Judgment of the Spanish Supreme Court 102/2017, 15 February 2017 (so-called “Puma case”)

Member State

Spain

Topic

Accountability/liability of Arbitrators

Deciding Court Original Language

Tribunal Supremo

Deciding Court English translation

Spanish Supreme Court

Registration N

Judgment no. 102/2017,

Cassation and violation procedure No.: 3252/2014

Date Decision

15 February 2017

National Follow Up Of (when relevant)

N/A

EU legal sources and CJEU jurisprudence

N/A

ECtHR Jurisprudence

N/A

Subject Matter

The main issue concerned the professional liability of arbitrators for their misconduct in the course of arbitration proceedings under Spanish law.

Legal issue(s)

Accountability/liability of arbitrators

The legal issue for the case in question, was whether the misconduct of two arbitrators can trigger professional liability under Article 21.1 of the Spanish Arbitration Act.

Quoting directly from the judgment (unofficial English translation):

“Several things are alleged: (1st) violation by the judgment of the doctrine contained in the judgment of 26 April 1999, since the judgment under appeal describes the conduct of the defendants as reckless, on the basis of the gross negligence of the arbitrators established in the case, without analysing the intention of the arbitrators, that is, without analysing the intentional subjective element required by the rule, and (2nd) the assimilation of recklessness to manifest, serious and inexcusable error, by citing the judgment of 20 December 2006 on the responsibility of judges and magistrates in the exercise of their functions, and the judgment of 30 May 2013 on judicial error.”

Request for expedited/PPU procedures

N/A

National Law Sources

Article 21.1 of the Spanish Arbitration Act 11/2011, which states that:

Article 21. *Liability of arbitrators and arbitral institutions. Provisioning funds*

1. Acceptance requires arbitrators and, as appropriate, the arbitral institution, to comply with their

commission in good faith. If they fail to do so, they will be liable for any damages resulting from bad faith, recklessness or *mens rea*. In arbitration commissioned from an institution, the damaged party may file suit directly against it, irrespective of any action for indemnity lodged against the arbitrators.

Arbitrators or arbitral institutions on their behalf will be bound to take liability insurance or equivalent security for the amount established in the rules. Public entities and arbitral systems integrated in or under the aegis of governmental authorities are exempted from this obligation.

Facts of the case

The judgment in question refers to the arbitration proceedings between Puma AG RDS (Puma) and Estudio 2000 SA (Estudio 2000) which was a Spanish distributor of Puma‘s products. The two appellants in the case at hand were members of the arbitration tribunal (called in the judgments “defendant-arbitrators”) that on 2 June 2010 issued an arbitral award under which it ordered Puma to pay EUR 98 million to Estudio 2000 for the termination of the contract underlying the arbitration in question. It appeared that the arbitration tribunal rendered the award without the presence of the arbitrator nominated by Puma. The court proceedings revealed that the two arbitrators (Luis Jacinto Ramallo Garcia and Miguel Temboury Redondo) deliberately met in the absence of the third arbitrator (Santiago Gastón de Iriate y Medrana), who was on a boat trip outside Madrid, and decided on the contents of the arbitration award, which were communicated to the parties the same day.

Puma sought to annul this arbitration award in the Provincial Court of Madrid. The Court indeed set the award aside in its judgment of 10 June 2011 (no 200/2011) “on the basis that the arbitral tribunal had deliberated, voted and issued the award without the participation of the arbitrator appointed by Puma in breach of the principle of arbitral collegiality, which constituted an infringement of the right of defence and in turn a violation of public policy (see Article 41.1(f) of the Arbitration Law, and Article 24 of the Spanish Constitution).”

Estudio 2000 started new arbitration proceedings regarding the same claims, which ended with an award of compensation that was 60% lower than in the initial arbitration.

Puma started legal proceedings alleging that the two arbitrators in question should be held professionally liable for their misconduct and compensate Puma for the fees it paid to those arbitrators that amounted to 750,000 EUR each.

“On 20 September 2013 the Court of First Instance No. 43 of Madrid found the arbitrators?defendants liable (ordinary proceeding 1880/2012) on the basis that the award has been issued recklessly, finding that the Defendants had been guilty of a ‘manifest, serious and inexcusable error‘ in believing that they could issue a majority award without convening further

with the third arbitrator.” “The Judge noted that collegiality is a fundamental principle of arbitration, recognised in Articles 35 and 37 of the Spanish Arbitration Law, and furthermore that deliberation is the manner of forming the will of an arbitral tribunal, which is known by those, such as the Defendants, who are lawyers by profession. The court also made an award of costs against the arbitrators?defendants.”

This judgment was appealed by the two arbitrators in question.

The judgment was upheld by the Provincial Court of Appeal of Madrid on 27 October 2014 (Appeal 75/2014).

The judgment was again appealed (appeal in cassation) by the two arbitrators in question.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Supreme Court dismissed the appeals in cassation and agreed with the reasoning of the lower instance courts.

In particular, the Supreme Court decided that “2.- The Arbitration Law restricts the responsibility of the arbitrators to «damages caused by bad faith, recklessness or fraud» (Article 21 Arbitration Law), considering that only damages caused intentionally or by gross negligence can satisfy the liability demanded of arbitrators without threatening the necessary freedom of action for the exercise of the heteronomous power of the resolution of conflicts in accordance with the will of the parties. Imposing on the arbitrator the damages caused by negligence that do not involve a sufficiently characterised breach of their duties is contrary to the functional autonomy protected by the parties‘ freedom to agree that forms the basis of this institution (judgment of 22 June 2009).”

3.- Recklessness is not identified with the intention to prejudice, or with what the judgment of 26 April 1999 describes as «intentional harmful illegality», in the framework of a responsibility based exclusively on wilful misconduct and negligence, in which recklessness does not have to be intentional, especially after the judgment of 22 June 2009. Recklessness is equal to an inexcusable negligence, with a manifest and serious error, without justification, that is not linked to the annulment of the award, but to a perilous action on the part of those who know their office and should have respected it in the interest of those who entrusted them to carry out the arbitration. The conduct is of one who ignores, without respect for a minimum standard of reasonableness, the rights of those who commissioned the arbitration and the proper functions of the arbitrators; in summary, denaturalising the course of arbitration without any possibility that the award could be properly issued, as it happened in this case, with the consequent damage. Ultimately, it was extraordinary or unforeseen conduct that is beyond the good judgment of anybody.

It is unacceptable that those who have clearly violated the rules of arbitration, then rely on them by

proposing an interpretation that, if it were admitted, would invalidate the very essence of what constitutes the deliberation and decision of all the members of an arbitral or judicial tribunal, and which is inseparable from the principles of collegiality and of contradiction between all of them through the deliberation process and the taking of the responsibility for decisions when more than one arbitrator is involved, confusing the essential question of making or adopting the decision of the collegiate body, with the need to constitute a certain majority for it to take effect.

It is not possible to carry out the rule of two against one by the elimination of the third arbitrator from the deliberations and the voting, nor is it in the judgment of 21 March 1991, which has nothing to do with this case. In the judgment of 21 March 1991, there was a deliberation and vote on the award by all of them, although it was drafted by those who voted in favour, which is different from two arbitrators excluding the third one from the deliberation and vote of the award. Nor does the Law require that the arbitrators deliberate the award all together, regardless of whether there is unity of opinion."

The Court stated that deliberation and voting "operates as a means of internal control of its members […]. In other words, it is not the case of that, once the possibility of the majority has been envisaged, or by the agreement of those who support a particular proposal or decision, the participation of the remaining members can be rejected 'ad limite', since they have the right and obligation to know […] the internal reasons that justified the decision and final vote". This resulted in the confirmation of the liability of the arbitrators in question that were ordered to cover the costs of the proceedings.

Relation of the case to the EU Charter

N/A

Relation between the EU Charter and ECHR

N/A

Use of Judicial Interaction technique(s)

N/A

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

N/A

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external –

with European supranational courts)

N/A

Strategic use of judicial interaction technique (purpose aimed by the national court)

N/A

Impact on Legislation / Policy

This decision is of great significance. Although some national laws provide for some forms of liability of arbitrators, it is usually not common practice for courts to hold arbitrators liable. This case led to a different conclusion. The fact that the arbitrators were held liable in the case at hand triggered a vivid reaction within the international arbitration community who saw this judgment as potentially endangering Spain‘s reputation as an arbitration-friendly seat.

Notes on the national implementation of the preliminary ruling by the referring court

N/A

Impact on national case law from the same Member State or other Member States

N/A

Connected national caselaw / templates

N/A

(Link to) full text

No link to the original judgment

The English unofficial translation of the judgment is available at:
https://www.cremades.com/pics/contenido/7729b459e44f750f4ee0e6fe7d8e3c3e_398872_1.pdf

Further reference to the case can be found at:

Claire Morel de Westgaver and Brian Kotick, ‘Improper Deliberations in International Arbitration as a Ground for Annulment‘, Kluwer Arbitration Blog, May 5 2017, http://arbitrationblog.kluwerarbitration.com/2017/05/05/improper-deliberations-in-international-arbitration-as-a-ground-for-annulment/

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