



The European Arbitration Review 2018

Published by Global Arbitration Review in association with

Advokattfirman Delphi
ArbLit
Association for International Arbitration
Bär & Karrer AG
Billiet & Co
Clyde & Co LLP
De Brauw Blackstone Westbroek
Dittmar & Indrenius
Fried, Frank, Harris, Shriver & Jacobson LLP
FTI Consulting
Jenner & Block London LLP
Konrad & Partners

Kubas Kos Galkowski
Lazareff Le Bars
Leaua & Asociatii
Lévy Kaufmann-Kohler
Luther Rechtsanwalts-gesellschaft mbH
MARCHENKO DANEVYCH
Pérez-Llorca
Peter & Partners International Ltd
PLMJ Lawyers
Squire Patton Boggs (US) LLP
Ulčar & Partners Ltd
VMB Law Firm

Spain

Mercedes Romero and Raquel López Pérez-Llorca

By virtue of the privity doctrine, the parties to an arbitration procedure are generally entitled to seek the annulment and recognition of the arbitral award.¹ However, the question that remains is whether third parties are entitled to these legal actions.

A recent High Court of Madrid decision dated 13 October 2016 (STSJ Madrid, and the judgement)² seems to conflict with previous case law and scholarly work dealing with third-party standing in annulment proceedings. This judgement offers a broader interpretation and indicates that third parties that have not been part of the arbitration proceedings could indeed be entitled to bring annulment actions as long as certain conditions are met.

The issue of having legal standing to set aside an arbitral award is mainly regulated in article 10 of the Spanish Civil Procedure Act,³ together with articles 40 and 41 of the Spanish Arbitration Act.⁴ Most scholars and case law have interpreted both statutes to mean that third parties should not be able to bring annulment actions, even if they are interested in the outcome of the arbitral proceedings or could be directly affected by the arbitral award.⁵ However, the judgement seems to have taken the stance that third parties may have legal standing to seek annulment.

In addition, we believe that the judgement's rationale might also be useful for filling the legal void found in the Spanish International Judicial Cooperation in Civil Matters Act ('IICJ Act').⁶ Article 44.2 of the IICJ Act does not expressly grant third parties the right to seek non-recognition of an arbitral award in pending judicial proceedings. We raised this very issue in our *GAR* article last year⁷ and therefore, we believe that the test for third-party standing to seek annulment, set out by the judgement detailed below, could provide us with a means of defending the rights of third parties in the annulment and enforcement proceedings of arbitral awards.

The Facts

In the case in question, the dispute concerned the validity of a corporate agreement through which the director of the company CERMOL 79, S.A. (the company) was appointed. The parties to the dispute were (i) the members of the company who challenged the validity of the agreement, against (ii) the company itself. Jurisdiction to arbitrate this case arose from the arbitration clause for shareholder-corporation disputes contained in the company's bylaws.

The arbitral award was rendered on 4 January 2016, and held that the disputed corporate agreement appointing the director was null and void. The director of the company, who had not taken part in the arbitration, sought the annulment of the award before the High Court of Madrid, arguing that it was against public policy and in violation of article 41.1(f) of the Spanish Arbitration Act and article 24 of the Spanish Constitution (due process clause).⁸

Firstly, the company and its members who challenged the corporate agreement in arbitration, namely the respondents in the annulment proceedings (the 'respondents'), argued that the

director's claim for annulment should be dismissed due to lack of legal standing to set aside the award, since he was not a party to the arbitration. Conversely, the respondents submitted that the other statements on the merits were unfounded and based on the director's subjective opinion.

Given that legal standing is a jurisdictional concern, the Tribunal ruled on this before considering the merits of the dispute. Despite the fact that the judgement ultimately found that the director lacked standing,⁹ what is interesting is the reasoning behind the decision, since it dissents from the majority view, which rejects third-party standing to seek annulment.

Ruling of the judgement: test to determine if third parties have legal standing to annul an arbitral award

In summary, the Tribunal held that the director did not have standing, not because he was a third party, but because, as a director of the company, he should have participated in the arbitration if he did indeed have a legitimate interest in the outcome of the proceedings. That is to say, the judgement relies on an estoppel argument, which prevents a party from claiming a right that it has previously waived. This principle is embodied in article 6.2 of the Spanish Civil Code in connection with article 7.1.¹⁰ Here, the director had the opportunity to participate in the arbitration pursuant to article 206 of the Spanish Corporation Law,¹¹ but he chose not to do so and, therefore, he could not benefit from having standing to set aside the award later on.

The judgement is particularly groundbreaking because it concluded that a third party who shows a direct interest in the outcome of the annulment proceedings could have standing to seek annulment even if they have not been part of the arbitration proceedings. According to the judgement, direct interest for seeking annulment would be understood to be a basis for a due process claim,¹² ie, that the third party lacked the opportunity, or was unjustly denied the chance of participating in the main arbitration proceedings.

The judgement also highlights that even though scholarly work and case law is divided on this matter, third-party standing to seek annulment must be acknowledged if we adopt a broad interpretation of article 41.1 of the Spanish Arbitration Act, which states that: 'an award may be set aside only if the applicant alleges and furnishes proof [...].'

The wording of the aforementioned provision does not expressly exclude third parties. Therefore, in the Tribunal's view, the legislator's intent when enacting this new Arbitration Act in 2003 was to extend the scope of standing for annulment actions to include third parties. Indeed, in what was article 48 of the 1988 Spanish Arbitration Act, the scope of standing was specifically limited to the parties to the main arbitration proceedings:

[...] Law 60/2003 has introduced certain amendments which in some ways modify the previously established system, since the new Law refers

to [standing for annulment] much more extensively than the Law of 1988 did [...]. This wording seems to show that it not only includes those who were parties to the arbitration process, but also includes those who, while not yet party to the arbitration procedure, may nevertheless justify a direct interest in the exercise of the annulment action, because they should have been part of it, or, having been part of it, have been wrongly denied the chance to take part in the arbitral process.¹³

Scholars such as Professor Martín Brañas¹⁴ support this view, stating that the new scheme under the 2003 Spanish Arbitration Act provides for third-party standing to annul an award as long as the requesting party proves it has a direct interest in the outcome of the annulment:

*The amendment is evident, the Law does not currently limit standing to those who were part of the arbitration process, but also opens the door to others who, having not been part of the arbitration, are nevertheless directly interested in the annulment of the award due to the existence of any of the causes for annulment set forth in art. 41 of the Arbitration Act.*¹⁵

Notwithstanding the above, it is worth noting that the majority position still seems to be more conservative when it comes to allowing third parties to annul an arbitral award. In fact, until now, case law has largely supported the idea that only the parties to the arbitration are entitled to seek annulment in accordance with articles 9 and 41.1 of the Spanish Arbitration Act.¹⁶

For instance, Madrid's Appellate Court issued a judgment in 2008, which held that no third party should ever have standing to seek annulment of an arbitral award even if they showed a legitimate interest.¹⁷ The reasoning relied on the privity of contract nature, which is an essential element of an arbitration agreement. In similar terms, some scholars have been reluctant to broaden the standing to annul an award to include interested third parties, based on a narrow interpretation of article 41.1 of the Spanish Arbitration Act in relation to the privity of contract doctrine.¹⁸

Third-party's burden of proving legitimate interest to annul the award

Once the test for third-party legal standing is satisfied, tribunals can conclude that the requesting party has a direct interest in the annulment proceedings. Then the question becomes whether or not third-party interests are significant enough to break with the majority position of rejecting third-party standing in annulment proceedings.

Third-party interests in arbitration have grown exponentially in recent years due to the consolidation of this dispute resolution mechanism. In practice, this means that, in many instances, other parties that have not been part of the arbitration will be affected by the award. As a consequence, third parties will try to find a way to protect themselves from the potential negative effects of an arbitral award. As Professor Brekoulakis points out:

*The fact that third-party recourse against domestic awards has been accepted in some jurisdictions provides evidence that the interests of a third party might well be adversely affected by arbitration proceedings.*¹⁹

In this regard, it is worth mentioning a recent decision from the Belgian Constitutional Court dated 16 February 2017,²⁰ which has ruled that third parties must be provided with an opposition procedure against arbitral awards, as is the case for third parties in ordinary judicial proceedings. Likewise, the French Supreme

Court has acknowledged third-party interests – at least in domestic arbitration – by ruling on 5 May 2015²¹ that a joint guarantor has standing to challenge an award if it directly affects their interests.

Conclusion

Third-party standing to seek annulment remains a controversial issue in case law and scholarly work. In arbitration, as opposed to in judicial proceedings, only the parties that have signed an arbitral agreement are bound by arbitration and, in principle, are the only ones entitled to seek annulment of the award.

In Spain, the majority view was that third parties lack standing to annul an award in all cases. However, since the enactment of the 2003 Spanish Arbitration Act, the wording of article 41.1 has changed in a way that, according to some scholars, does not expressly exclude third parties from having standing to set aside an award under certain circumstances.

The judgement in question seems to have taken the stance of opening the door to third parties that wish to annul an award even if they have not been a party to the arbitration, as long as they show a direct interest in the outcome of the proceedings. Direct interest is understood to be a basis for a due process claim, ie, that the third party lacked the opportunity, or was unjustly denied the chance of participating in the main arbitration proceedings.

As a consequence, the debate moves to whether the 'direct interest' definition from the judgement could be deemed equal to the 'legitimate and direct interest' required by the third-party intervention mechanism set forth in article 13.1 of the Spanish Civil Procedure Act,²² which allows third parties to intervene in pending judicial proceedings and whose scope is broader than the one provided in the judgement.

In that scenario, third parties would be able to intervene in pending annulment proceedings in order to defend their interests. Nevertheless, future judicial decisions that develop this concept of direct interest of third parties to seek annulment of an arbitral award would be needed to further clarify the issue.

Notes

- 1 Born, G. *International Commercial Arbitration, Second Edition*, Kluwer Law International, 2014, pp. 1405 – 1406.
- 2 See High Court of Madrid decision dated 13 October 2016 [AC 2016, 1799].
- 3 'Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil'.
- 4 'Ley 60/2003, de 23 de diciembre, de Arbitraje'.
- 5 This is true even in the international arbitration arena. As stated by Professor Born: 'In many jurisdictions, only parties to an arbitration, who are bound by an arbitral award, are entitled to seek to annul the award', *op. cit.*, p. 3391.
- 6 'Ley 29/2015, de 30 de julio, de Cooperación Jurídica Internacional'.
- 7 Montero, F., and Romero, M. 'The European, Middle Eastern and African Arbitration Review 2016', *Law Business Research*, 2016, p. 123.
- 8 'Constitución Española, de 29 de diciembre de 1978'.
- 9 As a consequence of finding a lack of legal standing, the Tribunal did not have to issue a judgment on the merits.
- 10 Article 6.2 of the Spanish Civil Code: 'The voluntary exclusion of applicable law and the waiver of any rights acknowledged therein shall only be valid when they do not contradict the public interest or public policy or cause a detriment to third parties'. Article 7.1 of the Spanish Civil Code: 'Rights must be exercised in accordance with the requirements of good faith'.
- 11 'Real Decreto Legislativo 1/2010, de 2 de julio, por el que se aprueba el Texto Refundido de la Ley de Sociedades de Capital'.

- 12 Translated transcript from the original judgement in Spanish: '(...) if the basis for annulment is a due process claim, third-party standing shall be admitted'.
- 13 Literal translation from the original judgement in Spanish.
- 14 In similar terms, Barona Vilar, S. *Comentarios a la Ley de Arbitraje*, Thomson Civitas, 1^o ed., 2004, p. 1453. See also González-Montes, J.L. *El control judicial del arbitraje*, 1st ed., La Ley, 2008, p. 126.
- 15 Translation from the original in Spanish: Marín Brañas, C. 'La acción de anulación frente a laudos arbitrales: especial referencia a su tramitación procedimental', *Foro Nueva Época*, núm. 3, 2006, p. 130.
- 16 See Madrid Court of Appeals decision dated 16 December 2009 [JUR 2009, 193855].
- 17 See Madrid Court of Appeals decision dated 15 September 2008 [JUR 2008, 382560].
- 18 For instance, Merino Merchán, J., Chillón Medina, J. *Tratado de Derecho Arbitral*, 3rd ed., Thomson Civitas, 2006, p. 726.
- 19 Brekoulakis, S. 'The relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room', *Penn State Law Review*, Vol. 113:4, 2009, p. 1170.
- 20 Declève, Q. 'Belgian Constitutional Court Rules Third Party Opposition Against Arbitral Awards Admissible', *International Litigation Blog*, 2017, Web. 8 September 2017.
- 21 'Arrêt no. 424 du 5 mai 2015 (14-16,644) - Cour de cassation - Chambre commerciale, financière et économique - ECLI:FR:CCASS:2015:CO00424'.
- 22 Article 13.1 of the Spanish Civil Procedure Act: 'While a process is pending, whoever proves to have a direct and legitimate interest in the outcome of the lawsuit may be admitted as plaintiff or defendant'.



Mercedes Romero
Pérez-Llorca

Mercedes Romero joined Pérez-Llorca in 2006 after practising law for a year and a half at a medium-sized law firm in Madrid. She made partner in January 2017. Mercedes holds a Postgraduate degree in international commercial arbitration from Queen Mary University, London and a degree in law from Universidad Carlos III, Madrid.

Mercedes advises clients on international arbitration and litigation in various sectors such as the financial, construction, engineering, corporate, energy and telecommunications sectors. Mercedes participates in complex judicial and arbitral proceedings, both nationally and internationally, regarding controversies arising from contractual obligations in purchase agreements, distribution agreements, financial operations, financial lease agreements, joint ventures, turnkey contracts, shareholder agreements and all types of contractual disputes. In addition, Mercedes participates in enforcement proceedings of foreign judgments and awards, as well as other issues relating to international private law.

Mercedes is a professor at Universidad Carlos III de Madrid and Universidad Europea de Madrid. She also participates as a regular speaker in arbitration courses and conferences.

Mercedes writes regularly for various publications, such as for the firm's national and international newsletters, and contributed to the reissue of the Arbitration Code Aranzadi (2009). She is currently contributing to the new Arbitration Code which is to be published by Thomson Reuters Aranzadi in 2017.

Mercedes Romero is listed by the legal directory *Best Lawyers* for arbitration and mediation.



Raquel López
Pérez-Llorca

Raquel López joined Pérez-Llorca in 2017 after one year working as a trainee for several international law firms in Madrid. She is currently an associate in the litigation and arbitration practice. Raquel holds a master's degree in legal practice from Universidad Carlos III, Madrid, a Law degree from Universidad de Granada, and a Juris Doctor degree from Stetson University College of Law, United States.

In addition, Raquel is a member of the Spanish Arbitration Club. As a student, she participated in the Willem C. Vis (East) International Commercial Arbitration Moot in Hong Kong, and in the Foreign Direct Investment International Arbitration Moot in Buenos Aires.

Pérez-Llorca

Paseo de la Castellana, 50
28046 Madrid
Spain
Tel: +34 91 436 04 20
Fax: +34 91 436 04 30

Mercedes Romero
mromero@perezllorca.com

Raquel López
rlopez@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. With offices in Madrid, Barcelona, London and New York, the firm advises both national and international clients, including major banks, public and private companies, national and regional government authorities, national and international 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.



**ABA Section of
International Law**
Your Gateway to International Practice

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012