One of the rare occasions in which the Spanish Supreme Court rules on a res judicata award

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Last October 6, 2015 the Spanish Supreme Court (SC) ruled on a claim for review of an arbitration award that allegedly was unfairly won through fraudulent practices.

Review of *res judicata* arbitration awards is quite an extraordinary legal resource that can only be based on the limited and exceptional grounds set out by law. If the claim for review is upheld, the award is rescinded and the parties have the right to re-initiate the procedure. The exceptional nature of this process (and its consequences) explains that competence is retained by the SC. In all other cases where a non *res judicata* award can be challenged, competence lays with the regional *Tribunales Superiores de Justicia* (High Courts of Justice).

In the case at hand, the claimant brought the claim after learning that the sole arbitrator had certain nondisclosed professional links with the successful party. It claimed that the arbitrator refused the experts' reports it had proposed with no justification and instead he appointed an expert who acted partially because he had maintained a close relationship with the successful party while carrying out his expertise.

The claimant alleged several facts that in its opinion had biased the arbitrator. However, the SC held that only the following had certain weight:

i. the arbitrator, some years before his appointment and during two years, had worked at the same law firm that the in-house lawyer of the successful party, such law firm being one of the largest Spanish firms,

ii. the arbitrator had drafted several agreements for the successful party ten years before being appointed,

iii. the arbitrator had a position in a company that, nine years before, had participated in *projects* where the successful party -together with a substantial number of other European entities- had also taken part in.

The SC dismissed the claim but made a number of interesting statements:

1. According to the SC, the arbitrator should have disclosed the above facts (in particular, those referred under paragraphs ii and iii) to the unsuccessful party following section 17.2 of the Spanish Arbitration Act, despite the time elapsed and the discrete and indirect nature of the relationship between the arbitrator and the successful party.

   Such disclosure, according to the SC, was important to avoid any suspicion in such party, should it become aware of these facts after the award was issued (as it happened in the case at hand).

   The SC concluded by referring to the permanent doctrine of both Spanish courts and the European Court of Human Rights that impartiality of judges (arbitrators, in this case) is equally important as *the mere appearance of such impartiality*.

2. The SC stressed the exceptional nature and narrow scope of this review challenge, reinforcing the *res judicata* principle of arbitration awards:

   - Its purpose is not to judge the conduct of the arbitrator (whose responsibility could be considered through a different specific action) or the due process.

   - The grounds for challenge are limited and shall be constructed in a restrictive way.

   - Evidence has to be strong enough and not mere indications.

3. After considering that the arbitrator should have disclosed the alleged circumstances, the SC held that they either did not have *sufficient gravity and seriousness* or lacked the required evidence to sustain the existence of a fraudulent activity.

   The fact that the arbitrator and the in-house lawyer had worked during two years at the same law firm was considered to be *an indirect and circumstantial* relationship. Besides, no evidence was produced on that the in-house lawyer had a significant involvement in the arbitration proceedings but that an external law firm had been retained for this arbitration. Finally, the SC said that the law firm in question is one where *dozens of lawyers work* so it could well be that the arbitrator did not know *this coincidence*.

   The collaboration of the arbitrator in the drafting of several agreements and his position in a company that participated in *projects* together with the successful party were viewed as isolated issues that occurred time ago (ten and nine years, respectively).

   The judgment went on saying that no evidence had been produced as to the existence of a recent business relationship between the successful party and the arbitrator, something which following the SC's suggestion, could have been done by requesting the exhibition of its financial statements.

There is no doubt as to the importance of arbitrators making disclosure of the relevant circumstances that could give rise to justifiable doubts on their impartiality or independence. However, the facts alleged in this case had taken place long before the appointment of the arbitrator (more than five, nine and ten years), and in any case the time passed exceeded by far the three-year reference set in the Orange List of the IBA Guidelines on Conflicts of Interest. This guide has been used in several occasions by the Spanish High Courts of Justice as a guidance when ruling on vacation actions.

Two important and arguable conclusions can be drawn from this judgement:

- The SC seems to say that there is no specific time reference when it comes to disclosing past relationships.

- It also seems that the SC is of the view that circumstances that *prima facie* seem to be minor, can become relevant by the mere fact that have not been disclosed.