

LEXNET NOTIFICATION by kmaleon: 201810245876608
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19-12-2018

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LOS CLAVELES CLUB 1/10

SENDER: Superior Court of Justice. Civil Chamber. Las Palmas de Gran Canaria

RECIPIENTS

NAME	NO.	CHAMBER
Francisco Manuel Montesdeoca Santana	213	Illustrious Association of Procurators of Las Palmas
Manuel Angel Alvarez Hernandez	152	Illustrious Association of Procurators of Tenerife

ROLL DATA

NIG: 3501631120180000010

Jurisdictional Order: Civil

Roll: Exequatur 0000010/2018

NOTIFIED RESOLUTION

AUTO FREE TEXT

This document is an authentic copy of the one signed electronically by:
SABEL MORALES MIRAT - Lawyer of the Administration of Justice 18/12/2018 - 14:13:39
In accordance with the provisions of current regulations on the Protection of Personal Data, I inform you that the information contained in this communication is confidential, being prohibited its diffusion by any means or procedure, and should be treated exclusively for the purposes of the Administration of Justice.
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Section: JP
HIGH COURT OF JUSTICE. CIVIL
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Procedure: Exequator
No. Procedure: 0000010/2018
NIG: 3501631120180000010
Resolution: Auto 000012/2018
Intervention: Intervener: Attorney:
Plaintiff CLUB LOS CLAVELES : MANUEL ANGEL ALVAREZ HERNANDEZ
Defendant : WIMPEN LEISURE MANAGEMENT, S.A
Counsel: : FISCAL MINISTRY

President:

HE. Mr. D. Antonio Doreste Armas.

Magistrates:

Ilma. Mrs. D^a Margarita Varona Faus.

Ilma. Mrs. Carla Bellini Domínguez.

In Las Palmas de Gran Canaria, on December 18, 2018

FACTS

FIRSTLY.- On June 7, 2018, there has been presented before this Civil and Criminal Chamber of the Superior Court of Justice of the Canary Islands by the Attorney Mr. Manuel Alvarez Hernández, in name and representation of the entity Club Los Claveles, he has written **lodging an application for recognition and effectiveness of a foreign arbitral award** issued on August 1, 2017 by the arbitrator Mr. Brendan Malone, against the Wimpen Leisure Management S.A. entity, requesting we admit to procedure and declare its effectiveness and enforceability with the imposition of costs on the defendant.

SECONDLY.- By Decree of the Lawyer of the Administration of Justice dated June 15, 2018, it was agreed to admit the claim for processing with regard to recognition of the foreign arbitral award and summon the defendant and transfer to the Public Prosecutor's Office the matter to consider the corresponding allegations in relation to whether or not to recognize the foreign arbitral award.

THIRDLY.- The Public Prosecutor's Office issued a report on July 17, highlighting the provenance of recognition of the Award rendered. The defendant appeared on July 27, 2018, through the attorney Francisco Manuel Montesdeoca Santana and under the direction of attorney José María Rocavert Marcet, and it was requested we deny the exequatur of the award referred to due to lack of active legitimization "ad causam" of Club Los Claveles "or passive" ad causam " of Wimpen Leisure Management, S.A., subsidiary, rejecting the exequatur for lack of accreditation of the authenticity of the arbitral award and its finality and enforceability.

Having examined the merits of the case, they ask that the exequatur be denied because WIMPEN LEISURE MANAGEMENT, S.A. is unable to comply with orders 9, 10, 11 and 12 of the arbitral award, all with express condemnation in costs.

The Speaker, Mr. Magistrate Mr. Antonio Doreste Armas, here expresses the unanimous opinion of the Court.

LEGAL REASONING

FIRSTLY.- It is claimed in the demand formulated by the representation of the Club entity Los Claveles the recognition in Spain of the Arbitral Award dated August 1, 2017 by the arbitrator, Mr. Brendan Malone, against the Wimpen Leisure Management S.A. entity, and the decision of this court is as follows:

1. I reject the objections regarding the competence of the Court to decide on the substantive dispute between the parties.
2. I reject (dictate) the 4th order sought by the plaintiffs.
3. I reject (dictate) the 5th order sought by the plaintiffs.
4. I decree declaring that the Committee is duly constituted with respect to its elected members, under the terms of the 6th order that the claimants seek to obtain.
5. I decree declaring that Ray Steele was validly invited to be part of the Committee, under the terms of the 7th order that the plaintiffs seek to obtain.
6. I decree declaring that the Special General Meeting (JGE) of 2016 was duly convened and that all matters dealt with in said forum, including the elections of ANN Burston and Roger Lindsay, were valid, in the terms of the 8th order that the plaintiffs seek to obtain.
7. I reject (dictate) the 9th order sought by the plaintiffs.
8. I reject (dictate) the 10th order sought by the plaintiffs.
9. I order the defendants to cede control of all property belonging to the Club Los Claveles, which are in their possession or under their control, to the President of the applicant, including - without prejudice to the generality of the foregoing - the Registry of Members referred to in clause 11.6 of the Club Constitution Act, within 28 days of the issue of this order.

10. I order the defendants to assign to the plaintiff all the accounting books that are kept with respect to Club Los Claveles, by virtue of the provisions of clause 17.1 of the Club Constitution Act, within 28 days of the issue of this order.

11. I order the defendants to produce a reconciliation of the Community bank account of the Los Claveles owners, which reflects the amounts properly belonging to the Club, and (subsequently) transfer these amounts to the claimant, all within 28 days of the issue of this Arbitral Award.

12. I order that all expenses and legal fees reasonably incurred by the applicant, jointly or by the members of the Committee on an individual basis, in absence of reimbursement by WimPen, in relation to this Dispute, be paid from the funds of Club Claveles, under Clauses 12.1.10 and 12.2 of the Club Constitution Act.

13. I reject (dictate) the 15th order that the plaintiffs intend to obtain.

14. I reject (dictate) the 16th order sought by the plaintiffs.

15. I issued a First Provisional Arbitral Award on May 6, 2016, and a Second Award of Provisional Arbitration on November 23, 2016. The present Arbitral Partial Award replaces these two provisional arbitration awards.

16. The present arbitral award resolves the basis of the dispute. In the meantime, the award of expenses is reserved.

In response to the request for recognition of that arbitral award, the defendant, after due process, has appeared in the proceedings answering the demand of recognition of foreign arbitral award by means of written pleadings presented on July 27, 2018, in which he pleads that:

1º The exequatur of the award referred to by the lack of active legitimation "ad causam" is denied the LOS CLAVELES CLUB or passive "ad causam" by WIMPEN LEISURE MANAGEMENT, S.A.

2º Subsidiarily, I reject the exequatur for lack of accreditation of the authenticity of the award arbitration and its finality and enforceability, and

3º Subsidiarily, in the case of entering into the merits of the case, the exequatur be denied because WIMPEN LEISURE MANAGEMENT, S.A., cannot comply with orders 9, 10, 11 and 12 of the arbitral award.

4º Order the other party pay costs, whatever the outcome.

Regarding the petitions that are made above.

For its part, the Public Prosecutor's Office, in the report issued in the case, states that the Civil and Criminal Chamber of the Canary Islands Supreme Court is competent to recognize and validate the enforceability of the arbitration, it being understood that the Award must be recognized upon completion and that each one of the requirements demanded by the Legislation be carried out.

SECONDLY .- First of all, we must highlight the formal requirements demanded by Article IV of the New York Convention of June 10, 1958 on the recognition and execution of arbitral sentences, which provides that:

"1. To obtain the recognition and execution provided in the previous article, the party that ask for recognition and enforcement must submit, along with the claim:

a) the duly authenticated original of the judgment or a copy of that original that meets the conditions required for its authenticity.

b) The original of the agreement referred to in Article II or a copy that meets the conditions required for its authenticity.

2. If that judgment or agreement were not in an official language of the country in which the judgement is invoked, the party requesting the recognition and execution of the latter must present a translation of these documents into that language. The translation must be certified by an official translator or a sworn translator, or by a diplomatic or consular agent. "

In these proceedings, the plaintiff has produced, together with the claim, a copy of the arbitration award, (doc.1), which meets the conditions required for its authenticity, (document 2) in which the certified translation is certified by a sworn English interpreter.

THIRDLY.- Furthermore, it must be borne in mind that Article V of the Convention of New York on recognition and enforcement of arbitral awards of June 10, 1958 states:

"1. The recognition and enforcement of the judgment may only be refused, at the request of the party against whom it is invoked, if this party tests before the competent authority of the country in that the recognition and execution is requested:

a) That the parties to the agreement referred to in Article II were subject to some incapacity under the Act that is applicable to them or that said agreement is not valid under the Law to which the parties have submitted it, or if nothing had been indicated in this respect, by virtue of the Law of the country in which the judgment was issued; or

b) That the party against whom the arbitral award is invoked had not been duly notified of the appointment of the arbitrator or of the arbitration procedure or has not been able, for any other reason, to conduct a means of defence; or

c) That the judgment refers to a difference not foreseen in the commitment or not included in the provisions of the arbitration clause, or contains decisions that exceed the terms of the commitment or the arbitration clause; However, if the provisions of the judgment that refer to the issues submitted to the arbitration can be separated from those that have not been submitted to arbitration, recognition and enforcement may be given to the former; or

d) That the constitution of the arbitral tribunal or the arbitration procedure have not been made fully aware of any agreement between the parties or, failing such agreement, that the constitution of the Court arbitration or the arbitration procedure have not been adjusted to the law of the country where the arbitration has taken place; or

e) That the judgment is not yet binding on the parties or has been annulled or suspended by a competent authority of the country in which, or pursuant to the law, the judgment was made.

2. The recognition and enforcement of an arbitral award may also be denied if a competent authority of the country where recognition and enforcement is requested verifies:

a) That, according to the Law of that country, the object of the difference is not susceptible to solution by arbitration, or

b) That the recognition or execution of the judgment would be contrary to the public order of that country".

Art. 46 of Law 29/2015, of July 30, includes the causes of denial of the recognition of foreign resolutions.

FOURTHLY.- Having been requested by the applicant for recognition procedure of a foreign arbitral award, it is necessary to mention, first of all, that the Law on Arbitration 60/2003, of December 23, in section X of its Statement of Reasons, indicates textually that: "Title IX regulates the exequatur of foreign awards, consisting of a sole precept in which, in addition to maintaining the definition of a foreign award that that has not been made in Spain, a re-send to the international conventions to which Spain is a party and, above all, to the New York Convention of 1958. Given that Spain has not made any modification to this Convention, it is applicable regardless of the commercial nature or not of the dispute and whether or not the award has been handed down in part in the agreement. This means that the scope of application of the New York Convention in Spain makes unnecessary an internal legal regime of exequatur of foreign awards, without prejudice of what other more favourable international agreements could have. "

And Article 46 of the Arbitration Law, provides that: "1. The foreign award is understood as pronounced outside of Spanish territory. 2. The exequatur of foreign awards shall be governed by the Convention on recognition and enforcement of foreign arbitral awards, made in New York, June 10, 1958, notwithstanding the provisions of other agreements or international agreements more favourable to their concession, and will be carried out according to the procedure established in the civil procedure order for the sentences handed down by foreign courts".

Also, this same Law 11/2011, of May 20, the reform of the Law of Arbitration 60/2003, of 23rd December, establishes in its Preamble, and specifically in its section II, the following: "With this purpose of promoting arbitration, the present Law begins by the reallocation of judicial functions in relation to arbitration, both support functions, such as knowledge of the annulment action of the award and the exequatur of foreign awards, which allows more uniformity to the system through an elevation of certain functions. These are, in particular, those relating to the appointment and removal of court arbitrators, knowledge of the action for annulment of the award and competence to know the exequatur of foreign awards, which are now attributed to the Civil Chambers and of Criminal Matters of the Superior Courts of Justice, arbitration thus staying in the Courts of First Instance . These changes have led to a new redaction to article 8 of Law 60/2003, of December 23rd, of Arbitration, as well as to the modification of the Law of Civil Procedure of February 3rd, 1881. "

It is also worth noting that the regulations that dealt with this matter in our procedural civil law - specifically articles 951 to 958 of the LEC of 1881 - was repealed by Law 29/2015, of July 30, on International Legal Cooperation in Civil Matters, which contemplates and regulates the applications for exequatur, establishing the procedure to be followed in Article 54 of the aforementioned Law, which is, for these purposes, relevant to the case, since its Sole Transitory Provision, within its point 3, establishes that: "This law applies to the demands of exequatur that are presented before the courts by Spanish nationals after their entry into force, regardless of the date on which the foreign judgment had been made. "And, furthermore, the Sixth Final Provision establishes that: "This law will come into force twenty days after publication in the" Official State Gazette ", the ruling demand of this exequatur procedure having been presented before the Civil and Criminal Chamber of the TSJC on June 9, 2017.

FIFTHLY.- The allegations that the defendant, WIMPEN LEISURE MANAGEMENT, S.A. make regarding the demand for recognition of a foreign Arbitral Award, refer to:

1. Failure to prove the authenticity of the award.
2. Lack of accreditation that the award is firm and has executive force.
3. Absence of the due representation of the attorney who promotes the exequatur.
4. Order 9 of the Award.
5. Order 10 of the Award.
6. Order 11 of the Award.
7. Order 12 of the Award.
8. Procedural exception: Lack of active legitimization "ad causam" of the Los Claveles Club and passive "ad causam" of Wimpen Leisure Management, S.A.

It is appropriate here to address the aforementioned allegations concerning the application:

With respect to the first, it must be remembered that the text of the apostille is the one approved in the The Hague Convention of October 5, 1961, which meets the requirement that this International Treaty requires, without this Chamber being able to enter into any criticism of the content of the same, being to indicate that the authenticity of the text of the Award derives from the condition of the Scottish notary that accredits it.

With regard to the second claim, which is also of a formal nature, it must be stated that the accreditation of the finality and enforceability of the Award follows on from the section "Rules Applicable "on page 4 of the Award, invoking the Scottish regulations ("Scottish Arbitration Rules" that is, what the official translator reproduces as "Normative Scottish Arbitration ").

In addition, paragraph 16 of the Award (page 35) reads "The present Award ... comes into force immediately ", a phrase whose exegesis is carried out according to the canons and

hermeneutics of arts. 1.281 and seq. of the Civil Code (especially articles 1,284 and 1,286) and this indicates the enforceability and firmness of it.

The allegation, minor in nature, re the alleged defect of representation on the part of the attorney of the party that urges the "exequatur" must also be rejected, the nuance that in the representation is indicated "Club Los Claveles" when what is actually being referred to is the "Claveles Club Committee" is clearly irrelevant, since the identity is obvious considering that this Committee is, in the Anglo-Saxon terminology, the organ of the aforementioned Club. The rest of the claims cannot be accepted by this Chamber, since they are about issues unrelated to the mere recognition of the Award, one cannot question the merits (ended by the finality of the Award) or in the material execution thereof, this being within the jurisdiction of the Court to which it corresponds, ex art. 8.6 of the Law of Arbitration, in the terms that result from art. 1 of Law 11/2011, as will be seen next.

Finally, the final one of the obstacles must also be rejected (listed 8th in the opposition order) that alleges the defects of locus standi "ad causam", precisely because this type of legitimation affects the substance of the matter and, therefore, it is not a question of a formal obstacle but of a substantive issue that has already been resolved within the Award, all without prejudice to the possible opposition that the sentenced party may bring with regard to the execution of the Award, which is beyond the jurisdiction of this Chamber, as will be indicated in the final paragraph of the next *Legal Basis*.

SIXTHLY.- In consequence and having seen what has been so far expressed, the competence of this Chamber of the Civil Law of the Superior Court of Justice extends only and exclusively to the recognition of the Award rendered by Mr. Brendan Malone on August 1, 2017.

So then, given that the parties agreed at the time to submit to the arbitration system to resolve the conflicts that had arisen during the contracts carried out by the parties involved, and given that the Award issued by the aforementioned body has been adjusted to the standards that are included in the New York Convention dated June 10, 1958, ratified by Spain in 1977, thus meeting the requirements required for that purpose in art. 46.2 of the Arbitration Law, and without it having been alleged by the defendant nor by the Public Prosecutor's Office, there is no reason to deny the recognition of the Arbitral Award, so this Chamber therefore agrees to the recognition of the mentioned Arbitral Award in the terms that are included in it, said recognition as provided by the aforementioned art. 8.6 of the Law of Arbitration as modified by art. unique.1 of Law 11/2011, of May 20:

"For the recognition of foreign arbitral awards or decisions, the competent Civil and Criminal Chamber of the Superior Court of Justice of the Autonomous Community of domicile or place of residence of the party against whom the recognition or address or place of residence of the person to whom the effects of those refer, subsidiary jurisdiction is determined subsidiarily by the place of execution or wherethose awards or arbitration resolutions must produce their effects".

However, regarding the execution of this Arbitral Award this Civil Chamber is not competent, in accordance with the provisions of section two of the aforementioned art. 8.6:

"For the execution of arbitral awards or arbitral decisions the Court of First Instance will be competent according to the same criteria. "

SEVENTHLY.-

Having seen the aforementioned precepts and other general and pertinent applications, there is no pronouncement regarding costs.

THE OPERATIVE PART OF THE JUDGMENT

The Chamber accepts the claim made by the Court attorney D. Manuel Álvarez Hernández on behalf of the Club los Claveles against Winpem Leisure Management S.A. regarding **RECOGNITION AND EFFECTIVENESS of the arbitral award** issued on 1st August 2017 by Mr. Brendan Malone, without expressly ordering costs.

This resolution to be notified to the Public Prosecutor and involved parties.

There is no recourse against this resolution.

So we are in agreement, as the Magistrates we send and we sign the order.

LexNET Message - Notification

IdLexNet 201810245876608

Subject Exequator

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Recipients Procurator ALVAREZ HERNANDEZ, MANUEL ANGEL [152] (Illustrious Association of Attorneys of Tenerife)

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12/19/2018 12:04 ALVAREZ HERNANDEZ, MANUEL ANGEL [152] - Illustrious Association of Procurators of Tenerife

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(* All the times referred to by LexNET are Peninsular time.

TRANSLATED by :

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Paul Coulson

22nd December 2018

This translation of 9 pages is true and has been done to the best of my ability. Please address all enquiries or queries relating to this translation to the above contact details.