

Spain's New Arbitration Act

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Note on the Translation: The following text translates into English the new Spanish Arbitration Act (*Ley 60/2003 de 23 de diciembre, de Arbitraje*), passed under urgency on December 23, 2003. It was officially published on December 26, 2003 in the *Boletín Oficial del Estado*, and will come into force on March 26, 2004.

The Act is based on the UNCITRAL Model Law on International Commercial Arbitration, with significant changes. Wherever possible and appropriate we have used the English language of the UNCITRAL Model Law in this translation.

The Spanish text of the Act begins with a lengthy Statement of Purposes (*Exposición de Motivos*), which is not translated here. The Statement of Purposes is not a normative part of a Spanish enactment.

The Act contains some expressions for which there is not a precise equivalent in either the UNCITRAL Model Law or the common law, or where the usage is unusual. It also makes references to other Spanish legislation. We have used occasional explanatory footnotes in these circumstances.***

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*** See Article by G. Stampa 'The 2003 Spanish Arbitration Act' in *ASA Bull.* 4/2004, p. 671.

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Arbitration Act 2003
(Ley 60/2003 de 23 de diciembre, de Arbitraje)

TITLE I

General Provisions

Article 1. *Scope of Application*

1. This Act shall apply to any arbitration where the place of arbitration is in Spanish territory, whether of domestic or international character, without prejudice to the provisions of treaties to which Spain is a party or to legislation containing specific provisions relating to arbitration.

2. The provisions of paragraphs 3, 4 and 6 of Article 8, of Article 9, except paragraph 2, of Articles 11 and 23 and of Titles VIII and IX of this Act shall apply even when the place of the arbitration is outside Spain.

3. This Act shall be of supplementary application to any arbitration proceedings provided for in other legislation.

4. Employment arbitration is excluded from the scope of this Act.

Article 2. *Subject Matter of Arbitration*

1. All disputes relating to matters within the free disposition¹ of the parties according to law are capable of arbitration.

2. Where the arbitration is international and one of the parties is a State or a company, organisation or enterprise controlled by a State, that party shall not be able to invoke the prerogatives of its own law in order to avoid the obligations arising from the arbitration agreement.

¹ Matters capable of free disposition (*libre disposición*) are not exactly defined in Spanish law, and it is not clear how the courts will interpret 'free disposition' in this context. If it is narrowly interpreted, then it might exclude disputes arising from economic rights subject to mandatory rules, such as unfair competition, intellectual property (subject to express provision to the contrary in specific legislation), and agency disputes.

Article 3. *International Arbitration*

1. An arbitration is international whenever any of the following circumstances exist:

- a) that, at the time of the conclusion of the arbitration agreement, the parties have their domiciles in different States.
- b) that the place of arbitration, determined in accordance with the arbitration agreement, the place of performance of a substantial part of the obligations of the legal relationship from which the dispute arises, or the place with which the dispute is most closely connected, is situated outside the State in which the parties have their domiciles.
- c) that the dispute arises from a legal relationship which concerns interests of international commerce.

2. For the purposes of the preceding paragraph, if a party has more than one domicile, the domicile shall be that which has the closest relationship to the arbitration agreement; and if a party has no domicile, it shall be his habitual residence.

Article 4. *Rules of Interpretation*

Where a provision of this Act:

- a) allows the parties the power to freely determine a certain issue, that power includes that of authorising a third party, including an arbitral institution, to make that determination, except in respect of the matters set out in Article 34.
- b) refers to the arbitration agreement or to any other agreement between the parties, such agreement includes the provisions of any arbitration rules to which the parties have submitted themselves.

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- c) refers to a claim, it will also apply to a counterclaim, and where it refers to a defence, it will also apply to a defence to such counterclaim, except in respect of paragraph a) of Article 31 and subparagraph a) of paragraph 2 of Article 38.

Article 5. *Notifications, Communications and Calculations of Time*

Unless otherwise agreed by the parties, and excluding in all cases communications made in judicial proceedings, the following provisions shall apply:

- a) Any notification or communication is deemed to have been received on the day it is delivered to the addressee personally, or the day on which it is delivered at his domicile, habitual place of residence, place of business or mailing address. Likewise, notifications or communications made by telex, fax, or other means of telecommunications of electronic, telematic or similar nature that enable pleadings and documents to be sent and received with verification of their sending and receipt, in accordance with what has been designated by the addressee, shall be valid. If none of these addresses can be found after making a reasonable inquiry, the notification or communication is deemed to have been received on the day it is delivered or its delivery was attempted, by registered letter or any other verifiable means, at the addressee's last-known domicile, habitual place of residence, mailing address or place of business.
- b) The periods of time specified in this Act shall run from the day following receipt of the notification or communication. Where the last day of the period is an official holiday at the place of receipt of the notification or communication, the period shall be extended until the following working day. Where a pleading has to be submitted within a period of time, the period of time shall be deemed to have been complied with if the pleading is forwarded within that time, although it is received later. Periods of time specified in days shall be computed in natural days.

Article 6. *Tacit Waiver of Powers of Legal Challenge*²

Where a party, knowing of the non-compliance with any provision of this Act or any requirement of the arbitration agreement, does not state his objection within the period provided or, in the absence of such a period, as soon as possible, shall be deemed to have waived the powers of legal challenge provided for in this Act.

Article 7. *Court Intervention*

In matters governed by this Act, no court shall intervene except where so provided in this Act.

Article 8. *Competent Courts for Assistance and Supervision of Arbitration*

1. The First Instance Court at the seat of the arbitration shall have jurisdiction in respect of the judicial appointment of arbitrators; if the seat has not yet been determined, then jurisdiction shall reside with the First Instance Court at the domicile or habitual place of residence of any of the respondents; if none of the respondents have their domicile or habitual place of residence in Spain, then that at the domicile or habitual place of residence of the claimant, and if the claimant has no domicile or habitual place of residence in Spain, then the First Instance Court shall be any of the claimant's choice.

2. The First Instance Court at the seat of the arbitration or that of the place where the assistance is required shall have jurisdiction in respect of judicial assistance in the taking of evidence.

3. The Court³ at the place where the award has to be enforced shall have jurisdiction in respect of interim measures and, in default of such court, that at the place where the measures have to be implemented, in accordance with Article 724 of the Civil Procedure Act.

² Article 6 refers to the waiver of the powers of legal challenge ('las facultades de impugnación') rather than the 'right to object' ('derecho a objetar') referred to in the Spanish text of Article 4 of the UNCITRAL Model Law. Article 6 therefore appears more restricted than its UNCITRAL Model Law equivalent, as the waiver applies only to possible court proceedings, and not to any rights to object to non-compliance before the arbitrators.

³ Although not specified in the Act, the reference here is clearly to the First Instance Court.

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4. The First Instance Court at the place where the award was issued shall have jurisdiction to enforce the award, in accordance with paragraph 2 of Article 545 of the Civil Procedure Act and, where applicable, Article 958 of the Civil Procedure Act of 1881.

5. The Provincial Court of Appeal at the place where the award has been made shall have jurisdiction in an application to set aside an award.

6. The jurisdictional entity to which the civil procedure rules attribute the enforcement of foreign judgments shall have jurisdiction in respect of the recognition of foreign awards.⁴

TITLE II

The Arbitration Agreement And Its Effects

Article 9. *Form and Content of the Arbitral Agreement*

1. The arbitration agreement, which may be in the form of a clause in a contract or in the form of a separate agreement, shall express the will of the parties to submit to arbitration all or some disputes which have arisen or which may arise between them in respect of a determined legal relationship, whether contractual or non-contractual.

2. If the arbitration agreement is included in a standard form agreement, its validity and its interpretation shall be governed by the rules applicable to these contracts.

3. The arbitration agreement shall be verifiable in writing, in a document signed by the parties or in an exchange of letters, telegrams, telex, facsimile or any other means of telecommunications that provides a record of the agreement.

This requirement shall be satisfied when the arbitration agreement appears and is accessible for its subsequent consultation in an electronic, optical or any other type of format.

⁴ The effect of this paragraph is to attribute jurisdiction to the First Instance Court (cf. Article 85 of the Fundamental Law of the Judiciary (*Ley Organica de Poder Judicial*)).

4. The arbitration agreement appearing in a document to which the parties have expressly referred in any of the forms specified in the preceding paragraph shall be deemed incorporated into the contract.

5. There is an arbitration agreement when in an exchange of statements of claim and defence the existence of an arbitration agreement is alleged by one party and not denied by the other.

6. In respect of international arbitration, the arbitration agreement shall be valid and the dispute shall be capable of arbitration if it complies with the requirements established by the juridical rules⁵ chosen by the parties to govern the arbitration agreement, or the juridical rules applicable to the merits of the dispute, or Spanish law.

Article 10. *Testamentary Arbitration.*

Arbitration may be validly provided for in a testamentary disposition to resolve disputes between beneficiaries or legatees⁶ in matters relating to the distribution or administration of the estate.

Article 11. *Arbitration Agreement and Substantive Claim Before a Court*

1. The arbitration agreement obliges the parties to comply with the agreement and prevents the courts from hearing disputes submitted to arbitration, provided that an interested party raises an objection to jurisdiction.

2. The objection to jurisdiction shall not prevent the initiation or continuation of the arbitral proceedings.

3. The arbitration agreement shall not prevent any of the parties, before or during the arbitral proceedings, from applying to a court for interim measures of protection nor prevent the court from granting them.

⁵ The Act uses the neutral expression 'juridical rules' (*las normas jurídicas*) in preference to 'applicable law' (*derecho aplicable*) to recognise that the applicable rules may be the rules of multiple legal systems, or of international commerce.

⁶ The Spanish text uses *legatarios* which includes the recipients of both real and personal property, and so is wider than the English 'legatees' (which properly speaking refers only to a bequest of personal property), including also devisees of real property.

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TITLE III

The Arbitrators⁷

Article 12. *Number of Arbitrators*

The parties are free to determine the number of arbitrators, provided that there is an odd number. In the absence of any agreement between the parties only one arbitrator shall be appointed.

Article 13. *Capacity to Act as an Arbitrator*

All natural persons in full possession of their civil rights may act as arbitrators, provided that they are not restricted by the legislation applicable to them in the exercise of their profession. Unless otherwise agreed by the parties, no person shall be prevented by reason of their nationality from acting as an arbitrator.

Article 14. *Institutional Arbitration*

1. The parties may entrust the administration of the arbitration and the appointment of arbitrators to:

- a) Public corporations empowered to exercise arbitral functions, according to their governing legislation, and particularly the Tribunal for the Defence of Competition.
- b) Non-profitmaking associations and societies whose rules envisage arbitral functions.

2. Arbitral institutions shall exercise their functions in accordance with their rules.

⁷ The Act invariably uses the expression 'arbitrators' ('árbitros') in preference to the UNCITRAL Model Law's 'arbitral tribunal' ('tribunal arbitral'). It occasionally uses 'colegio arbitral' which we translate as 'arbitral panel'.

Article 15. *Appointment of Arbitrators*

1. In internal arbitrations other than those to be decided in equity in accordance with Article 34, an arbitrator shall be a lawyer in practice unless otherwise expressly agreed to the contrary.

2. The parties are able to freely agree on the procedure for the appointment of the arbitrators, provided that there is no violation of the principle of equal treatment. In the absence of any agreement, the following rules shall apply:

- a) In an arbitration with a sole arbitrator, the arbitrator shall be appointed by the competent court upon the request of any of the parties.
- b) In an arbitration with three arbitrators, each party shall nominate one arbitrator, and the two arbitrators thus appointed shall nominate the third arbitrator, who shall act as the presiding arbitrator of the arbitral panel. If a party fails to nominate an arbitrator within thirty days of receipt of the demand to do so from the other party, the appointment of the arbitrator shall be made by the competent court, upon request of any of the parties. The same procedure shall apply when the two arbitrators cannot reach an agreement on the third arbitrator within thirty days from the latest acceptance.

Where there are multiple claimants or respondents, the former shall nominate one arbitrator and the latter another. If the claimants or the respondents do not agree on their nomination of the arbitrator, all of the arbitrators shall be appointed by the competent court upon request of any of the parties.

- c) In arbitrations with more than three arbitrators, all shall be nominated by the competent court upon request of any of the parties.

3. If it is not possible to appoint the arbitrators by the procedure agreed upon by the parties, any of the parties may apply to the competent court for the nomination of the arbitrators or, if appropriate, the adoption of the necessary measures for this purpose.

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4. The applications made in accordance with the previous paragraphs shall follow the form of verbal proceedings⁸.

5. The court shall only refuse the request filed when it considers that, on the basis of the documents submitted, the existence of an arbitration agreement is not established.

6. Where the court proceeds to appoint arbitrators for the tribunal, it shall make a list of three names for each arbitrator to be appointed. In making this list, the court shall have regard to any qualifications established by the parties for an arbitrator and will take the measures necessary to guarantee independence and impartiality. In the case of the appointment of a sole or third arbitrator, the court shall also take into account the convenience of nominating an arbitrator of a nationality other than those of the parties and, where applicable, those of the arbitrators already appointed in light of the prevailing circumstances. Subsequently, the court will proceed to make the appointment of the arbitrators by means of the drawing of lots.

7. There shall be no appeal against final decisions in respect of matters attributed by this Article to the competent court, except in the case of refusal of the application filed in accordance with paragraph 5.

Article 16. *Acceptance by the Arbitrators*

Unless the parties have otherwise agreed, each arbitrator, within fifteen days from that following the communication of the nomination, should communicate their acceptance to whoever nominated him. If within the period established an acceptance is not communicated, the arbitrator shall be deemed to have not accepted his nomination.

Article 17. *Grounds for Abstention and Challenge*

1. An arbitrator shall be and remain independent and impartial during the arbitration. In no case shall he maintain any personal, professional or commercial relationship with any of the parties.

⁸ 'Verbal proceedings' ('juicio verbal') are one of two forms of declarative civil proceedings provided for in the Spanish Civil Procedure Act (Ley de Enjuiciamiento Civil) 2000. In general, this procedure applies to smaller claims, and after a brief statement of claims moves quickly to a single oral hearing that addresses all issues. This procedure is also referred to in Articles 19.1.a and 42.1 of the Act.

2. A person proposed as arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his nomination, shall disclose to the parties without delay the occurrence of any such circumstances.

At any time during the arbitration, any of the parties may request from the arbitrators clarification of their relationships with any of the other parties.

3. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 18. *Challenge Procedure*

1. The parties are free to agree on a procedure for challenging an arbitrator.

2. Failing such agreement, a party who intends to challenge an arbitrator shall state the grounds within fifteen days after becoming aware of the acceptance or after becoming aware of any circumstance which may give rise to justifiable doubts as to his impartiality or independence. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitrators shall decide on the challenge.

3. If a challenge under any procedure agreed upon by the parties or under the procedure of the previous paragraph is not successful, the challenging party may in due course rely upon the challenge in applying to set aside the award.

Article 19. *Failure or Impossibility to Act*

1. If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. If there is no agreement of the parties on the termination of the mandate and there is no agreed procedure to overcome such disagreement, the following rules shall apply:

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- a) The application for termination shall take the form of verbal proceedings. This application may be joined with the request for the nomination of arbitrators, as set out in Article 15, in case the application for termination is granted.

There shall be no appeal against the final decisions made.

- b) In an arbitration with more than one arbitrator, this question shall be decided by the remaining arbitrators. If they are unable to reach a decision, the procedure set out in the previous subparagraph shall apply.

2. The withdrawal of an arbitrator from his office or the agreement by one party to his termination, in accordance with the provisions of the present Article or those of paragraph 2 of the previous Article, does not imply acceptance of the validity of any ground referred to in these provisions.

Article 20. *Appointment of Substitute Arbitrator*

1. Irrespective of the reason for the appointment of a new arbitrator, he shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

2. Once the substitute arbitrator is appointed, the arbitrators, after hearing the parties, shall decide if it is appropriate to repeat any prior proceedings.

Article 21. *Responsibility of the Arbitrators and of the Arbitral Institutions. Provision of Funds.*

1. Acceptance obliges the arbitrators and, where applicable, the arbitral institution to comply faithfully with their responsibilities, being, if they do not do so, liable for the damage and losses they cause by reason of bad faith, recklessness or fraud. Where the arbitration is entrusted to an arbitral institution, the injured party shall have a direct action against the institution, regardless of any actions for compensation available against the arbitrators.

2. Unless otherwise agreed, both the arbitrators and the arbitral institution may require from the parties the provision of funds that they

consider necessary to meet the fees and expenses of the arbitrators and those that may be incurred in the administration of the arbitration. Should the parties fail to provide the funds, the arbitrators may suspend or terminate the arbitral proceedings. If one of the parties has not made its provision within the time fixed, the arbitrators, before deciding to terminate or suspend the proceedings, shall inform the remaining parties, so that they may provide the funds within a new period fixed by the arbitrators, should they wish to do so.

TITLE IV

The Jurisdiction of the Arbitrators

Article 22. *Competence of the Arbitrators to Rule on their Jurisdiction*

1. The arbitrators may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any other objection the acceptance of which would prevent the arbitrators from entering into the merits of the dispute. For this purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not entail by itself the invalidity of the arbitration agreement.

2. The objections referred to in the previous paragraph shall be raised no later than the submission of the statement of defence, and the fact that a party has appointed or participated in the appointment of the arbitrators shall not preclude that party from raising such an objection. The objection that the arbitrators are exceeding the scope of their jurisdiction shall be made as soon as the matter alleged to be beyond the scope of their jurisdiction is raised during the arbitral proceedings.

The arbitrators shall only admit later objections if the delay is justified.

3. The arbitrators may rule on the objections referred to in this Article either as a preliminary question or together with the remaining questions submitted to their decision relative to the merits. The decision of the arbitrators may only be impugned by means of an application to set aside the award in which it is adopted. If the objections are dismissed by means of a preliminary decision, the making of the application to set aside will not suspend the arbitral proceedings.

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Article 23. *Power of the Arbitrators to Order Interim Measures*

1. Unless otherwise agreed by the parties, the arbitrators may, at the request of any party, order such interim measures as they may consider necessary in respect of the subject-matter of the dispute. The arbitrators may require appropriate security from the applicant.

2. The provisions relating to the setting aside and enforcement of awards shall apply to the arbitral decisions in respect of interim measures, regardless of the form of those measures.

TITLE V

The Conduct of Arbitral Proceedings

Article 24. *Principles of Equal Treatment of Parties and of a Fair Hearing*

1. The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

2. The arbitrators, the parties and the arbitral institutions, if applicable, are obliged to maintain the confidentiality of information coming to their knowledge in the course of the arbitral proceedings.

Article 25. *Determination of Rules of Procedure*

1. In accordance with the previous Article, the parties may freely agree on the procedure to be followed by the arbitrators in the conduct of the proceedings.

2. Failing such agreement, the arbitrators may, subject to the provisions of this Act, conduct the arbitration in such manner as they consider appropriate. The power conferred upon the arbitrators includes the power to determine the admissibility, relevance and usefulness of any evidence, the manner of taking evidence, including on the arbitrators' own motion, and its weight.

Article 26. *Place of Arbitration*

1. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitrators having regard to the circumstances of the case and the convenience of the parties.

2. Notwithstanding the provisions of the previous paragraph, the arbitrators may, after consulting the parties and unless otherwise agreed by the parties, meet at any place they consider appropriate for hearing witnesses, experts or the parties, or to inspect objects, documents or persons. The arbitrators may deliberate at any place they consider appropriate.

Article 27. *Commencement of Arbitration*

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 28. *Language of the Arbitration*

1. The parties are free to agree on the language or languages to be used in the arbitration. Failing such agreement, the arbitrators shall determine the language, having regard to the circumstances of the case. Unless otherwise agreed by the parties or determined by the arbitrators, the language or languages established shall apply to any written statement by a party, any hearing, and any award, decision or other communication by the arbitrators.

2. The arbitrators, unless objected to by one of the parties, may order that, without need of translation, any documents be submitted or any proceedings be performed in a language different from that of the arbitration.

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Article 29. *Statements of Claim and Defence*

1. Within the period of time agreed by the parties or determined by the arbitrators and unless the parties have otherwise agreed as to the required elements of the statements of claim and defence, the claimant shall state the facts supporting his claim, the nature and circumstances of the dispute and the relief sought, and the respondent may answer the matters raised in the statement of claim. The parties may submit with their statements all documents they consider to be relevant or make reference to the documents or other evidence they will submit or propose.

2. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitrators consider it inappropriate to allow such amendment having regard to the delay in making it.

Article 30. *Form of the Arbitral Proceedings*

1. Unless otherwise agreed by the parties, the arbitrators shall decide whether to hold oral hearings for the presentation of oral argument, the taking of evidence and the submission of conclusions, or whether the proceedings shall be conducted solely in writing. However, unless the parties have agreed that no hearings shall be held, the arbitrators shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

2. The parties shall be given sufficient advance notice of any hearing and shall be able to take part directly or by means of representatives.

3. All statements, documents or other instruments provided to the arbitrators by one party shall be communicated to the other party. Likewise, any documents, expert reports or evidentiary instruments on which the arbitrators may rely in making their decision shall be communicated to the parties.

Article 31. *Default of the Parties*

Unless otherwise agreed by the parties, if, without showing sufficient cause in the opinion of the arbitrators:

- a) the claimant fails to communicate his statement of claim in time, the arbitrators shall terminate the proceedings, unless, after hearing the respondent, the respondent indicates his intention to formulate a claim.
- b) the respondent fails to communicate his statement of defence in time, the arbitrators shall continue the proceedings without treating such failure as an acceptance or admission of the facts alleged by the claimant.
- c) any party fails to appear at a hearing or to produce evidence, the arbitrators may continue the proceedings and make the award on the evidence before them.

Article 32. *Expert Appointed by the Arbitrators*

1. Unless otherwise agreed by the parties, the arbitrators may appoint, on their own motion or upon the request of any party, one or more experts to report to them on specific issues and may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents or objects for his inspection.

2. Unless otherwise agreed by the parties, if a party so requests or if the arbitrators consider it necessary, the expert shall, after delivery of his report, participate in a hearing where the arbitrators and the parties, by themselves or assisted by expert witnesses, have the opportunity to put questions to him.

3. The previous paragraphs shall be understood as being without prejudice to the power of the parties, unless otherwise agreed, to submit expert reports by experts freely appointed by them.

Article 33. *Court Assistance in Taking Evidence*

1. The arbitrators or any party with their approval may request from the competent court assistance in taking evidence, in accordance with the applicable rules on the taking of evidence. This assistance may consist in the taking of evidence before the competent court or in the adoption by the competent court of specific measures necessary in order that the evidence may be taken before the arbitrators.

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2. If it is so requested, the court shall take evidence under its exclusive supervision. Otherwise, the court shall limit itself to ordering the relevant measures. In both cases, the court shall deliver to the applicant a certified copy of the proceedings.

TITLE VI

The Making of the Award and the Termination of the Proceedings

Article 34. *Rules Applicable to Substance of Dispute*

1. The arbitrators shall decide in equity only if the parties have expressly authorized them to do so.

2. Subject to the previous paragraph, where the arbitration is international, the arbitrators shall decide the dispute in accordance with such rules of law as are chosen by the parties. Any designation of the law or legal system of a given State shall be construed, unless otherwise stated, as referring to the substantive law of that State and not to its conflict of laws rules.

Failing any designation by the parties, the arbitrators shall apply the law that they consider appropriate.

3. In all cases, the arbitrators shall decide in accordance with the terms of the contract and shall take into account the applicable usages.

Article 35. *Decision Making by Panel of Arbitrators*

1. Where there is more than one arbitrator, any decision shall be made by a majority, unless otherwise agreed by the parties. If there is no majority, the decision shall be made by the presiding arbitrator.

2. Unless otherwise agreed by the parties or by the arbitrators, the presiding arbitrator may decide by himself questions of order, formalities, and progress⁹ of the proceedings.

⁹ In the Spanish text, 'ordenación, tramitación e impulso'.

Article 36. *Award by Agreement of the Parties*

1. If, during arbitral proceedings, the parties wholly or partially settle the dispute, the arbitrators shall terminate the proceedings in respect of the points agreed and, if requested by both parties and not objected to by the arbitrators, record the settlement in the form of an arbitral award on agreed terms.

2. An award on agreed terms shall be made in accordance with the provisions of the following Article and shall have the same effect as any other award on the merits of the case.

Article 37. *Time, Form, Contents and Notification of the Award*

1. Unless otherwise agreed by the parties, the arbitrators shall decide the dispute in a single award or in as many partial awards as they deem necessary.

2. Unless otherwise agreed by the parties, the arbitrators ought to decide the dispute within six months from the date of the submission of the statement of defence referred to in Article 29 or from the expiry of the period to submit it. Unless otherwise agreed by the parties, this period of time may be extended by the arbitrators, for a period not exceeding two months, by means of a reasoned decision.

The expiry of the period to issue the final award without the issue of the final award shall mean the termination of the arbitral proceedings and the termination of the office of the arbitrators. Nevertheless, it shall not affect the efficacy of the arbitration agreement, without prejudice to any liability the arbitrators may have incurred.

3. The award shall be made in writing and shall be signed by the arbitrators, who may add any dissenting opinion. Where there is more than one arbitrator, the signatures of the majority of all members of the arbitral panel or that of its presiding arbitrator alone shall suffice, provided that the reason for any omitted signature is stated.

For the purposes of the previous paragraph, the award shall be deemed made in writing when its content and signatures are recorded and accessible for consultation in an electronic, optical or other type of format.

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4. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms in accordance with the previous Article.

5. The award shall state its date and the place of arbitration as determined in accordance with paragraph 1 of Article 26. The award shall be deemed to have been made at that place.

6. Subject to the agreement of the parties, the arbitrators shall decide in the award on the costs of the arbitration, which shall include the fees and expenses of the arbitrators and, where applicable, the fees and expenses of counsel or representatives of the parties, the cost of the services provided by the institution administering the arbitration and the other expenses of the arbitral proceedings.

7. The arbitrators shall notify the award to the parties in the form and time agreed by the parties or, failing such agreement, by means of the delivery to each party of a copy signed by the arbitrators in accordance with paragraph 3 within the period established by paragraph 2.

8. The award may be formalised before a Notary Public. Any of the parties, at their own expense, may require the arbitrators, before notification, to formalise the award before a Notary Public.

Article 38. *Termination of Proceedings*

1. Without prejudice to the provisions of the previous Article, in respect of notification and, if applicable, formalisation of the award before a Notary Public, and the following article, regarding the correction, clarification and issue of a supplement to the award, the arbitral proceedings and the mandate of the arbitrators shall terminate with the final award.

2. The arbitrators shall also issue an order for the termination of the arbitral proceedings when:

- a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitrators recognise a legitimate interest on his part in obtaining a final settlement of the dispute.
- b) the parties agree on the termination of the proceedings.

- c) the arbitrators find that the continuation of the proceedings has for any other reason become unnecessary or impossible.

3. Where the period provided for by the parties for this purpose has expired or, in the absence of such provision, two months from the termination of the proceedings, the arbitrators' obligation to preserve the documentation of the proceedings shall cease. Within this period, any party may request that the arbitrators return the documents submitted by that party. The arbitrators shall accept the request provided that it does not breach the confidentiality of the arbitral deliberations and that the applicant agrees to meet the expenses of the delivery, if applicable.

Article 39. *Correction, Clarification and the Issue of a Supplement to the Award*¹⁰

1. Within ten days of receipt of the award, unless another period of time has been agreed upon by the parties, any party, with notice to the other party, may request the arbitrators:

- a) to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature.
- b) to clarify a point or a specific part of the award.
- c) to supplement the award as to claims presented in the arbitral proceedings and not resolved in the award.

2. After hearing the other parties, the arbitrators shall decide on applications for the correction of errors and for clarification within ten days, and for the issue of a supplement to the award within twenty days.

3. Within ten days of the date following the date of the award, the arbitrators, on their own motion, may correct any of the errors referred to under paragraph 1(a) of this Article.

¹⁰ The Spanish text avoids the reference in Article 33 of the UNCITRAL Model Law to an 'additional award' to address omissions. Instead it refers to a 'complemento del laudo' for this purpose, which we have translated as the issue of a 'supplement' to the award. The practical difference is that a successful application under Article 33(3) of the UNCITRAL Model Law results in two separate awards (i.e., the original award and the additional award), while the procedure contemplated by the Spanish Arbitration Act may result in a single (though supplemented) award.

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4. The provisions of Article 37 shall apply to arbitral decisions relating to the correction, clarification or the issue of a supplement to the award.

5. Where the arbitration is international, the terms of ten and twenty days provided for in the previous paragraphs shall be one and two months, respectively.

TITLE VII

The Application to Set Aside and Revision of the Award

Article 40. *Application to Set Aside the Award*

An application to set aside a final award may be made in the terms provided for under this Title.

Article 41. *Grounds*

1. An arbitral award may be set aside only if the party making the application alleges and proves:
 - a) that the arbitration agreement does not exist or is not valid.
 - b) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
 - c) that the arbitrators have decided questions not submitted to their decision.
 - d) that the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act.
 - e) that the arbitrators have decided questions not capable of settlement by arbitration.

f) that the award is in conflict with public policy.

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

3. In the cases referred to in subparagraphs (c) and (e) of paragraph 1, the setting aside shall affect only the determinations of the award on questions not submitted to the decision of the arbitrators or not capable of arbitration, provided that they can be separated from the remainder.

4. An application for setting aside shall be made within two months from the date on which the party making that application had received the award or, if a request for correction, clarification or to supplement the award had been made, from the date on which the party making that application had received the decision on the request, or from the date on which the term for making that decision expired.

Article 42. Procedure

1. The application to set aside an award shall follow the procedure for verbal proceedings. Nevertheless, the statement of claim shall be filed in accordance with the provisions of Article 399 of the Civil Procedure Act,¹¹ accompanied by documentation proving the arbitral agreement and the award, and, if applicable, shall contain a proposal of the evidence upon which the applicant intends to rely. The respondent shall be notified of the application, in order that he may answer within twenty days. In the answer the respondent shall refer to the evidence upon which he intends to rely. Once the application is answered or the time period to do so has expired, the parties shall be summoned to a hearing, at which the applicant may propose new evidence in respect of the allegations contained in the respondent's answer.

2. There is no appeal from the judgment in respect of an application to set aside.

¹¹ Article 399 of the Civil Procedure Act (*Ley de Enjuiciamiento Civil*) sets out the requirements for a statement of claim in ordinary proceedings. These are more extensive and detailed than those for verbal proceedings (cf. footnote 8 above).

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Article 43. *Res Judicata and Revision of Final Awards*

The final award has the effects of *res judicata* and shall only be subject to an application for revision in accordance with the procedure established in the Civil Procedure Act for final judgments.

TITLE VIII

The Enforcement of Awards

Article 44. *Applicable Rules*

The enforcement of the awards shall be governed by the provisions of the Civil Procedure Act and this Title.

Article 45. *Suspension, Dismissal and Continuance of Enforcement in the Case of an Application to Set Aside an Award*

1. An award is enforceable even though an application to set aside has been made. Nevertheless, in that event the party against whom enforcement is sought may apply to the competent court for the suspension of enforcement, provided that he offers security for the amount awarded, plus the damages and losses that might arise from the delay in the enforcement of the award. The security may take any of the forms provided for in paragraph 3(2) of Article 529 of the Civil Procedure Act.¹² Once the application for suspension is filed, the court, after hearing the party seeking enforcement, shall fix the security. There is no appeal against this decision.

2. The suspension shall be lifted and the enforcement continue when the court is satisfied that the application to set aside has been disallowed, without prejudice to the right of the party seeking enforcement to demand, if applicable, indemnification for the damages and losses caused by the delay in the enforcement, by means of the procedure set out in Articles 712 and subsequent articles of the Civil Procedure Act.¹³

¹² Paragraph 3(2) of Article 529 of the Civil Procedure Act (Ley de Enjuiciamiento Civil) provides that security may take the form of cash, first demand bank guarantee of indefinite duration or any other means that, in the opinion of the court, guarantees the immediate availability of the amount of the security.

¹³ Article 712 et seq. of the Civil Procedure Act relate to proceedings for the quantification of damages and losses.

3. The enforcement shall be revoked, with the consequences set out in Articles 533 and 534 of the Civil Procedure Act,¹⁴ when the court is satisfied that the application to set aside has been allowed.

If the application to set aside relates only to the questions referred to in paragraph 3 of Article 41 and other determinations of the award remain valid, then the application shall be considered successful in part, for the purposes provided for in paragraph 2 of Article 533 of the Civil Procedure Act.

TITLE IX

The Recognition¹⁵ of Foreign Awards

Article 46. *Foreign Character of the Award. Applicable Rules*

1. A foreign award is an award which has been issued outside of Spanish territory.

2. The recognition of foreign awards shall be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made in New York, on 10 July 1958, without prejudice to the provisions of other more favourable international conventions, and shall take place in accordance with the procedure established in the civil procedure rules for judgments issued by foreign courts.

Additional Provision. *Consumer Arbitration*

This Act shall be of supplementary application to the arbitration referred to in the Law 26/1984, of 19 July, General Law for the Defence of Consumers and Users, and regulations pursuant to this Law may provide for a decision in equity, unless the parties expressly opt for arbitration at law.

¹⁴ Articles 533 and 534 of the Civil Procedure Act relate to the repayment of money, the return of goods, costs, and compensation, in the event of the revocation of provisional orders of execution.

¹⁵ Title IX and Article 46.2 use 'exequatur', which translates as 'recognition' of an award, but Article 46.2, by incorporating through reference the New York Convention 1958, in fact deals with both the recognition and enforcement of foreign awards. The enforcement of a recognised foreign award will be in accordance with the New York Convention 1958, and will follow the procedure established in the Civil Procedure Act for the enforcement of domestic judicial decisions.

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Transitional Provision. *Transitional Regime*

1. In the cases where before the entry into force of this Act the respondent has received the request to submit a dispute to arbitration, or the arbitral proceedings have been initiated, the arbitration shall be governed by the provisions of the Law 36/1988, of 5 December, of Arbitration. Nevertheless, the provisions of this Act shall apply in respect of the arbitration agreement and its effects.

2. The provisions of this Act relating to the application to set aside and revision shall apply to awards made after the entry into force of this Act.

3. Proceedings for enforcement of awards and of recognition of foreign awards which are pending on the entry into force of this Act shall continue according to the provisions contained in the Law 36/1988, of 5 December, of Arbitration.

Repeal Provisions. *Repeals*

The Law 36/1988, of 5 December, of Arbitration is repealed.

First Final Provision. *Amendment of the Law 1/2000, of 7 January, of Civil Procedure.*

1. Subparagraph 2° of paragraph 2 of Article 517 shall be amended as follows:

'2°. The arbitral awards or arbitral decisions.'

2. A new sentence is added to subparagraph 1 of paragraph 1 of Article 550, in the following form:

'Where the title is an award, it must also be accompanied by the arbitral agreement and the documents confirming its notification to the parties.'

3. A new subparagraph 4° is added to paragraph 1 of Article 559, in the following form:

'4°. If the title of enforcement were an arbitral award which has not been formalized before a Notary Public, its lack of authenticity.'

Second Final Provision. *Jurisdictional Authority.*

This Act is passed pursuant to the exclusive jurisdiction of the State for commercial, procedural and civil legislation, according to Article 149.1.6^a and 8^a of the Constitution.

Third Final Provision. *Entry into Force*

This Act shall enter into force three months after its publication in the *'Boletín Oficial del Estado'*.

Madrid, 23 December 2003