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## Spain

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### A. Legislation and rules

#### A.1 Legislation

International arbitration in Spain continues to be governed by Act 60/2003 of 23 December on Arbitration (the “Arbitration Act 2003”), to which no legislative amendment was made during 2017.

The Arbitration Act 2003 was significantly amended in 2011 (through Act 11/2011 of 20 May 2011). The most significant changes were related to the jurisdiction of the High Courts of Justice (*Tribunales Superiores de Justicia*) for the judicial appointment and removal of arbitrators, the annulment of arbitral awards and the recognition of foreign arbitral awards. It is also noteworthy that the use of arbitration is specifically admitted for solving disputes that arise within corporations (*arbitraje estatutario*). The changes also include a heterogeneous set of reforms that principally affect arbitrators, institutional arbitration, awards and procedures. The aim of these changes was to increase arbitration’s effectiveness, thereby enhancing Spain as a venue for international arbitration.

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## A.2 Institutions, rules and infrastructure

On 18 December 2017, three Spanish arbitration institutions (*Corte Española de Arbitraje*, *Corte de Arbitraje de Madrid* and *Corte Civil y Mercantil de Arbitraje*) signed a Memorandum of Understanding for the unification of the three arbitration courts with the aim of creating a single institution for the administration of international arbitrations in Spain.

## B. Cases

### B.1 Annulment of arbitral awards

#### B.1.1 Lack of independence and impartiality of the arbitral court

Three judgments<sup>6</sup> issued by the Madrid High Court of Justice set aside awards due to the lack of independence and impartiality of the arbitral court. In these three cases, the same arbitral court elaborated and provided arbitral forms orientated to companies in order to appear as claimants in the arbitral proceedings. The three judgments addressed the fact that if the arbitral court is the one that drafts (or collaborates in drafting) the claim to be presented by a party, it means that it is initially taking a side in favor of one of the parties, facilitating the exercise of its actions and indicating the way to submit their claims. The third judgment highlights the principle of equality by stating that it is not only necessary that the arbitrators remain independent and impartial during the whole procedure, but this must also apply to the arbitral court.

#### B.1.2 Lack of notification of the proceedings

Several judgments<sup>7</sup> issued by the Madrid High Court of Justice set aside awards because one of the parties was not properly notified of

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<sup>6</sup> 73/2016 dated 21 February 2017, Roj: STSJM 2185/2017; 77/2016 dated 26 April 2017, Roj: STSJM 4571/2017; and 63/2016 dated 4 May 2017, Roj: STSJM 4765/2017.

<sup>7</sup> 59/2016 dated 17 January 2017, Roj: STSJM 99/2017; 42/2016 dated 24 January 2017, Roj: STSJM 2503/2017; 49/2016 dated 31 January 2017, Roj: STSJM 1139/2017; 66/2016 dated 6 March 2017, Roj: STSJM 2507/2017; 12/2017 dated 26



the commencement of the arbitration or the appointment of the arbitrators. Therefore, the High Court of Madrid found that the party was unable to present its case in a proper manner as required by Article 41.1.b) of the Arbitration Act 2003. In this regard, the Court reasoned that it is evident that the grant for setting aside the award was justified under Article 41.1.b) since the award was issued without one of the parties being able to assert their rights in the arbitration.

### B.1.3 An arbitral award cannot be rendered by only two arbitrators

Several judgments<sup>8</sup> issued by the Madrid High Court of Justice, and a judgment<sup>9</sup> issued by the País Vasco High Court of Justice set aside awards due to a breach of Article 12 of the Arbitration Act 2003, which establishes that the parties are free to determine the number of arbitrators subject only to appointing an odd number thereof. In these cases, the awards were rendered by only two arbitrators. The High Court of País Vasco stated that an award cannot be valid when it has been rendered by just two arbitrators. The second judgment concluded that an arbitral clause which does not stipulate an odd number is null and void. The courts deemed these circumstances as conflicting with the public policy which is included in Article 40.1.f) of the Arbitration Act 2003.

### B.1.4 Interpretation cannot change the grounds of the original award

A judgment issued by the High Court of Justice of Madrid<sup>10</sup> set aside the interpretation of an award issued by a sole arbitrator after a request for such interpretation was made by one of the parties. The High Court of Madrid considered that the sole arbitrator did not limit himself to the interpretation of the award, but changed the grounds on which the award relied. The interpretation of the award did not clarify

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April 2017, Roj: STSJM 4907/2017; and 51/2016 dated 28 June 2017, Roj: STSJM 8066/2017.

<sup>8</sup> 75/2016 dated 4 April 2017, Roj: STSJ M 3911/2017; 34/2017 dated 11 June 2017, Roj: STSJ M 8080/2017; and 39/2017 dated 26 September 2017, Roj: STSJ M 9472/2017.

<sup>9</sup> 14/2016 dated 18 April 2017, Roj: STSJ PV 405/2014.

<sup>10</sup> 46/2016 dated 18 January 2017, Roj: STSJ M 104/2017.

any doubtful section of the award nor correct any material errors, but changed the legal grounds by which the sole arbitrator ordered the payment of the arbitration costs to a party. The High Court of Madrid stated that the interpretation of the award had to be set aside due to a breach of the public policy included in Article 41.1.f) of the Arbitration Act 2003.

#### B.1.5 Improper notice of the identity of the arbitrators

A judgment of the High Court of Justice of Madrid,<sup>11</sup> dated 12 September 2017, set aside an award due to a breach of the right of self-defense, which is against Article 41.1.b) of the Arbitration Act 2003. The situation of was caused by the party not having been notified during the arbitration of the identity of the arbitrators by the Royal Spanish Football Federation. Hence, the party was not able to verify the suitability of the members of the arbitral tribunal.

#### B.2 Recognition and enforcement of foreign arbitral awards

Title IX of the Arbitration Act 2003 regulates the *exequatur* procedure of foreign arbitral awards. This title, which is made up of a single article, provides that the *exequatur* proceeding in Spain will be governed by the New York Convention and, when applicable, by other more favorable international conventions.

Pursuant to the Preamble of the Arbitration Act 2003, the New York Convention applies to both commercial and non-commercial disputes, regardless of whether or not the award was rendered in a state party to the Convention.

More importantly, the Arbitration Act 2003 draws attention to the fact that there are no domestic rules relating to the *exequatur* of foreign arbitral awards in Spain. Thus, as established by the New York Convention, arbitral awards issued in other states are binding on the Spanish authorities; and their enforcement shall be ensured by the corresponding competent courts.

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<sup>11</sup> Roj: STSJ M 9469/2017.



However, the *exequatur* of foreign awards is subject to the following procedural rules:

- (a) The party applying for recognition and enforcement shall, at the time of the application, supply the duly authenticated original award or a duly certified copy.
- (b) That party shall also provide the original agreement in writing under which the parties submit to arbitration the dispute in hand or a duly certified copy.

In addition, the competent court, if the award or agreement is not drafted in Spanish or any of the other official languages of Spain, may request a translation of these documents into such language(s). The translation(s) must be certified by an official or sworn translator or by a diplomatic or consular agent.

Although foreign arbitration awards are deemed binding, under certain specified circumstances, their *exequatur* may be refused by Spanish judges.

The following reasons can be validly used by Spanish courts:

- (a) The parties to the agreement were, under the law applicable to them, under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication on this, under the law of the country where the award was made.
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.
- (c) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those

not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was issued.

These circumstances shall be proved by the party against whom the recognition and enforcement is invoked.

Finally, the competent Spanish court may also refuse to recognize and enforce an arbitral award if the subject matter is not capable of settlement by arbitration under Spanish Law, or the recognition or enforcement of the award would be contrary to the public policy of Spain.

To assess how Spanish courts address this issue, let us analyze the most recent decisions of the two main High Courts of Justice of Spain: Catalonia and Madrid.

#### B.2.1 Court decisions based on the granting of exequatur due to the fulfillment of all the requirements to that effect

The High Court of Catalonia<sup>12</sup> decided to grant recognition and enforcement of an arbitral award delivered in the United Arab Emirates. In this case, the Court found that the award met all the requirements of Article IV of the New York Convention. The arbitral award issued by the arbitrators was duly authenticated before the competent authorities of the United Arab Emirates, as well as by the Chancellor of the Embassy of Spain in Abu Dhabi, in accordance with

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<sup>12</sup> Decision 21/2017 dated 22 February 2017, Roj: ATSJ CAT 55/2017.



the Hague Convention of 5 October 1961. The requirement regarding the necessary sworn translation of the arbitration award was also met. A duly authenticated copy of the existing arbitration agreement was provided. Finally, regarding the substantive reasons that must be fulfilled to proceed to the recognition of a foreign award (that is, the subject matter could be decided through arbitration, and it is not contrary to the Spanish public order), the High Court of Catalonia pointed to the fact that the party arguing against the recognition of the award did not even allege that the award was contrary to the Spanish public order or that the subject matter could not be decided through arbitration.

The High Court of Madrid<sup>13</sup> decided to grant the recognition and enforcement of a foreign award against the Republic of Equatorial Guinea. The government of Equatorial Guinea alleged the doctrine and rules of state immunity, that prevent a state from being sued in the courts of other states. Regarding the state immunity alleged by the Republic of Equatorial Guinea, the High Court of Madrid held that when a state undertakes to submit to arbitration a given matter or any differences which arise from a relationship, state immunity does not apply.

The Republic of Equatorial Guinea alleged as well that the arbitral award was not final. Regarding this, the High Court of Madrid ruled that a “final award” cannot be equated with a “final court judgment.” That being said, only when an award is annulled or suspended by a competent authority of the state in which it has been rendered shall it not be recognized and enforced in Spain.

Lastly, the Republic of Equatorial Guinea maintained that the arbitral tribunal was not impartial. The High Court of Madrid construed that the reason alleged by the Republic of Equatorial Guinea could not be accepted since the partiality of the arbitrator or tribunal was not raised within the time established for this purpose by the ICC Rules. Therefore, the Court found that the party waived this right.

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<sup>13</sup> Decision 11/2016 dated 28 September 2016, Roj: ATSJ M 424/2016.

The High Court of Catalonia<sup>14</sup> decided to grant recognition and enforcement of an arbitral award rendered in Milan. In that case, the party against whom the recognition and enforcement was requested alleged, as an objection to the recognition of the award, the exception of *res judicata*, since the other party had previously requested the same recognition before a Spanish court of first instance, which decided to deny it due to the fact that the award was not yet final. The High Court considered that, although the exception of *res judicata* might be included in the concept of “public order,” it could not be applied in the present case, since the circumstances had changed greatly over time. In that regard, the Court pointed to the fact that the award was already final (upheld by both the Milan Court of Appeal and the Rome Court of Cassation) and the party seeking recognition and enforcement of the decision had complied with all recognition and enforcement requirements.

More importantly, the High Court of Catalonia stated that the refusal of *exequatur*, when all the requirements of the New York Convention, the Spanish Law on Arbitration and the Act on International Legal Cooperation are met, would have gone against the presumption of validity and effectiveness of foreign arbitral awards, which is key to international cooperation in judicial matters.

### B.2.2 Court decisions based on the refusal of the *exequatur* due to the ineffectiveness of the judgment

The High Court of Justice of Madrid<sup>15</sup> refused to recognize and enforce an arbitral award issued in Quebec, due to the fact that, despite the request of the *exequatur* meeting all the formal requirements, the award did not meet the conditions to be effective in Spain. This refusal was grounded on the fact that, according to the Quebec legislation which was applicable regarding the effectiveness of the decision, the award rendered should have been approved by the courts to be effective. In the case at hand, the High Court of Justice of

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<sup>14</sup> Decision dated 19 December 2016, Roj: ATSJ CAT 495/2016.

<sup>15</sup> Decision 3/2017 dated 14 February 2017, Roj: ATSJ M 136/2017.



Madrid underscored the fact that the arbitral award, the recognition and enforcement of which was sought, had not been approved by the competent courts of Quebec and, therefore, *exequatur* could not be granted pursuant to Article V.1 of the New York Convention.

On 15 December 2016 the High Court of Justice of Catalonia issued a ruling (*Auto*) dismissing the opposition of a Spanish company to the recognition of an Austrian award issued by the Vienna International Arbitration Court on 31 March 2016.

The defendant argued that a pending annulment appeal had been filed before the Supreme Court of Austria, but acknowledged that suspension of the award had not been requested before the Supreme Court.

Considering this, and the fact that the award itself showed it was final, the High Court of Justice dismissed the opposition.

The ruling also reminds us that, within the scope of the New York Convention:

- (a) *Exequatur* proceedings shall only be declined if the award is annulled or suspended in the state of origin, according to Article V.1 e) of the New York Convention;
- (b) Enforcement proceedings may be adjourned if an annulment claim is filed in the state of origin and the court dealing with the enforcement proceedings finds it appropriate and the defendant grants a caution.

### C. Funding in international arbitration

Due to the high cost of arbitration, individuals and companies are increasingly opting for third-party funding. This method of funding is practically unknown in Spain, where there is no rule that regulates this funding mechanism. However, as third-party funding offers plenty of advantages and as it has spread across different European countries, it seems that it may be implemented in Spain in the near future.

In Spanish doctrine,<sup>16</sup> the possible nature of a third-party funding arrangement has been analyzed and has been equated with different obligation methods: an insurance contract, a loan agreement, a so-called *quota litis* pact (contingency fees) for remuneration for lawyers, or some type of company. In the latter respect, it has been considered within the concept of an internal company or a company without personality, as the investment partner and the plaintiff agree on aspects of funding; they share a common interest, which is to maximize the economic result of the legal action, but they do not act externally in a unified way.

It has also been compared with a litigious credit sale regulated by Article 1535 *et seq.* of the Spanish Civil Code. However, in that case, when the sale takes place, the original holder of the litigious credit dissociates him/herself from the dispute and the third party takes their place as claimant. In investment arbitration cases, this could lead to an obstacle to the acquirer of the credit as he/she might not be considered as an investor for the purposes of the investment treaties.

In relation to the *quota litis* pact — a way to compensate lawyers for their services through the payment of a percentage of the amount the court grants to the party — in its decision of 4 November 2008, the Administrative Chamber of the Spanish Supreme Court reversed the prohibition of this remuneration mechanism for lawyers, and so it seems that the door to third-party funding has been opened.

Whatever its legal nature is, since Article 1255 of the Spanish Civil Code lays down the principle of contract freedom, it seems that third-party funding would be admissible in Spain.

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<sup>16</sup> Olivier COJO, *Arbitraje y financiación procesal parciaria (third-party funding) en España: un análisis bajo el prisma de las nuevas Directrices de la IBA sobre Conflictos de Interés*, La Ley mercantil, n° 8, 2014; Carmen ALONSO CÁNOVAS, *Third-Party Funding: La financiación institucional de litigios y arbitrajes*, Spain Arbitration Review Revista del Club Español del Arbitraje, 2016, n° 26, pages 9-22 y Pablo CONSTENLA, *De la venta de crédito litigioso al sofisticado third-party funding*, Revista Lex Mercatoria n° 1, 2015, pages 18-20.



Another aspect that has also been argued between national and international doctrines is the obligation to disclose the fact that there is an investment partner, who is not a party in arbitration proceedings but wants to control and supervise the arbitration result, as their remuneration depends on it.

Article 6(b) of IBA Guidelines on Conflicts of Interest in International Arbitration establishes that, in the event that a person has a controlling influence or a direct economic interest over one party, the award may be considered to bear the identity of such party.

On the other hand, Article 7(a) does not establish the obligation to disclose in any case. Instead, it has been determined that when there is any kind of relationship between the investment partner and the arbitrator, this information should be disclosed in order to guarantee the arbitrator's independence and impartiality.

Finally, there is another issue related to funding: the lack of economic resources to face arbitration proceedings. This issue occurs when one party does not have the resources to finance the arbitration but is bound by an arbitration agreement. In principle, this agreement has binding force, but in this case the fundamental right of access to justice could be violated.

Some jurisdictions have resorted to the UNCITRAL Model Law (Article 8.1) or the New York Convention (Article II.3) to find a solution. These articles state that, when an arbitration agreement exists, the court before which the action is brought should refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of being performed. The inability to perform the arbitration agreement could be interpreted as the incapacity of one party to assume the cost of arbitration.

However, in the *Paczy* case, the English Court of Appeal considered that the impossibility of being performed only applies to the arbitration agreement itself.