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**Spain.** In a Spanish Supreme Court judgment dated February 15, 2017 (Judgment No. 102/2017), the court dismissed the cassation challenge against a decision the Court of Appeal of Madrid had issued on October 27, 2014. This decision upheld civil liability of two arbitrators because they infringed the arbitral collegiality principle for not inviting the third arbitrator to the deliberations and issuing the award without giving the third arbitrator opportunity to participate in the deliberations.

**Background**

The underlying dispute concerned a distribution agreement between PUMA S.E. (“**Puma**”) and Estudio 2000 S.A. (“**Estudio**”). Puma did not renew this agreement and Estudio therefore commenced arbitration claiming millions of Euro in compensation. The award granted Estudio EUR 98.19 million in compensation. Nonetheless, only two of the three arbitrators, Mr. O and Mr. M, signed this award under the following terms (in English translation):

“*This arbitral award is signed in accordance with article 37.3 Arbitration Act by Mr. O and Mr. M, being the majority of the members of the Arbitral Tribunal required. The signature of Mr. C does not appear as he has not given his consent to the present award, whose notification to the parties should be done as soon as possible in accordance with the interest in such sense expressed by the parties during the present arbitration.*”

At Puma’s request, the Superior Court of Madrid set aside the award in its final judgment. The court considered that Mr. O and Mr. M had improperly excluded Mr. C from the discussion and deliberation of the award, and that the arbitral award had been rendered improperly.

Due to the annulment of the award, Puma started a liability claim against Mr. O. and Mr. M., requesting reimbursement of their fees (EUR 750,000), plus interest and costs. Puma based its claim on the fact that the pair of arbitrators infringed the arbitral collegiality principle, as they had excluded the third arbitrator (Mr. C) that Puma had appointed.

The court of first instance recognized the claim based on proven facts. First, Mr. O (president of the arbitral tribunal) and Mr. M (appointed by Estudio) met on June 2 to issue the arbitral award, emailing a copy to Mr. C. Second, on the same day, Mr. C had informed the arbitral tribunal that he was out of the city on this date, and had not been called to the meeting. Third, Mr. C had always attended the tribunal meetings without showing dilatory or obstructive intent.

Mr. O and Mr. M filed an appeal at the Madrid Court of Appeal, which upheld the first instance judgment. The arbitrators filed a cassation appeal against this judgment before the Supreme Court under Article 21.1 of the Spanish Arbitration Act, arguing the following:

1. Firstly, the arbitrators thought the judgment was inconsistent with Spanish Supreme Court case law. In particular, they claimed that the Supreme Court judgment of April 26, 1999 required that arbitrators’ negligence had to be intentional for liability.
2. Secondly, the arbitrators invoked a judgment the Spanish Supreme Court of March 21, 1991, which dismissed an action to set aside in, which the circumstances revealed that a majority of the members of the arbitral tribunal had adjudicated the dispute, and rendered a final decision.[[1]](#footnote-1)
3. Finally, the arbitrators argued that the case should follow the same line of cases in which an arbitral tribunal is “truncated”.

**Decision**

The Spanish Supreme Court rejected the arbitrators’ grounds of cassation. It stated that the issue to be discussed was the content and scope of the arbitrators’ behavior. In this regard, Article 21.1 of the Spanish Arbitration Act limits arbitrators’ liability to the “*damages caused by bad faith, recklessness or willful misconduct*.”[[2]](#footnote-2)

The Court rejected the arbitrators’ allegations that the judgment of the court of appeal did not comply with the criteria established in its 1991 and 1999 judgments. First, the judgment dated February 15, 2017 states that for the actions to qualify as “reckless,” willful misconduct or intent is not a required condition. “Recklessness” equates to inexcusable negligence. In this case, the court concluded that the arbitrators’ behavior was unjustified, as they had ignored their duties as arbitrators, and their unusual behavior had caused damage to one of the parties. Regardless their intention, it was proved that the two arbitrators had excluded the third arbitrator from deliberating and making the arbitral award.

Second, the Court concluded that the arbitrators confused the collegiality principle with the necessity of achieving a majority of consent in order for the award to be valid. The Spanish Arbitration Act requires that all arbitrators in the arbitral tribunal participate in the deliberation and decision making process. It is for this reason that the dissenting opinion mechanism is allowed; it ensures that all criteria are expressed in the award and that the parties are aware of each arbitrator’s position. Moreover, the Supreme Court denied the applicability to this particular case of the case law regarding “truncated tribunals”. In the case at hand, Mr. C had not prevented the arbitral tribunal from deliberating, voting, and making the arbitral award so the tribunal was not truncated.

Finally, the Court underlined the fact that Mr. O and Mr. M were fully aware of the remaining arbitrator’s absence. They gathered to render the award nearly a month ahead of schedule and they did so without calling Mr. C.

**Comment**

This decision is interesting for its treatment of arbitrators’ personal liability. The arbitrators were found liable notwithstanding the principle of general immunity from civil liability that Spanish law still provides to arbitrators.

In this case, the Supreme Court took a comprehensive view of the specific circumstances and confirmed that the arbitrators were at least grossly negligent in performing their role under Article 21.1 of the Arbitration Act.

The first instance and the appeal courts rightly considered that the arbitrators had breached their contractual obligations with the parties by violating the principle of collegiality during the decision making process. Consequently, the Supreme Court concluded that the party who had appointed Mr. C as arbitrator had seen its right of defense infringed and that the arbitrator’s conduct had resulted in damages.

In spite of this unfortunate case, Article 21 of the Spanish Arbitration Act sets forth a very high standard of negligence: arbitrators will only be liable for bad faith, recklessness or willful misconduct. In this particular case, the Supreme Court rightly concluded that the two arbitrators had acted recklessly and crossed the line. Hence, the Supreme Court held them liable against the party that appointed the excluded arbitrator.

Thus, we can conclude that arbitrators accepting appointments in Spain are highly protected. Yet, they must be aware of their contractual duties towards the parties and the arbitration process at all times, including with respect to the deliberations and signing of the award. This case might also send a warning to other jurisdictions that excluding an arbitrator from the deliberation process is a severe violation of arbitrators’ obligations. A similar violation was reported by Rusty Park (Professor of Law, Boston University), who noted that two barristers from London once sent a senior American arbitrator [him] an agreed award for his signature.

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1. In that case, however, we submit that no evidence existed for the exclusion of the third arbitrator from the deliberation process, as the award includes the third arbitrator’s dissenting opinion. Indeed, the Supreme Court dismissed the action to set aside the award because the third arbitrator had participated in the deliberation process, even though only a majority of the tribunal members adopted the award. [↑](#footnote-ref-1)
2. Article 21 Act 60/2003, of December 23, 2003 on Arbitration. Liability of arbitrators and arbitral institutions. Provision of funds (English translation). [↑](#footnote-ref-2)