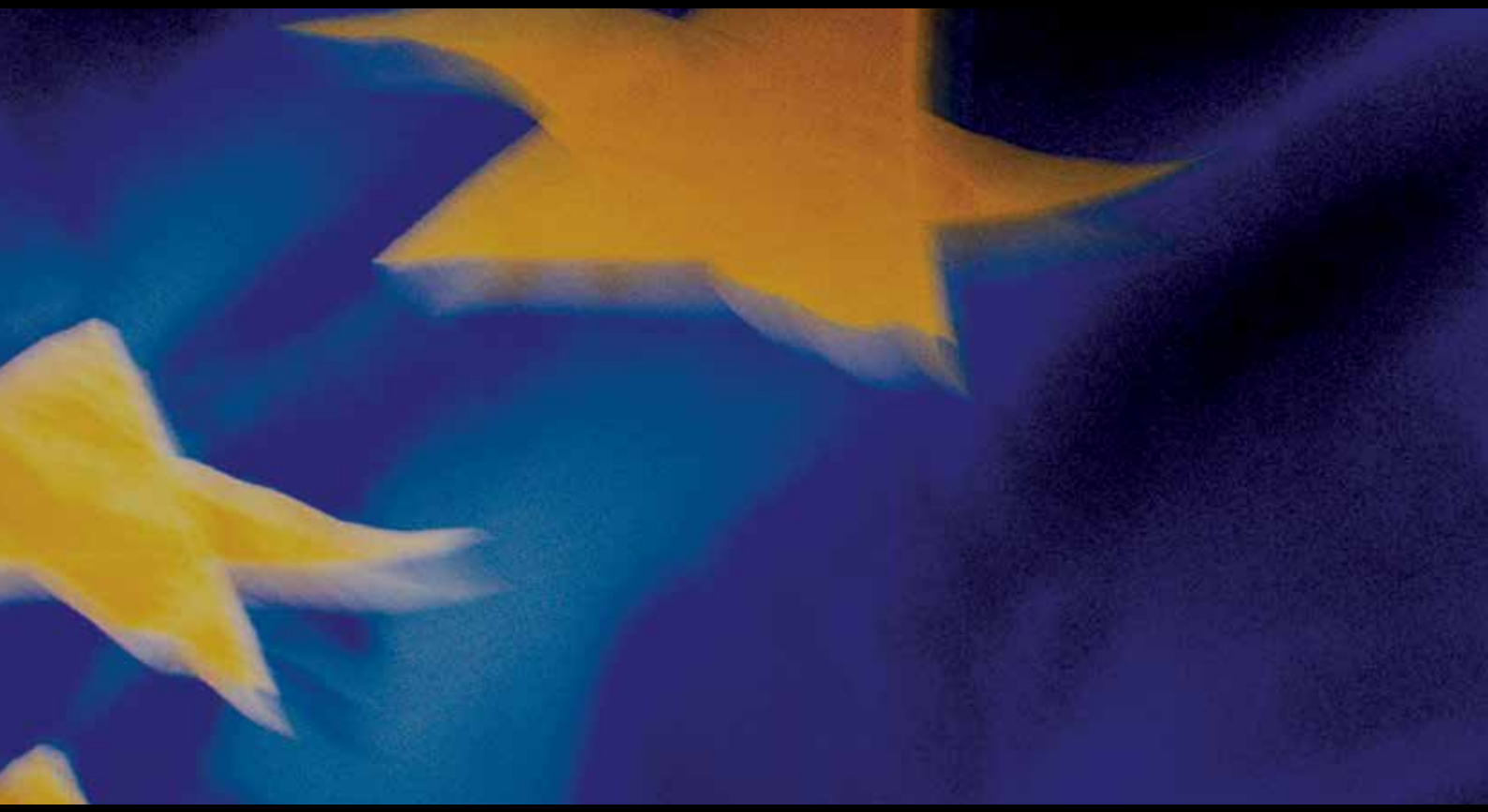
THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 2015



Published by Global Arbitration Review in association with

Pérez-Llorca

gar
The international journal of commercial and treaty arbitration

www.GlobalArbitrationReview.com

Defective Evidence-Taking and the Joining of Non-Signatories

Félix J Montero and Beatriz Orbis
Pérez-Llorca

The annulment on defective evidence-taking and the criteria of the Spanish Constitutional Court on the standard of due defence rights

The Spanish Courts have defined the requirements for setting aside an award in the event that the grounds for the annulment fall under article 41.1 (b) and (d) of the Spanish Arbitration Act.

Article 41.1 (b) provides that an award can be nullified if the claimant for annulment successfully alleges that he or she was unable to present their case, among other reasons, because of the denial of essential means of evidence:

> *they were not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or were otherwise unable to present their case*

Denial of evidence or poor practice in evidence-taking might also fall under article 41.1 (d), if the conduct of the arbitral proceedings was not in accordance with the agreement of the parties or the provisions of the Spanish Arbitration Act:

> *that the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such an agreement was in conflict with an imperative provision of this act, or, failing such agreement, was not in accordance with this act*

As we are well aware, arbitration proceedings are ruled and governed by the parties' procedural agreement and any action going beyond such an agreement could be deemed as null and void under article 41.1 (d) of the Spanish Arbitration Act. However, in the case law we will be examining, it is clear that awards are very scarcely annulled on these grounds in Spain.

In the decision rendered by the Superior Court of Justice of Catalonia decision No. 6/2014, dated 23 January 2014 (RJ 2014, 868), the witness and expert evidence proposed by the parties and accepted by the arbitral tribunal could not be produced because the arbitral institution did not deliver the necessary notifications to the witnesses and experts on time. Furthermore, the claimant alleges that the cross-examination of one of the parties to the proceedings was not made to the representative expressly appointed for such purposes, but rather to another representative who was sufficiently empowered to act on behalf of the party.

The grounds for annulment raised by the claimant were:

- irregularity of proceedings (article 41.1 (b) of the Spanish Arbitration Act); and
- breach of public policy (article 41.1 (f) of the Spanish Arbitration Act).

The Superior Court of Justice of Catalonia refers to well established case law from the Spanish Constitutional Court on the non-production of a means of previously accepted evidence, establishing the requirements that must be met to confirm that a breach of due defence rights has occurred, including:

- that the denial or non-performance of the evidence admitted is the responsibility of the arbitral tribunal;[1] and
- that the denied means of evidence is critical in terms of defence. It is necessary that the claimant for annulment evidences that they were unable to make their defence during the arbitration proceedings as a result of the dismissal.[2] Moreover, this requirement must be present on two different occasions:
  - the claimant is obliged to demonstrate the facts of the case that were intended to be used as evidence and were not proved due to being denied in the evidence-taking stage; and
  - the claimant for the annulment of the award has to reasonably argue how the admission or the proper practice of their means of evidence would have favourably influenced the granting of their claims.

The annulment of the arbitral award can only be ordered if the claimant complies with these conditions.

Nevertheless, the Superior Court of Justice of Catalonia decided to dismiss the annulment claim in this particular case. The Court stated the inadmissibility of the annulment request for the following reasons:

- the claimant for annulment had been aware, since 16 November, of the fact that the examination of witnesses and experts was scheduled for 4 December, therefore the applicant had enough time to prepare the hearings;
- the claimant was informed that the notifications were unsuccessfully served on the witnesses and experts five days before the date of the hearings and did nothing;
- the witnesses who were not notified were persons linked to the party who later claimed for annulment of the award;
- there is no evidence that the claimant made any attempt to have the witnesses and experts notified; and
- the claimant made no request to the arbitral tribunal regarding the date for holding the hearings, although they were well aware that the witnesses and experts had not been notified.

Furthermore, the Superior Court of Justice of Catalonia states that the effectiveness of the defencelessness has not been reasonably argued and evidenced as required by Constitutional Court case-law:

> *The applicant fails to prove the effective defencelessness that they had presumably suffered because of the failure to practice the evidence. For this, they must argue in their claim (which they do not, despite the statements contained in his claim about a 'very clear prejudice') the specific factual circumstances that the witnesses could have demonstrated and their influence on the outcome of the arbitral process; somewhat dubious given the terms of the dispute that can be seen from the rendered award.*

With respect to the examination of the claimant's representative through an individual who was not appointed by the applicant, the Superior Court of Justice of Catalonia states the following:

> *Examination of the defendant was held by a legal representative of the claimant, who was therefore a suitable person according to the provisions of Article 301 of the Civil Procedure Act.*[3] *[…] this neither caused defencelessness, insofar as Mr. […] answered all the questions raised, thereby demonstrating his perfect knowledge of the issue.*

Consequently, insofar as the applicant was entitled to make objections to the evidence-taking carried out during the arbitration, the Superior Court of Justice of Catalonia considers that there was:

- no breach of the rules agreed by the parties or equality of arms (due process); and
- no defencelessness; as provided in articles 41.1 (b) and (d), respectively.

Another relevant case is the Superior Court of Justice of the Basque Country decision No. 3/2014, dated 13 May 2014 (JUR 2014, 162624), with regard to the denial of an expert report brought to the arbitral proceedings seven months after it was drafted. Consequently, the Court argued that there had been an 'extemporaneous exercise of the right to evidence' and even states that it is probable that the claimant for annulment considered that the expert report was not favourable to their interests, and for this reason they decided not to provide the report at the appropriate moment:

> *It has not been a lack of flexibility in the application of the rules of the arbitration, nor a breach of the equity applied by the arbitrator that has prevented the submission of the expert report issued at the defendant's request. On the contrary, it was the party themselves who decided when to submit the report; the moment chosen was not the most favourable to the resolution of the dispute, and was chosen in order to delay the counter party finding out its content.*

A very similar situation has been resolved by the Superior Court of Justice of Murcia's decision 2/2014, dated 10 March 2014 (AC 2014, 483), in relation to the denial of experts' cross-examination that was previously renounced by the interested party.

Notwithstanding the foregoing, it must be noted that, contrary to case law established by both the Supreme Court and the Constitutional Court, certain scholars[4] state there is no need to evidence, under the grounds for annulment provided in article 41.1 (b), that the infringement of the rules agreed by the parties or of the Arbitration Act, has led to a lack of legal protection.

However, despite such opinions, we can conclude that denying certain means of evidence does not constitute grounds for annulment of the award per se, unless said situation had effectively caused a serious lack of legal protection for the concerned party (breach of due defence rights).

The extension of the arbitral clause to non-signatories and the latest criteria of Spanish Courts

Spanish Courts have recently resolved annulment actions based on arbitral clauses that had been 'extended' to non-signatory parties. This concept, stated by continental scholars as 'extending' the arbitration clause, is also well known in common law as 'joining non-signatories' to arbitral proceedings. Such an expression accurately describes arbitration procedures brought by or against someone who has not signed the arbitration clause.

Before 2005, Spanish Courts normally rejected that third parties and non-signatories to the arbitral clause were joined to the arbitration proceedings. In recent years,[5] Spanish case-law has aimed to establish the criteria that should apply when non-signatories of an arbitration clause seek either to join or to avoid an arbitration based on such an arbitration clause. This said third party could be:

- a member of a corporate group that the signatory belongs to;
- a shareholder of the signatory; or
- a director or representative of the signatory.

The main problem arbitrators and tribunals have to deal with in joining non-signatories is the balance between maintaining an arbitration's consensual nature and maximising an award's practical effectiveness by binding related entities or individuals.[6]

In this sense, although Spanish courts are cognisant of the fact that if an arbitration agreement is not signed it has a limited scope and validity, tribunals are aware of the criterion stated by arbitrators in several awards rendered under ICC rules and, thus, by French Courts who deal with annulment actions brought against arbitral awards issued in France. The most representative case is the *Dow Chemical v Isover St Gobain* award,[7] in which arbitrators accepted the possibility of a third party joining arbitration proceedings once it had been initiated by one of its affiliates (with the mutual consent of the parties; the only difference lay in the fact that the arbitration's effects differed with respect to non-signatory affiliates).

Furthermore, Spanish Courts are taking into account that several legal systems impose no requirement for the form of the arbitration clause (ie, verbal agreements are valid in certain jurisdictions). Arbitration rules based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law) have provided the possibility that a written arbitration agreement is made by 'an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference'[8] (eg, electronic data interchange, electronic email, telegram telex, telecopy).

Similar provisions can be found under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which defines an agreement in writing as 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'.[9]

With regard to the latest Spanish case law on the extension of the arbitration clause to non-signatories, we will consider the Superior Court of Justice of Catalonia's decision No. 9/2014, dated 6 February 2014 (RJ 2014, 1987), which analyses the inclusion of an arbitration clause in the by-laws of a company and the possibility of involving non-signatory third parties to such by-laws in the arbitration proceedings.

In this sense, the possibility of including an arbitration clause in the by-laws of a corporation was introduced in article 11 bis of the Spanish Arbitration Act by means of the reform of Law 11/2011:

1 *Corporate enterprises may submit their disputes to arbitration.*
2 *The inclusion of a clause in the corporate by-laws on submission to arbitration will be subject to a two-thirds majority of the shares or stakes into which the share capital is divided.*
3 *The corporate by-laws may provide for objections to company agreements lodged by its shareholders or directors to be submitted to the decision of one or several arbitrators, to be appointed by the arbitral institution entrusted with arbitration proceedings.*

In this particular case, the action for setting aside the award was based on the annulment grounds provided in article 41.1 (a) of the Spanish Arbitration Act: 'that the arbitration agreement does not exist or is not valid'.

The claimant argued that the arbitration clause did not exist due to the fact that no arbitral agreement was included in the shareholders' agreement entered into with the entities that were parties to the arbitration proceedings; namely, while an arbitration clause was included in the company's by-laws, there was no arbitration clause introduced in the supplementary shareholder's agreements entered into by the parties. In addition, the respondent in the arbitration (who brought the annulment claim) argued that they were not a party to the by-laws as they were not a shareholder of the company at the time when said by-laws were approved.

The annulment action was dismissed. In this case, the Superior Court of Justice of Catalonia stated that entities or individuals that were not shareholders of a company when the by-laws were approved are also bound by said corporate by-laws and to all of its agreements (including arbitration clauses). The Superior Court of Justice of Catalonia quotes certain case-law from the Spanish Supreme Court:[10]

> *By-laws, as a constitutive agreement that has its origin in the will of the company's founders, can contain an arbitral agreement for the resolution of corporate conflicts. An arbitral agreement is an accessorial rule to the by-laws and as such is independent from the founders' will and represents a further corporate rule that binds – due to its inscription in the Commercial Registry – not only its signatories but also the present and future shareholders*

The examined decision also states that the shareholders' agreement with no arbitration clause that is referred to by the claimant for annulment, was signed by all the shareholders of the company (this is to say, by both the founders and the later shareholders) and, therefore, 'these sort of agreements are reached to regulate different aspects of the corporate relationships and, hence, are subordinate or interdependent to the by-laws',[11] which do include an arbitration clause.

In this case, the scope of the arbitral clause contained in the by-laws included 'all litigious corporate issues', and it was not necessary to reiterate the will of the parties to submit their conflicts to arbitration in the shareholders' agreements entered after the approval of the by-laws. The Court additionally took into account that said shareholders' agreement did not expressly exclude the submission to arbitration agreed in the by-laws by the same signatories.

A similar situation is described by the Superior Court of Justice of the Basque Country in decision No. 9/2013, dated 16 October 2013 (RJ 2013, 7407), which also dismissed the annulment request. In this case, the arbitration clause was included in a contract for the incorporation of a limited liability company.

The scope of the arbitration clause encompassed any dispute arising out of the performance of the contract. The limited liability company whose incorporation was included in the contract (the new company) had been established before the initiation of the arbitration proceedings; and the new company was a party to the arbitration proceedings. In this context, the claimant for annulment of the award claimed that:

- since the new company was established before the arbitration was initiated, the contract in which the arbitral clause was contained was duly performed before the arbitration began; hence, disputes arising from the execution of the contract could not be submitted to arbitration; and
- the new company was not a party to the agreement in which the arbitration clause was included and, consequently, cannot be a party to the arbitration proceedings.

The annulment was rejected by the Superior Court of Justice of the Basque Country, which analysed in its decision the purpose of the agreement containing the arbitration clause and stated that the aim of the agreement was not only the incorporation of the new company, but also 'the construction of a unique business platform' that included both the new company and the signatories to the agreement.

Therefore, the court stated that, at the time the arbitration proceedings were initiated, the performance of the contract had not been completed. Additionally, the new company, after its incorporation, became a party to the contract and thus to the arbitration clause, therefore making it possible for them to be a party to the arbitration proceedings.

Although both decisions admitted that non-signatories were parties to arbitration proceedings, the main difference between the two situations was that while the Superior Court of Justice of Catalonia's decision refers to a non-signatory which seeks to arbitrate despite not having agreed on an arbitral clause, the Superior Court of Justice of the Basque Country's decision refers to a non-signatory who resists arbitration.[12]

A priori, even though it might be easier to justify allowing a willing party to join arbitration proceedings than to compel an unwilling party, in both cases the Courts have analysed the facts of the case in order to ascertain the will of the parties involved. A consenting non-signatory will not succeed in joining the arbitration if the particular circumstances do not properly demonstrate the consent to arbitrate of all parties involved in the dispute.

Notes

1 See Constitutional Court decisions 113/2009 dated 11 May 2009 (RTC 2009, 113); 1/1996 dated 15 January 1996 (RTC 1996, 1); or 70/2002 dated 3 April 2002 (RTC 2002, 70).

2 See Constitutional Court decisions 113/2009 dated 11 May 2009 (RTC 2009, 113); 217/1998 dated 16 November 1998 (RTC 1998, 217); or 219/1998 dated 27 January 1999 (RTC 1998, 219).

3 '1. Any party may request the court to question the other parties about any facts and circumstances they may be aware of that have some bearing on the matter at issue in the trial. A joint litigant may request another joint litigant to be questioned, providing a dispute or conflict of interests exists between them in the proceedings.
2. Where the party holding legal capacity to act in the trial is neither the subject of the legal relationship at issue nor entitled to the right by virtue of which action has been brought, the questioning of such subject or holder may be sought.'

4 'It should be noted, in the meantime, that the infringements set out in this rubric must not be narrowed to those who produce defencelessness, or in other words, that defencelessness is not a ground for its annulment relevance.' (Lacruz Mantecón, M.L., La impugnación del arbitraje, Reus, Madrid, 2011, p231). In the same oppinion, Cadarso Palau, J, 'Artículo 41. Motivos', in VV AA, Comentarios a la Nueva Ley de Arbitraje 60/2003 de 23 de diciembre, Civitas, Madrid, 2011, p570; amongst others.

5 The starting point was set by the Provincial Court of Madrid decision dated 17 November 2005, analysed by Spanish scholars. Among others, Alonso Puig, JM, 'Recepción del Arbitraje comercial

internacional en España. Experiencias derivadas de la nueva Ley de Arbitraje Española. Problemas sustantivos y procesales', in VV AA, El Arbitraje internacional: cuestiones de actualidad, Bosch, Barcelona, 2009, p179 et seq; or Correa Delcasso, JP, 'La extensión del convenio arbitral a partes no firmantes del mismo: análisis de la doctrina de la Corte de Arbitraje de la CCI, in VV AA, Arbitraje: Comentarios prácticos para la empresa, Difusión Jurídica y Temas de Actualidad, Barcelona, 2011, p45 et seq.

In this particular case, the Court resolved an annulment action based on a presumable breach of public policy; the decision rendered admitted the possibility of condemning a co-respondent who was not a signatory of the arbitral clause (but a representative of the signatory), by an application of the so-called disregard of legal entity theory.

6 Park, William W, 'Non-signatories and international contracts: an arbitrator's dilemma', in *Multiple Parties in International Arbitration*, Oxford, 2009, p3.

7 *Dow Chemical v Isover St Gobain*, ICC Case No. 4131, Interim Award, 23 September 1982.

8 See article 7.3) and 4) of the UNCITRAL Model Law.

9 See article II.2 of the New York Convention.

10 See Spanish Supreme Court decision dated 9 July 2007 (RJ 2007, 4960).

11 See Spanish Supreme Court decision dated 18 June 2013 (RJ 2013, 4632). In the same opinion, Spanish Supreme Court decision dated 6 March 2009 (RJ 2009, 2793).

12 Park, William W (op cit, p22) distinguishes between 'consenting non-signatories' and 'non-consenting non-signatories'.

Félix J Montero
Pérez-Llorca

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 Pérez-Llorca in July 2004 after six years as a practising lawyer, and was promoted to partner in January 2008. His working languages are Spanish and English, and he regularly lectures on litigation and arbitration law.

Félix has experience in domestic and international commercial arbitration, both institutional and ad hoc. He has participated in important arbitrations on disputes administered by the International Court of Arbitration of the ICC on mechanical engineering turnkey contracts (energy, automotive, oil, iron and steel industry); international corporate law; international loan agreements; civil engineering contracts (harbour construction, railway overhaul, water treatment and telecom infrastructures); distributorship contracts; administrative concessions; and so on.

Félix regularly contributes articles to national and international publications and is co-author of Código de Arbitraje (Aranzadi, second edition, 2009), a volume compiling and commenting statutory materials and rules on arbitration. In addition, Félix has participated in the Thomson-Aranzadi commentary to the 2003 Spanish Law on Arbitration, with comments to articles 6, 35, 36, 37, 38 and 39.

Félix is also a member of the Spanish Club of Arbitration, an officer of the IBA Litigation Committee and a former member of the steering committee of the International Arbitration Commission at the Union Internationale des Avocats.

Beatriz Orbis
Pérez-Llorca

Beatriz Orbis joined Pérez-Llorca in 2012, after four years as a practising lawyer. Her working languages are Spanish, English and Catalan.

In commercial litigation and arbitration, Beatriz has experience in banking law, construction law, lease contracts, industrial agreements, share claims, civil liability and tort, and annulment of corporate resolutions. Additionally, Beatriz has experience in domestic and international commercial arbitration, both institutional and ad hoc. Beatriz has participated in arbitrations held before the ICC and in domestic arbitrations before entities such as the Madrid Court of Arbitration, the Spanish Court of Arbitration and the Court of Commercial and Civil Arbitration.

Beatriz is a member of the Madrid Bar Association and the Spanish Arbitration Club.

Pérez-Llorca

Paseo de la Castellana, 50
28046 Madrid
Spain
Tel: +34 91 436 04 20
Fax: +34 91 436 04 30
pll@perezllorca.com

Av Diagonal 640 8ºA
08017 Barcelona
Spain
Tel: +34 93 481 30 75
Fax: +34 93 481 30 76

Félix J Montero
fmontero@perezllorca.com

Beatriz Orbis
borbis@perezllorca.com

www.perezllorca.com

Established in 1983, Pérez-Llorca has become one of the leading independent Spanish law firms due to the solid legal background, experience and continuous training of its lawyers, as well as their dedication to quality and efficiency. The firm advises both international and domestic clients, including major banks, public and private companies, national and regional government authorities, international and domestic investors and funds, and prestigious foreign law firms.

International experience
The firm has continued experience in cross-border transactions. Our legal advice is tailored to the requirements of national and international companies within the main sectors of Spanish law: administrative law, banking and finance, capital markets, civil and commercial litigation, commercial law, competition law, copyright law, corporate compliance, corporate governance, corporate law, corporate restructuring, data protection and e-commerce, environment, European Union law, insolvency, intellectual property, labour law, land planning, litigation before the European Court of Justice, litigation before the public administrations, M&A, national and international arbitration, private equity, project finance, public procurement, real estate, tax, unfair competition and white collar crime.

Our litigation and arbitration practice
This team is principally dedicated to defending the interests of the client companies, with lawyers acting before all legal forums throughout Spain. This team focuses on both commercial litigation and international and domestic arbitration. Its members have broad experience in complex cases relating to unfair competition, intellectual property, energy, construction, engineering, banking, tort liability, distribution and agency contracts. In addition, partners of the firm are regularly appointed as arbitrators in significant international and domestic arbitration proceedings.

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 2015 ISSN 1753-1101