



Partial awards set aside for lack of impartiality of arbitrator and arbitral institution (Madrid High Court of Justice)

Alberto Fortún

Socio

alberto.fortun@cuatrecasas.com

SPREEDREAD

In a decision dated 4 November 2016, but only recently published, the Madrid High Court of Justice set aside two partial arbitral awards on the following grounds:

- Lack of impartiality of the arbitrator appointed by the court of arbitration.
- Lack of impartiality of the arbitral institution itself.

The decision was unanimous in respect of the first ground but by majority in respect of the second ground.

While the court's decision to set aside the awards for lack of impartiality (in reality, independence) of the arbitrator appointed by the court of arbitration was unsurprising and standard, the decision holding that the arbitral institution acted impartially is surprising. This is so in part because, as held in the dissenting opinion, in the authors' view there was clearly insufficient evidence to reach this conclusion.

However, most shocking to the Spanish arbitration community was the majority conclusion that the finding that the arbitral institution acted impartially resulted in the invalidity of the arbitration agreement. It is likely that in reaching this conclusion, the court exceeded the powers conferred on it by the Spanish Arbitration Law. (Bajoz Eólica, SL v Caixabank, SA (Judgment No. 70/2016).)

BACKGROUND

Relevant provisions mentioned by the court:

- Articles 14.2 and 14.3 of the Spanish Arbitration Law (LA) provide, among other things, that arbitral institutions will ensure that arbitrators are independent.
- Article 17.1 of the LA states that all arbitrators must be and remain independent and impartial throughout arbitration and they may not maintain any personal, professional or commercial relationship with the parties.



· Article 17.2 of the LA establishes that proposed arbitrators must disclose any circumstances that could raise doubts as to their impartiality or independence and must continue to do so after their appointment. In addition, at any time during the arbitration, the parties may ask the arbitrators to clarify their relationship with any of the other parties.

· Article 17.3 of the LA provides that an arbitrator may be challenged only when there are circumstances that give rise to justifiable doubts as to their impartiality or independence.

Other relevant provisions:

· Article 11.1 of the Barcelona Arbitral Tribunal (TAB) Rules includes among the factors to be taken into account by the TAB when it appoints an arbitrator, the arbitrator's independence.

· Article 13.2 of the TAB Rules provides that the proposed arbitrator shall, within fifteen days following the notification of his candidacy as arbitrator, communicate in writing to the TAB any circumstance that in his judgment could obstruct his freedom or independence.

FACTS

The underlying arbitration concerned a dispute regarding a banking contract between Caixabank, SA (Caixabank), one of the most important banks in Spain, and Bajoz Eólica, SL (Bajoz), a wind energy company. Under the contract, any dispute arising between the parties was to be settled under the TAB rules by one arbitrator appointed in accordance with the TAB Rules.

Thereafter, a dispute arose between the parties. Caixabank initiated arbitration proceedings against Bajoz before the TAB. The TAB provided the parties with a list of four potential candidates for appointment as sole arbitrator (all of them chosen in strict alphabetical order from the institution's list of arbitrators).

Bajoz's lawyers flatly rejected the four proposed arbitrators for different reasons:

· Mr. M.C. and Mr. F.M. were rejected because they had also been proposed by the TAB as candidates in at least one of the three other arbitration proceedings initiated by Caixabank against companies represented by Bajoz's lawyers.

· Mr. E.M. was rejected due to a clear conflict of interest with Caixabank because he held the position of secretary general and adviser to the board of directors of a company of which Caixabank was a shareholder.

· Mr. R.B. (the arbitrator ultimately appointed by the TAB) was rejected on the basis that as a notary public, he must have maintained professional relations with Caixabank.

After the parties were notified of the appointment of Mr. R.B. as sole arbitrator, Bajoz filed a brief with the TAB:



- Complaining that the TAB had not ruled on the objections raised to Mr. R.B.'s suitability.

- Requesting the TAB to order the arbitrator to provide a list of the number of instances, since 2011, in which he had acted as notary public in the granting of writs in which one of the parties was either Caixabank, BBVA, Banco Santander or Banesto (the most important banks in the country).

The arbitrator provided the clarifications requested by Bajoz stating, (among other things), that although he had maintained professional relations with Caixabank as a notary public in the last three years, those relations were quantitatively and qualitatively irrelevant.

On the basis of this response, Bajoz challenged the arbitrator's appointment before the TAB. The court of arbitration dismissed the challenge arguing, among other things, that although Mr. R.B. had had professional relations with Caixabank in the last three years, in view of Mr R.B.'s response, these relations were not significant enough as to affect Mr. R.B.'s independence or impartiality.

Therefore, the arbitration proceedings continued. Mr. R.B. issued two partial awards, against which Bajoz filed an action to set aside, on the basis of various factors including lack of impartiality and independence of both the arbitrator and the arbitral institution.

DECISION

The Madrid High Court of Justice decided to set aside both arbitral awards for lack of impartiality of both the arbitrator and the TAB, rejecting the other grounds for annulment that Bajoz alleged.

Arbitrator impartiality

First, pursuant to Article 17.1 of the LA, the court considered that there were reasonable doubts as to the impartiality of Mr. R.B. based on the professional relations maintained with Caixabank as a notary public. In particular, according to the information disclosed by the arbitrator in the course of the judicial proceedings, in recent years Mr. R.B. had authorised an increasing number of public deeds in which one of the parties involved was Caixabank. On this issue, the decision of the court was unanimous.

TAB impartiality

However, there was no unanimity as to the court's ruling on the lack of impartiality of the TAB. As has commonly occurred in the long list of judgments in which the Madrid Superior Court of Justice has set aside arbitral awards, the court was divided.

- Their honours Mr. Jesús Maria Santos Vijande and Ms. Susana Polo Garcia considered that the TAB had acted with clear partiality in favor of Caixabank.



· His Honour, Mr. Francisco Javier Vieira Morante, the court president, issued a dissenting opinion opining that such partiality could not be inferred from the proven facts.

The majority opinion maintained that TAB's behavior raised doubts as to its impartiality because:

· It appointed Mr. R.B. as arbitrator without dealing with the concerns raised by Bajoz as to the arbitrator's independence and impartiality. The court of arbitration has a duty to answer parties' concerns related to independence and impartiality if (as in this case) they are serious and reasonable.

· It rejected Bajoz's challenge against Mr. R.B. made on the basis of the professional relations between the arbitrator and Caixabank, notwithstanding the fact that Mr. R.B. admitted those professional relations. The TAB instead relied on the arbitrator's word that these relations had little relevance.

On the other hand, the dissenting judge considered that TAB's behavior did not unequivocally reflect bias in favor of Caixabank, but rather a lack of diligence on the part of certain TAB employees. Consequently, the court president opined that the court should have dismissed this ground for annulment, without prejudice to the liability of the TAB for its negligent performance.

Consequences of TAB impartiality

The court then indicated that submission to institutional arbitration constitutes a contract and that it is not possible to separate the parties' consent to submit their dispute to arbitration from their agreement to submit the dispute to a particular arbitral institution. Thus, if a court declares, as in this case, that the chosen arbitral institution has failed to act impartially during the arbitral proceedings, that declaration could ultimately render invalid the parties' arbitration agreement.

COMMENT

The points of interest in this case relate to two circumstances. The first is the absence of evidence to conclude that the TAB failed to act impartially in the course of the arbitral proceedings. This circumstance is clearly exposed by the court president in his dissenting opinion, which explains in detail the reasons why it was not possible to conclude that the TAB had failed to act impartially.

The second, more serious issue refers to the court's majority conclusion that the natural consequence of declaring that an arbitral institution has failed to act impartially is the invalidity of the arbitration agreement.

In line with the dissenting opinion, the authors consider that the TAB's two errors referred to in the court judgment may reflect a lack of diligence by some TAB employees perhaps leading to the liability of the TAB as an institution pursuant to Article 14 of the LA. The court of arbitration should have been more diligent and, among other things, it should have ensured that that arbitrator's disclosure was full and complete. Had the TAB done this, it would never have



appointed Mr. R.B. as arbitrator given the growing number of professional contacts between him and Caixabank in recent years.

However, we consider that it is not possible to infer from this lack of diligence that the arbitral institution failed to act impartially. Such a conclusion would mean that the TAB intentionally tried to benefit one of the parties to the arbitration, attributing to its performance an almost criminal attitude. It is difficult to imagine that an arbitral institution, whose very survival depends ultimately on its appearance of impartiality and independence and which has never been accused of lack of impartiality in its 28 years of existence, would consciously try to favour a party in one of its arbitral proceedings.

Finally, we cannot fail to mention the surprise caused in the Spanish arbitral community by the court's conclusion that the declaration that the arbitral institution failed to act impartially resulted in the invalidity of the parties' arbitration agreement. In this respect, the authors consider that the court exceeded the powers conferred on it by the Spanish Law of Arbitration.

To the extent that judgments setting aside arbitral awards issued by the corresponding competent High Court of Justice are not subject to appeal, this decision is final and could potentially have persuasive value in proceedings for annulment of arbitral awards rendered in Madrid.

CASE

Bajoz Eólica, SL v Caixabank, SA (Judgment No. 70/2016) (Madrid High Court of Justice).