

## SPAIN

### DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

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OF GARRIGUES

GARRIGUES

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The importance of both domestic and international arbitration have increased in Spain since the Arbitration Act<sup>1</sup> ("the SAA") was passed in 2003, and the Spanish courts have generally displayed a pro-arbitration approach. In this regard, it is important to note that arbitration in Spain is mainly based on the principle of party autonomy and thus, the parties may decide how most part of the procedure will be developed. Consequently, the arbitral proceeding is characterized, as per its own nature, for its flexibility and efficiency. However, there are certain mandatory provisions on procedure from which the parties may not deviate (i.e. impair number of arbitrators).

Key places of arbitration in the jurisdiction	The key places of arbitration in Spain are Madrid and Barcelona.
Civil law / Common law environment?	Spain has a civil law system based on comprehensive legal codes and laws rooted in Roman Law.
Confidentiality of arbitrations?	<p>According to Article 24(2) SAA, arbitrators, the parties and the arbitral institutions shall keep confidential any information received in the course of the arbitral proceedings.</p> <p>Although this provision seems to apply only to substantive information received during the proceedings, it is however extended to any kind of document and information provided during the arbitration (that is, the submissions, award, etc.).</p>
Requirement to retain (local) counsel?	No requirements exist.
Ability to present party employee witness testimony?	There are no specific rules either on who can or cannot appear as a witness. Therefore, there is no restriction on the ability to present party employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat?	<p>Pursuant to Article 26 SAA, the parties are free to agree on the place of arbitration.</p> <p>However, arbitrators may, after consulting the parties and unless otherwise agreed by them, meet at any place they deem appropriate for hearing witnesses, experts or the parties, examining or recognising goods, documents or persons.</p>
Availability of interest as a remedy?	Interest is allowed under Spanish law. As to the principal amount, it includes the interest agreed by the parties or, failing such agreement, the legal interest rate published in the Official Gazette (the interest rate provided in the Spanish Act 3/2004, of 29 December, against late payment in commercial transactions, also applies to certain commercial transactions).
Ability to claim for reasonable costs incurred for the arbitration?	Pursuant to Article 37(6) SAA, the award will include the arbitrators' decision on costs related to the arbitration, which will include their own fees and expenses and, where appropriate, the fees and expenses of counsels or

<sup>1</sup> Act 20/2003, of 23 December 2003, on Arbitration (*Ley 20/2003, de 23 de diciembre, de Arbitraje*).

	<p>representatives of the parties, the cost of the service provided by the institution administering the arbitration, as well as any other costs incurred during the arbitration proceedings. Such costs do not usually include travel and/or accommodation arrangements for witnesses or experts.</p> <p>The SAA remains silent regarding the apportionment of arbitration costs. Consequently, the criteria established under the Spanish Civil Procedure Act, which, in general terms, only provides for the recoverability of the costs by a party who is entirely successful (in case of partial success, each party bears its own expenses and the common costs are split), does not always apply.</p> <p>In order to decide on such costs, the arbitrators will take into account the parties' agreement; but if such agreement does not exist, 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.</p>
Restrictions regarding contingency fee arrangements and/or third-party funding?	<p>No restrictions regarding contingency fee arrangements exist. Contingency and success fees were historically banned, but were recently accepted as a pro-competitive measure (the prohibition of contingency fee arrangements under Article 16 of the Code of Conduct of Spanish Advocates was suspended by the agreements passed by the Plenary of the General Council of Spanish Advocates on 10 December 2002 and 21 July 2010).</p> <p>The SAA does not govern third-party funding. Although in practice this type of funding is being used (particularly after the prohibition of contingency fees was lifted), there is still scope for improvement and development.</p>
Party to the New York Convention?	Spain is a Contracting State to the New York Convention since 12 May 1977 and no reservations or declarations were made. The Convention entered into force in Spain on 10 August 1977.
Other key points to note	φ
<a href="#">WJP Civil Justice score (2017-2018)</a>	0.70 (23 <sup>rd</sup> position in the global ranking).

## ARBITRATION PRACTITIONER SUMMARY

The SAA, amended in 2011, was drafted following the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), adopted on 21 June 1985, and only a few modifications were introduced thereto. It applies to both domestic and international arbitration when Spain is the place of arbitration, and certain provisions apply even when the place is abroad.

Date of arbitration law?	23 December 2003, last amended by Law 11/2011, of 20 May 2011.
UNCITRAL Model Law? If so, any key changes thereto?	<p>The SAA is based on the UNCITRAL Model Law. Nevertheless, the SAA presents some differences:</p> <ul style="list-style-type: none"> <li>- any dispute over matters that can be freely and legally disposed of by the parties are arbitrable (Article 2(1) SAA);</li> <li>- in international arbitration, States or State-controlled entities cannot invoke prerogatives provided by their national law to circumvent obligations deriving from the arbitral agreement (Article 2(2) SAA);</li> <li>- arbitral proceedings are considered international also if the legal relationship from which the dispute stems has an impact on international trade (Article 3(1c) SAA);</li> <li>- in international arbitration, the arbitration agreement is valid if they fulfil the requirements set forth in any of the following rules are met: the legal rules chosen by the parties, the rules applicable to the merits of the dispute or the SAA (Article 9(6) SAA);</li> <li>- capital companies may subject their internal disputes, including the challenge of corporate resolutions, to arbitration (Article 11 bis SAA);</li> <li>- awards setting aside a registrable agreement must be entered in the Mercantile Registry (Article 11 ter SAA);</li> <li>- the default rule requires a single arbitrator to be appointed (rather than three) (Article 12 SAA);</li> <li>- a specific procedure for the appointment of arbitrators in multi-party arbitrations is foreseen (Article 15(2b) SAA);</li> <li>- if arbitrators do not notify the acceptance of their appointment within the agreed period (default rule of 15 days from the nomination) the appointment shall be deemed to have been declined (Article 16 SAA);</li> <li>- arbitrators may incur liability in the event of bad faith, gross recklessness or wilful act (Article 21 SAA); and</li> <li>- arbitral proceedings are presumed confidential (Article 24(2) SAA).</li> </ul>
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling	Since 25 November 2010, the Court of First Instance, No. 101 of Madrid ( <i>Juzgado de Primera Instancia No. 101 de Madrid</i> ) was assigned exclusive jurisdiction over arbitration matters. This is

<p>arbitration-related matters?</p>	<p>the first, and so far only, specialized court in Spain for arbitration-related matters.</p> <p>The success of this specialized court, especially in terms of length of the proceedings, has led to several requests for more of these courts from different legal practitioners. Therefore, it is not unlikely that more courts specialized in arbitration are to be created in Madrid; as well as in other key seats in Spain, such as Barcelona.</p> <p>In fact, there is already an initiative to centralize the enforcement of arbitral awards requested all over Catalonia in a specialized court located in Barcelona, which is pending for approval from the Spanish General Council of the Judiciary.</p>
<p>Availability of <i>ex parte</i> pre-arbitration interim measures?</p>	<p>Article 11(3) SAA provides that the arbitration agreement will not prevent any of the parties, prior to or during the arbitral proceedings, from requesting for interim measures to a court, or the court from granting such measures.</p>
<p>Courts' attitude towards the competence-competence principle?</p>	<p>The <i>Kompetenz-Kompetenz</i> principle is enshrined in Article 22 SAA (as expressly admitted in its recitals), pursuant to which arbitrators can decide on their own jurisdiction, either through a partial or final award.</p> <p>Such principle is generally respected by Spanish courts, even when the validity or the existence of the arbitration agreement itself is challenged (see decisions of the Supreme Court n° 409/2017, of 27 June 2017 (RJ 2017\3021)<sup>2</sup>; and n° 776/2007, of 9 July 2007 (RJ 2007\4960)).</p> <p>Spanish courts may only review the decision of an arbitral tribunal on its own jurisdiction within the context of a request for set aside or a request for recognition and enforcement of an award deciding on the jurisdiction of the tribunal.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>In accordance with the criteria for the recognition and enforcement of awards under Article V of the New York Convention, Article 41(1) SAA states the grounds for the annulment of awards, establishing that an award may be set aside only if the party against whom it is requested evidences that:</p> <ul style="list-style-type: none"> <li>a) The arbitration agreement does not exist or is not valid;</li> <li>b) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;</li> <li>c) The award contains decisions on matters not submitted to arbitration;</li> <li>d) The appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the</li> </ul>

<sup>2</sup> In this decision, the Supreme Court admitted that, in case the jurisdiction of a court is challenged due to the existence of an arbitration agreement, such court may fully examine the validity and effectiveness of the arbitration agreement.

	<p>parties, unless such agreement was in conflict with an imperative provision of the SAA, or, failing such agreement, was not in accordance with such act;</p> <p>e) The subject-matter of the dispute cannot be submitted to arbitration;</p> <p>f) That the award is contrary to Spanish public policy.</p> <p>In conclusion, all the grounds for annulment of awards provided for by the SAA are based on the standard set-out for the recognition and enforcement of awards under the New York Convention.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>There is no express legal provision regarding the enforcement of annulled foreign awards in Spanish Law.</p> <p>However, the granting of <i>exequatur</i> for foreign awards is governed by the New York Convention. Pursuant to Article V(1e) of the Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party demonstrates that the award has been set aside by a competent authority in the country where the award was rendered.</p> <p>In that line of reasoning, Spanish courts have generally adopted the view that an annulled award cannot be recognized.</p> <p>Notwithstanding with the above, it is important to note that the European Convention on International Commercial Arbitration concluded in Geneva on 21 April 1961 ("the Geneva Convention"), ratified by Spain in 1975 provides, to a certain extent, a more favourable regime regarding the recognition and enforcement of arbitral awards than the one established in the New York Convention.</p> <p>Concretely, with regard to the recognition and enforcement of foreign awards that have been annulled at the seat of arbitration, the Geneva Convention provides that their recognition and enforcement may only be refused when their annulment was based on any of the grounds set out in its Article IX (incapacity of the parties or invalidity of the arbitral convention, lack of due process, abuse of powers by arbitrators, and when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the Convention). Therefore, if the award was annulled on a different ground, the Convention does not prohibit its recognition or enforcement.</p> <p>However, the scope of application of the Geneva Convention is more limited than the New York Convention, since it is only applicable to commercial matters, and only if the parties are located in different contracting States.</p>
<p>Other key points to note?</p>	<p>φ</p>

## JURISDICTION DETAILED ANALYSIS

### 1. Legal Framework of the jurisdiction

#### 1.1 Is the arbitration law based on the UNCITRAL Model Law?

##### 1.1.1 If yes, what key modifications, if any, have been made to it?

The current SAA is based on the UNCITRAL Model Law on International Commercial Arbitration, adopted on 21 June 1985.

However, the SAA presents the following differences:

- any disputes over matters that can be freely and legally disposed of by the parties are arbitrable (Article 2(1) SAA);
- in international arbitration, States or State-controlled entities cannot invoke prerogatives of their national law to circumvent obligations deriving from the arbitral agreement (Article 2(2) SAA);
- arbitral proceedings are considered international also if the legal relationship from which the dispute stems has an impact on international trade (Article 3(1c) SAA);
- 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 are met (Article 9(6) SAA);
- capital companies may subject their intra-company disputes, including the challenge of corporate resolutions, to arbitration (Article 11 bis SAA);
- awards setting aside a registrable agreement must be entered in the Mercantile Registry (Article 11 ter SAA); the default rule is a single arbitrator to be appointed (Article 12 SAA);
- a specific procedure for the appointment of arbitrators in the case of several parties is foreseen (Article 15(2b) SAA);
- if arbitrators do not notify the acceptance of their appointment within the agreed period (default rule of 15 days from the nomination) it will be understood to be declined (Article 16 SAA);
- arbitrators may incur liability in the event of bad faith, gross recklessness or wilful act (Article 21 SAA); and
- arbitral proceedings are presumed confidential (Article 24(2) SAA).

#### 1.2 When was the arbitration law last revised?

The SAA was last amended by Law 11/2011, of 20 May 2011.

Even though Law 29/2015, of 30 July 2015, on International Legal Cooperation did not amend the SAA, it amended the legal regime for the recognition and enforcement of foreign decisions, which applies when the foreign country where the decision was rendered is not part to the New York Convention.

### 2. The arbitration agreement

#### 2.1 How do courts in the jurisdiction determine the law governing the arbitration agreement?

As per Article 34 SAA, arbitral tribunals must decide disputes in accordance with the law or rules chosen by the parties. Any designation of the law or legal system of a particular State is deemed to refer directly to the substantive laws of that respective state.

In international arbitration, in the absence of an agreement between the parties, the arbitral tribunal may directly – without resorting to conflict of law rules – apply the law that it considers the most appropriate.

Arbitrators may decide the case *ex aequo et bono* (i.e., according to what is fair and equitable) only if expressly authorised to do so by the parties.

If the arbitration agreement is included in a broader contract, it will be possible to apply the law applicable to the contract to the arbitration agreement itself. This remains without prejudice to the principle of separability that will be explained below.

At any rate, regardless of the substantive law chosen by the parties, if the seat of arbitration is Spain, mandatory laws affecting Spanish public policy may not be infringed. Otherwise, the award may be annulled.

## **2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which is set forth?**

Yes. The principle of separability or autonomy of the arbitration clause is enshrined in Article 22(1) SAA, which establishes that an arbitration clause that forms part of a broader contract will be considered as an independent agreement from the other terms thereof.

This means that the invalidity of the underlying contract will not automatically extend to the arbitration agreement contained therein, unless it is proven that the arbitration agreement itself is vitiated by fraud, or initial lack of consent.

## **2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?**

Regarding the formal requirements of an arbitration agreement, the SAA follows Article 7 of the UNCITRAL Model Law and provides in Article 9(3) SAA 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 considered to be met when the arbitration agreement is accessible for its subsequent consultation in an electronic, optical or any other format.

Article 9(5) SAA establishes that there is an arbitration agreement when, in an exchange of statements of claim and defence, the existence of an arbitration agreement is alleged by one party and not denied by the other.

Lastly, as regards of 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 any of the following: the rules of law chosen by the parties to govern the arbitration agreement, the rules of law applicable to the merits of the dispute, or the SAA.

## **2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?**

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 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 active role in the transaction) is generally followed. In any event, according to Spanish case law, third parties' tacit acceptance of the arbitration clause may only be deduced from unequivocal and conclusive facts of the case. Thus, extending arbitration clauses to parent companies is certainly not automatic, but based on fact-intensive tests. Contrary to the extension of the arbitration clause to non-signatories, we refer to the decision of the Supreme Court, Civil Section, of 9 July 2007 and, in favour of the

extension of the arbitration clause to non-signatories, we refer to the decisions of the Supreme Court, Civil Section, of 26 May 2005 and the *La Coruña* Court of Appeal, 4th Section, of 22 June 2005.

## **2.5 Are there restrictions to arbitrability? In the affirmative:**

### **2.5.1 Do these restrictions relate to specific domains?**

The SAA favours arbitrability. In fact, pursuant to Article 2 SAA, it has been established that any matters that can be freely and legally disposed of by the parties can be submitted to arbitration.

Notwithstanding with it, matters related to criminal law or constitutional law, as well as those related to civil status, nationality, family or inheritance, cannot be resolved by arbitration.

Furthermore, according to Article 1(4) SAA, labour arbitration is expressly excluded from the scope of the SAA.

Civil and corporate matters can be arbitrated. In fact, submitting intra-company disputes to arbitration is expressly recognised in Article 11 bis SAA.

Likewise, intellectual and industrial property issues, as well as disputes related to competition law, are arbitrable. However, there are some restrictions over these matters. For instance, regarding trademark registration, disputes related to the existence of formal defects or to absolute prohibitions to register are not arbitrable; with regard to patents, only disputes between two private parties are arbitrable; and with reference to competition law, only disputes over civil aspects and compensations are arbitrable.

### **2.5.2 Do these restrictions relate to specific persons?**

Arbitration regarding consumers falls under Law 26/1984, of 19 July, on the General Defence of Consumers and Users. In such cases, the SAA will only apply to those issues that are not addressed in Law 26/1984.

Spanish courts have consistently held that when deciding on an action to set aside, they are not entitled to review the merits of the case neither to correct hypothetical mistakes from arbitrators. Accordingly, the courts have interpreted the concept of “*public policy*” very restrictively. Despite this consolidated case law, in 2015, the Superior Court of Justice of Madrid set aside several awards reaching its decisions by reviewing the merits of the case based on a broader interpretation of “*public policy*”, specifically in the so called “*economic public order*” which, according to the Superior Court of Justice of Madrid, includes certain basic rules and irrevocable principles of contract law in cases of special gravity or singularly in need of protection, being the good faith principle the paradigm of the principles integrating the “*economic public policy*”.

Notwithstanding the above, these decisions do not imply a change in the courts consistent trend to restrictively interpret “*public policy*” but an exception in specific cases with certain common characteristics *i.e.*: banking disputes concerning the validity of interest rate swap contracts and concerning consumers and small and medium-sized business that were not duly informed of the mechanics of the swaps at stake. In fact, in coetaneous cases of actions to set aside an award, the same Court confirmed its traditional view: “*the concept of public policy cannot turn into a backdoor to allow control of the decision granted by the arbitrators*” (Judgment of the Superior Court of Justice of Madrid of 21 April 2015).

## **3. Intervention of domestic courts**

### **3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?**

#### **3.1.1 If the place of the arbitration is inside of the jurisdiction?**

Pursuant to Article 11(1) SAA, the arbitration agreement prevents courts from hearing disputes submitted to arbitration, where invoked by the interested party by a jurisdictional objection (*declinatoria*, which is comparable to a motion to stay the proceedings).

The defendant must file such objection before the court within the first 10 days of those provided to file the answer to the claim.

In this regard, it is relevant to note that the decisions of Spanish courts are consistent and clear with regard to the court not being able to assess, of its own motion, the submission to arbitration. Therefore, it is necessarily the interested party who has to file the jurisdiction objection.

### **3.1.2 If the place of the arbitration is outside of the jurisdiction?**

According to Article 1(2) SAA, although the scope of application of the Act is limited to the arbitration proceedings conducted in Spain, rules contained in certain articles, including those contained in Article 11, will be applicable even when the place of arbitration is outside Spain.

Therefore, Spanish courts will also stay litigation when there is a valid arbitration agreement, even if the place of arbitration is outside the jurisdiction, provided that the interested party files a jurisdictional objection (*declinatoria*).

### **3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?**

Arbitrators cannot enjoin courts to stay litigation proceedings. As it has been explained in the question above, Article 11(1) SAA provides that it is the interested party who has to file a jurisdictional objection (*declinatoria*) in order to prevent courts from hearing the dispute.

### **3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)**

As per Articles 1(2) and 8(3), (4) and (6) SAA, the Spanish courts will intervene in arbitrations seated outside of Spain on the following grounds:

- the adoption of interim measures when the award is to be enforced in Spain, or when such measures are to carry legal consequences in Spain; irrespective of whether they are requested by the interested party or by the arbitrators; and
- the recognition and enforcement of foreign awards in Spain.

## **4. The conduct of the proceedings**

### **4.1 Can parties retain outside counsel or be self-represented?**

The SAA remains silent regarding whether an obligation or not from a party exists to be represented by a counsel within the arbitration proceedings. Therefore, parties may retain outside counsels or be self-represented.

However, pursuant to Article 539(1) of the Spanish Civil Procedure Act, the involvement of counsel and court representative (in Spanish, *procurador*) shall be required for enforcement actions arising from arbitration awards whenever the amount for which the enforcement is being ordered exceeds 2,000 euros.

In such cases, outside-counsels will have to meet the special requirements applicable to them in order to be entitled 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 practise 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.

**4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?**

According 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.

However, an arbitrator may only be challenged where there are grounded doubts regarding his/her impartiality or independence (Article 17(3) SAA).

In this sense, Spanish courts tend to seek guidance from the IBA Guidelines on Conflicts of Interest, as well as the recommendations published by the Spanish Arbitration Club (*Club Español del Arbitraje*).

Notwithstanding with the above, it is relevant to note that, 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.

**4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?**

The appointment of arbitrators is regulated under Article 15 SAA.

Pursuant to this article, the parties may freely agree the procedure for the appointment of arbitrators, as long as the principle of equality is honoured.

Failing such agreement, the following rules will apply:

- a) In arbitration with a sole arbitrator, he/she will be appointed by the competent court upon request of the interested party.
- b) In arbitration with three arbitrators, each party will appoint one arbitrator, and the two arbitrators appointed will appoint the third arbitrator, who will chair the proceedings. If a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of the latest acceptance, the appointment will be made by the court upon request of the interested party.

Where more than one claimant or respondent is involved, the latter will appoint one arbitrator and the former another. If claimants or respondents cannot agree on the appointment, all arbitrators will be appointed by the court at the request of the interested party.

- c) In arbitration with more than three arbitrators, they will be appointed by the competent court upon request of the interested party.

Where the appointment of arbitrators under the procedure agreed to by the parties is not possible, any party may apply to the competent court to appoint the arbitrators or, if appropriate, to adopt the necessary measures therefore. The court may dismiss a request for appointment of arbitrators only when, in light of the documents produced, it deems that no arbitration agreement exists.

Where arbitrators are to be appointed by the court, it will draw up a list of three candidates for each arbitrator to be appointed. When drawing up the list, the court will take into consideration any requirements agreed by the parties, and will take the necessary measures to ensure their independence and impartiality. Where a sole or a third arbitrator is to be appointed, the court will also have regard to the advisability of appointing an arbitrator of a nationality other than those of the parties and, as appropriate, of those of the arbitrators already appointed, in light of the circumstances prevailing. The arbitrators are subsequently appointed by lot.

#### **4.4 Do courts have the power to issue interim measures in connection with arbitrations?**

##### **4.4.1 If so, are they willing to consider *ex parte* requests?**

Courts have the power to issue interim measures in connection with arbitrations whenever any of the parties request their issuance, even prior to the starting of the arbitration proceedings.

In fact, Article 11(3) SAA states that the arbitration agreement will not prevent a party, prior to or during the arbitral proceedings, from applying to a court for interim measures, or the court from granting such measures.

Concretely, as stated under Article 8(3) SAA, competence to adopt interim measures will be incumbent upon the court with jurisdiction in the place where the award is to be enforced and, failing that, upon the court in the place where the measures are to carry legal consequences.

#### **4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?**

##### **4.5.1 Does it provide for the confidentiality of arbitration proceedings?**

As stated under Article 24(2) SAA, arbitrators, parties and arbitral institutions, if appropriate, are bound to honour the confidentiality of the information received on the occasion of arbitration.

##### **4.5.2 Does it regulate the length of arbitration proceedings**

Article 37(2) SAA provides that, unless otherwise agreed to by the parties, arbitrators shall deliver the award within 6 months of the date of submission of the defence or the expiration of the deadline therefor.

##### **4.5.3 Does it regulate the place where hearings and/or meetings may be held?**

The parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings (Article 25(1) SAA).

In particular, according to Article 26 SAA, the parties are free to agree on the place of arbitration. Notwithstanding, the arbitrators may, in consultation with the parties and unless otherwise agreed by them, meet at any place they deem appropriate for hearing witnesses, experts or the parties, or recognising goods, documents or persons. Arbitrators may hold consultation meetings at any place they deem appropriate.

##### **4.5.4 Does it allow for arbitrators to issue interim measures?**

Pursuant to Article 23(1) SAA, once the arbitration proceedings have started, except otherwise agreed by the parties, the arbitrators may, at the request of a party, grant any interim measures deemed necessary or appropriate with respect to the subject-matter of the dispute.

##### **4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?**

As stated under Article 25 SAA, the parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings, although subject to certain provisions established under Article 24 SAA (*i.e.*, that the parties will be treated with equality, that each party will be given full opportunity to present his case and that the arbitrators, parties and arbitral institutions, as appropriate, are bound to honour the confidentiality of the information received on the occasion of arbitration).

However, in the absence of such agreement between the parties, the arbitrators may conduct the proceedings as they deem appropriate. This faculty includes the power to decide over the admissibility, relevance, materiality and usefulness of the evidence, as well as over its taking and evaluation.

#### **4.5.6 Does it make it mandatory to hold a hearing?**

In Spain, it is not mandatory to hold a hearing; the proceedings may be conducted in writing only.

In fact, pursuant to Article 30 SAA, except otherwise agreed by the parties, the arbitrators will decide whether it is necessary to hold a hearing for the presentation of opening statements, evidence and/or closing statements, or whether the proceedings will exclusively be conducted in writing.

#### **4.5.7 Does it prescribe principles governing the awarding of interest?**

As indicated in Section I above, arbitrators may award interest. However, the SAA does not prescribe principles governing the awarding of interest.

#### **4.5.8 Does it prescribe principles governing the allocation of arbitration costs?**

The SAA does not prescribe principles governing the allocation of arbitration costs.

Regarding arbitration costs, the Act only establishes that the award will include the arbitrators' decision on costs, which will include their own fees and expenses and, where appropriate, the fees and expenses of counsels or representatives of the parties, the cost of the service provided by the institution administering the arbitration, as well as any other costs incurred during the arbitration proceeding (Article 37(6) SAA).

However, as explained in Section I above, arbitrators usually take into consideration not only the outcome of the arbitration ("loser pay" rule), but also the behaviour of the parties during the proceedings and if there has been frivolous disregard to the other party's rights.

### **4.6 Liability**

#### **4.6.1 Do arbitrators benefit from immunity to civil liability?**

Arbitrators are not immune from liability (nor are arbitral institutions).

In fact, Article 21 SAA states that the acceptance of the arbitration proceedings by the arbitrators requires them to comply with their mission in good faith; so that if they fail to do so, they will be liable for any damages they cause resulting from bad faith, recklessness or *mens rea*.

#### **4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?**

Arbitrators, as well as arbitral institutions, as the case may be, may incur, not only in civil, but also in criminal liability, again in those cases where damages were intentionally caused or when they acted with gross negligence.

In arbitrations held before an arbitral institution, the injured party may file suit directly against it, irrespective of any action for indemnity lodged against the arbitrators.

With regard to lawyers intervening in the arbitral proceedings, they may also incur in criminal liability if they commit certain crimes regulated under the Spanish Criminal Code. For instance, the destruction, disablement or hiding of documents received as a lawyer (article 465 of the Criminal Code); the defence of two parties with opposing interests in the same matter or the causing of damage to the interests of his/her client by actions or omissions (article 467 of the Criminal Code).

## **5. The award**

### **5.1 Can parties waive the requirements for an award to provide reasons?**

Pursuant to Article 37(4) SAA, the award will state the grounds upon which it is based, except for awards delivered on the terms agreed by the parties, when they have decided to settle the dispute wholly or

partially.

Consequently, the parties cannot waive the requirements for an award to provide reasons, except in the case of settlement of the dispute by agreement.

### **5.2 Can parties waive the right to seek the annulment of the award?**

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

### **5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at the seat of arbitration?**

There are no atypical mandatory requirements as per SAA.

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

- a) it shall be rendered within 6 months from the date when the statement of defence was or should have been filed, unless otherwise agreed by the parties (this period may be extended by the arbitrators for no more than 2 months by means of a reasoned decision, unless the parties agreed otherwise);
- b) 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;
- c) it shall be signed by the arbitrators, who may manifest their favourable 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);
- d) it shall state the reasons upon which it is based, unless it is an award by consent of the parties; and
- e) it shall state its date and place of arbitration, as well as the allocation of costs.

### **5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?**

In Spain, the awards cannot be appealed.

### **5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign?**

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).

- In relation to the enforcement of domestic awards, Article 44 SAA refers to the Civil Procedure Act, save certain provisions regarding the stay, dismissal and restart of the proceedings.

Consequently, domestic awards may be enforced directly by the First District Court of the place where the award was issued, following the procedure established in the Civil Procedure Act (Articles 517 and seq.), which may be summarised as follows:

- a) the application to enforce an award may be filed before the court only after 20 days have expired since the award was notified to the parties; and
- b) 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 10 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:

- a) the party has already paid or complied with the award;
- b) enforcement has been requested after the expiry of the maximum period to enforce the award (five years after the award was notified);
- c) formalisation of the parties' agreements and transactions in a public document;
- d) lack of capacity or representation of the enforcing party or the party against whom enforcement is sought;
- e) radical nullity of the award, if it contains no ruling; and
- f) if the award has not been notarized, 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.

- With regard to foreign awards, Article 46 SAA provides that they will be recognised pursuant to the New York Convention, save any other most favourable international convention.

The competent authority for the recognition of a foreign award is the Civil and Criminal Chambers of the High Courts of Justice of the region where the party against whom recognition is requested or who is affected by such award or decision has his place of business or residence (Article 8(6) SAA). The enforcement procedure of foreign award will be the same as for domestic awards above explained.

### **5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?**

Article 45 SAA provides that an award is enforceable even if it is being challenged. Hence, annulment proceedings do not automatically stay the exercise of the right to enforce an award.

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.

### **5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?**

There is no express legal provision regarding the enforcement of annulled foreign awards in Spanish Law.

However, as it was explained in Section II.5.E above, *exequaturs* for foreign awards are governed by the New York Convention. Pursuant to Article V(1e) of the Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party proves that the award has been set aside by a competent authority of the country in which the award was made.

Spanish courts have adopted the view that an annulled award cannot be recognised. However, some isolated decisions have been favourable to the enforcement of vacated awards, as it was explained in Section I above.

### **5.8 Are foreign awards readily enforceable in practice?**

Once a foreign award has been recognized in Spain pursuant to the New York Convention, enforcement may take approximately nine months.

## **6. Funding arrangements**

### **6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?**

No restrictions regarding contingency or alternative fee arrangements exist. Contingency and success fees were historically banned, but were recently accepted as a pro-competitive measure (the prohibition of contingency fee arrangements under Article 16 of the Code of Conduct of Spanish Advocates was suspended by the agreements passed by the Plenary of the General Council of Spanish Advocates on 10 December 2002 and 21 July 2010).

The SAA does not govern third-party funding. Although in practice this type of funding is being used (particularly after the prohibition of contingency fees was lifted), there is still scope for improvement and development.

## **7. Is there likely to be any significant reform of the arbitration law in the near future?**

There is not likely to be any significant amendment of the SAA.