International Arbitration

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PREFACE

Following the success of the fifth edition, we are pleased to present the sixth edition of *Global Legal Insights – International Arbitration.* The book contains 32 country chapters, and is designed to provide general counsel, government agencies, and private practice lawyers with a comprehensive insight into the realities of international arbitration by jurisdiction, highlighting market trends and legal developments as well as practical, policy and strategic issues.

In producing *Global Legal Insights – International Arbitration*, the publishers have collected the views and opinions of a group of leading practitioners from around the world in a unique volume. The authors were asked to offer personal views on the most important recent developments in their own jurisdictions, with a free rein to decide the focus of their own chapter. A key benefit of comparative analyses is the possibility that developments in one jurisdiction may inform understanding in another. I hope that this book will prove insightful and stimulating reading.

Joe Tirado
Garrigues UK LLP

Spain

Luis Cordón, Jose Piñeiro & Fabio Virzi
Cases & Lacambra

Introduction

Law on arbitration

The Spanish legal provisions on arbitration currently in force were enacted by the Spanish Arbitration Act 60/2003, of 23 December 2003 (SAA). This Law is clearly inspired by the Model Law adopted by the United Nations Commission on International Trade Law on 21 June 1985 (UNCITRAL Model Law). The Model Law constitutes the point of departure of the Spanish legislation in order to include technical advances and to meet the new needs arising in arbitration practice, particularly as regards the requirements of the arbitration agreement and the adoption of interim measures.

The Model Law embraces both continental European and Anglo-Saxon legal traditions. Consequently, its terms do not entirely respond to the traditional canons of Spanish law; however, such terms do facilitate the application of the law by actors working out of economic areas where Spain maintains active and growing commercial relations.

New York Convention

The New York Convention on Recognition and Enforcement of Arbitral Awards was signed by Spain on 29 April 1977. Spain has adhered to this Convention from such date without making any reservation, and applies it to the enforcement of arbitral awards made in non-Member States.

The New York Convention has been adhered to by many States. Some of them apply this Convention *erga omnes*, which means from the rest of the world, without limiting its applicability to arbitrations connected to other Member States. Due to this *erga omnes* effect, this Convention has become the general rule for such Member States.

Recognition and enforcement of arbitration awards

Spain has signed the European Convention on International Commercial Arbitration of 21 April 1961, ratified by Spain on 5 March 1975, as well as the Geneva Convention of 1961 on International Commercial Arbitration.

International arbitration

SAA constitutes a sole and uniform legislative body in Spain due to the monistic approach on which SAA is based. This means that, except for unusual exceptions, the same provisions are applicable to both domestic and international arbitration. Therefore, instead of having different rules, Spain has only one law in force for both type of arbitrations: the SAA.

Notwithstanding the foregoing, in any case, Spanish legislation is inspired by provisions regarding international arbitration laid down in treaties ratified by Spain or contained in laws with special provisions on arbitration.

Having said the above, article 3 of the SAA determines when an arbitration is considered international:

- when the parties are domiciled in different States at the time when the arbitration agreement is concluded;
- when the following places are located outside the State in which the parties are domiciled: (a) the place of the arbitration, as determined in the arbitral agreement; (b) the place where the obligations deriving from the discussed legal relationship are to be performed; or (c) the place to which the subject matter of such dispute is most closely related; or
- when the legal relationship from which the dispute stems affects the interests of international trade.

Overview of arbitration institutions

The main internal bodies providing arbitration services in Spain are the following:

- The Madrid Court of Arbitration (*Corte de Arbitraje de Madrid*).
- The Civil and Trade Court of Arbitration (*Corte Civil y Mercantil de Arbitraje* – CIMA).
- The Spanish Court of Arbitration (*Corte Española de Arbitraje*).
- The Arbitral Tribunal of Barcelona (*Tribunal Arbitral de Barcelona*).

Additionally, the extraordinary work of the International Chamber of Commerce (ICC), headquartered in Barcelona, is noteworthy.

Nevertheless, the proliferation of different arbitral bodies in Spain over the last few years is starting to be seen as a problem by stakeholders. For this reason, in December 2017 the Madrid Court of Arbitration, CIMA and the Spanish Court of Arbitration signed an agreement to unify such three arbitral bodies into one with respect to international arbitration proceedings. The main purpose of this arrangement is to reinforce the image of Spain as an attractive forum to hold arbitration. As result of this agreement, on October 2019, the above-mentioned arbitration courts created the Madrid International Centre of Arbitration (CIAM). The CIAM will be operational during the first half of 2020.

Special national courts

There are no special national courts to hold international arbitration proceedings in Spain. Nevertheless, international arbitration bodies such as the ICC, the Stockholm Chamber of Commerce (SCC) and the International Centre for Settlement of Investment Disputes (ICSID) usually rent out offices for local arbitration bodies in order to practise oral hearings.

Notwithstanding the aforementioned, some national courts have powers regarding international arbitration. For example, the Civil and Criminal Section of the Autonomous Supreme Court of the region of the domicile of the party against whom the recognition is applied, and the First Instance Courts, are entitled to recognise and enforce international arbitration awards according to article 8.6 of the SAA.

Arbitration agreement

What formalities are needed for the arbitration agreement?

The answer to this question is found in article 9.1 of the SAA. According to this article, the arbitration agreement may adopt the form of either a separate agreement or an arbitration clause established in a broader contract, so long as it expresses the parties' willingness to submit to arbitration all or certain disputes arising between them in respect of a given legal relationship, whether contractual or otherwise.

The arbitration agreement must be made in writing, in a document signed by the parties or in an exchange of letters, telegrams, telexes, faxes or other telecommunication methods

that ensure a record of the agreement (article 9.3 of the SAA). In any case, this formality should be additionally complied with when an arbitration agreement is stated on a separate document and the parties make reference to it in the contract.

When the arbitration agreement is contained in an adhesion contract, its validity and interpretation will be governed by the specific rules applicable to such contracts (article 9.2 of the SAA).

Regarding international arbitrations, article 9.6 of the SAA specifically stipulates that the arbitration agreement will be reputably valid, and the dispute arbitrable, if the requirements of the rules of law chosen by the parties to govern the agreement, or by the applicable substantive law, or by Spanish law, are complied with.

What disputes are arbitrable?

The guiding principle in Spain is the freedom of choice of the parties, which allows for the arbitrability of those matters within the free disposition of the parties. In this sense, the parties can choose a different dispute resolution method, out of the jurisdictional authorities of their respective States.

By contrast, matters excluded from the free disposition of the parties – such as criminal matters – are considered non-arbitrable. The former Spanish Arbitration Act 36/1988, of 5 December 1988, listed in article 2 the disputes which are considered non-arbitrable:

- Those matters in which a final judicial resolution has been issued, except for aspects related to their enforcement.
- Matters inseparably united to other matters excluded from the free choice of the parties.
- Matters in which the law requires the intervention of the Public Prosecution in representation of those without capacity or representation to act in trial.
- Labour arbitrations.

Although the Spanish Arbitration Act 36/1988 was abolished by the SAA, the aforementioned exclusions are still being considered applicable.

Rules for joinder/consolidation of third parties

The SAA does not contain any specific provision on joinder or consolidation of a third party, and does not provide for a regulatory framework for consolidation of arbitral proceedings either.

However, most of the arbitral institutions have regulated this issue in their own regulations. By way of example:

- The Rules of Arbitration of the Madrid Court of Arbitration contain, in its article 9, several rules regarding the joinder and appearance of third parties.
- The Arbitration Rules of the CIMA contain, in its articles 13 and 14, several rules on the incorporation of additional parties and on the consolidation of proceedings.
- The ICC Rules of Arbitration contain several rules on multiple parties, multiple contracts and consolidation (articles 7–10 of said normative body).

Competence-competence and separability

The principle of competence-competence is expressly recognised in article 22 of the SAA, which states that arbitrators may rule in their own jurisdiction, including any pleas with respect to the existence or validity of the arbitration agreement, or any others whose acceptance would prevent consideration of the merits of the case. Their decision may only be challenged by means of an application to set aside the final or a separate award on jurisdiction.

A plea that the arbitrators are exceeding the scope of their authority must be lodged as soon as the matter alleged to lie beyond the scope of their authority arises during the arbitral proceedings. Arbitrators may only admit a tardy plea if they consider the delay to be justified.

Arbitrators may rule on a plea referred to in the above-mentioned article either as a preliminary question or in an award on the merits.

Under the SAA, the principle of competence-competence includes the separability principle in the sense that the validity of the arbitration agreement established as a clause of a contract does not depend on the validity of the contract itself. In this regard, the arbitrator would be competent to judge and declare the validity of the arbitration agreement even if the contract is declared null.

Arbitration procedure

Commencing arbitration proceedings

According to article 27 of the SAA, arbitration commences on the date on which a request to submit the dispute to arbitration is received by the respondent, unless otherwise agreed by the parties.

With regard to the specific requirements needed by such request in order for it to be valid and to allow the arbitration proceeding to commence, it depends on each arbitration institution's internal rules. By way of example, the Rules of Arbitration of the Madrid Court of Arbitration contain, in article 5, a list of the formalities and the information that the request of arbitration must contain.

Hearings outside the seat of arbitration

Under article 26 of the SAA, the parties can freely determine the place of the arbitration. Failing such agreement, it will be determined by the arbitrators, taking into consideration the circumstances of the case and the convenience of the parties. Arbitrators may, unless otherwise agreed by the parties, meet at any place they deem appropriate for hearing witnesses, experts or the parties, inspecting goods or documents, or examining persons.

Expedited arbitration

The SAA does not contain any specific provision on expedited arbitrations. However, most of the arbitral institutions have regulated said principle in their own regulations. By way of example, article 28 of the Arbitration Rules of the CIMA states that the arbitral tribunal shall direct the proceedings with due expedition and efficacy.

Rules on evidence

The general rule is that parties are free to choose the applicable rules on evidence, subject in any case to the requirements of the institution in which the arbitration takes place, as well as observing the equality, review and rebuttal principles.

The framework provided by the SAA is stated in article 30 by which, subject to any contrary agreement of the parties, arbitrators will decide whether to hold oral hearings for the presentation of the statements of evidence and the issuance of conclusions, or whether the proceeding will be conducted only in written form. Unless the parties have agreed that no hearings will be held, the hearings will be announced by arbitrators at an appropriate stage of the proceedings, if so requested by a party.

In the case of oral hearings, the parties must be provided with sufficient advance notice, and may appear before the arbitration tribunal directly or by proxy.

All written statements, documents or other instruments received by arbitrators from one party will be communicated to the other party. The parties will likewise be notified of any documents, expert reports or other evidentiary material on which arbitrators may base their decision.

Additionally, the IBA rules on evidence of 29 May 2010 can be taken into consideration by arbitrators by way of an inspiration guide (not compulsory), particularly regarding international arbitrations.

Applicable rules regarding privilege and disclosure

There are no rules or laws providing for an arbitrator's privilege or immunity. Nevertheless, article 21.1 of the SAA establishes the arbitrator's liability for damages in the case of improper performance of their duties based on bad faith, temerity or wilful misconduct. This is why arbitrators, or arbitral institutions on their behalf, are bound to take liability insurance or equivalent security for the amount established in their internal rules.

With regard to the disclosure rules, according to article 24.2 of the SAA, the arbitrators, the parties and the arbitral institutions are bound to honour the confidentiality of the information received on the occasion of arbitration proceedings. This principle is one of the main advantages of the arbitration system and one of the reasons for its success, since it allows the parties to protect their public reputation. However, occasionally courts may require arbitrators or arbitral institutions to disclose part of the information or documentation provided during an arbitral proceeding, if the substantive matter is linked to the merits of a judicial dispute and disclosure is absolutely necessary to resolve it.

IBA Rules on the taking of evidence in international arbitration

IBA Rules on evidence are not compulsory in Spain, since they are not considered to be definitive law. Nevertheless, this does not preclude arbitrators of proceedings being inspired by such rules. The nature of the IBA Rules on evidence in Spain is merely indicative, not binding. Our courts have specifically declared that Spanish arbitrators are only subject to the SAA and the specific regulations of each arbitral institution.

Rules regarding expert evidence

The specific provisions regarding expert evidence are given by article 32 of the SAA, which empowers arbitrators to appoint – unless otherwise agreed by the parties – one or more experts, at their own initiative or at the request of a party. If the parties have no objections to it, experts appointed by the arbitral tribunal, after delivering their reports, shall participate in the hearing in order to be interrogated.

Within this framework, however, there is not any specific standard under the SAA which regulates the treatment and timings of expert evidence; it is common to apply the general provisions contained in our Procedural Law for judicial proceedings (Act 1/2000, of 7 January 2000) by analogy. This law stipulates that expert reports must be submitted by the parties at least five days prior to the hearing taking place.

New LCIA and IBA guidelines

Currently, there are no directions to take the new LCIA and IBA guidelines into consideration, beyond the consideration of their principles as mere inspirations for international arbitrations held in Spain. These rules are still not considered as positive law in our country.

Confidentiality of evidence and pleadings

Confidentiality is one of the governing principles of the Spanish arbitration proceedings. This principle is expressly enacted by article 24.2 of the SAA, which stipulates that the arbitrators, the parties and the arbitral institutions are bound to honour the confidentiality of the information received on the occasion of arbitration proceedings.

The main advantage that confidentiality provides to the Spanish arbitration system is to duly preserve the reputation of the parties, which is one of the reasons that motivates most investors, traders and companies to choose arbitration as their dispute-resolution mechanism.

Furthermore, this principle affects both the information and documentation regarding the substance of the dispute, as well as any type of document or evidence connected to the arbitration proceeding (awards, submissions, etc.).

Arbitrators

Appointment of arbitrators

According to article 15 of the SAA, in arbitration proceedings that are not to be decided *ex aequo et bono* or conducted by a single arbitrator, such person will be required to be an attorney if acting as such, unless otherwise agreed by the parties. When arbitration is conducted by three or more arbitrators, at least one must be an attorney.

Additionally, the parties are free to agree on a procedure for appointing the arbitrator or arbitrators, providing that the principle of equality is honoured. Failing such agreement, the SAA establishes some rules for the appointment of an arbitrator:

- In an arbitration with a sole arbitrator, he will be appointed by the competent judicial court at the request of a party.
- In an arbitration with three arbitrators, each party will appoint one arbitrator, and the two arbitrators thus appointed will appoint the third arbitrator, who will preside over the proceedings. If a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of the latest acceptance, the appointment will be made by the competent judicial court at the request of a party.
- Where more than one claimant or respondent is involved, the latter will appoint one arbitrator, and the former another. If claimants or respondents cannot agree on the appointment, all arbitrators will be appointed by the competent judicial court at the request of a party.
- In an arbitration with more than three arbitrators, they will be appointed by the competent judicial court at the request of a party.

If arbitrators cannot be appointed under the procedure agreed by the parties, any party may apply to the competent court to appoint the arbitrators or, as appropriate, to adopt the necessary measures therefor. When arbitrators are appointed by the court, it will draw up a list of three names for each arbitrator to be appointed. Where a sole or a third arbitrator is to be appointed, the court will also have regard to the advisability of appointing an arbitrator of a nationality other than those of the parties and, as appropriate, of those of the arbitrators already appointed, in light of the prevailing circumstances. The arbitrators are subsequently appointed by lot.

Moreover, it is common that each specific arbitral institution demands additional requirements of arbitrators in order to compose the list of eligible arbitrators.

Challenging arbitrators

As provided in article 17.3 of the SAA, an arbitrator may be challenged only in the event of justifiable doubts affecting his impartiality or independence arising, or if he does not possess the qualifications agreed by the parties. A party may challenge an arbitrator appointed by them, or in whose appointment they have participated, only for reasons of which he/she becomes aware after the appointment was made.

In order to avoid arbitrators being challenged, article 17.1 of the SAA obliges all arbitrators to be, and to remain, independent and impartial throughout arbitration, without maintaining any personal, professional or commercial relationship with the parties. For this purpose,

the person/s proposed as arbitrator/s must disclose – from the time of their appointment and without delay – any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence.

The procedure under which the challenge of an arbitrator shall take place is established in article 18 of the SAA. The parties may agree on a procedure for challenging arbitrators but, failing such agreement, a party who intends to challenge an arbitrator must state the grounds for the challenge within 15 days after becoming aware of the acceptance, or of any circumstances that may give rise to justified doubts about the arbitrator's impartiality or independence.

Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitrators will decide on the challenge. If the challenge under any of the precedent procedures is not successful, the challenging party may submit the challenge as grounds for objecting to the award.

Are the IBA Guidelines on conflict of interest taken into account?

With regard to the IBA Guidelines on conflicts of interest, they apply as previously explained in respect of the IBA Rules on evidence. That is to say, the IBA Rules (in general) are not positive law in Spain; they are not mandatory, but only taken into consideration as inspiration in Spanish arbitration proceedings – specifically, in order that the impartiality principle should reign during the arbitration proceeding.

This indicative character has been declared, among others, by the Appeal Court of Madrid, in the ruling nº 506/2011, on 30 June 2011, and by the Supreme Court of Justice of Madrid, in the ruling nº 92/2017, on 23 March 2017. It is remarkable that this Supreme Court of Justice has specifically declared that these IBA Rules are balanced with the issuing of rulings about arbitrators' conflicts of interest.

Terminating an arbitrator's mandate

As stated in article 38 of the SAA, an arbitrator's mandate is terminated when the arbitral proceeding terminates, either if it is with a final award or if: (i) the claimant withdraws his claim, unless the respondent objects and the arbitrators acknowledge a legitimate interest on his part in obtaining a final settlement of the dispute; (ii) the parties mutually agree on the termination of the proceedings; or (iii) the arbitrators find that continuation of the proceedings is unnecessary or impossible.

There are other exceptional reasons why an arbitrator's mandate may expire before the termination of the arbitral proceeding based on grounds of abstention and/or challenge affecting their impartiality or independence, as well as on the failure or impossibility of the arbitrator to act. As stated in article 17 of the SAA, an arbitrator should abstain or, on the contrary, be challenged by the parties only if circumstances arise that give rise to justifiable doubts regarding his impartiality or independence, or when the eligible arbitrator is not qualified according to the qualification requirements agreed by the parties. According to article 18 of the SAA, the parties are free to agree on a procedure for the challenging of arbitrators; failing such agreement, article 18.2 of the SAA provides for the procedure to follow. In connection with the failure or impossibility of the arbitrator to act, article 19 shall be considered.

Immunity of arbitrators

As previously indicated, arbitrators are subject to a very high standard of liability since they are not afforded immunity from suit. In this sense, they are responsible for the damages and prejudices caused when acting in bad faith, temerity or wilful misconduct, as determined in article 21.1 of the SAA.

Secretaries to the Arbitral Tribunal

The SAA does not contain any provisions determining the Secretaries of the Arbitral Tribunal's activities.

Thus, this matter is individually regulated by each arbitral institution, which is entitled to freely define the duties, competences and working tasks of this administrative organism. This is the case, for example, of the Madrid Court of Arbitration.

Interim relief

What types of interim relief are available to parties?

At the request of a party and without prejudice of any contrary agreement signed by the parties, arbitrators are permitted to grant any interim measures deemed necessary in connection with the object of the dispute, as established in article 23 of the SAA. In such cases, arbitrators may require the claimant to furnish sufficient security.

In connection with such interim reliefs, the SAA does not detail any specific measure; arbitrators commonly apply by analogy some of the measures listed in article 727 of the Spanish Procedural Law (Act 1/2000, of 7 January 2000), such as: preventive seizure of goods; judicial intervention or administration of productive goods; goods depository, etc.

In order to enforce interim measures adopted within an arbitral proceeding, judicial intervention is usually needed.

Can the parties apply to both courts and tribunals for interim relief?

The answer is affirmative. Parties can apply to both courts and arbitral tribunals in order to be granted any interim measure.

Concretely, the SAA establishes that those arbitral decisions on interim measures connected to the subject matter of the dispute are enforceable before any court. Regardless of the form adopted by arbitral decisions on interim measures, the rules on setting aside and enforcement of the awards will apply to them.

In addition, the arbitration agreement does not prevent the parties, prior to or during the arbitral proceeding, from applying to a court for interim measures, or the court from granting such measures. Article 8.3 in connection with article 11.3 of the SAA allows such possibility.

Can and do national courts order anti-suit injunctions in aid of international arbitration?

The answer to this question is found in article 722 (first paragraph) of the Spanish Procedural Law (Act 1/2000, of 7 January 2000), which regulates the injunctions in arbitration proceedings and foreign litigation, determining that whoever may prove to be a party of an arbitration agreement may seek injunctions from the court prior to the arbitration proceedings. Whoever may prove to be a party in a pending arbitration proceeding in Spain may also seek them or, as appropriate, whoever may have sought the court's certification referred to in article 15 of the SAA (arbitrator's judicial appointment), and/or in the event of institutional arbitration, whoever may have duly filed an application to the relevant institution according to their regulations.

Can and do national courts order anti-arbitration injunctions in aid of domestic litigation?

According to the second paragraph of article 722 of the Spanish Procedural Law, whoever can prove to be a party to any jurisdictional or arbitration proceedings being conducted in a foreign country may seek injunctions from a Spanish court, except in cases where the main matter at issue should solely lie within the competence of Spanish courts.

The foregoing means that anti-arbitration injunctions in aid of domestic litigation cannot be requested if it is proven that the sole competence of a specific matter corresponds to the Spanish courts.

Security of costs

As indicated above, article 23 of the SAA establishes that arbitrators may, at the request of the parties, adopt any interim measures deemed necessary in connection with the object of the dispute, requiring the claimant to furnish sufficient security.

Arbitration award

Formal requirements for an arbitration award

The specific formal requirements for an arbitration award to be valid and enforceable are listed in article 37 of the SAA and may be summarised as follows:

- *Deadline for issuing the award:* within six months of the date of submission of the statement of defence or of the expiration of the deadline therefor, unless otherwise agreed by the parties.
- *Written form:* it must be issued in writing and signed by the arbitrators. Arbitrators may specify the sense of their votes.
- *Reasoning:* the award must argue the grounds upon which it is based, unless the award is issued as a way of termination by mutual agreement of the parties. Additionally, it must state the date and the place of arbitration.
- *Costs of arbitration:* it must contain a specific decision regarding the costs of the arbitration.
- *Notification:* it must be expressly notified to the parties to the arbitration, according to the form and within the time frame agreed by them or, failing that, by delivering a signed copy of the award to each party.

Time frame for the arbitration award

As specified above, according to article 37.2 of the SAA, and subject to any contrary agreement of the parties, arbitrators must issue the award within six months of the date of submission of the statement of defence or, failing that, of the deadline for its submission.

Unless otherwise agreed by the parties, this term may be extended by the arbitrators for a period of no longer than two months under a duly justified ground. Additionally, the failure to deliver the award on time will not affect its validity, unless otherwise agreed by the parties.

Can an arbitral tribunal order costs for the parties?

An arbitral tribunal may order costs for the parties by reasoning contained in the award. As determined in article 37.6 of the SAA, the arbitrators' decision on arbitration costs shall include: the arbitrator's fees and expenses and, as appropriate, the fees and expenses of the parties' defence or representatives; the cost of the services rendered by the institution conducting the arbitration; and all other expenses incurred in the arbitral proceedings.

Can interest be included in the award and/or costs?

Under the SAA provisions, the possibility of claiming interest on arbitration costs is not expressly regulated. Interest can be included in the final award but only regarding the principal amount claimed in the proceedings.

Challenge of the arbitration award

Can an arbitration award be appealed?

As established in article 43 of the SAA, an arbitral award constitutes *res judicata*, which means that there is no other action against it except for those seeking to set it aside or, as

appropriate, the object of a request of review under provisions on final sentences established in our Procedural Law (Act 1/2000, of 7 January 2000). As a general rule, therefore, an award could not be appealed to ordinary jurisdiction in Spain.

On what grounds can an arbitration award be challenged?

An arbitration award can be challenged only if the applicant party is able to allege and demonstrate the occurrence of some of the following grounds, listed in article 41 of the SAA:

- the arbitration agreement does not exist or is not valid;
- the applicant party has not properly received notice of the appointment of an arbitrator and/or of the arbitral proceedings, or otherwise has not been able to present his case;
- when the arbitrators decide about questions not subject to their jurisdiction;
- when the arbitrators have not observed the agreement of the parties regarding their appointment and/or the arbitral proceeding, unless such agreement does not respect any imperative provision of the SAA or, failing such agreement, the arbitrators have proceeded against the SAA;
- when the arbitrators decide about non-arbitrable matters; or
- if the award violates public order.

Initially, such list of grounds was conceived by the Spanish legislator as restrictive. However, in the last few years, some abuses in the utilisation of some of those reasons (especially the public order umbrella) are being detected, with the intention of trying to reverse the original conception of the arbitration as a sole-instance proceeding to a second-instance one, to judge once again the merits of the case.

Modifying the arbitration award

Under article 39 of the SAA, the parties are entitled to apply for the correction, rectification, interpretation and/or issuance of an additional award within 10 days of its notification, unless another time is agreed by the parties. These modifications of the award are allowed in the following cases:

- correction of the award if any errors in computation, clerical, typographical or similar are identified;
- interpretation of a specific point or part of the award, when this point or part is not considered sufficiently clear;
- additional award, if the party observes that the award has not decided about any submitted request or claim; and
- rectification of part of the award, in the case of partial over-extension regarding non-arbitrable matters or questions not submitted to the decision of the arbitrators.

Recent examples of successful and unsuccessful challenges of arbitral awards

Despite numerous attempts at challenging an arbitral award in Spain, those that have succeeded cannot be considered relevant. However, the growing interest of some tribunals (Supreme Justice Court of Madrid, by way of example) to control the reasoning of arbitral awards has been noticeable, based on the application of the control of public order test, as previously stated (article 41.1.f of the SAA). The application of this test has currently allowed ordinary courts to challenge some arbitration awards. However, this test could open a dangerous window, since it could put the Spanish arbitration proceedings at risk (if the validity of the awards is frequently challenged), causing what is known as the international arbitration escape.

It has been additionally observed that some arbitral awards have been successfully challenged based on the bad faith intervention of some arbitrators, by ignoring the third arbitrator's opinion in resolving the dispute (in the case of arbitral tribunals composed of three arbitrators).

Enforcement of the arbitration award

Under what convention can an international arbitration award be enforced?

Under the Convention on Recognition and Enforcement of Arbitral Awards made in New York on June 1958 and signed by Spain in July 1977 (article 46 of the SAA).

In order to enforce international and domestic arbitration awards, the formal requirements needed in Spain are established in our Procedural Law (article 523 of Act 1/2000, of 7 January 2000) by reference to the Spanish legal system on recognition and enforcement of international rulings.

Can an arbitration award be enforced if it has been set aside at the courts of the seat of arbitration?

Article 45 of the SAA establishes that awards in Spain are enforceable even when action has been brought to set them aside. Nevertheless, in that case, the concerned party may apply to the competent court for suspension of the enforcement, if it provides a security amounting to the value of the sentence plus any damages that may stem from delayed enforcement. The court, upon receipt of the application for suspension, will hear the executant and will deliver a decision on the security to be furnished. The Clerk of the Court will raise the suspension and will order the continuation of the enforcement upon confirmation of dismissal of the action for setting aside the award.

Trends of enforcement – pro-arbitration or anti-arbitration

We can assert that Spain is in favour of arbitration. It is observable, by way of example, in the wording of article 517.2.2º of the Spanish Procedural Law (Act 1/2000, of 7 January 2000), by which arbitral awards are considered to be enforcement titles (together with other titles as judicial rulings); they are automatically enforceable before the ordinary courts.

Investment arbitration

Bilateral investment treaties

Spain has signed more than 88 bilateral investment treaties (BITs).

Multilateral investment treaties

Spain is a member of a large number of multilateral treaties. Regarding investment treaties, Spain has been a signatory of the ICSID Convention since 21 March 1994, and the Energy Charter Treaty since 17 December 1994.

Recent investment arbitration cases

Spain has around 35 arbitration proceedings open in different arbitral tribunals for the reform of the electricity sector and cuts to renewable energies carried out by the Spanish Government between 2010 and 2013. Currently, Spain has lost several arbitration proceedings, which basically have been submitted by powerful investment funds: Eiser (sentencing Spain to pay €128 million); Antin (sentencing Spain to pay €112 million); Masdar (sentencing Spain to pay €65 million); Novaenergía (sentencing Spain to pay €53.3 million); Greentech (sentencing Spain to pay €39 million); Reeff (€67 million); 9REN (€41.7 million); SolEs Badajoz (€41 million); Nextera (€290 million); Infrared Environmental Infrastructure (unknown); and Demeter y Cube (€33 million).

Recent news indicates that many small energy investors are currently taking actions against Spain before the World Bank's International Centre for Settlement of Investment Disputes (CIADI) under the same representation (class action lawsuits), in order to minimise the costs of the arbitration proceeding, which in the past had dissuaded them to sue Spain.

Treatment of investment arbitration awards by national courts

The treatment of investment arbitration awards by our national courts is exactly the same as the enforcement of a court ruling or an award not related to investment. Our Spanish Procedural Law (Act 1/2000, of 7 January 2000) states in its article 517 that arbitration awards shall involve enforcement.

Challenge of awards. Has your State accepted the award and paid the investors?

Spain has challenged the €128 million Eiser award, arguing that there could be a conflict of interest with one of the arbitrators for being part of the arbitral tribunal in another case concerning the same issue. Spain has also challenged recognition sought by the winning party, demanding the annulment of the admission. According to recent news, Spain has also challenged the Antin, the Masdar and the Infrared award.

With regard to the payment of penalties, the Spanish Government has alleged this to be an impossibility, as EU legislation would supposedly not allow it. During the last few months, the European Commission has taken part in such arbitrations, being aligned with the interests of Spain, without any input for the moment. Investment funds are now claiming before the US Courts in order to force Spain to pay, even applying to seize Spanish overseas assets, if necessary.

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