

## Different standard of impartiality in litigation and arbitration

Madrid, January 2023

The Spanish Supreme Court (SSC) has recently confirmed<sup>1</sup> a judgment of the Court of Appeal of Navarra that had been appealed by the defendant because, among other reasons, one of the three members of the tribunal *could be* friends with the claimant's counsel since both studied law and were professors at the same university, participated in the same conference on commercial law and belonged to the same bullfight association.

The SSC found that these circumstances do not reveal *per se* a "close friendship" and, more importantly, that the Spanish Law on the Judiciary only refers to a close friendship between the judge and the party itself (not its counsel) as a reason to challenge the independence and impartiality of a judge<sup>2</sup>.

This contrasts with arbitration standards, according to which a close friendship between an arbitrator and a party's counsel falls under the "orange list" of the IBA Guidelines on Conflicts of Interest<sup>3</sup>. Therefore, this circumstance must be disclosed by the arbitrator<sup>4</sup> and may result in his or her disqualification<sup>5</sup>.

Similarly, the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, the LCIA Notes for Arbitrators and the Code of Best Practices in Arbitration of the Spanish Arbitration Club refer to personal relationships between arbitrators and counsels as a reason that may compromise, at least potentially, an arbitrator's independence and impartiality.

In fact, High Courts such as those of Madrid and Catalonia<sup>6</sup> have noted that certain relationships between an arbitrator and a party's counsel, depending on their nature, may indeed affect the arbitrator's impartiality and even justify the annulment of the award provided that the issue was duly and timely raised. Interestingly, in carrying out such an analysis they usually take into account the IBA Guidelines on Conflicts of Interest.

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<sup>1</sup> Judgment 847/2022 dated 28 November 2022.

<sup>2</sup> This finding is consistent with previous SSC rulings such as those of 21 September 2016 (appeal 455/2014) and 22 October 2014 (appeal 818/2013).

<sup>3</sup> Section 3.3.6 of part II of the IBA Guidelines on Conflicts of Interest.

<sup>4</sup> Paragraph 3 of part II of the IBA Guidelines on Conflicts of Interest.

<sup>5</sup> "Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively [...] there are justifiable doubts as to the arbitrator's impartiality or independence" (paragraph 4 of part II of the IBA Guidelines on Conflicts of Interest).

<sup>6</sup> Judgment 28/2022 dated 12 July 2022 of the High Court of Madrid and judgment 53/2022 dated 3 October 2022 of the High Court of Catalonia.