

**Arbitrators and arbitral institutions may not participate or be heard  
in the action to set aside an award**

Madrid, September 2018

A recent judgment of the Madrid High Court (MHC)<sup>1</sup> has found that arbitrators and arbitral institutions may not have any involvement in the action to set aside an arbitral award, despite their potential economic liability<sup>2</sup>.

The MHC noted that a proposal to amend the Arbitration Act was put forward in 2011 to entitle arbitral institutions to participate as defendants, but it finally did not go through.

The MHC reminded that the parties to the annulment action are the claimant and the defendant in the arbitration, and only exceptionally may third parties intervene in the action, provided they prove they ignored the existence of the arbitration and are directly affected by the award, in particular because they should have been a party to the arbitration proceedings.

In our view it is unfortunate that arbitrators or arbitral institutions are not, at the very least, heard by the court dealing with a vacatur action when their circumstances or the conduct of the arbitrator or the arbitral institution is part of the cause of action, as was the case in a judgment handed down on 28 July this year by the MHC.

The reasons why we think arbitrators and arbitral institutions should be heard is because they could shed light upon the merits of the annulment action and it seems fair that they have the opportunity to defend themselves in proceedings that eventually may give rise to a damages action against them.

The 28 July MHC judgment vacated a partial award rendered in a well-known and protracted arbitration dispute between Delforca (formerly Gaesco) and Banco Santander administered by the Spanish Arbitration Court (CEA), that is currently part of the Spanish Chamber of Commerce<sup>3</sup>.

Among other things, the majority of the tribunal<sup>4</sup> found that there was an “obvious” lack of impartiality of the CEA, given (i) that its president at the time the arbitration started was also a director of Banco Santander Colombia and he only resigned when Delforca raised this issue, and (ii) the existence of three lawsuits between Delforca and the predecessor entity of the Spanish Chamber of Commerce.

As regards the latter circumstance, it is important to note that Delforca had brought two damages actions against the predecessor entity as a result of the annulment of a previous award on the same dispute; the third litigation was about the stay of the

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<sup>1</sup> Judgment num. 21/2018, of 24 April.

<sup>2</sup> This is the doctrine generally followed by Spanish courts and the Constitutional Court.

<sup>3</sup> The arbitration started in 2008 and a first award was rendered in 2009; this award was annulled in 2011 following an action brought by Delforca. New arbitration proceedings ensued that led to the partial award that was vacated by this 28 July judgment.

<sup>4</sup> The president of the MHC issued a well-articulated dissenting opinion.

previous arbitration. Banco Santander apparently submitted that these lawsuits had been brought precisely to torpedo the arbitration, but the MCH ruled that was not the case given that the annulment of the previous award was a legitimate reason to bring a damages action against the arbitral institution and the arbitrator<sup>5</sup>.

The MHC's majority view was that the lack of impartiality of the CEA rendered the arbitration agreement "invalid", and thus they decided to vacate the award. The practical consequence of this judgment seems to be that the parties will have to resolve their dispute before judicial courts, more that then years after the first arbitration request.

The above indicates that one should be wary of annulment actions based on this sort of grounds, to prevent opportunistic tactics that may violate the estoppel and good faith principles.

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<sup>5</sup> The first award was set aside on the grounds of lack of impartiality of the president of the tribunal and infringement of the right to practice the evidence proposed.