The European Arbitration Review

2019

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The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

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Summary

Under article 11.1 of the Spanish Arbitration Act,[1] an arbitration agreement binds the parties to its terms and prevents courts from hearing disputes which are submitted to arbitration, provided that the concerned party invokes said arbitration agreement and raises an objection to jurisdiction within 10 days of the service of process. This is the 'negative effect' of the arbitration agreement.

In 2018, Spanish courts have rendered a large number of interesting decisions that clarify some of the conditions for bringing an objection to jurisdiction. The aim of this article is to provide an overview and analysis of the conclusions reached in these rulings.

THE SUBMISSION OF A DISPUTE TO ARBITRATION CANNOT BE ASSESSED EX OFFICIO, AS IT CAN ONLY BE ASSESSED FOLLOWING A MOTION FROM A PARTY BY MEANS OF AN OBJECTION TO JURISDICTION WHICH IS FILED IN DUE TIME AND FORM

Under Spanish law, the existence of an arbitration agreement cannot, under any circumstance, be assessed ex officio. A recent decision from the Court of Appeal of Bilbao, dated 18 May 2018,[2] has confirmed that it is the party that wishes to invoke the arbitration agreement who carries the procedural burden to file the objection to jurisdiction in due time (ie, within 10 days of the service of process) and form (the brief containing the objection must be accompanied by the piece of evidence on which it is based).[3] Thus, the judge before which a claim is filed cannot dismiss it ex officio and nor do so based on belated allegations made by a party in its statement of defence.

In view of the above, the Court of Appeal of Bilbao dismissed the objection to jurisdiction that was alleged by the defendant in its statement of defence, in which the defendant argued the existence of a framework agreement of sanitary assistance which established that the parties must submit any controversy regarding the said agreement to arbitration.

In the same vein, the Court of Appeal of Málaga decision dated 8 January 2018[4] found that if the defendant appears in the court proceedings without duly filing an objection to jurisdiction, the defendant is tacitly renouncing the arbitration agreement, thus preventing a solution by means of arbitration in relation to that specific dispute.

ONLY THOSE ACTIONS AIMED AT CHALLENGING CORPORATE RESOLUTIONS WHICH ARE CONTRARY TO PUBLIC ORDER SHALL BE EXCLUDED FROM THE POSSIBILITY OF BEING SUBMITTED TO ARBITRATION PROCEEDINGS

With regard to corporate arbitration, a decision from the Court of Appeal of Valladolid, dated 5 March 2018,[5] addressed the question of whether a claim against corporate resolutions should be considered as a public order issue for the parties, and therefore cannot be decided in arbitration proceedings, or if the claim is actually subject to the parties' decision according to the principle of autonomy of the will. In the case at hand, the Court of Appeal of Valladolid accepted the objection to jurisdiction filed by the defendant and decided to refrain from hearing the dispute as it considered that, according to the relevant clause of the company bylaws, the matter was subject to arbitration.

In particular, the Court of Appeal of Valladolid found that only actions aimed at challenging corporate resolutions that are contrary to public order are excluded from the possibility of being submitted to arbitration proceedings, as they are issues outside the scope of decision of the parties. Actions aimed at challenging corporate resolutions which are merely contrary to the law, the company bylaws or corporate interests are not excluded. In this regard, an infringement of a legal rule is not enough on its own to be considered as an infringement of

public order, and requires a higher degree of unlawfulness or severity, such as if it is contrary to constitutional principles, a criminal offence or a contradiction of the essential principles for society that could be considered under the scope of public order.

DISMISSAL OF AN OBJECTION TO JURISDICTION DUE TO THE INCLUSION OF THE ARBITRATION CLAUSE IN A LETTER OF INTENT

A decision from the Court of Appeal of Madrid, dated 19 February 2018,[6] revoked a first instance ruling that upheld an objection to jurisdiction based on an arbitral agreement included in a letter of intent. Letters of intent are contractual entities in common law, whose incorporation into the Spanish legal system has arisen as a result of its wide use by economic operators. Consequently, they are a strange element for the Spanish legal system, and lack any legal regulation, but have been accepted by means of the principle of autonomy of the will,[7] meaning that its content is decided by the parties, and could contain a binding offer, or not. Therefore, general rules on its effects, characteristics or concept cannot be extracted solely from its denomination. It will depend on the degree of determination of the key elements, the content of the document and the behaviour of the parties.

Under these circumstances, the Court of Appeal found that the letter of intent entered into by PKG Holdings LLC and GEA Group AG and the named declaration of non-binding intentions for the acquisition of the Bossar business was a simple offer without any binding force (as clearly follows from its name, but also from its clauses), and therefore its arbitration clause (which submits all disputes arising out of or in connection with the letter of intent to the German Arbitration Institute) is inoperative.

ACCEPTANCE OF AN OBJECTION TO JURISDICTION FOR THE CLARITY OF THE ARBITRATION CLAUSE AND THE EFFECTIVE POSSIBILITY OF ITS KNOWLEDGE BY THE PARTIES

Unlike article 8.1 of the UNCITRAL Model Law on International Commercial Arbitration,[8] article 11.1 of the Spanish Arbitration Act does not expressly stipulate that the success of the objection to jurisdiction is dependent on having an arbitration agreement which is not null and void, inoperative or incapable of being performed. However, there is well-established case law[9] supporting the prevention of an arbitration clause that is null and void from having effect. In this regard, to be considered effective, the arbitration clause must state the unequivocal will of the parties to submit all, or some, of the issues that arise or that may arise from the relevant contract to the decision of one or more arbitrators.[10] Therefore, the waiver of the exercise of actions before the courts through submission to arbitration must be explicit, clear, conclusive and unequivocal.[11]

The above doctrine was applied by the Court of Appeal of Barcelona in its decision dated 29 June 2018.[12] In the case at hand, the claimant opposed the objection to jurisdiction, which had been filed in due time and form by the defendant, alleging that the arbitration agreement was ineffective due to a lack of express acceptance and ignorance of its real scope. The Court of Appeal of Barcelona has confirmed a first instance ruling that upheld the objection to jurisdiction. The Court of Appeal considered that the arbitration clause was grammatically comprehensible because of its simple wording. The Court of Appeal also felt it was clear that the claimant had the effective possibility of understanding the clause, as it appears to be in a specific titled section, with capital letters and emphasised. This section came at the end of the document, above the parties' representatives' signatures. But, moreover, the claimant's allegation that they had not noticed the arbitration clause cannot be accepted given that, before the agreement was signed, the claimant made some amendments to

it, without expressing any concerns about the arbitration clause. Finally, the fact that the contract contained a submission to the courts of Madrid is irrelevant. Such a compromise does not contradict the main arbitration clause, as it specifies that it will only be applicable if the parties waive the arbitration agreement in writing.

THE LOSS OF ECONOMIC RESOURCES SUFFERED BY ONE PARTY AFTER SIGNING THE ARBITRATION AGREEMENT DOES NOT MAKE THE ARBITRATION AGREEMENT INEFFECTIVE

The Court of Appeal of Toledo decision dated 9 April 2018[13] decided on the appeal filed by the claimant against the first instance ruling, which upheld an objection to jurisdiction filed by the defendant. In particular, the claimant alleged the rebus sic stantibus clause on the basis that, as a consequence of his current lack of financial resources, he was granted legal aid to afford legal representation and access to the court system, and therefore, if he was forced to go to arbitration, he would be deprived of his right to access justice as he was unable to afford the costs and expenses of arbitration proceedings.

The application of the rebus sic stantibus clause is exceptional as it clashes with the general principle pacta sunt servanta. In the case at hand, the Court of Appeal did not deem the imbalance due to a change in circumstances to have been proven, given that the unpredictability – the key element for the application of the rebus sic stantibus clause – has not been proven in this case, as at the time the arbitration agreement was signed, the consequences of a change in financial circumstances were easily foreseeable.

The Court of Appeal also dismissed the claimant's allegation regarding the breach of article 24 of the Spanish Constitution,[14] which refers to the legal protection of citizens' rights. As the Court of Appeal indicates, arbitration is precisely an alternative means of resolving disputes without having to go to court. Therefore, the Court of Appeal did not accept the grounds for the appeal, as the acceptance of the objection to jurisdiction by the court of first instance is lawful, due to the existence of the parties' submission to arbitration. Those parties who agree on the submission of disputes to arbitration should be aware of its implications, and it cannot be alleged that its fulfilment is impossible because of the loss of economic resources suffered by one party after signing the arbitration agreement, as this is a possibility that should be anticipated and assessed.

FINAL CONSIDERATIONS

The 'negative effect' of the arbitration agreement gives rise to interesting questions and controversial situations to be addressed by courts and arbitral tribunals. One of the most common practical issues derived from objections to jurisdictions is the potential coexistence of two types of proceedings – court and arbitration – in relation to the same dispute. Indeed, article 11.2 of the Spanish Arbitration Act, as well as article 8.2 of the UNCITRAL Model Law on International Commercial Arbitration,[15] states that the objection to jurisdiction shall not prevent the initiation or continuance of arbitration proceedings. As a consequence, an objection to jurisdiction filed in the court proceedings may not cause a stay of the concurrent arbitral proceedings, leading to an undesirable overlap between both the proceedings and the decision makers: the court and arbitral tribunal.

This article has also addressed other more specific and less common practical issues which arise from objections to jurisdiction that will help to gain a broader insight into the negative effect of the arbitration agreement under Spanish law, in relation to matters as diverse as

corporate arbitration, letters of intent, rebus sic stantibus clause or the principle of autonomy of the will.

Notes

[1] 'Ley 60/2003, de 23 de diciembre, de Arbitraje'.
[2] See Court of Appeal of Bilbao decision dated 18 May 2018 [LA LEY 94981, 2018].
[3] Article 65.1 of the Spanish Civil Procedural Act ('Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil').
[4] See Court of Appeal of Málaga decision dated 8 January 2018 [JUR 2018, 185924].
[5] See Court of Appeal of Valladolid decision dated 5 March 2018 [JUR 2018, 190040].
[6] See Court of Appeal of Madrid decision dated 19 February 2018 [JUR 2018, 139580].
[7] Article 1255 of the Spanish Civil Code (Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil).
[8] A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests no later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
[9] See Spanish Supreme Court judgment dated 27 June 2017 [RJ 2017, 3021].
[10] See Spanish Supreme Court judgments dated 27 June 2017 [RJ 2017, 3021] and 11 February 2010 [RJ 2010, 3771].
[11] See Spanish Constitutional Court judgment dated 2 December 2010 [RTC 2010, 136].
[12] See Court of Appeal of Barcelona decision dated 29 June 2018 [JUR 2018, 206788].
[13] See Court of Appeal of Toledo decision dated 9 April 2018 [JUR 2018, 207569].
[14] All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.
[15] Where an action referred to in paragraph 1 of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

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