Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020[1] and lifts the arbitration clause's suspension

Jorge Azagra
International Arbitration and Litigation

Mariana de la Rosa
International Arbitration and Litigation

Almost two years to the day after the first judgment in the saga,[2] on 16 September 2021 we learned of the latest instalment[3] in the attempt by an events promoter facing insolvency to suspend the effects of an arbitration clause in a contract it had signed with an artist's representative for a concert to be performed in Spain in the summer of 2018 ('Contract').

1 Judgment 255/2020 of 30 October 2020, Commercial Court 1 of Santander, Rec. 427/2018 ('Judgment 255/2020') (Id Cendoj: 39075470012020100001), commented on by J. Azagra and M. de la Rosa in 'Insolvency and Arbitration Agreements in Spain: Following on from Decision 266/2019 of 30 September 2019' (2021) 8 Investment Arbitration Outlook, 28 <https://fr.zone-secure.net/107881/1410671/#page=28> accessed on 7 February 2022.

2 Judgment 266/2019 of 30 September 2019, Commercial Court 1 of Santander, Rec. 427/2018 ('Judgment 266/2019') (La Ley 137375/2019), commented on by J. Azagra and M. de la Rosa in 'Insolvency and Arbitration Agreements in Spain: Commentary on Decision 266/2019 of 30 September 2019' (2020) 7 Investment Arbitration Outlook, 12 <https://fr.zone-secure.net/107881/1232393/#page=12> accessed on 7 February 2022. The artist appealed Judgment 266/2019 and in ruling 460/2020 of 12 August, Section 4 of the Appeal Court of Cantabria ('Appeal Court'), Rec. 63/2020 (Id Cendoj: 39075470012019100012), the Appeal Court held that a defect in the summons meant that the artist's right to defend himself and to effective judicial protection had been infringed. As a consequence, the proceedings returned to the moment just before the summons and the Court issued Judgment 255/2020.

3 Judgment 586/2021 of 16 September 2021 of the Appeal Court, Rec. 107/2021 (Id Cendoj: 39075370042021100436) ('Judgment 586/2021').

URÍA MENÉNDEZ

The promoter's attempt to get a quicker decision by resorting to the courts over arbitration has clearly backfired

Under Article 52.1 of Law 22/2003 of 9 July[4] (now Article 140.3 of Royal Legislative Decree 1/2020 of 5 May approving the revised text of the Insolvency Act[5]), the promoter asked to suspend the arbitration clause in the Contract on the basis that it could be detrimental to its insolvency proceedings. If suspended, the promoter would be able to file a claim before the Court seeking, on the one hand, reimbursement from the artist of the remainder of his fee and, on the other, damages for his failure to show up for the concert ('Claim'). The alternative would have been to resolve the dispute in arbitration proceedings in London per the Contract.

The Court granted the request for suspension, first in Judgment 266/2019 and then in Judgment 255/2020, on the grounds that the arbitration clause could be detrimental to the promoter's insolvency proceedings because (i) it was vaguely worded, and (ii) international arbitration in London is very costly.

The artist appealed and, as we argued should happen in Issue 8,[6] the Appeal Court concluded that the artist lacked standing to be sued in the Claim for what the promoter alleged was 'a breach of contract'. The Appeal Court found that it was not the artist who signed the Contract but his representative, who also issued 'the transfer payment order to return the artist's fee, even though 'the contract's object was a personal performance' (*servicios personalísimos*) by the artist. Consequently, the Appeal Court revoked Judgment 255/2020.

While no doubt an interesting debate, this article does not consider the principle of privity of contracts and its exceptions, but rather how insolvency proceedings affect arbitration clauses.

Now that we are back to square one (again), we reflect on the initial reasons why the Court suspended the Contract's arbitration clause. One of them was

4 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 ('RLD 1/2020'). The second sentence of Article 52.1 of the Insolvency Act reads as follows: 'Should the court deem that such clauses or agreements may be detrimental to the insolvency proceedings it may suspend its effects; all of which without prejudice to the provisions of international treaties.'

5 Article 140 of RLD 1/2020 reads as follows: '1. Commencing insolvency proceedings shall not, on its own, affect whether the mediation clauses and arbitration agreements the debtor signs are valid. 2. Pending mediation and arbitration proceedings on the date the insolvency proceedings begin will continue until the mediation proceedings end or the arbitration award is final. The insolvent debtor's legal standing in these proceedings shall be governed by the provisions on declaratory proceedings 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, before mediation or arbitration proceedings have begun, suspend clauses or agreements if he or she considers that it could be detrimental to the insolvency proceedings. This without prejudice to the provisions of international treaties. 4. In cases involving fraud, the insolvency administrator may challenge the mediation clauses and arbitration agreements and arbitration procedures.'

6 See footnote 2. In this article, we stated that 'the Court implicitly overc[ame] the hurdle [and possibly the boundaries of the Contract, but that goes beyond the scope of this follow-up] 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.'

that it would take longer to resolve the dispute by arbitration than through the courts. However, in this particular case, bringing the issue of suspending the arbitration clause before the courts has in fact delayed a decision on the merits of the Claim and the only clear-cut fact to be established so far is that it is the artist's representative who should be sued for breaching the Contract.

Although what is to come is not immediately obvious, the promoter's attempt to get a quicker decision by resorting to the courts over arbitration has clearly backfired. To put things into context, and while timing varies depending on the dispute and institution, LCIA arbitral proceedings take around 16 months on average.[7] An ad hoc arbitration under the UNCITRAL expedited rules may take between six and nine months.[8] It has now been 48 months since the concert was cancelled and, as already noted, we are back where we started. Therefore, our initial conclusion that disputes are resolved quicker by arbitration has been confirmed, especially since the question of the artist's legal standing could have been solved through a partial award without hindering the main dispute's resolution in the arbitration proceedings.

7 'Costs and duration: 2013-2016 LCIA' <https://www.international-arbitration-attorney.com/wp-content/uploads/2018/07/LCIA-Costs-and-Duration-Statistics.pdf> accessed on 7 February 2022.
8 'UNCITRAL, Expedited!' <http://arbitrationblog.kluwerarbitration.com/2021/07/14/uncitral-expedited/> accessed on 10 February 2022.

In the meantime, the ongoing reform of the Insolvency Act to transpose Directive 2019/1023/EC of the European Parliament and of the Council has reached another milestone. The draft bill amending the Insolvency Act[9] was published on 14 January 2022. However, the current wording does not alter Article 140.3 of RLD 1/2020, which sets out the exception that the Court relied on to suspend the effects of the arbitration agreement. At this advanced stage of the legislative process the legislator is unlikely to narrow down the exception in Article 140.3 of RLD 1/2020 which, in our opinion, is a missed opportunity.

9 In Spanish, the '*Proyecto de reforma de la Ley Concursal*'.

At this advanced stage of the legislative process the legislator is unlikely to narrow down the exception in Article 140.3 of RLD 1/2020 which, in our opinion, is a missed opportunity

This reform is just one example of a legislative trend that is clearly seeking to encourage arbitration: one of the latest examples is Directive 2019/790/EC of the European Parliament and of the Council, which requires Member States to provide that disputes concerning the transparency obligation and the contract adjustment mechanism be submitted to a voluntary alternative dispute resolution procedure. It was transposed into Spanish law in November 2021[10] in a new Article 194.5 of the Intellectual Property Act, which designates the First Section of the Intellectual Property Commission to arbitrate and mediate in intellectual property disputes.

10 Royal Legislative Decree 24/2021 of 2 November transposing EU directives in the areas of covered bonds, cross-border distribution of collective investment schemes, open data and reuse of public sector information, exercise of copyright and related rights applicable to certain online transmissions and to broadcasting radio and television programs, temporary exemptions on certain imports and supplies, for consumers and for the promotion of clean and energy efficient road transport vehicles.