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# Spain – GAR Know-How Commercial Arbitration

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## QUESTIONNAIRE

### Infrastructure

**1. The New York Convention**
**Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?**

Yes, Spain ratified the New York Convention on 12 May 1977, which entered into force in Spain on 10 August 1977. Spain made no reservations or declarations and hence, applies the New York Convention on the enforcement of arbitral awards made in non-member countries. Spain does not distinguish between whether the dispute arises from a contractual relationship, or whether it is civil or commercial under Spanish legal principles.

**2. Other treaties**
**Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?**

Spain is also a party to the Geneva Convention of 1961 on International Commercial Arbitration, which entered into force in Spain on 10 August 1975.

Spain has bilateral treaties with Switzerland (1896), France (1969), Italy (1973), Czechoslovakia (1987) (which currently applies to successor states, the Czech Republic and Slovakia), Uruguay (1987), Brazil (1989), Mexico (1989), China (1992), Bulgaria (1993) and Morocco (1997), which contain provisions on the recognition and enforcement of foreign arbitral awards. The rules on recognition and enforcement in these treaties are not drafted along the lines of the main international conventions or model laws relating to foreign arbitral awards because the primary purpose of those bilateral treaties is to regulate the enforcement of foreign judicial decisions.

**3. National law**
**Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?**

The 2003 Spanish Arbitration Act (the Arbitration Act), amended in 2011, was drafted following the UNCITRAL Model Law. It applies to all national and international arbitrations with Spain as the venue of arbitration (article 1.1 of the Arbitration Act). Certain provisions of the Arbitration Act apply even when the venue is set abroad.

However, there are differences worth noting between the Arbitration Act and the UNCITRAL Model Law: under the Arbitration Act, a dispute is arbitrable if the parties are free to contract (article 2.1 of the Arbitration Act); Spanish law does not allow a state in an international arbitration to rely on principles of domestic law to avoid enforceability of the arbitration agreement (article 2.2 of the Arbitration Act); Spain uses the impact on the interests of international trade as a qualifying criterion for arbitration to be considered international, in addition to article 1(3) and (4) of the UNCITRAL Model Law; Spanish law goes beyond the UNCITRAL Model Law in favour of the validity the arbitration agreement and the arbitrability of the dispute. Article 9.6 of the Arbitration Act states that, for international arbitrations, the arbitration agreement will be valid and the dispute will be arbitrable provided it is so under either the law to which the parties have submitted the arbitration agreement, the law governing the merits of the dispute or Spanish law; the default rule, unless the parties agree otherwise, is one arbitrator (article 12 of the Arbitration Act); under Spanish law, the arbitrator's liability can be established for wilful misconduct, bad faith or gross negligence (article 21 of the Arbitration Act); and arbitration is confidential unless otherwise agreed (article 24.2 of the Arbitration Act).

**4. Arbitration bodies in your jurisdiction**
**What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?**

The landscape of arbitral institutions in Spain has experienced very relevant developments over the last year due to the launch of the newly created Madrid International Arbitration Centre (CIAM in its Spanish acronym). In October 2019, the Chamber of Commerce of Spain (the entity to which the Spanish Court of Arbitration belongs), the Chamber of Commerce of Madrid (the entity to which the Madrid Court of Arbitration belongs) and the Civil and Commercial Arbitration Court (private association) announced the constitution of CIAM, that combines the international activities of these three arbitration courts, joined by the Madrid Bar Association (ICAM) as a strategic partner.

The CIAM aims at becoming the leading Spanish arbitral institution in the international field, ensuring a direct flow of cases from its three founding courts, which will continue to autonomously administer national arbitrations. The CIAM has started operating in 2020 and has jurisdiction to administer two types of international arbitrations as defined in article 3.1 of the Arbitration Act: (i) those arising from arbitration agreements in which the parties directly appoint the CIAM as administrative court and (ii) those arising from arbitration agreements in which the parties appoint any of the three original arbitration courts. This applies in both cases to arbitration agreements signed as of 1 January 2020. For arbitration agreements prior to 2020, the CIAM provides an opt-in system that requires the acceptance of all parties concerned.

Currently, ICC arbitration is commonly chosen by parties submitting disputes to international arbitration with a seat in Spain. When the international arbitration is not subject to ICC Rules, there are four arbitral institutions based in Spain that, in our experience, administer most international commercial arbitration cases: the Madrid Court of Arbitration; the Spanish Court of Arbitration, also based in Madrid; the Civil and Commercial Court of Arbitration, also based in Madrid; and the Arbitration Court of Barcelona. These arbitral institutions all act as appointing authorities. Madrid is the most frequently used seat.

The CEA (Club Español del Arbitraje) is an arbitral body. It does not administer cases but has acquired a well-deserved reputation in the promotion of arbitration in Spain and the consolidation of an international Spanish and Portuguese-speaking arbitration community. It boasts more than 1,000 members, all experts in arbitration, located in 43 jurisdictions worldwide through 30 international chapters. In 2019, the CEA launched its updated Code of Best Practices in Arbitration, which seeks to raise the standards of conduct even further in terms of independence, impartiality, transparency and professionalism. The Code contains recommendations not only for arbitral institutions, but for all professionals participating in the arbitration process: arbitrators, lawyers, experts and funders.

**5. Foreign institutions**
**Can foreign arbitral providers operate in your jurisdiction?**

Yes. ICC arbitration is frequently used in international transactions where the chosen seat of arbitration is Madrid. London Court of International Arbitration or International Centre for

Dispute Resolution arbitration is rare in Spain. There is no limit on foreign arbitrators or counsel providing services in Spain.

**6. Courts**
**Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with, and supportive of, the law and practice of international arbitration?**

As of 2011, Spain's regional High Courts of Justice (Tribunales Superiores de Justicia) have exclusive jurisdiction over set-aside actions against arbitral awards rendered in Spain over decisions related to recognition of foreign arbitral awards. They can also enforce arbitration agreements and appoint arbitrators. Since acquiring these powers, the arbitration community has confirmed the increased expertise in international commercial arbitration of judges in the High Courts of Justice.

Courts of First Instance at the seat of the arbitration remain competent for award enforcement, requests for interim measures and judicial assistance in the taking of evidence. In November 2010, the judiciary created a specialised court of first instance in Madrid (Court of First Instance No. 101), which is competent for these arbitration matters when the seat of the arbitration is Madrid.

As of the enactment of the 2003 Spanish Arbitration Act, Spanish courts have shown a solid pro-arbitration approach. Actions to set aside rarely succeed and awards are generally recognised and enforced. Nevertheless, it is important to get familiar with the case law that the High Court of Madrid has rendered in the past three years in relation to actions to set aside awards. In this regard, the Spanish Constitutional Court is expected to rule soon on the standard of review. Meanwhile, the High Court of Madrid has recently taken a new turn towards a limited scope of set aside actions (Decisions No. 29/2019 and No. 30/2019, both dated 12 September 2019).

**Agreement to arbitrate**

**7. Formalities**
**What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?**

The formal requirements imposed on arbitration agreements under article 9 of the Arbitration Act follow article 7 of the UNCITRAL Model Law. The arbitration agreement must be in writing and in a document signed by the parties or contained in an exchange of communications submitted via telex, facsimile or any other telecommunications method. If the arbitration agreement is incorporated into a standard contract, the rules of the arbitration agreement are the same as those in standard forms. The requirement of a written instrument is met if the agreement is contained in a digital or electronic source that allows retrieval. The parties' signatures are required.

The arbitration agreement can be in a separate agreement to arbitrate or in a contract clause. It must show the parties' consent to arbitrate disputes that have arisen or may arise in the future and refer to a defined legal relationship, whether contractual or non-contractual.

The Arbitration Act contains a conflict of laws provision that applies in international settings. The arbitration agreement will be valid if the agreement is valid under the rules of law chosen by the parties to govern the arbitration agreement, the rules of law that apply to the merits of the dispute, or under Spanish law.

**8. Arbitrability**
**Are any types of dispute non-arbitrable? If so, which?**

If the arbitration is international, the dispute will be considered arbitrable in Spain if it is arbitrable under either the law chosen by the parties, the law governing the contract or Spanish law, which is the place of arbitration. It would be difficult to find a case in which a commercial or corporate dispute is not arbitrable. The Arbitration Act establishes a general rule pursuant to which any matter of free disposition between individuals is arbitrable (article 2.1). However, exceptionally certain matters are considered non-arbitrable for reasons of public interest – such as those relating to personal capacity and status or strictly matrimonial matters – or are expressly excluded from arbitration by law. In this sense, article 1.4 of the Arbitration Act excludes labour disputes from its scope.

**9. Third parties**
**Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?**

The Arbitration Act does not contain provisions on joinder or third-party notices. However, parties may agree to a set of arbitration rules providing for joinder or third-party notice.

The Spanish courts' pro-arbitration bias has resulted in a line of precedents in which, exceptionally, non-signatory parties have been bound by an arbitration agreement, including the following: a third party subrogated by law in the contractual rights and obligations of a party that executed a contract incorporating an arbitration agreement (STSJ Madrid 14/2017, of 28 February; STSJ Madrid 68/2014, of 16 December; STSJ Madrid 6/2013, of 13 February; SAP Madrid 457/2009, of 1 October); a third party that becomes a legal successor by virtue of a company merger with a party that was bound by an arbitration agreement (SAP Madrid 510/2010, of 10 October 2010); a third party that is a party to a different contract closely linked to or directly implicated in the execution of the arbitration agreement or to the agreement wherein the arbitration clause is contained (STS 404/2005, of 26 May; STSJ Madrid 64/2015, of 16 September; STSJ Madrid 79/2015, of 3 November, and STSJ Madrid 35/2018, of 13 November); and pursuant to corporate veil-piercing or group of companies theories (STSJ Madrid No. 68/2014, of 16 December; STSJ C. Valenciana No, 14/2014, of 19 November and No. 13/2015, of 5 May).

**10. Consolidation Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?**

The Arbitration Act does not provide a regulatory framework for consolidation of arbitral proceedings. However, most Spanish arbitral institutions have included specific rules in their regulations and arbitrators can handle the issue of consolidation following international practices. Thus, consolidation would be possible if provided for in the arbitration rules agreed by the parties.

**11. Groups of companies Is the "group of companies doctrine" recognised in your jurisdiction?**

There are cases where non-signatory parties may be joined to the proceedings by way of subrogation, succession or representation, but consent is always required and, as a general rule, the joinder of non-signatories does not happen under the group of companies' doctrine.

However, we may find two cases in which, exceptionally, the High Court of Valencia has resorted to the "group of companies doctrine" to rule in favour of the extension of effects of the arbitral clause to non-signatory parties belonging to the corporate group of a holding company that was a part of the arbitral agreement (STSJ C. Valenciana No. 14/2014, of 19 November and No. 13/2015, of 5 May). In those exceptional circumstances, the following conditions are to be met: (i) the non-signatory party belongs to a group of companies as defined in the applicable law; (ii) the non-signatory party is effectively involved in the performance contractual relationship that gives rise to the dispute; and (iii) in the case at hand, it is possible to conclude that the non-signatory is bound to the arbitration agreement by way of estoppel, piercing the corporate veil or other legal theories that would justify the existence of consent.

**12. Separability**
**Are arbitration clauses considered separable from the main contract?**

Yes. The separability of the arbitration agreement is expressly recognised in article 22.1 of the Arbitration Act. This applies regardless of the arbitration agreement being an independent agreement or being incorporated into the body of the main contract (article 9.1 of the Arbitration Act). Hence, when a contract is declared null, it does not affect the validity of the arbitration agreement.

**13. Competence-competence**
**Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunal's jurisdiction and competence?**

Yes, the arbitrators can decide their own jurisdiction. Under article 22 of the Arbitration Act, arbitrators must be competent to resolve "any pleas with respect to the existence or validity of the arbitration agreement, or any others whose acceptance would prevent consideration of the merits of the case".

In a very relevant decision issued in June 2017, the Spanish Supreme Court ruled on the scope of review that a national court must engage when analysing the existence of a valid arbitration agreement whenever a defendant in court proceedings rises a motion to compel to arbitration (Decision of the Spanish Supreme Court, No. 409/2017, dated 27 June 2017). The Spanish Supreme Court ruled in favour of a full analysis, not limited to a prima facie review, expressly accepting the "weak theory" on the competence-competence principle, as opposed to the "strong theory". This recent decision would be aligned with the position that US courts have consistently followed. Spanish courts have applied this doctrine regarding motions to compel to arbitration (Order of the Provincial Court of Alava No. 44/2019, dated 8 April, Order of the Provincial Court of Valencia No. 199/2019, dated 9 July). However, obiter dicta, the Spanish Supreme Court stated in the same judgment that the court must limit itself to a prima facie review of the validity of the arbitration agreement when requested to appoint an arbitrator pursuant to article 15.5 of the Arbitration Act. Spanish courts have already followed this doctrine when appointing arbitrators (Decision of the High Court of Catalonia No. 28/2019, dated 8 April, Decision of the High Court of Madrid No. 15/2019, dated 2 April, and Decision of the High Court of Navarra No. 3/2018, dated 21 May 2018).

**14. Drafting**

**Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?**

No, there are no special issues to acknowledge in this case. The issues are the same as what international arbitration practitioners would consider in any other jurisdiction. In practice, to avoid misinterpretation or pathological drafting, it is advisable not to refer to the ordinary courts in the contract, or at least in the same dispute resolution clause.

**15. Institutional arbitration**

**Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?**

This is difficult to answer as there are no reliable statistics comparing ad hoc with institutional arbitration. In our firm's experience, institutional arbitration is more common than ad hoc arbitration and we usually advise selecting administered arbitration. If ad hoc arbitration is agreed, the UNCITRAL Rules are generally incorporated. For disputes arising from older contracts, there may be clauses in which the parties refer to the Arbitration Act. But this is less common in international transactions.

**16. Multi-party agreements**
**What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your jurisdiction in mind? In relation to, for example, the appointment of arbitrators.**

When drafting a multi-party arbitration agreement, it is common to mirror the ICC Rules. If the number of arbitrators is three, the default rule of article 15 of the Arbitration Act provides that both the claimants and the respondents appoint their own co-arbitrator. If the number of arbitrators is more than three, all of them are appointed by the competent court. However, if the claimants or the respondents are not able to agree on the appointment of their respective co-arbitrator, the court will appoint all the arbitrators. There is no other legal reference to multi-party arbitration. Most Spanish arbitration courts have incorporated multi-party and multi-contract provisions into their rules.

## Commencing the arbitration

**17. Request for arbitration**
**How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?**

Under article 27 of the Arbitration Act, the arbitral proceedings in respect to a particular dispute commence on the date on which a request for arbitration concerning such dispute is received by the respondent. The parties can agree otherwise. Thus, in practice, under most arbitration rules, the arbitral proceedings start when a request for arbitration is received at the arbitration court, which is then followed by the answer to the request for arbitration and the subsequent appointment of the arbitrators.

There are no mandatory limitation periods under the Arbitration Act, except for rendering the award, which is referred to below.

## Choice of law

**18. Choice of law**
**How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?**

Article 34.2 of the Arbitration Act follows article 28 of the UNCITRAL Model Law, under which the arbitrators must resolve the dispute according to the contract and the law chosen by the parties. Unless otherwise indicated, if the parties designate the law of a particular State it will be deemed as referring only to its substantive law (excluding its conflict of laws rules). If the parties have not agreed on the law applicable to the merits, the arbitrators will apply the law they consider appropriate, always taking into account not only on the contract, but also the relevant trade usages (article 34.3 of the Arbitration Act).

## Appointing the tribunal

**19. Choice of arbitrators**
**Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?**

There are very few limitations regarding on the requirements for selecting the arbitrators, but the existing limitations are mandatory. Any person in full enjoyment of his or her civil rights may act as arbitrator provided that the applicable legislation to his or her profession does not prevent so (article 13 of the Arbitration Act), as it is the case of acting judges, magistrates and members of the Public Prosecution office. The parties can agree on the number of arbitrators, provided that it is an odd number (article 12 of the Arbitration Act). If the arbitration is at law, at least one of the members of the arbitral tribunal must be a jurist, who may not be a Spanish national (article 15.1 of the Arbitration Act). In addition, if a person has acted as mediator, the default rule is that he or she will not be eligible to act as arbitrator (article 17.4 of the Arbitration Act). An arbitrator's nationality does not affect his or her eligibility, but the parties are free to agree otherwise (article 13 of the Arbitration Act).

**20. Foreign arbitrators**
**Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?**

Yes. Non-nationals can act as arbitrators in Spain. According to article 13 of the Arbitration Act, no person shall be prevented by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed by the parties. Apart from meeting the requirements for non-nationals to render services in Spain, no additional requirements or immigration conditions apply to arbitrators.

**21. Default appointment of arbitrators How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?**

The rules of any arbitration institution are considered incorporated by reference to the arbitration agreement (article 4.b of the Arbitration Act). If the arbitration is institutional, the appointing authority will be designated in the applicable rules. If the arbitration is not administered and the parties have not agreed on the appointing authority, the regional High Court of Justice acts as the appointing authority (article 8.1 of the Arbitration Act).

**22. Immunity**
**Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?**

No, they are not, but the standard of liability is very high. Arbitrators may only be held liable for acts conducted in bad faith, wilful misconduct or gross negligence.

In one specific case, the presiding arbitrator was declared not responsible despite the fact that the award had been set aside due to lack of impartiality, because of the arbitrator's failure to disclose his relationship with a party and its counsel, and denial of the right to submit evidence (Decision of the Madrid Court of Appeal No. 159/2015, dated 8 May 2015, and later confirmed by the Spanish Supreme Court in its Decision No. 493/2018, dated 14 September 2018). In another case, arbitrators have been declared responsible where two of them excluded the third arbitrator from the deliberation and notified the award; the award was subsequently set aside and the arbitrators held liable (Decision of the Spanish Supreme Court No. 102/2017, dated 15 February 2017).

To act as an arbitrator in Spain, arbitrators must have liability insurance. If the arbitrators do not have liability insurance, the arbitral institution must take out liability insurance on the arbitrators' behalf (article 21.1 of the Arbitration Act).

**23. Securing payment of fees**
**Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?**

Under article 21.2 of the Arbitration Act, arbitrators and arbitral institutions have the right to require provision of funds from the parties to cover their fees and expenses and any other costs arising from the proceeding. If there is no provision of funds, the arbitrators may suspend or terminate the arbitration proceeding. If one party does not contribute the provision of funds, the arbitrators will give the other parties the opportunity to complete the provision of funds before suspending or terminating the proceeding.

Spanish arbitral institutions provide fundholding services and act as the depository of the parties' funds. They also settle the arbitrators' fees and expenses.

## Challenges to arbitrators

**24. Grounds of challenge**
**On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?**

Articles 17 and 18 of the Arbitration Act regulate the challenge of arbitrators, following the best international arbitration practices. Independence and impartiality are required throughout the proceedings. Arbitrators have a duty to disclose any circumstance that may cast doubt on their independence and impartiality, both when proposed and when subsequent circumstances so require. An arbitrator may be challenged in view of justified doubts as to his or her impartiality or independence, or if the arbitrator does not possess the qualifications agreed by the parties.

The parties can freely agree the challenge procedure. Unless the challenged arbitrator withdraws voluntarily or the other party agrees on his or her removal, the other co-arbitrators in the arbitral tribunal will decide on the issue. If the challenge is not accepted, it can be used later as a ground to set aside the award. In administered arbitration, the institution usually takes responsibility for confirming or removing arbitrators based on lack of independence or impartiality.

The IBA Guidelines on conflicts of interest are frequently followed in Spain, especially in international arbitration disputes. Courts and arbitrators also take into account the best practices guidelines published by the Club Español del Arbitraje. Some judgments and rulings from the High Courts of Justice refer explicitly to this "soft" law (for example, the Decisions of the High Court of Asturias No. 3/2017, dated 25 April 2017, No. 2/2018, dated 3 April 2018 and No. 3/2018, dated 12 April 2018; the Decisions of the High Court of Madrid No. 28/2019, dated 12 September 2019, No. 5/2019, dated 15 February 2019, No. 46/2016, dated 2 June 2016, No. 34/2016, dated 14 April 2016 and No. 70/2016, dated 4 November 2016; and the Decisions of the High Court of Navarra No. 7/2019, dated 28 November, and No. 15/2013, dated 28 October 2013).

## Interim relief

### 25. Types of relief

**What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?**

Article 23 of the Arbitration Act gives arbitrators the authority to grant interim protective measures, unless otherwise agreed by the parties. The types of measures that arbitrators can grant are broad. The same grounds for annulment of an arbitral award would limit the arbitrators' authority to grant interim measures. Article 23 does not specify the interests to be protected by the measures or the type of measures allowed; in any event, measures should be provisional. The general interim relief procedure is regulated in articles 721 et seq. of the Spanish Civil Procedure Act.

The Arbitration Act does not contemplate the figure of the emergency arbitrator for the provision of emergency interim measures before the constitution of an arbitral tribunal. However, the relevant Spanish arbitration courts allow for this possibility in their regulations.

The parties have the right to resort to the ordinary courts for the provision of interim measures before and during the arbitration proceedings under articles 8.3 and 11.3 of the Arbitration Act (see Question 6). Also, according to article 54(2) of the Law of International Co-operation in Civil Matters (Law 29/2015), interim measures can be requested during the exequatur proceedings of a foreign award.

Orders for advance payment in anticipation of a future arbitral award are not considered a protective measure. Anti-suit injunctions are not provisional orders; these would be outside the scope of the arbitrator's authority under article 23.

Interim orders relating to the protection of evidence would be admitted more easily.

If Spain is the arbitration venue (the place of arbitration is not located abroad), any party can ask the Spanish courts for interim protective measures.

**26. Security for costs**
**Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?**

Security for costs would be considered an interim measure to protect the fairness of the arbitration proceedings, rather than substantive rights fought in the arbitration. There is no clear court precedent to this respect. However, in our experience, international arbitrators tend to consider that they have the power to decide on a petition for a security for costs when the arbitration is seated in Spain.

In our opinion, an agreement-based authority would be considered admissible. If the arbitrators have not been given this authority by agreement, the position of Spanish arbitration law is unsettled. Security for costs based on the parties' foreign nationality or domicile may encounter problems with the provisions against *cautio iudicatum solvi* in several international treaties to which Spain is a party. Security for costs (on other grounds) is usually linked with the rights of access to justice and due process and, according to some practitioners, could encounter public policy objections.

**Procedure**

**27. Procedural rules**
**Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?**

The principle of party autonomy governs and controls arbitration (article 25.1 of the Arbitration Act). There is no mandatory rule other than the respect for due process rights (ie, the right to be heard and the parties' equal treatment and contradiction).

**28. Refusal to participate**
**What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?**

Where a party decides not to appear in the proceedings, the arbitral institution and the arbitrators will attempt to obtain sufficient evidence to prove that the defaulting party received notice of the arbitration. If the respondent has been notified and decides not to participate, the arbitration will continue, and the arbitrator will resolve the dispute based on the existing allegations and evidence (article 31 of the Arbitration Act). Where a party decides not to participate in the proceedings, this does not mean that the party has admitted the claim.

**29. Admissible evidence**
**What types of evidence are usually admitted, and how is evidence usually taken? *(Will the IBA Rules on the Taking of Evidence in International Commercial Arbitration, or the 'Prague Rules' (the Rules on the Efficient Conduct of Proceedings in International Arbitration), generally be taken into account?)***

As stated in the Arbitration Act's preamble, the maximum freedom and flexibility of the parties and of the arbitrator governs the evidence-taking stage. As long as the principles of equality and

contradiction are respected, the Spanish legislator aims to distinguish international arbitration from domestic practices.

In practice, in international arbitration proceedings seated in Spain, witness statements and expert reports are usually produced, and cross-examination is accepted in evidentiary hearings. Document production is also a common practice but limited in its scope. The IBA Rules are normally mentioned in the terms of reference and, sometimes, mainly in international cases, adopted with binding force.

In our experience, the Prague rules are not being used in arbitrations seated in Spain. The Prague Rules do not reflect the Spanish Arbitration Practice and the rules on evidence they propose are not common in either court or arbitration proceedings seated in Spain. For example, in Spain, before ordinary courts, the rule is for the parties to appoint experts and counsel is allowed to cross-examine witnesses that the opposing party presents. The role that the Prague Rules assign to arbitrators and third-party neutrals is alien to both court and arbitration practice in Spain. There are many other examples distinguishing the Prague Rules from the Spanish practice.

**30. Court assistance**
**Will the courts in your jurisdiction play any role in the obtaining of evidence?**

If necessary, the arbitrators or a party with the arbitrators' approval may seek assistance from the courts with taking evidence (article 33 of the Arbitration Act). This role is assigned to the Courts of First Instance in the place of the arbitration or the place where the assistance is requested. This could involve taking evidence in court or adopting specific measures enabling arbitrators to take specific evidence. In practice, the courts' assistance is rarely requested.

**31. Document production**
**What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?**

Regarding document production in international arbitration, arbitrators look to the IBA Rules on the Taking of Evidence. In domestic arbitration and court litigation, document production is limited to the request for documents from the parties to the dispute. It requires that the document requested be identified and its relevance justified. This practice is widespread in other jurisdictions, including Latin American countries, so it is more than a domestic practice: not allowing a broad discovery is embedded in the Spanish due process system. The client's expectations respond to this culture as well.

**32. Hearings**
**Is it mandatory to have a final hearing on the merits?**

Unless otherwise agreed by the parties, the arbitrators have the power to decide whether to hold oral hearings for the presentation of oral arguments, the taking of evidence and the submission of conclusions.

However, this rule is not mandatory and the need to hold hearings is generally regulated in the arbitration rules.

If one of the parties expressly requests a hearing, and there is no agreement to the contrary, the arbitrators shall organise it (article 30.1 of the Arbitration Act).

In practice, oral hearings take place in almost every arbitration proceeding.

**33. Seat or place of arbitration**
**If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?**

Yes, the arbitrators and the parties have the freedom to select the place they consider most appropriate for the arbitration procedure (eg, for meeting with witnesses, parties and experts) regardless of the place of arbitration, according to article 26.2 of the Arbitration Act. However, in at least one case it has been established that the arbitrators' choice cannot deprive either party of their right of defence or create an unbalanced position between the parties (Order of the High Court of Madrid No. 13/2017, dated 11 July).

**Award**

**34. Majority decisions**
**Can the tribunal decide by majority?**

Unless the parties agree otherwise, they can decide by majority when there is more than one arbitrator. If no majority is reached, the chair will decide (article 35.1 of the Arbitration Act).

**35. Limitations to awards and relief**
**Are there any particular types of remedies or relief that an arbitral tribunal may not grant?**

Arbitrators may grant declaratory relief as well as monetary compensation. They may order a party to provide specific performance of a contract or to abstain from pursuing a course of action. They may also grant interest and awards on costs. Punitive damages do not exist in Spain and could be considered contrary to public policy.

**36. Dissenting arbitrators**
**Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?**

If more than one arbitrator is appointed, decisions may be adopted by a majority of the arbitral tribunal. If one of the arbitrators does not sign the award, that arbitrator must explain the reasons for the lack of such signature (failure to do so may lead to the award being set aside; see Decision of the High Court of Madrid No. 46/2019, dated 26 November). The Arbitration Act establishes

that arbitrators with a dissenting opinion may specify the sense of their vote (article 37.3 of the Arbitration Act). However, it does not refer to the drafting of dissenting opinions.

In practice, this possibility is generally admitted, and some institutions have incorporated this possibility into their latest regulation amendments. Additionally, the updated Code of Best Practices in Arbitration of the Club Español del Arbitraje (see Question 4) regulates the drafting of dissenting opinions in its article 48.6.

**37. Formalities**
**What, if any, are the legal and formal requirements for a valid and enforceable award?**

Article 37 of the Arbitration Act establishes that, unless the parties agree otherwise, the final award must be granted within six months from the date the respondent submits the first pleading (or when period to submit it expires). Additionally, unless the parties agree otherwise, the arbitrators can extend this time limit for up to two months.

The default rule contained in the Arbitration Act is that arbitrators can decide in a single award or in as many partial awards as they deem necessary.

The award must be in writing and signed by the majority of the arbitrators, or at least by the chair. Following the UNCITRAL Model Law, an award is considered to be in writing when a record is made of its content and signatures and the award is accessible on electronic, optical or other media for subsequent reference.

The award must state the date and the place of arbitration. Subject to what may have been agreed by the parties, the award must state the arbitrators' decision on costs as well as the reasons for their decision.

## 38. Time frames
## What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

There is a default time limit of six months to render the award from the date the respondent submits its first pleading or from the expiration of the time limit to submit it (article 37.2 of the Arbitration Act).

Upon notification of the award, any party may request (i) a correction of any computation, clerical, typographical or similar errors; (ii) a clarification of a specific part of the award; (iii) a supplementary decision in *infra petita* cases where the arbitrators did not resolve one of the claims presented; and/or (iv) a rectification if the award has decided on questions not submitted to the arbitrators or on a matter not subject to arbitration. The time limit for submitting these petitions, unless otherwise agreed, is 10 days in domestic cases and one month in international arbitration (article 39 of the Arbitration Act).

## Costs and interest

### 39. Costs
**Are parties able to recover fees paid and costs incurred? Does the "loser pays" rule generally apply in your jurisdiction?**

Yes. Pursuant to article 37.6 of the Arbitration Act, the arbitrators must decide on the allocation of arbitration costs, which shall include the fees and expenses of the arbitrators and, where applicable, the fees and expenses of the other party's counsel or representatives, the costs of the administrative court and other expenses arising from the proceedings. However, the Arbitration Act does not impose any criterion on the arbitrators: it does not require them to apply the "loser pays" principle or limit it to cases where one of the parties acts in bad faith. In practice, costs are proportionate to the success of each party's claims. The rules of the arbitral institutions and the arbitrators consider the parties' behaviour and collaboration when apportioning arbitration costs, in line with ICC standards. Arbitrators must be aware of the latest case law that the High Court of Madrid has rendered on this issue in order to avoid the annulment of their award (eg Decision of the High Court of Madrid No. 33/2018, dated 25 June 2018).

### 40. Interest on the award
**Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?**

Any party can add a petition for interest to a principal claim. It is usual in practice to seek for pre-award and post-award interests on both principal claim and costs.

Interest rates are periodically published in the Official Bulletin and normally apply to decisions rendered in Spain. A special law (Act 3/2004 of 29 December 2004) regulating interest rates on late payments may be applicable if Spanish law governs the merits.

## Challenging awards

### 41. Grounds for appeal
**Are there any grounds on which an award may be appealed before the courts of your jurisdiction?**

No, the arbitral award cannot be appealed by contesting the merits (fact and law) of the dispute settled by the arbitrator.

### 42. Other grounds for challenge
**Are there any other bases on which an award may be challenged, and if so what?**

Yes, an arbitral award may be set aside on limited grounds regulated in article 41 of the Arbitration Act, which reflects the UNCITRAL Model Law (section VIII of the preamble). The grounds for setting aside an award are the following: the arbitration agreement does not exist or is not valid; the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case; the arbitrators decided on

matters not submitted to them; the appointment of the arbitrators or the arbitral procedure was not in accordance with the parties' agreement, unless such agreement conflicted with a mandatory provision of the Arbitration Act or, failing that, was not in accordance with this Act; the arbitrators decided on matters not capable of being settled by arbitration; or the award conflicts with public policy.

In practice, conflict with public policy is the ground that is most frequently raised by the parties seeking to set aside an award. However, in line with the Spanish courts' pro-arbitration bias, the courts hold a restricted view on the application of these grounds.

**43. Modifying an award**
**Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?**

As stated, under Spanish law there is no right to appeal an arbitral award.

Regarding the action to set aside an award, the Arbitration Act does not regulate the exclusion agreement. Based on article 6.2 of the Spanish Civil Code, legal doctrine argues that the exclusion agreement would go against the right of defence and, therefore, against public policy. Similarly, as stated by the Supreme Court in a judgment dated 10 March 1986, and the Decision of the Spanish Constitutional Court No. 176/1996, dated 11 November, the exclusion agreement would be contrary to the fundamental right to effective legal protection recognised in article 24.1 of the Spanish Constitution.

**Enforcement in your jurisdiction**

**44. Enforcement of set-aside awards**
**Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?**

Article 46.2 of the Arbitration Act stipulates that the New York Convention governs the exequatur of foreign awards, without prejudice to the provisions of other international conventions more favourable to the exequatur.

As established in section X of the preamble to the Arbitration Act, the scope of application of the New York Convention in Spain makes an internal regime for exequatur of foreign awards unnecessary.

Therefore, the same controversy surrounding the interpretation of article V.1.e of the New York Convention might apply to Spain. In this regard, Spanish courts have generally recognized foreign awards where there was a pending set-aside procedure before the courts of the seat of arbitration (Order of the Supreme Court No. 9443/2004 dated 20 July 2004, Order of the Court of First Instance of Rubí No. 584/2006 dated 11 June 2007, Order of the High Court of Catalonia No. 127/2011 dated 17 November 2011 and Order of the High Court of Murcia No. 1/2019). Contrarily, the High Court of Madrid has shown a different (and controversial) stance by

denying the exequatur of a Canadian award that was pending approval by a domestic judicial decision at the time of the exequatur request (Order No. 3/2017 dated 14 February 2017).

**45. Trends**
**What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?**

The decisions issued by Spanish courts on the exequatur and enforcement of foreign awards acknowledge the formal character of these proceedings and apply restrictively the grounds for refusal as stipulated in article V of the New York Convention.

From time to time, there is a decision that generates some controversy as to the scope and reach of the concept of public policy, but it is generally acknowledged that it has an exceptional character.

**46. State immunity**
**To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?**

Article 2.2 of the Arbitration Act denies the possibility of a state or a state entity opposing the prerogatives of its own law in order not to comply with obligations resulting from an arbitral agreement.

In 2015, Spain passed a new Law on State Immunity (Organic Law 16/2015) which incorporates the contents of the UN Convention on State Immunity of 2004. Under article 16 of this law, one of the few exceptions to jurisdictional immunity is indeed the existence of an arbitration agreement between the state and an individual of a different state with regard to a commercial transaction. State immunity from enforcement measures is also regulated in article 17 of this law, allowing enforcement procedures against assets found in Spain that are used for purposes other than official non-commercial purposes. Enforcement is also allowed when the State has tacitly or explicitly consented it by means of an international agreement, a written contract or a declaration within a judicial procedure.

**Further considerations**

**47. Confidentiality**
**To what extent are arbitral proceedings in your jurisdiction confidential?**

The confidentiality obligation under article 24.2 of the Arbitration Act binds the parties, arbitrators and arbitral institutions, unless otherwise agreed by the parties. As such, the parties who are involved in an arbitration proceeding (namely parties, arbitrators and tribunal, but also experts, secretaries or interpreters) cannot reveal information relating to an arbitration proceeding to those who do not participate in it.

Arbitral awards are not usually published in Spain.

The updated Code of Best Practices in Arbitration issued by the Club Español del Arbitraje (see Question 4) favors transparency by recommending the publication of the award shortly after its approval, anonymizing the names of the parties.

**48. Evidence and pleadings**
**What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?**

Both parties and arbitrators are obliged to keep confidential all the information in the arbitral procedure. However, this principle does not apply between the parties as all written submissions and documents filed by one party shall be submitted to the other party (article 30.3 of the Arbitration Act). The parties can only disclose this information outside the arbitration proceeding to comply with an order from the arbitrator or the courts.

**49. Ethical codes**
**What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?**

The Arbitration Act does not include an ethics code that binds arbitrators or counsel. The only two requirements are independence and impartiality. However, arbitrators and counsel admitted to Spanish bars are bound by the professional code and ethical rules applicable to lawyers.

Spanish practitioners practising international arbitration are also familiar with the guidelines approved by the IBA and the Club Español de Arbitraje, which contain ethical rules. The updated Code of Best Practices in Arbitration of the Spanish Arbitration Club (see Question 4) contains a renewed and ambitious approach to areas such as the concept of independence and impartiality binding arbitrators, the scope of the arbitrators' disclosure duty, rules on arbitration fees or the confidentiality regime. Regarding counsel, the Code is a pioneer by introducing concepts such as rules on the appointment of lawyers, prohibition of communications with the arbitrators, duties of integrity and confidentiality. Although the Code of Best Practices is a soft law instrument, the parties can agree to grant it binding force in their arbitration agreement.

**50. Procedural expectations**
**Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?**

There are not.

Following article 5 of the UNCITRAL Model Law, article 7 of the Arbitration Act prohibits domestic court intervention in arbitration procedures, unless expressly permitted in the Arbitration Act. Thus, domestic court intervention is limited to assistance at the evidence-taking stage, appointment of arbitrators and decisions on interim measures.

**51. Third-party funding**
**Is third-party funding permitted in your jurisdiction? If so, are there any rules governing its use?**

Spanish arbitration laws and civil procedure rules do not refer to third-party funding; however, there are no laws that apply to arbitration or civil procedure prohibiting third-party funding. Some funders are providing financial support to arbitration claims in Spain and have established offices in Spain for this purpose. The practitioners' consensus is that third-party funding should be accepted. However, the lack of legal framework or court decisions on the matter creates uncertainties regarding the consequences of third-party funding in related matters, such as security for costs, awards of costs against third-party funders or valid assignment of claims to the funder.

The updated Code of Best Practices in Arbitration launched by the Club Español de Arbitraje (see Question 4) addresses this issue and provides that any party that receives funds from a third-party funder must inform the arbitrators and the other party thereof and reveal the identity of the third-party funder in its statement of claim or statement of defence or within a reasonable period of time, if the funding takes place at a later stage. The arbitrators may request further information to the party concerned, who may suppress confidentiality provisions or the economic terms of the transaction.

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