

## The Spanish Supreme Court confirms declaring the liability of two arbitrators for excluding their colleague

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On 15 February 2017, the Spanish Supreme Court confirmed the decision adopted by the Madrid Provincial Court on 27 June 2014, which condemned each of the two arbitrators of a three-member tribunal to pay to one of the parties of the arbitration proceedings, an amount of 750,000 euros (each of the arbitrator's fees) plus interest. In its turn, this decision had confirmed the one adopted by the Court of First Instance in 2013.

The origin of this decision lies on the dispute between Puma AG RUDOLF DASSLER SPORT (PUMA) and ESTUDIO 2000, S.A. (ESTUDIO), that had been submitted to ad hoc arbitration pursuant to a distribution agreement between the parties. The arbitration proceedings terminated with an award rendered by majority of the chairman and one of the co-arbitrators.

After the arbitration proceedings, Puma sought the annulment of the arbitration award for violation of public policy because the award infringed the collegiality principle as only two arbitrators had deliberated, voted and rendered the award.

In the annulment proceedings, the Madrid Provincial Court considered that after several meetings, the tribunal was close to reach to a unanimous decision on 28 May 2010, but in a meeting on 31 May 2010, in which the three arbitrators participated, it resulted that the possibility of an agreement was clearly excluded but a decision could not be reached. Two days later, the chairman and one of the co-arbitrators independently met, rendered and signed the award which was then notified to the parties with a copy to the third arbitrator who was not called to this last meeting, as his colleagues already knew that he was traveling. The email notifying the award to the parties indicated that the award had not been signed by the third arbitrator because he had not yet expressed his agreement, but the signing arbitrators considered it to be adequate to notify the award as early as possible, as the parties had expressed their interest in this regard.

The Madrid Provincial Court considered that there would have been no objection if in the meeting held on 31 May 2010, the tribunal had reached to a decision by majority reflected in the award drafted after that meeting with just the two arbitrators conforming the majority. However, the Madrid Provincial Court, after having heard to the members of the tribunal, considered that, the same was not the case because the decision was deferred to a later meeting. Additionally, the Madrid Provincial Court considered that not only the third arbitrator had not been called to the meeting held on 2nd June, but neither could he participate in any

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other way or have a say in the final decision which did not admit any kind of contribution as it was notified immediately.

It is interesting to note that the Court considered that the non-participation of the third arbitrator could not be cured just with the possibility to render a dissenting opinion a posteriori, because once the award is signed, the arbitrators terminate their functions and as the notification took place immediately, the possibility to render a dissenting opinion was not real.

The Court determined then that the infringement of the principle of collegiality is part of a public policy and therefore it set aside the award.

On 20 September 2013, the Court of First instance rendered a decision on the claim that had been filed by PUMA on liability of the arbitrators. The Court condemned the two arbitrators that rendered the award to pay 750,000 euros each, which was the sum of the fees they received in the arbitration proceedings. The decision was confirmed by the Madrid Provincial Court on 27 October 2014.

The Madrid Provincial Court deeply examined the liability of the arbitrators. It considered necessary that the function of the arbitrators shall not be threatened by potential liability claims and, therefore, in order to incur in any liability, it is necessary to commit, at least, a gross negligent behaviour. It added that the liability of the arbitrators cannot be appreciated in the cases where the margin of error is not exceeded. It indicated that it is necessary that the conduct of the arbitrators cause an economic damage and that there shall be a link between the damage and the acts of the arbitrators and there shall be no other means to repair the damage caused.

The Spanish Supreme Court confirmed the decision of the Madrid Provincial Court on 15 February 2017.

The Supreme Court referred to Article 21 of the Spanish Arbitration Act which engages the liability of arbitrators for damages caused by bad faith, recklessness or wilful misconduct and indicated that the liability of arbitrators can be engaged even if there is no intention to cause a damage. Indeed, the Supreme Court stated that recklessness shall be identified as gross negligence and does not require any intention to cause a damage, and it refers to a conduct of someone that ignores a minimum reasonability in the rights of the parties of the arbitral proceedings causing that an award cannot be correctly rendered.

The Court continues its reasoning by stating that the deliberation and the decision of all the members of the tribunal is the essence of the principle of collegiality and contradiction between the arbitrators and that the adoption of the decision shall not be confused with the need to build a certain majority for the decision to take effect. Therefore, the majority decision cannot be obtained just with the exclusion of a third arbitrator during the debates and the voting process. The Court confirmed the statement of the Madrid Provincial Court whereby, even if there is a decision by majority, the participation of the disagreeing members cannot be excluded because they possess the right and the obligation to know the reasons that justified the final decision and that will be included in the final award, and also have the right to draft a dissenting opinion. If the majority excludes the participation of the other members, they

cannot duly exercise these rights which affects legal security and the transparency of the award.

Additionally, the Supreme Court considered that the third arbitrator did not perform any dilatory tactics or obstructed the deliberations and the voting process that may have justified its exclusion.

Consequently, the Supreme Court considered that the arbitrators that rendered the award had incurred in liability for having acted with recklessness and confirmed the decision condemning them to pay back their respective fees.