

KEEPING ALL ARBITRATION OPTIONS OPEN

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In the current financial climate counterparties may be reluctant to fund or even follow through with arbitration proceedings but remedies exist to progress disputes

A party in dispute wishing to enforce an arbitration clause should be prepared for the fact that in the current financial climate counterparties may be reluctant to fund or even follow through with proceedings, says Félix JMontero, co-Head of Arbitration at Pérez-Llorca in Madrid.

'Despite its benefits, arbitration is paid justice and for which the parties have to share in advance the cost of the institution and the arbitrators. A possibility exists that either a claimant or defendant may be

unable to afford the necessary upfront costs, or a defendant, because of their own precarious financial position, may not readily cooperate in the process.'

Many clauses though expressly preclude parties from resorting to the national courts, albeit public legal assistance may be available to parties in financial difficulties, and though arbitral institutions and arbitrators are under an obligation not to progress proceedings if the relevant costs cannot be met.

La parte en una disputa que quiera hacer valer la cláusula de arbitraje tiene que estar preparada para el hecho de que en el actual clima económico la contraparte no quiera financiar o continuar los procedimientos, sin embargo existen remedios, dice Félix Monteiro, co Responsable del área de Arbitraje de Pérez-Llorca en Madrid.

'A claimant can of course decide to cover all the costs up front – which would be adjudicated at the time of the award – but they may also not be in a position to do so. The issue then is what recourse is available to resolve their claim?'

Nevertheless precedents exist, before the ICC International Court of Arbitration and German Federal Courts, in which parties to an arbitration have, in exceptional circumstances and because of manifest lack of financial capability, been able to circumvent arbitration clauses and resort to jurisdiction in the courts, explains Montero.

'No such precedent has yet been set in Spain, but it nonetheless offers companies the comfort of knowing that the possibility remains of progressing disputes, even in the face of extreme difficulties, albeit there may be hurdles to overcome.'

The issue is particularly critical as an

arbitration clause cannot be relied on once a company has been declared bankrupt, he says.

'Arbitration proceedings may be continued against a company in bankruptcy, but not commenced against them, which brings an additional complication – to commence proceedings ahead of a declaration or to take your chances in the commercial courts.

In terms of timing and when relatively specialised decisions are required, we would advise a party to avoid from litigating against a company in front of a Bankruptcy Judge.'