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English Arbitration, Spanish Insolvency and David Guetta

Manuel Penades (King's College London) · Friday, November 15th, 2019

One of David Guetta's most famous songs is "When Love Takes Over". Recent weeks have shown him that insolvency can also "take over". The Commercial Court in Santander (Spain) ruled recently that an arbitration agreement signed by the agents of David Guetta ceased to produce effects due to the insolvency of the counterparty, the Spanish company Delfuego Booking SL.

Facts of the Case

In April 2018, Delfuego Booking signed a contract with the agents of David Guetta for the performance of a concert by the renowned artist in Santander (Spain). The agreement included a choice of English law and submitted the disputes arising out of the contract to arbitration in London.

On the date of the concert, David Guetta did not travel to Spain and the show had to be cancelled. The organisers of the event suffered several losses. The agents of David Guetta refunded EUR 203,000 to Delfuego Booking, which allegedly covered part of the fees that had been paid to the artist prior to the concert. Delfuego Booking claimed that their losses were greater, including the additional advance fees not returned by the French DJ, the costs related to the technical and logistical preparation of the show and the reimbursement of thousands of tickets to disappointed fans. These amounted to around EUR 600,000. The agents of David Guetta refused to pay.

Due to the inability to pay its debts, the Commercial Court of Santander opened insolvency proceedings against Delfuego Booking in September 2018. The main asset in the insolvency was the claim of the company against David Guetta's agents, which the administrator intended to pursue. Given the lack of resources to commence arbitration in London, the administrator requested the Commercial Court to suspend the effects of the arbitration agreement pursuant to article 52.1 of the Spanish Insolvency Act ("SIA"). According to this provision,

> *[t]he opening of insolvency proceedings shall not affect in and of itself the mediation clauses and arbitration agreements subscribed by the insolvent party. The court shall be allowed to suspend the effects of such clauses or agreements when it finds that they may harm the insolvency process, notwithstanding the provisions in international treaties.*

The Court's Decision

The request required a double analysis by the Court: firstly, a choice of law test to ascertain the law governing the effects of the opening of insolvency proceedings on the London arbitration agreement (on this question see also a previous post), and secondly, the application of the relevant applicable law. In both steps, the Court cited relevant literature in the field.

As to the choice of law point, the Court reasoned that neither the New York Convention nor the Geneva Convention was applicable to resolve the question at hand. The issue was not the validity or the effectiveness of the arbitration agreement in general, but the impact that the insolvency of one of the parties had on the agreement to arbitrate. Neither of those Conventions referred to this question. Rather, the choice of law rule had to be found in the European Insolvency Regulation Recast ("EIR Recast") which provides in article 7 that "the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened", including in article 7.2.f "the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits". This covered arbitration agreements which had not been activated at the time of the opening of insolvency proceedings, as in the dispute between Delfuego Booking and David Guetta's agents. Therefore, Spanish law was the relevant applicable law.

At the second stage of the analysis, the Court confirmed that article 52 SIA was the relevant provision, even if the arbitration was international. The assessment then moved into the requirements to exercise the power to suspend the effects of the arbitration agreement to avoid harm to the insolvency process. This is one of the most valuable parts of the judgment, given the dearth of previous case law on that point.

To start with, the Court emphasised that such power must be approached in the context of the general rule of article 52.1, which favours the effectiveness of arbitration agreements post-insolvency, and hence must be exercised with caution.

Second, the harm referred to in article 52.1 should not be equated to the abstract procedural threat produced by the existence of dormant arbitration agreements or to the mere possibility that individual arbitration proceedings may run in parallel to the insolvency. Rather, the relevant harm concerns the substantive collective interest protected by the insolvency process. That is, the need to maximise the value of the insolvent estate to increase the payment rate of outstanding debts to creditors. This interpretation is supported by similar factors empowering the court to terminate executory contracts "in the interest of the insolvency" under article 61.2 SIA. In that context, the Court found critical that, in addition to the inevitable costs linked to international arbitration in London, the arbitration agreement was very vaguely drafted as it failed to choose any arbitral institution or any rules applicable to the arbitration. This would have resulted in additional costs and procedural uncertainty.

Finally, the Court clarified that in international disputes, the suspension of arbitration agreements does not activate the jurisdiction of the insolvency court to hear the merits of the case (the *vis attractiva concursus*). Instead, it simply revives the general rules of international jurisdiction applicable to civil and commercial matters. Even if the Court did not state it expressly, the relevant rules in that case were those in the Brussels I Regulation Recast ("BIReg Recast"). One of the

forums available to Delfuego Booking under the Regulation were the courts of Santander, as "the place in a Member State where, under the contract, the services were provided or should have been provided" (article 7.1.b, second indent BIReg Recast). It followed that the alternative to the deficient London arbitration agreement was not litigation abroad, but at the insolvent company's domicile.

Based on these factors, the Court concluded that maintaining the effectiveness of the arbitration agreement would harm the relevant interests in the insolvency and ordered its suspension.

Comment

The judgment of the Commercial Court of Santander provides valuable guidance in a relevant area of practice that lacked judicial elaboration in Spain. One should be aware that the application of article 52 SIA has generated abundant uncertainty before international arbitral tribunals and it is hoped that this decision will shed some light in that sphere. The judgment, however, should not be perceived as arbitration hostile.

First, the Court only applied Spanish law to this case because the arbitration agreement had not been activated before the opening of insolvency proceedings. Had arbitration been pending, article 18 EIR Recast would have made English law applicable to define the effects of insolvency on the ongoing arbitration (although the outcome under English law might have been similar – see here and more generally here).

Second, if Spanish law had applied to a pending arbitration, article 52.2 SIA would have secured the continuation of the proceedings until the rendering of a final and binding award and the Court would not have had the power to suspend the arbitration agreement.

Third, the Court emphasised that the suspension in this case was fundamentally motivated by the vagueness of the arbitration agreement and the availability of the home court's jurisdiction under the BIReg Recast. Had the arbitration agreement been better drafted or jurisdiction of the Spanish courts been unavailable after the suspension of the agreement, it is possible that the Court would have reached a different conclusion.

Overall, this is a balanced decision that demonstrates the commendable willingness of the judge Carlos Martínez de Marigorta Menéndez to engage with the complexities of the issue and, more generally, confirms the ability of Spanish courts to produce sophisticated legal analysis in the field of international arbitration – a much-needed message in light of certain other court decisions rendered in Spain in the recent past (see here and here).

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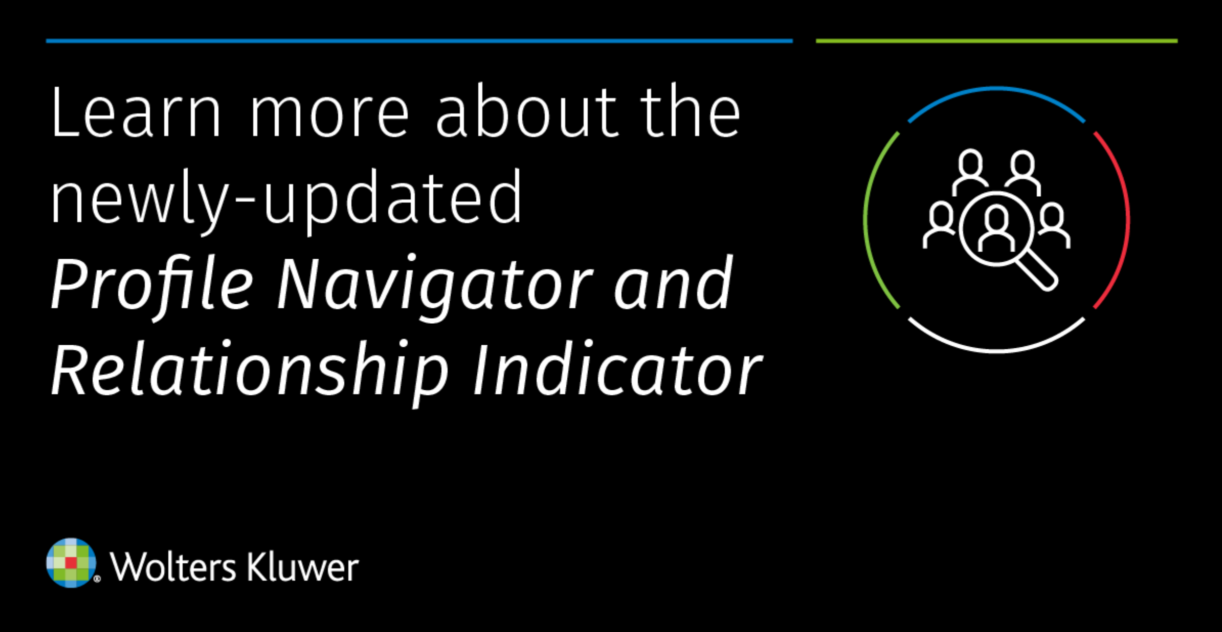

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