

Inability to afford arbitration costs. Can the arbitration agreement still be enforced?

Madrid, April 2024

The Court of Appeal of Córdoba (CAC) has declared an arbitration agreement unenforceable because one of its parties (a natural person), who had filed a court claim against the other, was not able to afford the costs of the arbitration¹.

The CAC noted that the fundamental rights of access to justice and defence provided for by article 24 of the Spanish Constitution (SC) would be breached should an arbitration agreement be enforced despite the financial inability of one of the parties to bear the costs of the arbitration.

The CAC found that the claimant's financial situation was so "precarious" (he had earned €13,000 in the last year, had no property and only €1,400 in a bank account) that his "right of access to justice (a *fundamental* right) should prevail over what was agreed in the contract".

It is worth noting that the claimant had not been declared insolvent or, at least, the judgment does not state it had. Pursuant to the Spanish Insolvency Act², an arbitration agreement will remain in force during the insolvency proceedings as a rule, but the insolvency court may declare it unenforceable if "detrimental to the conduct of the insolvency proceedings". Some courts have released insolvent debtors from arbitration agreements pursuant to this provision on the grounds that the high costs of arbitration would prevent them from pursuing their claims to the detriment of their creditors (the case of David Guetta is well known³).

According to a publication by the Eastern Europe law firm Queritius⁴, the Polish Supreme Court (PSC) issued a judgment⁵ reaching the same conclusion as that of the CAC on similar grounds. Seemingly, the PSC relied, *inter alia*, on articles 6.1 of the European Convention of Human Rights ("right to a fair trial") and 47 of the Charter of Fundamental Rights of the European Union ("right to an effective remedy and to a fair trial").

Both the CAC's and the PSC's decisions seem to be aligned with a certain trend in Europe to favour a pro-jurisdiction approach in detriment to the principles of *pacta sunt servanda* and *favor arbitrandi*.

It remains to be seen whether the position of these courts to release natural persons from arbitration agreements because of the lack of financial resources to access arbitration will extend to companies.

¹ Judgment 428/2023 of 19 December 2023. It overturned the ruling rendered by a first instance court that had declared its lack of competence to hear the claim due to the arbitration agreement.

² Article 140.

³ Judgment 266/2019 of 30 September 2019 of the commercial court 1 of Cantabria.

⁴ <https://arbitrationblog.kluwerarbitration.com/2024/03/21/can-the-inability-to-bear-arbitration-costs-render-the-arbitration-clause-unenforceable-according-to-the-polish-supreme-court-it-can/>

⁵ Judgment of 19 January 2024.