

Arbitration and disputes between shareholders of close companies

Madrid, September 2023

The High Court of Navarra (HCN) has issued a judgment¹ denying the extension of an arbitration agreement included in the bylaws of a company to a dispute concerning its two joint and several directors, who were also shareholders.

The decision was rendered as a result of a request for the appointment of an arbitrator to solve, among others, both a derivative and a direct liability claim filed by another shareholder against the two company's directors.

The claimant based its request on the arbitration agreement incorporated in the company's bylaws, whereby any dispute "between the shareholders and the company or between the shareholders themselves" should be submitted to arbitration.

Even though both directors were also shareholders of the company (and as such bound by the corporate arbitration agreement), the HCN found that the liability claims were not subject to arbitration since the defendants were being sued as directors (not as shareholders) while the arbitration clause did not refer to disputes involving directors. The HCN noted that ruling otherwise would breach the directors' right of access to justice and hence dismissed the request.

The judgment does not spell out the details of the dispute, but it could well be that the real conflict was one between shareholders and that the liability actions at hand were only a ramification. If that had been the case, the decision rendered did not really solve the problems between the shareholders, but probably entangled them with two different proceedings, namely arbitration (shareholder vs. shareholders) and litigation (shareholder vs. directors).

In other cases courts have looked beyond and provided more practical decisions by finding that claims by shareholders against directors that are also shareholders may fall within arbitration clauses that only refer to disputes between shareholders or between them and the company.

We refer, for instance, to a judgment² where the Supreme Court held that the underlying dispute in a liability claim by a shareholder against a director who was the other shareholder was ultimately a conflict "between shareholders" covered by the by-laws' arbitration clause, that merely mentioned disputes involving the shareholders and the company.

Similarly, the Madrid Court of Appeal considered in a more recent decision³ that the liability claim filed by a shareholder holding a 21.92% against the, allegedly, *de facto* director of the company that held the remaining 78.08% should be regarded as a dispute between shareholders and thus included in the scope of the by-laws' arbitration agreement despite the fact that it did not mention disputes concerning directors, but only between the shareholders and the company.

¹ Judgment of the High Court of Navarra 6/2023 dated 14 April 2023.

² Judgment of the Spanish Supreme Court 886/2004 dated 15 September 2004.

³ Order of the Madrid Court of Appeal 136/2016 dated 16 September 2016.