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# Spain

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## A. Legislation and rules

### A.1 Legislation

The Spanish Arbitration Act (Act 60/2003 of 23 December 2003) was amended in 2011 (through Act 11/2011 of 20 May 2011). The most significant changes are 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 promoted 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 security and effectiveness, thereby enhancing Spain as a venue for international arbitration.

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### A.1.1 Jurisdiction of Spanish courts in relation to arbitration

With regard to the judicial functions in support and control of arbitration, the Civil and Criminal Chamber of the High Courts of Justice (*Salas de lo Civil y Penal de los Tribunales Superiores de Justicia*) now hold some of the competencies previously assigned to the Provincial Court (*Audiencia Provincial*) and the First Instance Court (*Juzgados de Primera Instancia*).

Since the reform, the Civil and Criminal Chamber of the High Courts of Justice have become competent to hear cases relating to the appointment and challenge of arbitrators, the annulment of awards and the recognition of foreign arbitral decisions.

### A.1.2 Changes related to institutional arbitration and arbitrators

The amendments to the Arbitration Act made in 2011 also included some changes that were introduced with the idea of strengthening arbitrators' capacity and responsibility, as well as avoiding conflicts of interest, thus enhancing the independence and transparency of arbitral institutions.

In addition, arbitrators and institutions are required to hold civil liability insurance, a rule that is not imposed on public entities and arbitration systems integrated within or reliant upon public authorities.

### A.1.3 Changes related to the arbitral procedure

A number of amendments have been introduced in order to enhance legal certainty and effectiveness, with the idea of promoting domestic arbitration and, at the same time, improving the conditions of international arbitrations seated in Spain.

With regard to the language used in an arbitration, the reform makes it possible for parties to bring witnesses, experts, and/or any third persons, to take part in the proceedings and use their own language.

Regarding the term to render an award, the new regulation added that, unless otherwise agreed by the parties, the award is valid even though



it is not issued within the mandatory six-month term, without prejudice to any liability the arbitrators may have incurred.

## A.2 Institutions, rules and infrastructure

In light of these changes in the Arbitration Act, Spanish arbitral institutions developed changes and amendments to their rules in order to comply with the new regulation.

For example, in June 2014, the Arbitration Court for Civil and Commercial Law (*Corte Civil y Mercantil de Arbitraje*) approved its new Rules. The new developments introduced focused on the following objectives: (i) improving communication between the parties and the tribunal; (ii) appointment of arbitrators; (iii) review of arbitral awards by the Court; and (iv) regulation of statutory arbitration. One of the most substantial amendments included in the new Rules is probably the option of challenging an award before the Court (Article 51 *et seq.* of the Rules). This possibility must be expressly agreed upon by the parties to the proceedings and the reasons invoked for such a challenge (Article 53) may be that: (i) the award incurs a manifest violation of the substantive legal rules on which the judgment is based; or (ii) a manifestly erroneous assessment has been made of the facts that were decisive for the grounds of the award.

## B. Cases

### B.1 Annulment of arbitral awards

Article 41 of the Spanish Arbitration Act regulates the grounds for setting aside an award. According to Spanish case law (eg, the judgment issued by Malaga's Court of Appeals on 5 May 2009), the action for annulment is a special process in which the main issue is denial of a defense, which cannot be purely formal or hypothetical, but must be real or material, because otherwise, it would constitute a procedural irregularity with no nullifying significance. It is also widely accepted that the parties' assessment of the correctness of the award or the manner in which the merits of the case were judged

cannot be grounds for an action seeking annulment (judgment of Valencia's Court of Appeals dated 25 June 2009).

**B.1.1 Court decisions based on Article 41 a) of the Spanish Arbitration Act: nonexistence or invalidity of the arbitration agreement**

A Judgment issued by Valencia's Court of Appeals on 28 January 2009 ruled that arbitration agreements must be: in writing; in a document signed by the parties; or in an exchange of letters, telegrams, telexes, faxes or other means of telecommunication that constitute a record of the agreement. Failure to meet these requirements may lead to the annulment of the award on the grounds that the arbitration agreement did not exist, was unenforceable or was ineffective. Therefore, an arbitration agreement cannot be proven by tacit consent or *facta concludentia*.

Similarly, a judgment issued by the Court of Appeals in Asturias on 16 July 2009 states that arbitration agreements must express the unequivocal will of the parties to submit their disputes to arbitration, so that there is no doubt whatsoever in this regard.

In contrast (but in a very specific case), a decision issued by the Court of Appeals in Barcelona on 13 November 2007 concluded that, considering the particular circumstances of the case, formal requirements to record the arbitration covenant had to be mitigated. In the case in question, there was no contract signed by both parties; just a reference to the arbitration agreement in an invoice issued by an agent who intervened in the commercial relations between the litigating parties. The decision was based on: commercial practices and custom, as ratified by the Chamber of Commerce of Barcelona and the Cereal Trade Association; prior commercial practices between the parties; and the freedom to provide consent within the legal context in which the dispute arose.



### B.1.2 Court decisions based on Article 41 b) of the Spanish Arbitration Act: failure to serve notice or improper notice of the designation of the arbitrator or the arbitral proceedings

According to a ruling issued by the High Court of Catalonia on 15 March 2012, a defective notice on the designation of the arbitrator does not produce any procedural denial of defense if the party was able to participate during the proceedings and did not raise any objection on that issue in the course of the case. This ruling invokes the Supreme Court's criteria stated in the judgment it issued on 13 March 2001, where it ruled that there is no infringement of the right to be heard or of the principles of contradiction and equality that might cause an effective denial of defense, if the parties were able to present their allegations and use their own means of defense regarding the merits of the case.

In its judgment of 9 February 2010, the Court of Appeals in Madrid ruled that notices or communications served by telex, fax or by another electronic, telematic or similar telecommunication method, generating a record of receipt and agreed upon by the parties, are valid. If the whereabouts of a party cannot be identified, notice shall be deemed to be received on the day delivery occurs or is attempted at the addressee's last known domicile, address, customary residence or establishment. This is an exceptional measure, only applicable when reasonable inquiries have failed to ascertain the addressee's current whereabouts.

According to a judgment issued on 5 June 2013 by the Court of Appeals in Madrid, an award was null and void because of failure to correctly serve notice of the proceedings. The judgment addresses the need for reasonable inquiry in order to confirm the current address of the party to be notified. Consequently, any delivery of notice at a prior (but now different) address is deemed defective.

### B.1.3 Court decisions based on Article 41 c) of the Spanish Arbitration Act: decisions not submitted to arbitration

A judgment issued on 19 April 2012 by the High Court of the Basque Region ruled that an arbitrator is entitled to decide on any issues that are necessary, relevant or related to resolving the dispute. In other words, the court ruled that arbitration agreements hold maximum enforceability.

The High Court of Justice in Madrid, in a ruling dated 9 February 2016, partially set aside an arbitral award that declared a company director held subsidiary liability, without the claimant having requested it. The court concluded that, in this regard, the award was null and void since it infringed the principle of congruency.

### B.1.4 Court decisions based on Article 41 d) of the Spanish Arbitration Act: arbitral procedure not in accordance with the agreement of the parties

In a case where one of the arbitrators in the tribunal resigned, thus reducing the number of arbitrators from three to two, the High Court of Justice in Madrid, in a judgment dated 9 February 2016 (AC 2016, 532), set aside an arbitral award due to the violation of an imperative legal provision. The court concluded that an award rendered by an even number of arbitrators must be null and void. The court also considered that such composition of an arbitral tribunal violates the equality and hierarchy of norms and principles, thus transgressing the public order.

A judgment issued by Valencia's Court of Appeals on 25 May 2009 rejected an action seeking annulment that was brought on the grounds that the arbitrator failed to issue the award within the stipulated deadline. According to the judgment, as long as the parties did not protest within the stipulated timespan, the elementary principle of legal certainty, combined with the consideration of the necessary good faith, meant the annulment action must be fully dismissed. Similarly, a judgment issued by the Court of Appeals in Madrid on 23 December 2009 concluded that such a breach does not constitute grounds for



annulling the award, although it may give rise to arbitrators' liability. As in the previous decision, it argues that the lapse of the deadline without any objection being raised by the parties can be deemed as an acceptance of extending the deadline. In contrast, a decision issued by the Court of Appeals in Barcelona on 10 February 2010 ruled that failure to issue the award within the time limit allowed was sufficient grounds for annulling the award, basing its decision on elementary principles of legal certainty and speed.

**B.1.5 Court decisions based on Article 41 e) of the Spanish Arbitration Act: the subject matter of the dispute not apt for settlement by arbitration**

A judgment issued by the Court of Appeals in Barcelona on 9 February 2010 maintained that litigation involving leases between Spanish and foreign parties could be resolved by arbitration, even if Spanish legislation governing leases contained mandatory rules. According to the judgment, such rules did not preclude the dispute from being resolved by arbitration, but rather only precluded the arbitrators from resolving the dispute in contravention of said rules.

**B.1.6 Court decisions based on Article 41 f) of the Spanish Arbitration Act: public policy**

According to a judgment issued on 7 January 2010 by the Court of Appeals in Valencia, the exception of public order does not allow the court to decide on the substance of the matter discussed in the arbitration, but only on the external observance of the constitutional rules regarding attendance, audience, reciprocity and the right to produce evidence. Obviously, the appropriateness of the award's legal reasoning cannot be discussed. Similarly, in a decision dated 12 May 2008, Madrid's Court of Appeals ruled that an award is contrary to public policy when it violates any of the fundamental rights or principles granted by Article 24 of the Spanish Constitution, which guarantees the right to defense, the prohibition of denial of defense, the right to due process with every legal guarantee, the right to request and provide evidence, the right to appeal, and the right to receive a decision based on the merits of the case. Also public policy may be

argued if the award was inconsistent or based on unreasonable or arbitrary grounds.

As regards the right to evidence, a judgment issued by the Court of Appeals in Navarra on 30 April and a judgment issued by the Court of Appeals in Valladolid on 15 June 2009 state that reviewing the assessment of the evidence is not included under the concept of “public order.” The right to evidence is not an unlimited right and additionally, the party seeking the nullity of the arbitral award needs to prove how the arbitrator’s refusal to accept the evidence had an impact on their right of defense.

As regards impartiality of the arbitrators, on 18 April 2010, the Court of Appeals in Madrid issued a judgment regarding a case where nullity was sought on the grounds that one of the arbitrators was biased. Lack of impartiality can only be said to exist where the personal relationship is pre-existing and intense, to such an extent that it would give rise to the suspicion that the arbitrator is not impartial and there is a reasonable fear that decisions would be biased. In the case in question and prior to issuing the award, one of the arbitrators disclosed what his position and the position of the other arbitrators, would be, opening a negotiation process between the parties. This conduct was qualified as “an unfortunate leak” that did not affect the award’s fundamental core. Similarly, in a judgment issued by the High Court of Justice in Aragon on 8 January 2013 and a judgment issued by the High Court of Justice in Catalonia on 15 July 2013, the relations of the arbitrator with the counsel of one of the parties (in the first case) and with one of the parties (in the second case) were not deemed relevant enough to raise doubts as to the arbitrator’s impartiality. Also, according to a judgment issued by the High Court of Justice in Catalonia on 25 March 2013, arbitrators are presumed to be impartial and any rejection of *exequatur*, based on the breach of the impartiality obligation, must be well grounded and not based on mere suspicions.



The High Court of Justice in Galicia issued a judgment on 2 May 2012 addressing the requirement that the award must state the reasons upon which it is based. In this case, a party sought nullification of an arbitral award on the grounds that the award lacked sufficient reasoning. The court set aside the arbitral award because the court deemed the arbitrator's reasoning to be so limited that it was impossible to know why some claims had been upheld and others had not.

On 9 May 2010, the Court of Appeals in Madrid ruled that although certain evidence introduced during the arbitration proceedings (namely, witnesses' admissions and testimony) did not have sufficient documentary support, such fact could not be deemed an infringement of the essential principles of both parties' right to be heard, to due process and to a level playing field. Unless there is an agreement, an arbitral decision or a ruling that requires written records, arbitration allows oral proceedings and this infringement cannot give rise to nullity.

In 2015, the High Court of Justice in Madrid issued five rulings annulling arbitral awards due to an alleged breach of "economic public policy" in cases related to the sale of swaps by financial institutions.

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

Recognition and enforcement of foreign arbitral awards are regulated in Article V of the New York Convention as established by the Court of Appeals in Madrid in the judgment it issued on 1 April 2009. However, Spain has not made use of the reciprocity reservation or ratified the convention in a way that is applicable to awards issued in a nation other than Spain, if the nation is not party to the Convention. Nor has Spain made use of the trade reservation, meaning that the Convention can be applied to all kinds of awards regardless of the subject, and not only to awards that settle commercial disputes.

According to Spanish case law, *exequatur* proceedings are merely procedural and the merits of the case can only be analyzed to the extent necessary to ensure that the essential principles of international public order are observed.

### C. Trends and observations

Arbitration in Spain has evolved positively during the last 10 years. The current Arbitration Act, promulgated in 2003 and based on the UNCITRAL Model Law, set a modern legal framework for arbitration that was further improved by the amendments to the Arbitration Act in 2011.

Spanish courts' favorable attitude toward arbitration has consolidated and increased during the last decade. In general terms, the limited scope of an action to set aside an arbitral award is well understood by state courts. Furthermore, Spanish case law regarding the recognition of foreign arbitral awards is well-settled and generally very consistent in the interpretation of the New York Convention.

The most well-known arbitral institutions have revised their arbitration rules in recent years in order to keep them in line with new needs and modern trends in international arbitration. It can be expected that new revisions will take place to address the latest international trends toward greater efficiency and transparency in arbitration.

In the last decade, there has also been a remarkable increase in public and private initiatives to spread knowledge and training on arbitration.

The Spanish government also keeps a respectful attitude toward arbitration despite the high number of investment arbitrations that have been started against Spain during the last decade in relation to renewable energy.