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Arbitration in Spain: Impartiality of Arbitrators & Arbitrating Corporate Matters

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In this article we will be dealing with two topics addressing the criteria of Spanish state courts as regards the impartiality of arbitrators and the arbitrability of corporate disputes. Impartiality of arbitrators is an area that continuously provides the chance to comment on court decisions and it is worth noting the position of the Spanish courts, it being a relevant venue in international arbitrations. In addition to that, we will also study a Supreme Court ruling that addresses the arbitrability of corporate disputes. Due to the controversy generated in the past in relation to this matter, it is interesting to scrutinise the decision of the Spanish Supreme Court to assess whether it could be of general application to this type of matter or if it refers to a specific case.¹

Impartiality of arbitrators and conflicts of interest

Applicable Spanish rules

By virtue of article 17.1 of the Spanish Arbitration Act (Law 60/2003 of 23 December 2003, hereinafter referred to as the Arbitration Act), 'an arbitrator shall be and remain independent and impartial during the arbitration. In no case shall he maintain any personal, professional or commercial relationship with any of the parties'. Thus, as stated in section 2 of the article, an 'arbitrator should disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence'. Lastly, section 3 of the article indicates that an arbitrator may be challenged if circumstances that give rise to justifiable doubts as to his or her impartiality or independence exist.

Therefore, lack of independence and impartiality constitutes a ground for challenging an arbitrator. The procedure for the challenge of an arbitrator aims at removing a member of the tribunal when a party considers that the impartiality or independence of the arbitrator is in question and thus, he or she is unfit for the arbitration.

According to article 18.2 of the Arbitration Act, the party challenging an arbitrator shall state the grounds for the challenge within 15 days of becoming aware of the circumstances that give rise to doubts about the arbitrator's impartiality or independence. It will be up to the arbitrator and, if applicable, the co-arbitrators, to decide whether or not there is any circumstance likely to lead to the removal of the challenged arbitrator. If the challenge is unsuccessful, the challenging party may rely upon the challenge in a later request to set aside the award. The challenging party may apply to the courts within two months after service of the award to set it aside.

The Ruling of 16 June 2008 of the Madrid Court of Appeals With regard to the above, the ruling of 16 June 2008 of the Madrid Court of Appeals² rejected the ground put forward by the challeng-

ing party in applying to set aside the award on the basis that 'not every circumstance can find shelter under the shadow of impartiality'. As will be discussed here, despite the existence of set parameters and guidelines that can assist courts in deciding whether or not grounds for impartiality exist, the truth is that impartiality is an attitude; it is a state of mind of the arbitrator, which presents special difficulties in terms of objective determination. Consequently, the courts will have to analyse the issue on a case-by-case basis and, more specifically, examine the circumstantial elements surrounding the alleged impartiality.

In the aforementioned ruling, the claimant filed for the removal of all members of the arbitral tribunal. The claimant, in the action for setting aside the award, alleged that an objective circumstance existed that gave rise to doubts as to the impartiality of the arbitral tribunal, it being the fact that the counsel for the respondent forms part of the list of arbitrators of the institution administering the arbitration.

In its ruling, the Madrid Court of Appeals begins by stating that the claimant uses the concept of impartiality in such wide terms that denaturalises the concept. Moreover, the court explains thoroughly the grounds on which the requested removal was rejected. We hereby present some of the arguments the Court of Appeals presented.

First, the Court of Appeals states that the requirement of impartiality refers only to arbitrators and thus, there is no basis in the Arbitration Act on which to expand such requirement neither to party counsel nor for attributing the lack of impartiality appreciated in others to the arbitrators. Nor can the arbitral institution be required to comply with identical or even similar requirements to those imposed on the arbitrators.

Subsequently, the court examines the situation of each one of the three arbitrators of the tribunal to find that no justifiable doubt exists as to their impartiality. Specifically, in relation to the challenged arbitrator, it states that he was obviously selected by the appointing party because of the confidence that he inspired and that, undoubtedly, the party thought that the arbitrator would carry out his duties in accordance with the requirements of impartiality and independence. With regard to the arbitrator selected by the opposing party, he actually revealed kinship and friendship relationships with a party in due course. In this regard, being aware of these circumstances, the party filing for annulment did not challenge the arbitrator at any time and thus, had relinquished its powers to make a legal challenge.³ Lastly, regarding the chairman of the tribunal, the court conveys that there is no personal, professional or any other kind of circumstance that could hinder his impartiality.

1 Both topics have been studied in depth by Mercedes Romero and Antonio Góngora, associate lawyers at Perez-Llorca's litigation & arbitration department, for which we are grateful.

2 Ruling of June 16, 2008 of the Madrid Court of Appeals, Section 8. Judge pronouncing the ruling: Magistrate Antonio García de Paredes.

3 In this regard, note that Article 6 of the Arbitration Act states that 'Where a party, knowing the non-compliance with any provision of this Act or any requirement of the arbitration agreement, does not state his objection within the period provided or, in the absence of such a period, as soon as possible, shall be deemed to have waived the powers of legal challenge provided for in this Act'.

The Court finishes by restating what should be understood as impartiality. Impartiality is:

[...] an attitude, a state of mind of the arbitrator that, by itself, presents special difficulties in terms of objective measurement and that can generally only be detected by means of instrumental (and external) evidence from which to infer a bias towards one of the parties. For these reasons, a challenge for impartiality (if it is to be considered a serious one) should be accompanied by elements capable of objective verification, eg circumstances, connections, behaviours, relationships, etc., that allow to infer beyond any reasonable doubt that the arbitrator is going to decide (or is going to be able to decide) in favour of a party even before the proceedings reach the deciding stage.

The Impartiality Criteria

As already discussed, and following the criteria of the Court of Appeals, partiality is a state of mind of the arbitrator, that will necessarily be subjective⁴ and abstract,⁵ and is therefore difficult to verify. Consequently, it would have to be detected by means of external facts, circumstances, connections, behaviours, etc.

Precisely with the intent of helping to resolve situations that could give rise to justifiable doubts as to the impartiality or independence of an arbitrator, on 22 May 2004 the International Bar Association (IBA) approved the new Guidelines on Conflicts of Interest in International Arbitration after an assessment of the different cases and scenarios concerning conflicts of interest between parties and arbitrators. These Guidelines unify the circumstances that give, or can give, rise to justifiable doubts as to the impartiality or independence of an arbitrator. Today, the Guidelines⁶ are widely recognised and used by the arbitration community, even though they are not mandatory.

The Guidelines establish three lists under the names of the Green List, the Orange List and the Red List, which, taking into account the numerous interactions that take place between the parties and the arbitrators on a day to day basis, classify the different scenarios based on the possibility of existence of conflicts of interest.

In relation to the aforementioned ruling, the Guidelines contemplate, in the denominated Green List, a situation where '[t]he arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organisation.'⁷

Hence, according to the IBA Guidelines, the fact that the counsel of one of the parties and an arbitrator belong to the same professional association is innocuous and it will not even have to be revealed to the parties. Therefore, according to the IBA Guidelines, the fact that counsel and arbitrators belong to the same list of arbitrators of the institution administering the arbitration is also irrelevant.⁸

4 *Comentarios a la Nueva Ley de Arbitraje 60/2003*, 23 de diciembre, Coordinador: González-Soria, J. Editorial: Thomson – Aranzadi, Navarra 2004, p 178.

5 *Ethical rules for arbitrators*, Mullerat Balmaña, R. Anuario de Justicia Alternativa, No. 6, Editorial Bosh, February 2005.

6 The Guidelines form part of the 'Soft Law', which can be defined as the collection of guidelines, codes and rules that make up good practice in this matter.

7 Section 4.4.1 of the IBA Guidelines on Conflicts of Interest in International Arbitration.

8 See, in this regard, Court Ruling 75/2008 of 15 February 2008 of the Madrid Court of Appeals [JUR 2008, 122406] in which the claimant in the action to set aside the award, also requested, among other issues, the removal of the chairman, a co-arbitrator and the counsel for one of the parties on the basis that they all belonged to the 'Club Español del

Thus, case-by-case, our jurisprudence will differentiate the scenarios susceptible to giving rise to doubt as to the partiality of an arbitrator from those in which there is no trace of partiality. Undoubtedly, the IBA has already carried out significant work on the matter, which can continue to serve as a guideline for the Spanish courts. In any case, what is not questionable is that 'not every circumstance can find shelter under the shadow of impartiality'.

Arbitration of corporate matters: struggling with the subjective effectiveness of the arbitration agreement

Background

In the field of arbitrability, if there is a delicate and problematic subject, to the point of giving rise to passionate and extreme doctrinal debates, that is undoubtedly the arbitrability of corporate matters. In this prolific debate about arbitrability of corporate matters, the initial prevailing position was characterised by a pronounced belligerence towards arbitration. In the early 1980s the legal framework at that time did little to favour the possibility of arbitrating corporate matters, since the Companies Act endorsed a quasi-public and institutional conception of corporations, whereas the Arbitration Act at that time appeared extremely restrictive. The main arguments to deny the possibility of introducing an arbitration agreement in the bylaws of a company revolved around the mandatory character of the rules governing the challenge of corporate resolutions and the subjective effectiveness of that agreement.

However, in the last quarter of the 20th century, while the Spanish economy was liberalising, new legislation came into force favouring a policy turn more favourable to arbitration. The new Companies Act instituted a more contractual perception of corporations, and a new Law on Arbitration modernised this area, thus helping to improve the reputation of arbitration.

Finally, it was a resolution by the General Management of Registries and Notaries of 1998 (DGRN)⁹ that affirmed the possibility of registering the corporate bylaws, including an arbitration agreement, which represented the binding character of that agreement with regard to all shareholders, even those that did not personally subscribe to the agreement. In this regard, the DGRN recognised that:

[A]n external, unregistered agreement will bind only those subscribing to it and their inheritors. However, if [the agreement] is conceived as a corporate agreement and it is registered, it will bind all present and future shareholders. The registered arbitration agreement defines the position of the shareholders, the collection of powers and duties attached to that position and thus, the subjective novation of the position of shareholder causes a subrogation in the position of the previous shareholder, although limited to the controversies deriving from corporate matters.

The doctrine of the DGRN was confirmed by the Supreme Court¹⁰ a few months later. The Court completed the doctrine by specifically admitting arbitration in disputes related to corporate resolutions:

[T]his Court holds that, at least initially, neither the General Shareholders' Meeting nor the challenge of the Corporate Resolutions fall outside the scope of arbitration; notwithstanding the fact that if there is any point that falls outside the contracting power of shareholders, the arbitrators cannot decide on the matter, under risk of facing partial or total annulment of the award. Various arguments are taken into account: the challenge of corporate agreements is governed by mandatory rules, that the arbitration agreement does not (and cannot) reach. What the arbitration agreement reaches is the procedure to solve these issues. The mandatory character of

Arbitraje'. The Court of Appeals rejected the request to set aside the award.

9 Resolution of the DGRN of 19 February 1998 (La Ley 3465, 1998).

10 Ruling of 18 April 1998 of the Supreme Court (La Ley 4466, 1998).

the rules governing the challenge of Corporate Agreements does not impede its negotiable and thus, non-mandatory character.

The Ruling of the Supreme Court of 9 July 2007

However, 10 years after the progress made in the field of arbitrability of corporate disputes, the stand of the Supreme Court seems to have veered towards more restrictive approaches concerning arbitrability. We are referring to the ruling of the Supreme Court of 9 July 2007¹¹ dealing with the question of whether an exclusion agreement concerning various shareholders of a limited liability company is capable of being challenged in arbitral proceedings. The problem rested on the fact that in the same general shareholders' meeting in which the exclusion agreement was adopted, another resolution was also adopted by virtue of which the objective scope of the arbitral clause (contained in the corporate bylaws) was extended to include the challenge of corporate agreements (possibility expressly excluded in the former clause).

The Supreme Court ruling in question contains a series of assertions that could be understood as restricting the subjective scope of the arbitration agreements that could be included in corporate Bylaws. In this sense, the Supreme Court states that:

The conclusion that should be reached is that the modification of corporate bylaws including either a submission to arbitration as the means to resolve corporate conflicts or an extension of the objective scope of the arbitration clause requires the acceptance of those affected, as it entails a form of restriction or limitation of the right to effective protection of the courts in the exercise of rights and legitimate interests that can be relied upon by way of application to the Constitutional Court (following the constitutional jurisprudence that has just been referred to).¹²

Using, among others, arguments such as the one referred to previously, the Supreme Court found that the excluded shareholders were not bound to the arbitration agreement as they had not accepted the modification by virtue of which the challenges to corporate agreements would be submitted to arbitration. Although such conclusion is sound and reasonable, the argument displayed by

the Supreme Court can give rise to doubts concerning the subjective effectiveness of these types of arbitration clauses. On the other side, the same conclusion could have been reached on the basis of a mere temporal issue, that being the fact that the arbitration clause in force at the time of the adoption of the resolution did not contemplate the possibility of submitting the challenge of corporate resolutions to arbitration.

However, the Supreme Court, by demanding 'the requirement of acceptance of those affected', seems to be stating that every shareholder that does not accept the arbitral clause contained in the corporate bylaws would not be bound by it. We consider this position superseded by a more favourable one since the position of the shareholder, its powers and duties (whether contractual or contained in the bylaws), are capable of assignment.

In the same line, the Supreme Court's assertion that subscribing an arbitral agreement, or modifying or extending its objective scope, 'entails a form of restriction or limitation of the right to effective protection of the courts in the exercise of rights and legitimate interests'. It is also rather questionable since, as expressly stated in the Statement of Purposes of the former Arbitration Act, 'the arbitration agreement does not entail a waiver by the parties of their fundamental right to effective protection of the courts in the exercise of rights and legitimate interests enshrined in article 24 of the Constitution'. The cause for stand of the Supreme Court in the discussed ruling seems to be the specific circumstances of the case.

Modification of the corporate bylaws as a means to modify the arbitration agreement: majority vs unanimity
The question of whether the agreement to extend the arbitration clause contained in the corporate bylaws requires majority or unanimity (an issue also dealt with in the ruling analysed) is not an easy one. The answer to this question is complex in the sense that, taking into account the contractual nature of arbitration, the subjective scope of the agreement is to be conformed by those subscribing it.

That being said, we believe that the functioning of corporations essentially depends on the principle of majority and that, when a shareholder meets that condition, he or she inevitably accepts to be governed by such principle, which regulates the *ad intra* relationships between shareholders. Consequently, when an agreement

11 Ruling of 9 July 2007 of the Supreme Court (La Ley 1571, 2007).

12 The High Court is referring to the ruling of the Constitutional Court of 17 January 2005 (Le Ley 11379, 2005).

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is adopted by the majority of shareholders of a corporation, the validity of that agreement is derived precisely from the adhesion of shareholders to the majority principle.

Therefore, it would be of no practical consequence to contend that those who voted against the incorporation to or extension of the arbitration agreement in the corporate bylaws would not become bound by the agreement when the majority has voted in favour of such incorporation or extension. To hold the contrary could cause a distortion of the majority principle¹³ that, as we have already stated, is essential for the functioning of corporations.

We believe that the position held by the Supreme Court in the discussed ruling that could lead to a situation where it would be necessary to have the unanimous vote of the shareholders to incorporate or modify the arbitration agreement, which could be contained in the corporate bylaws, can also be explained by the specific circumstances of the case.

13 In this regard, B Cremades states, 'With regard to the modification of the bylaws in force to include an arbitration clause, the old commercial law doctrine could reappear. Is majority enough or is unanimity of shareholders required? In my opinion, the doctrine of the Supreme Court is clear enough and leaves no room for speculation concerning the need for unanimity. To have recourse to arbitration does not encompass waiving the right to access to courts, nor does it encompass a fade in powers or the waiving of those already available. It implies, simply and exclusively, an option, from those available in the legal ordinance, to solve corporate controversies. I believe it is a genuine and simple modification of the Bylaws that would have to be undertaken in the case of a *sociedad anonima* by virtue of articles 103 and 144 of the current Law of Sociedades Anónimas, as in article 158 of the Rules of the Commercial Registry. If we are to disregard the condition of non-waivability of the 'subjective power of challenge' that used to justify the banning of arbitration of corporate matters, it seems difficult, if not impossible, to justify the loss of rights or waivers of already available ones due to the mere fact of agreeing to arbitration instead of a court solution.' B Cremades, 'El arbitraje societario', *Diario La Ley*, Section of Doctrine, 2000, Ref D-281, Vol 9 (free translation).



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Félix J Montero is an expert in litigation and arbitration and has extensive professional experience in both commercial and civil litigation as well as national and international arbitration.

Félix joined Perez-Llorca in July 2004 after six years as a practising lawyer at B Cremades y Asociados. His working languages are Spanish, English and German and he regularly lectures on litigation law for the Masters in Legal Practice at the University Carlos III in Madrid and in international arbitration for the Masters on Business Law at the Carolina Foundation.

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Félix regularly contributes articles to national and international publications and is co-author of *Código de Arbitraje* (Aranzadi, 2005), a volume compiling and commenting on statutory materials and rules on arbitration. In addition, Félix has participated in the Thomson-Aranzadi commentary to the 2003 Spanish Law on Arbitration coordinated by David Arias, with comments to articles 6, 35, 36, 37, 38 and 39.

Félix is also a member of the Spanish Club of Arbitration (Club Español del Arbitraje), the IBA and the steering committee of the International Arbitration Commission at the Union Internationale des Avocats (UIA).