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Insolvency and Arbitration Agreements in Spain: Following on from Decision 266/2019 of 30 September 2019¹



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In issue 7 of the Investment Arbitration Outlook we commented on Judgment 266/2019 of Commercial Court Number 1 of Santander (the 'Court') in which the Court upheld a request to suspend the effects of an arbitration agreement on the grounds that it could be detrimental to insolvency proceedings.

To recap, an events promoter and the representatives of an artist signed a contract pursuant to which the artist was to perform a concert in Spain in summer of 2018 (the 'Contract'). The Contract included an arbitration agreement and was governed by the laws of England and Wales. The artist did not show up for the concert and did not return all of his fee. The events promoter—which was eventually declared insolvent in Spain—sought payment not only of the remainder of the fee, but also for the damage

¹ Judgment 266/2019 of 30 September 2019, Commercial Court Number 1 of Santander, Rec. 427/2018 ('Judgment 266/2019') (La Ley 137375/2019).



suffered (the 'Claim'). Its main (and almost only) asset in the insolvency proceedings was precisely the Claim against the artist, whilst most of its insolvency creditors were consumers affected by the cancellation of the concert. In this context, the events promoter requested the Court to order that the effects of the arbitration agreement in the Contract be suspended so that it could file a lawsuit in relation to the Claim before the Court instead of starting arbitration proceedings in London per the Contract. As commented, the general rule under the Spanish insolvency legal framework is that the commencement of insolvency proceedings involving one of the contractual parties does not affect arbitration agreements. However, the Court granted this request in Judgment 266/2019 on the grounds that the arbitration agreement could be detrimental to the insolvency proceedings, pursuant to the exception under the second sentence of article 52(1) of the Insolvency Act² (currently article 140(3) of RLD 1/2020³).

² The Spanish Insolvency Act (Law 22/2003 of 9 July) ('Insolvency Act') was superseded by Royal Legislative Decree 1/2020 of 5 May approving the consolidated text of the Insolvency Act, which entered into force on 1 September 2020. The second sentence of article 52(1) of the Insolvency Act read as follows: '*Should the court deem that such clauses or agreements may be detrimental to the insolvency proceedings it may grant the suspension of its effects; all of which without prejudice to the provisions of international treaties.*' (the original in Spanish reads as follows: '*Cuando el órgano jurisdiccional entendiera que dichos pactos o convenios pudieran suponer un perjuicio para la tramitación del concurso podrá acordar la suspensión de sus efectos, todo ello sin perjuicio de lo dispuesto en los tratados internacionales.*').

³ Article 140 of Royal Legislative Decree 1/2020 of 5 May approving the consolidated text of the Insolvency Act ('RLD 1/2020') reads as follows: '*1. The commencement of insolvency proceedings shall not, on its own, affect the validity of the mediation clauses and arbitration agreements signed by the debtor. 2. Mediation proceedings and arbitration proceedings that are pending on the date*

The artist appealed Judgment 266/2019. The appeal was upheld by the Appeal Court of Cantabria (Section Number 4) in ruling 460/2020 of 12 August 2020.⁴ According to the Appeal Court, the artist was right to allege the infringement of his rights of defence and effective judicial protection based on a defect in the summons, and that this had vitiated and rendered null subsequent stages of the proceedings.⁵ Therefore, the Appeal Court referred the proceedings back to square one, i.e. to the moment prior to the summons of the artist.

when the insolvency proceedings begin will continue until the mediation proceedings end or until the arbitration award is final. The legal standing of the insolvent debtor in these proceedings shall be governed by the provisions for declarative trials in Chapter I of this Title. 3. The judge hearing the insolvency proceedings, ex officio or at the request of the insolvent debtor [...] or the insolvency administrator [...] may grant, before mediation or arbitration proceedings have begun, the suspension of the effects of those clauses or agreements if the judge considers that it could be detrimental to the insolvency proceedings. Without prejudice to the provisions of international treaties. 4. If there is fraud, the insolvency administrator may challenge before the insolvency judge the mediation clauses and arbitration agreements and arbitration procedures.'

⁴ Judgment 460/2020 of 12 August 2020, Section Number 4 of the Appeal Court of Santander, Rec. 63/2020 (Id Cendoj: 39075470012019100012).

⁵ In short, in its petition the events promoter indicated as the artist's address for summons the address of one of his representatives in Spain. An attempt was made to summon the artist through that representative. However, the representative appeared before the Court and stated that he had not acted as the artist's agent, only as an intermediary. The events promoter gave the Court a new address for the summons, that of another entity which it claimed was a representative of the artist, and, again, the recipient of the summons sent a certified letter (*bufofax*) to the Court stating that it had accepted the summons by mistake since it did not have powers of attorney to represent the artist. It also gave the Court an address for the artist in Dubai. The Court considered this second summons valid and, as a consequence, the artist was declared in default for failure to appear. The Appeal Court of Cantabria concluded that by not summoning the artist in Dubai the artist's rights of defence and effective judicial protection were infringed.

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As a consequence, the Court was once again asked to consider the dispute and, exactly one year and one month after it issued Judgment 266/2019, the Court rendered its second decision on 30 October 2020.⁶ This decision follows Judgment 266/2019 word for word, and once again the Court has suspended the effects of the arbitration agreement in the Contract. The only (but important) difference between the two judgments is that in Judgement 255/2020 the Court examined and subsequently rejected the artist's argument that he lacked standing to be sued on the grounds that he was not a party to the Contract because it was signed by his representatives, not him. The Court justified its decision on the grounds that the request to suspend the arbitration clause did not derive from the Contract itself, but rather the insolvency proceedings, which constitute plenary declaratory proceedings. On the other hand, the Court implicitly overcame the hurdle (and possibly the boundaries of the Contract, but that goes beyond the scope of this article) by further stating that even if the Claim had arisen from the Contract, the Contract's object was the artist's personal services (*servicios personalísimos*) and that it was the artist himself who returned part of the fee to the events promoter.

We have been informed that the artist has also appealed this decision. We will see what happens next.

⁶ Judgment 255/2020 of 30 October 2020, Commercial Court Number 1 of Santander, Rec. 427/2018 (Judgment 255/2020) (Id Cendoj: 39075470012020100001).

However, it is clear that three years after the concert was cancelled a decision on the merits is some way off. In our initial commentary we concluded that, irrespective of what the Court decided, 'arbitration proceedings could often result in a quicker resolution of the dispute.' Subsequent events have only served to support that conclusion.

In the meantime, an important reform of the Insolvency Act is underway to transpose into Spanish law Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132. The text of the draft bill amending the Insolvency Act (*anteproyecto de ley de reforma de la Ley Concursal*) was published on 8 July 2021. The current text does not alter the wording of article 140(3) of RLD 1/2020; i.e. the exception that allowed the Court, taking into consideration the very particular circumstances described in our previous commentary, to suspend the effects of the arbitration agreement. However, the draft bill does emphasize the general rule that the commencement of insolvency proceedings does not affect the validity of the contracts executed by the insolvent party or, as a consequence, its mediation or arbitration agreements. We will monitor closely whether the legislator takes this opportunity to narrow down the exception in article 140(3) of RDL 1/2020.



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