



Arbitration Guide
IBA Arbitration Committee

SPAIN

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I. Background

(i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

As regards domestic disputes, more parties resort to the courts than to arbitration, although domestic arbitration has increased since the Arbitration Act 60/2003 of 23 December was passed in 2003 (hereafter, 'SAA' or the 'Arbitration Act').

Similarly, recourse to arbitration for international disputes has also increased over the past years, Madrid being the most popular seat.

Parties regard arbitration's main benefits to be both its flexibility and efficiency. Also, parties consider that arbitration offers a more specialised and technical solution to their conflicts and, with respect to the resolution of international disputes, a solution which is closer to their specific cultural and legal traditions. The rapidness of arbitration, considering that it is a one shot procedure, is seen as an additional important advantage.

However, some users consider a disadvantage of arbitration to be the finality of the award, since it is not subject to appeal. Furthermore, the procedure's costs, which used to be one of its strengths, now tends to be perceived as one of its weaknesses, in view of the significant costs that may be involved, particularly in complex disputes.

(ii) **Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

Most arbitration proceedings are institutional. Nonetheless, agreements for ad hoc arbitrations also exist, in many cases to avoid bureaucratic issues which may arise in the context of the former. For example, from the beginning of the arbitration until the constitution of the arbitral tribunal several months may elapse because the institution's representatives must gather to take decisions such as those related to jurisdictional objections or challenges of arbitrators which, consequently, delay the proceedings. Also, some institutions' rules provide that the draft award must undergo a scrutiny process, which warrants the quality of the award, but delays its issuance.

Although international arbitration in Spain has steadily increased over the past years, a significant part of arbitrations are still domestic.

As to domestic arbitral institutions, the most commonly used are the Court of Arbitration of the Official Chamber of Commerce of Madrid (*Corte de Arbitraje de la Camara Oficial de Comercio e Industria de Madrid*), the Civil and Commercial Court of Arbitration (*Corte Civil y Mercantil de Arbitraje*), the Spanish Court of Arbitration (*Corte Española de Arbitraje*) and the Barcelona

Arbitral Tribunal (*Tribunal Arbitral de Barcelona*), together with their respective rules. These institutions administer both domestic and international arbitrations.

As to international institutions, the most commonly used are the International Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

(iii) What types of disputes are typically arbitrated?

Commercial or corporate disputes are typically arbitrated in Spain, particularly those related to sales contracts, energy, stock agreements, financial derivatives, joint venture agreements, mergers and acquisitions, construction projects and supply and distribution contracts.

(iv) How long do arbitral proceedings usually last in your country?

The duration of the proceedings will of course vary depending on the specific circumstances of the case, but in general terms the award is rendered after one year to one and a half years after the arbitration has commenced. In more complex cases the award may take two to two and a half years.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

No restrictions exist. Under Article 13 SAA, unless otherwise agreed by the parties, no person shall be prevented from acting as an arbitrator by reason of his or her nationality.

With regard to foreign counsel, there are also no specific restrictions to act as such in an arbitration seated in Spain, although special requirements do apply for counsel to appear before Spanish courts. Until a couple of years ago, the only requirements to be admitted as a lawyer in Spain were to hold a Spanish law degree (or an equivalent foreign degree officially approved) and to be a member of a local bar association, which would entitle a lawyer to practice anywhere in Spain. New legislation was enacted in line with other European jurisdictions, according to which prospective lawyers – apart from holding a law degree – will need to hold a Master's degree, which will be followed by a period of apprenticeship and passing a written national exam.

II. Arbitration Laws

- (i) **What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

Arbitration in Spain is governed by the Arbitration Act 60/2003 of 23 December, as amended by Acts 5/2011 and 11/2011 of May 20, 2011. The Arbitration Act applies both to domestic and international arbitrations.

It should be noted that:

1. the Act applies without prejudice to the provisions of treaties to which Spain is a party or to legislation containing specific provisions relating to arbitration, such as consumer protection and intellectual property regulations (Articles 1.1 and 1.3); and
2. employment arbitration is excluded from the scope of the Arbitration Act (Article 1.4).

The Arbitration Act is based on the UNCITRAL Model Law, although some changes were implemented in order to adapt it to the Spanish legal system.

- (ii) **Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

There are no major distinctions between domestic and international arbitration in Spain. The only differences refer to the form and content of the arbitration agreement (Article 9 SAA), the rules applicable to the substance of the dispute (Article 34 SAA), and the correction, clarification and the issue of a supplement to the award (Article 39 SAA).

As mentioned above, the Arbitration Act is based on the UNCITRAL Model Law and, thus, follows a monist system: it applies to all arbitrations that take place in Spain; both national and international (Article 1 SAA). Further, certain provisions regarding the jurisdiction of the Spanish courts, interim measures, the arbitration agreement and the recognition and enforcement of awards shall apply even when the seat of the arbitration is not in Spain (Article 1.2 SAA).

- (iii) **What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

The New York Convention was ratified by Spain in 1977, and no reservations or declarations were made. The Geneva Convention was ratified in 1975, and the Washington Convention was ratified by Spain in 1994.

Spain is a party to bilateral treaties regarding the recognition and enforcement of arbitral awards with Morocco (30 May 1997), Bulgaria (23 May 1993), People's Republic of China (2 May 1992), Mexico (17 April 1989), Brazil (13 April 1989), Uruguay (4 November 1987), Czech Republic (4 May 1987), Slovakia (4 May 1987), Italy (22 May 1973), France (28 May 1969), Colombia (30 May 1908) and Switzerland (19 November 1896).

Moreover, Spain has ratified 72 bilateral investment treaties that remain in force, a large number of them with Latin American countries (Argentina, Chile, Colombia, Costa Rica, Cuba, El Salvador, Ecuador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela, among others).

(iv) 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?

Pursuant to Article 34.2 SAA, where the arbitration is international, the arbitrators shall decide the dispute in accordance with the rules of law chosen by the parties.

In any event, any designation of the law or legal system of a given state shall be construed, unless otherwise stated, as referring to the substantive law of that state and not to its conflict of laws rules.

Absent a choice of law provision, the arbitrators shall apply to the merits the law that they deem appropriate. With respect to this election, the Arbitration Act does not provide arbitrators with any specific guidance.

Finally, pursuant to Article 34.3 SAA, the arbitrators shall, in any case, decide in accordance with the terms of the contract and shall take into account the relevant trade usages.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Regarding the formal requirements of an arbitration agreement, the Arbitration Act follows Article 7 of the UNCITRAL Model Law and provides in Article 9.3 that the arbitration agreement should be in writing, in a document signed by the parties or in an exchange of letters, telegrams, telex, facsimile or any other means of telecommunications that provides a record of the agreement. This requirement is met when the arbitration agreement appears and is accessible for its subsequent consultation in an electronic, optical or any other format.

As to the material requirements of an arbitration agreement, Article 9.1 SAA establishes that it may exist in the form of a clause in a contract or in the form of a separate agreement, and it shall express the will of the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a specific legal relationship, whether contractual or non-contractual.

Furthermore, Article 9.4 SAA provides that if the arbitration agreement is included in a standard form agreement, its validity and its interpretation shall be governed by the rules applicable to such contracts.

Article 9.5 SAA establishes that there is an arbitration agreement when in an exchange of statements of claim and defense the existence of an arbitration agreement is alleged by one party and not denied by the other.

Lastly, as regards international arbitration, under Article 9.6 SAA, the arbitration agreement shall be deemed valid and the dispute arbitrated if it meets the requirements set by the rules of law chosen by the parties to govern the arbitration agreement, or by the rules of law applicable to the merits of the dispute, or by Spanish law.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Spanish courts have generally displayed a pro-arbitration approach.

The Spanish Arbitration Act has adopted a position which favours the validity of arbitration clauses. Pursuant to Article 9 SAA, an arbitration clause will not be enforced if it does not reflect the unequivocal will of the parties to submit their disputes to arbitration. In addition, an arbitration clause incorporated in the general conditions of a contract may not be enforced if the conditions infringe the rules applicable to these types of contracts.

Furthermore, in the context of international arbitration, it suffices that the agreement meets the requirements set forth either under the law chosen by the parties to govern the arbitration clause, or under the substantive law, or under Spanish law.

- (iii) **Are multi-tier clauses (e.g. arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tier clauses are not common in Spain and, certainly not as frequent as in other jurisdictions, such as the United States. However, Spanish legal scholars and case law have examined similar concepts (for instance, the failure to try the conciliation between the parties, prior to the process, as provided in Article 403.2 of the Spanish Civil Procedure Act).

Nonetheless, multi-tier clauses are enforceable in Spain, provided that their terms are clear.

- (iv) **What are the requirements for a valid multi-party arbitration agreement?**

Multi-party arbitration agreements are subject to the aforementioned general requirements.

The Arbitration Act includes a special provision for the appointment of arbitrators in multi-party cases: unless otherwise provided by the parties, in an arbitration with three arbitrators, the multiple claimants and/or multiple respondents, must each agree a common arbitrator, and the two arbitrators thus appointed are to appoint the third arbitrator. If either the claimants or respondents fail to agree on the appointment of their respective arbitrator, the competent court will appoint all arbitrators upon request of any of the parties.

- (v) **Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

No, it would not be enforceable, because it would not be valid under Spanish law. In accordance with articles 9.1 SAA and 1261 of the Spanish Civil Code, both parties must consent to submit their disputes to arbitration for the agreement to be valid and enforceable.

- (vi) **May arbitration agreements bind non-signatories? If so, under what circumstances?**

Arbitration agreements may bind non-signatories if they have a very close and strong relationship with a signing party, or have played a strong role in the performance of the contract.

In practice, the criteria established in the Rules of the International Chamber of Commerce (ICC), as put forward in the ICC case *Dow Chemical France v Isover Saint Gobain's* (whereby a non-signatory may benefit from or be bound by an

arbitration agreement signed by a group company because of its role in the transaction), is generally followed.

In any event, third parties' tacit acceptance of the arbitration clause may only be deduced from unequivocal and conclusive facts of the case, according to the Spanish case law that has ruled in favour.

Thus, extending arbitration clauses to parent companies is certainly not automatic, but based on fact-intensive tests. Some decisions rejected the extension of the arbitration clause to non-signatories¹, while others have accepted the extension².

IV. Arbitrability and Jurisdiction

- (i) **Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

Under Article 2 SAA, only disputes relating to matters within the free disposition of the parties are arbitrable. For instance, criminal matters and parental issues are not arbitrable.

In this regard, two issues may be noted:

1. some matters of private law, such as certain family law issues, cannot be arbitrated; and
2. both industrial property and issues submitted to company by-laws are expressly recognised as arbitrable by Spanish legislation.

The Arbitration Act displays a high degree of flexibility with respect to international arbitration in that it provides that a dispute may be arbitrated if the requirements of the rules of law chosen by the parties to govern the arbitration agreement, or if the rules of law applicable to the merits of the case, or Spanish law are met.

Pursuant to the principle of competence-competence, expressly recognised in Article 22.1 SAA, the arbitrators will decide whether the matter is arbitrable or not. Hence, the lack of arbitrability is a matter of jurisdiction.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits**

¹ Supreme Court, Civil Section, 9 July 2007.

² Supreme Court, Civil Section, 26 May 2005; La Coruña Court of Appeal, 4th Section, 22 June 2005.

for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

Pursuant to Article 11.1 SAA, as amended in May 2011:

1. the arbitration agreement stops the courts from hearing disputes submitted to arbitration. The defendant must file a jurisdictional objection before the court (*declinatoria*, which is comparable to a motion to stay the proceedings); and
2. such jurisdictional objection must be filed within a fixed period of time that depends on the proceedings commenced before the courts: in ordinary proceedings (*juicio ordinario*), such period is the first ten days of the twenty days the defendant has to answer the claim; and in oral proceedings (*juicio verbal*), such objections must be filed within the first ten days after the notification for the trial has been served to the defendant.

If the parties participate in court proceedings, they are deemed to have agreed to waive the arbitration agreement (save in the case an *ad cautelam* response is filed).

It must be noted that if arbitration is also in process, the arbitrators can continue the proceedings and can decide on their own jurisdiction, even if the court deals with the jurisdiction of the arbitral tribunal.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

Arbitrators can decide on their own jurisdiction under Article 22 SAA, and can also decide any objections with respect to the existence or validity of the arbitration agreement, or any other objection which would prevent the arbitrators from addressing the merits of the dispute.

Thus, the principle of *competence-competence* is expressly recognised in our jurisdiction.

There is no specific provision in our law regarding a court ruling on an issue relating to the tribunal's jurisdiction. In any event, once the proceedings have ended, Article 22.3 SAA provides that the decision of the arbitrators on their jurisdiction may only be challenged by means of an application to set aside the award.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Parties are free to agree on any specific procedure for the appointment of the arbitrators.

Absent an express agreement, Article 15.2 SAA provides as follows:

1. in an arbitration with a sole arbitrator, the court shall appoint the arbitrator upon the request of any of the parties;
2. in an arbitration with three arbitrators, each party shall nominate one arbitrator, and the two arbitrators thus appointed shall nominate the third arbitrator, who shall act as the presiding arbitrator of the arbitral panel. If a party fails to nominate an arbitrator within 30 days of receipt of the demand to do so from the other party, the appointment of the arbitrator shall be made by the competent court, upon request of any of the parties. The same procedure shall apply when the two arbitrators cannot reach an agreement on the third arbitrator within 30 days from the latest acceptance;
3. where there are multiple claimants or respondents, the former shall nominate one arbitrator and the latter another. If the claimants or the respondents do not agree on their nomination of the arbitrator, the competent court shall appoint all the arbitrators upon request of any of the parties; and
4. in arbitrations with more than three arbitrators, the competent court shall appoint all of them upon request of any of the parties.

As to the courts' role, Article 15.3 SAA provides that if it is not possible to appoint the arbitrators by the procedure agreed upon by the parties, any of the parties may apply to the competent court for the appointment of the arbitrators or, if appropriate, the adoption of the necessary measures for this purpose.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Pursuant to Article 17.2 SAA, a person proposed to act as arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of nomination, shall disclose to the parties without delay the occurrence of any such circumstances.

Thus, two requirements may be distinguished: (i) the duty of disclosure encompasses any circumstances which give rise to justifiable doubts as to the arbitrator's independence and impartiality; and (ii) the arbitrators must disclose

any conflict upon their appointment and without delay after their appointment, should any circumstances arise.

The parties may agree on a specific procedure to challenge an arbitrator.

Unless otherwise agreed by the parties, courts do not play any role in the procedure to challenge an arbitrator. This is exclusively handled by the arbitral tribunal: the party who wishes to challenge an arbitrator shall state on which grounds within 15 days after becoming aware of the arbitrator's acceptance of his or her appointment, or after becoming aware of any circumstance which may give rise to justifiable doubts as to his or her impartiality or independence. Unless the challenged arbitrator decides to voluntarily withdraw from office, or the opposing party agrees to the challenge, the arbitrators shall decide on the challenge.

If a challenge is unsuccessful, the challenging party may rely upon the challenge to try to have the award set aside.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

There are some limitations on who may serve as arbitrator. Under Article 15.1 SAA, unless the parties agree otherwise, the sole arbitrator must be a jurist. This is not required if the arbitrator must decide the dispute *ex aequo et bono*. In a tribunal formed by three or more arbitrators, at least one of them must be a jurist.

Aside from the general provisions of the Arbitration Act regarding independence and impartiality, arbitrators who are jurists do have ethical duties as per the rules of their respective bar associations. There is however, no specific binding ethical code. Nonetheless, two documents issued by the Spanish Arbitration Club (an institution founded in 2004 by Spanish arbitration practitioners striving to promote arbitration in Spanish and Portuguese-speaking countries) must be noted: (i) Recommendations on the Independence and Impartiality of Arbitrators (2008); and (ii) Code of Good Arbitration Practice (2009).

Both documents, albeit not legally binding but with a status of recommendations, establish ethical duties for arbitrators. The parties may nevertheless endow such recommendations with contractually binding force by inserting a specific reference to them in their arbitration agreement.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

Regarding conflicts of interest for arbitrators, reference must be made to the aforementioned Recommendations on the Independence and Impartiality of

Arbitrators, issued by the Spanish Arbitration Club, although the IBA Guidelines are also frequently followed, particularly in international arbitration.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Pursuant to Article 23 SAA, unless otherwise agreed by the parties, arbitrators are entitled to issue interim measures they may deem necessary or appropriate with respect to the subject-matter of the dispute. Arbitrators may also require appropriate security from the applicant, but it is not common for the parties to obtain preliminary relief in arbitration.

There are no special requirements as to the form of the tribunal's decision, which may be issued either in the form of an order or an award (the latter may increase its enforceability).

Interim measures issued by arbitrators are enforceable in courts and the same provisions relating to the setting aside and enforcement of awards apply regardless of the form of such measures.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

Courts may grant interim measures in support of arbitrations. Pursuant to Article 11.3 SAA, courts may order any interim measure upon the request of any party, both before and after the commencement of arbitration proceedings and the constitution of the arbitral tribunal, either domestic or international. In particular, courts may grant these measures when the requesting party intends to enforce them against third parties (*Foster Wheeler Trading Company AG SA and Foster Wheeler Trading Company AG. v. National Company for Fishing and Marketing*, Decision of the Court of First Instance of Madrid, number 69, dated June 28, 1999).

Although the Arbitration Act does not set forth the conditions for the granting of an interim measure, the requesting party must comply with two general procedural requirements, and prove before the court: (i) *fumus boni iuris* (prima facie case); and (ii) *periculum in mora* (the adverse consequences it would have for the requesting party's case if the court rejected the measures). In addition, the court may request that appropriate security be provided by the requesting party.

Court ordered interim measures will remain in force after the arbitral tribunal's constitution.

- (iii) **To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

Pursuant to Article 33 SAA, the arbitral tribunal or the parties may request judicial assistance for evidence production. This assistance may consist in the demand for the production of the requested evidence in front of the judicial authority, if the parties so request the court to do so, or in the adoption of the necessary measures to produce the evidence before the arbitral tribunal.

The competent court for such assistance is the court of first instance of the place of arbitration or of the place where the taking of evidence will take place. Pursuant to Article 33.1 SAA, the arbitrators or any party with their approval may request from the competent court evidentiary assistance, which may consist either of the taking of evidence before the court, or of the adoption of specific measures so that the evidence may be taken before the arbitrators.

Domestic courts are very restrictive when deciding requests for interim measures, and they will analyse very carefully whether the aforementioned conditions are met.

The tribunal's consent in this matter is not necessary.

VII. Disclosure/Discovery

- (i) **What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

Spanish procedural rules do not include discovery and Spanish courts will not assist foreign judicial authorities in discovery requests. This is the general trend in relation to arbitration in Spain, although arbitrators do allow disclosure in some cases.

- (ii) **What, if any, limits are there on the permissible scope of disclosure or discovery?**

There are no particular limits, provided that its scope is considered relevant for the dispute and does not breach public order or is so broad as to hinder the parties' right of defense (that is, fishing expeditions).

- (iii) **Are there special rules for handling electronically stored information?**

No, there are no special rules.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Pursuant to Article 24(2) SAA, arbitrators, parties and arbitral institutions are obliged to keep the information received in the course of the arbitral proceedings, as confidential. Although this provision seems to apply only to substantive information received during the proceedings, it is extended to any kind of document and information provided during the arbitration (that is, the submissions, award, etc.).

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

No, there are no provisions of such kind in our law. However, arbitral tribunals are very concerned about trade secrets and may be reluctant to request the production of a document if a party alleges that it contains trade secrets. In such cases, the arbitral tribunal will try to agree upon a mechanism with the parties to protect the sensitive information.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

No, there are no provisions of such kind in our arbitration law, but specific Spanish mandatory rules would apply in relation to restrictions established by law on trade secrets, military secrets and professional privileges, which may only be waived by an express declaration of both the parties and competent authorities.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Overall, albeit not yet widespread, there is a growing trend to seek guidance from the IBA Rules, particularly as regards to written witness statements.

Generally, the IBA Rules are only used as guidance, unless the parties have provided otherwise, and therefore the tribunal retains discretion to depart from them. It is not uncommon for tribunals to adopt only part of the Rules for the specific circumstances of the case.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

The arbitral tribunal's discretion is only limited by the principle, established in our law, that the parties must be given equal treatment and that due process is respected.

- (iii) **How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

Witness testimony is usually presented through direct oral examinations, but the use of witness statements with cross examination is becoming increasingly common in domestic arbitration.

It is not uncommon for arbitrators to question witnesses, usually after they have been cross-examined by the parties.

- (iv) **Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?**

There are no specific rules either on who can or cannot appear as a witness, nor are there mandatory rules on oath or affirmation.

Nonetheless, pursuant to Article 26 SAA, arbitrators may, subject to the specific provisions of the Act, conduct the arbitration the way they deem appropriate, and it is not uncommon for arbitrators to request the witnesses to promise or swear that they will speak the truth before the tribunal.

- (v) **Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?**

Our arbitration rules do not contemplate any differences between connected and unrelated witnesses.

- (vi) **How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

Experts shall deliver their testimony in a report and thereafter, pursuant to Article 32.2 SAA, unless otherwise agreed by the parties, if the arbitrators consider it necessary or if a party so requests, the expert shall attend the evidentiary hearing to confirm the report and to be cross-examined.

There are no specific formal requirements regarding independence and/or impartiality of expert witnesses.

- (vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

Although arbitral tribunals may decide to appoint experts, this is not common, particularly in domestic arbitrations.

When ordered, such evidence is generally considered to be more neutral, and therefore perhaps more reliable, compared to the evidence provided by party-appointed experts.

No specific requirement may be found in our jurisdiction regarding the selection of experts from a particular list.

- (viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

Witness conferencing ('hot-tubbing') is still uncommon in Spain, but is increasing, particularly in complex disputes where the party-appointed expert reports reflect significant differences in their views.

While the approach differs depending of the particular circumstances of each case, the typical procedure would be the tribunal chairing a discussion between the experts, where counsels may be allowed to join in and pose questions to both experts, and the experts may also pose questions to each other. The tribunal may request the parties to submit a list of open and short questions before the hearing to guide the tribunal.

Lastly, it is becoming more common for the tribunal to request the experts of each party to submit a joint expert opinion clearly stating the issues on which they agree, and those on which they disagree, explaining why they disagree with each other.

- (ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

There are no rules or requirements in Spain as to the use of arbitral secretaries, but their use is becoming increasingly more common. The Tribunal usually asks the parties if they have any objection to the use of a secretary, after being informed of the conditions and costs of the secretary's involvement.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Article 37 SAA sets forth the formal requirements that an award must fulfill to be valid:

1. it shall be made in writing, qualifying as such when its content and signatures are recorded and accessible for consultation in an electronic, optical or other type of format;
2. it shall be signed by the arbitrators, who may manifest their favorable or dissenting vote (where there is more than one arbitrator, the signatures of the majority of all members of the arbitral panel or that of its presiding arbitrator alone shall suffice, provided that the reason for any omitted signature is stated);
3. it shall state the reasons upon which it is based, unless the award is an award on agreed terms in accordance with Article 36 of the SAA which provides for awards made by the agreement of the parties; and
4. it shall state its date and place of arbitration.

In any event, after the reform of May 2011, Article 37.2 *in fine* SAA provides that, unless otherwise agreed by the parties, if the final award is not issued within the deadline to do so, this shall not affect the enforceability of the arbitration agreement, nor the validity of the award, without prejudice to the liabilities the arbitrators may have to face.

Under the current Arbitration Act there are no limitations on the types of permissible relief, with the reservation that the relief shall not infringe public policy.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Spanish law does not allow punitive damages. Be that as it may, when the contract contains provisions for punitive damages, arbitrators tend to grant them if the conditions provided for in the contract are met, and they would carefully assess their proportionality. However, the enforcement of these kind of damages in Spain may prove complicated.

Arbitrators may award interest. Under Spanish law the parties may have agreed that accrued interest is capitalised to generate interest. Existing such an agreement, or if any other applicable law to the dispute does not foresee otherwise, arbitrators may grant compound interest.

(iii) Are interim or partial awards enforceable?

Both partial and interim awards are enforceable in Spain.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Under Article 37.3 SAA, arbitrators may state their favorable or dissenting opinion or vote in the award.

There are no specific rules in our jurisdiction as to the form or content of dissenting opinions, as they are not part of the award and, hence, are not enforceable.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Awards by consent are permitted pursuant to Article 36 SAA.

Furthermore, the proceedings may terminate under Article 38.2 SAA by the following means, besides the issuance of an award:

1. withdrawal of the claim, unless the respondent objects thereto and the arbitrators recognise that the respondent has a legitimate interest in obtaining a final decision on the dispute;
2. agreement of the parties on the termination of the proceedings; and
3. continuation of the proceedings has become, according to the arbitrators, unnecessary or impossible.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Arbitrators may correct or interpret the award, pursuant to Article 39.3 SAA, as follows:

1. upon request of the parties, which may, within ten days of receipt of the award (unless another period of time has been agreed upon), request to correct in the award any computational, clerical or typographical error, or any errors of a similar nature; to clarify a point or a specific part of the award; to supplement the award as to claims presented in the arbitral proceedings and not resolved in the award or to rectify any partial extra limitation of the award, when it has decided any issues which were either not submitted to the tribunal's decision or not capable of arbitration.

After hearing the other parties, the arbitrators shall decide on applications for the correction of errors and for clarification within ten days, and for

the issue of a supplement to the award and rectification of extra limitation, within 20 days (in the context of international arbitration, the deadlines are one month and two months, respectively); and

2. the arbitrators may *ex officio*, within ten days of the date following the date of the award, correct any computational, clerical or typographical errors in the award, or any errors of similar nature.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

The arbitrators decide who bears the costs related to the arbitration, taking into account the parties' agreement, if such agreement exists.

The 'loser pays' rule does not always apply. As the Arbitration Act remains silent regarding the apportionment of costs, if there is no agreement of the parties on this issue, the arbitrators are not bound by any specific rules in this regard.

Generally, arbitrators take into consideration not only the outcome of the arbitration, but also the behaviour of the parties during the proceedings and if there has been frivolous disregard to the other party's rights.

(ii) What are the elements of costs that are typically awarded?

Under Article 37.6 SAA, the costs shall include the fees and expenses of the arbitrators and, where applicable, the fees and expenses of counsel or representatives of the parties, experts, and the cost of the services provided by the institution administering the arbitration.

Costs do not usually include travel and/or accommodation arrangements for witnesses or experts or internal parties' costs.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Yes, the arbitral tribunal has jurisdiction to decide on its own costs and expenses.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

As mentioned above, the Arbitration Act remains silent on this issue and thus, the arbitrators are not bound by any specific criteria in their decision on this matter.

Hence, the arbitrators may exclude expenses of the parties that they consider inappropriate and lower the amount of those they consider are excessive.

Moreover, the arbitrators may decide on the basis of the behavior of the parties during the proceedings and on how successful the parties have been in relation to their respective claims. Arbitrators may also apply the criteria established in the

Civil Procedure Act, which, in general terms, only provides for the recoverability of the costs by a party who is entirely successful, whereas in a partial success, each party bears its own expenses and the common costs are split.

- (v) **Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

No, courts do not have the power to review the tribunal's decision on costs.

XII. Challenges to Awards

- (i) **How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

Awards may be challenged only if the party making the application alleges and proves one of the following grounds (Article 41.1 SAA):

- a) that the arbitration agreement does not exist or is not valid;
- b) that proper notice of the appointment of an arbitrator or of the arbitral proceedings was not given, or the party was otherwise unable to present its case;
- c) that the arbitrators have decided questions not submitted to their decision;
- d) that the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act;
- e) that the arbitrators have decided questions not capable of arbitration; and
- f) that the award is in conflict with public policy.

Furthermore:

- the grounds referred to in subparagraphs (b), (e) and (f) above may be raised by the court hearing the application to set aside the award on its own motion or at the request of the Attorney-General in relation to interests the defense of which is conferred on him by law; and

- in the cases referred to in subparagraphs (c) and (e) above, the setting aside shall affect only the determinations of the award on questions not submitted to the decision of the arbitrators or not capable of arbitration, provided that they can be separated from the remainder.

Pursuant to Article 41.4 SAA, the time limit in which to challenge the award is two months after the notification of the award, or after the notification of the decision on the clarification, complement or correction of it, or after the expiry of the time limit to adopt the clarification, complement or correction.

The average duration of the challenge procedure is six to nine months.

Article 45 SAA provides that an award is enforceable even though an application to set it aside has been made. Hence, challenge proceedings do not stay enforcement proceedings.

Nonetheless, the aforementioned provision allows the party against whom enforcement is sought to apply to the competent court to have the enforcement suspended, provided that security is offered for the amount awarded, plus the damages and losses that could arise from the delay in the enforcement of the award.

The security may be in any of the forms provided in paragraph 3(2) of Article 529 of the Civil Procedure Act: cash, first demand bank guarantee or any other means that, in the opinion of the court, guarantees the immediate availability of the amount of the security.

- (ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

No, the parties cannot waive the right to challenge an arbitration award.

- (iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

No, the awards cannot be appealed.

- (iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

No, courts cannot remand an award to the tribunal.

XIII. Recognition and Enforcement of Awards

- (i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless**

to obtain leave to enforce? Under what circumstances?

The enforcement procedure varies depending on whether the award is domestic or foreign (an award issued outside of Spain is considered a foreign award pursuant to Article 46 SAA).

Domestic awards may be enforced directly by the court of first instance of the place where the award was issued, following the procedure established in the Civil Procedure Act (Articles 517 and seq.).

The procedure established in the Civil Procedure Act (Articles 517 and seq.) may be summarised as follows:

1. the application to enforce an award may be filed before the court only after 20 days have elapsed since the award was notified to the parties; and
2. the court will issue its decision (auto), whereby it will verify that the award complies with all the legal formalities and that the relief sought by the enforcing party complies with the award, ordering enforcement of the award.

The party against whom enforcement is being sought has ten days after receiving the court's decision to oppose the enforcement on the following grounds, established in Articles 556 and 559 of the Civil Procedure Act:

1. the party has already paid or complied with the award;
2. enforcement has been requested after the expiry of the maximum period to enforce the award (five years after the award was notified);
3. formalisation of the parties' agreements and transactions in a public document;
4. lack of capacity or representation of the enforcing party or the party against whom enforcement is sought;
5. radical nullity of the award, if it contains no ruling; and
6. if the award requires to be certified by notary public, lack of authenticity of the latter.

The court enforcing the award is also the competent court to rule on the grounds raised against the enforcement. Filing an objection against the enforcement will not stay the enforcement of the award pursuant to Article 556.2 of the Civil Procedure Act.

Foreign awards are recognised pursuant to the New York Convention. Generally, the competent authority is the superior court of justice of the domicile or residence of the party against which recognition is sought or, on a subsidiary basis, of the place where the award will have effect.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Once the exequatur has been obtained (as per the New York Convention and the procedure set out at Article 54 of the International Legal Cooperation Act 29/2015), it will be enforced by the court of first instance of the place of execution of where the award will deploy its effects, following the procedure described above as per the Civil Procedure Act (Articles 517 and seq.).

(iii) Are conservatory measures available pending enforcement of the award?

The purpose of conservatory measures in Spain is to preserve the rights of the parties while a final decision on the dispute is pending.

After the award has been issued and notified to the parties, conservatory measures already granted will remain in place only for 20 days, after which they shall cease to have effect if enforcement has not been sought.

When seeking enforcement of an award, conservatory measures can be requested to ensure the success of such enforcement (that is, freezing assets or bank accounts).

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Courts generally display a pro arbitration attitude in the enforcement of domestic and foreign awards.

As to the enforcement of foreign awards set aside by the courts at the place of arbitration, Spanish courts have adopted the view that an annulled award cannot be recognised. However some isolated decisions have adopted the French position, favorable to the enforcement of vacated awards (see decision of the First District Court, No. 3, of Rubí, of 11 July 2007, aligning with the decision rendered by the Tribunal de Grande Instance de Paris in the case *Compagnie de Saint Gobain vs. Fertilizer Corporation of India Ltd.*).

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Enforcement takes approximately nine months.

The time limit for seeking the enforcement of an award is five years, pursuant to Article 518 of the Civil Procedure Act.

XIV. Sovereign Immunity

- (i) **Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

Article 2.2 SAA provides that where the arbitration is international and one of the parties is a state or a state-controlled entity, such party shall not invoke the prerogatives of its own law in order to avoid obligations arising from the arbitration agreement.

Further, the state's submission to arbitration is recognised by the European Convention of 1961 and the Washington Convention of 1965, both ratified by Spain.

However, the Spanish Constitutional Court (TC 107/1992) has confirmed that state parties enjoy immunity from enforcement, and that on the basis of article 21.1 of the Judicial Power Organic Law, the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963, the premises of diplomatic missions and consulates and the assets thereof cannot be seized. Moreover, this decision also states that other assets that are out of the missions and consulates enjoy immunity if they are unequivocally affected by the diplomatic and consular relations, including bank accounts, even if they are also used for commercial purposes.

- (ii) **Are there any special rules that apply to the enforcement of an award against a state or state entity?**

See above.

XV. Investment Treaty Arbitration

- (i) **Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

Spain ratified the Washington Convention in 1994.

Spain has also ratified other multilateral treaties regarding the protection of investments, such as the North American Free Trade Agreement, the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in MERCOSUR, the Agreement on Trade Related Investment Measures, the General Agreement on Trade in Services and the Energy Charter Treaty.

(ii) Has your country entered into bilateral investment treaties with other countries?

Spain has signed BITs with 71 countries that provide for investor state arbitration, including a large number with Latin American countries (Argentina, Bolivia, Chile, Colombia, Costa Rica, Cuba, El Salvador, Ecuador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela, amongst others). A list with links to the respective full text can be found at: <http://www.comercio.mityc.es/>

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Albeit not an exhaustive list, the following treatises and materials may be highlighted³:

- Barona Vilar/ Silvia (Coor), *Comentarios a la Ley de Arbitraje: Ley 60/2003, de 23 de diciembre, tras la reforma de la Ley 11/2011, de 20 de mayo de 2011*, Ed. Tirant Lo Blanch, Valencia, 2011.
- Calvo Caravaca, A. L. (Dir), Carrascosa González, J., *Derecho Internacional Privado Vol. I y II*, Ed. Comares, Granada, 2017.
- Cerdón Moreno, F., *Arbitraje y jurisdicción: algunas cuestiones polémicas*, Ed. Civitas, Navarra, 2010.
- Gonzalez-Bueno, C. (ed), *The Spanish Arbitration Act. A Commentary*, Ed. Dykinson, S.L., Madrid, 2016.
- González Soria/ Julio (Coor), *Comentarios a la nueva Ley de Arbitraje: Ley 60/2003, de 23 de diciembre: Actualizada conforme a las modificaciones introducidas por la Ley 11/2011, de 20 de mayo, de reforma de la Ley 60/2003*, Ed. Thomson-Aranzadi, Navarra, 2011.
- Mallandrich Miret, N., *Le regulación del auxilio judicial en el arbitraje tras la reforma de la Ley de arbitraje operada por la Ley 11/2011, de 20 de marzo*, Ed. La Ley, Madrid, 2012.
- Moreno, J. D. (Dir.), *La reforma de la ley de Arbitraje de 2011*, Ed. Wolters Kluwer, Madrid, 2011.

³ Nonetheless, it must be noted that several of the commentaries to the Spanish Arbitration Act are being modified, in accordance with the reforms which were introduced in May 2011.

- Pelayo Jiménez, R., *El concepto de orden público y la anulación de laudos arbitrajes*, Ed. La Ley, Madrid, 2015.
- Prats Albentosa, L. (Coord.), *Comentarios a la Ley de arbitraje*, Ed. La Ley, Madrid, 2013.
- Sospedra Navas, F.J., *Mediación y Arbitraje. Los sistemas alternativos de resolución de conflictos*, Ed. Civitas, Madrid, 2014.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

The following major arbitration events may be highlighted:

- International Congress of the Spanish Arbitration Club, a conference discussing major issues and recent developments on international arbitration, held annually in June;
- CEA-40 events, organised by the under 40 section of the Spanish Arbitration Club in order to share and discuss experiences in the practice of arbitration, periodically, throughout the whole year;
- Moot Madrid, an arbitration competition for law students conducted in Spanish, also held annually, from January to June; and
- IE Law School Executive Education Program “Práctica Arbitral”, a program which fully covers every aspect of institutional arbitration, together with various case studies and the simulation of an arbitral procedure, held annually in Madrid, in May and June.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Yes, we can confirm it has become a real alternative for the parties.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

The enactment of the Civil and Commercial Mediation Act 5/2012 of 26 July has provided a stable framework for mediation to flourish in Spain.

Other forms of ADR methods (i.e. expert determination, dispute boards or other) have been seldom used in Spain traditionally. However, awareness as to the advantages of said ADR methods, particularly in the construction sector, is quickly rising.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

On 30 July 2015, Law 29/2015 on international legal cooperation in civil matters was enacted, which serves as a general framework, on a subsidiary basis to European Law and International Treaties, as well as to specific sectorial legislation. This law is a landmark step in the Spanish procedural framework since, amongst other effects, it derogates the ancient system for the enforcement of foreign resolutions (including foreign awards) in Spain, introducing a more modern regime.

Lastly, it must also be noted that, since 2011, many Spanish institutions (e.g. the Civil and Commercial Court of Arbitration (CIMA), in 2014; the Tribunal Arbitral of Barcelona (TAB), in 2014; the Madrid Court of Arbitration (CAM), in 2015; etc.) have introduced the role of emergency arbitrator –who decide on urgent matters before the arbitration tribunal is constituted– into their rules.