obliged to apply the test of suitability (idoneidad);38

(iv) In applying the test of appropriateness, BBVA considered the personal circumstances of the Claimant’s administrator, who the Tribunal found had knowledge and experience of financial products which required that he exercise a higher level of care than an ordinary consumer;39

(v) The Arbitral Tribunal did not make any express finding over the provision of information by BBVA regarding the costs of cancellation, instead finding the Claimant knew that it was contracting a product of 13 years duration;

(vi) The information provided by BBVA was not misleading in any way;40

(vii) Indeed, the evidence from a recorded telephone conversation confirmed that the Claimant’s administrator understood the product contracted.

The Superior Court of Justice of Madrid noted the established case law that an annulment is not an appeal, and that annulment is limited to the grounds set out in the Arbitration Act.41 Turning to the public policy ground, the Superior Court of Madrid stated that public policy included the fundamental rights and liberties protected by the Constitution as well as imperative norms of European law “that are now known as ‘economic public policy’ which includes certain basic rules and irrevocable principles of contracting in circumstances of special seriousness or singularly necessary of protection”, referring to the jurisprudence of the European Court and specifically to Eco Swiss, and also to the Supreme Court decision in Togi. By associating Eco Swiss and Togi in this way, the Togi decision was raised from a definitive determination of Spanish law (an error in regard to which by an arbitral tribunal is not a ground for annulment), to a rule ‘fundamental for the functioning of the market whose breach justifies annulment or the non-recognition of an award’. The basis of this principle, according to the Superior Court and referring explicitly to Togi, was contractual good faith, the breach of which was especially reprehensible in a contractual situation of ‘desequilibrium, disparity or asymmetry between the parties by

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34 Superior Court of Justice of Madrid, 28 January 2015, judgment 13/2015.
35 Repos, Fundamento Jurídico Sexto y Cuarto.
36 Repos, Fundamento Jurídico Sexto, 2nd fourth paragraph: “En el caso de la negociación con la Demandada, la Demandante, por medio del Sr. Julio, expresó su preocupación por la encuadra de subidas de tipos de interés y se interesó por si había algún producto que le cubriera de las subidas de tipos para no tener sorpresas de un año a otro con sus costes financieros. La Demandada le ofreció entonces la suscripción de una perruca de tipos de interés, individualizada dicho producto como último para estabilizar el coste financiero de su empresa.” See also Fundamento Jurídico Séptimo, fourth paragraph: “En este sentido, el propio laudo estima (§ 9, F 7) que ‘resulta determinante la cantidad del testamento del Sr. Julio (3 Administrador del Demandante) al tono en el acta de la venta fue meritorio a señalar que su principal preocupación al tiempo de contratar la operación era eliminar el riesgo de las variables subidas de tipos, y asegurarse de que los costes financieros fueran siempre estables, pues no quería sorpresas’.”
37 Repos, Fundamento Jurídico Sexto: “El laudo, con más razón, considera suficiente ese test y excluye la prioridad del test de idoneidad (§ 13, F 5), cuando pondiera el cumplimiento por BBVA de sus obligaciones de información.”
38 Repos, Fundamento Jurídico Séptimo, second paragraph.
39 Repos, Fundamento Jurídico Séptimo: “Así en el §23 [del laudo] se advierte que se ‘aporta una información clara, correcta, sincera y que engloba a la demandada para que, con una mínima duda, fuera consciente de los elementos necesarios del producto que estaba contrayendo, en virtud del cual, y como lo indica D. Andrés: ’Sería equivocado decir que usted tiene un tipo fijo para el problema del 5,70% (ya que el Emisor que paga el cliente al Banco se compri en el Jurisdiccional que recibe el cliente del Banco’.”
40 Repos, Fundamento Jurídico Cuarto.
reason of the complexity of the product and the disparate knowledge of the contracting parties.\(^\text{41}\)

Turning to the facts of the case, the Superior Court of Madrid began by recording “obvious errors of law, manifest in the award, that contravene the legislation” as well as “omissions in reasoning equally obvious,” including the following:

(i) This was clearly a case of investment advice to a retail client and so the test of suitability (and not mere appropriateness) applied. Nevertheless, the arbitral tribunal had found that an appropriateness assessment had been performed, and that BBVA was not required to perform the suitability test. In this respect, the award had an obvious error in respect of a basic element relating to the information obligation, and therefore was constitutionally invalid by reason of its arbitrariness;\(^\text{42}\)

(ii) The award found that the swaps contract was not particularly complex, while the LMV specifically prohibited that a swaps contract be considered non-complex;\(^\text{43}\)

(iii) the award stated that it was obvious that the swaps contract did not provide for early cancellation, and entirely overlooked the obligation of the bank to inform the client regarding the possibility of early cancellation and the costs that this involved.\(^\text{44}\)

The judgment concluded that the finding in the award that there was no mistake by the investor sufficient to vitiate the contract was based on the obvious breach of mandatory rules, and that these breaches of mandatory rules meant that the reasoning of the award was arbitrary.\(^\text{45}\) The Court said that it was not its function to decide whether the contract was void for mistake and lack of consent; however, this award was annulled for being contrary to public policy, as the reasoning was arbitrary, in violation of the right of defence guaranteed by Article 24.1 of the Spanish Constitution, in that it was manifestly contrary to mandatory legal rules. In addition, the importance of these mandatory rules as an expression of contractual good faith was a question of public policy that provided an additional basis of annulment.\(^\text{46}\)

Accordingly, two breaches of public policy were ultimately relied upon: the breach of the right of defence guaranteed by Article 24.1 of the Spanish Constitution, and secondly, the violation of the “economic public policy” identified with the policy objectives of MiFID and LMV of contractual good faith, and the protection of retail investors. A breach of the right of defence by reason of arbitrariness was an established ground of public policy based on Spanish Constitution. The breach based on “economic public policy” was a new extension of public policy, based in European law and derived from Eko Suisse.

From an arbitral perspective, this judgment requires a number of comments:

(i) Notwithstanding the Superior Court's protestations to the contrary, the award was clearly annulled on the merits. The fact that the Superior Court avoided a pronouncement of the ultimate issue of whether the contract between the Claimant and BBVA was void for mistake, and framed its decision in the language of constitutional doctrine and fundamental law, does not purport that the Superior Court identified basic factual and legal errors affecting the merits, and annulled the award on the basis of these errors;

(ii) The doctrine that arbitrary reasoning justifies annulment is only defensible where the doctrine is narrowly confined. It is relatively easy, for a determined judge, to reframe a disputable finding of fact or law as an error in reasoning;

(iii) The doctrine that certain EU laws are fundamental, and therefore any decision inconsistent with these laws is annulable, is a thinly disguised justification for annulment on the merits. This doctrine now has the name ‘economic public policy’, and might be extended whenever an annulment court is faced with an award that combines issues of EU law, contractual good faith and disequilibrium, disparity or asymmetry between the parties;

(iv) Finally, the award was annulled notwithstanding the Arbitral Tribunal's findings that the Claimant had sought a product with the characteristics of an interest rate swap, understood the product and its risks, and had not been deceived in any way by BBVA. The annulment decision also relied significantly on Togo v. Cotonou on the correct statement of the law, even though this Supreme Court decision was handed down after the issue of the award.\(^\text{47}\)

\(^{41}\) Repas, Fundamento Jurídico Cuarto.

\(^{42}\) Repas, Fundamento Jurídico Sexto, second paragraph: “Comencemos considerando... lo que son errores de Euskera ostensibles, manifestadas del lenguaje interpuesto, por contrarrestar la Ley, Considere- remos también omisiones de motivación igualmente patales.” Fur discussion of this point, end errors made by the Superior Court, see Manuel Conde Saaba Sánchez, la Constitución del PCI de Madrid de 28 de enero de 2015, La Ley, nº 9215, jueves 9 de abril 2015, pp. 1-8.

\(^{43}\) Repas, Fundamento Jurídico Sexto, 1st final paragraph: “En mi opinion, patente sin necesidad de elucubración alguna, que el lenguaje es la calificación jurídica que constituye el presupuesto básico para determinar el alcance de los deberes de información a que son impositores a la entidad financiera interesada del swap. Este grave patente es, en sí mismo, expresión de la arbitrariedad constitucionalmente prohibid. (art. 24.1 CE).”

\(^{44}\) Repas, Fundamento Jurídico Sexto, 2nd.

\(^{45}\) Repas, Fundamento Jurídico Sexto, 3rd.

\(^{46}\) Repas, Fundamento Jurídico Octavo: “En definitiva: el lenguaje ostentó un derecho sobre la base de la fracción legal patente de normas importantes de un lado, no error grave de calificación sobre los deberes de información de BBVA al no realizar el test de idoneidad y, pese a ello, calificar el swap de idóneo para ELPOS y ELPPS y, de otro lado, dar por buena, contra ley, la omisión de informar, precisión sobre usos y riesgos de la operación por no reputar el producto como completo. Estos contenidos patentes de normas importantes hacen que la motivación del lenguaje sea arbitraría; los principios jurídicos sobre los que se orienta el fallo son tan inconsistente errados que evita de rato la motivación que se regirse en rado desdén del lenguaje.”

\(^{47}\) Repas, Fundamento Jurídico Octavo: “En estas circunstancias, la Sala hace ve la necesidad de te- ner presente que, en este ámbito de enjuiciamiento, no tiene por qué incidir, ni incidir, si el contro- te debe ser analizado o no en función de un error esencial de conocimiento: su objeto de análisis es el lenguaje, cada motivación conforme al orden público por arbitrariedad, en el sentido de manifestaciones que contrarresta a reglas legales importantes; como mantenga que están normas que no siguen su expresión del principio general de buena fe contractual, y este principio, muy significativamente en este tipo de contratos y con esta clase de contrato... es cuestión de orden público, tam- bién se agrupa en el caso de omisión del art. 24.1 CE, por esta circunstancia añadida.”

\(^{48}\) The award was issued on January 14, 2014, and the Supreme Court judgment in Togo v. Cotonou was handed down on January 26, 2016.
The Repos decision attracted considerable commentary from the Spanish arbitral community, however, and all negative. There is a general consensus that the award was annulled on the merits, and is indiscernible for that reason. The Superior Court of Madrid has departed from its previous jurisprudence respectful of the limits of annulment. On the other hand, the new criteria have so far been confined to domestic cases, where there is a strong policy favouring the protection of retail clients. The new doctrine has not yet been applied to an international arbitral award, and hopefully will be confined to domestic securities arbitrations.

The decision is clearly a judicial reaction to the financial crisis in Spain, and the voluminous litigation arising from the scandalous mis-selling of financial products, and not just swaps, to retail investors. Financial arbitration in Spain has found itself in the eye of a hurricane, and the Repos judgment in this context has been defended in these terms:

"The image of our financial sector is badly damaged as a result widespread unprofessional conduct, in which neither the entities nor the regulators have lived up to expectations. The fact that the courts act and apply MiFID for what it is (a protective regulation) helps to restore the confidence of domestic and foreign investors. It is good for transparency and market unity to know that in Spain there are not two separate systems (judicial and arbitral) in which the rules of public policy are applied differently."

In our opinion, the judgment of the Superior Court of Madrid could have a beneficial effect for arbitration. The annulment action is designed by the Legislature as an inst

There is a spirited defence of the Repos decision by the lawyers for the applicant: see Pablo Franquet and Jordi Ruiz de Villa (Efeca Mariposa: Nulidad de Leudo Sobre un Swap por Violación del Orden Público; http://www.jusnaturalis.com/efecto-mariposa-nulidad-de-leudo-sobre-un-swap-por-violacion-del-orden-publico) (2013).

There are many commentaries on the Repos decision and its implications. The following are particularly useful: Pilar Pérez Vázquez: Anulación de deudas sobre contratos de previsión financiera (SWAPs) par el Tribunal Superior de Justicia de Madrid, Díaz La Ley, nº 8700, febrero 2016, pág. 1; Manuel Corrió Sánchez: El principio de máxima intervención judicial en el arbitraje y sus principales manifestaciones, Arbitraje Revista Arbitrato Comercial y de Inversiones, 2016, Volume 9 Issue 2, pp. 333-427; José Carlos Fernández Rosas: Riesgo de la intervenencia en el arbitraje de los leva Díaz La Ley 2016, nº 8515, juicio 9 de abril de 2015, pp. 1-8; Pacoal Sala Sánchez, El principio de máxima intervención judicial en el arbitraje y sus principales manifestaciones, Arbitrato Revista Arbitrato Comercial y de Inversiones, 2016, Volume 9 Issue 2, pp. 333-427.

Pablo Franquet and Jordi Ruiz de Villa (Effeca Mariposa: Nulidad de Leudo Sobre un Swap por Violación del Orden Público, supra, n° translation; the original Spanish read: "La imagen de nuestro sector financiero está muy dañada porque consecuencia de una situación de multa pública generalizada, en la que en las entidades no los supervisores han estado a la altura. El hecho de que los administradores y ejecutivos MRÜ como básicos (p.ej. normativa propia) pueda agravarse la confusión de los inversores nacionales y extranjeros. Es bueno para la transparencia y la unidad de mercado que se haya en España no existan dos sistemas separados: judicial y arbitral en que los normas de orden público se apliquen de forma distinta... En nuestro opinión, la sentencia del TSJM puede tener un efecto beneficioso para la institución del arbitraje. La acción de revocación está diseñada por el legislador como un instrumento que previene la total encumbración del sistema arbitral respecto a la jurisdicción. El hecho de que los tribunales ejercen su función de control en lugar para el arbitraje financiero. En un mercado maduro, lo que aliviaba el inversor no era la aplicación de las normas, sino su fácil aplicación. El riesgo de revocación tiene un saldo de efectos disciplinarios sobre los arbitros, que no ha obligar a no sufrir agravios en la aplicación de la MRÜ y en la supresión de la doctrina del TSJUE y del Tribunal Supremo. Las normas de orden público a la igual de igual forma en todos los ámbitos de la justicia. Lo proponemos en éste sistema y refuerza el arbitraje como vía de resolución alternativa de conflictos."
ween 2011 and 2015 and that these cases amounted to 11.62% of TAB’s revenue during this period. The Superior Court of Madrid held that arbitral institutions also have an obligation of independence and impartiality ‘with the consequent reasons for arbitration, and the duty of disclosure and of information that apply to the arbitrators, mutatis mutandis, are required from the institutions called to administer arbitral proceedings.’ The Court noted that an institution needed to ‘exercise extreme care in managing the arbitration where a habitual client is involved.’

The annulment application in Construcciones Leon Rabadas S.L. v. BBVA35 was based on the number of repeat appointments that the members of the tribunal had had in arbitrations administered by the Court of Arbitration of Madrid (‘CAM’) involving BBVA. This award was not annulled, but the following facts appear from the judgement: there was one arbitrator (C) on this tribunal who had been appointed six times by BBVA, resulting in five awards which were favourable to BBVA, three of which had subsequently been annulled. On three occasions C had coincided in the tribunal with another member of the tribunal in this case (M), on two occasions proposed by C, and which resulted in three awards favourable to BBVA.

The appearance of repeat players is not surprising given the volume of swaps cases, and the possible demand for arbitrators to have specialist knowledge of derivatives. The AEB Framework Agreement for Financial Transactions provides in its model arbitration clause for a three-member tribunal that the arbitrators ‘should have a broad knowledge of the financial products and derivatives markets.’

G. The Restriction of the Compétence/Compétence Principle in Swaps Arbitrations:

The judicial suspicion of arbitration arising from swaps cases further manifested itself in a recent decision of the Spanish Supreme Court that increased the role of the courts in the determination of the jurisdiction of an arbitral tribunal, thereby reducing the scope of the compétence/compétence principle in Spanish law.

Article 11.1 of the Spanish Arbitration Act requires the courts to abstain from hearing disputes submitted to arbitration on the objection of a party, and identifies the procedure for making an objection as the plea of lack of jurisdiction (declinatio). The plea of lack of jurisdiction raises the question of the extent of the court’s review of the jurisdiction of the arbitral tribunal in deciding whether the court has no jurisdiction. Should the court be satisfied by prima facie evidence of the existence of a valid arbitration agreement, and leave the determination of validity and scope of the agreement to the arbitral tribunal, on the basis that the tribunal has jurisdiction over its jurisdiction? Or should the court itself rule on the validity and scope of the arbitral tribunal as part of the determination of the objection to its own jurisdiction?

35 This is not the only recent case where an award has been annulled on the basis of the conflict of interest of the arbitral institution. In E.Dife Europe S.L v. Instituto Ferial de Madrid (IFEMA) 65/2013, November 13, 2013, the Superior Court of Justice of Madrid annulled an award on the basis that the institution administering the arbitration formed part of the Madrid Chamber of Commerce, which also owned 31% of the respondent in the arbitration. The court found that the indirect interest of the arbitral institution in the outcome of the arbitration violated the principle of the equality of the parties which, as a matter of public policy, could not be waived.

36 Superior Court of Justice, Madrid, 14 April 2016; Judgment 34/2016.

In Banco Popular Español S.A. v Agrumeexport S.A.37 the Claimant commenced judicial proceedings seeking the nullity of a swaps contract. There was an arbitration clause in the framework agreement (CMOF) but not in the swaps confirmation. The Spanish Supreme Court, affirming lower court decisions, held that when dealing with an objection to its jurisdiction based on an arbitration agreement the Court should not confine itself to a superficial review, but should carry out a complete review of the validity, efficacy and applicability of the arbitration agreement. The effect of this decision, which reverses previous authority, is to enable the court to obtain a ruling on the tribunal’s jurisdiction by the court before arbitration commences, thereby circumventing the compétence/compétence principle.

Further the interpretation of the scope of the arbitration agreement by the lower courts, limiting the jurisdiction of the arbitral tribunal to questions related to the interpretation, performance and execution of the CMOF was upheld, as it was not proved that the Claimant, in consenting to arbitration in the CMOF, had accepted clearly and unequivocally to submit to arbitration questions relating to the swaps contract.

The Supreme Court reasoned that the constitutional justification for arbitration, based on the will of the parties, requires a submission to arbitration to be ‘explicit, clear, categorical and unmistakable’. This requirement has a ‘special relevance’ when the arbitration clause appears in an adhesion contract where one of the parties ‘has chosen the arbitral solution as the most convenient to its interests’.38 The Supreme Court distinguished previous case law requiring an express referent in an arbitration clause as applying to ‘those arbitral agreements reached by negotiation, but not to those contained in contracts of adhesion since such an interpretation would not be in keeping with the justification for arbitration, which is the “explicit, clear, categorical and unmistakable” will of the parties, but of both parties, of securizing the possibility of submitting disputes to the courts.’

This Supreme Court decision significantly readjusts the balance between the courts and arbitration, demonstrates a judicial distrust in arbitration, and comes close to a rejection of an arbitration clause contained in an adhesion contract.

H. Conclusions:

What conclusions can be drawn from the scrutiny of the arbitral process by Spanish courts in the swaps cases? I propose two sets of series of propositions.

The first set of propositions demonstrates that the information asymmetry between banks and retail investors, which is a target of the MiFID Directive, the LTV and Spanish case law, has been compounded by a procedural asymmetry in dispute resolution created by the banks’ use of adhesion contracts containing arbitration clauses. To summarize:

37 Supreme Court, Civil Chamber, June 27, 2017; Judgment 409/2017.
38 Ibid., Fundamento de Derecho Quinto, paragraph 2 and 3.
39 Ibid., Fundamento de Derecho Quinto, paragraph 6, emphasis added.

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(i) The swaps cases involved a transactional relationship between banks and retail clients, where the banks were the stronger party by reason of their superior information and knowledge of the product;  
(ii) The stronger party directed the disputes to arbitration using adhesion contracts;  
(iii) The volume of arbitrations has proved economically significant to the arbitral institutions chosen by the stronger party in their adhesion contracts;  
(iv) The arbitral institutions did not voluntarily declare the extent of their economic interests in the swaps arbitrations, or the appointment history of individual arbitrators;  
(v) The stronger parties have made a practice of repeat appointments of certain arbitrators.

The use of adhesion contracts containing arbitration clauses has meant that the banks entered the dispute resolution process with better knowledge of the arbitral institution (which they had chosen), of the available pool of arbitrators, and the trend of decisions. This procedural asymmetry was much greater than would exist if the disputes went into the courts, because of the confidentiality of arbitration, and the influence of the parties in the selection of arbitrators. This procedural asymmetry is particularly uncomfortable in securities disputes, where the legislative objective of the protection of a vulnerable party is apparently undermined by the combination of adhesion contracts and arbitration. The reputation and legitimacy of commercial arbitration might be enhanced by its exclusion from securities disputes involving retail investors, or at least by a prohibition on the combination of arbitration clauses and adhesion contracts in this type of disputes.

The second set of propositions relates directly to the outcomes of the annulment proceedings in the Spanish courts. My thesis is that different outcomes between arbitral tribunals and the courts are bad for arbitration, even where both the arbitral process and judicial scrutiny of the process are operating professionally:

(i) There has been an unusually high rate of annulment in Madrid of awards arising from swaps arbitrations;  
(ii) The Superior Court of Madrid has annulled numerous awards on thinly disguised merits grounds;  
(iii) Both the courts and arbitrators are applying the same law to the same contracts so there should not be a significant difference in outcomes;  
(iv) Different perspectives on the merits may suggest different philosophical perspectives in the courts and arbitral community: in Reposa the arbitral tribunal was satisfied the applicant understood the swaps contract and was not deceived by the bank; the Superior Court of Madrid emphasized the investor protection function of the LMF; the inequality of the parties and the alleged failure of the bank to comply with its statutory assessment obligations.

My ultimate conclusion, which I would generalize to international commercial and investment arbitration, is that wherever there is a significant difference in substantive outcomes between the courts and arbitral tribunals in disputes that are identical from a legal perspective then inevitably the legitimacy of arbitration will be called into question.

The arbitral community can respond to this conflict proactively, and make the case that the problem is in the courts; in effect that private justice operates to higher standards than public justice, at least in certain types of disputes. Indeed, at its most basic level, this is the entire rationale of the investment arbitration system.

However, investment arbitration enjoys the advantages of its own annulment system, in the case of ICSID, or at least the choice of a neutral, arbitration-friendly seat. It is also a system where there is a presumptive equality between investor and state participants. The problem in these Spanish swaps cases is precisely the inequality of the parties in the swaps relationship. The legitimacy of arbitration requires that party autonomy, like Caesar's wife, be above suspicion, and transactional or procedural asymmetries create just such suspicions.

An annulment mechanism is an indispensable protection in arbitration, but only operates successfully where there is mutual respect and comity between arbitrators and judges. The expansion of arbitration must not be accompanied by the suspicion that powerful interests can use arbitration as a form of haven from unwanted regulation. Judges are not always immune from irrational suspicions, and ultimately, as the Spanish Constitution mandates, citizens are entitled to the protection of their courts.

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60 As noted in the text above, Reposa refers to 'disequilibrium, disparity or asymmetry between the parties by reason of the complexity of the product and the disparate knowledge of the contracting parties'.  
61 Arbitration in Spain is confidential; see Article 24.2 of the Arbitration Act.