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The Arbitration Court as part of a Chamber of Commerce: [Im]partial?

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Commentary

The Arbitration Court as part of a Chamber of Commerce: [Im]partial?

By
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[Editor's note: Calvin A. Hamilton is founding partner of the firm HAMILTON in Madrid and heads the arbitration department. He is admitted as an attorney in both New York and Madrid. Copyright © 2012 by Calvin A. Hamilton Responses are welcome.]

I. Challenge to the jurisdiction of the Court of Arbitration

This month's decision for review concerns an appeal brought before the Superior Court of Justice (the 'Court')¹, from a judgment handed down by an Administrative Court (the 'lower court') upholding a Resolution issued by Madrid's Regional Economic Council (the 'ECMC') that it lacked the competence to hear the appeal of a decision by the Madrid Court of Arbitration (the 'Court of Arbitration') denying a request for an interim measure consisting of the suspension of proceedings related to 4 requests for arbitration.

On July 22, 2008, the Court of Arbitration issued a decision refusing Respondent's (Appellant in these proceedings) request to suspend the administration of 4 arbitration claims. The 4 arbitrations involved the same parties, different contracts, each with a similar arbitration clause entrusting the administration of the arbitrations to the Court of Arbitration. The Respondent cited the Court of Arbitration's lack of impartiality to administer the arbitrations, based on the fact that the Court of Arbitration was part of the structure of the Madrid Chamber of Commerce and that the Claimants were prominent members of the Chamber of Commerce. Respondent also claims that the lack of impartiality affects the appointment of the arbitrator.

The Respondent appealed the decision of the Court of Arbitration to the ECMC which, on November 10,

2008, declined to hear the appeal citing a lack of competence.

The Respondent appealed the ECMC's Resolution to the Administrative Court which, on March 13, 2009, upheld the said Resolution. The Respondent also specifically requested the granting of an interim measure in the form of suspension of the arbitration proceedings.

The Respondent now petitions this Court to overturn the judgment of the lower Court granting the request for the interim measure. The Court refuses, upholding the judgment of the lower Court.

II. The lower Court rejects Appellant's request for the adoption of the Interim Measures

The lower Court rejected the Appellant's request to overturn the ECMC's Resolution and to grant the interim measure. The lower court stated that the first order of business was to determine whether the ECMC did have competence to hear the appeal of the decision of the Court of Arbitration. Further, that suspension of the arbitration proceedings would, in certain respects, frustrate the appropriateness of the appeal process, since the effect would be to prematurely pronounce on the merits of the request for the interim measure. On the other hand, the damages would not be irreparable, since an estimation of the appeal would give rise to the nullity of the arbitration proceedings with its consequent economic implications. Equally, a decision which puts an end to the arbitration procedures will be subject to review before the competent court.

The lower court found that the ECMC was not competent to hear the appeal.

III. The allegations presented to the Court

The Appellant first argued that the case law relating to 'actos negativos'², whereby administrative acts may be suspended where a challenge to the act has been brought, was not applicable to the present circumstances given that the said doctrine only applies in situations where suspension of the act in question would create a situation which did not exist prior to the decision to proceed with the arbitration proceedings. The Appellant argues that the suspension would leave the Appellee in the same position as before the arbitrations were filed. The Appellant disagrees with the lower Court's finding that to grant the suspension would prejudice the merits. The Appellant continues that the decision to grant the suspension does not cause irreparable harm to the Appellee. In a worst case scenario, were Appellant to lose the appeal, the Appellee simply would continue with the arbitrations. Appellant goes on to state that refusal to suspend the Resolution would cause irreparable harm to the Appellant's patrimony were the arbitration awards handed down in favour of the Appellee. It would result in the apportionment of Appellant's assets in favour of Appellee and/or innocent third parties. It would also result in a denial of Appellant's constitutional rights to a fair trial in that the Court of Arbitration lacks the requisite impartiality needed to fairly administer the arbitration which includes the process to appoint the arbitrator.

The ECMC, the Claimant and the Chamber of Commerce also oppose the appeal.

IV. The Discussion of the Court

The Court agrees with the Appellant that one of the determinant factors in ruling on a request for interim measures is whether or not the resulting harm will be irreparable. The answer will require a review of the different interests involved without reaching a decision on the merits of the claim. The specific interim measure requested was the suspension of the 4 arbitration proceedings before the Madrid Court of Arbitration.

The Court explained that the ECMC is a public organ and as such derives its competences from the law. The Court examined the relevant law from which the ECMC derives its competences and determined that the law did not attribute the required competence to ECMC to hear the appeal from the decision of the Court of Arbitration.

In light of the lack of the afore-stated competence, the Court explained that the particular interests of the Appellant cannot override the fundamental nature of the law. The Court found, based on public policy fundamentals, that the real policy interest consists of the preservation of party autonomy. The Court explained that the Appellant had freely entered into the arbitration clauses in question. The Court found no evidence of misconduct in the negotiation and signing of the clauses. As a result, the Appellant should not be allowed to invoke public policy arguments, such as the partiality of the Chamber of Commerce, the Court of Arbitration and the arbitrator to get out from under its contractual obligations and to end-run around the ECMC competence issue.

The Court concluded by stating that the issue was not whether or not to suspend an 'acto negativo', rather that the request for the interim measure requires a predetermination of the merits; allegations which neither party had raised and proven. Further, and more important, to allow the suspension of the proceedings would be to recognize a competence in the ECMC which does not exist under law.

The Court denied the appeal.

V. Conclusions

The Court was puzzled by the Appellant's attitude. The Madrid Chambers of Commerce are no different from other Chambers of Commerce in Spain or in other parts of the world. Many Chambers of Commerce have a Court of Arbitration incorporated into the respective structure. The International Chamber of Commerce in Paris is the most notorious. These institutions provide an additional service to its members, namely, the resolution of commercial disputes. These institutions zealously ensure that the Court, as an integral part of the infrastructure, is fiercely independent. The Chambers have been successful in this effort. Of the annulment proceedings brought before national courts, few challenge the Chambers of Commerce model to incorporate a Court of Arbitration based on the argument that the Court lacks impartiality.

The Court was further puzzled by the Appellant's attitude because a review of the record showed that the Appellant itself was also a member of the Madrid

Chamber of Commerce thus the Court could not explain the Appellant's double standard; except to conclude that the motion was brought in bad faith³.

The author is of the opinion that situations like the present warrant the imposition of large penalties against parties to ensure against such frivolity.

Endnotes

1. Recurso de Apelación n° 1169/2009/Sentencia n° 516, Tribunal Superior de Madrid Sala de lo

Contencioso-Administrativo Sección Novena, 4 de mayo de 2010.

2. The central administration and the courts accept that an appeal against an administrative act will not result in a suspension of the act, unless the court before which the appeal is brought, at the instance of one of the parties, agrees the suspension where failure to accord the suspension will result in irreparable harm or where the harm will be difficult to repair. LPA art. 116 and LJ art. 122.
3. Up until 2012, it was mandatory that businesses located in Madrid belong to the Madrid Chamber of Commerce. This is no longer the case. ■

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