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International Arbitration

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Spain

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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). The SAA is clearly inspired by the Model Law adopted by the United Nations Commission on International Trade Law on 21 June 1985 (the UNCITRAL Model Law), particularly as regards the requirements of the arbitration agreement and the adoption of interim measures.

New York Convention

The New York Convention on the Recognition and Enforcement of Arbitral Awards was signed by Spain on 29 April 1977 (without any reservations).

Recognition and enforcement of arbitration awards

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

International arbitration

Spain has only one law in force for both types of arbitration (national and international): 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.

This being said, 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*).

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

Furthermore, 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 agreement is to reinforce the image of Spain as an attractive forum in which to hold international arbitration proceedings. As result of this agreement, on October 2019, the abovementioned arbitration courts created the Madrid International Centre of Arbitration (CIAM), which began operating at the beginning of 2020.

Special national courts

There are no special national courts in which to hold international arbitration proceedings in Spain.

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

Arbitration agreement

What formalities are needed for the arbitration agreement?

According to article 9.1 of the SAA, the arbitration agreement may adopt the form of either a separate agreement or an arbitration clause established in a broader contract, as 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).

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 arbitration, 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.

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, as follows:

- 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 to represent 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 considered applicable.

Rules for joinder/consolidation of third parties

The SAA contains neither specific provisions on the joinder or consolidation of a third party, nor for a regulatory framework for consolidation of arbitral proceedings.

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

- The Rules of Arbitration of the Madrid Court of Arbitration contain several rules regarding the joinder and appearance of third parties.
- The Arbitration Rules of the CIMA contain several rules on the incorporation of additional parties and on the consolidation of proceedings.
- The ICC Arbitration Rules contain several rules on multiple parties, multiple contracts and consolidation.

Competence-competence and separability

The principle of competence-competence is expressly recognised in article 22 of the SAA, which states that arbitrators are empowered to decide on their own jurisdiction, including any pleas with respect to the existence or validity of the arbitration agreement, or any others whose acceptance would prevent the consideration of the merits of the case.

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.

The requirements needed by such request for it to be valid and to allow the arbitration proceedings to commence depend on each arbitration institution's internal rules. By way of example, the Rules of Arbitration of the Madrid Court of Arbitration contain a list of the formalities and the information that the request of arbitration must contain to be considered valid.

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, the seat 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 Spanish arbitral institutions have addressed said principle in their own regulations.

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.

In this regard, article 30 of the SAA states that, 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.

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 International Bar Association (IBA) Rules on the Taking of Evidence of 29 May 2010 can be taken into consideration by arbitrators by way of an inspiration guide (not compulsory), particularly regarding international arbitration.

Applicable rules regarding privilege and disclosure

There are no rules or laws providing arbitrator privileges or immunity. Indeed, 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. Therefore, arbitrators or arbitral institutions on their behalf are bound to take liability insurance or equivalent security for the amount established in their internal rules.

Regarding disclosure rules, according to article 24.2 of the SAA, the arbitrators, parties and 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. However, occasionally courts may require arbitrators or arbitral institutions to disclose part of the information or documentation provided during arbitral proceedings if the substantive matter is linked to the merits of a judicial dispute and disclosure is necessary to resolve it.

IBA Rules on the Taking of Evidence in International Arbitration

The IBA Rules on the Taking of Evidence are still not considered positive law in Spain. However, said guidelines are taken into consideration in both national and international arbitrations held in Spain.

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 this, experts appointed by the arbitral tribunal, after delivering their reports, shall participate in the hearing to be interrogated.

New London Court of Arbitration (LCIA) and IBA guidelines

The new LCIA and IBA guidelines are still not considered positive law in Spain. However, said guidelines are taken into consideration in both national and international arbitrations held in Spain.

Confidentiality of evidence and pleadings

Article 24.2 of the SAA expressly states that the arbitrators, parties and arbitral institutions are bound to honour the confidentiality of the information received on the occasion of arbitration proceedings.

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* and that are conducted by a single arbitrator, such person will be required to be an attorney, 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, provided that the principle of equality is honoured. In the absence of such agreement, the SAA establishes some rules for the appointment of an arbitrator:

- In an arbitration with a sole arbitrator, he/she 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 from the receipt of a request to do so from the other party, or if the two arbitrators appointed by the parties 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 any of the parties.
- Where more than one claimant or respondent is involved, the claimants will appoint one arbitrator and the respondents another one. If claimants or respondents cannot agree on the appointment, all arbitrators will be appointed by the competent judicial court at the request of any of the parties.

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, adopt the necessary measures in this regard.

Moreover, it is common that each specific arbitral institution demands additional requirements for an arbitrator to be appointed.

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/her impartiality or independence, or if he/she does not possess the qualifications agreed on 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.

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 parties may agree on a procedure for challenging arbitrators but, in the absence of an agreement, a party who intends to challenge an arbitrator must state the grounds for the challenge within 15 days of becoming aware of the arbitrator's acceptance, or of becoming aware of any circumstances that may give rise to justified doubts about the arbitrator's impartiality or independence.

Are the IBA Guidelines on Conflicts of Interest taken into account?

The IBA Rules are not positive law in Spain but are taken into consideration as inspiration in Spanish arbitration proceedings; specifically, the principles contained in the IBA Guidelines on Conflicts of Interest are considered.

Terminating an arbitrator's mandate

As stated in article 38 of the SAA, an arbitrator's mandate is terminated when the arbitral proceeding is terminated, either by a final award or if: (i) the claimant withdraws his/her claim, unless the respondent objects and the arbitrators acknowledge a legitimate interest on his/her 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 proceedings 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.

Immunity of arbitrators

As previously indicated, arbitrators are subject to a very high standard of liability since they have not been granted immunity. 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 activities of the secretaries to the arbitral tribunal.

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 can 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.

The SAA does not detail any specific measure and, therefore, 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; and goods depository, etc.

To enforce interim measures adopted within arbitral proceedings, judicial intervention is usually needed.

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

Parties can apply to both courts and arbitral tribunals to be granted any interim measure.

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 to an arbitration agreement may seek injunctions from the court prior to the arbitration proceedings.

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 from the date of submission of the statement of defence or from the expiration of the deadline to submit said written statement, unless otherwise agreed by the parties.
- *Written form:* the award must be issued in writing and signed by the arbitrators. Arbitrators may specify the reasoning behind 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:* the award must contain a specific decision regarding the costs of the arbitration.
- *Notification:* the award must be expressly notified to the parties, 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 of the expiration of the deadline to submit said written statement.

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. In any case, 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?

The arbitral tribunal can condemn the defeated party to bear the costs of the proceedings. 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.

On what grounds can an arbitration award be challenged?

An arbitration award can be set aside only if the applicant party is able to demonstrate the occurrence of some of the following grounds listed in article 41 of the SAA, as follows:

- 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/her case;
- when the arbitrators decide on 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 on non-arbitrable matters; or
- if the award violates public order.

Modifying the arbitration award

Under article 39 of the SAA, the parties are entitled to apply for the correction, rectification, and/or for the issuance of an additional award within 10 days of its notification, unless another deadline is agreed by the parties.

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.

Enforcement of the arbitration award

Under what convention can an international arbitration award be enforced?

An international arbitration award can be enforced under the Convention on Recognition and Enforcement of Foreign Arbitral Awards, as adopted in New York on June 1958 and signed by Spain in July 1977 (article 46 of the SAA).

The specific formal requirements needed in Spain to enforce international and domestic arbitration awards are established in our Procedural Law (article 523 of Act 1/2000, of 7 January 2000).

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 an action has been brought to set them aside. Nevertheless, in that case, the concerned party may apply to the competent court for the suspension of the enforcement if it provides a security amounting to the value of the sentence plus any damages that could be caused.

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 enforcement titles (together with other titles as judicial ruling) that 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 many multilateral treaties. Regarding investment treaties, Spain has been a signatory of the International Centre for Settlement of Investment Disputes (ICSID) Convention since 21 March 1994, and the Energy Charter Treaty since 17 December 1994.

Recent investment arbitration cases

Spain has been sued and condemned within many arbitration proceedings 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.

Treatment of investment arbitration awards by national courts

The treatment of investment arbitration awards by our national courts is 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 be enforced.

Challenge of awards. Has Spain accepted awards and paid investors?

Spain has achieved the annulment of an award issued within an investment arbitration proceeding due to the abovementioned reform of the electricity sector and cuts to renewable energies (in which Spain was ordered to pay €128 million to Eiser), arguing that there had been a conflict of interest with one of the arbitrators for being part of the arbitral tribunal in another case concerning the same issue.

According to recent news, Spain has also challenged other awards issued within investment arbitration proceedings in which Spain was ordered to pay huge amounts in compensation in relation to the abovementioned reform of the electricity sector.

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With more than 12 years of experience, Jose has wide expertise in banking litigation, representing national and international financial institutions, as well as expertise in legal advice on consumer protection. Prior to joining the firm, Jose developed his professional career at Cuatrecasas in the litigation department, mainly in its Barcelona office.

His expertise also covers legal assistance in judicial and arbitration proceedings in the field of civil and commercial law. Jose specialises in cases of contractual and non-contractual civil liability in the fields of sport, insurance, construction and corporate disputes, as well as in damages claims for antitrust infringements.

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Fabio Virzi is a partner at Cases & Lacambra and a member of the litigation and arbitration practice in the Madrid office of the firm.

Fabio has extensive experience advising a multitude of clients in the resolution of civil and commercial disputes, both in the pre-litigation phase and during the proceedings. Fabio is an expert in litigation related to the finance, banking, construction and insurance industries, as well as M&A transactions and private equity. Furthermore, Fabio is an expert in the field of domestic and international arbitration. He has taken part in domestic arbitration proceedings before the leading Spanish courts of arbitration, as well as in international arbitrations under the rules of the ICC.

Before joining Cases & Lacambra, Fabio developed his career in the litigation and arbitration departments of Uría Menéndez, Garrigues, Landwell-PwC and Ontier.

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