Spain

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Spain is a contracting State of the New York Convention of 1958, which has been in force since 10 August 1977. Spain did not make any reservations or declarations.

Spain is also party to the European Convention on International Commercial Arbitration of 1961, which has been in force from 10 August 1975, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 in force from 17 September 1994, and the Energy Charter Treaty ratified on 11 December 1997 and entered into force on 16 April 1998.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Spain has 87 bilateral investment treaties (BITs) in force, for instance, with most Latin and Central American countries, China, Turkey, Morocco, South Korea, Egypt, India and Iran.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Primary domestic sources in arbitration are the Spanish Arbitration Act (the SAA), particular substantive law applicable to the case – including international conventions – case law produced by national courts and arbitration tribunals, and scholars.

The SAA does not generally differentiate between domestic and foreign arbitral proceedings. In fact, in its recitals it is recognised that the law has opted for a monistic system.

According to the SAA, an arbitration is considered foreign where, indistinctively:

- the parties are domiciled in different states at the time of entering the arbitration agreement;
- the place of the arbitration, the location where substantial part of the contractual obligations are fulfilled or the closest place to the dispute, is located outside the state where the parties are domiciled; or
- the relationship from which the controversy derives affects the interests of international trade.

Furthermore, an award is considered foreign when it has been rendered out of Spain (article 46.1 SAA). In terms of recognition and enforcement of foreign awards, the general legal framework to be applied is the Civil Procedure Act and the Legal Cooperation Act.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Although the SAA is based on the UNCITRAL Model Law, it (primarily) presents the following differences:

- any matters that can be freely and legally disposed of by the parties are arbitrable (article 2.1);
- in international arbitration, states (or the entities controlled by them) cannot invoke prerogatives recognised under their national law to circumvent the obligations deriving from the arbitral proceedings (article 2.2);
- arbitral proceedings are also considered foreign if they affect the interests of international trade (article 3.1.c);
- in international arbitration, arbitration agreements are valid provided that the requirements set forth in the legal rules chosen by the parties, the rules applicable to the merits of the dispute or the SAA (article 9) are met;
- the default rule is only one arbitrator (article 12);
- a particular procedure for the appointment of arbitrators in the case of several parties (article 15.2.b) is foreseen;
- if arbitrators do not confirm the appointment within the agreed period (default rule of 15 days from the nomination), it will be understood that it has been declined (article 16);
- arbitrators may incur liability in the event of bad faith, gross recklessness or wilful act (article 21); and
- arbitral proceedings are presumed confidential (article 24.2).

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The SAA gives primacy to party autonomy. Nonetheless, parties cannot deviate from due process. Article 24 states that parties shall be treated with equality and each party shall be given full opportunity to present its case.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

According to article 34 of the SAA, in international arbitration, arbitrators shall resolve the dispute following the legal rules (including non-national laws) agreed by the parties (the only limitation is public policy). Failing an agreement, arbitrators shall apply those rules that they deem appropriate, considering that any reference to national laws (save any agreement otherwise) excludes conflict of laws rules. Therefore, both the parties and arbitrators are given a high degree of flexibility and freedom in this sense, under the SAA.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

Some of the most prominent Spanish arbitral institutions are as follows:

Corte Civil y Mercantil de Arbitraje (CIMA)
Calle Jorge Juan, No. 8 (2nd floor) 28001 Madrid
www.arbitrajecima.com
Corte de Arbitraje de Madrid (CAM)
Calle de Las Huertas 11 (3rd Floor)
28012 Madrid
www.arbitramadrid.com

Both CIMA and CAM utilise the assistance of lists of arbitrators and tariffs to fix the fees.

CIMA rules foresee the possibility of challenging the validity of the award before the arbitral institution (based on limited grounds and provided that it is expressly agreed by the parties), and CAM rules provide a summary procedure.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

The SAA favours arbitrability. In fact, it provides that any matters that can be freely and legally disposed of by the parties can be submitted to arbitration (article 2). This is a clear demonstration in favour of arbitration, following the premises of the Model Law and taking non-arbitrability as an exception.

In addition, the possibility to submit intra-company disputes to arbitration is expressly recognised in article 11-bis. Moreover, securities transactions are considered as arbitrable, and Spanish case law has recognised the arbitrability of subjective rights related to competition law (judgment of the Madrid Appeal Court, 25 September 2015).

Notwithstanding, some matters remain non-arbitrable, such as family law issues, the civil status and capacity of individuals, criminal liability, insolvency procedure and, in general, matters related to public policy. Further, there is still a reluctance to admit the arbitrability of tax disputes, and the SAA excludes labour disputes from its scope (article 1).

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The SAA sets forth the requirements of arbitration agreements (without determining any particularities for public entities).

According to article 9, an arbitration agreement shall be in writing, in a document signed by the parties or an exchange of letters, telegrams, telexes, faxes or other telecommunication methods (including electronic) that ensure a record of the agreement is kept. Additionally, where an arbitration agreement is accessible for subsequent reference on electronic, optical or other media, it will be regarded as compliant with this requisite.

When construing these requirements, the Spanish Supreme Court has concluded that conclusive facts can evidence the consent to submit a dispute to arbitration even if the agreement is only signed by one party (judgment 24 November 1998), and that apart from formal requirements attention shall be paid to the willingness of the parties (judgment 9 May 2003).

In this vein, for instance, as stated in article 9, tacit consent is accepted when there is an exchange of statements of claim and defence and the existence of the arbitration agreement is alleged by one party and not denied by the other.

Lastly, pursuant to article 9.2, arbitration agreements can be contained in adhesion contracts. Their validity and interpretation will be governed by the rules applicable to such contracts. In particular, arbitration agreements signed by consumers, under certain circumstances, are not binding for them as it is set forth under the Consumer's Act of 16 November 2007.

In any case, it is strongly recommended to use standard clauses provided by the various arbitration courts (for instance, CIMA or CAM), to avoid any doubt about the willingness of the parties to submit all disputes to arbitration or any omission in the arbitration clause.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

If the parties expressly submit the dispute to a particular individual who subsequently dies or is declared unable to perform his or her duties, the validity of the arbitration agreement could be jeopardised (judgment of the Superior Court of Justice of Castilla y La Mancha, 25 September 2013).

Additionally, although according to the Spanish Insolvency Act, the mere declaration of insolvency does not affect the validity of arbitration agreements, if the court considers that they could affect the course of insolvency proceedings, then it can stay their effects (article 52.1 of the SAA).

The parties may of course agree on the termination of the arbitration agreement or they can just enter into a new agreement that overrides (tacitly or expressly) the previous one.

Moreover, please note that an arbitration clause may be considered not valid (and therefore, non-enforceable) if the willingness of the parties to submit to arbitration is not clear enough (judgment of the Constitutional Court, 2 December 2010, and of the Supreme Court, 27 June 2017).

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The SAA provides that the arbitration agreements must be considered a separate and independent agreement from the underlying contract. Therefore, they are not affected by the fate of the latter.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under the SAA, signature is not essential to confirm the consent to submit a dispute to arbitration.

Having said that, the SAA in article 11-bis allows the inclusion of an arbitration agreement in the articles of association for inter-company

disputes if a qualified majority of two-thirds of the shareholders votes in favour. If so, those shareholders who have not voted in favour would nonetheless be bound by the arbitration agreement.

Additionally, in certain limited circumstances, Spanish case law has extended its effects to non-signatory parties. For instance:

- in case of assignment of a contract that contains an arbitration agreement, it is generally accepted that the latter is transmitted to the assignee (judgment of the Madrid Appeal Court, 18 February 2002);
- the same outcome is achieved in cases of succession, including mergers and acquisitions, and contractual subrogation (judgment of the Madrid Appeal Court, 26 October 2010); and
- with regard to mandate contracts, representation is recognised, and, therefore, an agent can bind the principal if he or she has enough power to do it (judgment of the Madrid Appeal Court, 16 January 2006).

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The SAA does not contain any special rule on joinder or notice to third parties. Thus, third-party participation will depend upon the arbitration rules chosen by the parties. The interest of the joinder of third parties for the parties initially involved in the arbitration will have to be assessed on a case-by-case basis.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Spanish case law extends the effects of an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that certain requirements are met. The Superior Court of

Justice of Valencia has set forth, in its judgments dated 19 November 2014 and 5 May 2015, that the essential elements to be considered are as follows:

- the existence of a group of companies: paying attention to European legislation;
- effective participation of the non-signatory: in relation to the dispute and regardless of the stage in which participation took place; and
- application to the facts of a legal doctrine: among others, the estoppel or the piercing of the corporate veil.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The SAA does not have any special provision on the validity of multiparty arbitration agreements. It merely provides an arbitrator's appointment procedure in case of several parties.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The SAA does not have any special provision on consolidation of separate arbitral proceedings. Thus, the consolidation of separate arbitral proceedings will depend upon the arbitration rules chosen by the parties.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Any individual in full possession of his or her civil rights may be an arbitrator, provided that he or she is not barred from it by his or her professional rules. Unless otherwise agreed by the parties, nationality shall not be an impediment to act as an arbitrator (article 13 SAA), and neither shall be religion or gender.

Nonetheless, for arbitrations in which only one arbitrator is appointed, the arbitrator shall be a jurist (unless the parties have agreed otherwise or in ex aequo et bono arbitrations). Equally, when arbitration is to be conducted by three or more arbitrators, at least one of them shall be a jurist.

For instance, lawyers, public notaries, scholars or ex judges can be appointed as arbitrators (the SAA does not require a minimum experience).

Conversely, active judges, magistrates and public prosecutors cannot be appointed as arbitrators, nor the person who has been previously appointed as the mediator in the dispute, save agreement on the contrary by the parties (article 17.4 SAA). Further, if it is an institutional arbitration, the organisation shall be capable of conducting the arbitrations (judgment of the Superior Court of Justice of Galicia, 24 July 2014), and an internal body of one of the parties is ineligible (ruling of the Barcelona Appeal Court, 28 September 2012).

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

In general terms, in most of the cases, practising lawyers tend to sit as arbitrators.

Having said that, there is a tendency to provide more diversity. In particular, gender diversity. This is actually supported by institutions and also by private practitioners. At an institutional level, for instance, the Club Español del Arbitraje (the CEA) established in 2017 a special section particularly dedicated to women: CEA Mujeres.

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The default rule is to appoint only one arbitrator.

Regarding the procedure, failing an agreement, article 15 of the SAA foresees an appointment procedure depending on the number of arbitrators:

- in case of a sole arbitrator, he or she will be appointed by the competent court upon request of the interested party;
- in case of an arbitral panel of three arbitrators, each party shall appoint one, and then two arbitrators appointed shall choose the chair. If a party does not appoint an arbitrator within 30 days of a request, appointment will be made by the competent court,

upon request of the interested party. The same procedure will be followed in case the two appointed arbitrators do not reach an agreement as to the chair within 30 days of the last acceptance. When there are several claimants and respondents, each group shall appoint one arbitrator. Failing an agreement, all the arbitrators will be appointed by the competent court upon request of the interested party; and

- when arbitration is to be conducted by more than three arbitrators, all of them shall be appointed by the competent court upon request of the interested party.

In those cases where appointment shall be carried out by national courts, they will provide a list of three candidates for each arbitrator (taking into consideration any requirements agreed by the parties and trying to assure independence and impartiality). Appointment will take place by drawing lots, and it is not possible to challenge the final decision.

Lastly, similar appointment rules apply for both CIMA and CAM, although reference to the court should be substituted by the arbitral institution.

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Arbitrators shall be and maintain themselves as impartial and independent throughout the whole procedure, being barred from having personal, professional or commercial relationships with the parties. In

fact, arbitrators are under the obligation to disclose any circumstances that may affect their impartiality or independence (article 17 SAA). In this sense, there is a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration (judgment of the Superior Court of Justice of Madrid, 4 November 2016), as well as the recommendations published by the CEA (judgment of the Superior Court of Justice of Madrid, 4 May 2017).

Notwithstanding, being independent and impartial should not be compared with not incurring in any of the abstention or recusal causes provided for the judges and magistrates foreseen in the Spanish Organic Law of the Judicial Power (judgment of the Superior Court of Asturias, 25 April 2017). An arbitrator may only be challenged if there are grounded doubts concerning partiality or independence or if he or she does not hold the qualifications agreed by the parties.

Challenge proceedings can be agreed by the parties. Failing such agreement, arbitrators will hear the challenge, which shall be filed within 15 days of the interested party being aware of the acceptance by the arbitrator or of the circumstances that would ground the challenge. If the challenge is not upheld, the decision cannot be appealed, although the interested party could reiterate the arguments within the eventual challenge proceedings of the award.

Lastly, if the arbitrator is legally or de facto impeded because of any circumstance (eg, illness or declaration of disability) in properly conducting the arbitration, he or she shall cease performance of arbitrator duties, unless there is a disagreement as to whether the arbitrator is impeded. In these cases, the competent authority to hear the challenge, failing any agreement, would be the court (in cases of a sole arbitrator) or the arbitrators not affected (in case of arbitral tribunals).

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Once arbitrators accept the appointment, they shall faithfully fulfil the mandate given by the parties, with independency and impartiality. This relationship is equivalent to a mandate contract.

In institutional arbitral proceedings, remuneration is based on tariffs and it is paid (as well as the expenses) by both parties equally, save any agreement otherwise or an eventual condemnation in costs.

Although the SAA does not govern communications between arbitrators and parties, it also imposes the obligation to communicate to the counterparty any writs and documents filed for the arbitrators. Additionally, unilateral communications would be prohibited based on the obligation of the arbitrators to be impartial and independent and to treat the parties equally, which is in line with the CEA published recommendations on the independence and impartiality of arbitrators.

The above is regardless of whether an arbitrator has been appointed by a party, court or arbitral institution.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

According to the SAA, the proposed arbitrators are required to disclose any circumstances that may affect their impartiality or independence, before accepting the position. Once the arbitrators are elected, they remain obligated to disclose any new circumstances that may occur.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are not immune from liability (nor are arbitral institutions). In fact, according to article 21 of the SAA, arbitrators may incur in liability in case of bad faith, gross recklessness or wilful default. Thus, arbitrators will only incur in liability in those cases where damage is intentionally caused or when they have acted with gross negligence or recklessness (judgments of the Supreme Court of 22 June 2009 and 15 February 2017). Liability can be either civil or criminal.

Although with some caveats, Spanish case law has recognised that the procedure to be followed is similar to the one foreseen for judges and magistrates (judgment of the Seville Appeal Court, 30 April 2010).

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

When a valid arbitration agreement has been entered into, parties are barred from filing a claim at national courts (positive effect) and national courts are prevented from hearing them (negative effect).

However, negative effect is not automatic (further, no anti-suit injunctions are foreseen). Accordingly, a party shall challenge the jurisdiction of national courts within 10 days of those provided to file the answer to the claim (staying the legal period to file the said answer), against which an opposition could be filed within five days of its

notification. An appeal could be filed in case the court denies its jurisdiction. Otherwise, it would only be possible to file a challenge before the same court.

Challenge over jurisdiction does not impede commencement or continuation of arbitral proceedings. In case no challenge to jurisdiction is filed, it would be considered as a tacit waive to arbitration (article 11 SAA).

Lastly, it shall be stressed that the Spanish Supreme Court has embraced the soft application of the Kompetenz-Kompetenz principle, confirming that national courts are fully empowered to carry out a full review of the case whenever jurisdiction is challenged (judgment 27 June 2017).

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

Article 22 of the SAA confirms the application of the Kompetenz–Kompetenz principle (as expressly admitted in its recitals, and despite the Supreme Court judgment that has embraced the soft application of this principle). Hence, arbitrators are also competent to rule on jurisdiction (either through a partial or final award), even in those situations where the validity or existence of the arbitration agreement itself is challenged.

These claims shall be made when filing the statement of defence at the latest. The fact of having participated in the appointment of the arbitrator does not bar from filing it. The claim grounded on the fact

that the dispute falls out the jurisdiction of the arbitrator shall be made as soon as practicable during arbitral proceedings.

In particular, CIMA rules stipulate that the objection to the jurisdiction of the arbitral tribunal shall be raised no later than at the time of filing the response to the request for arbitration. And, where the objection relates to any matter arising from the filing of the counterclaim, at the time of response to the notice of counterclaim. CAM rules, as the SAA, allow the parties to object the jurisdiction later, in the statement of defence.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Pursuant to articles 26 and 28 of the SAA, when no agreement exists, arbitrators shall determine the place and language of arbitration, taking into consideration all the circumstances of the case. Further, when

from the said circumstances a particular language cannot be agreed upon, arbitration will be conducted in any of the official languages of the place of the proceedings.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Unless otherwise agreed, arbitration commences on the date upon which the notice of arbitration is served on the respondent (article 27 SAA).

Although the SAA does not develop the requirements of the notice of arbitration, CIMA and CAM rules does stipulate certain information and documentation that must be included in the request for arbitration, in a similar wording. For example, CAM rules states the following:

- the notice for arbitration shall include:
  - the arbitration agreement;
  - the parties involved in the arbitration and the claimant's counsel (name, address and other relevant particulars to identify and contact them);
  - a description of the controversy and the reliefs sought;
  - the act, contract or legal transaction from which the dispute arises; and
  - any comments as to the arbitrators (as a proposal to the number, the language or the place of arbitration) and, if the arbitration agreement already provides for the appointment of three members, the designation of the one arbitrator that the claimant is entitled to appoint, the law applicable to the merits of the dispute, evidence of the payment of the provision of funds, etc; and
- the applicant shall submit a digital copy, and copies for the institution, each party involved and the arbitrators.

Hearing

28 | Is a hearing required and what rules apply?

Parties are free to decide on the particularities of arbitral proceedings (article 25 SAA). Failing such agreement, arbitrators may decide as they deem appropriate.

Additionally, failing any agreement otherwise, arbitrators shall decide on whether hearings take place (to make any pleas, take evidence or make conclusions). In practice, conclusions are in writing and, although it is not common, it is possible to not schedule any hearings (unless the parties refuse, arbitrators generally fix hearings).

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Any evidence legally taken or obtained is admitted, upon which the facts of the controversy will be established. The SAA is based on the premise that parties can agree on the particular procedure. In practice, guidance is sought (particularly in international arbitration) from the IBA Rules on the Taking of Evidence.

Failing any agreement, parties should file all available documents and expert reports along with their corresponding statements. Under Spanish law neither disclosure nor discovery is recognised although the parties could agree otherwise. Party-appointed experts are more common than tribunal-appointed ones.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

The SAA states that, save in those cases where it is expressly foreseen, national courts shall not intervene (article 7).

Intervention is foreseen for the appointment or challenge of arbitrators (articles 15.3 and 19.1.a), the taking of evidence (article 33), application for interim measures (article 11.3), challenge of the validity of the award (article 40 et seq) or its enforcement (article 45).

Confidentiality

31 | Is confidentiality ensured?

According to article 24 of the SAA, arbitrators, the parties and the arbitral institutions shall keep confidential any information received on occasion of the arbitration, including the award. Confidentiality is considered as a cornerstone of arbitration.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Both national courts and arbitrators are competent to order interim measures (articles 11 and 23 SAA). According to article 11.3, interim measures can be requested to national courts by any party either before the commencement or during arbitration proceedings.

This dual system is considered by the recitals of the SAA as alternative. Therefore, parties are free to choose to address its application to either arbitrators or courts.

Available interim measures are listed in article 726 of the Spanish Civil Procedure Code (SCPC), which is an open list. Courts will uphold an application for interim measures if security is provided and the following are evidenced:

- bonus fumus iuris;
- periculum in mora; and
- proportionality.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The SAA does not govern emergency arbitrators. Conversely, both the CIMA and CAM rules expressly foresee particular proceedings.

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

An arbitral tribunal may order any of the interim measures listed in the SCPC after it is constituted. Among them are interim freezing orders, appointment of a receiver, an order to cease a certain activity or to refrain from a particular behaviour, etc. As expressly stated in the SAA, arbitrators may (ie, it is a matter of discretion) request the applicant to provide security.

Notwithstanding this, if the affected party decides not to comply with the interim measure ordered by the arbitrators, the latter will have to seek judicial assistance.

Finally, it is not common for arbitrators in domestic arbitration proceedings to order security for costs – being only applied in practice in international investment arbitration proceedings.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Regarding the party, the only sanction that can be imposed as a result of this tactics is the condemnation in costs. In particular, the arbitral decision to condemn in costs to a party may be founded, among others, under the principle of good faith that all person participating in the arbitration proceedings shall embrace.

Moreover, as regards the counsels of the parties, there are certain ethical rules for those who are qualified in Spain (such as the Spanish and European code of conduct for lawyers or the Spanish Statute of the Practice of Law), and reference is also made to the IBA and CEA recommendations in this regard, which are aligned. The infringement of these rules can be sanctioned by the corresponding Bar Association pertaining to the counsel with the prohibition to act either before court or arbitration proceedings or even with the exclusion from the Bar.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Pursuant to article 35 of the SAA, it is sufficient if the decision is adopted by the majority, unless the parties have agreed otherwise. If it is not possible, the chair will decide.

The arbitrator who does not agree with the majority can freely dissent. Although they would not affect the validity or effectiveness of the award, dissenting opinions are used in subsequent challenge of awards proceedings.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

If any arbitrator does not agree with the sense of the award, he or she may explain the reasons (article 37.3 SAA).

Although no guidelines are provided as to how to express them, dissenting opinions are generally used when arbitrators disagree with the opinion reached. Dissenting opinions will not benefit from the legal effects of the award, the effectiveness of which will not be affected.

Form and content requirements

38 | What form and content requirements exist for an award?

Pursuant to article 37 of the SAA, awards shall be rendered in writing (electronic means are accepted), dated, expressing the venue of the arbitration and signed by the arbitrators, who may express their favouring or dissenting opinion. For arbitral tribunals, it is enough if it is signed by the majority or even just the chair, provided that reasons are given justifying the lack of the absent signatures.

The above does not justify in any event the exclusion of a dissenting arbitrator from the decision-making process, since otherwise liability could be imposed to the arbitrators (judgment of the Supreme Court, 15 February 2017).

Further, the award shall always be reasoned, unless it is an award by consent.

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Unless otherwise agreed, according to article 37 of the SAA, arbitrators have six months from the date when the statement of defence is or should have been filed to render the award, and it can be extended by the arbitrators for no more than two months by means of a reasoned decision.

The rules on arbitration of both the CIMA and CAM echo the SAA. In particular, the rules of the CAM expressly allow to extend the term to

submit the award, by agreement of all parties, as many times and for the time limit they consider convenient.

Date of award

40 For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The award is effective and binding on the parties from the date it is served.

Types of awards

41 What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under the SAA, final and partial awards are possible, as well as consent awards (article 36). Further, the award can condemn a party, declare any rights or create, modify or extinguish rights.

Termination of proceedings

42 By what other means than an award can proceedings be terminated?

Aside from the award, arbitration proceedings terminate when:

- the claimant has withdrawn, save the defendant refuses and arbitrators recognise to the latter a legitimate interest to continue with the arbitration proceedings;
- parties agree on the termination; or
- arbitrators verify that proceedings have become unnecessary or impossible (article 38.2 SAA).

The mere default does not imply termination of the proceedings, unless it is the claimant who does not file the statement of claim in time, without explaining such behaviour. In this case (failing an agreement otherwise), proceedings will be considered as terminated, save if the defendant shows an interest in making any plea (article 31 SAA).

Cost allocation and recovery

43 How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

As stated in article 37.6 of the SAA, arbitrators shall decide on the allocation of the costs. However (conversely to domestic litigation), there is no imperative imposition of criteria to be followed. Therefore, failing an agreement of the parties, it is left to the discretion of the arbitrator.

The SAA expressly includes as costs:

- the fees and costs of the arbitrators;
- fees of the legal counsels;
- the costs of the arbitral institution; and
- any other cost originating from the proceedings (thus, including experts).

Interest

44 May interest be awarded for principal claims and for costs, and at what rate?

Interest is allowed under Spanish law. As to the principal amount, it will include the interest agreed by the parties or, failing such agreement, the legal interest rate published in the Official Gazette or the interest rate foreseen in the Spanish Act 3/2004, 29 December, combating late payment in commercial transactions, that applies to certain commercial transactions.

Once the award is rendered and until it is fully complied with, the interest resulting from adding two points to the legal interest rate will be included, unless the parties have agreed otherwise or any substantive law applicable to the arbitration proceedings provides a different interest rate.

Costs do not accrue interest. However, if a party is obliged to trigger enforcement proceedings, the SCPC foresees a provisional increase of 30 per cent of the amount for which enforcement is sought by way of interest and costs of the enforcement proceedings.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

According to article 39 of the SAA, any party may apply, within 10 days of the notification of the award (unless any other time limit has been agreed), to:

- correct any calculation, copies, typographical or similar mistakes;
- clarify part of the award;
- supplement the reliefs sought that were not addressed; and
- rectify partial exceedances, when it has decided on non-arbitrable differences or on those that were not submitted to arbitration.

Arbitrators on their own can only proceed to correct calculation, copies, typographical or similar mistakes, within the time limit of 10 days from the date when the award was signed.

Notwithstanding, the above-mentioned time limits are extended to one month for international arbitrations.

Challenge of awards

46 How and on what grounds can awards be challenged and set aside?

The only possible grounds are expressly listed in article 41 of the SAA, which echoes article V of the New York Convention. In essence, an award could only be set aside if it is evidenced that:

- the arbitration agreement does not exist or it is not valid;
- appointment of the arbitrator or arbitral proceedings have not been properly notified or, for any reasons, a party has been impeded from presenting its case;
- arbitrators have decided on differences not contemplated by, or not falling within, the terms of the submission to arbitration;
- the appointment of arbitrators or the arbitral procedure was not in accordance with the agreement of the parties (unless the agreement was against public policy) or, failing such agreement, was not in accordance with the SAA;
- the subject matter of the difference is not capable of settlement by arbitration; or
- the award is contrary to public policy.

The application to set aside shall be brought before the Superior Court of Justice of the autonomous community in which the award is rendered (article 8.5 SAA) – within two months of the notification of the final award (ie, once, if so, the corresponding clarification, correction or supplement has been served on, or the time to do it has elapsed).

Having said that, the SAA also provides particular review proceedings for awards with res judicata effects (article 43). These proceedings are for very limited scenarios (eg, the award was based on evidence that thereupon was considered false by a criminal judge), and the procedure is governed by the SCPC (article 509 et seq).

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Aside from the possibility to set aside the award based on very limited grounds, the SAA does not provide for any further appeal or challenge.

Conversely, for example, CIMA rules foresee the possibility of an agreed intra-arbitral challenge when there is a manifest disregard of the substantive law on which the decision is based; or when the award is based on a clearly erroneous assessment of the facts, which have been of decisive importance. These proceedings are usually promptly decided, and the costs, which are generally imposed to the losing party (unless otherwise agreed), would depend on the disputed amount.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

In relation to enforcement of domestic awards, the SAA (article 44) refers to the SCPC, save certain provisions regarding the stay, dismissal of the challenge of the award and restart of the proceedings. The SCPC considers the award as an enforceable title (ie, it can be directly enforced), governs the procedure and provides very limited grounds for opposition to the enforcement:

- the limitation period to file the enforcement claim has elapsed;
- the debtor has complied with the judgment;
- other limited procedural grounds (for instance, the lack of capacity of the claimant).

Moreover, if the award is against Spanish public policy, it cannot be either recognised or enforced.

Article 46 of the SAA provides that recognition and enforcement of foreign awards shall be governed by the New York Convention, save any other more favourable international convention. Thus, the grounds for refusal are the same as those foreseen in the said international convention. The enforcement procedure will be the same as for domestic awards though (ie, under the SCPC).

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The limitation period is five years as from the date the award is served (or if corrected or clarified, as from this latter date), pursuant to the SCPC (article 518).

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Spanish courts have a favourable attitude towards recognition and enforcement of foreign awards.

However, enforcement of an annulled award is disputed. In fact, there are reputable Spanish scholars who have rejected this possibility. Moreover, case law has not thoroughly addressed this particular issue, and, therefore, the outcome is uncertain.

Notwithstanding, for instance, the ruling of the first instance court of Rubí, dated 11 June 2007, which expressly recognised (referring to French cases Hilmarton and Chromalloy) the possibility of enforcing an award set aside by the courts at the place of the arbitration. Nonetheless, this possibility was envisaged assuming that, aside from the New York Convention, the European Convention on International Commercial Arbitration also applied (which is more lenient concerning enforcement of set aside awards). Additionally, it is specifically stated that, unlike the New York Convention, the annulment of an award in the state of origin does not imply as a 'necessary consequence' the impossibility of being recognised or enforced in another state.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Emergency arbitration is not governed under the SAA. However, most arbitral institution rules govern it and, although no publicity has been given to any decisions enforcing orders rendered by emergency arbitrators, its enforceability is widely accepted.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Costs for the applicant directly depend upon the economic value of the award, and include the solicitors, court agents and court fees. For the other party, the SCPC also foresees a provisional increase of 30 per cent of the amount enforced.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Under Spanish law neither disclosure nor discovery is recognised although the parties could agree otherwise. Conversely, parties shall provide all available documents along with their corresponding statements.

However, this is not as stringent as it may seem. The SCPC allows a party to trigger preliminary proceedings aimed at obtaining essential documents for the controversy from the counterparty or any third party, and the production of specific documents related to the subject matter of the dispute, or the evidence to be taken can also be requested during the proceedings.

Further, written witness statements are not usual, and party officers in most cases can only testify within the proceedings if their testimony has been requested by the counterparty (although some arbitral rules provide otherwise).

Notwithstanding, there is a tendency (particularly in international arbitration) to apply, or seek guidance from, the IBA Rules on the Taking of Evidence.

Lastly, conversely to Anglo-Saxon judicial systems, law is exclusively enacted through writing legal codes and laws. Therefore, in Spain case law is not recognised as serving the same function.

Professional or ethical rules

54 Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The SAA does not provide any guidance as to professional or ethical behaviour, beyond the obligation for arbitrators to be and stay impartial and independent.

Nonetheless, there are certain ethical rules for those who are qualified in Spain (such as the Spanish and European code of conduct for lawyers or the Spanish Statute of the Practice of Law), and reference is also made to the IBA and CEA recommendations in this regard, which are aligned.

Third-party funding

55 Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

The SAA does not govern third-party funding. Although, in practice, this type of funding is becoming more used in practice (especially in international arbitration).

Regulation of activities

56 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There are no noteworthy particularities aside from those developed in the questions above.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

A new arbitration centre

At the beginning of this year, the Madrid International Arbitration Centre (CIAM) started operations. The main Spanish arbitration institutions have joined together to create this new organisation, which aims to be a leader in the field of international arbitration.

Arbitration proceedings against Spain

In recent years there have been numerous arbitration proceedings against Spain under the Energy Charter Treaty owing to several legislative reforms in the field of renewable energies. The ICSID issued on 2 December 2019 its first award in favour of Spain, changing the tendency that existed up to then. The procedure was initiated by a group of German companies and the Spanish company Marquesado Solar SL. The Arbitral Tribunal considered that the premiums expected by the companies were exorbitant and, therefore, were neither reasonable nor legitimate. The key has been the concept of reasonable profitability, meaning that the expectation of a foreign investor should be to obtain a reasonable return on his or her investment, according to Spanish law. This has led to a significant reduction in the compensations that Spain must pay.

Following this, Spain obtained other victories with regard to the procedures initiated by the German company RWE and by PV Investors. The latter has been a special victory for Spain, as it was considered the most important arbitration against Spain not only because of the amount claimed but also because it took eight years to conclude. According to the Spain's lead counsel, this has been one of the largest damage reductions in the history of investment arbitration.

In addition, many claimants are giving up their claims against Spain in exchange for the benefit of the new renewable energy remuneration proposed by the Spanish government.

Covid-19

Owing to the covid-19 crisis, the governments of most states around the world, including Spain, have been forced to implement extraordinary legislative measures, with a very different scope and effect on foreign investments, that may breach the provisions contained in certain bilateral investment treaties (BITs).

Dispute over awards, scope and the concept of 'public order'

During the past few years, there has been a dispute between case law and scholars about the scope of the revision of the awards to be carried out by the Superior Court of Justice when deciding if an award shall be set aside. This was because the Superior Court of Justice was increasingly inclined to analyse questions of substance of the award, on the grounds of one of the formal reasons of article 41 of the SAA to set aside an award: public order.

This controversy has recently come to an end, thanks to the ruling of the Constitutional Court of 15 June 2020, that declared null a resolution of the Superior Court of Justice of Madrid that previously annulled an award on grounds of public order, ignoring the will of the parties to desist from the procedure after reaching an agreement.

The Constitutional Court has reproached the Superior Court of Justice for not respecting the parties' right to dispose of the procedure, based on an extreme widening of the concept of 'public order' to carry out a substantive review of the dispute by the judicial body. But what is really important about this resolution is that the Constitutional Court has reminded the Superior Court of Justice, among other things, that:

> *"the control of the arbitral awards is limited and that the annulment of an award can only be obtained in exceptional cases", (ii) "it is clear that the annulment action must be understood as an*

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external control process on the validity of the award that does not allow a review of the merits of the arbitrators' decision" and, therefore, (iii) the lack of clarity in the concept of public order cannot in any case become a "pretext for the judicial body to re-examine the issues discussed in the arbitration proceedings, denaturing the arbitration institution and ultimately violating the autonomy of the will of the parties.

Coronavirus

58 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programs, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The health crisis caused by covid-19 forced the adoption of extraordinary measures by both the Spanish government and the General Council of the Judiciary, as well as by several municipal administrations.

Regarding measures concerning judicial proceedings, we can highlight the general stay of scheduled legal acts and the interruption of procedural deadlines for all jurisdictional orders during the state of emergency period. Therefore, procedural acts (such as hearings, declarations, etc) and deadlines for the filing of procedural documents (appeals, allegations, etc) were adjourned from 14 March 2020 until 4 June 2020.

Moreover, when technically possible depending on the court, hearings are being held via videoconference.

Conversely, arbitral proceedings were not stayed by law although some arbitral institutions as CIMA also stayed the procedural deadlines during the state of emergency, and both the CIMA and CAM adjourned the holding of hearings unless they were made via tele or video conference. It is now common that the hearings are held via videoconference, following the prior agreement of the parties.