

Setting aside an arbitral award as a result of an institutional relationship between one of the parties and the arbitral institution

Madrid, January 2015

Last November, the High Court of Justice of Madrid set aside an arbitral award rendered by a sole arbitrator appointed by the Court of Arbitration of Madrid (the CAM) in an arbitration between the Madrid trade fair institution IFEMA (the respondent) and E. Life Europe, S.L. (the claimant).

E. Life Europe claimed that the award violated the public policy, and in particular the principle of impartiality, because the CAM is the arbitration body of the Official Chamber of Commerce and Industry of Madrid, which, in turn, owns 31 percent of IFEMA. E. Life Europe further argued that IFEMA had been able to impose upon it the specific arbitration of the CAM due to its superior bargaining power.

IFEMA alleged that the impartiality requirement refers to the arbitrator himself, not to the arbitral institution, which, by definition, has no power to resolve the dispute. And the sole arbitrator was independent and impartial, according to IFEMA.

IFEMA further claimed that the contract which contained the arbitration agreement had been negotiated on a level playing field.

In addition, IFEMA claimed that the institutional links between the CAM and IFEMA were notorious when the parties entered into their arbitration agreement and also across the whole arbitration process; however, the claimant had not raised any objection in this respect and hence its silence amounted to a tacit waiver of the right to challenge the award, according to the arbitration act.

The High Court of Justice said that the discussion about the bargaining power of the parties to a contract is only relevant when one of the parties is a consumer, not when both parties are corporations, like in the case at hand.

The High Court of Justice also found that no abuse by IFEMA could be claimed, because E. Life Europe expressly wanted that the sole arbitrator was appointed by the CAM, rather than by agreement of the parties.

The judgement said the real issue was not the impartiality of the arbitrator, but the neutrality of the CAM and the principle of equality.

According to the High Court of Justice, the principle of equality is a matter of public policy and due process and is therefore beyond the will of the parties. As a consequence, the existence of a conflict of interests in the arbitral institution renders the arbitration award and the very arbitration agreement null and void. This would be so even in case E. Life Europe had been aware of the institutional links between the CAM and IFEMA (by notoriety or otherwise), because no waiver is admissible, even *ex post*.

According to the High Court of Justice, the CAM should have never accepted to administer the arbitration.

J. Almoguera y Asociados

The decision reached by the High Court of Justice seems arguable, in particular given that it was not established that the parties had not been at all times on a level playing field. Indeed, it does not seem obvious in this particular case that vacating the award was the most appropriate decision, taking into account not only the principle of due process, but also those of party autonomy and good faith, which are not less important than the former.