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The Spanish Application of the UNCITRAL Model Law on International Commercial Arbitration

by DAVID J. A. CAIRNS*

I. INTRODUCTION: CONTINUITY, HARMONISATION AND INTERNATIONAL BEST PRACTICE

THE OBJECTIVE of the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') is to contribute 'to the establishment of a united legal framework for the fair and efficient settlement of disputes in international commercial relations'.[1] The Model Law establishes a standard to serve as a basis for the harmonisation of national arbitration laws, on the basis that such harmonisation increases consistency and predictability in international arbitration, and therefore the fairness and efficiency of the settlement of international commercial disputes.

An important feature of a model law as an instrument of harmonisation is its flexibility. Each jurisdiction can decide whether to take a model law in its entirety, substantially, or simply to pick and choose amongst its terms. This characteristic means harmonisation by model law is likely to be incomplete (compared with, for example, harmonisation by international convention), but does encourage more jurisdictions to engage with the model law. The Model Law has certainly proved an attractive standard for reform of national arbitration laws, with 51 jurisdictions having now enacted legislation based on this text.[2]

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[1] General Assembly Resolution 40/72 (adopted 11 December 1985) quoted in Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (T.M.C. Asser Institut, The Hague, 1989), p. 1.

[2] On the nature of the Model Law as an instrument of harmonisation, *see* 'The United Kingdom and the UNCITRAL Model Law: The Mustill Committee's Consultative Document of October 1987 on the Model Law' in (1987) 3 *Arb. Int'l* 278 at 280–281 and 285–286 (identifying 10 different options in a non-exhaustive list of the possible methods the United Kingdom might adopt the Model Law). For a regularly updated list of the jurisdictions with legislation based on the Model Law, *see* www.uncitral.org

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The Model Law offers a well drafted and internally coherent arbitration text, and is no doubt attractive for this reason alone. However, harmonisation is an independent justification to adopt the Model Law, particularly in jurisdictions where the facilitation of international trade or the encouragement of international arbitration are policy priorities. Once a particular jurisdiction takes the decision to consider the adoption of the Model Law, then the question of the extent to which Model Law text should be accepted or modified involves the interplay of factors that can be classified under four distinct headings: (i) the existing law and the elements of the existing law it is considered desirable to preserve; (ii) domestic policy imperatives relating to arbitration, and particularly international arbitration; (iii) the Model Law text, its strengths, weaknesses and omissions; and (iv) international best practice.[3]

A model law ideally embodies international best practice, but the UNCITRAL Model Law on International Commercial Arbitration was promulgated in 1985, and international arbitral law and practice has developed substantially in the 20 years since this time. In 1999, the UNCITRAL Secretariat identified 13 problem areas in international arbitration for possible future study, and subsequent examination of two of these subjects (interim measures and the requirement of written form for the arbitration agreement) has resulted in proposals for amendments to the Model Law.[4] Any legislator considering the Model Law today must consider not only the Model Law text, but also subsequent developments and the various approaches that have been proposed or adopted in other jurisdictions in response to the weaknesses and omissions of the Model Law. In short, current international best practice must be addressed; harmonisation is an evolutionary process.

The policy framework for the adoption of the Model Law must therefore accommodate domestic priorities (existing law and practice; domestic policy imperatives) and the priorities of harmonisation itself (the Model Law text; international best practice). It also must balance continuity (preservation of well established and acceptable doctrines of existing law; the now familiar Model Law text) with improvement (repeal of outdated or poorly functioning aspects of existing law; adoption of international best practice).

This article considers the character of the adoption of the Model Law in Spain. Spain joined the Model Law nations with the enactment of Ley 60/2003

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3 *See e.g.*, the factors identified by the Mustill Committee, *supra* n. 2 at pp. 286–287.

4 UNCITRAL Secretariat, *Possible Future Work in the Area of International Commercial Arbitration* (A/CN.9/460, 32nd session, Vienna, May/June 1999); *Settlement of Commercial Disputes: Possible Uniform Rules on Certain Issues concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement* (A/CN.9/WG.II/WP.108, Working Group II, 32nd session, Vienna, March 2000); *Settlement of Commercial Disputes: Interim Measures of Protection* (A/CN.9/WG.II/WP.138, Working Group II, 43rd session, Vienna, October 2005); *Settlement of Commercial Disputes: Preparation of a Model Legislative Provision on Written Form for the Arbitration Agreement* (A/CN.9/WG.II/WP.136, Working Group II, 43rd session, Vienna, October 2005).

de arbitraje ('2003 Arbitration Act' or 'AA') on 23 December 2003, which entered into force on 26 March 2004.[5]

The 2003 Arbitration Act includes a lengthy *Exposición de Motivos* ('Statement of Legislative Purposes'), which explains the justification for the adoption of many individual provisions. It describes the Model Law as the 'principal inspiration' for the 2003 Arbitration Act, and makes clear that the internationalisation of Spanish arbitration law – and specifically to encourage the choice of Spain as an arbitral seat – is a major objective of the 2003 Arbitration Act. It describes the Model Law as 'accessible' to international business, therefore providing an attractive base for Spain's aspirations to be a major international seat of arbitration.[6] This legal base, it is no doubt hoped, will set off the many other advantages offered by Spain as a seat for international arbitration, including the increasing importance of the Spanish language in international arbitration; Spain's cultural ties with both Europe and Latin America; clear cost advantages in comparison with other major European arbitration centres; and a reliable and supportive judiciary.

The 2003 Arbitration Act differs radically from its insular 1988 predecessor, Ley 36/1988, de 5 de diciembre, de arbitraje ('1988 Arbitration Act'). From an international perspective, the 1988 Arbitration Act had significant defects in terms of limitations on party autonomy, possibilities of judicial interference and inappropriate mandatory formal requirements.[7] The adoption of the Model Law is a major legislative change, and a significant policy reorientation in favour of international arbitration. Nevertheless, the Spanish Legislature opted for continuity with the 1988 Arbitration Act in some important respects, particularly in respect of domestic arbitrations, and paid tribute to the success of the 1988 Arbitration Act in encouraging the acceptance and use of arbitration in Spain, consolidating the place of institutional and international arbitration in Spain, generating a valuable body of doctrinal writing and standardising judicial procedures in control and support of arbitration.[8] These achievements provided a solid foundation for the adoption of the Model Law.

Fidelity to the Model Law is the principal distinguishing feature of the 2003 Arbitration Act, but there was also careful attention to subsequent developments and international best practice. The Special Section of the General Codification Commission entrusted with preparing the draft of the 2003 Arbitration Act considered the work of UNCITRAL since 1985, the experience of other countries that had adopted the Model Law (particularly in Latin America, where there was a close and reciprocal judicial tradition), the experience of the ICC and its

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[5] For an English translation of the 2003 Arbitration Act, *see* David J. A. Cairns and Alejandro López Ortiz, 'Spain's New Arbitration Act' in (2004) 7 *Int'l Arb. L Rev.* 39 (with introductory note); (2004) *ASA Bulletin* 695 (this translation does not include the Statement of Legislative Purposes, which is not a normative part of a Spanish enactment).

[6] Statement of Legislative Purposes, I.

[7] On the problems with the 1988 Arbitration Act, *see* David J. A. Cairns and Gonzalo Stampa, 'Arbitration Law Reform in Spain: Taking Off … At Last?' in (2001) 4 *Int'l Arb. L Rev.* 84; Gonzalo Stampa, 'España Sede de Arbitrajes Internacionales: Un Despegue Abortado' in (2000) 4981 *Diario La Ley* 1; (2000) *Revista Jurídica La Ley* D-23, 1678; Bernardo M. Cremades, *Arbitration in Spain* (Butterworths, 1991).

[8] Statement of Legislative Purposes, I.

Arbitration Rules for refinements in matters of procedure, and French and Swiss law in respect of certain matters.[9] The search for international best practice also appears in the specific provision for on-line arbitration, multiparty arbitration and confidentiality.

The 2003 Arbitration Act places particular emphasis on arbitral efficiency. This objective is manifested in departures from the Model Law in the provision for a single arbitrator (unless otherwise agreed by the parties), some shortened timeframes, modification of the role of domestic courts, and the time limit for rendering an award. The speedy and efficient resolution of disputes is a traditional justification for arbitration, but it is not, especially today, the only or even predominant motive for the choice of arbitration by the parties, particularly in international arbitration. The modifications in the interests of arbitral efficiency in the 2003 Arbitration Act most clearly demonstrate the tension between international harmonisation and domestic policy objectives.

The 2003 Arbitration Act has been welcomed and applauded by Spanish lawyers. It has immediately raised the profile of arbitration in Spain, and has been the catalyst for a number of public and private initiatives, including the promulgation of new rules by the leading Spanish arbitration institutions,[10] the appearance of advanced university programmes relating to arbitration, an astonishing output of new textbooks on arbitration and a profusion of promotional events by leading Spanish law firms. There is no doubt that the 2003 Arbitration Act has generated an expectation that Spain's profile in international arbitration is set to rise.

This article considers the Spanish application of the Model Law, by addressing specific topics under the chapter headings of the Model Law. It does not address every article of the Model Law or the 2003 Arbitration Act. Rather, the intention is to highlight the most important features of the 2003 Arbitration Act in terms of the endorsement or departure from the Model Law, and to demonstrate the interplay between existing Spanish arbitral law and practice, the objective of procedural efficiency, the Model Law text, and the search for international best practice. It also examines the distinctive features of Spanish arbitral jurisprudence, and their continuance or adaptation in light of the new legislation, in order to provide a comprehensive overview of contemporary Spanish arbitral law and practice.

II. SCOPE OF APPLICATION (ARTICLES 1–6 AA; ARTICLES 1–6 MODEL LAW)

The most important feature of the Spanish approach to the general provisions of Chapter 1 of the Model Law is in relation to the scope of application. The 2003 Arbitration Act seeks to establish the widest possible single regime for arbitration.

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[9] For the sources of the 2003 Arbitration Act, *see* Statement of Legislative Purposes, I; Evelio Verdera y Tulles, *La Ley 60/2003, de 23 de diciembre, de Arbitraje entre la Tradición y la Novación* (Madrid, Real Academia de Jurisprudencia y Legislación, 2005), pp. 59–71.

[10] *See* Carlos de los Santos, 'New Rules for Four Main Spanish Arbitration Institutions' in (2005) *Arbitration* (March) 38, discussing the new rules of the Corte de Arbitraje de Madrid, Corte Civil y Mercantil de Arbitraje, Corte Española de Arbitraje and the Tribunal Arbitral de Barcelona.

The Model Law's defining criteria of 'international commercial arbitration' is rejected on the basis that international experience demonstrates that the Model Law's provisions can be successfully applied in domestic arbitrations.

The scheme of the scope of the 2003 Arbitration Act can be summarised as follows.

(a) Territoriality

The 2003 Arbitration Act applies to any arbitration within Spanish territory 'whether of a domestic or international character'.

The 2003 Arbitration Act has a limited extra-territorial effect, following the Model Law in respect of the extra territoriality of provisions relating to the negative effect of the arbitration clause, interim measures and the recognition and enforcement of awards, adding to this list in art. 9 the form and content of the arbitration agreement (except in respect of standard form agreements).

(b) Single ('Monist') Regulation of Domestic and International Arbitration

As far as possible, the 2003 Arbitration Act establishes a single regime for domestic and international arbitrations. The Statement of Legislative Purposes states that the Arbitration Act has preferred a 'monist' to a 'dualist' arbitration regulation on the basis, confirmed by recent experience in other jurisdictions, 'that the good regulation of international arbitration has to be good also for domestic arbitration, and vice versa'.[11]

(c) Definition of International Arbitration

Notwithstanding the monist objective, there are various provisions that apply specifically to international arbitration.[12] Accordingly, art. 3 contains a definition of 'international arbitration'. This three point definition closely follows art. 1.3 of the Model Law, except that subparagraph (c) of the Model Law is replaced by a provision, derived from French law, which includes within the definition of international arbitration disputes arising from 'a legal relationship which concerns the interests of international trade'.

Amongst the specific provisions applying to international arbitration, a notable addition to the Model Law is art. 2.2, derived from art. 177.2 of the Swiss Private International Law Act, stating that a state party or entity cannot invoke the prerogatives of its own law to avoid its obligations arising from the arbitration agreement.

(d) General Definition of Subject Matter Arbitrability

Article 1.5 of the Model Law excludes from its operation any disputes which may not be submitted to arbitration by virtue of any other law of the state. Article 2.2

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[11] Statement of Legislative Purposes, II.

[12] Articles 2.2, 9.6, 34.2 and 39.5.

of the 2003 Arbitration Act replaces the express subordination to other laws in respect of arbitrability with a general principle that all matters within the 'free disposition' of the parties according to law are capable of arbitration. Of course, matters of 'free disposition' are often defined in legislation, so behind the statement of principle there will often be a subordination to other legislation.[13]

(e) General Law of Supplementary Application to Specific Arbitral Legislation

Article 1.3 provides that the 2003 Arbitration Act shall be of supplementary application to any arbitration proceedings provided for in other legislation. There is considerable Spanish legislation providing for arbitration of specific types of disputes. In some cases, such as in the intellectual property field, the legislation does little more than confirm the arbitrability of certain types of disputes, leaving the arbitration itself to be governed by the general arbitration law. In other cases, most notably consumer arbitrations, there is detailed legislative regulation of the form of the arbitral proceedings, thereby diminishing the sphere of application of the general law. This supplementary application might mean that the 2003 Arbitration Act applies to non-commercial arbitrations (again, consumer arbitrations provide an example).

Labour arbitrations have their own legislation and arbitral tribunals and are specifically excluded from the 2003 Arbitration Act.[14]

III. THE ARBITRATION AGREEMENT (ARTICLES 9–11 AA; ARTICLES 7–9 MODEL LAW)

Article 9 of the 2003 Arbitration Act includes all of the elements of art. 7 of the Model Law with three significant additions: express provision for standard form agreements, for arbitration agreements made by electronic means of communications, and a presumption of validity of the arbitration agreement.[15]

(a) Arbitration Agreements in Standard Conditions

Article 9.2 assumes that an arbitration agreement may be validly included in a standard form agreement, and provides that its validity and interpretation are governed by the specific rules applicable to standard form contracts. There was a

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[13] For a comprehensive analysis of subject matter arbitrability, *see* Pilar Perales Viscasillas, *Arbitrabilidad y Convenio Arbitral. Ley 60/2003 de Arbitraje y Derecho Societario* (Editorial Aranzadi SA, 2005); Pilar Perales Viscasillas, 'Arbitrabilitidad de los Derechos de la Propiedad Industrial y de la Competencia' in (2005) 6 *Anuario Justicia Alternativa* 13.

[14] 2003 Arbitration Act, art. 1.4.

[15] *ibid.* art. 9.6 provides that the arbitration agreement will be valid 'if it complies with the requirements established by the juridical rules chosen by the parties to govern the arbitration agreement, or the juridical rules applicable to the merits of the dispute, or Spanish law'. *cf.* art. 178.2 of the Swiss Private International Law Act 1987 and Evelio Verdera y Tulles, *La Ley 60/2003, de 23 de diciembre, de Arbitraje entre la Tradición y la Novación* (Madrid, Real Academia de Jurisprudencia y Legislación, 2005), pp. 66 and 73.

similar provision in the 1988 Arbitration Act[16] and there is considerable Spanish case law in relation to arbitration agreements in standard form agreements.

Standard form agreements are governed by the Law of General Contractual Conditions.[17] Article 5 of this Law provides that standard conditions ought to comply with the standards of 'transparency, clarity, precision and simplicity', and sets out the prerequisites for the incorporation of standard conditions, including the need to expressly inform the 'adherent' to the standard conditions of their existence, and to provide a copy. Article 7 complements this provision by expressly providing that standard conditions are not incorporated into a contract when they are 'illegible, ambiguous, obscure or incomprehensible' (except where expressly accepted in writing by the adherent) or when the adherent has not had a real opportunity to know the standard conditions at the time of entering into the contract. Article 8.1 provides that standard conditions that breach this Law to the prejudice of the adherent will be null and void.

Article 8.2 of this Law is an important provision for consumer arbitrations, a highly active sphere of arbitration in Spain. Article 8.2 provides that standard conditions in consumer contracts will be null and void when they are 'abusive' and states that the standard conditions will be deemed abusive in all cases defined in art. 10*bis* of the General Law for the Defence of Consumers and Users.[18] Article 10*bis* provides that all contractual terms not individually negotiated will be considered abusive 'when, contrary to the requirements of good faith, they cause, to the prejudice of the consumer, an important disequilibrium in the rights and obligations of the parties derived from the contract. In all cases contractual terms will be considered abusive clauses in the circumstances set out in the Additional Provision of the present Law'. The first Additional Provision contains a list of 29 types of conditions which are deemed abusive in consumer contracts, with no. 26 being:

> The submission to arbitrations other than consumer arbitrations, except in the case of a form of institutional arbitration created by the legal rules for a specific sector or purpose.

In Spain, there is a well developed regime of consumer arbitrations administered by various levels of local government and also a national body for disputes affecting consumers at a national level.[19] The effect of these provisions is that an arbitration agreement contained in standard terms and conditions of a consumer

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[16] 1988 Arbitration Act, art. 5.2.

[17] Ley 7/1998 de 13 abril, de condiciones generales de la contratación.

[18] Ley 26/1984 de 19 de julio, de consumo. Article 10*bis*, and the first additional provision to which it refers, were added to Ley 26/1984 by Ley 7/1998 de 13 de abril.

[19] *See* Real Decreto 636/1993 de 3 de mayo, de arbitraje de consumo, which provides, *inter alia*, for the procedure for consumer arbitrations, including specific provisions for the appointment of the tribunal, and for a simplified and expedited procedure and award.

contract is null and void unless the arbitration is within an official consumer arbitration scheme.[20]

A specific type of 'standard form' arbitration agreement that has received considerable judicial support is provisions in the Articles or Statutes of a corporation referring to arbitration any disputes between shareholders or between shareholders and the company. The courts have accepted that on purchasing shares a shareholder accepts the conditions regulating the corporation in its Statutes, and this can include the acceptance of an arbitration agreement, provided that the subject matter of the dispute is arbitrable.[21]

(b) Arbitration Agreements Made through Electronic Means

The 2003 Arbitration Act expressly provides for an arbitration agreement concluded by electronic means, although without abandoning the requirement of 'writing' that remains imperative to secure recognition and enforcement pursuant to the New York Convention. The Spanish approach accords with the latest UNCITRAL proposal, subject only to some differences in wording.[22]

Article 9.3 provides that 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*' (emphasis added). Article 9.3 then goes on to provide that this does not require an actual physical document. The requirement of being 'verifiable in writing' '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'.

This provision for an electronic arbitral agreement is complemented by art. 37.3 which provides for an electronic award. A similar technique is adopted as with the electronic arbitration agreement: the requirement of the award being 'in writing' is retained, but an award is 'deemed made in writing when its content and signatures are recorded and accessible for consultation in an electronic, optical

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[20] The legislation thereby defeats the practice of referring consumer disputes to arbitration by private institutions of suspect independence: *see* Sentencia del Audiencia Provincial Barcelona núm. 846/2003 (Sección 14ª), de 17 octubre (JUR 2003\259579), where the court annulled an award pursuant to the rules of the Asociación Europea de Arbitraje de Derecho y Equidad (AEADE) arising from a contract between a distributor of mobile phones and a consumer, on the grounds, *inter alia*, that the arbitral institution was not an official institution pursuant to art. 31 of Ley 26/1984, and had in fact previously advised the distributor, and also because the arbitration clause clearly was in fact abusive. The court in this case recommended the application of an 'action of cessation' pursuant to art. 10*ter* and the Third Additional Provision of Ley 26/1984 to require the respondent to cease to use the abusive arbitration clause.

[21] STS núm. 355/1998 de 18 de abril; Auto Juzgado de lo Mercantil, Cádiz de 4 febrero de 2004 (recurso núm. 20/2004) ('La adquisición de la condición de accionista o socio de una sociedad, mediante la adquisición de acciones o participaciones de la misma, supone la suscripción por el adquirente de los Estatutos que regulan el funcionamiento de la sociedad, y que vinculan a los nuevos socios mientras no se produzca la modificación de los mismos' [*Translation*: 'The aquisition of the status of shareholder of a corporation, by means of the purchase of shares, supposes the acceptance by the purchaser of the Statutes that regulate the operation of the corporation, and that bind the new shareholders while they remain unchanged']). *See generally*, Perales Viscasillas, *supra* n. 13 at ch. IV.

[22] *See Settlement of Commercial Disputes: Preparation of a Model Legislative Provision on Written Form for the Arbitration Agreement* (A/CN.9/WG.II/WP.136, Working Group II, 43rd session, Vienna, October 2005).

or other type of format'. Finally, s. 5.a of the 2003 Arbitration Act provides for the electronic delivery of notifications and communications. The intention is to make possible in Spain arbitrations conducted entirely by electronic or digital means.[23]

IV. THE ARBITRAL TRIBUNAL (ARTICLES 12–21 AA; ARTICLES 10–15 MODEL LAW)

Title III of the 2003 Arbitration Act (arts 12–21) addresses the number, capacity, appointment, challenge, replacement and liability of the arbitrators. There are many modifications and additions to the Model Law provisions, although the principles of the Model Law remain intact. The modifications and additions reflect three distinct motivations: speed and economy, international best practice and various domestic imperatives inherited from previous Spanish arbitration law and practice.

(a) Number of Arbitrators

The most significant change in the interests of economy is that, in the absence of any agreement of the parties, only one arbitrator will be appointed, instead of the three arbitrators provided for in the Model Law and in the previous Spanish arbitral legislation.[24]

(b) Court Challenges to Arbitrators

Procedural economy also motives art. 18.3 relating to appeals for an unsuccessful challenge to an arbitration. Articles 18.1 and 18.2 provide an identical procedure to arts 13.1 and 13.2 of the Model Law where the arbitral tribunal decides in the first instance on a challenge to an arbitrator. However, instead of the procedure in art. 13.3 of the Model Law, whereby there is an immediate appeal to the appropriate court from an unsuccessful challenge, art. 18.3 of the 2003 Arbitration Act provides that the recourse is to wait until the award is issued and apply to set it aside. The Statement of Legislative Purposes explains that:

> the possibility of applying directly to the courts in the face of a decision disallowing a challenge [as provided in the Model Law] would have, undoubtedly, the advantage of preliminary certainty in respect of impartiality, but would lend itself to the use of this power for the purposes of delay. It is considered that a challenge will be improperly disallowed and will give rise to the nullity of the complete arbitral proceedings much less frequently than the cases in which demands would be immediately formulated before judicial authorities for the purpose of delaying the procedure.

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[23] *cf.* Statement of Legislative Purposes, VII: 'Therefore, arbitrations can take place which use only informatic, electronic or digital mediums, if the parties so consider it convenient'. Electronic arbitration under the 2003 Arbitration Act is fully discussed in Alejandro López Ortiz, 'Arbitraje y Nuevas Tecnologías' in (2004) 51 *Revista de Contratación Electrónica* 35 at pp. 49–65.

[24] 1988 Arbitration Act, art. 13; *cf.* Sentencia Audiencia Provincial Cantabria núm. 66/2005 (sección 1ª) de 3 de marzo de 2005, where it was held that the failure of an appointing authority to appoint the mandatory number of arbitrators in the absence of agreement of the parties is a ground for annulment under art. 41 of the 2003 Arbitration Act.

(c) Multi-party Arbitrations

The appointment of arbitrators in multi-party arbitration with three arbitrators is provided for in art. 15.2.b in a simple but effective provision that reflects international best practice.[25]

(d) Continuation of Proceedings following a Successful Challenge

Article 20.2 of the 2003 Arbitration Act provides that on appointment of a substitute arbitrator 'the arbitrators, after hearing the parties, shall decide if it is appropriate to repeat any prior proceedings', thereby expressly providing for a matter not dealt with in the Model Law.[26]

(e) Judicial Refusal to Appoint an Arbitrator

Article 15.5 of the 2003 Arbitration Act provides that a court may refuse to appoint an arbitrator on the sole ground that 'on the basis of the documents submitted, the existence of the arbitration agreement is not established'.

Strictly speaking, the arbitral tribunal should be established and rule itself on the existence of an arbitral agreement, and the matter should not come before the court unless the disappointed party applies to set this decision aside.[27] The Model Law has no equivalent provision, but in other jurisdictions the respondent has opposed the appointment of an arbitrator under the equivalent of art. 11 of the Model Law on the grounds that no arbitration agreement exists, compelling the court to investigate (at least on a *prima facie* basis) the existence of the arbitration agreement. There is, therefore, some logic in making express provision for the rejection of an application for an appointment on this ground, while trying to limit it as much as possible, as the Spanish Legislature has chosen to

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[25] The final part of art. 15.2.b reads: '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'.

[26] *cf.* art. 15 of the UNCITRAL Arbitration Rules and art. 28 of the 1988 Arbitration Act.

[27] 2003 Arbitration Act, art. 22.3, corresponding to art. 16(3) of the Model Law. *cf. Fung Sang Trading* v. *Kai Sun Sea Products and Food Company Ltd*, High Court of Hong Kong, 29 October 1991, (1992) XVII ICCA *YB Comm. Arb.* 289, where Kaplan J responded to a request to decide on the existence of an arbitration agreement in an application for appointment of an arbitrator as follows: '[31] … tempting as it was to dispose of the matter on the affidavits, to adopt such a course would have been to turn art. 16 [of the Model Law] on its head. What should happen is this: I should appoint an arbitrator. The two appointed arbitrators will then appoint the third to make up the tribunal of three … The Tribunal may rule on this point [*i.e.*, the existence of an arbitration agreement] as a preliminary issue or as part of an award on the merits. If done by way of preliminary question and if in favour of the plaintiffs the defendants will then have 30 days in which to invite this court to decide the question …

[32] If the Tribunal makes an award on the merits, which clearly would encompass a finding that they had jurisdiction to do so, then the defendants will have an opportunity to apply to set the award aside'.

See also Pacific Industrial Lines v. *Tsinlien Metals and Minerals Co.*, High Court of Hong Kong, 30 July 1992, CLOUT Case 3, where Kaplan J accepted that the applicant does not need conclusively to establish an arbitration agreement, and that the 'strong arguable case in support of an arbitration agreement' demonstrated in that case was at least sufficient (at paras 16–19).

do.[28] The risk in the Spanish approach is that once the legislation recognises a legitimate basis to oppose an application for appointment, then respondents are likely to exploit the opportunity to place issues before the court that properly should be before the arbitral tribunal. For example, in a case before the Mercantile Court of Cadiz for appointment of an arbitrator under art. 15 of the 2003 Arbitration Act, the respondent unsuccessfully argued that an arbitration agreement relied upon by the applicant in the Articles of a company did not bind the parties, or alternatively, did not apply to this dispute, and therefore the arbitration agreement did not exist, to which it added arguments relating to the subject matter arbitrability and the existence of a dispute. The court properly refused to entertain the arguments not based on the inexistence of the arbitral agreement, but the application to appoint an arbitrator still required a substantial ruling on binding effects on shareholders of an arbitration agreement contained in a company's Articles under Spanish law.[29]

(f) Other Departures from the Model Law affecting the Arbitral Tribunal

The 2003 Arbitration Act contains a number of modifications to the Model Law reflecting historical concerns or domestic imperatives. These include (i) only lawyers in practice can act as an arbitrator in a domestic arbitration (art. 15.1); (ii) the express authorisation of institutional arbitration (art. 14); (iii) the final selection of an arbitrator by a court through the use of a draw from three possible names;[30] (iv) express provision for the legal liability of arbitrators for breach of duty 'by reason of bad faith, recklessness or fraud' (art. 21.1)[31] and (v) the provision of funds (art. 21.2).

V. JURISDICTION OF ARBITRAL TRIBUNAL (ARTICLES 11 AND 22 AA; ARTICLES 8 AND 16 MODEL LAW)

The 2003 Arbitration Act fully embraces the *compétence/compétence* principle. Article 22 reproduces art. 16 of the Model Law, confirming as a matter of

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[28] Statement of Legislative Purposes, IV, emphasises that this does not permit the court to enter into the validity of the arbitration agreement or the arbitrability of the subject matter of the dispute 'which, if allowed, would slow down unduly the appointment and would empty of content the rule that it is the arbitrators that are called upon to decide, in the first instance, over their own jurisdiction. Therefore, in the application for the appointment of arbitrators in the exceptional case of the inexistence of the arbitral agreement, that is, when *prima facie* it can be decided that there really does not exist an arbitral agreement, the judge is not called in these proceedings to exercise control over the requirements of the validity of the agreement'.

[29] Auto Juzgado de lo Mercantil, Cádiz, de 4 de febrero 2004 (Recurso no. 20/2004).

[30] On the final selection by a drawing of lots from three names, *see* J. Garberí Llobregat (ed.), *Comentarios a la Ley 60/2003, de 23 de diciembre, de Arbitraje* (Editorial Bosch SA, 2004), pp. 339–340 and Sentencia Audiencia Provincial de Madrid de 7 de noviembre de 1995.

[31] 2003 Arbitration Act, art. 21, covers the same subject matter, but in different terms than art. 16 of the 1988 Arbitration Act; significantly art. 21 has dropped the potential liability for negligence that existed under the 1988 Arbitration Act: on this, *see* Verdera y Tulles, *supra* n. 15 at pp. 90–92. Note that the liability of the arbitrator is complemented in art. 17.1 by establishing an express duty (not reflected in the Model Law) that: 'In no case shall he maintain any personal, professional or commercial relationship with any of the parties'. *cf.* Sentencia Tribunal Supremo 332/1999 de 26 abril, suggesting that 'illegal intentional damage' was a prerequisite to the liability of the arbitrators under the 1988 Arbitration Act.

Spanish law both the separability of the arbitration agreement and the jurisdiction of the arbitrators to rule on their own jurisdiction.

(a) Negative Effect of the Arbitration Agreement

The negative effect of the arbitration agreement is confirmed in art. 11.1 of the 2003 Arbitration Act, which is a more simple provision than art. 8.1 of the Model Law in that it dispenses with the limitation on the exclusion of the court's jurisdiction derived from Art. II.3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Under art. 11.1, the existence of an arbitration agreement (or at least *prima facie* evidence of an arbitration agreement) is sufficient to prevent the court from continuing to hear the dispute.

Accordingly, the 2003 Arbitration Act respects the all important balance between party autonomy and the power of intervention of domestic courts. Some minor variations from the Model Law are identified elsewhere in this article.[32]

Article 8 of the Model Law requires a 'request' from the party seeking to enforce an arbitration agreement to the court 'not later than when submitting his first statement on the substance of the dispute'. Article 11 of the 2003 Arbitration Act, by contrast, requires the party seeking to enforce the arbitration agreement to invoke an objection to jurisdiction in Spanish civil procedure known as a '*declinatoria*'. This is a general procedure in the 2000 Civil Procedure Act to object to the jurisdiction of a tribunal, but the objection must be *made within 10 days*. This unexpectedly short timeframe creates a potential trap for a foreign party engaged in an arbitration in Spain, and the potential for a Spanish party to escape its arbitration agreement by commencing proceedings in Spain in the expectation that the jurisdiction of the court will be established by the default of the foreign party to submit its *declinatoria* within the prescribed time.[33]

(b) Recourse Against an Interim Award on Jurisdiction

Article 22.3 of the 2003 Arbitration Act provides for an application to set aside an interim award on jurisdiction (in accordance with the procedure to set aside in arts 40–42), and that the application to set aside will not suspend the arbitral proceedings.

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32 *i.e.* art. 15.5 of the 2003 Arbitration Act which entitles the domestic courts to rule on the existence of an arbitration agreement in an application to appoint an arbitrator; and art. 18.3 which defers the right to impugn a decision to reject a challenge to an arbitrator until after an award is issued.

33 *See* Civil Procedure Act 2000, art. 39 (*declinatoria* and submission to arbitration) and arts 63 to 65, and particularly art. 64.1 ('the *declinatoria* must be submitted within the first 10 days of the date to answer the claim'). There is a full discussion of this problem by Miguel Ángel Fernández-Ballesteros in Julio González Soria (ed.), *Comentarios a la Nueva Ley de Arbitraje* (Editorial Aranzadi SA, 2004), pp. 119–126. Spanish commentators have also expressed concern that art. 11.2 of the 2003 Arbitration Act provides that the *declinatoria* 'does not prevent the initiation or continuance of the arbitral proceedings', while omitting the qualification in art. 8.2 of the Model Law ('while the issue is pending before the court'), thereby creating the possibility of parallel arbitral and court proceedings if the court rejects the objection to its jurisdiction: *see* Fernández-Ballesteros, *supra* at pp. 126–128.

VI. INTERIM MEASURES (ARTICLES 11.3 AND 23 AA; ARTICLE 17 MODEL LAW)

Article 23 of the 2003 Arbitration Act regulates the power of the arbitrators to order interim measures. Article 23.1 reproduces art. 17 of the Model Law, and as in the Model Law the power of the arbitrators is concurrent and alternative to the power of the courts to order interim measures in support of arbitration.[34]

Article 23 has been welcomed by Spanish commentators as one of the most important advances of the new legislation. The 1988 Arbitration Act made express provision for interim measures only in annulment proceedings, where the party in whose favour the award was made could seek 'precautionary measures tending to ensure the full enforceability of the award once it has become final'.[35] The treatment of interim measures in such a limited context, and the removal from the draft Act of an express provision authorising the arbitral tribunal to grant interim measures, created considerable uncertainty as to the available judicial and arbitral interim measures in Spain.[36] These uncertainties in this important facet of arbitral procedure have been swept away by the new art. 23.

The Spanish Legislature was not tempted, however, to go beyond the existing Model Law text and enter into the questions presently under consideration by an UNCITRAL Working Group of the types of interim measures, the criteria for granting interim measures or the availability of *ex parte* interim measures.[37] The 2003 Arbitration Act accepts the Model Law text without anticipating the future development of international practice in these matters.

(a) Types of Interim Measures

The 2003 Arbitration Act contains no description of the types of interim measures available in an arbitration under the Spanish Arbitration Act. This was a deliberate decision on the part of the Legislature, as the Statement of Legislative Purposes makes clear:[38]

> The Law has considered it preferable not to enter into the determination of the ambit of the precautionary power. Obviously, the arbitrators lack executive power, and therefore for the execution of interim measures it will be necessary to have recourse to the judiciary … However, if within interim measures it is proper to distinguish between declarative and executive aspects,

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[34] Articles 17 and 9 of the Model Law; arts 23, 11.3 and 8.3 of the 2003 Arbitration Act; art. 722 of the 2000 Civil Procedure Act.

[35] *See* art. 50. On this provision, *see* Cremades, *supra* n. 7 at pp. 91–95.

[36] *See* Verdera y Tulles, *supra* n. 15 at pp. 92–102. *cf.* Gonzalo Stampa, 'Court Issues Writ Implementing Precautionary Measures Simultaneous to International Arbitration Proceedings' in (2000) *Int'l Arb. L Rev.* N-19 (case note on the first interim order by a Spanish court in support of international commercial arbitral proceedings outside Spain). The 2000 Civil Procedure Act made some progress with its express recognition (art. 722) of judicially ordered interim measures in support of domestic or international arbitral proceedings: *see* Cairns and Stampa, *supra* n. 7 at p. 86.

[37] The latest draft art. 17 of the Working Group on these issues appears in *Settlement of Commercial Disputes: Interim Measures of Protection* (A/CN.9/WG.II/WP.138, Working Group II, 43rd session, Vienna, October 2005).

[38] Statement of Legislative Purposes, V.

this Law concedes the former to the arbitrators, except where there is an agreement of the parties to the contrary.

In default of express provision, commentators refer to the types of interim measures recognised by the Spanish Civil Procedure Act 2000 to identify the interim measures potentially available to arbitral tribunals, and then proceed to exclude certain measures as appropriate only for judicial authority.[39] The limitation on the power of the arbitral tribunal to order interim measures is a practical rather than jurisdictional question; certain types of interim measures are better sought directly from the courts than from the arbitral tribunal.

The list of types of interim measures in art. 727 of the 2003 Civil Procedure Act includes the preventive embargo (attachment) of goods,[40] judicial administration of goods, impounding of goods, the taking of inventories, caveats in public registries, orders to cease any activity, the accounting for receipts from an activity alleged to be illegal and the prohibition of which is sought by the applicant, the deposit of works or objects alleged to infringe intellectual or industrial property rights, and 'such other measures that, for the protection of certain rights, are expressly provided for by law, or which are necessary to ensure the effectiveness of the judicial remedy that may be granted in a favourable judgment'.[41]

Spanish procedural law specifies certain mandatory characteristics of interim measures. Article 726 of the 2000 Civil Procedure Act states that interim measures should be (i) exclusively directed towards ensuring the effectiveness of the remedy that might be granted in the final judgment; (ii) not capable of substitution by any other equally effective measure less burdensome to the respondent; and (iii) be similar to the orders sought in the proceeding, although of a temporary, provisional and conditional character capable of modification or removal. In judicial proceedings, the provision of security by the party seeking the interim measures is mandatory, while in arbitral proceedings the tribunal has a discretion as to whether to require security or not from the applicant.[42]

(b) Enforceability of Interim Measures Ordered by the Arbitrators

Article 23.2 adds a novel provision relating to the enforcement of (or challenge to) interim measures ordered by the arbitral tribunal, by subjecting interim measures to supervision in accordance with the provisions relating to the setting aside and enforcement of arbitral awards. An analogous principle is currently under consideration by the UNCITRAL Working Group. The Spanish formulation is more simple and direct than the latest UNCITRAL draft, but also more cautious in that it avoids the vexed issue of the enforcement of interim measures made by

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39 Garberí Llobregat, *supra* n. 30 at pp. 461–462; González Soria, *supra* n. 33 at pp. 270–272; Verdera y Tulles, *supra* n. 15 at p. 103.

40 2000 Civil Procedure Act, arts 727.1, 738.2 and 584–592.

41 *ibid.* art. 727.11.

42 2003 Arbitration Act, art. 23.1; 2000 Civil Procedure Act, art. 728.3.

a tribunal with a foreign seat.[43] The judicial supervisory role under art. 23.1 applies to all 'arbitral decisions' in respect of interim measures, meaning that the form of the interim measures – award, order, decision, etc. – is immaterial.

VII. CONDUCT OF ARBITRAL PROCEEDINGS (ARTICLES 24–33 AA; ARTICLES 18–27 MODEL LAW)

The provisions of the 2003 Arbitration Act follow the Model Law closely in their provision for the conduct of the arbitral proceedings (arts 24–33 of the 2003 Arbitration Act; arts 18–27 of the Model Law).

The 2003 Arbitration Act thus avoids the anomalies that previously existed in Spanish law regarding judicial assistance in the taking of evidence. Pursuant to art. 27 of the 1988 Arbitration Act, an application for judicial assistance for the taking of evidence had to be made by the arbitrators, not the parties. There was confusion in the legislation over the court to which this application should be made, and there was a mandatory requirement that the court restrict itself to evidence admissible in Spanish law.[44] The mandatory time limit for the issue of an award made the cumbersome procedure of the 1988 Arbitration Act of little practical use and open to tactical abuse. These problems have now been removed, with the exception of the possible practical restriction on recourse to judicial assistance where there is no flexibility in the time limit for making the award.[45]

(a) Confidentiality

Confidentiality became a major concern of arbitral practitioners after the decision of the High Court of Australia in *Esso Australia Resources Ltd* v. *Plowman* that arbitration was private but not confidential to the parties.[46] *Esso Australia* v. *Plowman* ran counter to the general understanding of the arbitration community, at least in Europe, and caused considerable debate.[47] One Model Law

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[43] *See* draft art. 17*bis*, *Settlement of Commercial Disputes: Interim Measures of Protection* (A/CN.9/WG.II/WP.138, Working Group II, 43rd session, Vienna, October 2005). Article 23.1 of the 2003 Arbitration Act applies only to the enforcement of interim measures made by an arbitral tribunal with a Spanish seat, meaning that the enforcement of 'foreign' interim measures is subject to the questionable possibilities offered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[44] 1988 Arbitration Act, arts 27 and 43 (confusion over court) and arts 26 and 44 (strict applicability of Spanish law of evidence).

[45] The time limit for making the award is discussed *infra*. *cf.* Sentencia del Audiencia Provincial Castellón (Sección 2ª), de 27 marzo 1998 (AC 1998, 752) where the party seeking annulment had sought judicial assistance in the taking of evidence, and relied upon that evidence without protest at the possible expiration of the time limit for the award, and then sought to annul the award on the basis that it was out of time. The court found that the applicant by his conduct had tacitly agreed to an extension of the legal time limit until the issue of the award. The court expressly noted the possible tactical abuse ('*uso antisocial del Derecho*') of an application for judicial assistance to exhaust the legal time for the issue of the award under the 1988 Arbitration Act.

[46] (1995) 11 *Arb. Int'l* 235; (1995) 128 *ALR* 391.

[47] *See in particular*, Jan Paulsson and Nigel Rawding, 'The Trouble with Confidentiality' in (1995) 11 *Arb. Int'l* 303; Patrick Neill QC, 'Confidentiality in Arbitration' in (1996) 12 *Arb. Int'l* 287; Andrew Rogers QC and Duncan Miller, 'Non-Confidential Arbitration Proceedings' in (1996) 12 *Arb. Int'l* 319; L. Yves Fortier QC, 'The Occasionally Unwarranted Assumption of Confidentiality' in (1999) 15 *Arb. Int'l* 131; Steven Kouris, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' in (2005) 22 *J Int'l Arb.* 127.

jurisdiction (New Zealand) responded immediately by making express legislative provision for arbitral confidentiality.[48]

Neither the Model Law nor the 1988 Arbitration Act addressed confidentiality. Accordingly, the express provision in art. 24.2 of the 2003 Arbitration Act for the confidentiality of information disclosed during arbitral proceedings is a new addition to Spanish law. Article 24.2 did not appear in the original draft of the 2003 Arbitration Act, but was added as the draft passed through the Spanish Legislature.[49]

VIII. MAKING OF THE AWARD AND THE TERMINATION OF THE ARBITRAL PROCEEDINGS (ARTICLES 34–39 AA; ARTICLES 28–33 MODEL LAW)

The 1988 Arbitration Act in Spain included a number of idiosyncratic provisions relating to the making of the award. These were understandable in terms of the domestic history and policy of Spanish arbitration, but well out-of-step with international practice. These included restrictions on the parties' choice of law, a presumption in favour of arbitration in equity where the parties had not specifically elected arbitration at law, and mandatory time limits and formalities in relation to the award. The 2003 Arbitration Act eliminates some of these idiosyncrasies, but vestiges remain and are particularly significant in respect of the deadline for making the award.

(a) Applicable Substantive Law

Article 34 of the 2003 Arbitration Act reverses the traditional Spanish caution in respect of the parties' choice of applicable law, and more fully endorses party autonomy in this respect than the text of art. 28 of the Model Law. The Arbitration Act 1988 limited the parties' choice of applicable law to a system of law with 'some connection with the underlying legal transaction or with the dispute', and the Statement of Legislative Purposes of this Act referred to the need to prevent arbitration from enabling certain international legal relationships to 'escape from the law',[50] with one objective apparently being to avoid the choice of *lex mercatoria* as the applicable law.[51] In contrast, the 2003 Arbitration Act not only suppresses this requirement in respect of international arbitrations, but modifies the reference to 'rules of law' chosen by the parties to read 'juridical rules' because, according to the Statement of Legislative Purposes, the Model

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[48] Arbitration Act 1996, art. 14 (New Zealand); David J. A. Cairns, 'Confidentiality and State Party Arbitrations' in (2002) *New Zealand L J* 125.

[49] *See generally*, Garberí Llobregat, *supra* n. 30 at pp. 597–601 (where it is suggested that this amendment was added to provide a further reason for parties to choose arbitration in preference to judicial proceedings).

[50] 'a fin de evitar que por la vía del arbitraje se produzca lo que se ha dado en llamar la fuga del Derecho de determinadas relaciones jurídicas internacionales' ['in order to avoid that by means of arbitration there is what has been called an escape from the law of certain international legal relationships']. The requirement of art. 62 of the 1988 Arbitration Act of some connection with the underlying transaction or dispute reflected the long established requirement for contractual choice of law clauses in art. 10.5 of the Spanish Civil Code.

[51] *See* Cremades, *supra* n. 7 at p. 3 ('The true bête noire of the Ministry of Justice in drawing up the 1988 Arbitration Act was lex mercatoria as a sort of special law benefiting multinational companies') and at p. 17.

Law text appears to require a reference to the legal system of a state 'when in some cases what needs to be applied are the rules of various systems or the rules common to international commerce'.[52] The 2003 Arbitration Act also goes further than the Model Law in respect of the arbitrator's power to determine the applicable law in the absence of any designation by the parties (art. 28(2) of the Model Law) in authorising the arbitrators to 'apply the law that they consider appropriate' without first determining the applicable conflict of laws rules and then using the conflict of law rules to determine the applicable rules.

(b) Arbitration in Law and in Equity

Article 34 of the 2003 Arbitration Act also reproduces the Model Law requirement to decide in accordance with the terms of the contract and to take into account the applicable trade usages, and provides that the arbitration shall be in equity only if expressly authorised by the parties. The Spanish concept of arbitration in equity corresponds with the concept of *amiable compositeur*, and historically arbitration in Spain was presumed to be in equity unless specified to the contrary. The 2003 Arbitration Act adopts the Model Law position in this matter, and abolishes what to international practitioners was a surprising anomaly in Spanish law.

(c) Arbitral Decision-making

As regards the decision-making by the arbitral tribunal, art. 35 of the 2003 Arbitration Act follows art. 29 of the Model Law in providing for decisions by majority vote, and empowering the presiding arbitrator to decide by himself 'questions of order, formalities and progress' of the proceedings.[53] Article 37.3 of the 2003 Arbitration Act corresponds to art. 31.1 of the Model Law, but with a modification expressly authorising a dissenting opinion. Truncated tribunals are dealt with only indirectly, as in the Model Law, by stating that an award is valid if signed by a majority of the arbitrators (or even only by the presiding arbitrator) 'provided that the reason for any omitted signature is stated'.

(d) Reasons/Formalities

Two further innovations regarding the form of the award should be noted. First, the requirement for formalisation of the award before a notary has been abolished. This requirement had been interpreted as mandatory in respect of even an international arbitration with a seat in Spain, resulting in the annulment of an ICC award by the Spanish Supreme Court.[54] Formalisation before a notary

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52 Statement of Legislative Purposes, VII; *cf.* Holtzmann and Neuhaus, *supra* n. 1 at pp. 764–769, referring to the uncertainty as to the meaning of the words 'rules of law' at the time of drafting the Model Law text.

53 The 2003 Arbitration Act differs from the Model Law in not requiring the express authorisation by the parties or the members of the tribunal as a prerequisite to the exercise of this procedural power by the presiding arbitrator.

54 Sentencia del Tribunal Supremo de 4 de diciembre de 1993, reproduced in (1994) *Revista de la Corte Española de Arbitraje* 199; *see also* Fernando Mantilla Serrano, 'Arbitraje Internacional y Protocolización del Laudo' in (1994) *Revista de la Corte Española de Arbitraje* 179; and Verdera y Tulles, *supra* n. 15 at pp. 118–125.

is now only optional at the request and expense of one of the parties.[55] Secondly, the requirement that the award be in writing is glossed to provide for electronic awards, complementing the provisions in arts 5 and 9 relating to electronic notifications and electronic proof of the arbitration agreement, and so in effect providing for on-line arbitration in Spain.[56]

The 2003 Arbitration Act follows art. 31 of the Model Law in its requirements for reasons and also for the award to state the date and place of arbitration. In addition, it expressly provides for decisions on the costs of the arbitration, including the fees and expenses of the arbitrators, counsel's fees and the costs of any services provided by an arbitral institution.[57]

(e) Time Limit for the Award

The one matter in relation to the making of the arbitral award where Spanish practice was retained in preference to international practice is in respect of the time limit for making the award. Spanish law and jurisprudence has always been jealous of the legislative time limit for the issue of an award, on the assumption (not justified in respect of international arbitration) that a speedy resolution of the dispute is the primary reason for resort to arbitration. As the requirement was for the benefit of the parties, it was under the 1988 and now 2003 Acts subject to party agreement to a different timeframe. However, the Special Section of the General Codification Commission responsible for drafting the 2003 Arbitration Act sought to further balance the quick resolution of disputes with the reality of international arbitration by conferring on the arbitral tribunal the power to extend the time limit for issuing an award for an indefinite period. As the Bill passed through Parliament, however, the period of an extension was limited to just two months.

The time limit for issuing an award in Spain is not a mere formal requirement, but a substantial requirement firmly embedded in Spanish arbitral practice. Spanish jurisprudence is clear that the time limit is a restriction *rationae temporis* of the jurisdiction of the arbitral tribunal, on the logic that the parties would agree to surrender their right of access to the courts for a limited period of time only.[58]

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[55] 2003 Arbitration Act, art. 37.

[56] *ibid.* art. 37.3; Statement of Legislative Purposes, VII.

[57] *ibid.* art. 37.6.

[58] Sentencia Tribunal Supremo de 10 de abril de 1991; Sentencia Tribunal Supremo de 12 de noviembre de 1992 (recurso núm. 2090/1998) ('el plazo fijado para emitir el laudo arbitral debe ser respetado de un modo inexorable, porque es el lapso del tiempo durante el cual las partes voluntariamente, renuncian al ejercicio jurisdiccional de sus diferencias, y dotan de facultades decisorias a los árbitros, pasado el cual cesa la potestad de los mismos, por haber rebasado el límite, y vicia de nulidad cualquier actividad arbitral extemporánea') ['the time-limit fixed for issuing the arbitral award ought to be inexorably respected, because it is the period of time during which the parties voluntarily waive the determination of their differences [by the ordinary courts], and grant the powers of decision to the arbitrators. The expiry of this period terminates the power of the arbitrators, for having exceeded the limit, and nullifies any arbitral action outside this time']. A recent annulment case confirms that the reasoning of the established jurisprudence continues to apply 'inexorably' under the 2003 Arbitration Act: *see* Sentencia Audiencia Provincial Asturias núm 472/2004 (Sección 4ª) de 18 noviembre (recurso de anulación núm 326/2004).

Under the 1988 Arbitration Act the expiry of the time limit had the effect of nullifying the arbitration agreement and therefore enabling judicial proceedings to commence.[59] By contrast, art. 37.2 of the 2003 Arbitration Act provides that the expiry of the time limit terminates the arbitral proceedings and the office of the arbitrators but does not affect the efficacy of the arbitration agreement 'without prejudice to any liability the arbitrators may have incurred'.[60]

The subordination of the time limit to the agreement of the parties provides a means to escape the straightjacket of an unreasonable timeframe for an international arbitration. An agreement of the parties, under the 2003 Arbitration Act, includes 'the provisions of any arbitration rules to which the parties have submitted themselves'.[61] Accordingly, where the rules of an institution make specific provision for the time limit for an award, and more importantly establish a mechanism for the extension of the time limit, such as art. 24 of the ICC Rules of Arbitration or art. 63 of the WIPO Arbitration Rules, then a Spanish-based arbitration will be governed by the time limits in these rules and not by art. 37 of the 2003 Arbitration Act.

Nevertheless, the mandatory time limit in art. 37.2 of the 2003 Arbitration Act is a significant local variation from the Model Law, and a serious potential pitfall for an international arbitration with a seat in Spain. At the time of drafting the arbitration agreement, counsel must ensure either the chosen institutional rules address the time limit for the award or specifically contract out of the time limit. There is a risk, particularly in an ad hoc arbitration, that a major international arbitration with a Spanish seat might find itself with a hopelessly short timeframe, which can only be overcome through the good sense and cooperation of the parties after the dispute has arisen (which might not be forthcoming). This is exactly the type of unexpected local variation that the adoption of the Model Law is designed to avoid.

(f) Preservation and Return of Documentation

Article 38.3 is an innovative provision relating to the duty of the arbitral tribunal to preserve documentation relating to an arbitration. The arbitrators have a duty to preserve documents submitted in an arbitration for a period of only two months from the termination of the proceedings, with the parties having the right within this time to request the return of the documents, at their expense, submitted by them. This is a highly practical provision, both from the perspective of parties who might submit original documents in evidence, and of arbitrators

[59] 1988 Arbitration Act, art. 30.2; under art. 45.3 of the 1988 Arbitration Act, failure to deliver the award within the prescribed time limit was an express ground for annulment.

[60] On this provision generally, *see also* Verdera y Tulles, *supra* n. 15 at pp. 111–113; for a case where a party sought (unsuccessfully) to recover damages from the members of an arbitral tribunal for damages for failure to comply with their mandate in this respect, *see* Sentencia Tribunal Supremo 332/1999 de 26 de abril.

[61] 2003 Arbitration Act, art. 4.b. The courts have on occasion inferred an agreement to extend the time limit when this is not express; *e.g.*, where the parties have agreed to seek judicial assistance in the taking of evidence without protest at the exhaustion of the statutory time limit: *see* Sentencia del Audiencia Provincial Castellón (Sección 2ª), de 27 marzo 1998 (AC 1998, 752) discussed *supra* n. 45.

who often find themselves unwilling custodians of voluminous documentation at the conclusion of an arbitration. The right of the parties to request and the arbitrator's duty to return documents is subordinated to the imperative to preserve the confidentiality of the arbitral deliberations, enabling the arbitrator to withhold, for example, a personally annotated copy of the parties' submissions.[62]

IX. RECOURSE AGAINST AWARD (ARTICLES 40–43 AA; ARTICLE 34 MODEL LAW)

The substantive grounds for setting aside an arbitral award in art. 41 of the 2003 Arbitration Act closely resemble the Model Law grounds in art. 34. The procedure set out in arts 41 and 42 of the 2003 Arbitration Act for an application to set aside, which the Statement of Legislative Purposes states 'tries to combine the demands of speed and the best defence of the parties', contains certain novelties. These procedural features are beyond the scope of this article, except to note that the Spanish Arbitration Act contains no equivalent to art. 34(4) of the Model Law, providing for the suspension of the setting aside proceedings and the remission to the arbitral tribunal to eliminate the grounds for setting aside. The Spanish approach is to terminate definitively the role of the arbitral tribunal with the issue of the final award, or with the correction or clarification of the award.[63]

(a) Public Policy Ground to Set Aside

Article 41.1.f of the 2003 Spanish Arbitration Act provides that an award may be annulled when it conflicts with public policy. Spanish law authorises the court to raise the public policy ground on its own motion, and also empowers the Attorney-General to intervene and raise this ground 'in relation to interests the defence of which is conferred upon him by law'.[64]

The meaning of 'public policy' as a ground to set aside or refuse to enforce a foreign arbitral award suffers from the same elusiveness of definition and imprecision of boundaries in Spain as in other jurisdictions. It has often been relied upon as a 'catch-all' in applications to set aside primarily based on other grounds or as a redundant means to re-express arguments made primarily on other grounds.[65]

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[62] For a discussion of the background to the possible importance of the conservation of the arbitral dossier in Spain, *see* Verdera y Tulles, *supra* n. 15 at pp. 113–118.

[63] A possible justification for the rejection of the remission provision of the Model Law is the mandatory time limit for the issue of an arbitral award in Spain, which would complicate the process of remission. *cf.* Holtzmann and Neuhaus, *supra* n. 1 at pp. 920–921 and 967 noting that 'remission' is primarily a common law device.

[64] 2003 Arbitration Act, art. 41.2; for the role of the Attorney-General (*Ministerio Fiscal*), *see* González Soria, *supra* n. 33 at p. 442; *cf.* Garberí Llobregat, *supra* n. 30 at pp. 1017–1018 for possible constitutional issues raised by annulment *ex officio* by the tribunal.

[65] *cf.* the complaint of the court in Sentencia Audiencia Provincial de Madrid, 24 July 1998 ('el concepto de orden público en estos supuestos [*i.e.* orden público procesal] no constituye un cajón de sastre en el que puedan subsumirse cualquiera infracciones.' ['[Procedural public policy] is not a 'catch all' in which any types of defects may be included']).

The predominant expression of public policy in Spanish case law has been procedural public policy based on fundamental rights in the Spanish Constitution. Article 24.1 of the Spanish Constitution of 1978 guarantees the fundamental right to 'effective judicial protection of the judges and courts … without there being in any case a denial of the right of defence',[66] and an overwhelming percentage of challenges to arbitral awards on public policy grounds in Spain have been based on alleged infractions of this fundamental right. The inviolability in arbitral proceedings of constitutionally guaranteed fundamental rights and liberties as a matter of public policy has been affirmed by the Spanish Constitutional Court as follows:[67]

> This concept of public policy has acquired a new dimension since the entry into force of the Constitution of 1978. Although the fundamental rights and public liberties guaranteed by the Constitution only reach full effect where the exercise of Spanish sovereignty governs, our public authorities, including the judges and courts, cannot recognise or receive resolutions made by foreign authorities that suppose the infringement of those fundamental rights and public liberties constitutionally guaranteed to Spaniards and, where appropriate, to Spaniards and foreigners. The public order of the forum has thus received in Spain a distinct content, impregnated in particular by the demands of Article 24 of the Constitution.

There is substantial case law relating to setting aside for breaches of procedural public policy.[68] However, art. 24 of the Spanish Constitution might also have a potential public policy implication on a more substantive level, as shown by a decision declaring unconstitutional legislation that made arbitration (through the state-administered consumer arbitration institutions) compulsory for small claims arising from transport contracts on the grounds that the constitutional right of access to the courts could only be excluded by the mutual consent of both

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[66] Article 24 of the Spanish Constitution reads:
'Artículo 24
1. Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión.
2. Asimismo, todos tienen derecho al Juez ordinario predeterminado por la ley, a la defensa y a la asistencia de letrado, a ser informados de la acusación formulada contra ellos, a un proceso público sin dilaciones indebidas y con todas las garantías, a utilizar los medios de prueba pertinentes para su defensa, a no declarar contra sí mismos, a no confesarse culpables y a la presunción de inocencia.
La ley regulará los casos en que, por razón de parentesco o de secreto profesional, no se estará obligado a declarar sobre hechos presuntamente delictivos'.
[*Translation*: Article 24
1. All persons have the right to the effective judicial protection of the judges and courts in the exercise of their rights and legitimate interests, without there being in any case a denial of the right of defence.
2. Similarly, all persons have the right to the ordinary judge predetermined by law, to the defence and assistance of a lawyer, to be informed of the accusation made against against them, to a public trial without delays and with all due guarantees, to use the relevant means of proof for their defence, to not incriminate themselves, to plead not guilty, and to the presumption of innocence.
The law shall regulate the cases in which, for reasons of relationship or professional confidence, there will be no obligation to give evidence in respect of allegedly criminal acts.]

[67] Sentencia Tribunal Constitucional de 15 de abril de 1986 (RTC 1986, 43).

[68] *See* C. Martín Brañas, 'La anulación del laudo arbitral en nuestra jurisprudencia' in (2001) *Tribunales de Justicia* (November) 62 for an illustrative list of decisions.

parties.[69] In other words, an arbitration must be based on a genuine arbitration agreement, which opens up the possibility to challenge on the public policy ground an award involving any controversial extension of the arbitration agreement; for example, through the group of companies doctrine.

The recent Spanish Insolvency Act expressly provides that arbitral agreements to which the debtor is a party shall have no effect for the duration of the insolvency proceedings, and also allows the trustees in bankruptcy to set aside 'arbitral agreements and proceedings' where they involve a fraud on creditors. This legislative concern that arbitral proceedings might be used as a potential vehicle to defraud creditors suggests an arbitral award tainted with the fraud of other creditors would be annulled on public policy grounds.[70]

As a final point on public policy, Spanish courts have largely rejected invitations to utilise the public policy ground to enter into the merits or the correctness of the application of Spanish law to awards, notwithstanding the frequency of these invitations.[71]

X. RECOGNITION AND ENFORCEMENT OF AWARDS (ARTICLES 44–46 AA; ARTICLES 35–36 MODEL LAW)

The Spanish Arbitration Act 2003 refers the enforcement of domestic awards to the procedure in the 2000 Civil Procedure Act for the execution of 'enforceable rights' (*títulos ejecutivos*, which includes final judgments of Spanish courts) and the recognition of foreign awards to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (to which Spain is a party).[72] It therefore preserves the distinction between domestic and foreign arbitral awards that was carefully examined, debated and rejected during the drafting of the Model Law. The result is different enforcement regimes depending on whether or not Spain was the seat of the arbitration, with an international commercial arbitration with a Spanish seat being subject to the enforcement regime for domestic awards.[73]

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69 Sentencia del Tribunal Constitucional núm. 174/1995 (Pleno), de 23 noviembre. Party autonomy in arbitration has a recognised constitutional significance as an expression of the superior constitutional value of individual liberty (*see* Sentencia del Tribunal Constitucional núm 176/1996 (Sala Segunda), de 11 noviembre). Accordingly, the constitutional right to effective judicial protection in art. 24 of the Spanish Constitution is not infringed by the negative effect of the arbitration agreement, provided there is a genuine arbitration agreement. *cf.* Auto del Tribunal Supremo (Sala de lo Civil), de 5 mayo 1998, where the argument was raised that there was a breach of procedural public policy because the existence of the arbitration agreement was not proved, which was rejected as being a mere disagreement with the practice of the proof and not a matter of public policy.

70 Ley 22/2003 de 22 de julio, Concursal; on this point, *see* Alejandro López Ortiz, 'The New Spanish Insolvency Act and Arbitration' in (2005) *Int'l Arb. L Rev.* N-22; on the new Insolvency Act and arbitration generally, *see* Pilar Perales Viscasillas, 'Los Efectos del Concurso sobre los convenios arbitrales en la Ley Concursal 22/2003' in I, II *Diario La Ley núm 6035 y 6036, 8 y 9 de junio de 2004.*

71 *See* González Soria, *supra* n. 33 at pp. 436–437, which points out that speculative uses of the public policy ground were encouraged under the 1988 Arbitration Act because a pending application to set aside automatically suspended execution of an award (which is not the case under art. 45.1 of the 2003 Arbitration Act).

72 2003 Arbitration Act, arts 44 and 46.2; 2000 Civil Procedure Act, arts 517–570.

73 On the debate over the inclusion in the Model Law of unified recognition and enforcement provisions, *see* Holtzmann and Neuhaus, *supra* n. 1 at pp. 1006–1012 and 1054–1063.

Under the 1988 Arbitration Act, an application for annulment of a domestic award automatically suspended enforcement proceedings,[74] with the consequence of having encouraged applications for annulment for the collateral purpose of frustrating enforcement. Article 45.1 reverses the assumption of the previous law, by providing that an award 'is enforceable even though an application to set aside has been made', but subject to the right of the party against whom enforcement is sought to apply for suspension of enforcement. An application for suspension must be accompanied by security for the amount of the award, plus any damages and losses that might arise from delay in the enforcement of the award. The drafting of art. 45.1 leaves unclear whether suspension is a right on offering the required security or whether the judge retains a discretion to refuse suspension. The Statement of Legislative Purposes, which explains that art. 45 seeks a balance between the interests of both parties, does not assist the resolution of this ambiguity.[75]

XI. CONCLUSIONS

The 2003 Arbitration Act is faithful to the principles of the Model Law, particularly in its wide recognition of party autonomy and in the relationship between arbitration and the jurisdiction of domestic courts. It is thoroughly up-to-date and accommodates within the Model Law framework contemporary challenges such as the electronic arbitration agreement, on-line arbitration, *lex mercatoria*, confidentiality and multi-party arbitration. The application of the Model Law to both international and domestic arbitrations increases the international accessibility of Spanish law and the attractiveness of Spain as an arbitral seat. The 2003 Arbitration Act is an ambitious commitment to the internationalisation of Spanish arbitral law.

The decision to adopt a single law for domestic and international arbitration and the policy objective to promote arbitral efficiency have, however, created some difficulties requiring care from the international practitioner. The expedited procedural timeframes, and particularly the time limit for rendering the award, are not appropriate in international arbitration. Similarly, the default provision for a single arbitrator is not the common practice in international arbitration. These provisions most clearly bring out the tensions in the decision to adopt 'one size fits all' arbitral legislation through the monist application of the Model Law. Fortunately, the wide recognition of party autonomy means their effects can be largely neutralised by agreement of the parties.

The 2003 Arbitration Act is an excellent implementation of the Model Law and further confirms the success of the Model Law as a means to harmonise international arbitral law and practice. The international practitioner can adopt a Spanish seat with full confidence of a comprehensive and thoroughly modern legislative framework for arbitration, the familiar principles of the Model Law and a supportive judiciary.

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[74] 1988 Arbitration Act, art. 55.1.

[75] González Soria, *supra* n. 33 at pp. 491–492 for consideration of this issue.