

A recent judicial decision on independence and impartiality of arbitrators

Madrid, July 2015

The Madrid High Court of Justice (the "MHCJ") has recently denied a vacation request of an award rendered by the Court of Arbitration of Madrid (the "CAM"). The arbitration involved Banco Bilbao Vizcaya Argentaria, S.A. ("BBVA") and Constructora de Viviendas Unifamiliares, S.L. ("VIUCON").

VIUCON and a related company, CABDE, S.A., had simultaneously filed two requests of arbitration regarding a financial product against the same entity, BBVA, and seeking the same decision.

BBVA nominated the same arbitrator for both proceedings, but the CAM did not confirm such arbitrator in one of the two proceedings.

VIUCON alleged that these circumstances had not been disclosed by the "BBVA arbitrator" and the CAM, respectively.

Therefore, it claimed that sections 17 of the Spanish Arbitration Act ("AA") and 11 of the CAM rules, both concerning arbitrators' duty of impartiality and independence, had been violated and requested the vacation of the award.

However, the MHCJ upheld the award for the following reasons.

Firstly, it did not find any ground why the "BBVA arbitrator" should not be considered independent and impartial. The MHCJ used the rules for disqualification of judges laid down by the Spanish law on the Judiciary and the 2004 International Bar Association guidelines on conflicts of interests (the "IBA Guidelines"), as indicative rules.

It is remarkable that this is the third time in less than a year that the MHCJ mentions the IBA Guidelines, even considering that the court points out their merely indicative nature.

The MHCJ also noted that, according to the IBA Guidelines, not every failure to disclose a circumstance relating to the independence and impartiality of the arbitrator implies *per se* that the arbitrator is not independent and impartial.

Finally, the MHCJ said that, pursuant to section 6 of the AA, VIUCON had tacitly waived its right to challenge the award because it had not raised any objection about the arbitrator's independence and impartiality when it first learned about the circumstances at hand.

This conclusion is indeed to be welcome, but is somehow inconsistent with that reached by the same MHCJ in the IFEMA case back in November 2014, which we commented in our January 2015 note.

In that occasion the MHCJ overturned an award on the grounds of lack of independence and impartiality despite the fact that the party bringing the vacation motion had been aware of the relevant circumstances and had not raised any objection until the award had been rendered. The court held that the principle of independence and impartiality is a public policy principle (equality) and therefore cannot be tacitly waived.