

MEALEY'S™

# International Arbitration Report

## **Spanish Courts Expect Arbitrators To Travel That Extra Mile To Ensure Proper Notification**

*by*  
*Calvin A. Hamilton*  
*and*  
*Marta Martini*

*HAMILTON*  
*New York and Madrid*

**A commentary article  
reprinted from the  
January 2013 issue of  
Mealey's International  
Arbitration Report**





# Commentary

## Spanish Courts Expect Arbitrators To Travel That Extra Mile To Ensure Proper Notification

By  
Calvin A. Hamilton  
and  
Marta Martini

*[Editor's Note: Calvin A. Hamilton is founding partner of the firm HAMILTON in Madrid and heads the arbitration department. He is an Arbitrator, Fellow of the CIArb, admitted as an attorney in both New York and Madrid. Marta Martini is a Venezuelan lawyer practicing in Madrid and has contributed to this article. Any commentary or opinions do not reflect the opinions of Butler Pappas or Mealey's Publications. Copyright © 2013 by Calvin A. Hamilton and Marta Martini. Responses are welcome.]*

### I. Importance of notifications in the arbitration proceedings.

Effective service of process is at the very foundation of the arbitration process-domestic or international, institutional or "ad hoc"- since, as in the jurisdiction of the civil courts, it guarantees the parties' rights to a defense. Such is the importance of effective notification (or service of process as it is referred to in some jurisdictions) in arbitration, that both the UNCITRAL Model Law, as well as arbitration legislation, foresee that failure to notify, or, mistakes in the notification of, any significant aspect of the proceeding, may give rise to a request for the annulment of the award.

For example, Article 34 of the UNCITRAL Model Law<sup>1</sup>, as well as Article 41 (b) the Spanish Arbitration Law<sup>2</sup>, provide that the award may be annulled where the party making the application claims and proves, among other reasons, that it "has not been duly notified of the appointment of an arbitrator or of the arbitral proceedings or was unable, for any reason, to assert their rights."

In light of the fact that proper notice to the parties during the proceedings-from the commencement up until, and including, the issuance of the final award or its clarification-is of vital significance to the validity and effectiveness of the arbitral award, the arbitrators must zealously ensure compliance with, and implementation of, all reasonable acts to ascertain the whereabouts of the parties in order to effect proper notification. Such efforts are meant to protect the parties' rights to due process; a necessary guaranty in arbitration proceedings.

### II. Cases brought before the Spanish Courts.

In this issue, we analyze the criteria established by the Spanish courts to grant or deny applications for, a) annulments of awards where failure or errors in the notification process during the arbitral proceedings are alleged, and b) enforcement of arbitral awards in which the notification of the award is a prerequisite for the validity of the said enforcement.

#### a) Judgment of the Madrid Provincial Court on September 27, 2012.<sup>3</sup>

The criteria were addressed by the Madrid Provincial Court (the "Court") in an application for annulment of an award issued by a sole arbitrator in an institutional arbitration held in Madrid. The Applicants, defendants in the arbitration proceedings, as well as in their capacity as guarantors under the contract, alleged that they were not personally served with process of the commencement of the arbitration proceedings, nor of the development of the arbitration proceedings, and that they only became aware of the arbitration at the

execution phase of the default award; upon being served with an attachment order at their respective personal domiciles.

The share purchase contract, subject of the dispute, (and which contained an arbitration agreement), provided that the address for service of process on the defendants/guarantors shall be the address of the company, which in turn was to notify the guarantors. From the commencement and throughout the arbitral proceedings, notices to the guarantors were sent to the address provided for in the contract, namely, the company. The first service of process was returned and all following notifications were refused.

The Court reasoned that special attention must be paid to addresses for notifications contained in contracts. It stressed that a distinction must be made between the domicile for purposes of, communications concerning the contractual obligations, on the one hand, and communications during the arbitration proceedings where a domicile was not specifically agreed, on the other. The Court noted that the contract also made reference to the domicile of the property pledged as guarantee and which was owned by the guarantors. This information provided an additional address where the guarantors could have been notified of the procedure.

The Court, upon analysis of the afore-stated and the provisions of Article 5 (a) of the Spanish Arbitration Law, expressly stated that *"... it is the arbitration law which imposes exigencies on arbitrators by requiring that reasonable efforts be made to ascertain the whereabouts of the party when same cannot be located at the contractually agreed domicile; this because of the special significance of the notification of the commencement and evolution of a process that may end with a conviction, as has been the case ..."*

Despite the failure of the co-defendants/guarantors to appear, the arbitrators never attempted service at any other address in an effort to assure protection of the parties' rights to due process. In particular, while the address for notification in the contract was that of the company, it was realistic that said address and that of the guarantors would be different. Additionally, there also existed another address referred to in the contract, which belonged to the property pledged as guarantee. No attempt was made to notify the parties at this latter address. Further, the applicants claimed that they no longer had any business dealings with

the company. Consequently, if service was conducted only at the company address, it was not likely that defendants would be notified of the arbitration.

The Court cited legal precedents from the Constitutional Court, as well as its own, to support the finding that constitutional protection, in relation to due process rights, is also available to arbitration proceedings. Consequently, judges and arbitrators have the same responsibility to ascertain that neither civil liberty, nor rights guaranteed under the constitution, are violated; protecting the parties' rights to due process and the adversary system along the way. Notwithstanding, the Court recognized that where the errors in the notification or failure to appear are imputed to a party, under such conditions, the tribunal can bear no responsibility and the consequences will be those foreseen in the law.

For all these reasons, the Court granted the application for annulment of the arbitration award.

#### **b) Judgment of the Madrid Provincial Court on October 8, 2012.<sup>4</sup>**

In another case, an award issued by a sole arbitrator in Madrid, concerning a lease agreement, the defendant made application for the annulment of the award alleging failure to notify the arbitration proceedings, until notification of the award. The error consisted in the fact that all attempts to effect service of process were made to the commercially leased property, in spite of the fact that the lease agreement provided for notice to lessee's habitual place of residence. No attempt was made to notify lessee at her place of residence. Further, the record does not show that the courier had effectively conducted service of process at the commercially leased property.

Although the Applicant alleged additional grounds for the annulment of the award, the Court based its decision to annul on the failure to notify defendant of the proceedings, employing the same criteria relating to the obligation of the tribunal to guaranty the defendant's right to a defense and to effective judicial protection.

#### **c) Judgment of the Madrid Provincial Court on October 14, 2011.<sup>5</sup>**

In yet another judgment, the Court denied enforcement of the award, because the requirement of effective

notification of the award to the losing party was not correctly executed.

In this case, the basis for the judgment is the same as for the above cases, to guaranty the right to a defense and accordingly, to afford effective judicial protection. The Court reasoned that based on the Arbitration law, in order to execute an award, it must be demonstrated that the losing party had been properly notified of the award, consistent with the majority position.

### III. The opinion of the courts on the responsibility of arbitrators.

The Spanish courts have always had a very positive attitude to arbitration. In the majority of their decisions, one readily appreciates the protection afforded the institution of arbitration. The decisions establish a clear deference to the jurisdiction of the arbitrators, as well as, limits on the participation of the courts in matters voluntarily submitted to arbitration. Consistent with the furtherance of the institution of arbitration, the Spanish Courts are extremely mindful of the very important need to protect the basic rights of citizens, such as the right to effective due process, to avoid violations of public order.

In the cases we have analyzed, as well as in many others, the courts have established clear criteria consisting of the responsibility of the arbitrator to be vigilant in taking all reasonable steps to ensure that notifications are accomplished by the parties, as mandated in the Arbitration Law, so as to avoid any violation of a party's rights to due process.

However, as pronounced in the decisions discussed, the obligation of arbitrators, which is comparable to that of the judges, is to procure the proper and effective balance in the legal process, *without thereby requiring the judge or appropriate tribunal to engage in a disproportionate investigative exercise, which would lead instead to an undue restriction on the right of defense of the remaining parties in the process.*

The judgments emphasize that the arbitrator is required to take all possible and reasonable steps to ensure the protection of the due process rights of the parties, without requiring the impossible. In fact, in its analysis of the evidence, the courts carefully review the record to determine whether the arbitrator or arbitral tribunal could have engaged in additional diligence toward

effective notifications, prior to agreeing or denying annulment of the award.

In this regard, it is important to note that there are court decisions, where the court, after analyzing the evidence, the conduct of the arbitral tribunal and the parties, and based on the analysis heretofore discussed, confirm the arbitration awards.

For example, in a decision handed down by the High Court of Valencia on May 18, 2012<sup>6</sup>, in which the defendant in arbitration proceedings held in Alicante, Spain, requested the annulment of the award alleging that he had not been duly notified of the arbitration proceedings and therefore could not exercise a right to a defense given his ignorance of the existence of the said proceedings, to which the court concluded that “. . . *This court understands that the allegations made by the plaintiff must be dismissed because on the one hand, the arbitrator's communications cannot be regarded as irregular, since notification not only existed but was made according to the applicable laws and regulations. But also and on the other hand, the hypothetical lack of knowledge of the arbitration and the consequent lack of a defense are attributable to the actual conduct of the defendant in the arbitration proceedings; it was his decision to remain in default and not present a defense. If one considers the law and the facts of the case, one cannot reach a conclusion other than that the arbitration panel acted in accordance with the provisions of the Arbitration Law, with due diligence in communicating both the commencement of the proceedings as well as the notification of the award . . .*”

In view of the Court's assessment that the tribunal had acted correctly, it dismissed the application for annulment, holding the applicant in default.

A similar decision was handed down by the High Court of Justice of Catalonia.<sup>7</sup> Applicant, defendant in an arbitration before the Catalonia Arbitration Board of Transportation, petitioned for annulment of an award issued by the said tribunal, alleging that it had not been notified of the arbitration proceedings, which deprived it of a right to a defense. The court analyzed the record of the arbitration proceedings and after hearing the parties, dismissed the application for annulment stating that the failure to stage a defense was entirely attributed to the defendant, consequently validating the award.

#### IV. Conclusion.

In the face of the dramatic development of international as well as the domestic arbitration, arbitrators are now, more than ever, expected to be diligent and circumspect in carrying out their tasks in the arbitral process. They are expected to be fair, while safeguarding the transparency of the process, so as to protect the rights of the parties and consequently guarantee the integrity and validity of the award; the ultimate goal of the institution of arbitration.

The arbitrators are encouraged to act diligently in carrying out all reasonable and necessary acts in the performance of their duties during the arbitration proceedings so that parties to the arbitration can participate fully in every aspect of the proceedings in guaranty of their fundamental rights to due process. They must assure prompt and proper service of all aspects of the arbitration process. Most significant, the arbitrators must perform all reasonable acts to locate the whereabouts of the parties to serve them with process of the commencement of the proceedings, the proceedings themselves and the issuance of the award.

As explained earlier, the arbitrators are not however required *“to engage in a disproportionate investigative exercise, which would lead instead to an undue restriction on the right of defense of the remaining parties in the process.”*

We commend the attitude of the Spanish courts in setting clear principles pursuant to which the arbitrators can be guided in the quest to guaranty the rights of

due process of all parties involved in the arbitration. The credibility in the arbitration process, together with the consolidation of the institution, depends on the constructive relationship between the courts and the arbitrators.

---

#### Endnotes

1. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985.
2. Law 60/2003 of 23 December on Arbitration.
3. Provincial Court of Madrid, Section 18, of September 27, 2012, No. 459/2012. Rec. 5/2011.
4. Provincial Court of Madrid, Section 11, of October 8, 2012, No. 502/2012. Rec. 4/2011.
5. Provincial Court of Madrid, Section 11, of October 14, 2011, No. 292/2011. Rec. 133/2011.
6. Regional Superior Court of Valencia, Section 1, of May 18, 2011, No. 16/2012. Rec. 33/2011.
7. Regional Superior Court of Justice of Catalonia, Section 1, of October 25, 2012, No. 62/2012. Re. 9/2012. ■



**MEALEY'S: INTERNATIONAL ARBITRATION REPORT**

*edited by Lisa Schaeffer*

**The Report** is produced monthly by



1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: [mealeyinfo@lexisnexis.com](mailto:mealeyinfo@lexisnexis.com)

Web site: <http://www.lexisnexis.com/mealeys>

ISSN 1089-2397